

umb

UNIVERZITA
MATEJA BELA

V BANSKEJ BYSTRICI



ZBORNÍK PRÍSPEVKOV
Z MEDZINÁRODNEJ ŠTUDENTSKEJ
VEDECKEJ KONFERENCIE

PRO-LEGAL
DEŇ
ŠTUDENTOV PRÁVA
A DOKTORANDOV
2026

2026

 BELIANUM

Univerzita Mateja Bela v Banskej Bystrici
Právnická fakulta



**Zborník príspevkov
z medzinárodnej študentskej vedeckej konferencie
PRO-LEGAL Deň študentov práva a doktorandov
2026**

Recenzovaný zborník vedeckých príspevkov

Ľubica Saktorová
(eds.)



Banská Bystrica
2026

Zostavovateľ (Editor) : JUDr. Ľubica Saktorová, PhD., LL.M., M.A.

Recenzenti (Reviewers) : doc. JUDr. Ivana Šošková, PhD., MBA
Mgr. Miroslava Dolíhalová, PhD.
JUDr. Peter Trajlínek, PhD.

Príspevky neprešli jazykovou korektúrou.

Za obsahovú a jazykovú stránku textu sú zodpovední autori publikovaných príspevkov.

ISBN 978-80-557-2337-2

EAN 9788055723372

<https://doi.org/10.24040/2026.9788055723372>



Recenzovaný vedecký zborník príspevkov z konferencie konanej dňa 26. marca 2026 na Právnickej fakulte Univerzity Mateja Bela v Banskej Bystrici „Zborník príspevkov z medzinárodnej študentskej vedeckej konferencie PRO-LEGAL Deň študentov práva a doktorandov 2026“ je publikovaný a šírený ako open access publikácia na základe podmienok Creative Commons Attribution 4.0 International Licence CC BY (uviedenie autora).

POĎAKOVANIE

Vážené kolegyne, vážení kolegovia, milé študentky, milí študenti,

pri príležitosti vydania zborníka z medzinárodnej študentskej vedeckej konferencie Pro Legal 2026 by som chcela poďakovať všetkým, ktorí prispeli k jej príprave, organizácii a akademickému obsahu. Rok 2026 bol pre konferenciu významný, najmä pokiaľ ide o jej rozsah a medzinárodné zastúpenie. Na podujatí sa zúčastnilo takmer 90 účastníkov z 18 európskych univerzít, čo sa odrazilo nielen v počte príspevkov, ale aj v tematickej rozmanitosti a akademickej kvalite riešených tém. Chcela by som poďakovať všetkým účastníkom za ich vedecké príspevky, odvahu pri prezentácii výsledkov svojej práce a ochotu zapojiť sa do vedeckej diskusie. Osobitne ďakujem študentkám a študentom, ktorí pomáhali s organizáciou konferencie. Ich nasadenie, zodpovednosť a dobrá energia sú pre PRO LEGAL nenahraditeľné.

Moje poďakovanie patrí aj zahraničným partnerom Právnickej fakulty Univerzity Mateja Bela v Banskej Bystrici za podporu a šírenie povedomia o konferencii v medzinárodnom akademickom prostredí.

Najhlbšiu vďaku však chcem vyjadriť kolegyniam a kolegom, ktorí sa dlhé roky venujú práci so študentmi a doktorandmi, podporujú ich prvé vedecké kroky, vedú ich k odbornému rastu a povzbudzujú ich v publikačnej činnosti. Za každým kvalitným študentským príspevkom stojí pedagóg alebo školiteľ, ktorý venoval svoj čas, skúsenosti a energiu rozvoju mladého človeka. Bez tejto každodennej, často nenápadnej práce, by podujatia, akým je PRO LEGAL, nemohli existovať.

Ďakujem všetkým, ktorí pomáhajú vytvárať priestor, v ktorom môžu mladí ľudia odborne rásť.

*JUDr. Ľubica Saktorová, PhD., LL.M., M.A.
predsedníčka Organizačného výboru
PRO LEGAL 2026*

ACKNOWLEDGEMENT

Dear Colleagues, Dear Students,

on the occasion of the publication of the proceedings from the Pro Legal 2026 international student scientific conference, I would like to thank those who contributed to its preparation, organization, and academic content. The year 2026 was significant for the conference, particularly in terms of its scale and international representation. Almost 90 participants from 18 European universities took part in the event, which was reflected not only in the number of papers but also in the thematic diversity and academic quality of the topics addressed. I would like to thank all participants for their scholarly contributions, their courage in presenting the results of their work, and their willingness to engage in scholarly discussion. I would also like to extend my special thanks to the students who assisted in organizing the conference. Their dedication, responsibility, and positive energy are irreplaceable to PRO LEGAL.

My appreciation likewise belongs to the international partners of the Faculty of Law, Matej Bel University in Banská Bystrica, for their support and for helping to promote the conference within the international academic community.

Above all, I would like to express my deepest gratitude to the colleagues who have devoted many years to working with students and doctoral candidates, supporting their first steps in research, guiding their professional development, and encouraging their scholarly publishing activities. Behind every high-quality student contribution stands a teacher or supervisor who has invested their time, expertise, and energy in the development of a young scholar. Without this daily and often unseen commitment, events such as PRO LEGAL would not be possible.

Thank you to everyone who helps create an environment in which young people can grow academically and develop their scientific potential.

*JUDr. Ľubica Saktorová, PhD., LL.M., M.A.
Chair of the Organizing Committee
PRO LEGAL 2026*

OBSAH

INTERNATIONAL SECTION Public law

A COMPARISON OF CONSTITUTIONAL PROVISION ON MINORITY RIGHTS BETWEEN HUNGARY AND VIETNAM	14

Van To Huu Nguyen

ADMINISTRATIVE HIERARCHY AND SUPERVISORY MECHANISM OF PUBLIC AUTHORITY AND ADMINISTRATIVE AUTHORITY OF LABIN AND THE LABIN REGION (LABINŠTINA) (1947.-1952.).....	25

Mladen Božičević

FINANCIAL MECHANISMS SUPPORTING THE DEVELOPMENT OF ROOFTOP SOLAR POWER IN VIETNAM.....	35

Nguy Ngoc Anh

THE JURIDIFICATION OF THE WORLD: POLITICAL AND LEGAL PERSPECTIVES	47

Malwina A. Tkacz

SWISS PERMANENT NEUTRALITY ON THE 21ST-CENTURY INTERNATIONAL LEGAL STAGE.....	55

Árpád Lapu

THE CHILD RIGHTS PROTECTION SYSTEM: LEGAL FRAMEWORK AND RESPONSIBLE INSTITUTIONS.....	65

Zuzanna Janowska - Adrianna Maciąg

RIGHT TO PRIVACY IN THE AGE OF SOCIAL MEDIA – SELECTED LEGAL CHALLENGES	76

Julia Cis - Natalia Skorża

REBUILDING THE PATH TO LEGAL COMPETENCE IN A DIGITAL PROFESSION	86

Roksolana Malyniak

ADAPTATION OF LAWYER INCOMPATIBILITY RULES TO EU STANDARDS: UKRAINE'S EUROPEAN INTEGRATION DIMENSION.....	93

Oleksandr Gruzdiev

THE PROBLEM OF ENVIRONMENTAL POLLUTION DUE TO THE CONSEQUENCES OF HOSTILITIES (ASPECT OF CIVIL LIABILITY).....	102

Anna Pavliuk

DISCRIMINATORY INTENT AS A DEFINING ELEMENT OF THE CRIME OF PERSECUTION	112

Victor Aleks Danchuk

LEGAL FRAMEWORKS GOVERNING PERSONS UNACCOUNTED FOR IN ARMED CONFLICT	122

Oksana Kiriak - Viktoriia Konoplia

DEPORTATION OF THE CHILDREN IN THE CONTEXT OF THE RUSSIA- UKRAINIAN WAR.....	134

Oksana Kiriak - Karyna Hodovska

MANDATORY REQUIREMENTS AS A FORM OF SANCTION TO FINANCIAL ENTITIES	146

Paulius Bareika

THE RESILIENCE OF LEGAL TENDER: A COMPARATIVE STUDY OF MANDATORY CASH ACCEPTANCE IN SELECTED DEVELOPED ECONOMIES.	159

Viliam Poništ

FREEDOM OF MOVEMENT IN THE NATIONAL LAW TRADITION.....	173

Polina Malesh

INTERNATIONAL SECTION Private law

IS THE HUNGARIAN NOTARY PUBLIC A JUDGE? “OTHER AUTHORITIES” IN THE APPLICATION OF THE EU SUCCESSION REGULATION	183

Csilla Rác

THE ROLE OF COPYRIGHT IN THE PROTECTION OF CREATIVITY	196

Korolanchuk Iryna

INTERNATIONAL LEGAL APPROACHES TO THE PROTECTION OF PERSONAL NON-PROPERTY RIGHTS IN THE CONTEXT OF AI TECHNOLOGIES	201
Maksymiliana-Ellanta Romaniuk	
EU COMPETENCE IN LABOUR LAW: THE IMPLICATIONS OF THE CJEU JUDGMENT IN CASE C-19/23	210
Toma Bilienė	
PECULIARITIES OF FULFILING OBLIGATIONS UNDER THE MARTIAL LAW...	222
Olha Oryshchuk	
SMART CONTRACTS AS AN EMERGING FORM OF AGREEMENT: LEGAL NATURE AND REGULATORY PERSPECTIVES	232
Vlasiuk Yevhen	
EXERCISE OF SHAREHOLDER’S RIGHTS DURING PROBATE PROCEEDING IN THE CZECH REPUBLIC	239
Barbora Zemanová	
CIVIL LAW CLASSIFICATION OF DIGITAL CONTENT IN THE CONTEXT OF HARMONIZATION OF UKRAINIAN LEGISLATION WITH EUROPEAN UNION ..	248
Inna Kozma	
JURISDICTIONAL CHALLENGES IN HOLDING TRANSNATIONAL CORPORATIONS ACCOUNTABLE	256
Alina Batramieieva	
CROSS-BORDER CORPORATE MOBILITY: BALANCING THE FREEDOM OF ESTABLISHMENT WITH STAKEHOLDER PROTECTION	264
Viktoriia Chernysheva	
 SEKCIA TRESTNÉHO PRÁVA, BEZPEČNOSTI, OBRANY A TECHNOLÓGIÍ	
POSTUP POLÍCIE PRI DOMÁCOM NÁSILÍ V PRÍPADE ODMIETNUTIASPOLUPRÁCE OBETE	274
Natália Šoučíková	

ÚČINNÁ LÚTOSŤ PRI DAŇOVÝCH TRESTNÝCH ČINOCH: SYSTÉMOVÝ POSUN TRESTNOPRÁVNEJ REAKCIE ŠTÁTU?	284

Vladimír Petrila

UMELÁ INTELIGENCIA A REGULAČNÉ TECHNOLOGIE (REGTECH) AKO NÁSTROJ PLNENIA REGULAČNÝCH POVINNOSTÍ VO FINANČNOM SEKTORE: PRÁVNE A PRAKTICKÉ ASPEKTY	292

Peter Beňo

TELEMEDICINE	309

Vladimíra Houdek Běhalová

AI AKO TICHÝ „PÁCHATEĽ“: PRÁVNE DÍLEMY MODERNEJ DOBY	320

Dalibor Vnenčák

NÁRODNÉ OBRANNÉ SILY SLOVENSKEJ REPUBLIKY – NOVÝ PRVOK V OBRANNOM SYSTÉME A JEHO PRÁVNE IMPLIKÁCIE	329

Alžbeta Janíčková

KOMPARÁCIA PRÁVA NA PRIMERANÚ DĹŽKU TRESTNÉHO KONANIA V NORMÁCH MEDZINÁRODNÉHO PRÁVA.....	341

Matej Biroš

DEEPPAKE PRED SÚDOM: FALOŠNÝ DÔKAZ, NOVÝ TRESTNÝ ČIN, ALEBO OBOJE?	353

Róbert Vitkovský – Mário Pira

ZAMESTNÁVANIE ODSÚDENÝCH OSÔB V ÚVTOS – NOVODOBÁ FORMA OTROCTVA ČI LEGITÍMNA PRÁCA ?	365

Alica Bornayová

SEKCIA PRACOVNÉHO PRÁVA, RODINNÉHO PRÁVA A ĽUDSKÝCH PRÁV

ĽUDSKÁ DÔSTOJNOSŤ MATKY A PRÁVA DIEŤAŤA V SITUÁCIÁCH NARÚŠAJÚCICH ZÁSADU „MATER SEMPER CERTA EST“	380

Andrea Mičudová

ZLYHANIE VÝKONU STYKU RODIČA S MALOLETÝM DIEŤAŤOM AKO PORUŠENIE POZITÍVNYCH ZÁVÄZKOV ŠTÁTU PODĽA ČLÁNKU 8 DOHOVORU	395

Luana Mazreku

ROZŠIROVANIE VÝKLADU PRIMÁRNEHO PRÁVA – KAM AŽ MÔŽE ZÁJSŤ EXTENZÍVNY VÝKLAD PRÁVA VOĽNÉHO POHYBU OBČANOV EURÓPSKEJ ÚNIE?	402

Veronika Janáková

OCHRANA SÚKROMIA HIV POZITÍVNYCH ZAMESTNANCOV V PRACOVNOPRÁVNÝCH VZŤAHOCH.....	411

Soňa Kašická

PRÁVO NA ODPOJENIE AKO VÝZVA VYMEDZENIA PRACOVNÉHO ČASU V DIGITALIZOVANEJ SPOLOČNOSTI.....	421

Laura Jarottová..... 421

ZAKÁZANÉ OTÁZKY NA PRACOVNÝCH POHOVOROCH NEPREDSTAVUJÚ ZLYHANIE PRÁVA, ALE ZLYHANIE PRACOVNEJ KULTÚRY.....	433

Diana Gogolová

ROVNOSŤ PRÍLEŽITOSTÍ A ZÁKAZ DISKRIMINÁCIE V PRACOVNOPRÁVNÝCH VZŤAHOCH.....	441

Simona Spodniaková

STAROBNÝ DÔCHODKOVÝ SYSTÉM SLOVENSKEJ REPUBLIKY V KONTEXTE PRÁVA NA PRIMERANÉ HMOTNÉ ZABEZPEČENIE V STAROBE.....	452

Oskár Tóth

URČENIE STATUSU TEHOTNEJ ŽENY V PRACOVNOM PRÁVE SLOVENSKEJ REPUBLIKY A V PRÁVE EURÓPSKEJ ÚNIE	462

Natália Štubendeková

STATUS PROFESIONÁLNEHO FUTBALISTU V KONTEXTE ZÁKONA O ŠPORTE A PREDPISOV MEDZINÁRODNEJ FUTBALOVEJ FEDERÁCIE.....	474

Nina Moresová

OCHRANA SÚKROMIA VEREJNÝCH OSÔB	483

Simona Majchútová

SEKCIA VEREJNÉHO PRÁVA A PRÁVNÝCH DEJÍN

UPLATŇUJE SA ZÁSADA ZÁKONNOSTI PRI VYVODZOVANÍ ADMINISTRATÍVNOPRÁVNEJ ZODPOVEDNOSTI?	497

Peter Synak

KEĎ TECHNOLOGIE ODÍDU A REGULÁCIA EŠTE LEN DOBIEHA: POHĽAD NA EFEKTIVITU REGULAČNÝCH SANDBOXOV	507

Dávid Kis

LIMITY PRÁVA NA INFORMÁCIE MEDZI PROPORCIONALITOU A ZNEUŽITÍM PRÁVA: KRITICKÁ KOMPARÁCIA NÁRODNEJ A MEDZINÁRODNEJ JUDIKATÚRY	517

Eva Babinská

UMELÁ INTELIGENCIA AKO NÁSTROJ ENVIRONMENTÁLNEHO DOZORU – PRÁVNE LIMITY A VÝZVY	527

Dominika Noskovičová

NORMOTVNORNÁ ČINNOSŤ SAMOSPRÁV A JEJ PROBLÉMOVÉ OBLASTI.....	537

Martina Kubišová

EFEKTIVITA MEDZINÁRODNÉHO TRESTNÉHO SÚDU V KONTEXTE NESPOLUPRÁCE ŠTÁTOV	550

Nicolas Longauer

OBNOVA KULTÚRNEJ IDENTITY AKO DÔKAZ SPÁCHANIA KULTÚRNEJ GENOCÍDY	560

Solomiia Stets

ZMENY ZMLÚV VO VEREJNOM OBSTARÁVANÍ	575

Adrián Líška

HODNOSŤ PALATÍNA V DEJÍNACH UHORSKEJ MONARCHIE	587

Olieinichenko Nikita

HISTORICKÁ A KOMPARATÍVNA ANALÝZA POSTAVENIA POŠKODENÉHO NA SLOVENSKU A V MAĎARSKU	603

Kovácsné Molnár Anna

SEKCIA OBCHODNÉHO PRÁVA, OBČIANSKEHO PRÁVA A MEDZINÁRODNÉHO PRÁVA SÚKROMNÉHO

POSTAVENIE LIKVIDÁTORA V KONTEXTE REKODIFIKÁCIE SÚKROMNÉHO
PRÁVA: OD ORGÁNU SUI GENERIS K ŠTATUTÁRNEMU ORGÁNU? 615

Peter Kišš

INŠTITÚT ŠPECIÁLNEHO SPRÁVCU V INSOLVENČNOM KONANÍ 624

Dominika Ficiková

PREUKAZOVANIE HMOTNOPRÁVNÝCH PODMIENOK PRI ODPOROVACEJ
ŽALOBĚ V KONKURZE 636

Vojtech Agner

KODIFIKÁCIA OBČIANSKEHO ZÁKONNÍKA: SPOLOČNÉ IMANIE MANŽELOV
AKO NÓVUM V MAJETKOVOPRÁVNÝCH VZŤAHOCH MANŽELOV 648

Zdenko Fuček

DOVOLENKOVÉ DELIKTY: NÁHRADA ŠKODY UTRPENEJ V ZAHRANIČÍ Z
POHLADU MEDZINÁRODNÉHO PRÁVA SÚKROMNÉHO 660

Timon Milan Solár

LIMITY OCHRANY TRETÍCH OSÔB PRI MODIFIKÁCII BEZPODIELOVÉHO
SPOLUVLASTNÍCTVA MANŽELOV 672

Filip Haluška

NIČOTNOSŤ UZNESENIA VALNÉHO ZHROMAŽDENIA AKO FANTÓM
OBCHODNÉHO PRÁVA 680

Maria Golubieva

DEDENIE INVESTIČNÝCH NEHNUTEĽNOSTÍ S CUDZÍM PRVKOM 687

Michaela Fedáková

INTERNATIONAL SECTION

PUBLIC LAW

A COMPARISON OF CONSTITUTIONAL PROVISION ON MINORITY RIGHTS BETWEEN HUNGARY AND VIETNAM

VAN TO HUU NGUYEN*

Abstract

This paper compares the constitutional rule on minority rights in Hungary and Vietnam. Both constitutions value ethnic diversity, but they follow different models. Hungary gives minorities' clearer rights and self-governance based on the Article XXIX of the Fundamental Law of Hungary 2011, while Vietnam highlights equality, unity, and state support for minority development under the Article 5 of the Constitution of Vietnam 2013. The study identifies the main similarities and differences and suggests that Vietnam can learn from Hungary's approach to cultural protection and participation in order to strengthen Vietnam's legal system for minority-rights protection.

Keywords: Comparison, constitution, Hungary, minority rights, Vietnam.

Introduction

Human rights, to be realized, require a functioning legal order, and for the foreseeable future states will remain the main frameworks for this. States will always be held accountable for their compliance with human rights¹. In this context, the protection of minority rights becomes a central concern. Minority groups often face greater risks of discrimination and exclusion, which makes the role of the state especially important. As the main duty-bearers of human rights obligations, states must ensure that minorities are not only formally equal under the law but also able to enjoy their rights in practice.

Minority rights, furthermore, represent a specific dimension of human rights, requiring states to adopt special measures to protect cultural identity, ensure equal participation, and prevent structural disadvantage. Without effective state action, the promise of human rights cannot be fully realized for minority communities. In addition, protecting minority groups is an important issue in many countries, inasmuch as minority communities often face challenges related to equality, culture, language, and social participation. Due regard must, therefore, be paid to, constitutional protection plays a key role in ensuring that the rights of these groups are recognized and respected.

Both Hungary and Vietnam include provisions on the protection of minority groups in their constitution. However, the two countries adopt different approaches. Vietnam mainly focuses on promoting national unity, equality, and solidarity among all ethnic groups. This approach aims to maintain social stability and harmony in a multi-ethnic society. In contrast, Hungary places stronger emphasis on legal mechanisms and individual minority rights. Its constitution

* Van To Huu Nguyen, PhD. Candidate, Faculty of Law and Political Sciences, University of Szeged, Hungary, email: vantohuunguyen@gmail.com

¹ Asbjørn, E. (1993). *New approaches to minority protection*. British, Manchester Free Press, 9.

provides clearer guarantees for cultural identity, language use, and participation in public life. These legal protections are designed to ensure that minority rights are not only recognized but also effectively enforced. By comparing the constitutional approaches of Hungary and Vietnam, this paper seeks to highlight key similarities and differences between the two systems. To this end, the comparison also aims to identify useful lessons that Vietnam may consider in order to strengthen its constitutional protection of minority groups while continuing to promote national unity and sustainable development.

1. Definition of minority

Before turning to constitutional regulations on minority rights, it is necessary to clarify the meaning of the term “*minority*”. A clear definition helps explain why certain groups require special protection and how legal systems respond to their specific vulnerabilities. This conceptual clarification provides an essential basis for understanding constitutional approaches to minority rights. In modern legal studies, the concepts of minorities and minority rights are commonly recognized, particularly among scholars concerned with human rights protection.

According to a definition offered in 1977 by Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, a minority is: “*A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members-being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language*”². In addition, reflecting a broader view a remarkable definition was proposed by the author Benoît-Rohmer Florence, showing that minority defines as “*a non-dominant or subordinated social group that might be oppressed or stigmatized on the basis of racial, ethnic, biological, or other characteristics*”³ as well as the important aspect of the definition offered by John Packer, when he argued that a minority is: “*A group of people who freely associate for an established purpose where their shared desire differs from that expressed by majority rule*”⁴.

² United Nations. (2010). *Minority rights: International standards and guidance for implementation*. New York and Geneva, Office of the United Nations High Commissioner for Human Rights, 2.

³ Florence, B. R. (1996). *The minority question in Europe: towards a coherent system of protection for national minorities*. Strasbourg, Council of Europe Publishing, 2.

⁴ John, P. (1996). On the Content of Minority Rights. In: Raïkka J. (ed.) *Do We Need Minority Rights? Conceptual Issues*. The Hague, Martinus Nijhoff Publishers, 123.

Under the Article 1 of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by consensus in 1992, indicating that States have the responsibility to protect the existence of minority groups within their territories. This includes safeguarding their national or ethnic background, as well as their cultural, religious, and linguistic identity. Beyond protection, states are also expected to create favourable conditions that allow minorities to preserve and develop these aspects of their identity. To fulfil these responsibilities, states should adopt appropriate laws and take other necessary measures to ensure that minority rights are effectively respected and implemented in practice. However, it is important to note that the Declaration only implicit to minorities as based on national or ethnic, cultural, religious, and linguistic identity, but no any definition to refer to “minority”.

There is, inasmuch as, no internationally agreed definition as to which groups constitute minorities. It is often stressed that the existence of a minority is a question of fact and that any definition must include both objective factors (such as the existence of a shared ethnicity, language or religion) and subjective factors (including that individuals must identify themselves as members of a minority)⁵. It is thus clear that minorities are groups of people who differ from the majority population in terms of ethnicity, language, religion, or culture. As they are smaller in number, minorities often have a weaker position within the state and society. Their differences may make them vulnerable to unequal treatment or social exclusion if they are not properly protected by law.

In many countries, minority groups face various disadvantages. They often have less political power and limited influence in decision-making processes. In addition, minorities may have lower access to education, health care, employment, and other public services. These disadvantages can lead to poverty, social marginalization, and discrimination. Without legal protection, minority communities may struggle to preserve their identity and fully participate in society. Although the term minority has been used in some hard and soft international documents it has no definition in international law. Therefore, states decide to consider or not a group as minority based on their will or self-designed definitions⁶. As a result, governments either do not define these terms in their domestic legal system simply naming the minorities they want to protect or have the opportunity to define the terms as they wish⁷.

⁵ United Nations. *Ibid.* 2.

⁶ Florence, B.R. *Ibid.* 20.

⁷ Ramin, R. (2015). The Legal Definition of Minority in the European Context: A Disquisition on the Term with a Focus on Ethnic Aspects. *Acta Humana*, 2015/Special edition, 54.

2. The constitutional provision on minority rights in Hungary and Vietnam

First of all, Hungary's rich historical traditions of ethnic diversity have been often illustrated by the statement of the lawyer János Csaplovics from the late 1820s, claiming that Hungary was "*Europe in miniature*"⁸. the Hungarian Republic is situated in a region in which the various national, ethnic and religious minorities have been mixing indefinitely throughout history. Hungary was already ethnically very distinct at the time when it first became a state, a lot of nationalities merging with the Hungarian people after the original settlement⁹. Hungary provides an interesting comparative example, as minority rights are not only recognized in the Constitution but are also supported by specific institutional mechanisms. Under the terms of the law, a national or ethnic minority is a community (*Volksgruppe*) in a numerical minority by comparison with the other inhabitants of the state, which has resided in the territory of the Republic of Hungary for at least a century, and whose members - who are Hungarian citizens - differ from other population components in language, culture and tradition. According to this definition, evidently inspired by Mr Capotorti, the following communities are assumed to be traditionally settled in Hungary: Germans, Armenians, Bulgarians, Croates, Greeks, Poles, Romanians, Ruthenians, Serbs, Slovaks, Slovenes, and Gypsies¹⁰.

The Hungarian constitutional framework emphasizes cultural autonomy, minority representation, and legal protection, offering valuable insights into a more institutionalized approach to minority rights. In accordance with Article XXIX of the Fundamental Law of Hungary 2011 affirms that: "*National minorities living in Hungary shall be constituent parts of the State. Every Hungarian citizen belonging to a national minority shall have the right to freely express and preserve his or her identity. National minorities living in Hungary shall have the right to use their mother tongue, to use names in their own languages individually and collectively, to nurture their own cultures, and to receive education in their mother tongues; National minorities living in Hungary shall have the right to establish their self-government at both local and national level; The detailed rules relating to the rights of national minorities living in Hungary, the national minorities, the requirements for recognition as a national minority, and the rules for the election of the self-governments of national minorities at local and national level shall be laid down in a cardinal Act. A cardinal Act may provide that recognition as a national minority shall be subject to a certain length of time of presence and*

⁸ Balázs, D. (2024). The question of recognising new minorities in Hungary. *Hungarian Journal of Legal Studies*, 65(4), 434.

⁹ Jenő, K. (1997). Legal Status of Minorities in Hungary. *Acta Juridica et Politica, Acta Universitatis Szegediensis de Attila József Nominatae*, 7(52), 1.

¹⁰ Péter, K. (2002). The Legal Status of Minorities in Hungary. *Acta Juridica Hungarica*, 43(3-4), 211.

to the initiative of a certain number of persons declaring to be members of the national minority concerned”¹¹. This rule explains that national minorities are important parts of the country. People from these groups have the right to keep and express their own identity, including using their mother tongue, keeping their traditional names, and preserving their culture and customs. They can also learn in their own language at school. The Fundamental Law does not define the term “*national minorities living in Hungary*” but only states that the detailed rules relating to the rights of national minorities living in Hungary, the national minorities, the requirements for recognition as a national minority, and the rules for the election of the self-governments of national minorities at local and national level shall be laid down in a cardinal Act¹², which is a special law provides more detailed rules to protect and support these rights.

Similarly, about the Constitution of Vietnam 2013, which consists of 11 chapters, 120 articles, representing the intellectual crystallization, will, and aspirations of the entire Party and people. It embodies the spirit of innovation towards the goal of a prosperous, strong, democratic, just, and civilized nation¹³. Also, it is clearly stressed that Vietnam is a unified country with 54 ethnic groups co-inhabiting and residing in an interlocking manner in many areas across the country¹⁴. Among them, the Kinh people make up the majority of the population, while the remaining 53 ethnic groups are considered ethnic minorities, totalling over 14.4 million people, reside in about 1,516 communes across 32 cities and provinces following the recent local administration restructuring¹⁵. To date, the protection of human and civil rights, along with the promotion of equality and solidarity among ethnic groups, continues to be a significant priority. Additionally, the Constitution establishes fundamental principles of ethnic equality, cultural protection, and state responsibility for the development of minority communities, reflecting a strong alignment with international standards concerning the rights of ethnic minorities.

In particular, based on Article 5 of the Constitution 2013 states that: “*The Socialist Republic of Vietnam is a unified nation of all ethnicities living together in the country of Vietnam; All the ethnicities are equal and unite with, respect and assist one another for mutual development; all*

¹¹ The Fundamental Law of Hungary on 25 April 2011. Retrieved from Ministry of Justice: <https://legislationline.org/sites/default/files/2025-02/the-fundamental-law-of-hungary.pdf>, (18/02/2026).

¹² Jozsef, P. (2023). The Parliamentary Representation of National Minorities in Hungary. In: *Europäisches Minderheitenrecht*. Nomos, Baden-Baden Publisher, Deutschland, 396-397.

¹³ Hoc, D. V. (2024). History of the Constitution of Vietnam. *Lex Humana, Universidade Católica de Petrópolis, Rio de Janeiro, Brasil*, 16(1), 355.

¹⁴ Phu, N. M. (2020). Policy and laws on ethnic minorities for sustainable development in Vietnam. *E3S Web of Conferences*, 210, 1.

¹⁵ Suu, N. Q., & Nhan, N. V. (2020). Some Urgent and Fundamental Issues to Complete Laws and Policies on Ethnic Minorities in Mountainous Regions of Vietnam. *International Journal of Management*, 11(12), 21.

acts of discrimination against and division of the ethnicities are prohibited; The national language is Vietnamese. Every ethnic group has the right to use its own spoken and written language to preserve its own identity and to promote its fine customs, practices, traditions and culture; The State shall implement a policy of comprehensive development and create the conditions for the minority ethnicities to fully utilize their internal strengths and develop together with the country”¹⁶. In accordance with this provision, it is very important to note that Vietnam is one unified country made up of many ethnic groups. All ethnic groups are equal, and any form of discrimination is strictly prohibited. Vietnamese is the official national language, but people from minority groups have the right to use their own languages and preserve their culture. The State also has the responsibility to support ethnic minorities so they can improve their living conditions and develop alongside the rest of the country.

3. The comparison of constitutional perspective on minority rights between Vietnam and Hungary

On the one hand, building on the general understanding of minorities and minority rights, it is important to examine how these rights are recognized and protected at the constitutional level. Constitutional provisions play a key role in setting the legal foundation for minority protection and guiding state policies and institutions. By examining the legal provisions on the rights of minorities in both Vietnam and Hungary above, several notable similarities can be identified as following: First, both countries recognize ethnic or national minorities as integral parts of the nation, which affirms their official status and inclusion within the State structure rather than treating them as separate or marginal groups. Second, both systems emphasize equality and explicitly prohibit discrimination, thereby establishing a legal foundation that ensures minorities are treated fairly in all aspects of social and political life. Third, both legal frameworks guarantee the right of minorities to use their own languages and preserve their cultural identities, which plays a crucial role in maintaining diversity and protecting traditional values. Finally, both States commit to supporting the development of minority communities, reflecting not only a formal recognition of rights but also an active role in promoting their socio-economic advancement and integration into broader national development.

On the other hand, while Hungary and Vietnam share these similarities in protecting national or ethnic minorities, there are important differences between the two countries. Firstly,

¹⁶ The Constitution was passed by the Vietnamese National Assembly on 28th November 2013. Retrieved from Thuvienphapluat: <https://thuvienphapluat.vn/van-ban/Bo-may-hanh-chinh/Hien-phap-nam-2013-215627.aspx>, (20/02/2026).

one of the most notable differences between Hungary and Vietnam lies in how each country defines the holder of rights in relation to national or ethnic minorities. This distinction reflects deeper legal philosophies about the role of the individual versus the community within the state.

In Hungary, the legal framework adopts a clear and modern approach by recognizing the individual as the primary subject of rights. The law explicitly states that “*Every Hungarian citizen belonging to a national minority has the right...*” Each person is directly protected by law, not just as a member of a group, but as an independent rights-holder. At the same time, Hungary does not ignore the collective dimension of minority life. Minority communities are also granted rights to preserve their language, culture, and identity. As a result, Hungary successfully combines individual rights with collective rights, creating a balanced and inclusive legal model. The minorities have individual and collective rights. The individual rights are in brief: free choice of identity, and also the right to be able to claim that identity; the right to equal opportunity; the right to be free from discrimination; the right to take part in public life; the right to patronise the culture; the right to culture and to native language education. The collective rights are in brief: free choice of identity; the right to be free from discrimination; the right to establish self-governments; the right to cultural and educational autonomy; the right to patronise traditions; the right for parliamentary representation etc.¹⁷

In contrast, Vietnam approaches the issue from a more collective perspective. The Constitution tends to refer to “*ethnic groups*” as unified communities, rather than clearly identifying each individual as a separate rights-holder. Rights are framed in terms of what is guaranteed to ethnic groups, emphasizing solidarity and equality among all nationalities. This reflects a broader political and social priority: maintaining national unity and cohesion in a multi-ethnic country. Because of this focus, however, the role of the individual within these groups is less clearly defined in legal terms. Overall, while Hungary highlights the legal status and autonomy of the individual alongside the group, Vietnam places stronger emphasis on the collective identity and unity of ethnic communities. This difference not only shapes how rights are written in law, but also influences how they are understood and applied in practice.

The second difference is that Hungary grants minority’s formal autonomy through self-governments, while Vietnam emphasizes centralized representation and coordination within state structures. In Hungary, the minorities have the possibility to form either in connection with local government elections, or independently of that, in the elections specially organised for them, local and minority self-governments. This double tier local government system

¹⁷ Jenő, K. *Ibid.* 15.

ensures the institutional guarantee of cultural autonomy¹⁸. It is also important to keep in mind that the aim of establishing minority self-governments was to extend the system of minority rights protection found in the Constitution of the Republic of Hungary¹⁹. These institutions allow minority communities to manage cultural, educational, and social affairs independently, giving them a significant degree of autonomy within the state. This system not only protects minority interests but also encourages active participation in public life and decision-making. In Vietnam, by contrast, there is no formal system of minority self-government. Ethnic groups are represented mainly through state institutions, and their rights are exercised within the broader framework of national governance. While cultural and social support exists, minorities do not have separate governing bodies with autonomous authority. This reflects Vietnam's focus on national unity and centralized management rather than local or group-level self-governance.

Regarding the legal framework in protection of minority rights, Hungary relies on a specialized law to protect minority rights, whereas Vietnam integrates these rights into general legal provisions without a separate act. In Hungary, minority rights are protected by a dedicated law - the Cardinal Act CLXXIX of 2011 on the Rights of National Minorities, accordingly, any ethnic group which has been resident in the territory of Hungary for at least one century, which is a numerical minority among the population of the state, and which is distinct from the rest of the population its own language, culture and traditions, but also bears witness to a sense of belonging which is committed to the preservation of these, to the development of their historically established communities and to express and protect the interests of their communities²⁰. This act provides detailed rules on how minorities can exercise their cultural, educational, and social rights, including the operation of local and national self-governments. Having a separate law ensures clarity, legal certainty, and specific mechanisms for enforcing minority rights. In contrary to Hungary, minority rights are mainly embedded in the Constitution and general laws, but there is no special act focused solely on minority rights in Vietnam. While the Constitution guarantees equality and protection for ethnic groups, the rules are broader and less detailed. The absence of a dedicated law means that the implementation of minority rights often depends on general legislation and government policies rather than a specific legal framework.

¹⁸ Jenő, K. *Ibid.* 14.

¹⁹ Niamh, W. (2000). Minority Self-Government in Hungary: Legislation and Practice. *Journal on Ethno politics and Minority Issues in Europe*, 2, 17.

²⁰ Ivan, H. (2022). Representation of National and Ethnic Minorities in the Hungarian Parliament. *Studia Iuridica Lublinensia*, 31(5), 78.

In terms of rights protection, moreover, Hungary offers strong, explicit protections for minority languages and education, whereas Vietnam provides more general allowances, prioritizing unity alongside cultural recognition. In Hungary, the law provides clear and specific protections for minority communities. The law acknowledges the free choice of identity, the right to use a native language, the right to form organisations, the right to have a connection with the mother country, and it ensures the right to have self-governments and parliamentary representation²¹. Individuals have the right to use their personal and community names in their minority language, and minorities are guaranteed the right to education in their mother tongue. These explicit provisions help preserve cultural identity and ensure that minority languages continue to thrive in both private and public life. In Vietnam, minority communities are also allowed to use their own languages, and mother-tongue education is permitted. However, the Constitution and laws place more emphasis on national unity, so these rights are less strongly guaranteed. The focus is on integrating ethnic groups into the broader society while still providing some cultural and linguistic recognition.

Lastly, when it comes to recognition, a community must meet specific criteria to be officially recognized as a national minority in Hungary. Based on Article 1 of the Act CLXXIX of 2011 states that: *“Ethnic groups’ resident in Hungary for at least one century, who are in a numerical minority amongst the population of the State, are distinguished from the rest of the population by their own language, culture and traditions and manifest a sense of cohesion that is aimed at the preservation of these and at the expression and protection of the interests of their historically established communities are considered national minorities”*²². This includes having a minimum number of members and demonstrating a long-term presence in the country. These requirements ensure that recognized minorities are established communities with a continuing cultural and social presence. In Vietnam, the recognition of ethnic groups is based primarily on historic classification rather than population size, it is also stressed that the community of Vietnam’s ethnic minority groups was formed and developed alongside the thousands-of-years-long history of building and defending the nation²³. The state recognizes ethnic groups that have long-standing historical and cultural roots, regardless of how many people belong to the group today. This approach reflects Vietnam’s focus on preserving the historical and cultural diversity of its population rather than setting quantitative thresholds. In

²¹ Jenő, K. *Ibid.* 14.

²² The Act CLXXIX of 2011 on the Rights of National Minorities (as in force on 21 December 2017). Retrieved from Nemzeti Jogszabálytár: <https://njt.hu/jogszabaly/en/2011-179-00-00>, (10/03/2026).

²³ Nhandan News. *An overview of the historical formation of the ethnic groups in our country*. Retrieved from Nhandan News: <https://special.nhandan.vn/vai-net-ve-lich-su/index.html>, (12/03/2026).

short, Hungary bases recognition on population and presence, while Vietnam relies on historical and cultural classification.

4. Some lessons Vietnam can learn from Hungary

While Vietnam has made efforts to protect ethnic minority rights, examining Hungary's experience offers several insights that could strengthen both legal protections and practical implementation. In this regard, Vietnam could consider and learn from Hungary's valuable lessons as following:

Firstly, clarify the rights-holder. Vietnam could benefit from explicitly defining who holds minority rights—whether individuals, communities, or both. Stronger recognition of individual rights would improve enforcement, education, and protection, ensuring that every minority member is aware of and can exercise their rights. A clear definition also helps state agencies apply the law more consistently, reducing ambiguity in practice.

Secondly, create clearer legal mechanisms. Hungary's Cardinal Act on the Rights of National Minorities provides detailed legal mechanisms for language, education, cultural autonomy, and representation. Vietnam could consider passing a dedicated minority rights act to provide similar clarity and guidance. Such legislation would make it easier to implement minority protections and give both the government and minority communities a clear framework to follow.

Thirdly, strengthen minority self-representation. Hungary's system of local and national minority self-governments gives communities a direct voice in cultural, educational, and social affairs. Vietnam could explore forms of community councils, consultative bodies, or local cultural self-governance, allowing minorities to participate more actively in decisions that affect their lives and preserve their cultural heritage.

Finally, expand mother-tongue education. While Vietnam currently allows the use of minority languages, there is room to strengthen mother-tongue education. Possible measures include expanding bilingual education programs, improving teacher training in minority languages, and encouraging greater community involvement in schools. This would help preserve minority languages and ensure that education is more accessible and culturally relevant.

Conclusion

Vietnam and Hungary both aim to protect minority rights, but Hungary provides stronger institutional tools, especially self-government and detailed laws. By adopting these measures

from Hungary's experiences, Vietnam could create a more balanced system that respects both individual and collective rights, while maintaining national unity and social cohesion. Strengthened protections and clearer legal mechanisms would not only safeguard minority cultures but also foster equality, inclusion, and sustainable development for all ethnic groups. In the long term, such reforms could help Vietnam build a society where diversity is celebrated, minority voices are heard, and every citizen has the opportunity to thrive.

Bibliography

1. Asbjørn, E. (1993). *New approaches to minority protection*. British, Manchester Free Press, 9.
2. Balázs, D. (2024). The question of recognising new minorities in Hungary. *Hungarian Journal of Legal Studies*, 65(4), 434.
3. Florence, B. R. (1996). *The minority question in Europe: towards a coherent system of protection for national minorities*. Strasbourg, Council of Europe Publishing, 2.
4. Hoc, D. V. (2024). History of the Constitution of Vietnam. *Lex Humana, Universidade Católica de Petrópolis, Rio de Janeiro, Brasil*, 16(1), 355.
5. Ivan, H. (2022). Representation of National and Ethnic Minorities in the Hungarian Parliament. *Studia Iuridica Lublinensia*, 31(5), 78.
6. Jenő, K. (1997). Legal Status of Minorities in Hungary. *Acta Juridica et Politica, Acta Universitatis Szegediensis de Attila József Nominatae*, 7(52), 1.
7. John, P. (1996). On the Content of Minority Rights. In: Raikka J. (ed.) *Do We Need Minority Rights? Conceptual Issues*. The Hague, Martinus Nijhoff Publishers, 123.
8. Jozsef, P. (2023). The Parliamentary Representation of National Minorities in Hungary. In: *Europäisches Minderheitenrecht*. Nomos, Baden-Baden Publisher, Deutschland, 396-397.
9. Nhandan News. *An overview of the historical formation of the ethnic groups in our country*. Retrieved from Nhandan News: <https://special.nhandan.vn/vai-net-ve-lich-su/index.html>
10. Niamh, W. (2000). Minority Self-Government in Hungary: Legislation and Practice. *Journal on Ethno politics and Minority Issues in Europe*, 2, 17.
11. Péter, K. (2002). The Legal Status of Minorities in Hungary. *Acta Juridica Hungarica*, 43(3-4), 211.
12. Phu, N. M. (2020). Policy and laws on ethnic minorities for sustainable development in Vietnam. *E3S Web of Conferences*, 210, 1.
13. Ramin, R. (2015). The Legal Definition of Minority in the European Context: A Disquisition on the Term with a Focus on Ethnic Aspects. *Acta Humana*, 2015/Special edition, 54.
14. Suu, N. Q., & Nhan, N. V. (2020). Some Urgent and Fundamental Issues to Complete Laws and Policies on Ethnic Minorities in Mountainous Regions of Vietnam. *International Journal of Management*, 11(12), 21.
15. The Act CLXXIX of 2011 on the Rights of National Minorities (as in force on 21 December 2017). Retrieved from Nemzeti Jogszabálytár: <https://njt.hu/jogsabaly/en/2011-179-00-00>
16. The Constitution was passed by the Vietnamese National Assembly on 28th November 2013. Retrieved from Thuvienphapluat: <https://thuvienphapluat.vn/van-ban/Bo-may-hanh-chinh/Hien-phap-nam-2013-215627.aspx>
17. The Fundamental Law of Hungary on 25 April 2011. Retrieved from Ministry of Justice: <https://legislationline.org/sites/default/files/2025-02/the-fundamental-law-of-hungary.pdf>
18. United Nations. (2010). *Minority rights: International standards and guidance for implementation*. New York and Geneva, Office of the United Nations High Commissioner for Human Rights, 2

ADMINISTRATIVE HIERARCHY AND SUPERVISORY MECHANISM OF PUBLIC AUTHORITY AND ADMINISTRATIVE AUTHORITY OF LABIN AND THE LABIN REGION (LABINŠTINA) (1947.-1952.)

MLADEN BOŽIČEVIĆ*

Abstract

This paper analyses the administrative hierarchy and supervisory mechanisms within the socialist system of governance in the Federal People's Republic of Yugoslavia in the period following World War II (1947–1952). The study is based on archival research carried out at the State Archives in Pazin. Particular attention is devoted to the functioning of local administration through People's Committees in the annexed territories of Istria, with a focus on Labin and the Labinština region. In the early socialist administrative system, People's Committees represented the principal organs of state authority at the local level. Their organisation was based on a system of both vertical and horizontal institutional relations. Within this framework, higher administrative bodies exercised supervisory control over the legality and propriety of acts adopted by lower authorities. The executive committee of a People's Committee was accountable horizontally to its respective committee and vertically to the executive committee of the higher-level People's Committee.

Keywords: administrative hierarchy, People's Committees, executive committees, administrative supervision

Introduction

At the outbreak of the Second World War in Istria, there were no organizations of the Communist Party of Croatia capable of leading an uprising. Instead, the Communist Party of Italy operated in the region. The Communist Party of Italy opposed the uprising in Yugoslavia, considering it to possess a nationalist character. Although the Italian fascist apparatus prevented the Communist Party from operating within the popular uprising the neighbouring Party leadership of the Croatian Littoral (Rijeka region) nevertheless provided significant assistance to the development of the National Liberation Movement. (Buršić, 1980.) After the capitulation of Italy in September 1943, popular power was established in Istria and Labin. Until the capitulation of Italy, the national liberation committees functioned as combat organs, and to a lesser extent as authorities, and after the capitulation of Italy, they assumed the role of new state authorities. (Dukovski, Grzunov, 2023.) The legal regulation of the organization and functioning of the National Liberation Committees had its own specific characteristics, adapted to the conditions of the Second World War. Both the manner of regulation and the types of acts through which such regulation was carried out depended on the conditions under which their issuing authority operated. Thus, the first National Liberation Committees functioned on the basis of political directives of the Central Committee of the Communist Party of Yugoslavia

* mladen.bozicevic@live.com, LL.M., PhD candidate, Doctoral research – Faculty of Law Rijeka, University of Rijeka, Croatia, Department of history of law and state, 4th year of study, part-time student

concerning the organization of People's Government, as well as on the basis of instructions and decisions issued by military commands in a given area. (Borković, 1990.)

1. The Post-War Period

ZAVNOH formally assumed the function of the highest political body of the People's Liberation Movement, but de facto also performed the function of the highest authority of Croatia. (Engelsfeld, 1999.) In the proclamation entitled "Istrian people", the Istrian People's Liberation Committee emphasized that Istria was liberated by the power of its own weapons and mass voluntary joining of partisan units and by the will of the people, and that Istria is Croatian land and will remain Croatian. (Informator, 2020.) In the "Proclamation to the People of Croatia", ZAVNOH also called on "the Croatian brothers of Istria, Zadar, Rijeka and the Adriatic islands" to fight for liberation from foreign rule. A week later, on 20 September 1943, ZAVNOH adopted the Decision on the annexation of Istria, Rijeka, Zadar and other occupied regions to Croatia. It confirmed the Pazin or September decisions - decisions of the District People's Liberation Committee for Istria on "annexation to the motherland and the proclamation of unification with the rest of our Croatian brothers". (Čulinović, 1968.) After the military liberation of the country in May 1945, Istria was still not formally part of Yugoslavia; rather, the Yugoslav Army received a mandate to occupy the area within Zone B. This occupation system confirmed the presence of the Yugoslav military in Istria, thereby strengthening its position regarding annexation to Croatia. Nevertheless, Istria remained, under international law, an integral part of the Italian state, with the Yugoslav Army holding a legitimate occupation mandate. (Vukas, Bartulović 2005.)

The first session of the post-war People's Committee of Labin was held on December 16, 1945, and the councillors were elected in the elections on November 25, 1945. The agenda included the dismissal of the old board, the election of a new executive board, and the reading and discussion of the secretary's report on the situation in the district and the development of popular Government. The second session was held on April 28, 1946, at which the further consolidation of popular power was discussed. (HR-DAPA-85, 1945.) After the end of the Second World War, a peace conference of the victorious countries in the Second World War was held in Paris from July 29 to October 15, 1946. The determination of the border between Yugoslavia and Italy and the determination of the status of Trieste were disputed. Paris Peace Treaties were signed on February 10, 1947. French line suggestion was accepted because it represented the principle of ethnic balance: in Yugoslavia and Italy there remained an approximately equal national minority. (Engelsfeld, 1999.) The Treaty came into force on

September 15, 1947. which was the beginning of the application of Yugoslav civil legislation to the administrative structure of Labin and Istria. Accordingly, laws on People's Committees began to be applied. The General Law on People's Committees was passed on May 21, 1946, and the second General Law on People's Committees was passed on June 6, 1949.

2. The Beginning of Yugoslav Constitutional order

The Constitution of the People's Republic of Croatia was adopted on January 1947 and the Law on Administrative-Territorial Division of the People's Republic of Croatia on June 1947. The new General Law on People's Committees was adopted in May 1949, the main characteristics of which are that People's Committees are the highest state bodies in administrative-territorial units and lead all State administration bodies in their area. (Stefanović, 1950.) In July 1947, the Law on the Administrative-Territorial Division of the People's Republic of Croatia was passed, which defined the following administrative-territorial units in the territory of the People's Republic of Croatia: regions, districts, cities, city districts, city settlements and areas of local People's Committees. In October of the same year, the Decree on the extension of the validity of the Constitution, laws and other regulations of the People's Republic of Croatia to the territory of Istria, the cities of Rijeka and Zadar and the island of Lastovo was passed, as well as the Decree on the recognition of People's Committees in the territory of Istria, the cities of Rijeka and Zadar and the island of Lastovo as legal authorities. (Žužić, 2009.) The Labin District People's Committee at its first session after the formal annexation of Istria to Yugoslavia on September 28, 1947, was composed of 70 councillors who were elected in the elections on September 14, 1947. At that session, its Executive Committee was also elected, consisting of a president, secretary and 8 members. At the next session of the People's Committee on December 21, 1947, the number of local People's Committees of the Labin's district was reduced to 12. They were local People's Committees: Plomin, Kršan, Šumber, Sv. Martin, Sv. Nedelja, Dubrova, Vinež, Podlabin, Labin, Raša, Sv. Lovreč, Crni. The Executive Committee of the Labin district People's Committee consisted of 9 departments: economy, finance, education, social welfare and public health, general affairs, trade and supply, purchase administration, planning commission and internal affairs. (HR-DAPA-85, Labin 1947) Elections for local People's Committees were held on May 22, 1949, and elections for local People's Committees in 1951 were postponed due to changes in the electoral law. The second election for the Labin District People's Committee was held in June 1950. At the first session of the newly elected People's Committee of 80 members, a new

executive committee consisting of the president, secretary and 13 members was elected. Such a district People's Committee operated until 1952, when the reorganization of administrative-territorial units in Yugoslavia took place. (HR-DAPA-85, Labin 1950)

The main characteristics of People's Committees are that they are the highest state bodies in administrative-territorial units and lead all state administration bodies in their area. For this reason, federal and Republican bodies of state Government and state administration carry out tasks within their jurisdiction through People's Committees, i.e. through their executive committees. (Krbek, 1950) If we look at all state bodies from the highest to the lowest, they would look like this: 1) National Assembly of the FNRJ 2) Presidium of the National Assembly of the FNRJ - a collegial body, composed of several people, and is entrusted with tasks that in other countries are entrusted to the president of the Republic 3) Government of the FNRJ – executive and administrative body 4) Members of the Government of the FNRJ 5) National Parliament of the Republic 6) Presidium of the Parliament – elected by the Parliament 7) Government of the Republic 8) Members of the Government of the Republic 9) People's Committees of various administrative-territorial units (regions, cities, city districts, urban settlements, and towns) 10) Executive committees of those administrative-territorial units. In all these state organs, the important fact is that nowhere do we find that organs of a higher unit appoint organs of a lower unit. All organs originate from the people. Although all organs originate from the people directly or indirectly, and not lower than higher, there is a certain subordination between them with regard to their work. On the one hand, in each unit, we have the subordination of the executive organ to the representative body. This is horizontal subordination. On the other hand, we have the subordination of the organs of lower units to the organs of higher units. This is vertical subordination. (Stefanović, 1950)

3. Democratic Centralism

Democratic centralism purported to combine two opposing forms of party leadership: democracy, which allows for free and open discussion, and central control, which ensures party unity and discipline. Democratic forms are 1) free critical thinking and debate before making decisions 2) decisions are democratically made 3) leadership is democratically elected and 4) decisions critically and democratically evaluated after an appropriate time after implementation. On the other hand, centralist characteristics are: 1) once decisions are made, they are implemented (discussion is subordinate to action) 2) those who disagree do not block or undermine implementation 3) authority of democratically elected leaders is respected. (Pusić

1985. p.196, Muratović 1986). This is the principle of operation within the communist party, which had a monopoly on decision-making and which transferred its decisions to the state level. In the "party and state" regime, the political organization (Communist Party) as a whole is connected to the administrative system as a whole. Not only are the members of the political organization in the top leadership positions in the administrative apparatus, they are in all key positions along the pyramid of the administrative hierarchy, in all territorial units. Party members are bound by party discipline to implement the organization's policy in every place where they are, and within the party hierarchy, lower forums and individual members are bound very strictly to the execution of the decisions of the higher ones. In this way, the internal cohesion and unity of the policy within the party organization was ensured, and at the same time, the transfer of a unified policy to the administrative apparatus along its entire length was ensured.¹ (Pusić 1985., p. 196) At the level of state Government and state administration, this relationship was based on similar principles. Higher People's Committees exercise general management over the work of lower People's Committees. They pass general regulations for the uniform implementation of their activities, give instructions and guidelines for the accomplishment of their tasks, provide them with organizational and professional assistance and help in the deployment of personnel, supervise the legality of their work and help them to develop their initiative and fully exercise their rights established by law. (Stefanović 1950.) Conditions for achieving democratic centralism at the state and legal level are: representative bodies must be truly democratic authorities of the working people and firmly control the work of executive and administrative bodies, mutual rights between higher and lower authorities should be as fully and precisely as possible established and ensured by law, and authorities should strictly adhere to the rights that belong to them in their work and not exceed them, the entire system must ensure a certain minimum of self-governing local authorities. (Sokol, 1986., p. 349)

4. Supervisory Mechanism of Lower and Higher Public Authorities

A higher People's Committee has the right to annul or repeal illegal or irregular acts of a lower People's Committee. and the Presidium of the People's Parliament of a People's Republic has the right to annul or repeal illegal or irregular acts of all People's Committees within the

¹ The main problem is the "party and state" regime, which leads to a large concentration of power. The specific tasks of governance and management that in that regime pass to the political organization, in addition to the non-professional members of the organization, and a certain professional party apparatus. As a result, tendencies toward oligarchizing of influence inevitably occur. (Pusić, 1985. P.196)

territory of the People's Republic. A People's Committee whose act has been annulled or repealed has the right to lodge an objection as to its legality with the organ immediately superior to the one which annulled or repealed the act, within 15 days of the notification of the decision on annulment or repeal. (The General Law on People's Committees 1949, Art. 43, paras. 1,2 and Art. 46.) The Presidium of the People's Parliament of a People's Republic has the right to dissolve any People's Committee within the territory of the People's Republic, and the Regional People's Committee has the right to dissolve any Local People's Committee within the territory of the region if their work is in obvious contradiction to the Constitution or Law. In such a case of dissolution of the People's Committee, the Act of dissolution must also contain the announcement of elections for a new People's Committee, which cannot be held earlier than one month, nor later than 3 months from the date of dissolution of the People's Committee. The body that dissolved the People's Committee appoints a temporary executive committee until the election of a new People's Committee, either from the members of the dissolved People's Committee or from other citizens. (The General Law on People's Committees 1949, Art. 50, paras. 1,4). Conflicts on jurisdiction between two People's Committees are resolved by the immediately higher People's Committee, i.e. the Presidium of the People's Parliament of the People's Republic. (The General Law on People's Committees 1949, Art. 52, para. 1)

4.1 Supervisory Mechanism and Hierarchy of Lower and Higher Administrative Authorities

With regard to the relations between the various organs of state administration of the same People's Republic, the rule of subordination is expressed in the general provision that the executive committees of the People's Committees, in addition to being responsible to their People's Committee for the performance of all state administration affairs, are also subordinate to the executive committee of the higher People's Committee, or to the Government of the People's Republic and its Ministries, within the framework of their competence. (The General Law on People's Committees Art. 42). For example, the Government of the People's Republic is horizontally subordinated to the People's Parliament, or rather its Presidium, and vertically in matters within Federal jurisdiction to the Government of the People's Republic of Yugoslavia, the Federal-Republic Ministries of the People's Republic are horizontally subordinated to the Government of the People's Republic, vertically to the corresponding organ of the Federal Government. The executive committee of the People's Committee is horizontally subordinated to its People's Committee, and vertically to the executive committee of the higher

People's Committee, or rather to the Government of the People's Republic and its organs. The commission of the executive committee of the People's Committee is horizontally subordinated to its executive committee, and vertically to the commission of the higher executive committee or the ministry. (Krbek, 1950)

The executive committee of the higher People's Committee has the right to annul or cancel illegal or irregular acts of the executive committee of the lower People's Committee. But if these acts were passed on the basis of general regulations (decisions) of the lower People's Committee, the executive committee of the higher People's Committee can only suspend them and propose to the lower People's Committee to cancel or abolish them. This was an amendment to the General Law on People's Committees passed in 1949. The executive board or commissioner, whose act was annulled or revoked by the corresponding higher authority, has the right to file an objection regarding the legality to the immediately higher authority than the one that annulled or revoked the act, i.e. the Presidium of the national Parliament of the People's Republic, within 15 days from the communication of the decision on annulment or revocation. That higher authority can then either confirm or cancel or cancel the act of annulment or revocation. If it is about suspending the execution of an act of the executive board or commissioner, the authority that decided on the suspension must submit the suspended act without delay to the competent authority for a decision. The executive board or commissioner, whose act has been suspended, has the right to submit its objections. (General Law on People's Committees 1949, Arts. 44, 45, 46.) Conflicts of jurisdiction between executive committees are resolved by the immediately superior executive committee, i.e. the Government of the People's Republic. (General Law on People's Committees 1949, Art. 52 para. 2)

4.2 Higher Administrative Body in Relation to a Lower Body of Public Authority

The executive committee of the higher People's Committee, i.e. the Government of the People's Republic, has the right to suspend the execution of inconsistent or irregular acts of the lower People's Committee and to propose to its People's Committee, i.e. the Presidium of the People's Parliament of the People's Republic, to annul or abolish them. The authority that decided to suspend execution must without delay submit the suspended act to the competent authority for a decision. And the People's Committee whose act has been suspended has the right to submit its objections. Since it is not a question of a higher organ of the state Government, but a higher organ of the state administration, it is only about the right to suspend execution and to propose cancellation to that organ of the state Government that is competent

for this. (General Law on People's Committees 1949, Art. 43 para. 3 and Art. 45) It is only asked on whose initiative the competent higher authorities will annul, abolish or suspend the execution of illegal and irregular acts of lower authorities (People's Committees, executive committees, commissioners) as presented here. They can do it on their own initiative, i.e. ex officio. In this way, both the principle of democratic centralization and the principle of legality appear to be effective. (Stefanović 1950)

In order for higher authorities to be able to control the work of lower authorities and to be able to find out about their illegal and irregular acts, it is stipulated that the minutes of the sessions of the People's Committee, decisions, instructions and orders of the People's Committee are delivered without delay directly to the higher People's Committee, i.e. the Presidium of the national Parliament of the People's Republic and the Government of the People's Republic. The minutes of the sessions of the executive committees, as well as the orders and instructions of the executive committees, are delivered directly to the higher executive committee, i.e. the Government of the People's Republic. (General Law on People's Committees 1949, Art. 51) In the system of unity of power that was in force in the FNRJ, which in principle concentrates all power in the representative bodies of state power, the state administration in the form of its highest bodies does not appear as some special, independent authority, but as an executive body of the representative bodies of state power. Administrative bodies depend on the representative bodies in a formal and material sense² - they are the executive bodies of the representative bodies. In the system of separation of powers, the issue of the relationship between the legislative and administrative authorities is significantly different. (Krbek, 1950)

4.3 Higher Body of The State Authority in Relation to a Lower Body of the State Administration and Relation Between State Authority to a State Administration of The Same Territorial Unit

The Presidium of the national Parliament of the People's Republic has the right to dismiss the executive committee of every People's Committee in the territory of the Republic, and the higher People's Committee has the right to dismiss every executive committee of the People's Committee in its territory if their work is in obvious contradiction with the Constitution or the Law. By the same decision that dismissed the executive committee, the corresponding national

² This is reflected in the powers of these bodies, while the People's Committees exercise power and pass general regulations within the framework of rights and duties established by the Constitution, executive committees perform tasks within their jurisdiction based on the Constitution

committee must be convened for a session to elect a new executive committee. (General Law on People's Committees 1949, Art. 50 para. 2) The People's Committee has the right to annul or repeal the illegal or irregular acts of its executive committee, as well as of its individual members. With regard to the relations between the various state administration bodies of the same unit, the executive committee has the right to annul or repeal or amend the illegal or irregular acts of its commissioners. (The Constitution of Republic of Croatia 1947, Art. 132 para. 3 and Art. 126 para.1)

Conclusion

Vertical subordination was quite strong, because higher authorities and administration had the right to cancel and annul not only illegal acts but also irregular acts. Also, the double subordination, horizontal and vertical, enabled strict control of every authority and administrative body. However, each body was democratically elected in elections with universal suffrage and women's suffrage and 18 years of minimum age. Likewise, the Electoral College could even recall councillors if their work contradicted the socialist order. In the following years, vertical subordination weakened and horizontal subordination strengthened, which led to the introduction of worker self-management. The preamble to the General Law on People's Committees from 1946 states that one of the goals of the law was "to include the broadest masses of the people, who have been outside the Government for centuries, in the state administration and learn how to govern the state". The political goal was clearly stated, which was connected with the process of the withering away of the state, and the first role of People's Committees in this direction was outlined. The scope and independence of People's Committees in carrying out tasks within their scope of work was limited. This was a consequence of the level of development of the new political and social system. At the time the law from 1946 was passed, the general social conditions required the existence of a strong central Government. In such a situation, both the scope and independence of People's Committees had to be relatively limited. This limitation was manifested in the fact that the People's Committees had more the character of the executive bodies of the higher organs of the state Government, than they would be characterized by some broader independent action, in that the administrative bodies of the People's Committee are doubly subordinated: to their People's Committee and to the competent higher administrative body, in the fact that the higher state authorities had the right to cancel and abolish the acts of the People's Committee and its organs, not only in the case of their illegality but also if they considered them irregular, i.e. useless. Although from an organizational point of view the People's Committees were

independent and were formed by the election of the voters of the administrative-territorial unit, from a functional point of view their independence was significantly narrowed.

Bibliography

1. Bartulović, Ž., & Vukas, B. *Državnopravni položaj Istre nakon II. svjetskog rata*. In *Istra u prvom desetljeću nakon II. svjetskog rata – Pazinski memorijal*.
2. Borković, I. (1990). Početni oblici organiziranja lokalnih organa uprave u Jugoslaviji. *Zbornik radova Pravnog fakulteta u Splitu*.
3. Čulinović, F. (1968). Državnopravno značenje odluka o priključenju Istre Hrvatskoj odnosno Jugoslaviji. In F. Čulinović, J. Bratulić, & N. Antić, *Priključenje Istre Jugoslaviji*.
4. Dukovski, D., & Grzunov, M. (Eds.). (2023). *Zapisnici sjednica Oblasnog narodnog odbora za Istru 1943.–1947*. Pazin.
5. Engelsfeld, N. (1999). *Povijest hrvatske države i prava*. Zagreb.
6. Krbek, I. (1950). *Osnovi upravnog prava FNRJ*.
7. Muratović, M. (1986). *Demokratski centralizam u Savezu komunista Jugoslavije*.
8. Mratović, A., Filipović, N., & Sokol, S. (1986). *Ustavno pravo i političke institucije*.
9. Pusić, E. (1985). *Upravni sistemi* (Knjiga 1).
10. Stefanović, J. (1950). *Ustavno pravo*.
11. *Radnički pokret i NOB općine Labin*. (1980). Rijeka.

Archival source

12. Državni arhiv u Pazinu. (1945–1955). *Narodni odbor kotara Labin* (HR-DAPA-85) [Arhivska građa]. Pazin, Hrvatska.

Legislation

13. Opći zakon o narodnim odborima. (1946). *Službeni list FNRJ*.
14. Opći zakon o narodnim odborima. (1949). *Službeni list FNRJ*.
15. Ustav Narodne Republike Hrvatske. (1947). *Službeni list NRH*.

Journal article

16. Žužić, P. (2009). Teritorijalno-administrativni ustroj na području današnje Istarske županije za razdoblje od 1945. do 1990.

Web source

17. Informator. (2020). *Vremeplov: Odluka ZAVNOH-a o priključenju Istre, Rijeke, Zadra i ostalih okupiranih krajeva Hrvatskoj (20. rujna 1943)*. <https://informator.hr/strucni-clanci-vremeplov/vremeplov-odluka-zav-noh-a-o-prikljucenju-istre-rijeke-zadra-i-ostalih-okupiranih-krajeva-hrvatskoj-20-rujna-1943>

FINANCIAL MECHANISMS SUPPORTING THE DEVELOPMENT OF ROOFTOP SOLAR POWER IN VIETNAM

NGUY NGOC ANH*

Abstract

In the context of increasingly severe climate change and rising energy demand, rooftop solar power is becoming a key solution in Vietnam. This model not only helps organizations and households reduce electricity costs and enhance energy independence. Vietnam is located in the tropical monsoon region and benefits from high solar radiation, averaging approximately 5 kWh/m² per day, which is relatively evenly distributed across the country from north to south. This is a significant advantage for developing rooftop solar power towards self-produced and self-consumed, in line with the revised Power Development Plan VIII, especially in the context of green transition towards the commitment to achieving Net Zero emissions by 2050. To effectively exploit this potential and achieving the set goals, further improvement of financial support policies is essential. This article analyses current regulations and financial mechanisms, while learning from international experiences to propose feasible policy solutions for Vietnam.

Keywords: Financial mechanisms, Rooftop solar, Renewable energy, Green energy transition

Introduction

In the context of increasingly severe climate change and ever-growing energy demand, rooftop solar power is emerging as a crucial solution in Vietnam. This model not only helps organizations, business and households reduce electricity costs and enhance energy independence, but also helps alleviate pressure on the national power grid, thereby promoting the transition to green and sustainable energy.

With an average solar radiation intensity of approximately 5 kWh/m²/day and a high number of sunshine hours ranging from 1,700 to 2,500 hours per year, Vietnam is considered a country with significant potential for solar power development¹.

This is a significant advantage for developing rooftop solar power towards self-produced and self-consumed, in line with the revised Power Development Plan VIII. Specifically, the Plan VIII aims for 50% of public buildings and 50% of residential houses to use self-produced and self-consumed rooftop solar power by 2030, serving on-site electricity demand without feeding power into the national grid².

* Nguy Ngoc Anh, email: nnanh@ctu.edu.vn; Faculty of Law, University of Miskolc, Hungary; Lecturer Can Tho University, Vietnam.

¹ When will potential become reality? <https://evn.com.vn/d6/news/Bao-gio-tiem-nang-thanh-hien-thuc-6-17-18736.aspx>

² Decision No. 768/QĐ-TTg approval of the revised national power development plan for the period 2021-2030, with a vision to 2050

To achieve goal, the government has also released decree 0.58/2025/ND-CP concerning renewable energy development. This decree encompasses regulations governing self-generated and self-consumed rooftop solar power. However, achieving the set goals, further improvement of financial support policies is essential, especially in the context of green transition towards the commitment to achieving Net Zero emissions by 2050.

Based on this, the article focuses on analysing Vietnam's current regulations and financial mechanisms for rooftop solar power, while propose recommendations to improve these policies that are aligned with Vietnam's practical conditions and global energy transition trends.

1. Definition and role of financial support for rooftop solar power

1.1 Definition and role of rooftop solar power

1.1.1 Definition

Prior to 2025, rooftop solar power was defined in decree 135/2024/ND-CP "*Rooftop solar power is electricity produced from photovoltaic panels based on the principle of converting light energy into electrical energy, through a construction structure installed on the roof of a building, connected to electrical equipment and directly serving the power generation process.*"³

In 2025, decree 58/2025 was issued and replaced decree 135/2024. The definition of rooftop solar power will generally remain largely unchanged compared to decree 135/2024, still primarily focusing on describing the method and process of electricity generation: "*Rooftop solar power is electricity generated from photovoltaic panels based on the principle of converting solar energy into electrical energy. These panels are installed on the roofs of buildings, connected to electrical equipment, and serve electricity generation activities.*"⁴

This definition illustrates that the energy input comes from sunlight, and the technology used is photovoltaic panel. This distinguishes it from other electricity sources like hydropower or wind power. It also specifies that the installation is on building rooftops, such as those of homes, factories, and offices, which sets it apart from solar farms or ground-mounted projects. The main goal is to generate electricity for immediate using.

³ Clause 1, Article 3 of Government Decree No. 135/2024/ND-CP: Stipulates mechanisms and policies to encourage the development of self-produced and self-consumed rooftop solar power

⁴ Clause 4, Article 3 No. 58/2025/ND-CP guiding the Electricity Law on the development of renewable energy and new energy

1.1.2 Role of rooftop solar power

In the context of climate change, energy demand and electricity costs increase. Rooftop solar power systems have become a sustainable solution for many households and enterprises in Vietnam. These systems not only facilitate cost reduction but also advance green development objectives, mitigate carbon emissions, and enhance overall quality of life.

First of all, rooftop solar power helps many households and businesses save significantly on electricity costs. According to EVN, the average electricity price in Vietnam has officially increased by 4.8% since May 2025, which makes living costs a significant pressure on households and businesses, especially during the peak summer months when electricity demand increases sharply. Therefore, investing in rooftop solar power systems will help households can save 70% to 80% of monthly electricity consumption costs when using solar power systems combined with storage solutions.⁵

Furthermore, developing rooftop solar power is an effective and sustainable solution to reduce pressure on the national power grid and ensure energy security. It helps households, businesses, and agencies reduce their dependence on the national power grid. When combined with a storage system, the system can provide stable electricity throughout the day, even during power outages, ensuring uninterrupted operations. This is especially important during prolonged heatwaves when electricity demand is very high, overloading the national power grid and leading to sudden or intermittent power outages.

Developing rooftop solar power also contributes to promoting the green energy transition, thereby reducing dependence on fossil fuels, ensuring energy security, reducing emissions, and limiting environmental pollution. This energy transition plays a crucial role in helping Vietnam fulfil its commitment to achieving net zero emissions by 2050. While, it contributes to achieving the development goals outlined in the Power Development Plan VIII “Striving to have 50% of public buildings and 50% of residential houses using self-generated rooftop solar power (for on-site consumption, not selling electricity to the national grid) by 2030 and strongly developing renewable energy sources (excluding hydropower) for electricity production, reaching approximately 28-36% by 2030. The target for 2050 is for renewable energy to reach 74-75%.”⁶

⁵ Adjustment of the average retail electricity price effective from May 10, 2025; <https://www.evn.com.vn/d/vi-VN/news/Dieu-chinh-gia-ban-le-dien-binh-quan-tu-ngay-1052025-60-142-502657>

⁶ Decision No. 768/QĐ-TTg of the Prime Minister: Approving the Adjustment of the National Power Development Plan for the 2021-2030 period, with a vision to 2050

1.2 The necessity of financial support for rooftop solar power

The rooftop solar power in the energy transition plays a vital role. So, it is necessary to implement supportive policies to promote its development, especially financial support plays a particularly crucial role for the following reasons:

Firstly, financial support helps reduce initial installation costs, creating an incentive for households and enterprise, especially small and medium-sized enterprises (SMEs). Because the initial installation cost is quite high, ranging from approximately 12-18 million VND/kWp for a standard grid-connected system, and depending on the capacity such as a 3 kWp system costs around 30-50 million VND, a 5 kWp system around 50-75 million VND, and a 10 kWp system around 100-140 million VND. For systems with integrated battery storage, the cost can increase sharply. Although the average payback period is about 5-6 years⁷. This initial investment level is a major barrier for many households. Therefore, financial support policies will help reduce cost pressure, thereby encouraging investors to participate.

Secondly, green credit packages and preferential interest rates from banks with long loan terms (up to 10 years) will help people and businesses easily access capital and balance their finances. Applying this tool will significantly contribute to expanding the scale of rooftop solar power deployment in practice.

Thirdly, tax incentives (such as import tax exemptions and reductions on equipment, and corporate income tax incentives) contribute to reducing total investment costs and increasing the economic efficiency of the project. This is especially significant for businesses considering long-term investments.

Fourth, to ensure economic efficiency and long-term investor confidence, a preferential feed-in tariff (FIT) policy for a certain period is very important, as it increases the attractiveness of this energy and reduces risks.

2. Forms of financial support

2.1 Feed-in Tariff (FIT)

The Feed-in Tariff (FIT) mechanism is a support tool for renewable energy producers, incentivized by long-term fixed-price power purchase agreements for renewable energy investors. The guaranteed purchase obligations and grid access increase investor security. This mechanism enhances the competitiveness of renewable energy sources compared to traditional

⁷ Table of Solar Power Installation Costs in 2026, <https://solar.techpal.vn/bang-chi-phi-lap-dien-nang-luong-mat-troi/>

energy sources. The term "Feed-in Tariffs" (FIT) originated in the 1970s when referring to renewable energy development and is now widely used globally. According to Kangsadan Sagulpongmalee and Apichit Therdyothin (2016), FIT can be understood as a supportive electricity tariff, first introduced in the US in 1978. This mechanism aims to encourage the development of renewable energy sources and increase their competitiveness with traditional energy sources in electricity generation.⁸

In Vietnam, the feed-in tariff (FIT) mechanism for rooftop solar power was implemented starting in 2017 and has gone through three period as follows:

❖ Period from 2017-2019 (FIT 1)

FIT 1 was a historic "boost" for Vietnam's rooftop solar power (RSP) with an attractive price of VND 2,086/kWh (excluding value-added tax), equivalent to 9.35 US cents/kWh. The electricity selling price was adjusted according to fluctuations in the VND/USD exchange rate. This price only applied to grid-connected projects with photovoltaic cell efficiency greater than 16% or module efficiency greater than 15%, and was applied for 20 years from the date of commercial operation⁹. This price was adjusted in 2026 as follows: for rooftop solar power systems that commenced operation and meter readings between June 1, 2017 and June 30, 2019: electricity purchase price (excluding value-added tax) in 2026 is 2,348 VND/kWh (equivalent to 9.35 US cents/kWh).¹⁰

❖ Period from 2019-2020 (FIT 2)

This period applied the FIT price according to decision No. 13/QĐ-TTg, with a purchase price of VND 1,943/kWh (8.38 USD/kWh) for rooftop solar power systems that commenced operation and had their meter readings confirmed between July 1, 2019, and december 31, 2020 and was valid for 20 years from the date of commissioning¹¹. This price will be adjusted in 2026 to VND 2,105/kWh (equivalent to 8.38 US cents/kWh).

This was a boom period for rooftop solar power because the FIT price regulations in period 1 created confidence and motivation for investors. According to updated figures, as of December 31, 2020, There were 101,029 rooftop solar power projects which had been connected to the grid with a total installed capacity of nearly 9,296 MWp. The electricity was

⁸ Dr. Phạm Cảnh Huy, Nguyễn Tuấn Cường, The Feed-in Tariff (FIT) Mechanism in Vietnam-Current Situation and Solutions, <https://tapchicongthuong.vn/co-che-gia-mua-ban-dien-fit-tai-viet-nam-thuc-trang-va-giai-phap-97509.htm>

⁹ Article 12 of Decision No. 11/2017/QĐ-TTg of the Prime Minister: On the Mechanism to Encourage the Development of Solar Power Projects in Vietnam

¹⁰ Official Document No. 8486/EVN-KDMBD+TCKT on the Notification of Rooftop Solar Power Purchase Prices in 2026 -Vietnam Electricity (EVN)

¹¹ Decision No. 13/2020/QĐ-TTg of the Prime Minister: On the mechanism for encouraging the development of solar power in Vietnam

produced from rooftop solar power to date had reached over 1.15 billion kWh, contributing to ensuring electricity supply for the national power grid.¹²

❖ The period from 2021 to the present

The period after 2020 marked a significant shift in rooftop solar power in Vietnam. After December 31, 2020, the model transitioned from selling electricity (FIT prices) to self-production and self-consumption model, prioritizing the development of self-consumed rooftop solar according to the National Power Development Plan VIII. Initially, the electricity purchase price during this period followed decree 135/2024 *“The price for surplus electricity fed into the national grid shall be the average market electricity price of the previous year, as announced by the system operator and electricity market operator, to ensure appropriate incentives for each stage of national power system development.”*¹³

However, this decree was replaced by decree 58/2025 *“The purchase price for surplus electricity shall be the average market electricity price of the previous year, as announced by the electricity market operator, but shall not exceed the maximum price of the ground-mounted solar electricity price framework”*.¹⁴ Compared with decree 135, decree 58 sets a price ceiling, limiting the risk of excessive price increases for the national power system, while partially restricting potential profits for investors and creating greater stability for the electricity market.

Under this mechanism, individuals and businesses can install rooftop solar power systems for direct use, selling surplus to the grid at commercial prices, instead of relying on the previous FIT (Feed-in Tariff). This period focuses on optimizing on-site energy consumption and reducing investment costs, while creating conditions for a more sustainable solar power market. However, this rooftop electricity purchase mechanism has reduced the incentive for investment due to a lack of price guarantees and policy stability.

2.2 Tax incentives

2.2.1 Corporate income tax incentives

According to the 2025 corporate income tax law, businesses implementing projects for the production of renewable energy, clean energy, energy from waste disposal, and environmental protection activities will be subject to a preferential tax rate of 10% for 15 years. The

¹² Rooftop solar power boom, <https://en.evn.com.vn/d6/news/Rooftop-solar-power-boom-is-underway-with-a-total-installed-capacity-reaching-nearly-9300-MWp-66-142-2169.aspx/>

¹³ Clause 7, Article 8 of Government Decree No. 135/2024/ND-CP: Stipulates mechanisms and policies to encourage the development of self-produced and self-consumed rooftop solar power.

¹⁴ Clause 4, Article 14 of Government Decree No. 58/2025/ND-CP: Stipulating detailed regulations on a number of articles of the Electricity Law regarding the development of renewable energy and new energy sources.

preferential tax rate on income from new investment projects is applied from the first year the project generates revenue¹⁵. In addition, businesses are exempt from tax for up to 4 years and receive a 50% reduction in tax payable for up to 9 years, with the exemption and reduction periods calculated from the first year the new investment project generates taxable income. If the project does not generate taxable income in the first 3 years after the year of revenue generation, the tax exemption and reduction period will be calculated from the 4th year.¹⁶

If a business incurs losses during its operation, these losses can be carried forward to subsequent years for a maximum of 5 consecutive years, and deducted from the taxable income of those years¹⁷. The loss incurred during the tax period is determined as the negative difference in taxable income, excluding losses carried forward from previous years¹⁸.

However, to benefit from these incentives, businesses are required to establish a project and comply with accounting, invoicing, documentation, and tax declaration procedures. Enterprises must separately account for income from production and business activities eligible for tax incentives and income from activities not eligible for tax incentives. If separate accounting is not feasible, the income from activities eligible for tax incentives shall be determined proportionally, based on the ratio of revenue or costs of the eligible activities to the total revenue or total costs of the enterprise.¹⁹

Furthermore, if during operation a business incurs expenses related to reducing greenhouse gas emissions to achieve carbon neutrality and net zero, reduce environmental pollution, and are also related to the enterprise's production and business activities, these expenses will be deductible if sufficient invoices and non-cash payment documents are available in accordance with the law.

2.2.2 Import tax incentives

According to the provisions of the 2016 Import and Export Tax Law, imported goods used to create fixed assets for renewable energy production projects, clean energy projects, waste disposal energy projects; and environmental protection activities will be exempt from import tax, including²⁰:

¹⁵ Article 13 the Corporate Income Tax Law 2025

¹⁶ Article 14 the Corporate Income Tax Law 2025

¹⁷ Article 16 the Corporate Income Tax Law 2025

¹⁸ Article 7 of Decree 320/2025/ND-CP provides detailed regulations and measures for organizing and guiding the implementation of the Corporate Income Tax Law.

¹⁹ Clause 2, Article 18 of the Corporate Income Tax Law 2025

²⁰ Clause 11, Article 16 of the 2016 Law on Import and Export Taxes

- a) Machinery and equipment; components, parts, and spare parts for assembly or use in conjunction with machinery and equipment; raw materials and supplies used to manufacture machinery and equipment or to manufacture components, parts, and spare parts of machinery and equipment;
- b) Specialized transport vehicles used directly in the production line of the project;
- c) Construction materials that cannot be produced domestically.

The import tax exemption for goods imported as stipulated in this clause applies to both new investment projects and expansion investment projects.

Raw materials, supplies, and components that cannot be produced domestically, imported for the production of investment projects belonging to the list of specially prioritized investment sectors or areas with particularly difficult socio-economic conditions as stipulated by investment law, high-tech enterprises, science and technology enterprises, and science and technology organizations are exempt from import tax for a period of 5 years from the start of production²¹. Therefore, if rooftop solar power projects import components, machinery, etc., or components that cannot be produced domestically, they will be exempt from import tax on these goods.

2.3 Support for installation costs and loan assistance for households

Clause 2, article 22 of the Electricity Law No. 61/2024/QH15 assigns the Prime Minister and provincial People's Councils the authority to issue policies supporting households installing self-generated and self-consumed electricity. However, currently, there is no document regulating policies to support households installing rooftop solar power for self-production and self-consumption, and these policies are only in draft form.

The Ministry of Industry and Trade has submitted a draft proposal for specific financial support to the Prime Minister for decision as follows:²²

Household solar power systems will receive investment support with a maximum limit of VND 500,000 per 1 kWp of total rated capacity of photovoltaic panels installed in the system (hereinafter referred to as PV panels), but not exceeding VND 2,500,000 per household.

Household solar power systems will also receive support for commercial loan interest rates for investment as follows:

- a) The short-term lending interest rate in VND shall be applied as stipulated in clause 2, article 13 of circular no. 39/2016/TT-NHNN dated December 30, 2016, of the State Bank of

²¹ Clause 13, Article 16 of the 2016 Law on Import and Export Taxes

²² Draft Decision of the Ministry of Industry and Trade stipulating policies to support households installing self-generating and self-consuming electricity and electricity storage systems.

Vietnam regulating lending activities of credit institutions and branches of foreign banks to customers;

b) The maximum interest rate support period is 3 years from the date of disbursement of the loan according to the credit agreement with the commercial bank;

c) The maximum loan amount eligible for interest rate support is 7 million VND per 1 kWp of the total rated capacity of the PV panels installed in the system, but not exceeding 35 million VND.

The financial support for this provision shall be balanced within the development investment expenditure of the local budget. Annually, the Provincial People's Committee submits to the Provincial People's Council for consideration and decision the specific level of financial support, ensuring it is consistent with the province's budget and the capital investment needs for the development of household solar power systems in the area.

3. Evaluate and propose recommendations.

With the above support mechanisms, development of rooftop solar power in Vietnam have achieved positive results. In particular, 2020 witnessed a breakthrough in Vietnam's rooftop solar power. As of December 31, 2023, Vietnam's Electricity Corporations were implementing rooftop solar power purchase and sale contracts with organizations and individuals for 103,509 rooftop solar power systems, with a capacity of approximately 9,595,853 kWp, installed under the incentive mechanism for developing RSP projects in Vietnam.²³

However, since the fixed feed-in tariff (FIT) mechanism expired, there has yet to be a complete and stable replacement policy. This has diminished the ability to attract investment in the solar power sector, especially rooftop solar power. The lack of price guarantees and policy stability has made investors more cautious than before. Therefore, a new feed-in tariff mechanism needs to be issued soon to create incentives and enhance investment attraction in this sector.

Regarding tax incentives for rooftop solar power, they are mainly applied within the general legal framework. According to the corporate income tax law, a major limitation is that corporate income tax incentives only apply to investment projects, while many small and medium-sized enterprises only install rooftop solar power systems for self-production,

²³ Current status and solutions for the development of rooftop solar power, <https://vietnamnet.vn/4-nam-dien-tai-tao-o-viet-nam-phat-trien-than-toc-nhu-the-nao-2123006.html>

consumption, and sale to the national grid without needing to establish a project, and therefore do not benefit from the incentives. According to decree 58, organizations and individuals developing power sources with an installed capacity of 1,000 kW or more, and organizations and individuals developing power sources with an installed capacity of less than 1,000 kW who register to sell surplus electricity to the grid, must register their development and be granted a certificate of registration for power source development; establishing a project is not mandatory. Therefore, consideration should be given to exempting or reducing corporate income tax on income from selling surplus electricity to EVN, in order to encourage businesses to participate without the burden of investment procedures.

Furthermore, Government should supplement value-added tax (VAT) incentives for rooftop solar power equipment and installation services to reduce initial investment costs for both businesses and households. At the same time, consideration should be given to exempting personal income tax on income from electricity sales by households, thereby creating an incentive to spread this model among the population.

In addition, there are currently no official regulations on financial support for households; only draft regulations exist, primarily applicable to this group, while similar policies for businesses are lacking. The level of financial support needs to be increased, as the current support is insufficient to incentivize investors compared to installation costs. Therefore, an official policy should be issued soon and its scope expanded. Simultaneously, the State Bank of Vietnam should direct commercial banks to implement green credit packages with preferential interest rates, relax lending conditions for households and small and medium-sized enterprises, and encourage the issuance of green bonds to raise capital for the renewable energy sector.

Finally, there is a need for specific regulations on granting REC²⁴ certificates to households, businesses, or agencies investing in rooftop solar power, and tax incentives for the transfer of REC certificates. This is an important market tool contributing to promoting green energy development and environmental protection. Currently, REC certificates are not regulated as carbon credits or greenhouse gas emission reduction credits as stipulated in clause 35, article 3 of the 2020 Environmental Protection Law, and are not within the scope of Government Decree No. 06/2022/ND-CP dated January 7, 2022, on reducing greenhouse gas

²⁴ Renewable Energy Certificates (RECs) are one of the standards applied to encourage investment in and use of renewable energy. An REC certifies a certain amount of electricity produced from a renewable energy source. Each REC represents 1 MWh of renewable energy - Official Letter No. 995/BDKH-KTTT dated August 8, 2023, from the Climate Change Department (Ministry of Natural Resources and Environment).

emissions and protecting the ozone layer²⁵. Therefore, when these certificates are transferred, value-added tax of 10%, corporate income tax (for businesses), and personal income tax (for households) must still be paid. Meanwhile, for other certificates such as emission reduction certificates and carbon credits, businesses that earn income from the first transfer of emission reduction certificates or carbon credits after their issuance are exempt from corporate income tax²⁶. Similarly, if individuals or households earn income from the first transfer of their recognized greenhouse gas emission reduction results or carbon credits, they are also exempt from personal income tax²⁷. It can be seen that certificates such as RECs, carbon credits, and emission reduction certificates all aim at the common goal of reducing greenhouse gas emissions and protecting the environment. Therefore, it is necessary to consider adding tax incentives for these types of certificates.

The comprehensive improvement of policies on electricity pricing, taxation, and finance will contribute to promoting the sustainable development of rooftop solar power in Vietnam in the future.

Conclusion

Rooftop solar power plays a crucial role in the Net Zero 2050 roadmap and ensures national energy security. To achieve the goals of the Power Development Plan VIII, Vietnam needs to quickly fill the policy gaps after the FIT phase with a synchronized financial ecosystem. Key solutions include: establishing a stable surplus electricity purchase price framework to build investor confidence; expanding tax incentives (CIT, VAT, PIT) and simplifying procedures for both businesses and households; officially implementing green credit packages and financial support for the people; establishing a legal framework for renewable energy certificates (RECs) equivalent to carbon credits.

²⁵ Official Letter No. 4665/TCT-CS regarding VAT policy dated October 23, 2024, from the General Department of Taxation

²⁶ Article 4 of the Corporate Income Tax Law 2025

²⁷ Article 4 of the Personal Income Tax Law 2025

Bibliography

1. Import and Export Tax Law 2016
2. Electricity Law 2024
3. Corporate Income Tax Law 2025
4. Personal Income Tax Law 2025
5. Decree No. 135/2024/ND-CP: Regulations on mechanisms and policies to encourage the development of self-produced and self-consumed rooftop solar power
6. Decree 58/2025/ND-CP guiding the Electricity Law on the development of renewable energy and new energy
7. Decision No.11/2017/QĐ-TTg: On mechanisms to encourage the development of solar power projects in Vietnam
8. Decision 02/2019/QĐ-TTg amending Decision 11/2017/QĐ-TTg on mechanisms to encourage the development of solar power projects in Vietnam issued by the Prime Minister
9. Document No. 8486/EVN-KĐMBĐ+TCKT regarding the announcement of the purchase price of rooftop solar power in 2026 by Vietnam Electricity Group
10. Decision No. 768/QĐ-TTg of the Prime Minister: Approving the Adjustment of the National Power Development Plan for the period 2021 - 2030, vision to 2050
11. Decision No. 13/2020/QĐ-TTg of the Prime Minister: On the mechanism to encourage the development of solar power in Vietnam
12. Decree 320/2025/ND-CP detailing some articles and measures to organize and guide the implementation of the Corporate Income Tax Law
13. 16. Official Letter No. 995/BĐKH-KTTT dated August 8, 2023, from the Climate Change Department (Ministry of Natural Resources and Environment)
14. Official Letter No. 4665/TCT-CS on VAT policy dated February 23, 2024, from the General Department of Taxation
15. Official Letter No. 4614/BCT-DL of 2018 on reporting the situation of solar power development issued by the Ministry of Industry and Trade
16. Report No. 205/BC-BTC serving the meeting on solar power development Rooftop solar power installations at residential buildings and offices in Vietnam
17. Official Letter No.1534/BTC-CST Regarding preferential policies for rooftop solar power projects with an installed capacity of no more than 50kw
18. Draft Decision stipulating policies to support households installing self-generating and self-consuming electricity and electricity storage systems of the Ministry of Industry and Trade
19. Rooftop solar power boom, <https://en.evn.com.vn/d6/news/Rooftop-solar-power-boom-is-underway-with-a-total-installed-capacity-reaching-nearly-9300-MWp-66-142-2169.aspx/>
20. Adjustment of average retail electricity price from May 10, 2025 <https://www.evn.com.vn/d/vi-VN/news/Dieu-chinh-gia-ban-le-dien-binh-quan-tu-ngay-1052025-60-142-502657>
21. Current status and solutions for the development of rooftop solar power, <https://vietnamnet.vn/4-nam-dien-tai-tao-o-viet-nam-phat-trien-than-toc-nhu-the-nao-2123006.html>
22. Installation costs <https://solar.techpal.vn/bang-chi-phi-lap-dien-nang-luong-mat-troi/>
23. Dr. Pham Canh Huy, MSc. Nguyen Tuan Cuong, FIT electricity purchase and sale price mechanism in Vietnam - Current situation and solutions <https://tapchicongthuong.vn/co-che-gia-mua-ban-dien-fit-tai-viet-nam-thuc-trang-va-giai-phap-97509.htm>

THE JURIDIFICATION OF THE WORLD: POLITICAL AND LEGAL PERSPECTIVES

MALWINA A. TKACZ*

Abstract

The paper examines the phenomenon of the juridification of the world, understood as the expansion of legal norms into nearly all spheres of social and political life. Drawing on Vittorio Possenti, it argues that juridification reflects not only a growth of regulation but a transformation of legal authority itself. This process is examined within the tradition of legal positivism, tracing its development from early modern thinkers to contemporary theories that separate legal validity from moral content. Against this background, the paper explores Possenti's critique, emphasizing the ethical risks of a morally neutral conception of law. Through historical and contemporary examples, it shows how juridification may enable unjust yet formally valid systems. The analysis concludes by emphasizing the need to reconsider the ethical foundations of law, particularly in relation to justice and human dignity.

Keywords: *juridification of the world, legal positivism, natural law, jurisprudence, Vittorio Possenti*

*"The positivization of law means that legal validity can be granted to any content solely by virtue of a decision intended to confer legal validity, but which can just as easily revoke it. Positive law is binding by virtue of a decision."*¹

– N. Luhmann

Introduction

Legal systems are experiencing an unprecedented increase in laws and regulations – a phenomenon often referred to as the "juridification of the world." The significant expansion of legal norms raises profound questions about the purpose, function, and legitimacy of law. This development is closely associated with the theory of legal positivism, while it also necessitates a reappraisal of the long-standing debate between natural law and positive law. This paper examines this issue through the lens of political and legal scholarship, with a particular emphasis on the enduring dichotomy between natural law and positive law. By engaging with the thought of Vittorio Possenti, an Italian ethicist and political philosopher, this analysis explores the criticism of legal positivism and its far-reaching implications for contemporary politics and law.

* Mgr. Malwina A. Tkacz, PhD candidate (1st year, full-time), Department of Theory of Law and Constitutional Law, Faculty of Law, Trnava University, e-mail: malwina.a.tkacz@gmail.com

¹ Luhmann, N. (1970). *Positives Recht und Ideologie. Soziologische Aufklärung. Aufsätze zur Theorie sozialer Systeme*, p. 180.

1. Legal Positivism – History

Legal positivism, as a theoretical stance and philosophical movement, has a long history that has evolved in various forms and interpretations. Although it is mainly associated with modern thought from the 19th and 20th centuries, its roots can be traced back to ancient philosophy. The term "legal positivism" is derived from the Latin *ius positivum*, corresponding to the Greek *dikaion nomikón*, which referred to a system of law based on written law established by public authority. It was likely popularized through Chalcidius' commentary on Plato's *Timaeus* in the early 5th century, which distinguished between *iustitia naturalis* and *iustitia positiva*². According to that work, positive law was understood not only as statutory law but also customary law and laws arising from human activity.

Modern philosophy of law draws little from ancient and medieval traditions regarding definitions of positive law and legal positivism. The origins of contemporary legal positivism lie in the political philosophies of Thomas Hobbes and David Hume, with its first comprehensive formulation attributed to Jeremy Bentham. Bentham's ideas were later adopted, modified, and popularized by John Austin³.

In the 19th century, the collective views of these philosophers, which defined law as the command of a sovereign backed by force, dominated Anglo-American jurisprudence. By the mid-20th century, however, the positivist concept began to lose prominence among legal philosophers. Instead of focusing on the theory's influence on legislative institutions, scholars began highlighting its relevance to law-applying institutions, such as courts. Simultaneously, the emphasis on the coercive aspect of law gave way to theories that stress its systematic and normative character.

Among the philosophers who have addressed the theory of legal positivism, Hans Kelsen, H.L.A. Hart, and Joseph Raz stand out. Although their interpretations of it share some important similarities, they also have notable differences. Kelsen's approach, in particular, has attracted both attention and criticism, including that of Possenti.

2. Significance of Legal Positivism

The significance of legal positivism extends beyond the philosophy of law and permeates social and political theory. Its influence is evident in the works of Marx, Weber,

² Murphy, J. B. (2008). *The philosophy of positive law: foundations of jurisprudence*. p. 76.

³ Bix, B. H. (2005). Legal positivism. *The Blackwell guide to the philosophy of law and legal theory*. p. 10.

Durkheim, American legal realists, and contemporary feminist legal scholars⁴. Legal positivism is regarded by contemporary legal practitioners as a dominant and well-established theory, present in universities, courts, and law firms. Proponents of legal positivism argue that law is fundamentally a matter of social facts. While some may seek to avoid the label of "legal positivism," their discomfort often stems from misunderstandings, as the term is frequently misused and oversimplified – often to condemn legal formalism, which asserts that law is always clear and must be rigidly applied, regardless of its purpose or fairness⁵.

Legal positivism is sometimes also associated with logical or sociological positivism. Although there are historical connections and similarities between these theories, they are fundamentally distinct. Contemporary legal philosophy has gained autonomy since the 19th century, distancing itself from traditional natural law perspectives. The rise of anti-foundationalist tendencies, along with an increase in the number of legal provisions and the role of law itself, has contributed to this shift.

The assigned legal order within a community – the set of norms governing interpersonal relations – plays a crucial role in its functioning. The question of what characterizes societies with established legal systems is central to discussions about the nature of law and its role in society⁶. Equally important is the question of why legal positivism is a dominant legal theory, influencing law and politics. To answer it, it is worth delving into the dichotomy of the law of nature and positive law.

3. The Dichotomy of Natural Law and Positive Law

The distinction between natural law and positive law is foundational in legal philosophy, as these theories represent radically different approaches to understanding the nature and source of legal authority. Natural law is premised on the idea that law is inherently tied to morality and justice, reflecting universal and immutable principles derived from nature or divine authority⁷. Positive law, in contrast, is man-made and rooted in the authority of the state. It derives its legitimacy from formal enactment rather than moral content.

Legal theorists who present or understand their theories as positivist consider them

⁴ Green, L., & Adams, T. (2019). Legal positivism. In E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2019 Edition). <https://plato.stanford.edu/entries/legal-positivism/>

⁵ Ibidem.

⁶ Kość, A. (2019). Porządek prawny jako społeczny porządek norm. *Roczniki Nauk Prawnych*, 10(1). s. 43.

⁷ D'Entreves, A. P. (1961). *Natural law: An introduction to legal philosophy*. p. 28.

to be opposed to or at least distinctly different from natural law theories. The natural law concept historically precedes positivist theories and serves as a reference point for other currents in the philosophy of law. Therefore, it is impossible to discuss contemporary forms of legal positivism without referring to natural law.

What characterizes natural law? It can be unwritten and resides within the person. According to Possenti, the concept of *ius naturale* is based on the idea that humans are naturally free, but also possess limitations and certain tendencies – similarly, the soul has its own bounds and nature; however, this does not limit its freedom⁸.

Moreover, natural law does not mean the laws of nature or physical law. Possenti claims that legal theorists often misinterpret the meaning of natural law. He points out that the adjective "natural" refers to the ontological nature of the human person and means that natural law is recognized in a natural way, that is, humans perceive it through rational knowledge, initiated, as the philosopher describes it, by an innate inclination.

4. Critique of Legal Positivism

As established before, legal positivism is characterized by the separation of law and morality. Possenti critiques this approach for enabling the creation of laws that may be unjust and for detaching legal systems from the ethical values that ought to underpin them.

This critique of positivism echoes historical arguments against the theory, such as Gustav Radbruch's "formula," which suggests that laws that are grossly unjust cannot be considered binding⁹. Radbruch's reconciliation of positivism with natural law underscores the limitations of legal positivism, which fails to account for the moral dimensions of law¹⁰. Possenti extends this critique, emphasizing the need for an understanding of law that is more holistic and grounded in ethical and cultural values.

5. Is Legal Positivism Dead?

Interestingly, there are many critical opinions on the division between "hard" and "soft" positivism. One thesis that relates to this issue is that of Lech Morawski on the death of legal positivism. This is a controversial statement; however, many modern legal scholars

⁸ Possenti, V. (2012). *Zarys filozofii polityki: społeczeństwa liberalne na rozdrożu*. p. 67.

⁹ It is worth emphasizing that Radbruch's formula, as one of the few constructive elements of legal philosophy, did not remain a purely theoretical postulate, but was used as a tool of justice after the end of World War II.

¹⁰ The views that make up Radbruch's "formula" (*Radbruchsche Formel*) were presented by him in three texts: *Five Minutes of Legal Philosophy*, *Law and Statute*, and *Statutory Lawlessness and Law Beyond Positivism*.

agree with it. Morawski's thesis is that legal positivism is a degenerated research program that has exhausted its theoretical and practical potential. According to him: *“the program for the reform of positivism carried out by Hart and his continuators has rendered positivism not so much soft as dead”*¹¹. Morawski believes that in their effort to correct the mistakes of legal positivism, modern positivists have had to reject the fundamental assumptions that defined the identity of this direction. Perhaps an even more significant aspect turned out to be the failure of positivism in practice: *“Positivists were unable to find any prescriptions, that would make it possible to remedy the most pressing problems of the modern world”*¹².

Is legal positivism really dead? If not, is it as dangerous as Possenti claims? Here we reach the problem stated at the beginning of this paper. What is the juridification of the world? How serious is this process? What does it have to do with politics and law?

6. The Juridification of the World

The term juridification of the world (*giuridificazione del mondo*), coined by Possenti, refers to the increasing dominance of legal norms and procedures in regulating human activity, often connected with the adoption of legal positivism in its most radical version¹³. Through this process, the law is entering areas that were previously regulated by moral, cultural, and religious values. Consequently, new expectations and requirements are being placed on the law.

Regardless of the definition of law adopted, it should be regarded as a manifestation of culture, and therefore a product of humans acting through various social institutions. Therefore, it seems impossible to disconnect it from the ideals that make up culture – from values, behavior patterns, ways of reasoning, and communication between people. This is emphasized by many contemporary philosophers and legal theorists¹⁴.

This raises several critical questions: Can state law be effectively grounded in the ideals of the common good and social justice today? How can we mitigate the pervasive influence of legal norms and procedures in contemporary society? How to overcome the modern juridification of the world? Is it necessary to do so?

¹¹ Morawski L. (2003). Pozytywizm „twardy”, pozytywizm „miękki” i pozytywizm martwy. *Ius et Lex*. Nr 1. p. 321.

¹² Ibidem. p. 344.

¹³ Kobyliński, A. (2014). [rec.] Vittorio Possenti, Nichilismo Giuridico. L'ultima parola? *Studia Philosophiae Christianae*. 50(2). p. 147.

¹⁴ Ibidem.

The sheer volume of legal acts signifies a trend towards juridification¹⁵. For instance, in Poland alone, over 14,500 pages of legal acts were adopted in the first half of 2022, representing a 75% increase compared to the previous year. This development is not unique to Poland; it reflects a global tendency toward legal “overproduction”. According to Possenti, this “overproduction” undermines the significance of law by disconnecting it from its moral and social purposes.

Possenti views law as a "life-sustaining force," inseparable from justice, which he describes as the "guiding star of society." However, he contends that modern legal systems, influenced by positivism, have reduced law to a mere procedural mechanism, devoid of substantive ethical content. This shift, he argues, has profound implications for the legitimacy and effectiveness of legal systems.

7. Political and Legal Implications of the Juridification of the World

The increasing dominance of law in all aspects of human life has profound and multifaceted political implications, particularly within democratic systems. While law should serve as a guarantor of fundamental rights and a promoter of justice, the proliferation of legal rules detached from their moral foundations poses a significant threat to democratic principles.

Legal positivism, as Possenti astutely observes, can enable the creation of laws that, while legally valid, are ethically oppressive or unjust. This shift towards a hyper-legalistic, procedural approach undermines the core tenets of democracy, where law should safeguard individual freedoms and rights. In such a system, law can be easily manipulated and instrumentalized, becoming a tool for political elites to consolidate power and serve their own interests rather than the interests of the people.

The historical precedent of Nazi Germany serves as a stark reminder of the dangers of prioritizing formal legality over moral considerations. Before World War II, German legal doctrine was dominated by legal positivism, emphasizing the absolute authority of the law and the unquestioning obedience to state authority. As Radbruch poignantly observed, "National socialism managed to convince, on the one hand, a retinue of soldiers, and on the other, hordes of jurists, using two elementary principles: 'an order is an order' and 'the law is

¹⁵ Jonski, K., & Rogowski, W. (2024). Legislative inflation in Poland: bird's eye view on three decades after the 1989 breakthrough. *The Journal of Legislative Studies*. 30(1). p. 1.

the law."¹⁶ While the former principle – the blind obedience of soldiers – might have inherent limitations, the latter – the absolute authority of the law – became the cornerstone of Nazi ideology, enabling the regime to justify its atrocities under the guise of legal legitimacy.

This historical example underscores the critical point: prioritizing formal legality over morality can facilitate the rise of authoritarianism, suppress dissent, and undermine democratic institutions. The overproduction of laws leads to a technocratic political culture where legal professionals and bureaucracies wield excessive power, alienating the public and diminishing their influence in the decision-making processes. This can lead to a decline in public trust in government and the rule of law, creating a fertile ground for the rise of populist movements that exploit public anxieties and grievances, further undermining democratic norms¹⁷.

This growth in legal bureaucracy further empowers legal experts, corporations, and international organizations, often operating within a framework of legal positivism. Their behind-the-scenes influence reduces public input and participation, consolidating power within a small elite and leading to decisions that may not reflect the will or needs of the people. This can exacerbate existing inequalities, marginalize vulnerable groups within society, and stifle innovation by creating an overly complex and burdensome regulatory environment. Furthermore, the constant production of new laws and regulations can create significant economic and administrative burdens on individuals, businesses, and government agencies, leading to increased costs, reduced efficiency, and stifled economic growth.

The dangers of the process of juridification are particularly evident in authoritarian regimes. By manipulating the formal validity of laws, these regimes can enact oppressive measures while maintaining a facade of legality. This instrumentalization of law serves to maintain political control, suppress rights, stifle opposition, and ultimately undermine the very foundations of justice and fairness. Moreover, the increasing reliance on legal mechanisms to address social and political issues can contribute to political polarization. Legal battles over contentious issues can become highly politicized, further entrenching opposing viewpoints and making compromise and consensus more difficult to achieve.

Conclusion

The juridification of the world, as analyzed through the works of Vittorio Possenti,

¹⁶ Radbruch, G. (2009). *Filozofia prawa*. p. 244.

¹⁷ Lacey, N. (2019). Populism and the Rule of Law. *Annual Review of Law and Social Science*. 15(1). p. 7.

highlights the dangers of overproducing laws that are disconnected from their moral and ethical foundations. Legal positivism, while shaping modern legal systems, has contributed to a detachment of law from justice and social values. This detachment can have profound and detrimental consequences for democratic societies, including the erosion of public trust, the rise of populism, the limitation of individual freedoms, the exacerbation of political polarization, and the stifling of economic growth.

Addressing these challenges requires a reorientation of our understanding of law. It is recommended to move beyond a purely procedural approach and reintegrate law with moral and ethical considerations. This requires a renewed emphasis on the common good, social justice, and the protection of fundamental rights.

Bibliography

1. Bix, B. H. (2005). *Legal positivism*. The Blackwell guide to the philosophy of law and legal theory.
2. D'Entreves, A. P. (1961). *Natural law: An introduction to legal philosophy*.
3. Green, L., & Adams, T. (2019). Legal positivism. In E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2019 Edition). <https://plato.stanford.edu/entries/legal-positivism/>
4. Jonski, K., & Rogowski, W. (2024). Legislative inflation in Poland: bird's eye view on three decades after the 1989 breakthrough. *The Journal of Legislative Studies*, 30(1).
5. Kość, A. (2019). Porządek prawny jako społeczny porządek norm. *Roczniki Nauk Prawnych*, 10(1).
6. Kobyliński, A. (2014). [rec.] Vittorio Possenti, Nichilismo Giuridico. L'ultima parola? *Studia Philosophiae Christianae*, 50(2).
7. Lacey, N. (2019). Populism and the Rule of Law. *Annual Review of Law and Social Science*, 15(1).
8. Luhmann, N. (1970). *Positives Recht und Ideologie. Soziologische Aufklärung. Aufsätze zur Theorie sozialer Systeme*.
9. Morawski, L. (2003). Pozytywizm „twardy”, pozytywizm „miękki” i pozytywizm martwy. *Ius et Lex*, Nr 1.
10. Murphy, J. B. (2008). *The philosophy of positive law: foundations of jurisprudence*.
11. Possenti, V. (2012). *Zarys filozofii polityki: społeczeństwa liberalne na rozdrożu*.
12. Radbruch, G. (2009). *Filozofia prawa*.

SWISS PERMANENT NEUTRALITY ON THE 21ST-CENTURY INTERNATIONAL LEGAL STAGE

ÁRPÁD LAPU*

Abstract

Ever since the 1815 enshrinement of Swiss neutrality under international law, Switzerland became a model of permanent neutrality and a basis of the concept of neutral status for other states. The international legal order, however, has changed significantly since, especially after the adoption of the UN Charter. Obligations stemming from neutrality and the boundaries of such obligations have changed fundamentally through interpretation and practice in the global stage. Switzerland joined the UN in 2002, voted for the sanctions of the European Union against Russia, and the relationship of Switzerland is becoming stronger with the EU. The research analyzes – through literature analysis and through assessing legal norms and their context – the Swiss application and interpretation of obligations stemming from permanent neutrality in the 21st century.

Keywords: permanent neutrality, Switzerland, UN, international law

Introduction

Ever since the Treaty of Paris, adopted supplementing the negotiations of the Congress of Vienna in 1815 (Sherman, 1918), Switzerland became the model of permanent neutrality and the first modern instance of a provision in an international treaty regarding the permanently neutral status of a state, confirmed by international law. The 19th century was the golden age of neutrality (Müller, 2019), when many neutral states emerged on the international and specifically, European stage.

Permanent neutrality means the state undertakes (usually through a neutrality-provision in its constitution) the duty of abstention from any international armed conflict in the future, and this obligation is recognized by the international community (for instance, through an international treaty) (Lapu, 2025). Permanent neutrality is a relatively modern, but at the same time, old institution of international law, as its modern form was established at the beginning of the 19th century and the international legal order underwent significant changes ever since. The adoption of the UN Charter, which generally prohibits the use of force in Article 2 (4), fundamentally changed the international legal order, differentiating between aggressor and a victim state in case of an international armed conflict (Villiger, 2023). This prompts the question, whether permanent neutrality can still exist today and how much the content of

* Árpád Lapu JD LLM, assistant research fellow, Third Year PhD student, lapu.arpad@kre.hu, Károli Gáspár University of the Reformed Church in Hungary, Faculty of Law, Department of International Law and Doctoral School of Law and Political Sciences, Hungary

(Swiss) permanent neutrality changed, with a view to the application and interpretation of norms stemming from permanently neutral status.

1. Positive legal obligations of Switzerland due to permanent neutrality

The Swiss state preserves its permanent neutral status, and this can be observed in official declarations (like the Foreign policy strategy 2024–2027), government documents and political debates in Switzerland. According to a study of the Federal Institute of Technology in 2022, 97% of the Swiss population supported maintaining neutrality at the beginning of 2022. After Russia's aggression against Ukraine, 8 per cent less people supported maintaining Swiss neutrality in the middle of 2022. Neutrality is considered as a part of Swiss identity (Keller et al., 2023).

Assessing the application of the legal obligations within the Swiss legal system stemming from permanent neutral status under international law and the legal framework established by it requires to examine constitutional provisions and (potential) application by all three branches of power. There is no specific Swiss act that regulates the obligations stemming from permanent neutrality comprehensively, nor a judicial decision that dealt with obligations stemming from permanent neutrality directly. This could also mean that so far, the legislative branch did not see it necessary to set boundaries for the foreign policy of Switzerland, which could be seen as a confirmation of it as well. There was no contentious legal issue that had to be settled by court decision regarding the neutral foreign policy of Switzerland either.

The constituent power of the Swiss Confederation did reference neutrality in the constitution and there are contemporary public debates regarding these norms. The Federal Constitution of the Swiss Confederation references the neutrality of Switzerland, but does not declare permanent neutral status in the same way some other permanently neutral states' constitutions do (for example, like the Constitution of Malta does in Article 1 (3) stating that "Malta is a neutral state"). In Article 173 about the duties and powers of the Federal Assembly, (1) a. states the following: "Taking measures to safeguard external security and the independence and neutrality of Switzerland", while the article about External and internal security (Article 185 of the Constitution of the Swiss Confederacy) references safeguarding the neutrality of Switzerland as one of the obligations of the Federal Council. The fact that neutrality is referenced in the constitution, and is listed among the obligations of state organs clarifies as a unilateral act under international law the permanent neutrality of Switzerland, especially keeping in mind that Swiss permanent neutrality was incorporated in the Second

Treaty of Paris of 1815, as mentioned above. However, there is a currently ongoing public debate of constitutional law nature regarding the neutrality of Switzerland, which is important to analyze.

The Federal Assembly is obliged by Article 173 of the Constitution of the Swiss Confederation to safeguard the independence and neutrality of Switzerland, thus, the Federal Assembly is obliged and has the responsibility to respect neutrality, but safeguarding also suggests a form of control over other organs of the state adhering to these obligations. The constitutional organ responsible for the external policy of Switzerland is the Federal Council, which is also obliged to safeguard neutrality. Thus, both Swiss legislation and foreign policy need to be in line with the obligations stemming from neutrality.

Permanent neutral status means, from the perspective of the law of neutrality within international law that the state takes up the obligation to assume a neutral status in case an international armed conflict breaks out between two or more states. In case of international armed conflicts, Hague Convention (V) and Hague Convention (XIII) of 1907, among other norms of international law, apply. The parties to the international armed conflict must respect the neutral status of the neutral state, while the neutral state is obliged to abstain from the conflict and this is regulated in the convention to detail (prohibitions regarding the transport of war material, treatment of military units of belligerent states by the neutral state, communications, commerce, etc.) (Bothe, 2015).

The Vienna Convention on the Law of the Treaties (1969) states in Article 26 the principle of “*pacta sunt servanda*”, meaning “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”. According to Article 27, a party may not invoke internal law for the failure of fulfilling an obligation under an international treaty. Article 31 obliges states to interpret the provisions of international treaties in good faith. This was confirmed by the International Court of Justice in the *Gabčíkovo-Nagymaros Case*, and the *Nuclear Tests Case* (Schrijver & Prislán, 2008).

While the law of neutrality in a strict sense only applies in case of the outbreak and ongoing international armed conflict, permanent neutrality sets the permanently neutral states’ general approach and position within the international community, striving to support central purposes of international law, as facilitating international peace and security. Permanently neutral status is not regulated in detail by any international agreement; it is only declared. The permanently neutral state commits itself to abstain from any future war, but the conduct of neutrality policy is at the discretion of the state (Keller et al., 2023).

This means, from the perspective of the law of neutrality, that Switzerland may not conduct its foreign policy in a manner that may breach the international law of neutrality, otherwise its actions could invoke international legal responsibility due to the Second Treaty of Paris, the signature of the V and XIII Hague Convention (1907) and other norms under international law. Switzerland is a global diplomatic hub, but at the same time, a protector of its national sovereignty, and is unique on the international stage. Many international organizations have their seats or offices in Switzerland, and the Swiss federal constitution is drafted and applied with a view of integrating international law into the Swiss legal order (“Völkerrechtsfreundlichkeit”). Switzerland follows the monistic concept; international law is directly part of Swiss law and is to be interpreted (Keller et al., 2023).

2. Assessment of the dynamic interpretation of the legal obligations of Switzerland under permanent neutrality

A civil society organization, Pro Schweiz, spearheaded a referendum initiative (Wahrung der schweizerischen Neutralität (Neutralitätsinitiative)¹ regarding adding constitutional norms into the Swiss federal constitution regarding Swiss neutrality. The organization argued that Switzerland is losing its neutrality step-by-step. The aim was for Switzerland to consequently keep to its neutrality, with clarity and credibility, securing long standing peace, stability and independence for Switzerland. The debates surrounding the initiative included topics like whether Switzerland could lead non-military coercive measures (including restrictive measures, or as it is referenced in public discussions, sanctions) even against states parties to international armed conflicts but would in fact continue to apply sanctions adopted by the United Nations Security Council. It would also ban Switzerland from participating in military exercises organized by the North-Atlantic Treaty Organization (NATO) or the European Union. The lower chamber of the Swiss parliament refused the initiative but would support the amendment of the Swiss constitution.

The proposed text of the federal constitutional amendment would declare the permanent neutrality of Switzerland similarly as it is declared in the case of other permanently neutral

¹ English Translation by the author:

„Art. 54a Swiss Neutrality Switzerland is neutral. Its neutrality is permanent and armed. Switzerland shall not join any military or defence alliance. Cooperation with such alliances is reserved for the event of a direct military attack against Switzerland or actions preparing such an attack. Switzerland shall not participate in military conflicts between third states, nor shall it adopt non-military coercive measures against states engaged in armed conflict. Reserved [exceptions] are obligations towards the United Nations (UN) as well as measures aimed at preventing the circumvention of non-military coercive measures imposed by other states. Switzerland shall use its permanent neutrality to prevent and resolve conflicts and shall make itself available as a mediator.”

states. The amendment would also state that the neutrality of Switzerland is an armed one. Neutral states under the law of neutrality, especially under the V and XIII Hague Convention of 1907, are obliged to protect their neutrality, even with force, if needed. There are, however, unarmed neutral states as well, like Costa Rica or Panama (Barany, 2026).

The initiative was supported by 129 806 signatures on the 11th of April 2024, reaching the necessary threshold. Article 139 of the Federal Constitution of the Swiss Confederation states that "Any 100,000 persons eligible to vote may within 18 months of the official publication of their initiative request a partial revision of the Federal Constitution." This may take the form of a specific draft of the constitution. The Federal Assembly may submit a counter-proposal to the initiative as well. On the 20th of March 2026 the majority of both houses of the Swiss federal parliament voted against the neutrality initiative. There was a proposal to amend the constitution by adding the text "Die Schweiz ist neutral. Ihre Neutralität ist immerwährend und bewaffnet"² to it, however, this proposal did not win the majority of both houses either. Pro Schweiz expressed its intention to keep the issue on the agenda. The organization formulated its critic regarding a specific line of foreign policy, which, according to their arguments, might gradually lead to an EU and a NATO accession and to giving up the neutrality of Switzerland in its press release regarding the refusal of the initiative by the federal parliament (Verein "Neutralität Ja").

The Federal Council argued for the refusal of the initiative stating that the adoption of the text would lead to a clear change in the course of Swiss neutrality, which would have a negative effect on the security, economic and foreign policy of Switzerland. This is fundamentally an argument for keeping the flexible interpretation of neutrality and a broad interpretation of obligations under the status of permanent neutrality.

This is already relevant from the perspective of assessing the role of the executive in the application of obligations stemming from permanent neutrality. According to the Federal Council, neutrality policy serves to ensure the effectiveness and credibility of Switzerland's neutrality during times of conflict and incorporates every measure that serves this purpose (Keller et al., 2023).

Assessing the flexible interpretation of Switzerland's permanent neutral status needs examining its foreign policy regarding restrictive measures, relations with international organizations and re-exporting, exporting war materiel to belligerent states. Switzerland joined

² The translation of the author: "Switzerland is neutral. Its neutrality is permanent and armed."

the League of Nations in 1920, after a debate regarding its participation in the international organization as a neutral state. The League of Nations adopted the London Declaration (1920) (Keller et al., 2023), allowing derogations from the obligations stemming from the Covenant of the League of Nations. At this time, Switzerland was obliged after its accession to apply the restrictive measures (economic sanctions) adopted by the Council of the League of Nations against specific states (Keller et al., 2023). On the 29th of April 1938 Switzerland adopted a declaration stating that Switzerland will not apply economic sanctions adopted by the Council of the League of Nations (Verdross, 1958). Even though many UN organs have their seats and offices in Switzerland, Switzerland did not join the UN until 2002 due to arguments for preserving its neutrality. In 1986, 75% refused accession to the UN, while in 2002, 54,6% supported the accession and 45,4% voted against it (Keller et al., 2023).

The obligation of Switzerland to apply sanctions adopted by the United Nations Security Council even as a permanently neutral state is not questioned by Switzerland, nor by the Pro Schweiz initiative. If the United Nations Security Council obliges a state to apply sanctions, the state in question must adhere to this obligation due to Article 103 of the UN Charter. According to Article 25 of the UN Charter, the Member States of the UN undertook the obligation by the signature of the UN Charter to carry out the decision of the Security Council. In 1990, before Switzerland's accession to the UN, Switzerland applied the UN imposed sanction regime against Iraq for the annexation of Kuwait (Keller et al., 2023).

The legal framework of applying sanctions is regulated by the Swiss Embargo Act, which states that Switzerland may apply sanctions imposed by the UN, the OSCE or major trade partners and for compliance with public international law (Keller et al., 2023). In 1993, the Neutrality Report of the Swiss government stated that neutrality allows for applying both UN and non-UN economic sanctions, among them, sanctions adopted by regional international organizations like the EU. In 1998/1999, Switzerland participated in EU sanctions against Yugoslavia, imposed without the authorization of the United Nations Security Council. The executive and legislative power in Switzerland, through its foreign policy interprets obligations under permanent neutral status as being in line with applying the sanctions of the European Union against an aggressor state, by applying the EU sanctions packages against Russia. The transfer of war material is regulated by the Swiss War Material Act (1972), export of war material is subject to licensing. The Federal Council of Switzerland vetoed the delivery of ammunition manufactured in Switzerland from Germany to Ukraine, referencing neutrality (Keller et al., 2023).

Switzerland adopted a declaration on the 6th of March 2025, regarding a stand-alone European security policy. The Federal Council also decided on the 25 June 2025, to start negotiations for facilitating security and defense partnership opportunities between the EU and Switzerland. The upper chamber of the Swiss parliament decided to ease regulatory burdens regarding exporting war material to 25 countries, mostly NATO members. The Federal Council adopted the first defense political strategy on the 20th of June 2025, with the goal to strengthen the Swiss defense industry, extend international arms cooperations and to facilitate the acquisition of new technologies. Switzerland is also participating the European Sky Shield Initiative – ESSI.

The Swiss federal government signed a joint declaration regarding strengthening foreign and security policy cooperation with the EU on the 5th of March 2026. The Swiss-EU dialogue on foreign and security policy will be supplemented with an additional ministerial level political dialogue to “analyze global developments early on, identify common interests and deepen cooperation on vital European security issues in a targeted manner“. The FRA (Framework Participation Agreement) concluded along with the joint declaration created a legal framework for Switzerland’s contribution to EU military and civilian missions, simplifying the procedure, but allowing Switzerland to decide on a case-by-case basis regarding its participation. The declaration of the Swiss government states that the agreement is in line with Swiss neutrality.

The Swiss federal government closed the negotiations regarding the Swiss-EU bilateral agreement. On the 21st of May 2025 the agreement was initialed in Bern. The European Commission accepted the texts and the EU ratification procedure goes on in the Council. The EU needs to confirm the text through a vote of the European Parliament as well for ratification. The President of the European Commission and the President of the Swiss Confederation signed the broad package of EU-Switzerland agreements on the 2nd of March. The texts deal with many issues, addressing migration, energy, traffic, agriculture, etc. A Swiss referendum is expected in the next months or years regarding the package. A dynamic alignment of EU law and Swiss law is part of the package (some norms adopted by the EU will be part of the Swiss legal order and will be directly applicable) and there was an agreement on transitional norms as well before all of the norms incorporated into the package would enter into force. Switzerland will participate in certain EU programs (Horizon, Euratom, Digital Europe, etc.).

Switzerland is also member of the OSCE, and Switzerland takes the presidential seat in 2026. Switzerland has defined five presidential priorities: “the Helsinki Principles – for lasting

peace; inclusive multilateral diplomacy; anticipating technologies – for a safe and humane future; democracy, the rule of law and human rights; and the OSCE's ability to act.” Swiss Foreign Minister, Ignazio Cassis declared that “In the face of war in Europe, Switzerland is committed to a just peace in Ukraine, based on international law and the Helsinki principles,” stating the Switzerland “will use our mediation experience to promote dialogue, trust, and security”.

This analysis leads to the conclusion that the Swiss executive and legislative power (while there is no comprehensive case law on this issue) interpret obligations stemming from permanent neutrality in a flexible manner, thus allowing for more discretion for Swiss foreign policy. Sanctions, closer cooperation with the European integration and other international organizations are allowed under permanent neutrality according to this interpretation, while the re-export of armed materiel to a victim of aggression and thus one of the parties of an armed conflict might not be in line with neutrality (applying a restrictive approach regarding this issue). Meanwhile, there is an intensive debate going on in Swiss society regarding the need for a stricter neutrality policy and stricter application of obligations stemming from permanent neutral status that was not supported by the majority of the federal parliament, by the federal government or by the people through referendum so far.

Conclusion

The role of Switzerland in the evolution of permanent neutral status and the law of neutrality under international law is significant. The adoption of the UN Charter, the appearance of collective security organizations and defense cooperations, along with the international armed conflicts of the 21st century, and its shifting international legal order warrant further analysis regarding the interpretation and application of the content of the obligations under permanent neutral status and the law of neutrality. Therefore, the analysis of Switzerland's interpretation of Swiss obligations under permanent neutral status is important from the perspective of the development of international law. Switzerland applies and references the law of neutrality. Switzerland interprets the law of neutrality in a broad sense, in a flexible manner, to allow for more discretion for its foreign policy. This means that according to the Swiss federal parliament and federal government, establishing closer ties with regional international organizations like the EU, applying the sanctions of the EU against an aggressor is in line with obligations under permanent neutrality and the law of neutrality. However, there is an ongoing debate within Swiss society regarding a possible amendment of the Swiss federal constitution in favor of a stricter position regarding neutrality that was not confirmed yet by referendum.

Bibliography

1. Barany, Z. (2026): How They Survive (I): The International System, Alliances, and Conflict Management. *States without Armies: Why They Exist and How They Survive*, Oxford University Press, 92–135, <https://doi.org/10.1093/9780197679708.003.0004>
2. Bothe, M. (2015): Neutrality, concept and general rules. *Max Planck Encyclopedia of Public International Law*, Oxford University Press. <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e349>
3. Botschaft zur Volksinitiative „Wahrung der schweizerischen Neutralität (Neutralitätsinitiative)“, BBl 2024 3136, <https://www.fedlex.admin.ch/eli/fga/2024/3136/de>
4. Charter of the United Nations, signed June 26, 1945. <https://www.un.org/en/about-us/un-charter/full-text>
5. Constitution of Malta, 1964 (as amended). <https://legislation.mt/eli/const/eng>
6. European Commission. (2026, February). Commission proposes measures to strengthen Europe's defence and security. https://ec.europa.eu/commission/presscorner/detail/en/ip_26_505
7. European External Action Service, EU and Switzerland sign joint declaration on strengthened cooperation in foreign and security policy (2023). https://www.eeas.europa.eu/eeas/switzerland-eu-and-switzerland-sign-joint-declaration-strengthened-cooperation-foreign-and-security_en
8. European External Action Service, Joint declaration on strengthened cooperation in foreign and security policy between the European Union and Switzerland (2023). https://www.eeas.europa.eu/eeas/joint-declaration-strengthened-cooperation-foreign-and-security-policy-between-european-union-and_en
9. Federal Act on War Materiel (War Mat Act, WMA) of 13 December 1996. https://www.fedlex.admin.ch/eli/cc/1998/794_794_794/en
10. Federal Constitution of the Swiss Confederation, 1999 (as amended). <https://www.fedlex.admin.ch/eli/cc/1999/404/en>
11. Federal Department of Defence, Civil Protection and Sport, Security policy strategy. <https://www.sepos.admin.ch/en/security-policy-strategy>
12. Federal Department of Foreign Affairs. <https://www.europa.eda.admin.ch/en/news/sHxHxYhqwno7>
13. Federal Department of Foreign Affairs, Switzerland adopts sanctions against Russia in line with the EU's latest measures (October 18, 2024), <https://www.eda.admin.ch/countries/luxembourg/en/home/news/news.html/content/europa/en/meta/news/2024/10/18/102847>.
14. Federal Department of Defence, Civil Protection and Sport, Switzerland strengthens its security policy in response to the changed international situation (2024). https://www.vbs.admin.ch/en/news/eRHRh_lKb5o-bGLn-U1_h.
15. Federal Department of Foreign Affairs, Foreign policy strategy 2024–2027. <https://www.eda.admin.ch/en/foreign-policy-strategy-2024-27>
16. Federal Department of Foreign Affairs, Report on neutrality (1993). https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/voelkerrecht/bericht-neutralitaet-1993_EN.pdf
17. Federal Office for the Environment. <https://www.bafu.admin.ch/en/news/O5M0QLVwbVE7A1uwQIJj->
18. Keller, H., Lüthi, N., Sefkow-Werner, V. (2023, online): Switzerland. Anne van Aaken et al. (eds): *The Oxford Handbook of International Law in Europe*. Oxford University Press, 765-800. <https://doi.org/10.1093/oxfordhb/9780198865315.013.40>
19. Lapu, Á. Semlegesség és szolidaritás (2025): A fegyveres összeütközésekkel szembeni állandó semlegesség a nemzetközi jogban és az európai integrációban való részvétel kapcsolata. *Glossa Iuridica*, 12(3–4), 283–307. ISSN 2064-6887. https://ajk.kre.hu/images/doc2025/glossa/2025XII34/GI_2025_3-4_283-307.pdf
20. Müller, L. (2019): Neutrality in world history, 1st ed, Routledge, 188. <https://doi.org/10.4324/9781315167466>
21. Organization for Security and Co-operation in Europe, <https://www.osce.org/chairpersonship/661444>.

22. Schrijver, N., Prislán, V. (2008, updated): Gabčíkovo–Nagymaros Case (Hungary/Slovakia). *Max Planck Encyclopedia of Public International Law*, Oxford University Press.
<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e135?p=emailAgA1OulJKH/4w&d=/10.1093/law:epil/9780199231690/law-9780199231690-e135&print>
23. Sherman, E. G. (1918): The neutrality of Switzerland. *The American Journal of International Law*, 12(4), 780-795.
24. Swiss Confederation, Consultation procedures (ended) 2025,
<https://www.fedlex.admin.ch/fr/consultation-procedures/ended/2025>
25. Verdross, A. (1958): Die österreichische Neutralität. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 19: 512-530.
26. Verein “Neutralität Ja”, Argumentarium, <https://neutralitaet-ja.ch/argumentarium/>
27. Verein “Neutralität Ja”, Schlussabstimmungen in der Frühlingssession 2026 (March 20, 2026),
<https://neutralitaet-ja.ch/2026/03/20/schlussabstimmungen-in-der-fruehlingssession-2026/>
28. Vienna Convention on the Law of Treaties, May 23, 1969,
https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

THE CHILD RIGHTS PROTECTION SYSTEM: LEGAL FRAMEWORK AND RESPONSIBLE INSTITUTIONS

ZUZANNA JANOWSKA* - ADRIANNA MACIĄG**

Abstract

Children's rights constitute a crucial element of the national human rights protection system, and their guarantees stem primarily from the provisions of the Constitution of the Republic of Poland and international obligations, including the Convention on the Rights of the Child. Legal regulations, particularly the Family and Guardianship Code and the Act on the Ombudsman for Children, also play a significant role in the national children's rights protection system. Protection mechanisms are implemented through specialized public institutions, such as the Ombudsman for Children, family courts, and social welfare authorities. The aim of this article is to present the main assumptions of the children's rights protection system in Poland and to identify the most important legal and institutional instruments that constitute its structure. The basic legal regulations and the role of institutions responsible for protecting children's well-being will be discussed, providing a starting point for further, in-depth analysis.

Keywords: child, child rights, family, protection system, child rights protection system

Introduction

The issue of children's rights is an important part of the human rights protection system. The contemporary approach to this issue assumes that a child is not only a person requiring care from adults, but also a person, who is entitled to a specific set of rights and freedoms. Due to the special life situation of children and their dependence on adults, it is necessary to create legal mechanisms that ensure effective protection of their interests.

The development of the concept of children's rights is closely related to the development of the international human rights protection system.

In the second half of the 20th century, there was a significant increase in interest in the legal situation of children, which resulted in the adoption of a number of international documents regulating this issue. These documents established the basic standards for child protection and became a reference point for national legal systems.

The Polish system of child rights protection has been shaped by both international regulations and national laws. It includes constitutional and statutory solutions, as well as the activities of public institutions responsible for their implementation.

Therefore, the analysis of this system requires consideration of both its legal basis and institutional mechanisms. It should be emphasized that the issue of children's rights is

* student, Law,, 3rd year, full-time program, 115728@student.urad.edu.pl, Faculty of Law and Administration, Casimir Pulaski Radom University, Poland

** student, Law, 3rd year, full-time program, 118818@student.urad.edu.pl, Faculty of Law and Administration, Casimir Pulaski Radom University, Poland

multifaceted and encompasses legal, social and pedagogical issues. Protection of children's rights cannot be considered solely in the context of applicable legal regulations, but should also take into account the broader context of the child's functioning in society. The literature in this field points out that the effectiveness of the system of protection of children's rights depends not only on the quality of legal regulations, but also on the level of social awareness and the proper functioning of institutions responsible for the implementation of these regulations.

Therefore, the modern state is faced with the necessity of creating comprehensive solutions that enable effective protection of children. This includes both creating appropriate legal regulations and developing an institutional system that enables responding to situations of child rights violations. In practice, this means that many entities, including public administration bodies, judicial institutions, and social organizations, must cooperate. A significant problem in the protection of children's rights is the lack of communication between institutions responsible for this protection, which often leads to violations or extreme situations where the child's life is seriously endangered.

1. Who is called a child?

According to the Convention on the Rights of the Child¹, a child is „every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”² This definition establishes a universal standard for identifying who is entitled to special protection and care. It indicates who is entitled to rights, which, similarly to the rights attributed to all human beings, can be classified into several categories: personal, political/public, social, and economic³. Each of these categories encompasses a set of entitlements that collectively ensure the child's ability to live, develop, and function within society in a manner consistent with human dignity.

Having established who qualifies as a child and is entitled to specific rights, it is necessary to undertake an analysis of the legal framework.

2. Legal Framework

2.1 International foundations of child rights protection

¹ The United Nations Convention on the Rights of the Child. (adopted 20 November 1989)

² Convention on the Right of the Child, article 1

³ Rzecznik Praw Dziecka, Prawa dziecka, <https://brpd.gov.pl/prawa-dziecka/>

The shape of modern standards for the protection of children's rights has been determined by international law regulations. The most important document in this area is the Convention on the Rights of the Child.

This Convention introduces a broad catalogue of rights for children. They include, among others, the right to life, the right to health protection, the right to education, as well as the right to protection against violence, exploitation and neglect. The document also emphasizes the importance of the family environment for the proper development of a child.

The central principle of the convention is the principle of the best interests of the child. According to the Convention, the primary consideration in all actions concerning children should be the best interests of the child and the creation of conditions that enable their proper development.

Poland ratified the Convention on the Rights of the Child in 1991, thereby committing itself to abide by the standards set out in the document. The Convention's provisions played a significant role in shaping national regulations concerning child protection.

In addition to the Convention on the Rights of the Child, other international law documents are also important for the protection of children's rights. Among them, one can point out, among others, the Convention for the Protection of Human Rights and Fundamental Freedoms⁴ and the Charter of Fundamental Rights of the European Union⁵. These documents do not only refer to the situation of children, but the regulations concerning the protection of human rights contained in them also apply to minors.

In the European context, the case law of the European Court of Human Rights⁶ also plays a special role. This Court has repeatedly emphasized that states have an obligation to take action to protect children from violence and to provide them with appropriate conditions for development. The case law influences the way of interpreting national law provisions and contributes to the further development of standards for the protection of children's rights.

2.2 Constitutional foundations of the protection of children's rights

Standards resulting from international law have been reflected in the Polish legal system primarily in the Constitution of the Republic of Poland of 1997⁷. This document contains a number of regulations related to the protection of the family and the rights of the child.

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (known as the European Convention on Human Rights or ECHR), signed in 1950, coming into force in 1953.

⁵ Charter of Fundamental Rights of the European Union, (2012)

⁶ European Court of Human Rights (ECtHR)

⁷ Constitution of the Republic of Poland (1997), article 18, 48, 72.

Article 72 of the Constitution is particularly important in this context, as it states that the Republic of Poland shall ensure protection of children's rights. This provision imposes on public authorities the obligation to take actions aimed at protecting children from violence, cruelty, exploitation and demoralization. This means that the state is not only limited to creating appropriate legal regulations, but is also obliged to take specific actions aimed at their effective implementation.

The Constitution also emphasizes the special role of the family in the process of raising a child. According to Article 18 of the Constitution, marriage, family, motherhood and parenthood are under the protection and care of the Republic of Poland. This regulation indicates that the state recognizes the family as the basic environment for the development of a child and at the same time commits to supporting its functioning.

In the context of protecting children's rights, Article 48 of the Constitution is also important, as it refers to the right of parents to raise their children in accordance with their own convictions. However, the provision indicates that the exercise of this right should take into account the child's degree of maturity and his or her freedom of conscience and religion. This means that the constitutional model of child protection assumes the need to maintain a balance between the rights of parents and the interests of the child.

2.3 Statutory basis for the protection of children's rights

Constitutional guarantees of child rights protection are developed in numerous statutory acts that regulate detailed issues related to the legal situation of a child and the state's obligations in terms of its protection. National legislation creates a comprehensive system of legal norms in this area, covering both family relations and the activities of public institutions responsible for supporting the child and their family.

One of the most important legal acts regulating the situation of a child is the Family and Guardianship Code.⁸ This act defines the basic principles of family functioning and regulates the relations between parents and children. In his provisions, special emphasis was placed on the parents' duties towards the child, which include not only providing for the child's maintenance, but also caring for the child's physical, emotional, and social development.

According to the regulations of the code, the exercise of parental authority should be subordinated to the child's best interests. This means that parents are obliged to take actions that will promote the child's proper development and take into account their needs and capabilities.

⁸ the Family and Guardianship Code (25 February 1964).

Parental authority is not absolute, but should be exercised with respect for the rights of the child as a separate legal entity, which is one of the basic principles of family law.

The Family and Guardianship Code also provides mechanisms for protecting a child in situations where his or her well-being is at risk. In cases, the family court may interfere with the exercise of parental authority by applying appropriate legal measures. The most important ones include limiting parental authority, establishing a curator's supervision, and in extreme cases, depriving the parent of their authority. These measures are protective in nature and are designed to ensure the child has the right conditions for development.

Another important element of the statutory system of child rights protection is the Act of 9 June 2011 on Family Support and Foster Care System. It regulates the rules for providing support to families experiencing difficulties in fulfilling their caring and educational functions and defines the organization of the substitute care system.

In the context of protecting children's rights, the provisions of the Social Assistance Act⁹, which define the rules for providing support to individuals and families in difficult life situations, are also important. These regulations enable taking actions aimed at improving the living conditions of the child and preventing situations that may lead to infringement of their rights.

The above regulations are supplemented by educational law¹⁰ and health protection regulations, which address specific aspects of a child's functioning in society. Ensuring access to education and healthcare¹¹ is one of the fundamental elements of implementing children's rights and their practical protection.

Among the legal acts related to the protection of children's rights, the Act on the Ombudsman for Children¹² should also be mentioned, which defines the rules of operation of one of the key bodies that stand guard over the rights of the youngest citizens.

3. Institutional system of child rights protection

The functioning of the system of child rights protection is not limited to the enforcement of relevant legal provisions. Public institutions responsible for their practical implementation also play a crucial role.

One of the most important institutions is the Ombudsman for Children¹³. His task is to monitor the observance of children's rights and take action in case of their violation. The Ombudsman

⁹ Social Assistance Act (12 March 2004).

¹⁰ Act on School Education (14 December 2016)

¹¹ Convention on the Right of the Child, article 24

¹² Act on the Ombudsman for Children (6 January 2000)

¹³ Ombudsman for Children, first established in Poland on 1 January 2000, <https://brpd.gov.pl>

for Children is an independent state body whose activities aim to monitor the observance of children's rights and take action in the event of their violation. In practice, this means that the Ombudsman can intervene in matters concerning children, ask public administration bodies to take specific actions, and also make relevant applications to the courts.

The duties of the Ombudsman for Children also include analyzing existing legal regulations and initiating legislative changes aimed at improving the situation of children.

Another important element of the Ombudsman's work is educational and informational activities. The aim of these activities is to raise public awareness of children's rights and promote standards for their protection. The Ombudsman cooperates with public institutions, non-governmental organizations, and educational institutions in this area.

It is worth emphasizing that the activities of the Ombudsman for Children cover a wide range of issues related to the situation of children. This concerns, among others, problems related to the functioning of the education system, health care, foster care, or combating violence against children. This institution plays a significant role in monitoring the situation of the youngest citizens and in taking actions aimed at improving their legal and social situation.

Family courts also play a significant role. They consider matters related to parental authority, child custody, contact with the child, and other issues related to the child's legal situation.

Social welfare institutions that support families in difficult life situations also play an important role in the system of child rights protection. Their activities focus on preventing situations in which a child's rights might be violated, as well as providing support in cases of already existing problems.

The main social assistance institutions include social assistance centers and county family assistance centers. Social assistance centers operate at the municipal level and are the first point of contact for families requiring support. Their task is to diagnose the family situation and take actions aimed at improving the child's living conditions, such as granting benefits, organizing help or referring to the appropriate institutions.

The county family support centers perform more specialized tasks, particularly in the area of organizing substitute care. Their competences include qualifying candidates for foster families, supporting them in performing their caring functions, and supervising the functioning of the foster care system.

Family assistants also play a significant role in the social assistance system, and their task is to work directly with families experiencing educational difficulties. Their activities involve supporting parents in organizing their daily lives, solving childcare and educational problems,

and strengthening parenting skills. This makes it possible to prevent situations that could lead to the need for court intervention or the placement of a child in foster care.

The system is supplemented by day care facilities and interdisciplinary teams for combating domestic violence. These facilities offer children help with learning, organization of free time and educational support, while interdisciplinary teams coordinate the actions of various institutions in situations where the child's safety is at risk.

The overall activity of the indicated institutions shows that the system of child rights protection in Poland is complex and multi-level. Their activities focus on preventing situations in which a child's rights might be violated, as well as providing support in cases of already existing problems.

4. Foster care and family support

The Act of 9 June 2011 on Family Support and Foster Care system is based on the fundamental principle that poverty alone cannot be a reason to take a child away from its biological family. In the Polish model of child protection, it is assumed that placing a minor in substitute care should be the last resort of state intervention in family life (*ultima ratio*). For this reason, the legislator introduced an extensive system of family support, the aim of which is to prevent the necessity of separating a child from their parents. In practice, it includes social work, family assistant support, help from day care facilities, and various forms of specialized counseling. It is only possible to place a child in substitute care if the use of these instruments proves ineffective or if the child's well-being is seriously at risk.

A characteristic feature of the Polish foster care system is that the majority of children in it are not orphans in the biological sense. In most cases, these children have at least one living parent, but due to the biological family's inability to provide proper care and upbringing, they cannot remain in their home environment. In social work literature and practice, they are sometimes referred to as "social orphans". The most common reasons for placing children in foster care include parental addiction, which accounts for about 40% of cases, as well as domestic violence, lack of care and upbringing, or the general inability of parents to provide the child with proper conditions for development. According to statistical data¹⁴, at the end of 2024, about 77,300 children were in foster care in Poland, of which nearly 59,800 were in family foster care, and about 17,500 in institutional care.

¹⁴ GUS. (2025). *Pieczna zastępcza w 2024 r.*, <https://stat.gov.pl/obszary-tematyczne/dzieci-i-rodzina/dzieci/pieczna-zastepcza-w-2024-r-,1,9.html>

The Polish foster care system is based on two main pillars: family care and institutional care, with the state policy consistently aiming to strengthen the former. Family care includes, among others, related, non-professional and professional foster families, as well as family children's homes. Related families play a special role, making up about 64%¹⁵ of all foster families in Poland, in most cases, they care for one child. Institutional care in child and youth care institutions remains an alternative.

Another important, yet often marginalized, element of the foster care system in public debate is the process of empowering foster care leavers.¹⁶ As a rule, foster care lasts until the ward reaches the age of majority, but in the case of continuing education, it is possible to extend it until the age of 25. To make it easier for young people to transition to independent living, instruments such as individual independence programs, financial assistance for continuing education, housing support, and so-called training apartments have been introduced, enabling them to gradually acquire life skills in a partially independent environment. Despite these solutions, their availability is territorially diverse in Poland, which indicates the need for further development of the support system for people leaving substitute care.

5. The functioning of the child protection system in practice.

An analysis of the functioning of the child protection system in Poland shows that its practical operation often deviates from the model assumptions resulting from the applicable legal regulations. Although the legal regulations create an extensive and coherent system of protection, their implementation in practice depends on many organizational, institutional and social factors.

In everyday practice, one of the key elements is the time of the institution's reaction to situations that threaten the child's well-being. In cases of domestic violence or serious neglect, it is crucial that the relevant authorities take action quickly. However, it happens that this reaction is delayed, which is due to, among other things, the heavy workload of social workers, limited staff resources or the need to conduct a detailed explanation procedure.

Another major problem is that social workers often schedule visits to families' homes in advance. This makes it possible to prepare and adapt to the situation, but the possibility of actually checking what is happening in a given house decreases.

¹⁵ GUS. (2025). Piecza zastępcza w 2024 r., <https://stat.gov.pl/obszary-tematyczne/dzieci-i-rodzina/dzieci/pieczka-zastepcza-w-2024-r-,1,9.html>

¹⁶ Act on Family Support and Foster Care (2011), article 37

The need for cooperation between many institutions is also evident, which on the one hand enables a comprehensive approach to the child's problems, but on the other hand may lead to difficulties in coordinating actions. Family courts, social welfare centers, schools, police, and other entities are often involved in cases concerning children.

The lack of effective communication between them may result in longer proceedings or duplication of actions.

A painful illustration of what can go wrong when institutions fail to cooperate is the case of young Kamil from Częstochowa¹⁷, who died in 2023 after suffering prolonged domestic abuse. Warning signs had reached both the school and social services, yet none of the institutions involved responded quickly or decisively enough. The case exposed a critical weakness in Poland's child protection system: even when the legal framework is in place, it can fail if information is not shared effectively and cooperation between responsible bodies breaks down in practice. At the same time, Kamil's case proved to be a turning point. It directly prompted the enactment of the Kamil's Act¹⁸, which imposed new obligations on institutions working with children in the area of violence prevention and strengthened the mechanisms for inter-institutional cooperation.

Another significant practical problem is the heavy workload of family courts, which affects the time it takes to resolve child-related cases. In situations requiring urgent intervention, this time is of particular importance, as delays in issuing decisions can directly affect the child's situation. Similar difficulties occur in the work of social assistance institutions, where the number of cases per one employee often makes it difficult to conduct in-depth work with the family.

The importance of social factors that influence the effectiveness of the system of child rights protection is also pointed out. They include, among others, the level of social awareness regarding children's rights and the readiness to react to cases of their violation. In many situations, people from the child's environment do not report disturbing signals to the relevant institutions, which may delay intervention.

At the same time, it should be emphasized that the child protection system in Poland has the ability to respond to situations of danger and take actions aimed at improving the situation of the child. In the practical functioning of the institution, preventive actions are also visible, such

¹⁷ Ordo Iuris. (2025). sprawa Kamilka z Częstochowy przed sądami. W tle kluczowy wątek odpowiedzialności za zaniedbania urzędników i sędziów.

¹⁸ Act of 13 May 2016 on counteracting threats of sexual crime and protection of minors. Journal of Laws 2026, item 110, 187.

as support for families experiencing educational difficulties or educational activities aimed at children and adults.

Conclusion

The system of child rights protection in Poland is based on extensive legal foundations and the activities of numerous public institutions. International, constitutional and statutory regulations form a coherent system of norms aimed at ensuring adequate protection for children. Modern legal systems are paying more and more attention to the issue of protecting children's rights, recognizing them as one of the fundamental elements of the human rights protection system. In Poland, this system is gradually developing, adapting to both international standards and changing social needs.

However, it should be noted that the effectiveness of the system of child rights protection depends not only on the legal regulations themselves, but also on their practical implementation. This requires proper preparation of public institutions, proper cooperation between different entities, and constant monitoring of the situation of children in society.

Bibliography

Legal acts

1. Act of 9 June 2011 on Family Support and Foster Care. Journal of Laws 2026, item 187,203.
2. Act of 13 May 2016 on counteracting threats of sexual crime and protection of minors. Journal of Laws 2026, item 110, 187.
3. Act on the Ombudsman for Children of 6 January 2000 (. Journal of Laws 2023, item 292.)
4. Charter of Fundamental Rights of the European Union, 18 December 2012, O.J. C 326/02.
5. Constitution of the Republic of Poland of 2 April 1997. Journal of Laws 2009, No. 114, item 946.
6. Convention on the Rights of the Child, adopted 20 November 1989, U.N. Treaty Series, vol. 1577, p. 3. Ratified by Poland 30 April 1991, Journal of Laws 1991, No. 120, item 526.
7. Education Act of 14 December 2016. Journal of Laws 2026, item 187, 203.
8. European Convention for the Protection of Human Rights and Fundamental Freedoms adopted 4 November 1950, ETS No. 005. Ratified by Poland 19 January 1993, Journal of Laws 1993, No. 61, item 284.
9. Family and Guardianship Code of 25 February 1964. Journal of Laws 2025, item 897.
10. Social Assistance Act of 12 March 2004. Journal of Laws 2026, item 26, 203.

Literature

11. P. Maciaszek, Wychowywanie według norm Konstytucji RP z 1997 r. [w:] Instrumenty ochrony praw rodziny i ochrony praw dziecka [Education according to the norms of the Republic of Poland of 1997 [in:] Instruments for protection of family rights and the protection of children's rights], red. M. Balwicka-Szczyrba, A. Sylwestrzak, Gdańsk 2020.
12. Andrzejewski, M., Smoczyński, T. Prawo rodzinne i opiekuńcze [Family and Guardianship Law]. Warszawa, C.H. Beck, 2024.
13. Czyż, E. Prawa dziecka [Children's Law]. Warszawa, Helsińska Fundacja Praw Człowieka, 2002.

14. Jaros, P., Michalak, M. Prawa dziecka. Dokumenty Organizacji Narodów Zjednoczonych [Children's Rights. United Nations Documents.]. Warszawa, Biuro Rzecznika Praw Dziecka, 2015.

Reports and Internet sources

15. GUS. (2025). Piecza zastępcza w 2024 r.
16. Rzecznik Praw Dziecka. (brpd.gov.pl). Prawa dziecka.
17. UNICEF USA. (2024). What are children's rights?
18. Humanium. (n.d.). Children of Poland.
19. Gov.pl. (n.d). Custody matters – matters of parental responsibility under Polish Family and Guardianship Code.
20. Ordo Iuris. (2025). Sprawa Kamilka z Częstochowy przed sądami. W tle kluczowy wątek odpowiedzialności za zaniedbania urzędników i sędziów.

RIGHT TO PRIVACY IN THE AGE OF SOCIAL MEDIA – SELECTED LEGAL CHALLENGES

JULIA CIS* - NATALIA SKORŻA**

Abstract

The development of social media has significantly impacted the way we communicate and share information about our personal lives. Online platforms allow users to quickly publish content, photos, and personal data, which promotes the free exchange of information but also poses threats to the right to privacy. In the digital environment, the boundary between the private and public spheres is becoming less clear, and data shared online can be used by other entities, including platform operators and economic entities. The lecture aims to analyze the importance of the right to privacy in the context of social media and to identify the most important challenges related to the protection of users' personal data, including data processing and user profiling. The paper argues that effective protection of privacy requires adapting legal mechanisms to rapidly developing technologies.

Keywords: right to privacy, personal data protection, social media, data processing, legal mechanisms

Introduction

In the age of social media, protecting privacy takes on new dimensions and involves many legal challenges. Using online platforms involves mass collection of users' personal data, including information about preferences, location, activity history, and interpersonal relationships. Such data can be easily used for user profiling, targeted advertising or analyzing consumer behavior, which poses a risk of violating the right to privacy. In the face of these challenges, the effectiveness of legal mechanisms protecting privacy becomes a key issue. The report will present the most important legal challenges related to privacy protection in social media, as well as an analysis of national and EU regulations in this area, including examples of real personal data breaches.

1. Right to privacy in the law of the European Union

The right to privacy is a fundamental individual right in the European Union legal system, primarily guaranteed by the Charter of Fundamental Rights. Article 7 ensures respect for private and family life, while Article 8 establishes personal data protection as a separate fundamental right¹. Privacy covers both traditional aspects of private life and the digital sphere, including electronic communications, online activity, and telecommunication services. It is not absolute and may be restricted for public safety, defense, or public order, provided that any limitation is proportionate, legally defined, and respects the essence of the right. Article 16 of the Treaty on

* Julia Cis, third-year student of Law at Casimir Pulawski Radom University, Poland, e-mail: 114003@student.uthrad.pl

** Natalia Skorża, third-year student of Law at Casimir Pulawski Radom University, Poland, e-mail: 11618@student.uthrad.pl

¹ Charter of Fundamental Rights of the European Union, 2012.

the Functioning of the EU² provides the primary legal basis for data protection. Secondary legislation includes Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data³, supplemented by Directive 2000/31/EC on information society services, including electronic commerce⁴, Directive 2002/58/EC in the electronic communications sector⁵, and Directive 2006/24/EC on the retention of telecommunications data⁶. Further important regulations include Commission Regulation No. 611/2013 on notification of personal data breaches⁷ and Regulation (EC) No. 45/2001 on data processing by EU institutions⁸. The rapid development of technology led to the adoption of the General Data Protection Regulation (EU 2016/679)⁹, which replaced Directive 95/46/EC and introduced new categories of sensitive data, including biometric and genetic data.

The European Court of Justice has repeatedly emphasized the importance of privacy protection in the context of personal data processing. In the judgment of 11 December 2014 in case C-212/13 *František Ryneš/Úřad pro ochranu osobních údajů*, the CJEU stated that video recordings enabling identification of persons constitute personal data and are therefore subject to protection, while the right of the property owner to safety may be taken into account when applying proportionate data protection measures¹⁰. In a similar vein, the Court in the case of C-101/01 *Göta hovrätt v Bodil Lindqvist* stated that publishing information about natural persons on the internet, such as a name and surname in combination with a telephone number, constitutes an interference with the right to privacy, as it enables the identification of specific persons¹¹. In the judgment in *Google Spain v. The Court of Justice of the European Union and Mario Costeja González* The Court found that the data subject may request the removal of links to information concerning him from the search results if this information is outdated, irrelevant or excessive in relation to the purposes of the processing, which led to the development of the so-called right to be forgotten¹².

² Treaty on the Functioning of the European Union, 1957.

³ Directive 95/46/EC of the European Parliament and of the Council, 1995.

⁴ Directive 2000/31/EC of the European Parliament and of the Council, 2000.

⁵ Directive 2002/58/EC of the European Parliament and of the Council, 2002.

⁶ Directive 2006/24/EC of the European Parliament and of the Council, 2006.

⁷ Commission Regulation (EU) No 611/2013, 2013.

⁸ Regulation (EC) No 45/2001 of the European Parliament and of the Council, 2001.

⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council (General Data Protection Regulation), 2016.

¹⁰ CJEU, *František Ryneš v Úřad pro ochranu osobních údajů*, C-212/13, 2014.

¹¹ CJEU, *Göta hovrätt v Bodil Lindqvist*, C-101/01, 2003.

¹² CJEU, *Google Spain SL and Google Inc. v AEPD and Mario Costeja González*, C-131/12, 2014.

2. GDPR as the core legal framework

The main legal instrument governing personal data protection in the European Union is Regulation (EU) 2016/679 (General Data Protection Regulation)¹³. It constitutes the cornerstone of the EU data protection system and reflects the recognition of personal data protection as a fundamental right, as enshrined in the Charter of Fundamental Rights of the European Union and the Treaty on the Functioning of the European Union. The adoption of the GDPR was a response to the rapid development of digital technologies and the increasing scale of personal data processing, particularly in the context of online services and social media platforms. Unlike its predecessor, Directive 95/46/EC, the GDPR introduced a uniform legal framework directly applicable in all Member States, thereby strengthening legal certainty and ensuring a consistent level of protection across the European Union. The regulation is based on a set of fundamental principles governing the processing of personal data, as outlined in Article 5. These include lawfulness, fairness and transparency, purpose limitation, data minimization, accuracy, storage limitation, integrity and confidentiality, and accountability¹⁴. These principles not only define the standards that controllers must comply with, but also serve as interpretative guidelines for assessing the legality of data processing operations.

In the context of social media, particular importance is attached to the principle of purpose limitation. According to this principle, personal data must be collected for specified, explicit, and legitimate purposes and must not be further processed in a manner incompatible with those purposes. However, the business models of many online platforms are based on the extensive reuse of user data for secondary purposes, such as targeted advertising, behavioral analysis, and algorithmic content personalization. This raises significant concerns regarding compliance with GDPR requirements and highlights the tension between economic interests and the protection of fundamental rights. Furthermore, pursuant to Article 6 GDPR, the processing of personal data must be based on one of several legal grounds. In the context of social media, the most commonly invoked bases include user consent, the necessity for the performance of a contract, and the legitimate interests of the data controller. While consent is often presented as the primary justification for data processing, its validity is frequently questioned due to the complexity of privacy policies and the imbalance of power between users and platform operators. As a result, consent may not always meet the criteria of being freely given, specific, informed, and unambiguous. Overall, the GDPR establishes a comprehensive and robust legal

¹³ General Data Protection Regulation (EU) 2016/679, Art. 1– Subject-matter and objectives

¹⁴GDPR - Principles relating to processing of personal data

framework for the protection of personal data. However, its practical effectiveness depends largely on proper enforcement and the willingness of both users and data controllers to comply with its provisions.

3. Rights of users under the GDPR

One of the most significant contributions of the GDPR is the establishment of a broad catalogue of rights granted to individuals, aimed at ensuring effective control over their personal data. These rights are designed to empower users and to counterbalance the asymmetry between individuals and large digital platforms that process vast amounts of data. The right of access, set out in Article 15 GDPR¹⁵, allows individuals to obtain confirmation as to whether their personal data is being processed and to receive detailed information about such processing, including its purposes, categories of data, and recipients. This right plays a crucial role in increasing transparency and enabling users to better understand how their data is used. Closely related is the right to rectification (Article 16)¹⁶, which enables individuals to correct inaccurate or incomplete personal data. Ensuring data accuracy is particularly important in digital environments, where incorrect information may be widely disseminated and difficult to correct. A key right in the context of social media is the right to erasure (Article 17)¹⁷, commonly referred to as the “right to be forgotten.” This right allows individuals to request the deletion of their personal data in certain circumstances, such as when the data is no longer necessary for the purposes for which it was collected, or when consent has been withdrawn. In the digital environment, where information can remain accessible indefinitely, this right serves as an important mechanism for protecting personal autonomy and reputation.

In addition, Article 21 GDPR¹⁸ grants individuals the right to object to the processing of their data, particularly when it is used for direct marketing purposes. This provides users with a tool to limit unwanted commercial exploitation of their personal information. The GDPR also introduces the right to data portability, which allows individuals to obtain their data in a structured, commonly used format and transfer it to another service provider, thereby promoting competition and user autonomy. Despite the extensive catalogue of rights, their practical implementation remains challenging. Many users are not fully aware of their rights or lack the knowledge necessary to exercise them effectively. Moreover, the complexity of digital services

¹⁵ GDPR, Art. 15 - Right of access by the data subject

¹⁶ GDPR, Art 16- Right to rectification

¹⁷ GDPR, Art 17.- Right to erasure (‘right to be forgotten’)

¹⁸ GDPR, Art 21. - Right to object

and the opaque nature of data processing practices can make it difficult for individuals to assert their rights in practice.

4. New regulations concerning online platforms

In recent years, the European Union has also adopted new regulations concerning the functioning of online platforms, in particular the Digital Services Act and the Digital Markets Act. The aim of these acts is to increase the responsibility of online platforms, ensure greater transparency of algorithms and limit the misuse of user data by the largest online platforms⁷. In response to the challenges related to the development of digital technologies and the growing role of online platforms in social and economic life, the European Union has adopted comprehensive regulatory frameworks in recent years, aimed at increasing the responsibility of entities that mediate the exchange of information and personal data.

The key legal acts in this field include Regulation (EU) 2022/2065 of the European Parliament and of the Council – Digital Services Act (DSA)¹⁹ and Regulation (EU) 2022/1925 of the European Parliament and of the Council – Digital Markets Act (DMA)²⁰. The Digital Services Act (DSA) is one of the most important elements of the EU regulatory reform concerning digital services. The main goal of the DSA is to regulate the obligations of online platforms, especially those with large-scale operations, in terms of content moderation, preventing the spread of illegal or harmful information, protecting users' rights, and the transparency of recommendation algorithms. This regulation imposes on platforms the obligation to, among other things, respond quickly to reports of violations of users' rights, publish regular reports on content moderation, and provide clear rules regarding interference with content published by users. Another important element of the DSA is the introduction of obligations concerning the transparency of the functioning of recommendation and personalization algorithms, which have a huge impact on the content presented to users. The Digital Markets Act (DMA), on the other hand, focuses on counteracting anti-competitive practices of the largest platforms, called "gatekeepers". DMA imposes obligations on such entities, including a ban on combining user data from different services without their consent, enabling service interoperability, and enabling users to choose alternative solutions without prior restrictions. The purpose of both acts is to strengthen the protection of users' rights in the context of the functioning of internet platforms, many of which collect large amounts of personal data and use them for marketing and commercial purposes.

¹⁹ Regulation (EU) 2022/2065 of the European Parliament and of the Council (Digital Services Act), 2022.

²⁰ Regulation (EU) 2022/1925 of the European Parliament and of the Council (Digital Markets Act), 2022.

Both DSA and DMA are part of the new EU regulatory approach, which emphasizes not only traditional data protection principles (compliance with GDPR), but also transparency, accountability, and fairness of digital services across the Union.

5. Privacy protection in Poland

The right to privacy is also protected in Polish law, primarily at the constitutional level. According to Article 47 of the Constitution of the Republic of Poland, everyone has the right to protection of private and family life, honor and good name, and to decide on their personal life. Furthermore, Article 51 of the Constitution guarantees protection of personal data and states that public authorities may not acquire, collect or make available any information about citizens other than that which is necessary in a democratic state governed by the rule of law²¹. At the statutory level, the basis for personal data protection in Poland is the Act on Personal Data Protection of 10 May 2018²², which adapts national regulations to the standards of the Regulation of the European Parliament and of the Council (EU) 2016/679 – GDPR.

The Act defines, among others, the organization and competences of the supervisory body, i.e. the President of the Personal Data Protection Office (UODO). This authority plays a key role in ensuring compliance with personal data protection regulations, including by: monitoring compliance with the GDPR – UODO can conduct inspections of entities processing personal data, issue recommendations, and impose administrative penalties in the event of infringements; maintaining data collection registers – in the case of certain data or specific sectors (e.g. processing sensitive data), the UODO monitors the maintenance of registers and the application of appropriate security measures; advice and education – the office provides guidelines, opinions, and interpretations of regulations for public administration, entrepreneurs, and citizens; receiving complaints and applications – individuals whose privacy rights have been violated may report the matter to the UODO, which investigates and takes appropriate action²³.

Privacy protection is also implemented under civil law. According to Articles 23 and 24 of the Civil Code, a person's personal rights, particularly honor, image, correspondence secrecy, and privacy, are subject to legal protection. In the case of a violation of personal rights, the person whose rights have been violated may demand cessation of the violations, removal of their effects, and monetary compensation²⁴. The significance of the right to privacy in Poland is also

²¹ Constitution of the Republic of Poland, 1997.

²² Act of 10 May 2018 on the Protection of Personal Data, 2018.

²³ Personal Data Protection Office, “The role of the Personal Data Protection Office in Poland”, 2026, <https://uodo.gov.pl>

²⁴ Civil Code (Act of 23 April 1964), 1964.

confirmed by the rulings of the Constitutional Tribunal. In the judgment of 12 December 2005, K 32/04, the Tribunal indicated that the right to privacy includes, among others, the right to decide on disclosing information concerning one's personal life and the right to control information concerning one's own person²⁵. In practice, this means that every citizen has the right to be aware of and control what personal data is processed, for what purpose and by whom. Additionally, thanks to the implementation of the GDPR in Polish law, citizens have a number of rights in relation to data controllers, including the right to: access to their data and information about their processing; correcting incorrect or incomplete data; restricting data processing or objecting to data processing for specific purposes; transfer of data between entities; withdraw consent to data processing at any time²⁶.

6. The scale of social media use and GDPR breaches in Poland

Social media have become one of the basic tools of communication and social life. In 2025, the number of adult social media users in Poland was approximately 25.6 million, which is 81.2% of the adult population. In total, 84% of all internet users use at least one social media platform²⁷. In 2024, the number of social media users in Poland was approximately 27.9 million, which is almost 69% of the country's total population²⁸. The most popular platforms in Poland are YouTube (approx. 29 million users, 75.6% of the population), Facebook (approx. 18.7 million), Instagram (approx. 11.3 million), TikTok (approx. 11.4 million adult users), and LinkedIn (approx. 8.2 million users)²⁹. User data is also a key element of the digital economy. In Poland, the value of the social media advertising market in 2024 was approximately 1.67 billion PLN³⁰.

In Poland, the most common causes of personal data protection breaches include³¹: human errors, such as sending data to the wrong recipient, hacker and phishing attacks, insufficient IT system security, lack of procedures or failure to follow them, and improper sharing of data with third parties. According to the Office for Personal Data Protection, most data breaches in Poland

²⁵ Constitutional Tribunal of Poland, Judgment of 12 December 2005, K 32/04.

²⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council (General Data Protection Regulation), 2016.

²⁷ DataReportal, Digital 2025: Poland, 2025, <https://datareportal.com/reports/digital-2025-poland?utm>

²⁸ LinkedIn, Raport DataReportal 2024, https://pl.linkedin.com/posts/mavika_raport-datareportal-2024-activity-7168885149651058688-1BLR

²⁹ WeNet, Internet i media społecznościowe – podsumowanie raportu Digital 2025 Poland, <https://wenet.pl/blog/internet-i-media-spolecznosciowe-podsumowanie-raportu-digital-2025-poland>

³⁰ IAB Poland, Social Media Report 2024, 2024, <https://raportstrategiczny.iab.org.pl/social-media/?utm>

³¹ Personal Data Protection Office, Report on the state of personal data protection in Poland, 2024. <https://gdpr.pl/prezesa-uodo-opublikowal-sprawozdanie-za-2024-rok>

result from organizational rather than technological shortcomings, indicating that the issue lies not only in cybersecurity but also in the procedures for processing personal data. Poland ranks among the EU countries with the highest number of reported GDPR violations. In 2024, approximately 14,000–19,000 breaches were reported, compared to 25,000–30,000 in Germany and around 20,000 in the Netherlands³². As indicated by the President of the Office for Personal Data Protection in the decision of 17 December 2024, DKN.5131.15.2024, disclosing data such as name, surname, address or PESEL number to an unauthorized person may cause a high risk of infringing the rights or freedoms of a natural person. The organization emphasized that the disclosure of this data constitutes a breach of the rules for processing personal data as defined in Article 5(1) of the GDPR, including the principles of data confidentiality and integrity. Furthermore, the decision states that the data administrator did not provide adequate technical and organizational measures to ensure data security, which constitutes a breach of Article 32 of the GDPR. The President of the UODO also pointed out that the lack of an appropriate legal basis for data processing results in a breach of Article 6 of the GDPR, and the disclosure of identification data to unauthorized persons may lead to a high risk, including the possibility of identity theft or other negative consequences for data subjects³³.

7. Key threats to privacy in social media – a practical perspective

The rapid development of social media platforms has significantly increased the scale and complexity of personal data processing, giving rise to numerous threats to users' privacy. One of the most serious concerns is the excessive collection of personal data, which often goes beyond what is necessary for the provision of basic services. Platforms routinely collect detailed information about users' behavior, preferences, location, and social interactions, thereby creating extensive digital profiles. Another major issue is the practice of profiling, which involves the automated processing of personal data in order to evaluate certain aspects of an individual's behavior, preferences, or interests. These profiles are widely used for targeted advertising, content personalization, and even influencing user decisions. This issue is regulated by Regulation (EU) 2016/679 (General Data Protection Regulation), which in Article 22³⁴

³² Gazeta Prawna, Rekordowe kary za RODO w Europie – Polska w niechlubnej czołówce, <https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/10631546%2Crekordowe-kary-za-rodo-w-europie-polska-w-niechlubnej-czolowce-zglosz.html>

³³ Decision of the President of the Office for Personal Data Protection of 17 December 2024, https://orzeczenia.uodo.gov.pl/document/urn%3Aandoc%3Agov%3Apl%3Auodo%3A2024%3Adkn_5131_15/content?query=&utm

³⁴ GDPR, Art 22. - Restrictions

grants individuals the right not to be subject to decisions based solely on automated processing, including profiling, where such decisions produce legal or similarly significant effects.

A further challenge concerns the lack of transparency in data processing practices. Privacy policies are often complex, lengthy, and difficult to understand, which prevents users from making fully informed decisions regarding their personal data. As a result, the concept of “informed consent” frequently becomes merely formal rather than substantive. Additionally, the growing economic value of personal data has led to its widespread commercialization, increasing the risk of misuse, unauthorized access, and data breaches. Social media platforms operate within business models in which user data constitutes a key asset, which may encourage practices that are not fully aligned with data protection principles.

These issues are clearly reflected in practice, as illustrated by the case concerning Meta Platforms. In 2023³⁵, the company was fined €1.2 billion for unlawfully transferring personal data of European Union users to the United States. The case highlighted the challenges related to international data transfers and the requirement to ensure an adequate level of data protection in third countries. Supervisory authorities concluded that the legal framework in the United States did not provide sufficient safeguards against access to personal data by public authorities, particularly intelligence services. Furthermore, the case revealed deficiencies in transparency, as users were not adequately informed about the transfer of their data and the associated risks. This lack of transparency undermines one of the core principles of data processing and limits users’ ability to make informed decisions. The Meta case demonstrates the difficulties of enforcing EU data protection standards in relation to global technology companies operating across multiple jurisdictions. It also highlights the broader challenge of reconciling the global nature of digital services with territorially limited legal frameworks, which remains one of the key issues in contemporary privacy protection.

Conclusion

The right to privacy in the EU, including in Poland, is protected by the Constitution and harmonized legal acts. The GDPR and new digital regulations provide individuals with tools to control their personal data and make companies more responsible for how they use it. In the digital age, privacy protection is a fundamental individual right. Nevertheless, legal systems sometimes fail to fully prevent violations, and breaches of privacy still occur due to human

³⁵ Irish Data Protection Commission (DPC), 2023, Decision concerning Meta Platforms Ireland Ltd., €1.2 billion fine for unlawful transfer of EU personal data to the US

error, inadequate enforcement, or rapidly evolving technologies. This highlights the ongoing need for stronger safeguards, public awareness, and effective monitoring mechanisms to ensure that personal data is truly protected.

Bibliography

Legal Acts

1. Act of 10 May 2018 on the Protection of Personal Data. (2018).
2. Charter of Fundamental Rights of the European Union. (2012).
3. Civil Code (Act of 23 April 1964). (1964).
4. Commission Regulation (EU) No 611/2013. (2013).
5. Constitution of the Republic of Poland. (1997).
6. Directive 95/46/EC of the European Parliament and of the Council. (1995).
7. Directive 2000/31/EC of the European Parliament and of the Council. (2000).
8. Directive 2002/58/EC of the European Parliament and of the Council. (2002).
9. Directive 2006/24/EC of the European Parliament and of the Council. (2006).
10. Regulation (EC) No 45/2001 of the European Parliament and of the Council. (2001).
11. Regulation (EU) 2016/679 of the European Parliament and of the Council (General Data Protection Regulation). (2016).
12. Regulation (EU) 2022/1925 of the European Parliament and of the Council (Digital Markets Act). (2022).
13. Regulation (EU) 2022/2065 of the European Parliament and of the Council (Digital Services Act). (2022).
14. Treaty on the Functioning of the European Union. (1957).

Court Decisions

15. Court of Justice of the European Union. (2003). Göta hovrätt v Bodil Lindqvist, C-101/01.
16. Court of Justice of the European Union. (2014). František Ryneš v Úřad pro ochranu osobních údajů, C-212/13.
17. Court of Justice of the European Union. (2014). Google Spain SL and Google Inc. v AEPD and Mario Costeja González, C-131/12.
18. Constitutional Tribunal of Poland. (2005). Judgment of 12 December 2005, K 32/04.

Reports and Internet sources

19. DataReportal. Digital 2025: Poland.
20. Gazeta Prawna. Rekordowe kary za RODO w Europie – Polska w niechlubnej czołówce,
21. IAB Poland, Social Media Report 2024.
22. Irish Data Protection Commission (2023), Decision concerning Meta Platforms Ireland Ltd., Fine for illegal transfer of EU personal data to the United States.
23. LinkedIn, Raport DataReportal 2024
24. Personal Data Protection Office, Report on the state of personal data protection in Poland, 2024.
25. Personal Data Protection Office, The role of the Personal Data Protection Office in Poland.
26. WeNet, Internet i media społecznościowe – podsumowanie raportu Digital 2025 Poland.

REBUILDING THE PATH TO LEGAL COMPETENCE IN A DIGITAL PROFESSION

ROKSOLANA MALYNIAK*

Abstract

This essay critically examines the structural transformation of the legal profession in the era of accelerating artificial intelligence, with particular emphasis on its implications for early-career lawyers and the future architecture of legal training. It argues that the traditional apprenticeship model, historically predicated upon the gradual acquisition of legal judgement through routine, supervised tasks, is undergoing systemic erosion as such functions are increasingly automated. Building on both doctrinal analysis and reflective insight, the paper identifies a widening disjunction between formal legal education and the practical competencies demanded by a digitised legal services market. In this context, it advances the proposition that professional relevance now hinges upon a hybrid skillset, combining technological fluency with higher-order human capacities, including strategic reasoning and adaptive judgement. The essay further evaluates emergent models of legal training, notably those integrating AI-driven simulation with structured human supervision, as a means of reconciling innovation with the regulatory imperative of effective oversight. It situates these developments within a broader framework of redistributed responsibility among key stakeholders: law firms, clients, regulators, and junior practitioners. Ultimately, the paper contends that the profession is not facing obsolescence but rather a process of functional reconfiguration. The capacity of future lawyers to remain competitive will depend upon their ability to synthesise technological capability with intrinsically human forms of judgement, supported by reimagined, collaborative models of professional formation.

Keywords: artificial intelligence; legal profession; legal education; professional training; early-career lawyers; digital transformation; legal technology; emotional intelligence; legal judgement; apprenticeship model; regulatory supervision; professional competence; legal innovation; future of law.

Introduction

As a young ambitious lawyer at the beginning of my legal career, I have been particularly interested in understanding what would set me apart on the market as a specialist and why the law firms should choose me to invest in my development so that in my professional future I could make that choice myself. This question has become even more pressing in the context of accelerating digitalisation and during the recent turbulent years of the spread of artificial intelligence, which are reshaping both the profession and the skills expected from junior lawyers.

Using my own example of searching for my unique legal strengths, this essay aims to harmonise which competencies a modern young lawyer must possess in order to “stay afloat” and remain competitive; how to cultivate such expertise when law firms are increasingly reluctant to finance the training of first-year associates; how to preserve and at the same time

* roksolanamalyniak@gmail.com; Taras Shevchenko National University of Kyiv, Faculty of law, Volodymyrska street, 60, Kyiv, 01033 Ukraine

modify the forms of such practices; and how the funding model for legal training may need to be rethought.

Humanity has always been prone to predicting the apocalypse. Fortunately, this is the part of the argument that remains theoretical. Every era has awaited its own end of the world, from the biblical flood to the mythical 2012 as the last day of civilisation. We have repeatedly played out scenarios in our minds of how it will all end: a comet will wipe us off the face of the Earth, man-made disasters will occur, invisible viruses will destroy humanity. And every time the prophecy failed to come true, we quickly switched to a new potential horror. This is not about collective paranoia; it is a feature of the human psyche, whereby our expectations of future events can be distorted by cognitive biases. This phenomenon was first explored by Harvard University psychology professor Dan Gilbert in his theory of affective bias, published in an article titled “Immune Neglect: A Source of Durability Bias in Affective Forecasting”.¹ According to Gilbert, we tend to overestimate the severity and duration of future disasters because our minds focus on the most vivid and frightening scenarios. This same psychological pattern explains the panic that grips us during the rapid development of artificial intelligence, especially in the legal field.

1. Chapter: From Routine to Reasoning: How AI Reshapes Making of a Lawyer

a. The Transformation of Early Legal Training

The spread of artificial intelligence is radically transforming the traditional trajectory of professional development for lawyers. The model, which for decades was based on gradually gaining experience by performing routine tasks under the supervision of senior colleagues, is collapsing. It was precisely these tasks, such as initial review of documents, basic legal research, preparation of drafts, that created the learning environment in which legal thinking was formed. Today, most of these functions are performed more efficiently by artificial intelligence systems, depriving young lawyers of opportunities that previously formed the foundation of professional expertise.

This creates a profound crisis in legal education. If routine tasks are no longer a platform for gaining experience, fundamental questions arise: how can legal judgement be

¹ Gilbert, D. T., E. C. Pinel, T. D. Wilson, S. J. Blumberg, and T. Wheatley, “Immune Neglect: A Source of Durability Bias in Affective Forecasting,” *Journal of Personality and Social Psychology* 75, no. 3 (1998): 617-638.

formed without regular analysis of legal issues? How can key skills be mastered without access to consistent practice?

As a young lawyer observing the transformation of the profession, I inevitably wonder what basic competencies are necessary today to remain competitive and attractive to law firms in the future. At the same time, law firms themselves face an equally difficult task: how to rethink and reform their training models so that, on the one hand, they do not lose financial stability and, on the other hand, they ensure the training of specialists capable of working in a digitalised and technology-oriented legal services market.

Law schools significantly exacerbate the structural imbalance between the theoretical and practical components of professional training, producing graduates with a high level of doctrinal knowledge but minimal practical skills. As a result, new lawyers enter the profession with a thorough understanding of legal doctrine, but without sufficient experience in interacting with clients, decision-making skills in situations of uncertainty, and the ability to apply norms to real-life circumstances. Traditionally, law firms have compensated for this gap through years of practice under the supervision of senior lawyers and partners, but this model of training is costly, resource-intensive, and often characterised by inconsistency in mentoring standards and training quality. The analytical report “Future Worlds 2050: Images of the Future Worlds Facing the Legal Profession 2020–2030”, prepared by the British Law Society, outlines a number of megatrends that will shape the future landscape of legal practice.² Among them, the growing importance of digital literacy and legal technology competence stands out. These skills are no longer optional. They are gradually forming a new “minimum standard” for professional qualification as a lawyer. Whereas technological awareness was previously seen as a useful addition to traditional legal knowledge, today it is a key prerequisite for professional relevance. Therefore, for me, mastering automated systems for analysing and predicting legal decisions is a basic requirement, which I am fulfilling by completing the relevant certification programme at our university. Along with technological skills, in my opinion, soft skills are becoming critically important, particularly emotional intelligence, communication flexibility in working with clients, and strategic thinking. In a world where algorithms can analyse millions of legal documents in seconds, a lawyer must be more than just an intermediary between the client and the law; they must be a facilitator of complex negotiations, a mediator in conflicts, and a strategist in matters of legal regulation. The rule of law will become a real challenge in the future, as the balance between technological progress and justice will depend on lawyers. It is

² Law Society of England and Wales, *Future Worlds 2050: Images of the Future Worlds Facing the Legal Profession 2020–2030* (2021).

my deep conviction that what kind of lawyer you are is determined first and foremost by what kind of person you are. And what is even more significant – AI doesn’t replace good lawyers. It makes them unstoppable.

b. The New Apprenticeship: Blending AI Simulation with Human Supervision

Imagine we are young lawyers who do not position themselves as an “AI-resistant” specialist, but have a high level of emotional intelligence, and aspires to start a career in a legal department. Obviously, such skills make a candidate attractive to an employer, but it is the employer who must implement appropriate training programmes that will allow young lawyers to remain useful and functionally relevant for them.

In the context of the rapid transformation of the legal profession, I see a need for a radical rethinking of both legal education and the mechanisms for training young lawyers. The first thing that comes to my mind is innovative initiatives such as the Kennedys - Spellbook Programme, which is a prime example of how law firms are trying to rethink training in an environment where AI is replacing a significant portion of traditional “entry-level” work.³ The programme demonstrates a new training format – simulation scenarios and AI-supported exercises designed to develop legal writing, professional thinking and adaptability. Equally important, Spellbook's algorithms create structured feedback loops that seem to replicate traditional mentoring by senior colleagues. I see potential in this.

However, such innovation does not exempt one from the need to critically correlate such programmes with regulatory expectations for legal education, in particular with the standards of the Solicitors Regulation Authority (SRA), for which the principle of “effective supervision” is central. The SRA clearly states that effective supervision involves regular discussions, direct human feedback and training under the guidance of experienced practitioners with at least three years of qualified practice.

Therefore, in my opinion, the future model for the development of young lawyers should combine innovative simulation tools with structured human mentoring that preserves the standards of professional responsibility and legal judgement.

³ Kennedys, “Kennedys Partners with Spellbook to Launch Groundbreaking Legal Training Programme for the AI Era,” October 1, 2025.

2. Chapter: Shared Responsibility for an AI-Enabled Legal Profession

a. Involvement and Responsibilities of Key Stakeholders

The transition to an AI-enabled legal services market redistributes responsibilities across all core stakeholders – law firms, clients, associates, and legal regulators. Law firms must adopt proactive innovation responsibilities: developing structured training programmes and appointing senior practitioners capable not only of supervising but also leading AI integration efforts to the junior-level. Clients, meanwhile, are no longer passive consumers of legal services but active drivers of technological sophistication; they demand that outside counsel match the digital literacy of in-house teams and reward those who deliver AI-enhanced outcomes. Associates bear responsibility for mastering new competencies, such as AI literacy, cross-functional communication and adaptive legal reasoning. Regulators (SRA, for instance) must articulate updated training standards that integrate safe AI use while safeguarding the core principle of effective human supervision.⁴

b. Threats and Opportunities in the AI-Driven Transformation

The legal profession faces a dual landscape defined by both existential threats and unprecedented opportunities. Among the key threats is the collapse of the traditional leverage model, which once depended on monetising junior-level work now performed faster and more accurately by AI. This erodes firm profitability, destabilises career progression pathways, and risks creating a “lost generation” of lawyers deprived of foundational practice skills.

Additionally, AI adoption exposes firms to ethical, regulatory and operational risks, including over-reliance on unproven systems, threats to data security, and difficulty ensuring compliance with supervision requirements. Yet alongside these threats are transformative opportunities. AI allows for unprecedented efficiency, scalability, and consistency in legal work, enabling firms to focus human expertise on higher-value, judgement-based tasks. It opens pathways for new pricing models based on outcomes rather than hours.

⁴ McKeen, R., “Excellence or Extinction: Why the Legal Industry’s AI Revolution Will Destroy the Middle,” JD Supra, June 20, 2025.

3. Chapter: Financing the Future of Lawyers Training

In the context of the proposed training model, the question of funding arises, and, in my opinion, the distribution of costs should reflect the real interest of each participant in the process. Since the traditional approach, whereby clients effectively paid for the training of junior lawyers, no longer works, it is logical that the main financial burden should be borne by law firms and legal departments, as they are the ones who benefit in the long term from trained professionals.

At the same time, the role of the individual lawyer in co-financing their professional development should not be overlooked. In a market increasingly defined by differentiation and specialisation, junior practitioners have a direct interest in enhancing their own employability and adaptability. Targeted investments in specialised certifications, technological competencies, and interdisciplinary skills can serve as a signal of commitment and foresight, while also mitigating the risk of professional obsolescence. However, such individual contributions should complement, rather than replace, institutional investment, in order to avoid reinforcing inequalities in access to professional advancement.

Clients, for their part, may continue to play a contributory, albeit more indirect, role in the financing of legal training. Rather than bearing the cost of inefficiencies through billable hours, clients can engage in collaborative initiatives that enhance the overall quality and innovation of legal services. This may include participation in joint pilot projects, co-development of AI-enabled solutions, or support for training frameworks that align legal expertise with client-specific needs. In this sense, client involvement shifts from passive subsidisation to active partnership.

Ultimately, the future of legal training funding should be conceptualised as a model of shared, but asymmetrical, responsibility. Law firms provide the institutional foundation and bear the primary financial burden; individual lawyers invest in their own professional capital; and clients support innovation-driven training ecosystems that yield mutual benefits. Such a model not only reflects the economic realities of an AI-driven legal market but also promotes a more sustainable, equitable, and forward-looking approach to the formation of the next generation of lawyers.

Conclusion

In reflecting on what it takes to remain competitive as a young lawyer, it becomes clear that the legal profession is not approaching obsolescence but is instead undergoing a

fundamental process of transformation. What is changing is not the relevance of lawyers, but the nature of the skills and pathways through which professional value is created. In this context, the competencies that will keep young practitioners “afloat” must be understood as a careful synthesis of technological literacy and distinctly human judgement - an ability not only to work alongside intelligent systems, but to critically assess, contextualise, and ultimately take responsibility for their outputs.

These competencies, however, cannot emerge within traditional training frameworks that are increasingly misaligned with the realities of an AI-driven legal market. They require consciously redesigned models of professional development, grounded in simulation-based learning, meaningful and accountable supervision, and a shared commitment among law firms, clients, and lawyers themselves to invest in long-term capability rather than short-term efficiency.

At the same time, the redistribution of the financial burden of training reflects a deeper shift in the economics of legal services. As clients move away from subsidising inefficiencies, investment in human capital becomes an internal and strategic priority for legal institutions, complemented by the individual efforts of lawyers to remain adaptable and competitive. Yet, the value of such investment extends beyond individual career outcomes. It serves a broader professional function: preserving the quality, ethical integrity, and social legitimacy of legal practice in a rapidly changing environment.

Bibliography

1. Gilbert, D. T., Pinel, E. C., Wilson, T. D., Blumberg, S. J., & Wheatley, T. (1998). Immune neglect: A source of durability bias in affective forecasting. *Journal of Personality and Social Psychology*, 75(3), 617-638.
2. Kennedys. (2025, October 1). *Kennedys partners with Spellbook to launch groundbreaking legal training programme for the AI era*. Kennedys.
3. Law Society of England and Wales. (2021). *Future worlds 2050: Images of the future worlds facing the legal profession 2020-2030*. The Law Society.
4. McKeen, R. (2025, June 20). *Excellence or extinction: Why the legal industry's AI revolution will destroy the middle*. JD Supra.

ADAPTATION OF LAWYER INCOMPATIBILITY RULES TO EU STANDARDS: UKRAINE'S EUROPEAN INTEGRATION DIMENSION

OLEKSANDR GRUZDIEV*

Abstract

Against the backdrop of the ongoing war and Ukraine's resolute pursuit of European integration, this article provides a comprehensive comparative legal analysis of the restrictions and incompatibility requirements associated with acquiring the status of a lawyer (advocate) in Ukraine and selected European Union member states. Ensuring the independence, integrity, and ethical standards of the legal profession necessitates strict criteria for admission and practice. The study examines statutory limitations, including prohibitions on concurrent employment in civil service, commercial activities, or law enforcement bodies, as well as moral and legal disqualifications such as prior criminal convictions or disciplinary offenses. By analyzing the regulatory frameworks of France and Germany alongside international guidelines, the research proposes actionable legislative solutions to mitigate corruption risks and address the "revolving doors" phenomenon within the Ukrainian Bar. Keywords: Status of a lawyer, Incompatibility requirements, Comparative legal analysis, Legal profession, European Union legislation.

Keywords: lawyer status, incompatibility requirements, comparative legal analysis, legal profession.

Introduction

The legal profession is foundational to upholding the rule of law and ensuring the proper administration of justice. Its effectiveness inherently depends on strict adherence to independence, professional integrity, and the avoidance of conflicts of interest. Consequently, statutory restrictions and incompatibility rules act as essential safeguards to prevent the merging of public authority with private legal practice and mitigate corruption risks. A comparative legal analysis highlights the intersection between national frameworks and international standards. Documents such as the UN Basic Principles on the Role of Lawyers and the CCBE Charter establish fundamental baselines for professional independence. Within the EU, states like France (Decree No. 91-1197) and Germany (BRAO) have developed nuanced models that address professional incompatibilities and the "revolving doors" phenomenon, offering valuable insights into balancing the free choice of profession with the integrity of the Bar. In Ukraine, the Bar's legal framework is undergoing dynamic transformation driven by European integration and anti-corruption reforms. While the Constitution (Article 131-2) and the Law "On the Bar and Legal Practice" establish the profession's foundation, their practical application regarding concurrent civil service or law enforcement roles has generated significant debate. This is evidenced by landmark jurisprudence, such as the Supreme Court's Grand Chamber

* Aleksandr Gruzdiev : aleksandr.gruzdiev@gmail.com; First-year master's student at the Institute of Law, Taras Shevchenko National University of Kyiv (Ukraine)

decision (Case No. 826/9606/17) regarding the impermissibility of an active prosecutor holding an advocate's certificate. The aim of this study is to conduct a comparative legal analysis of the restrictions and incompatibility requirements associated with acquiring the status of a lawyer in Ukraine and selected EU member states, with the primary goal of finding legislative solutions to overcome the "revolving doors" problem and align the national legal framework with European standards.

Chapter 1. The Problem of "Revolving Doors" and Corruption Risks in the Ukrainian

Bar. The "revolving doors" phenomenon is defined as the practice of the private sector hiring personnel who previously worked in the public sector, which applies not only to ordinary employees but also to senior executives and political leaders. The primary advantage of this practice for the private sector is that the hired individuals offer skills, resources, and competencies that are useful for gaining access to decision-makers, as the wealth of contacts and connections acquired during public service can prove to be a valuable asset. However, from a theoretical perspective, the unregulated transition of public officials to the private sector poses a threat to the democratic system, as it can undermine institutional integrity and lead to favoritism. Empirical studies on the consequences of "revolving doors" prove that organized interest groups that hire former officials (so-called "revolvers") gain significant advantages in accessing the formation of the political agenda at early stages. In particular, the greatest benefit from engaging former civil servants is derived by firms engaged in contract lobbying, which possess the lowest level of democratic legitimacy.

In Ukraine, forming an independent Bar faces the challenge of effectively managing conflicts of interest and preventing this "revolving doors" phenomenon. The uncontrolled transition of officials to legal practice poses a threat to the democratic system because it undermines institutional integrity and leads to favoritism. Despite the established rules in the Law of Ukraine "On the Bar and Legal Practice", the current access procedure to the profession has a number of vulnerabilities. Specifically, the current requirements for candidates lack a clearly defined criterion of ethical and moral fitness, allowing individuals with questionable reputations to claim the status of a lawyer. Qualification exams are often subjective and fail to fully verify a candidate's readiness to adhere to high ethical standards. The six-month traineeship often turns into a formality, especially when combined with other activities. The experience of EU countries indicates the need to extend this period to one to three years for real specialist training.

The problem of "revolving doors" is particularly acute for law enforcement officers. For a long time, the possibility of active prosecutors undergoing the admission procedure to the Bar was debatable. The attempt to obtain a lawyer's certificate while holding the position of a prosecutor was recognized as deliberately unlawful, as simultaneous compliance with two different oaths is impossible due to the contradictory principles of these professions. The statutory three-day suspension rule applies only to existing lawyers who take on incompatible roles, not to applicants, marking an important step in resolving the "revolving doors" problem. Without appropriate time restrictions, former judges, prosecutors, or investigators can immediately begin to "commercialize" their status and connections in private practice, which creates uncompetitive advantages and undermines trust in justice.

To combat these risks, anti-corruption legislation plays a pivotal role. For a long time, the foundational document in this area was the Anti-Corruption Strategy for 2021-2025. This document acknowledged that legislative flaws and the lack of effective risk-oriented mechanisms for detecting conflicts of interest limit the possibilities of minimizing corruption. To ensure the continuity of the process, a new Anti-Corruption Strategy for 2026-2030 will soon be adopted, which will continue the systematic fight against corruption and bring our legislation and practices closer to EU standards. At the legislative level, the "cooling-off period" mechanism in Ukraine is implemented in Article 26 of the Law of Ukraine "On the Prevention of Corruption". It establishes clear restrictions following the termination of activities related to the performance of functions of the state or local self-government. Specifically, former public servants are prohibited for one year from the date of dismissal from entering into employment agreements or engaging in entrepreneurial transactions with private-law legal entities if, during their last year in office, they exercised control over them. Furthermore, Article 26 contains direct restrictions on the representation of interests, prohibiting such individuals, for one year, from representing the interests of any person in cases where the opposing party is the body in which they worked at the time of termination of their service. However, in practice, these norms are often ignored. Most of the prohibitions and restrictions established by anti-corruption legislation are not backed by adequate measures of legal liability, making their application optional. Thus, the institution of incompatibility in Ukraine requires reforming not only through formal restrictions, but also through the introduction of real "cooling-off" periods and strengthening ethical filters at the stage of entry into the profession.

Chapter 2. International Standards and European Requirements for Lawyer Independence. In a modern democratic society, the legal profession requires strict guarantees

of independence and the avoidance of conflicts of interest to uphold the rule of law. To prevent improper state interference and preserve public trust, a comprehensive system of international standards governs admission criteria and incompatibility rules. International frameworks unequivocally establish that lawyers must operate free from state interference. The UN Basic Principles on the Role of Lawyers and the Council of Europe's Recommendation No. R (2000) 21 mandate that decisions regarding admission to the profession must be made by independent bodies and that bar associations must be strictly self-governing. Similarly, the CCBE Charter of Core Principles of the European Legal Profession outlines ten common principles necessary for the proper administration of justice. The Charter emphasizes a lawyer's absolute independence from the state and powerful interests, as well as independence from the client to ensure the quality of work. This directly dictates incompatibility requirements: a lawyer must strictly avoid conflicts of interest and maintain the honor and dignity of the profession, as only strong professional self-regulation can guarantee such independence from the state.

To minimize these risks, international organizations have developed corresponding standards. According to the OECD Guidelines for Managing Conflict of Interest in the Public Service, a conflict of interest arises between the public duty and private interests of a public official when the latter could improperly influence the performance of their official duties. The OECD emphasizes that negotiating future employment for a public official prior to leaving public office is already considered a conflict of interest situation. In the European Union, the application of post-employment restrictions, or so-called "cooling-off periods," is an established practice. As noted in European Parliament studies, the duration of such periods varies: from six months for former Members of the European Parliament to two years for members of the European Commission or the European Court of Auditors, and up to three years for the President of the European Commission. The Group of States against Corruption (GRECO) also underscores the necessity of introducing cooling-off periods and providing guidance to public officials to prevent the use of privileged public administration knowledge for the benefit of clients or employers.

The European Court of Human Rights (ECtHR) case law dictates that restrictions on legal practice—such as incompatibility rules—fall under Article 8 of the ECHR (right to respect for private life) and must be lawful, foreseeable, and proportionate. In *Bigaeva v. Greece*, the authorities denied a bar exam to a foreign national after she had already successfully completed a mandatory traineeship. The ECtHR found a violation of Article 8, noting that by allowing the traineeship, the authorities had created legitimate professional expectations. The sudden refusal arbitrarily shattered her professional career. Similarly, in *Mateescu v. Romania*, the Bar

Association forced a qualified doctor to choose between medicine and law, relying on vague rules about the "dignity of the profession". The ECtHR found this interference arbitrary and unforeseeable, as national law did not explicitly prohibit medical practice for lawyers, thus violating Article 8. Ultimately, while states and Bar self-government bodies are endowed with powers to regulate the legal profession, incompatibility rules must be clear, proportionate, and strictly serve the public interest. They must prevent conflicts of interest without becoming arbitrary obstacles to individual professional rights.

For Ukraine, implementing these high European standards acquires critical significance in the context of its EU candidate status. A strong, independent, and ethically impeccable Bar is a mandatory prerequisite for a fair judicial system, which is a key requirement of European integration (within the "Fundamentals" negotiating cluster). Therefore, adapting Ukrainian legislation—specifically by clearly defining incompatibility, mitigating "revolving door" risks between public service and private practice, and ensuring genuine self-regulation—is not merely an internal reform. It is a strategic step toward harmonizing Ukraine's justice system with EU values and fulfilling its European integration commitments. Furthermore, recognizing the importance of international alignment, Ukraine officially signed the European Convention on the protection of the profession of lawyer on March 9, 2026, becoming the 28th state party to the treaty. The document establishes uniform international standards for the independence of lawyers and now awaits ratification by the Verkhovna Rada of Ukraine to fully integrate these protections into national law.

Chapter 3. EU Experience: Models of Incompatibility Restrictions (France and Germany). In the context of Ukraine's European integration aspirations and the need to reform the institution of the legal profession, a comparative analysis of European standards is of key importance. Ensuring the independence, integrity, and ethical standards of the legal profession requires the establishment of clear criteria for admission to practice and strict rules of incompatibility. This chapter examines the legislative restrictions on legal practice using the examples of two leading legal systems of the European Union: France and Germany. The analysis focuses on statutory restrictions, moral and legal disqualifications, as well as prohibitions on holding concurrent civil service positions or engaging in commercial activities. The French model of regulating legal practice, the fundamental principles of which are laid down in Law No. 71-1130 of December 31, 1971 (Loi n° 71-1130) and detailed in corresponding decrees, is based on a fundamental principle: the legal profession is a free and independent profession (Art. 1 of the Law). This principle is enshrined in the lawyer's oath,

which requires the lawyer to perform their duties with dignity, conscience, independence, probity, and humanity (Art. 3 of the Law). The rules of incompatibility and restrictions on access to the profession in France are primarily of a moral, ethical, and legal nature. Pursuant to Article 11 of Law No. 71-1130, access to the legal profession is strictly prohibited for persons who fall under specific disqualification criteria. A criminal conviction for actions contrary to honor, probity, or good morals constitutes an absolute barrier. Disqualification also applies to being subject to disciplinary or administrative liability resulting in dismissal, striking off the register, or revocation of a license. Furthermore, being declared bankrupt (*faillite personnelle*) or being subject to other sanctions in the field of economic insolvency prevents entry into the profession. A distinct feature of the French model is its flexible approach to organizational forms of practice. Article 7 of the Law allows lawyers to work as employees (in the status of a salaried lawyer) or as independent associates (*collaborateur libéral*). However, the law strictly prohibits any terms in an employment contract that could restrict the lawyer's freedom, jeopardize their independence, or compel them to violate professional secrecy. A salaried lawyer is not subordinate to the employer regarding their legal position, which ensures the avoidance of conflicts of interest and maintains the incompatibility between the status of a lawyer and the status of a traditional employee in the commercial sector.

The German model, regulated by the Federal Lawyers' Act (*Bundesrechtsanwaltsordnung* - BRAO), conceptually differs by its high degree of detailed statutory restrictions. According to §§ 1 and 2 of the BRAO, a lawyer is an independent organ of the administration of justice (*unabhängiges Organ der Rechtspflege*) engaged in a free profession that is not considered a commercial trade (*Gewerbe*). German legislation establishes strict incompatibility rules as early as the stage of admission to the profession (*Versagung der Zulassung*). Pursuant to § 7 of the BRAO, admission to the bar must be denied in the event of holding the position of a judge, civil servant, or professional soldier, except when these duties are performed on an honorary (unpaid) basis. Admission is also denied for engaging in activities incompatible with the legal profession (particularly commercial activities) or activities that could compromise trust in the lawyer's independence. Financial collapse or insolvency (*Vermögensverfall*) is treated severely, as financial instability is considered a threat to clients' interests and the lawyer's independence. Having criminal convictions, loss of the right to hold public office, or prior disbarment are also strict grounds for refusal. The German legislature pays special attention to avoiding conflicts of interest. § 45 of the BRAO (*Tätigkeitsverbote*) explicitly prohibits a lawyer from acting in a matter if they previously participated in it as a judge, public prosecutor, civil servant, notary, or mediator. This is a classic manifestation of the rule of temporal incompatibility of statuses.

An interesting aspect of the German experience is the regulation of the status of an "in-house lawyer" (Syndikusrechtsanwalt). Under §§ 46 and 46a of the BRAO, lawyers may be employed by non-legal enterprises, but their work is recognized as legal practice only subject to strict requirements: professional independence, autonomous decision-making, and the absence of employer instructions regarding the legal assessment of situations. At the same time, such lawyers are significantly restricted in their right to represent their employer in civil or criminal courts, which prevents the blurring of the line between an independent defense counsel and a dependent employee.

A comparative analysis of the French and German approaches demonstrates a common goal: protecting the independence of the lawyer as a guarantee of the rule of law. However, the regulatory instruments differ: France places emphasis on broad moral and ethical caveats and internal guarantees of independence across all forms of collaboration, whereas Germany utilizes a clearly articulated list of incompatible positions (especially in the civil service sector) and strict financial criteria for admission to the profession. Both models offer effective mechanisms that can be implemented into Ukrainian legislation to strengthen the institutional capacity of the national legal profession.

Chapter 4. Ways of Adaptation and Legislative Solutions for Ukraine. Drawing upon these European experiences, the following recommendations are proposed to reform and enhance the legislative framework governing the legal profession in Ukraine. The primary focus must be on creating a structured, legally binding mechanism that eliminates the blurred lines between public service and private practice.

First, Regulation of the "Revolving Doors" Phenomenon and Temporal Incompatibility: To mitigate corruption risks and prevent the exploitation of insider connections, Ukrainian legislation should implement strict "cooling-off" periods or temporal incompatibility rules for former judges, prosecutors, law enforcement officers, and civil servants transitioning into private legal practice. The adoption of specific post-employment restrictions, mirroring the OECD and EU standards, will guarantee that former public officials cannot immediately commercialize their state influence. This requires robust enforcement mechanisms linked to disciplinary and administrative liability to ensure the cooling-off period is respected.

Second, Introduction of a Framework for Corporate Advocates (In-house Counsel): Ukraine should adopt a nuanced regulatory model for in-house lawyers seeking to acquire or maintain advocate status. Guided by the German Syndikusrechtsanwalt concept, legislation should

permit corporate employment for advocates only if their functional and professional independence from the employer is statutorily guaranteed. To prevent conflicts of interest and maintain impartiality, such corporate advocates should face specific restrictions regarding court representation of their employers in certain categories of cases. This model would resolve the current legal ambiguities surrounding the employment of advocates by commercial entities, preserving the core tenets of the profession while acknowledging modern market realities.

Third, Strengthening Employment Safeguards for Advocates: Taking into account the French model (e.g., *collaborateur libéral* and salaried lawyers), Ukrainian law should mandate that any employment or partnership agreements involving advocates include explicit clauses guaranteeing the advocate's absolute independence in determining legal strategy. The law must expressly prohibit any employer or managerial interference in the advocate's legal assessment and ensure the inviolability of attorney-client privilege within the corporate structure. Without these safeguards, the subordination inherent in an employment contract risks overriding the professional duties owed by the advocate to the client and the justice system.

Fourth, Expansion of Disqualification Criteria Based on Financial Integrity: To protect the public interest and maintain trust in the Bar, criteria for admission and grounds for license suspension in Ukraine should be expanded to include severe financial instability or personal bankruptcy (similar to the French *faillite personnelle* or the German *Vermögensverfall*). Recognizing that profound financial vulnerability can compromise an advocate's independence and ethical judgment is a critical step toward aligning with EU standards of professional integrity. A lawyer facing personal financial collapse may be susceptible to undue influence, jeopardizing the strict confidentiality and loyalty owed to their clients. By implementing these recommendations, Ukraine can significantly strengthen the institutional capacity of its Bar, ensuring that the national legal profession operates as a truly independent organ of the administration of justice, fully compliant with the principles of the European legal space.

Conclusions. The comprehensive comparative legal analysis conducted in this study underscores that strict incompatibility rules and admission restrictions are not mere administrative formalities, but fundamental safeguards designed to ensure the independence, integrity, and ethical standards of the legal profession. As Ukraine resolutely pursues its European integration trajectory, aligning the national regulatory framework for advocates with established EU standards—such as the CCBE Charter and the UN Basic Principles—is imperative for upholding the rule of law, mitigating corruption risks, and preventing the conflation of public authority with private legal practice. The examination of the French and German models reveals highly effective, albeit conceptually distinct, mechanisms for

preserving professional independence. France prioritizes moral integrity, broad ethical caveats, and the strict protection of professional secrecy within flexible employment structures. Germany, conversely, employs a highly detailed statutory approach, explicitly separating legal practice from civil service and commercial activities, while meticulously regulating the temporal conflicts of interest (the "revolving doors" phenomenon) and the unique status of in-house counsel. By implementing the proposed legislative solutions—such as mandatory cooling-off periods, strict independence criteria for corporate advocates, enhanced employment safeguards, and financial integrity assessments—Ukraine can significantly strengthen the institutional capacity of its Bar. This will ensure that the national legal profession operates as a truly independent organ of the administration of justice, fully compliant with the principles of the European legal space.

Bibliography

1. Council of Bars and Law Societies of Europe. (n.d.). *Charter of core principles of the European legal profession*.
2. Council of Europe. (2000). *Recommendation No. R (2000) 21*.
3. Council of Europe. (2026). *European convention on the protection of the profession of lawyer*.
4. European Court of Human Rights. (n.d.). *Bigaeva v. Greece*.
5. European Court of Human Rights. (n.d.). *Mateescu v. Romania*.
6. France. (1971). *Law No. 71-1130 of December 31, 1971*.
7. France. (1991). *Decree No. 91-1197*.
8. Germany. (n.d.). *Bundesrechtsanwaltsordnung* [Federal lawyers' act].
9. Organisation for Economic Co-operation and Development. (n.d.). *Guidelines for managing conflict of interest in the public service*.
10. Supreme Court of Ukraine, Grand Chamber. (2021). *Resolution of April 14, 2021 (Case No. 826/9606/17)*.
11. Ukraine. (n.d.). *Anti-corruption strategy for 2021-2025*.
12. Ukraine. (n.d.). *Anti-corruption strategy for 2026-2030*.
13. Ukraine. (n.d.). *Constitution of Ukraine*.
14. Ukraine. (n.d.). *Law of Ukraine "On the bar and legal practice"*.
15. Ukraine. (n.d.). *Law of Ukraine "On the prevention of corruption"*.
16. United Nations. (n.d.). *Basic principles on the role of lawyers*.

THE PROBLEM OF ENVIRONMENTAL POLLUTION DUE TO THE CONSEQUENCES OF HOSTILITIES (ASPECT OF CIVIL LIABILITY)

ANNA PAVLIUK *

Abstract

The Russian invasion of Ukraine in a short period of time has created a significant amount of environmental risks and real problems. The facts available today and the position of the Ukrainian public make the issue of providing compensation for environmental damage as a result of the Russian Federation's war in Ukraine relevant. However, certain complications may arise in this issue in the future, since the definition of "environmental damage" is still debatable not only among Ukrainian scientists, but is also absent at the level of national legislation. Given the complex and ineffective practice of applying the norms of international humanitarian law (in particular, regarding environmental protection), it is logical to review the above situation. In particular, to bring the conceptual range of national environmental legislation in line with the content of international acts. The actions of the military-political leadership and the armed forces of the Russian Federation, which cause damage to the environment within Ukraine and beyond its borders, constitute a violation of the norms and regulations of international law, and have the characteristics of a number of crimes. They declare that the military-political leadership of the Republic of Belarus also commits and is an accomplice in criminal actions against the Ukrainian environment. The Republic of Belarus contributes to the commission of crimes against the environment, in particular, by providing territory to the Russian Federation for the implementation of the Russian Federation's aggression against Ukraine since 2014. It is noted that the actions of the military-political forces of the Russian Federation during military operations against Ukraine, including those actions that cause irreparable damage to the Ukrainian environment, must be interpreted as a violation of the provisions, in particular: Protocol Additional to the Geneva Conventions (1949) relating to the Protection of Victims of International Armed Conflicts (hereinafter referred to as Protocol I), IV Convention on the Laws and Customs of War on Land and its annex: Regulations on the Laws and Customs of War on Land, Convention on the Prohibition of Military or Any Other Hostile Use of Means of Influence on the Natural Environment, international customary humanitarian law (including principles 9, 13 enshrined by the International Law Commission (ILC) in the codification of customary law "Protection of the Environment in Armed Conflict" (2022)).

Key words: armed conflict, environment, civil liability, aggressor, legislation.

Introduction

In Ukraine, the Russian army is operating according to the "scorched earth" tactic. Everything that their weapons can reach is being destroyed, destroyed: residential buildings and industrial facilities, protected areas, water pipelines, power plants... People are suffering, the natural resources of the Ukrainian land are being destroyed. An analogue of the crime of genocide in relation to the environment is ecocide, the destruction of the environment, which is equal to an ecological catastrophe. The insidious and immoral Russian invasion of Ukraine in a short period of time has created a significant amount of environmental risks and real problems.

* 5th year student of the Faculty of Law Yuriy Fedkovych Chernivtsi National University pavliuk.anna.yu@chnu.edu.ua; Scientific advisor Oksana Kiriak candidate of legal sciences, associate professor of the Department of Private Law Yuriy Fedkovych Chernivtsi National University, Ukraine

In connection with these environmental crimes, dangers are increasing for the civilian population not only of Ukraine, but also for the European continent in general ¹.

1. Statistics

It should be noted that since the beginning of the large-scale Russian aggression, the Operational Headquarters of the State Ecological Inspectorate of Ukraine recorded 245 crimes against the environment during the first month of the aggression alone. Unfortunately, the list of Russian crimes is currently open - it will be possible to talk about the overall indicators of the damage caused to Ukraine by the war only after its completion. However, the data available today already prove the criminal nature of Russia's actions².

The Ministry of Environmental Protection and Natural Resources of Ukraine primarily draws attention to:

- 1) damage to nuclear installations, threats to nuclear and radiation safety;
- 2) attacks by the invading Russian army on infrastructure and industrial facilities (oil depots, industrial enterprises, transport infrastructure nodes) and, as a result, toxic pollution of the environment;
- 3) environmental pollution during direct hostilities (fuel spills, pollution from destroyed military equipment and weapons, unexploded missiles and air bombs);
- 4) destruction of Ukrainian ecosystems (including protected ones) during hostilities;
- 5) damage to water supply, drainage and communications systems, as well as destruction of marine ecosystems ³.

Ukrainian society is mostly aware of the environmental problems that arise as a result of the actions of the Russian invaders. In particular, the Kyiv International Institute of Sociology has established that over 60% of Ukrainians are interested in and know what environmental damage the war is causing to Ukraine. The sociological data provided further indicate the need for the state to develop mechanisms for obtaining appropriate compensation from the aggressor state, because this is obviously what the Ukrainian people would prefer. The environmental damage from the aggressive actions of the Russian occupiers has both environmental (damage

¹ Russian Crimes Against the Environment: From War to Ecocide: Yurydychna Gazeta, Crimes, Environment, Ecocide, Borys Indychenko, Nataliya Hendel URL: <https://yur-gazeta.com/interview/rotskyi-zlochyni-proti-dovkillya-vid-voennih-do-ekocidu.html>

² Digest of Key Consequences of Russian Aggression for the Ukrainian Environment for May 11-18, 2022. Ministry of Environmental Protection and Natural Resources of Ukraine. URL: <https://mepr.gov.ua/news/39218.html> (accessed 03/15/2026)

³ Key Consequences for the Environment of Russian Aggression in Ukraine Feb. 24 - Mar. 31, 2022. Ministry of Environmental Protection and Natural Resources of Ukraine. URL: <https://mepr.gov.ua/news/39097.html> (accessed 15.03.2026).

to the environment) and economic (damage to resources) components. In view of the above, the issue of ensuring compensation for environmental damage resulting from the Russian Federation's war in Ukraine is becoming more relevant ⁴.

2. Violation of international law

It is a well-known fact that the actions of the military-political leadership and the armed forces of the Russian Federation, which cause damage to the environment within Ukraine and beyond its borders, constitute violations of the norms and regulations of international law and have the characteristics of a number of crimes. The military-political leadership of the Republic of Belarus also commits and is an accomplice in criminal actions against the Ukrainian environment. The Republic of Belarus has been facilitating the commission of crimes against the environment, in particular, by providing territory to the Russian Federation for the implementation of the Russian Federation's aggression against Ukraine since 2014. The actions of the military-political forces of the Russian Federation during the military operations against Ukraine, including those actions that cause irreparable damage to the Ukrainian environment, must be interpreted as a violation of the provisions, in particular: Protocol Additional to the Geneva Conventions (1949), relating to the Protection of Victims of International Armed Conflicts (hereinafter referred to as Protocol I) ⁵, IV Convention on the Laws and Customs of War on Land and its annex: Regulations on the Laws and Customs of War on Land⁶, Convention on the Prohibition of Military or Any Other Hostile Use of Means of Influence on the Natural Environment, customary international humanitarian law (including principles 9, 13 enshrined by the International Law Commission (ILC) in the codification of customary law "Protection of the Environment in Armed Conflict" (2022)⁷).

3. Ukrainian legal regulation

Unfortunately, the Law of Ukraine "On Environmental Protection" does not disclose the meaning of the concept of "environmental damage". Even Articles 68-70 of Section XV

⁴ Barsukova O. Radiation and mines: what environmental problems caused by war concern Ukrainians? Poll. Ukrainian Pravda. URL: <https://mepr.gov.ua/news/39218.html> (accessed 15.03.2026).

⁵ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) as amended on 30.11.93: Protocol of the United Nations Organization of 30.11.1993. URL: https://zakon.rada.gov.ua/laws/show/995_911#Text (accessed 15.03.2026).

⁶ IV Convention on the Laws and Customs of War on Land and its Annex: Regulations on the Laws and Customs of War on Land: Convention Ukraine of 18.10.1907. URL: https://zakon.rada.gov.ua/laws/show/995_222#Text (access date: 15.03.2026).

⁷ Convention on the Prohibition of Military or Any Hostile Use of Means of Environmental Impact: Convention Org. United Nations of 18.05.1977: as of 5 Oct. 1978 URL: https://zakon.rada.gov.ua/laws/show/995_258#Text (access date: 15.03.2026).

“Liability for Violation of Environmental Protection Legislation” of the said Law refer to violations of environmental legislation, define the grounds for liability for such violations and do not say a word about environmental damage, in particular as a result of military actions⁸.

In turn, it is worth paying attention to the need for comprehensive use of international and national law. In particular, the application of relevant provisions of the Criminal Code of Ukraine in the process of bringing to justice persons guilty of causing environmental damage. At the same time, justice at the national level must be carried out in compliance with high standards of the rule of law and legality and international standards of justice. One of the key elements of effective bringing to justice those guilty of causing environmental damage in conditions of armed conflict is documentation, collection of evidence and calculation of the amount of damage. This process requires significant financial and human resources, must be carried out in a timely, complete and in accordance with the standards of evidence under international law. As of now, the damage caused to the Ukrainian environment is not fully and properly recorded, which must be immediately corrected, primarily through the activation and coordination of the efforts of responsible state bodies and the involvement of international assistance.

No effective international mechanism has yet been created to stop or minimize damage caused to the environment during the war. At the national level, measures are also not being taken to minimize or prevent damage caused to the environment during the war in Ukraine.

4. International legal regulation

Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability for the prevention and remedying of environmental damage defines the term “environmental damage”. In particular, Article 2 of Directive 2004/35/EC defines environmental damage as damage to protected species and natural areas, in particular any damage that significantly affects the establishment or maintenance of a favourable conservation status of such natural areas or species. It is specifically stated that environmental damage may affect water resources and soils. In addition, damage is understood as a negative measurable change in a natural resource or a disruption of a service associated with natural resources, which may occur directly or indirectly. Directive 2004/35/EC, in a separate annex, specifies that when

⁸ On Environmental Protection: Law of Ukraine of 25 June. 1991 No. 1264-XII (as amended and supplemented). URL: <https://zakon.rada.gov.ua/laws/show/1264-12#n714> (access date 15.03.2026).

determining environmental damage, significant damage in the initial state should be determined by using measurable data⁹.

To understand the phenomenon of environmental damage, it is appropriate to refer to the text of the Convention on Civil Liability for Damage Caused by Activities Dangerous to the Environment of 21 June 1993 (Lugano, Switzerland). In particular, Article 2, paragraph 7 of this Convention determines that damage can have four interpretations, namely:

- 1) as loss of life or personal injury;
- 2) loss of or damage to property;
- 3) loss or damage resulting from environmental deterioration other than those specified in paragraphs 1 and 2, provided that compensation for environmental deterioration shall be limited to the cost of restoration measures that have been or should be applied (excluding lost profits resulting from this deterioration);
- 4) costs of preventive measures and any loss or damage caused by preventive measures¹⁰.

By resolution A/76/L.75, adopted on 28 July 2022, the UN General Assembly:

- 1) recognized the right to a clean, healthy and sustainable environment as a human right,
- 2) noted that this right is interrelated with other rights and existing international law,
- 3) reaffirmed that the promotion of this right requires the full implementation of multilateral environmental agreements based on the principles of international environmental law,
- 4) called on States, international organizations, businesses and other stakeholders to take political decisions, enhance international cooperation, strengthen capacities and continue to share best practices with a view to increasing efforts to ensure a clean, healthy and sustainable environment for all¹¹.

Responsibility for criminal acts against the environment should be a requirement of the international community as a whole, due to the transboundary nature of the consequences of the destructive impact on the environment, in order to avoid repeated destructive impact on the environment in the course of military operations. It is especially unacceptable to commit such acts repeatedly, during armed conflicts or in peacetime, in light of the increasingly intense climate change and global natural disasters. It is worth noting that due to the difficulties in

⁹ On environmental liability for the prevention and remedying of environmental damage: Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 (as amended and supplemented). URL: https://zakon.rada.gov.ua/laws/show/994_965#Text (access date 15.03.2026).

¹⁰ Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 21.06.1993. URL: <https://rm.coe.int/168007c079> (accessed 15.03.2026)

¹¹Resolution A/76/L.75, adopted 28 July 2022: UN General Assembly URL: <https://digitallibrary.un.org/record/3982508?ln=en&v=pdf>(accessed 15.03.2026)

bringing those responsible to justice for the destruction of the environment during the unprovoked aggression of the Russian Federation against Ukraine, the process of providing full compensation for the damage caused both directly to the environment and to specific individuals is complicated, the right to a safe and clean environment has been violated. The Russian Federation must bear international legal responsibility for the destruction of the environment of Ukraine, as well as compensate for the damage caused to the environment, which will allow such damage to be minimized, damaged elements of the environment to be restored and environmental safety for the citizens of Ukraine to be ensured through the inclusion of such damage in compensation mechanisms at the international level.

According to Recommendation 2245 (2023) of the Parliamentary Assembly of the Council of Europe, it is proposed to ensure the comprehensive responsibility of the Russian Federation for aggression against Ukraine by supporting and leading the initiative to establish a special international criminal tribunal to investigate and prosecute the crime of aggression committed by the political and military leadership of the Russian Federation, and ensuring the leading role of the Council of Europe in its establishment and providing it with specific expert and technical assistance; to support the work of international courts competent to investigate and punish crimes of genocide, violations of international humanitarian law and crimes against humanity; to create a comprehensive international compensation mechanism, including a register of damages caused by the aggressor ¹².

Also, Resolution 2482(2023) of the Parliamentary Assembly of the Council of Europe, which calls on the members of the UN Security Council to consider putting to a vote and not to obstruct the adoption of a Security Council resolution on referring the situation in Ukraine to the ICC Prosecutor under Chapter VII of the UN Charter, and for the UN General Assembly to support and approve the establishment of an ad hoc international criminal tribunal and an international compensation mechanism ¹³.

Differentiation of environmental damage

Environmental damage is divided into two types – ecological and economic. The material object of the encroachment is the quality of the environment, the state of ecological systems, those exchange processes that occur in the biosphere, constantly and invariably

¹² Recommendation 2245 (2023) of the Parliamentary Assembly of the Council of Europe URL: <https://pace.coe.int/en/files/31592/html> (accessed 15.03.2026)

¹³ Resolution 2482(2023) of the Parliamentary Assembly of the Council of Europe URL: <https://pace.coe.int/pdf/c7fbe351cabf5b7a5ddfaa8a1b21f06841e9128cd2da8bd1bc2211277e4e666a/resolution%202482.pdf> (accessed 15.03.2026)

reproduce life in all forms of manifestation. In turn, economic damage is caused to the property rights and interests of nature users. Damage can be expressed in causing property damage (death, damage, destruction of material values) or in not receiving the expected income”¹⁴.

In the context of Russian aggression, there is a definition of ten indicators of environmental damage. In the first place is the most tragic indicator of such damage: “death and deterioration of the health of the population associated with environmental pollution”, and in the tenth position is “any damage to the environment or health of the population that will occur after a certain period of time, provided that a causal relationship between it and military actions is proven”¹⁵.

It is obvious that the numerous facts of causing environmental damage cannot but raise the issue of bringing to justice and compensation for this damage. Meanwhile, from a legal point of view, the practical implementation of compensatory mechanisms for environmental damage resulting from the aggression of the Russian Federation is complicated by the fact that Ukrainian legislation does not contain direct definitions of environmental damage, in particular damage resulting from military actions and military aggression. The Law of Ukraine “On Environmental Protection” has, so to speak, a “peaceful” interpretation of the concept of “environmental damage” and the grounds for liability for its infliction through various variants of violations of environmental legislation⁸.

In this regard, an important step of the Ukrainian authorities regarding future compensation for environmental damage as a result of the Russian-Ukrainian war in Ukraine should be considered the approval of a special methodology, on the basis of which our state will calculate the damage caused to the lands and soils of Ukraine as a result of the Russian-Ukrainian war¹⁶. It is worth noting here that in the “General Provisions” of the approved methodology, the authors did not specify that the procedure for calculating the amount of damage caused to the lands of Ukraine applies specifically to the criminal activities of the Russian military. The document notes that it is about the procedure for calculating the amount of damage - soil contamination, littering of lands, caused as a result of emergency situations

¹⁴ Sirant M.M. Doctrinal approach to determining environmental damage in the European Union and Ukraine. Legal Bulletin. 2020. No. 14. P. 76–84.

¹⁵ Medvedev M.O. On the question of the legal consequences of the Russian Federation's aggression for the environment of Ukraine. Current problems of international relations. 2015. No. 126 (Part I). P. 79–92.

⁸ On Environmental Protection: Law of Ukraine of 25 June. 1991 No. 1264-XII (as amended and supplemented). URL: <https://zakon.rada.gov.ua/laws/show/1264-12#n714> (access date 15.03.2026).

¹⁶ On approval of the Methodology for determining the amount of damage caused to land and soil as a result of emergency situations and/or armed aggression and hostilities during martial law: Order of the Ministry of Environmental Protection and Natural Resources of Ukraine dated April 4, 2022 No. 167. URL: <https://zakon.rada.gov.ua/laws/show/z0406-22#Text> (access date: March 15, 2026).

and/or armed aggression and hostilities during martial law. The subjects of causing environmental damage to the lands of Ukraine in the Methodology are defined as states, executive authorities, local governments, business entities and individuals.

Criminal liability

We consider it appropriate to emphasize that causing damage to land and soil as a result of emergency situations and/or armed aggression and hostilities during martial law entails legal liability (criminal, civil and administrative). In addition, in accordance with Part 1 of Article 69, damage caused as a result of violation of legislation on environmental protection is subject to compensation in full⁸.

In the criminal law of Ukraine, the disposition of Article 441 “Crime of ecocide” provides for liability for the mass destruction of flora or fauna, poisoning of the atmosphere or water resources, as well as for committing other actions that may lead to an ecological disaster.

The qualification of the crime of ecocide under Article 441 of the Criminal Code of Ukraine, in contrast to ordinary crimes against the environment, is related to the scale and consequences – either the causing or the possibility of causing an ecological disaster.

This norm is applicable both during armed conflict and in peacetime. In the first case – during armed conflict – the qualification of ecocide is possible in the case of a serious violation of international humanitarian law simultaneously with the qualification of a war crime in aggregate. In criminal law this is the so-called “ideal aggregate”¹⁷.

Performance indicators

As of today, the Specialized Environmental Prosecutor's Office of Ukraine is investigating 10 criminal proceedings on the facts of ecocide as a result of Russian aggression, one of which has been sent to court - regarding the Russian shelling of the subcritical nuclear installation "Source of Neutrons" in Kharkiv. According to the Prosecutor General's Office (as of July 2024), prosecutors of specialized environmental prosecutor's offices carried out procedural management in 209 criminal proceedings (as specified by the Ministry of Environmental Protection and Natural Resources of Ukraine - regarding 367 episodes) on crimes in the field of environmental protection related to the armed aggression of the Russian

⁸ On Environmental Protection: Law of Ukraine of 25 June. 1991 No. 1264-XII (as amended and supplemented). URL: <https://zakon.rada.gov.ua/laws/show/1264-12#n714> (access date 15.03.2026).

¹⁷ Criminal Code of Ukraine: Code of Ukraine dated April 5, 2001 No. 2341-III: as of July 17, 2025 URL: <https://zakon.rada.gov.ua/laws/show/2341-14#Text> (access date: March 15, 2026).

Federation. The estimated amount of damage in these proceedings is over 250 billion hryvnias. That is, the crime of ecocide, in comparison with war crimes, covers cases when an environmental disaster occurred or could have occurred as a result of the actions of the aggressor. And such an example is the undermining of the Kakhovka hydroelectric power station dam¹⁸.

Conclusion

Thus, Ukraine is a pioneer in investigating such offenses and is taking all possible measures aimed at bringing to justice those guilty of war crimes against the environment, including ecocide. At the international level, discussions are underway at the initiative of Ukraine on the separate recognition of “ecocide” as a crime and its inclusion in the Rome Statute. Appropriate decisions would demonstrate the determination of the Ukrainian state to seek justice and compensation for the damage caused to the environment (in particular, to our lands)¹⁹.

Bibliography

1. Russian Crimes Against the Environment: From War to Ecocide: Yurydychna Gazeta, Crimes, Environment, Ecocide, Borys Indychenko, Nataliya Hendel URL: <https://yur-gazeta.com/interview/rotskyi-zlochyni-proti-dovkillya-vid-voennih-do-ekocidu.html>
2. Digest of Key Consequences of Russian Aggression for the Ukrainian Environment for May 11-18, 2022. Ministry of Environmental Protection and Natural Resources of Ukraine. URL: <https://mepr.gov.ua/news/39218.html> (accessed 03/15/2026).
3. Key Consequences for the Environment of Russian Aggression in Ukraine Feb. 24 - Mar. 31, 2022. Ministry of Environmental Protection and Natural Resources of Ukraine. URL: <https://mepr.gov.ua/news/39097.html> (accessed 15.03.2026).
4. Barsukova O. Radiation and mines: what environmental problems caused by war concern Ukrainians? Poll. Ukrainian Pravda. URL: <https://mepr.gov.ua/news/39218.html> (accessed 15.03.2026).
5. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) as amended on 30.11.93: Protocol of the United Nations Organization of 30.11.1993. URL: https://zakon.rada.gov.ua/laws/show/995_911#Text (accessed 15.03.2026).
6. IV Convention on the Laws and Customs of War on Land and its Annex: Regulations on the Laws and Customs of War on Land: Convention Ukraine of 18.10.1907. URL: https://zakon.rada.gov.ua/laws/show/995_222#Text (access date: 15.03.2026).
7. Convention on the Prohibition of Military or Any Hostile Use of Means of Environmental Impact: Convention Org. United Nations of 18.05.1977: as of 5 Oct. 1978 URL: https://zakon.rada.gov.ua/laws/show/995_258#Text (access date: 15.03.2026).
8. On Environmental Protection: Law of Ukraine of 25 June. 1991 No. 1264-XII (as amended and supplemented). URL: <https://zakon.rada.gov.ua/laws/show/1264-12#n714> (access date 15.03.2026).

¹⁸ Information from the Prosecutor General's Office as of July 2024: Office, Prosecutor General's Office.

¹⁹ War and environmental damage: can Russia be held accountable Pavlo Chernyshuk Yurydychna Gazeta, responsibility, Russia, court, war, environmental damage, climate, Kakhovka HPP

9. On environmental liability for the prevention and remedying of environmental damage: Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 (as amended and supplemented). URL: https://zakon.rada.gov.ua/laws/show/994_965#Text (access date 15.03.2026).
10. Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 21.06.1993. URL: <https://rm.coe.int/168007c079> (accessed 15.03.2026)
11. Resolution A/76/L.75, adopted 28 July 2022: UN General Assembly URL: <https://digitallibrary.un.org/record/3982508?ln=en&v=pdf>(accessed 15.03.2026)
12. Recommendation 2245 (2023) of the Parliamentary Assembly of the Council of Europe URL: <https://pace.coe.int/en/files/31592/html> (accessed 15.03.2026)
13. Resolution 2482(2023) of the Parliamentary Assembly of the Council of Europe URL: <https://pace.coe.int/pdf/c7fbe351cabf5b7a5ddfaa8a1b21f06841e9128cd2da8bd1bc2211277e4e666a/resolution%202482.pdf> (accessed 15.03.2026)
14. Sirant M.M. Doctrinal approach to determining environmental damage in the European Union and Ukraine. Legal Bulletin. 2020. No. 14. P. 76–84.
15. Medvedev M.O. On the question of the legal consequences of the Russian Federation's aggression for the environment of Ukraine. Current problems of international relations. 2015. No. 126 (Part I). P. 79–92.
16. On approval of the Methodology for determining the amount of damage caused to land and soil as a result of emergency situations and/or armed aggression and hostilities during martial law: Order of the Ministry of Environmental Protection and Natural Resources of Ukraine dated April 4, 2022 No. 167. URL: <https://zakon.rada.gov.ua/laws/show/z0406-22#Text> (access date: March 15, 2026).
17. Criminal Code of Ukraine: Code of Ukraine dated April 5, 2001 No. 2341-III: as of July 17, 2025 URL: <https://zakon.rada.gov.ua/laws/show/2341-14#Text> (access date: March 15, 2026).
18. Information from the Prosecutor General's Office as of July 2024: Office, Prosecutor General's Office.
19. War and environmental damage: can Russia be held accountable Pavlo Chernyshuk Yurydychna Gazeta, responsibility, Russia, court, war, environmental damage, climate, Kakhovka HPP

DISCRIMINATORY INTENT AS A DEFINING ELEMENT OF THE CRIME OF PERSECUTION

VICTOR ALEKS DANCHUK*

Abstract

Discriminatory intent, that is, the focus of the perpetrator's actions on depriving a particular group of people of their fundamental rights on the basis of a specific characteristic (nationality, ethnic origin, race, gender, religion, etc.) is a key element of the crime of persecution. This study analyzes the content and legal nature of discriminatory intent, the specifics of proving it, as well as its significance for the classification of the crime of persecution. Particular attention is paid to examining the distinction between discriminatory intent as an element of the crime of persecution and similar intent as a constituent element of the crime of genocide. Particular emphasis in the study was placed on examining the judicial practice of ad hoc tribunals and the International Criminal Court; their key approaches to establishing the presence of discriminatory intent in an act were analyzed, taking into account the context of the crime, the nature of the perpetrator's actions, and their targeting of a specific human group. It was concluded that a correct understanding of the content and criteria for proving the existence of discriminatory intent is of decisive importance for the correct classification of an unlawful act as the crime of persecution.

Keywords: *discriminatory intent, crime of persecution, ad hoc tribunals, ICC, genocide.*

Introduction

Persecution, that is understood as the deliberate and gross deprivation of a particular human group or community of their fundamental rights on the basis of national, ethnic, gender, political, religious or other grounds, has always been an integral part of human history. A striking example is the persecution of the Christian community in the Roman Empire in the 1st–4th centuries AD, primarily for refusing to recognise the emperor's divine title and to worship the ancient Roman gods. Another telling example is the oppressed status of Jews in medieval Europe, whose rights were systematically restricted—particularly their right to own land—who were forced to wear distinctive clothing, and who were constantly the victims of baseless accusations, especially during periods of natural disasters and epidemics.

Even today, in the 21st century, when international treaties and conventions guarantee the observance and protection of fundamental human rights and freedoms, the crime of persecution remains a cruel reality in many countries of the world. Ukraine is no exception, especially in the territories under Russian occupation. International human rights organizations, such as Human Rights Watch, and monitoring missions constantly record new cases of persecution of Ukrainian citizens who refuse to cooperate with the occupation authorities, or for other reasons

* PhD Candidate, 2025/2026, distance learning, Master of Law, Department of International Law and Comparative Law Studies, Law school, Yuriy Fedkovych Chernivtsi National University, Ukraine.
E-mail: viktoreleks.danchuk@chnu.edu.ua

seem suspicious to the occupation administration. However, no matter what basis one or another human group or community is persecuted, regardless of the intensity of such persecution, the restriction or deprivation of fundamental rights and freedoms must be carried out intentionally, that is, there must be a special intention to deprive a certain group of people of their basic rights on the basis of belonging to one or another group (discriminatory intent). The content, legal nature, and ways of proving discriminatory intent have repeatedly been the subject of debate and interpretation by the *ad hoc* tribunals and the International Criminal Court (ICC), as well as the object of research by scholars in the field of international and criminal law. Together, the jurisprudence of the *ad hoc* tribunals and the ICC, as well as doctrinal studies, have laid the foundations for a correct understanding of the essence of discriminatory intent as an integral element of the crime of persecution, which is crucial for its qualification as a crime against humanity and for bringing the perpetrators of its commission to criminal responsibility.

1. The scope and legal nature of discriminatory intent as a key element of the crime of persecution

The crime of persecution has a long and complex history of evolution from ancient times to the present day. From the complete absence of any legal mechanisms to protect the fundamental rights and freedoms of a particular group of people from restrictions on the basis of certain characteristics, to the full recognition of the crime of persecution as a crime against humanity in international treaties and conventions. For the first time in the history of international law, the crime of persecution was defined as a crime against humanity in Article 6(c) of the Charter of the Nuremberg Tribunal, which included among the latter, in particular: “... persecution on political, racial or religious grounds, in connection with or in furtherance of any crime within the jurisdiction of the Tribunal, whether or not such acts constituted a violation of the domestic law of the country where they were committed”¹.

As we can see, the discriminatory motive is already evident in the aforementioned Statute, namely “...persecution on political, racial or religious grounds...”². Over the decades, the concept of the crime of persecution has been supplemented and developed, taking on the form in which it is now enshrined in the Rome Statute of the ICC. Article 7(1)(h) of the Rome Statute of the ICC classifies the following acts, among others, as crimes against humanity: “persecution of any identifiable group or community on political, racial, national, ethnic, cultural, religious,

¹ Charter of the International Military Tribunal at Nuremberg, London, 8 August 1945, 82 UNTS 279.

² See (n.1 above).

gender (within the meaning of paragraph 3) grounds, or on any other grounds that are universally recognised as unacceptable under international law, in conjunction with any act referred to in this paragraph or any crime within the jurisdiction of the Court”³.

Article 7(2)(g) clarifies the meaning of the term “persecution”: “...the intentional and gross deprivation of fundamental rights contrary to international law on the grounds of membership of a particular group or community”⁴. In other words, it is precisely membership of a particular group or community that is the factor leading to the deprivation or restriction of human rights in this case. The Elements of Crimes that assist the ICC in interpretation and application, in particular Article 7 (1) of the Rome Statute, explain in this regard: “The perpetrator targeted such a person or persons because of the characteristics of the group or community, or targeted the group or community as such”⁵. This is followed by an addition to the preceding provision: “Such targeting was motivated by political, racial, national, ethnic, cultural, religious or gender-based grounds, as set out in Article 7(3) of the Statute, or by other grounds universally recognised as impermissible under international law”⁶. In other words, it can be confidently stated that the existence of a specific intent to deprive a person or group of persons of their fundamental rights on account of their membership of a particular group or community is regarded as an integral element of the crime of persecution, which has been enshrined in law in the Rome Statute of the ICC.

However, the path taken by discriminatory intent as an essential element of the crime of persecution—from its first mention in the Charter of the Nuremberg Tribunal to its final enshrinement in the Rome Statute of the ICC—was marked by prolonged debates regarding its nature and defining characteristics during the proceedings of *ad hoc* tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The work of these tribunals helped to broaden the understanding of persecution beyond mere physical violence and to recognise that other acts, such as the enactment of discriminatory laws, the denial of access to education or employment, and restrictions on the practice of cultural or religious rites, may also constitute persecution if they were committed with the requisite discriminatory intent and as part of a widespread or systematic attack against the civilian population. For example, in the *Krnjelac* case, the ICTY

³ *Rome Statute of the International Criminal Court*, Rome, 17 July 1998, in force 1 July 2002, 2187 UNTS 3. URL: <https://www.icc-cpi.int/publications/core-legal-texts/rome-statute-international-criminal-court>.

⁴ See (n.3 above).

⁵ Rome Statute, Art. 7(1); sub-para. (5) of Elements of Crimes for Art. 7(1)(h) – Crime against humanity of persecution.

⁶ See (n.5 above).

Appeal Chamber concluded: "...persecution as a crime against humanity requires evidence of a specific intent to discriminate on political, racial or religious grounds and that it falls to the Prosecution to prove that the relevant acts were committed with the requisite discriminatory intent."⁷ However, certain contradictions arose during the consideration by the aforementioned tribunals of cases concerning instances of persecution regarding the question of whether discriminatory intent is a mandatory element of all crimes against humanity provided for in the tribunals' statutes, or only for the crime of persecution. In this regard, the ICTY Appeals Chamber in the *Tadic* case noted that Article 5 of the ICTY Statute, in its ordinary meaning, does not require that "...all crimes against humanity be committed with discriminatory intent. Such intent is required only for one sub-category of these crimes, namely persecution"⁸. The ICTR Appeals Chamber reached a similar conclusion in the *Akayesu* case, stating in its judgment: "In the view of the Appeals Chamber, with the exception of the crime of persecution, discriminatory intent is not required under international humanitarian law as a legal element for all crimes against humanity"⁹. In other words, the case law of the *ad hoc* tribunals limits the requirement of discriminatory intent to the crime of persecution alone. In the *Kordic and Cerkez* case, the ICTY Trial Chamber ruled that to establish the fact of persecution, "...particular intent is required, in addition to the specific intent (to commit the act and produce its consequences) and the general intent (objective knowledge of the context in which the accused acted). This intent – discriminatory intent – is what sets the crime of persecution apart from other Article 5 crimes against humanity"¹⁰. As the Trial Chamber emphasised in the *Blaskic* case, "...the crime of persecution "acquires its specific character" through its particular, discriminatory *mens rea*: "It is the specific intent to cause harm to a person because they belong to a particular community or group, rather than the means used to achieve this, which gives it its individual character and gravity."¹¹ Thus, this requirement of discriminatory intent for the crime of persecution differs from the more general level of intent required for other crimes against humanity under Article 5, when mere "knowledge of the context" of a widespread or systematic attack against a civilian population is sufficient."¹² Thus, the essence of discriminatory intent lies in the fact that, firstly, it is a mandatory element for the classification of the crime of persecution, unlike other crimes

⁷ *Prosecutor v. Milorad Krnojelac* (Appeal Judgement), IT-97-25-A (17 September 2003), para. 184.

⁸ *Prosecutor v. Dusko Tadic* (Appeal Judgement), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, para. 283.

⁹ *The Prosecutor v. Jean-Paul Akayesu* (Appeal Judgment) ICTR-96-4-A (1 June 2001), para. 464.

¹⁰ *The Prosecutor v. Dario Kordić and Mario Čerkez* (Trial Judgment), ICTY-IT-95/14/2-T (26 February 2001), para. 212.

¹¹ *The Prosecutor v. Tihomir Blaškić* (Trial Judgment) ICTY-IT-95-14-T (3 March 2000), para. 235.

¹² See (n.11 above), para. 244.

against humanity, and secondly, it consists of a specific intent to cause harm to a person or group of persons precisely because of their membership of a particular group or community. However, the personal motives of the perpetrator of the offence of harassment should not be confused with discriminatory intent.¹³ In this context, one can cite the example of gender-based harassment. For instance, the personal motives for rape may include “obtaining sexual gratification” or “the opportunity” to commit rape. Such motives do not preclude the existence of discriminatory intent. Furthermore, personal motives should not be confused with the offender’s desire to act unlawfully on the basis of gender. Discriminatory intent is demonstrated when the offender intended to treat a particular gender group or a member of that group on an unequal basis. The existence of discriminatory intent may be proven by establishing the fact of disproportionate use of discriminatory behaviour against one group on the basis of gender. Alternatively, this may be confirmed by the use of the same discriminatory conduct committed against several groups, but directed separately on the basis of gender. Furthermore, it is worth noting that discriminatory intent does not require the demonstration of actual prejudice. It is sufficient to show that the perpetrator acted on the basis of gender. For example, a perpetrator may regard acts of persecution, such as enslavement or forced marriage of a woman or girl, as their “right”, and not commit them out of personal prejudice or with the aim of punishing the victim. However, such actions are still based on the victim’s gender¹⁴. Nevertheless, the presence of personal motives and prejudices is important to examine, as they may constitute aggravating circumstances, including where acts are committed on the basis of gender, in addition to helping to prove discriminatory intent. Thus, in every case, the offender’s intentions and motives must be thoroughly investigated.

As noted above, discriminatory intent is an essential element of the crime of persecution. That said, the question remains as to under what circumstances one can confidently conclude that a particular unlawful act was committed with discriminatory intent. The case law of *ad hoc* tribunals and the ICC offers guidance on this matter. Thus, the Appeals Chamber of the ICTY in the *Kvočka* case noted: “...discriminatory intent in crimes cannot be directly inferred from the general discriminatory nature of an attack classified as a crime against humanity. However, discriminatory intent may be inferred from the context of the attack, provided that it is supported by the surrounding circumstances of the crime”¹⁵. Accordingly, the Appeals Chamber in the

¹³ International Criminal Court (ICC), Office of the Prosecutor (OTP), *Policy on the Crime of Gender Persecution* 3 (Dec. 7, 2022) p. 17 URL: <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf>

¹⁴ See (n. 13 above), p. 18.

¹⁵ *Prosecutor v. Miroslav Kvočka et al.* (Appeal Judgement), IT-98-30/1-A (28 February 2005), para. 366.

Krnojelac case held that, “where beatings were inflicted solely on non-Serb prisoners in the prison, it could reasonably be concluded that these beatings were committed on account of the victims’ political or religious affiliation, and that these acts were committed with the requisite discriminatory intent”¹⁶. In this case, it appears that almost all the prisoners in the camp belonged to a non-Serbian group. This allowed for a reasonable conclusion that the reason for their detention was precisely their membership of this group, and therefore, a discriminatory nature was present”¹⁷. The position taken by the ICTY Appeals Chamber in the *Popovic et al.* case was quite interesting. In its decision on this case, the Appeals Chamber concluded that “...when considering whether the accused had the requisite intent for the crime of persecution, the Trial Chambers are entitled to take into account “the general attitude of the alleged perpetrator as demonstrated by his conduct”¹⁸. The use of derogatory language towards a particular group – even if such use is widespread – is one aspect of the accused’s conduct that may be taken into account, together with other evidence, to determine the existence of discriminatory intent”¹⁹. In this situation, the Appeals Chamber determined that the accused’s use of the word “*balija*” in relation to 400 Muslim prisoners, which is offensive to them, as well as his subsequent indifferent remarks regarding the fact that some of these prisoners had committed suicide, indicate his general conduct, which is evidence of discriminatory intent”²⁰.

The importance of taking into account the broader context of an attack on the civilian population in order to establish discriminatory intent has also been demonstrated by the practice of the ICC. A telling example in this regard is the conviction handed down by Trial Chamber VI in the case of *The Prosecutor v. Bosco Ntaganda* of 7 November 2019, in which the ICC sentenced Mr Bosco Ntaganda to 30 years’ imprisonment for committing numerous war crimes and crimes against humanity, including persecution, against the Lendu ethnic group in the Ituri Province of the Democratic Republic of the Congo. In particular, Mr Ntaganda was charged with the murder of Abbé Bwanalanga, as the direct perpetrator of the crime²¹. The Trial Chamber found that this murder was committed in the context of systematic violations of fundamental rights, including the right to life, directed exclusively against the Lendu ethnic group, which may indicate the existence of a general plan or policy to commit such violations. Since the murder of Abbé Bwanalanga was committed because of his membership of the Lendu

¹⁶ See (n. 7 above), para. 186.

¹⁷ See (n.15 above).

¹⁸ See (n.15 above), para. 460.

¹⁹ See (n.15 above), para. 461.

²⁰ *Prosecutor v. Vujadin Popovich et al.* (Appeal Judgement), IT-05-88-A (30 January 2015), para. 713.

²¹ *The Prosecutor v. Bosco Ntaganda* (Trial Judgment) ICC-01/04-02/06, T Ch VI (8 July 2019), para. 746.

people and was part of a widespread and systematic attack against them, the Trial Chamber found that the criminal act in question was discriminatory in nature, which is a necessary condition for the crime of persecution to be established²².

2. The distinction between discriminatory intent in crimes of persecution and genocide.

Any crime against humanity is characterised by the presence of a mental element, the establishment of which is necessary to prove the guilt of a particular individual or group of individuals in committing it. As regards the crime of persecution, the essential component of the mental element in this case is the specific intent to deprive a particular person or group of persons of their fundamental rights and freedoms on the grounds of their membership of a specific human group or community. In this respect, persecution as a crime against humanity differs from genocide, the mental element of which consists of the intent to destroy, in whole or in part, a specific national, ethnic, racial or religious group as such. In other words, as we can see, the crime of genocide also involves discriminatory intent, which, however, differs significantly from the discriminatory intent in the crime of persecution. Thus, the victims of both categories of crime are individuals who belong to a particular group or community and against whom attacks are carried out precisely because of their membership of that group. Although the essence of both crimes lies in the intent to discriminate against a specific population or group on various grounds, in the case of genocide, this intent must be combined with the intent to destroy, in whole or in part, a defined group of people²³. The above is fully confirmed by the case law of the *ad hoc* tribunals. In particular, the ICTY Trial Chamber in the case of *Kupreškić et al.* emphasised that “the requirement for a mental element to qualify persecution is stricter than for ordinary crimes against humanity, though less strict than for genocide... Both persecution and genocide are crimes committed against persons belonging to a particular group and targeted precisely because of that membership. In both cases, the decisive factor is the intent to discriminate: to attack individuals on the basis of their ethnic, racial or religious characteristics (and, in the case of persecution, on the basis of their political affiliation). Whilst in the case of persecution, discriminatory intent may take various inhumane forms and manifest itself in a multitude of actions, including murder, in the case of genocide, this intent must be accompanied by the intent to destroy, in whole or in part, the group to which

²² See (n. 21 above), para. 751.

²³ Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press 2003) 106-107.

the victims of genocide belong. Thus, it can be said that, from the point of view of *mens rea*, genocide is the extreme and most inhumane form of persecution. In other words, when persecution escalates into an extreme form of deliberate and intentional acts aimed at the destruction of a group or part of a group, such persecution may be considered genocide.”²⁴ Thus, the case law of the ICTY distinguishes between the crimes of persecution and genocide on the basis of specific intent directed against a particular person or group of persons, namely the intent to deprive them of their fundamental rights by reason of their membership of a defined group of persons, or the intent to destroy, in whole or in part, that group on the grounds of national, ethnic, racial or religious affiliation. In doing so, the ICTY Trial Chamber links the crimes of persecution and genocide in a certain way, asserting that genocide is, in essence, a form of persecution taken to the extreme. In the same judgment in the case of *Kupreškić et al.*, the ICTY Trial Chamber notes that “persecution is but one step away from genocide — the most abhorrent crime against humanity — for in genocide the persecutory intent is pushed to its uttermost limits through the pursuit of the physical annihilation of the group or of members of the group”²⁵. Initially, persecution is accompanied by systematic discrimination and marginalisation of a group of people, such as laws restricting access to public services, forced resettlement and economic isolation. These actions are aimed at humiliating and oppressing the group, but are not aimed at its destruction. However, the situation may change when, moving beyond oppression and discrimination, the government or non-state actors proceed to the deliberate destruction of a group or community, accompanied by mass killings and the destruction of the group’s cultural identity. The key factor in such an escalation is the specific intent (*dolus specialis*) to destroy the group, in whole or in part. This transition from persecution to genocide implies a deliberate effort to eliminate a specific group, rather than merely to oppress it²⁶. It should be noted that the crime of persecution consists in the deprivation or restriction of the fundamental rights of a particular group of people, including the right to life, which also implies the possibility of killing members of that group. In this situation, establishing the true intent of the perpetrator of the unlawful act – whether to oppress the group or to destroy it – will make it possible to determine exactly which crime was committed: persecution or genocide. Ultimately, both genocide and the crime of persecution may have the same objective, namely the elimination of a specific ethnic group or people, but the clearly defined general intent of the perpetrator of genocide to deliberately carry out the destruction of a specific group

²⁴ *The Prosecutor v. Kupreškić et al.* (Trial Judgment) ICTY-95-16-T (14 January 2000), para. 636.

²⁵ See (n. 24 above), para. 751.

²⁶ Gavira Díaz, P., & Petrossian, G. (2025). *Same Genus, Different Intent: Distinguishing Persecution as a Crime Against Humanity from Genocide*. *State and Law*, 100, 133. DOI: <https://doi.org/10.46991/SL/2025.100.104>.

does not fall within the scope of persecution²⁷. Therefore, acts which at first glance appear to fall within the provisions of Article 6 of the Rome Statute of the ICC (genocide), but where the existence of a specific intent to destroy a particular group has not been proven, may fall within the scope of Article 7(1)(h) of the Rome Statute of the ICC, provided that they meet the Elements of Crimes²⁸.

Conclusion

Thus, the crime of persecution occupies a special place amongst all other crimes against humanity, as its essential subjective element is the specific intent to deprive or restrict an individual or group of individuals of their fundamental rights on the basis of national, racial, religious, cultural, political or gender grounds (discriminatory intent). This element could already be identified in the relevant provisions of the Charters of the Nuremberg and Tokyo Tribunals, where specific grounds on which the crime of persecution might be committed were first defined, namely on political, racial or religious grounds. Over time, judicial practice, including that relating to the crime of persecution, has been supplemented by a succession of new cases and decisions which have elucidated the essence of discriminatory intent as its essential element, refined the general understanding of its legal nature, and defined the methods of proving it. The greatest contribution to clarifying the meaning of discriminatory intent was made by the practice of the *ad hoc* tribunals, namely the ICTY and the ICTR. Numerous decisions of these tribunals, relating in particular to charges of crimes against humanity, have established that discriminatory intent is an essential element only for the crime of persecution and is not required as a legal component of all other crimes against humanity. Furthermore, the importance of the context of the attack on the civilian population and the perpetrator's general attitude towards a particular group in establishing discriminatory intent in the perpetrator's actions has been emphasised. It has been concluded that even the use of derogatory language regarding a particular group or community may indicate the discriminatory nature of the act. Furthermore, the comparison of the crimes of persecution and genocide, particularly regarding their mental element, is of significant interest to the academic community. Thus, unlike persecution, genocide is characterised by the intent to destroy a specific human group, in whole or in part, rather than to deprive or restrict its fundamental rights, as is the case with the crime of persecution. However, it is fair to note that the crime of persecution may, over time, take on the characteristics of genocide, primarily through the transformation of the intent to

²⁷ See (n. 24 above).

²⁸ See (n. 26 above).

discriminate against a specific group into a specific intent to destroy it. Consequently, the work of *ad hoc* tribunals and the ICC, as well as academic works by specialists in the field of international and criminal law, are critically important for a correct understanding of the nature of discriminatory intent as a key element of the crime of persecution, which is the guarantee of the proper classification of the latter and of ensuring the inevitability of punishment for those guilty of committing it.

Bibliography

1. Charter of the International Military Tribunal at Nuremberg, London, 8 August 1945, 82 UNTS.
2. Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force 1 July 2002, 2187 UNTS 3. URL: <https://www.icc-cpi.int/publications/core-legal-texts/rome-statute-international-criminal-court>.
3. International Criminal Court (ICC), Elements of Crimes, ISBN No. 92-9227-232-2, 2011, URL: <https://www.refworld.org/reference/research/icc/2011/en/87658> [accessed 28 March 2026].
4. Prosecutor v. Milorad Krnojelac (Appeal Judgement), IT-97-25-A (17 September 2003), paras. 184, 186.
5. Prosecutor v. Dusko Tadic (Appeal Judgement), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, para. 283.
6. The Prosecutor v. Jean-Paul Akayesu (Appeal Judgment) ICTR-96-4-A (1 June 2001), para. 464.
7. The Prosecutor v. Dario Kordić and Mario Čerkez (Trial Judgment), ICTY-IT-95/14/2-
8. T (26 February 2001), para. 212.
9. The Prosecutor v. Tihomir Blaškić (Trial Judgment) ICTY-IT-95-14-T (3 March 2000), paras. 235, 244.
10. International Criminal Court (ICC), Office of the Prosecutor (OTP), Policy on the Crime of Gender Persecution 3 (Dec. 7, 2022) pp. 17-18 URL: <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf>
11. Prosecutor v. Miroslav Kvocka et al. (Appeal Judgement), IT-98-30/1-A (28 February 2005), paras. 366, 460-461.
12. Prosecutor v. Vujadin Popovich et al. (Appeal Judgement), IT-05-88-A (30 January 2015), para. 713.
13. The Prosecutor v. Bosco Ntaganda (Trial Judgment) ICC-01/04-02/06, T Ch VI (8 July 2019), paras. 746, 751.
14. Antonio Cassese, International Criminal Law (Oxford: Oxford University Press 2003) 106-107.
15. The Prosecutor v. Kupreškić et al. (Trial Judgment) ICTY-95-16-T (14 January 2000), paras. 636, 751.
16. Gavira Díaz, P., & Petrossian, G. (2025). Same Genus, Different Intent: Distinguishing Persecution as a Crime Against Humanity from Genocide. *State and Law*, 100, 133. DOI: <https://doi.org/10.46991/SL/2025.100.104>.

LEGAL FRAMEWORKS GOVERNING PERSONS UNACCOUNTED FOR IN ARMED CONFLICT

OKSANA KIRIIAK* - VIKTORIIA KONOPLIA**

Abstract

The phenomenon of persons missing under special circumstances has emerged as one of the most pressing legal and humanitarian challenges associated with contemporary armed conflicts and crisis situations. Against the backdrop of large-scale military aggression and its profound human consequences, ensuring the protection of individuals whose whereabouts remain unknown requires a coherent and effective legal response. This article explores the conceptual and legal foundations of the status of persons missing under special circumstances, with particular emphasis on the regulatory framework established by Ukrainian legislation. It examines the procedures for documenting disappearances, conducting search activities, and safeguarding the rights and interests of both missing persons and their family members. The study also assesses the responsibilities of competent state institutions and humanitarian actors involved in tracing, identification, and information-sharing processes. The analysis demonstrates that the issue extends beyond questions of legal status, encompassing broader concerns of human dignity, access to justice, and social protection. In this regard, the article highlights existing challenges in the implementation of national legislation and substantiates the need for further development of institutional and legal mechanisms capable of providing comprehensive protection for persons who have disappeared in connection with armed conflict and other extraordinary circumstances.

Keywords: missing persons, armed conflicts, legal frameworks, role of state authorities

Introduction

The twentieth century was marked by profound political, social, and legal transformations that reshaped the international order. The devastating consequences of the two World Wars exposed the vulnerability of individuals during periods of armed conflict and highlighted the urgent necessity of developing effective legal frameworks for the protection of human rights and human dignity. These historical experiences laid the foundation for the emergence of contemporary international humanitarian and human rights law.

In the modern era, one of the most pressing humanitarian and legal challenges concerns the protection of individuals whose fate or whereabouts remain unknown as a result of armed

* Oksana Kiriak, Associate Professor, Private Law Department of Yuriy Fedkovych Chernivtsi National University, e-mail: o.kiriyak@chnu.edu.ua

** Viktoriia Konoplia, 2nd year Law student, Faculty of law, Yuriy Fedkovych Chernivtsi National University, Ukraine e-mail: konoplia.viktoriia@chnu.edu.ua Scientific Supervisor: Oksana Kiriak PhD in Law, Associate Professor

conflicts, natural disasters, technological accidents, or other large-scale emergencies. The disappearance of persons under such circumstances raises complex legal, social, and humanitarian issues, affecting not only the individuals concerned but also their families and communities. Ensuring effective mechanisms for the search, identification, and protection of missing persons, as well as safeguarding the rights of their relatives, has therefore become an essential component of both national and international legal systems.

On a daily basis, populations encounter natural cataclysms or technological factors of such magnitude that they are capable of annihilating entire residential settlements. In nations currently enduring the state of war, individuals frequently vanish within zones of active hostilities or remain trapped beneath the debris of destroyed buildings. These occurrences are categorized as "special" circumstances precisely because they seize individuals unexpectedly and represent a total departure from the established norms of a civilized society.

In numerous countries, and specifically within Ukraine, the precise determination of the legal status of persons who have gone missing under such special circumstances is of urgent significance for the overarching protection of human and civil rights and freedoms.

According to the official data provided by the International Committee of the Red Cross, in the year 2024 alone, the total number of missing persons registered globally reached approximately 284,400 [1].

In the specific context of Ukraine, as of the period of 2025, data regarding more than 90,000 individuals was published on the Unified State Portal for Persons Missing under Special Circumstances. This staggering number encompasses military personnel, civilians, and children [2].

For the family members and close relations of an individual whose whereabouts cannot be established, the legal determination of a person as missing under special circumstances represents a particularly complex and distressing process. This complexity is not confined to its psychological impact but is also rooted in the persistent ambiguity of the legal category itself and the procedural intricacies that arise throughout its application.

These challenges are further intensified by the multifaceted administrative procedures involved at different stages of recognition, including evidentiary assessment, inter-agency coordination, and engagement between affected persons and competent state authorities. As a result, the overall process is frequently characterized by legal uncertainty and procedural protraction, which significantly complicate the realization of the rights and legitimate interests of the individuals concerned.

Chapter 1. Conceptual and Legal Definition of Persons Missing under Special Circumstances in Ukrainian Legislation

For the purpose of ensuring conceptual clarity and legal precision, the definition of a “person missing under special circumstances” must be derived primarily from the relevant statutory framework. The key normative act in this regard is the Law of Ukraine “On the Legal Status of Persons Missing under Special Circumstances,” adopted on 12 July 2017 and subsequently amended in response to the intensified security challenges following the onset of the full-scale armed aggression in 2022.

This legislative instrument establishes the foundational legal parameters for distinguishing between the general category of a “missing person” and the specifically regulated category of a “person missing under special circumstances.” Such differentiation is of particular legal significance, as it determines the applicable procedural regime, institutional competence, and scope of state obligations in relation to search, registration, and protection measures.

According to the aforementioned Law, a “missing person” is understood to be a physical individual for whom there is no information regarding their current location at the time an applicant submits a formal search request. Conversely, a “person missing under special circumstances” is defined as an individual who has gone missing in direct connection with an armed conflict, military hostilities, the temporary occupation of parts of the territory of Ukraine, or due to emergency situations of a natural or man-made character [3].

Consequently, the legislature highlights several distinctive features of these concepts: first, “special circumstances” refer to conditions that are not the norm in a civilized society, such as armed conflicts and military actions ; second, these involve circumstances that an individual is incapable of influencing or preventing, such as natural disasters; and third, while such events occur less frequently than standard disappearances, they tend to impact a significant number of people simultaneously[4].

Beyond the mere definition of legal status, this Law provides the necessary legal regulation of social relations associated with the acquisition of the status of persons missing under special circumstances. It covers the accounting, search procedures, and social protection mechanisms for such individuals and their respective families.

In an analysis of the Law, particular attention must be paid to Article 4, which dictates the procedure for recognizing an individual as missing under special circumstances. Pursuant to Article 4, an individual acquires this specific status from the moment information contained

in the disappearance application is entered into the Unified Register of Persons Missing under Special Circumstances. Furthermore, the individual is legally considered missing under special circumstances from the moment the applicant submits the initial report regarding the fact of disappearance [3].

An individual retains the legal status of a person missing under special circumstances until the formal termination of search activities by the competent authorities. This approach reflects the legislator's emphasis on the continuity of search efforts as a core procedural obligation, irrespective of the duration of absence or the passage of time.

Importantly, the cessation of search procedures is not automatically contingent upon the formal legal declaration of death. Even in cases where a person has been judicially declared deceased, the search process under the relevant legislative framework does not terminate if the actual circumstances of death remain unverified and the location of the body, burial site, or human remains has not been established. In such situations, the presumption of procedural necessity persists, requiring continued investigative and search measures.

This legal construct underscores a distinct separation between civil-law consequences of declaring a person deceased and the humanitarian and procedural obligations embedded in the search regime. The declaration of death serves primarily as a juridical mechanism for resolving issues of legal certainty, such as inheritance or civil status. However, it does not extinguish the state's duty to clarify the factual circumstances surrounding the individual's disappearance. Accordingly, the search obligation remains in force until the location of the person or their mortal remains is conclusively determined. This ensures that the legal framework prioritizes not only formal resolution of status but also the fulfillment of humanitarian imperatives, including the right of relatives to know the fate of the missing person and to obtain closure grounded in verified information.

Professor Kolpakov analyzed in his work "Missing Persons Under Special Circumstances in the Doctrine of Human Rights," this Law, noting several key points: «a) the legal fact of recording information about a person in the register serves as the simultaneous legal fact for the emergence of the individual's legal status as "missing under special circumstances"; b) a person is deemed missing from the moment the applicant submits the statement of disappearance; c) the moment an individual acquires legal status and the moment they are considered missing do not coincide; d) every individual, before acquiring the formal status of a missing person, exists for a certain duration in the status of a person considered missing.» [5].

According to the further insights of prof. Kolpakov, the process of an individual acquiring the status of "missing under special circumstances" consists of two distinct stages. During the first stage, the individual acquires the status of a person who is *considered* missing under special circumstances. The legal fact of the emergence of this status correlates with the moment the applicant submits the report of disappearance. The duration of this stage is limited by the legal fact of entering the relevant data into the Unified Register of Persons Missing under Special Circumstances. In the second stage, the status of a person *considered* missing under special circumstances is transformed into the formal legal status of a person *missing* under special circumstances. The legal fact of the emergence of this primary, explicit status correlates with the act of entering the relevant data into the aforementioned Unified Register [5].

Article 5 of the Law further delineates the rights of individuals missing under special circumstances. According to this article, such persons possess all rights guaranteed by the Constitution and laws of Ukraine, including the right to a comprehensive investigation into the circumstances of their disappearance and the establishment of their location. The State is under a strict obligation to take all possible measures to conduct the search for persons missing under special circumstances. Additionally, it is specifically noted that the rights, interests, and property of the missing person are subject to protection until the search is terminated or until the person is declared deceased in accordance with the law [6].

Furthermore, Article 6 of the Law specifies the rights of close relatives and family members of missing persons. Specifically, they possess the following rights:

- a) The right to receive reliable information regarding the location of the person missing under special circumstances, the circumstances of their death (if applicable), and the burial site (if known).
- b) The right to obtain accurate information regarding the progress and results of the search efforts.
- c) The right to social protection as defined by Ukrainian legislation.
- d) The right to receive free legal assistance [3].

In a continuing analysis of the Law, it is vital to emphasize Article 9, which addresses the specific legal status of individuals authorized to perform state functions who go missing during armed conflict, hostilities, internal disturbances, or while performing official duties related to the liquidation of the consequences of natural or man-made emergencies. For such individuals, their place of employment, position, and average salary at the enterprise,

institution, or organization (regardless of its subordination) are preserved, but only until the moment the person is legally declared deceased [3].

Chapter 2. International Humanitarian Law as a Normative Foundation for the Protection of Individuals in Armed Conflict

This legislative act represents a significant example of the domestication and practical implementation of international humanitarian law within the legal system of Ukraine. In doctrinal terms, international humanitarian law is widely regarded as an autonomous branch of public international law that governs the conduct of armed hostilities and seeks to mitigate their adverse humanitarian consequences. As emphasized in the scholarly work of M. V. Hrushko, V. V. Muzyka, T. S. Fedorova, and V. V. Vladyshevska, international humanitarian law comprises a coherent system of legal principles and norms regulating the permissible means and methods of warfare, ensuring the protection of persons affected by armed conflict, and defining the legal relationships between belligerent parties as well as between states not directly involved in hostilities. This normative framework is primarily oriented toward safeguarding human dignity and limiting suffering in conditions of armed conflict.

The primary purpose of international humanitarian law is to preserve human dignity and guarantee the protection of fundamental rights during periods of armed conflict. By establishing legal safeguards for civilians, prisoners of war, the wounded, the sick, and other protected persons, it seeks to limit the human suffering caused by warfare while ensuring compliance with universally recognized humanitarian standards. [7].

During the russo-Ukrainian war, the global community has witnessed a great number of human rights violations that has not been seen in recent history; it was not expected that such brutality could be repeated after the events of the 20th century.

Establishing the location of many individuals missing under special circumstances in Ukraine is nearly impossible as long as the war continues. Military personnel categorized as "missing" may be held in russian captivity, may have perished on the battlefield, or may be buried in mass graves. Until the individual or their remains are found, they will continue to be considered missing, as the search for them remains ongoing.

Chapter 3. Legal Nature and Institutional Framework of the Search for Persons Missing under Special Circumstances

The search for persons missing under special circumstances constitutes a structured system of legally regulated and institutionally coordinated measures undertaken by competent

public authorities and their designated officials with the aim of establishing the whereabouts of such individuals. This system operates on the basis of normative legal acts that define both procedural mechanisms and the distribution of competences among involved actors.

Within this regulatory framework, the legislator has introduced a functional distinction between two categories of authorized subjects. The first category comprises bodies responsible for the registration, accounting, and maintenance of official records concerning missing persons. The second category includes institutions vested with operational powers to conduct investigative and search activities. This differentiation ensures a clear allocation of responsibilities, thereby enhancing the efficiency and coordination of efforts aimed at locating persons missing under special circumstances.

The first group includes several central and local executive authorities and prosecutorial bodies. These include: the Ministry of Defense of Ukraine, the Ministry of Health of Ukraine, the State Migration Service of Ukraine, the State Penitentiary Service of Ukraine, the State Emergency Service of Ukraine, the Ministry of Regional Development and Construction of Ukraine, the Ministry for Reintegration of the Temporarily Occupied Territories of Ukraine, the Administration of the State Border Guard Service of Ukraine, the National Guard of Ukraine, the National Police of Ukraine, the Security Service of Ukraine, prosecutorial bodies, and local executive authorities.

The bodies authorized to conduct the search primarily include the National Police of Ukraine. Additionally, this function is assigned to subjects carrying out operational-search activities, the list of which is contained in Article 5 of the Law of Ukraine "On Operational-Search Activity". The search for a person missing under special circumstances is initiated upon a statement submitted to the relevant territorial body of the National Police of Ukraine. The statement must include information that may facilitate the search, such as the individual's personal data, the circumstances of their disappearance, distinctive features (tattoos, scars, physical traits), and additional data—information about witnesses or contacts who may know details of the disappearance.

Such a statement may be submitted by: a relative of the person, a representative of a military formation, a state authority, a local self-government body, a public association, or any other person who becomes aware of the disappearance. These same entities may also report the disappearance to the Commissioner. In such instances, the search application is filed by the Commissioner for Persons Missing under Special Circumstances.

Chapter 4. The Institutional Role of the Commissioner for Persons Missing under Special Circumstances in Ukraine

The legal status and operational mandate of the Commissioner for Persons Missing under Special Circumstances are defined by the Resolution of the Cabinet of Ministers of Ukraine “On the Commissioner for Persons Missing under Special Circumstances.” Under this regulatory framework, the Commissioner functions as an official within the Ministry of Internal Affairs of Ukraine and is entrusted with the coordination of activities related to the search for missing persons, as well as the resolution of interconnected legal and organizational issues in accordance with applicable legislation. The appointment and dismissal of the Commissioner are carried out by the Cabinet of Ministers of Ukraine upon the submission of the Minister of Internal Affairs [8].

In the exercise of these functions, the Commissioner is empowered to request and obtain relevant information from a wide range of actors, including state authorities responsible for the registration and search of missing persons, local self-government bodies and their officials, public associations, and international humanitarian organizations that may possess pertinent data. Such organizations include, inter alia, the Ukrainian Red Cross Society and the United Nations Office for the Coordination of Humanitarian Affairs.

Upon receipt of a request, the relevant domestic authorities and public associations are required to provide a written response within a three-day period, outlining the results of their review. The Commissioner subsequently consolidates the received information and transmits it, also within three days, to the competent territorial units of the National Police for the initiation or continuation of search activities. A central element of the Commissioner’s mandate is the oversight of the implementation of these measures, including the authority to request updated information from the National Police regarding the progress and outcomes of search operations.

V. K. Kolpakov, in the previously mentioned work, details the Commissioner's role, noting that they are responsible for the coordination of search efforts and the resolution of contiguous issues. The Commissioner is entrusted with the coordination of the search for persons missing under special circumstances, as well as the resolution of related issues. Coordination is the process of ensuring the consistency of actions and efforts between different individuals, groups, or organizations to achieve a common goal. It is a crucial element of the management and organization of any activity and may include planning, organization, communication, resource provision, control, and adjustment of actions. Depending on the nature of the activity and specific tasks, coordination may require various approaches and

instruments, such as the planning of joint activities, the exchange of information, the establishment of general rules and standards, as well as the determination of responsibility for the performance of certain tasks. To this end, the Commissioner interacts: firstly, with state authorities and local self-government bodies, various services of the President of Ukraine and the Cabinet of Ministers of Ukraine; secondly, with the relevant authorities of foreign states and international organizations; thirdly, with public associations, trade unions, and employers' organizations; fourthly, with enterprises, institutions, and organizations; fifthly, with physical persons (citizens, foreigners, and stateless persons) [5].

An important place in the activities of the Commissioner is occupied by the function of information support for the search. The Law provides that it is implemented through: a) receiving information from the subjects of the search; b) exchanging information with the Register, as well as with other state information resources; c) transferring generalized information to the National Police bodies, as well as to other state bodies authorized to record or search for missing persons; d) communicating with the relatives of missing persons to inform them of the search efforts. Within the framework of such communication, the Commissioner appeals to state authorities, local self-government bodies, public associations, and international humanitarian organizations with requests for information that may facilitate the search for a missing person. The heads of state authorities and local self-government bodies, as well as public associations that have received a request from the Commissioner, are obliged to consider it within a three-day period and provide a response in writing. At the same time, the legislator has established restrictions on the Commissioner's actions regarding information. The exchange of data obtained as a result of investigative actions or operational-search activities is prohibited [8].

Chapter 5. The Role of International Humanitarian Mechanisms in the Search for Missing Persons in Armed Conflict

The significance of international humanitarian mechanisms in addressing the issue of missing persons has also been emphasized in contemporary legal scholarship. In particular, L. Prypolova, in her study on the legal status of persons missing in connection with armed conflict and other special circumstances, highlights the pivotal role of the International Committee of the Red Cross (ICRC) in tracing individuals whose whereabouts remain unknown during armed conflicts.

According to the author, the Geneva Conventions confer upon the ICRC a broad humanitarian mandate, including access to persons deprived of their liberty in relation to armed

conflicts and the facilitation of family tracing activities. Within this framework, the ICRC coordinates the operation of specialized tracing mechanisms responsible for collecting, processing, and transmitting information concerning prisoners of war, civilian detainees, children, and other protected persons. These activities are aimed at restoring family links, clarifying the fate of missing individuals, and ensuring the exchange of humanitarian information between the parties to a conflict.

Particular importance is attached to the information and tracing systems established under the Geneva Conventions, which provide for the centralized collection and dissemination of data regarding prisoners of war and civilians affected by hostilities. Through these mechanisms, competent authorities and humanitarian organizations are able to conduct inquiries into the fate and whereabouts of missing persons, thereby contributing to the realization of the families' right to know and strengthening the protection afforded to victims of armed conflict under international humanitarian law. [9].

Conclusion

In conclusion, the phenomenon of persons missing under special circumstances constitutes one of the most complex and enduring challenges at the intersection of international humanitarian law, human rights law, and domestic legal regulation. Its relevance within contemporary legal systems is not merely persistent but demonstrably expanding, reflecting both the scale of modern armed conflicts and the increasing fragility of civilian protection in conditions of protracted insecurity. Each year, thousands of individuals are reported missing across different jurisdictions, and this figure continues to rise in correlation with the intensification of military confrontations, systemic displacement, and large-scale humanitarian crises.

While historically the legal and sociological discourse on missing persons was predominantly associated with phenomena such as transnational human trafficking, irregular migration flows, or cases involving individuals with cognitive impairments – particularly conditions such as dementia that may lead to involuntary disappearance – the contemporary landscape has significantly transformed. These earlier paradigms, though still relevant, are now structurally supplemented and, in many contexts, overshadowed by the consequences of armed conflicts of varying intensity and duration. In particular, ongoing or recently escalated hostilities, including the war between Ukraine and the Russian Federation, the Israeli–Palestinian conflict, and other regional confrontations, have generated unprecedented numbers of missing

persons, thereby reshaping both the empirical scope and normative urgency of this legal category.

Within this evolving context, the importance of a precise and functional legal definition of persons missing under special circumstances extends well beyond conventional scenarios of natural disasters or voluntary disappearance. It increasingly encompasses situations characterized by the direct exposure of civilians and combatants to hostilities, indiscriminate violence, and forced displacement. The legal category thus acquires a distinctly humanitarian dimension, grounded in the protection of human dignity under conditions of uncertainty and loss.

At the same time, the lived reality underlying this legal construct is marked by profound human suffering and prolonged psychological trauma. It reflects the experiences of parents searching for children separated in the aftermath of shelling or evacuation, children attempting to ascertain the fate of parents engaged in military service, and families enduring indefinite periods of uncertainty in the absence of verified information regarding the fate of their loved ones. This state of suspended knowledge produces a dual burden – legal uncertainty on the one hand and existential anguish on the other – thereby underscoring the necessity of robust institutional mechanisms capable of ensuring effective search procedures, reliable information exchange, and the realization of the “right to know” in accordance with international humanitarian standards.

Accordingly, the regulation of persons missing under special circumstances must be understood not as a purely technical legal framework, but as an essential component of a broader humanitarian architecture aimed at mitigating the consequences of armed conflict and preserving the minimum guarantees of human dignity in situations where certainty has been displaced by prolonged absence and unverified fate.

Bibliography

1. Number of missing people registered with the Red Cross and Red Crescent Movement up nearly 70% in five years. International Committee of the Red Cross. 29.08.2025. URL: <https://www.icrc.org/en/news-release/missing-people-registered-increased-70-percent-five-years> (accessed: 12.03.2026).
2. More than 90,000 Ukrainians in the registry of missing persons under special circumstances – commissioner. Radio Svoboda. News|Events. 26.02.2026. URL: <https://www.radiosvoboda.org/a/news-znykli-bezvisty-upovnovazhenyi/33688611.html> (accessed: 12.03.2026).
3. Law of Ukraine "On the Legal Status of Persons Missing under Special Circumstances": Verkhovna Rada of Ukraine of 12.07.2018, № 2505-VIII: as of 14.04.2022.

4. Saktorová Ľ. Crimes within the Jurisdiction of the International Criminal Court among Mutual Recognition Offences. In: Recognition of Foreign Criminal Sanctions. Praha: Leges, 2021, s. 165–182. ISBN 978-80-7502-537-1.
5. Kolpakov V. K. Missing Persons Under Special Circumstances in the Doctrine of Human Rights. Human rights and public governance in modern conditions, Riga, Latvia, July 28, 2023. Riga, Latvia: Baltija Publishing, 2023. pp. 367–391.
6. Daniel A. V. Search for Persons Missing under Special Circumstances. European Choice of Ukraine, development of science and national security in the realities of large-scale military aggression and global challenges of the XXI century, Odesa, Ukraine, June 17, 2022. Odesa: Publishing House "Helvetica", 2022. pp. 214–217.
7. International Humanitarian Law: educational and methodical manual / M. V. Hrushko et al. Odesa: Publishing House "Helvetica", 2022.
8. Resolution of the Cabinet of Ministers "Certain issues of implementation of the Law of Ukraine 'On the Legal Status of Persons Missing under Special Circumstances'": Cabinet of Ministers of 29.04.2022, № 511.
9. Prypolova L. I. Legal status of persons missing in connection with armed conflict and under special circumstances. Enterprise, Economy and Law. 2020. Vol. 3. pp. 198–202.

DEPORTATION OF THE CHILDREN IN THE CONTEXT OF THE RUSSIA-UKRAINIAN WAR

OKSANA KIRIIAK * - KARYNA HODOVSKA **

Abstract

In an era of rapid technological advancement and increasing global interdependence, war is often regarded as an obsolete means of resolving international disputes. Nevertheless, the russian–Ukrainian war, which escalated into a full-scale invasion in 2022, has precipitated a profound humanitarian crisis, with children among its most vulnerable victims. This paper examines the unlawful deportation and forcible transfer of Ukrainian children to russia and russian-occupied territories, a practice that had affected approximately 20,000 minors as of March 2026. Through an analysis of the relevant provisions of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, the paper argues that russia has systematically circumvented international humanitarian law by replacing legitimate parental consent with authorization from occupation-appointed authorities, conferring russian citizenship upon deported children, and placing them in russian families and state institutions without any realistic prospect of repatriation.

Key words: *deportation of children, forcible transfer, child protection, children`s right, crimes against humanity, war crimes, russian-Ukrainian war, evacuation, international humanitarian law.*

Introduction

In the context of the Russian-Ukrainian war, which began in 2014 and escalated into a full-scale invasion in 2022, the protection of children's rights, freedoms, and fundamental human dignity has emerged as one of the most pressing humanitarian and legal challenges facing the international community. Children have become particularly vulnerable victims of the armed conflict, suffering from displacement, family separation, disruption of education, psychological trauma, injuries, and loss of life. As a result, ensuring the effective protection of their rights under both international humanitarian law and international human rights law has become a matter of urgent concern.

Despite the existence of numerous international bilateral and multilateral treaties, conventions, and legal mechanisms designed to prevent and punish grave international crimes – including war crimes, crimes against humanity, the crime of aggression, and genocide – the russian federation continues to employ military force against Ukraine on a daily basis. Numerous reports and investigations conducted by international organizations, governmental bodies, and independent monitoring mechanisms have documented systematic violations of international

* Kiriak Oksana, Associate Professor, Private Law Department of Yuriy Fedkovych Chernivtsi National University, e-mail: o.kiriyak@chnu.edu.ua

** Karyna Hodovska, 3rd of study, Bachelor`s student, full-time study, Faculty of Law, e-mail: hodovska.karyna@chnu.edu.ua

law committed during the course of the conflict. These violations have had particularly severe consequences for children, whose rights to life, security, education, family unity, and protection from violence have been repeatedly endangered.

The ongoing hostilities demonstrate the limitations of existing international safeguards and highlight the necessity of strengthening accountability mechanisms to ensure the protection of civilians, especially children. In this regard, the Russian Federation's actions on the territory of Ukraine raise serious concerns regarding compliance with its obligations under international law and underscore the importance of coordinated international efforts aimed at preventing further violations, ensuring justice for victims, and safeguarding the rights and freedoms of future generations.

During all wars, the most vulnerable, unprotected part of society is children, who do not have a mechanism to protect their rights by themselves. According to the statistics that are regularly published on the website “Children of war” (1), as of March 2026, approximately twenty thousand children were deported or transferred by Russian authorities to the Russian Federation or to areas they occupied in Ukraine. In the present day, Ukrainian diplomats, in collaboration with the International Coalition for the Return of Ukrainian Children, were able to return 2047 children.

Generally, the Geneva Convention relative to the Protection of Civilian Persons in Time of War prohibits individual or mass forcible transfers, deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, regardless of their motive (2). However, it allows total or partial evacuation of a given area if the security of the population or imperative military reasons so demand, as Russia actively uses it to justify unlawful deportation.

In the initial phase of the relocation process, Ukrainian children were transferred by Russian authorities to temporary transit facilities located either within the territory of the Russian Federation or in areas of Ukraine currently under Russian occupation. These transit centres appear to function as intermediary holding sites prior to subsequent dispersal, rather than as short-term humanitarian reception points oriented toward family reunification or return.

Following this initial stage, children are reportedly redistributed to a wide network of destinations across multiple administrative regions of the Russian Federation, encompassing at least twenty-one distinct territorial units. Within these regions, the children are placed either within private foster households or in institutional care settings, where their residence is often indefinite in duration. This multi-stage relocation framework results in prolonged separation

from their families and places the children within a dispersed system of care arrangements, significantly complicating efforts aimed at tracing, legal recovery, and eventual repatriation.

Based on international humanitarian law, evacuations must be temporary and provided for essential reasons such as health, medical treatment, or safety. Nowadays, according to the evidence collected by the Independent International Commission of Inquiry on Ukraine (3), after four years of full-scale invasion, eighty percent of the children deported or transferred have no return. It can be concluded that the relocation of children has generally not been temporary, and russian authorities have not facilitated the return of the children to their families or country.

Moreover, they have been given russian citizenship and appeared on adoption databases (3) that have been encouraged at the highest level of the russian federation state apparatus.

In June 2023, the president of the russian federation declared, “We evacuated entire orphanages, and it was done legally because the directors of those orphanages were legal guardians of the children”. Based on the Geneva law, for a legally approved temporary evacuation of children from occupied territory, written consent of the parents, legal guardians, or, if these persons cannot be found, the written consent to such evacuation of the persons who, by law or custom, are primarily responsible for the care of the children is required(4). In fact, russian authorities did not have to attend to obtain the consent of directors appointed by the Ukrainian Government. Instead, they relied on the consent of local loyal authorities, in cases of Luhansk and Donetsk regions, appointed by them, or, for instance, in the Kherson region, occupation authorities dismissed the current director and replaced him with a new director who was ready to cooperate and to consent to deportation and transfer.

Chapter 1. Transfers of children after separation from parents or legal guardians due to hostilities

The transfer of Ukrainian children by the russian federation into russian-controlled territory has occurred under several distinguishable categories of purported “prerequisites,” which, when examined through the prism of international humanitarian law, reveal a pattern of systematic disregard for established legal protections afforded to children in armed conflict. In the initial and most frequently documented category, the transferred minors include those who became separated from their parents, legal guardians, or primary caregivers as a direct consequence of active hostilities, displacement, and the breakdown of civilian protective structures within the conflict zone. Such circumstances, under international humanitarian law – particularly the

Geneva Conventions and their Additional Protocols – impose heightened obligations on all parties to the conflict to ensure the protection, tracing, and reunification of separated family members, especially children, who are recognized as a particularly vulnerable protected group. Notwithstanding these binding legal obligations, available evidence indicates that the Russian Federation has not undertaken adequate, transparent, or good-faith measures to facilitate the safe evacuation of such children to Ukrainian government-controlled territory, nor has it consistently fulfilled its duty to notify competent Ukrainian authorities regarding the identity, location, or condition of transferred minors. Instead, patterns documented by international monitoring bodies and corroborated by witness testimonies suggest the absence of a functional or systematic notification mechanism, resulting in prolonged informational deprivation for families and Ukrainian state institutions alike.

This failure to cooperate with established humanitarian procedures has contributed to a situation in which the whereabouts and legal status of numerous children remain uncertain, thereby obstructing efforts aimed at family reunification and lawful repatriation. From a legal perspective, such omissions are not merely administrative deficiencies but may constitute violations of core principles of international humanitarian law, including the obligation to facilitate family contact, prevent enforced disappearance, and ensure the protection of civilians in occupied territories. Collectively, these practices reflect a broader pattern of non-compliance with international norms governing the treatment of separated and unaccompanied children in situations of armed conflict.

For instance, in February 2022, as the fighting broke out in Mariupol city, 17 children up to 17 years old who were on vacation in a health resort there lost contact with their families and the opportunity to leave the Ukraine-controlled region. Eventually, the children ended up in a hospital in Donetsk city.

In the words of a mother of six children, during their state at the hospital, her children had been pushed, slapped, insulted, screamed at, and given bad food. Pro-Russian persons constantly told her children that they would be given to other families and forget their own parents, which became enormous pressure on a child's unformed consciousness. Besides, three of them who have disabilities did not receive appropriate care and medicine.

In this case, the Russian side did not take any measures aimed at reuniting children and their parents or legal guardians. In June 2022, thanks to the efforts of volunteers, the return of twelve of these children was possible. However, according to the report of the International Commission of Inquiry on Ukraine, at least one of the 17 children was subsequently deported to the Russian Federation and placed in a foster family (3).

Children transferred following the arrest of the parent at a filtration point

The second category of documented incidents concerns cases in which Russian authorities transferred Ukrainian children to Russian-controlled areas within the Donetsk region following the detention of one or both parents at so-called filtration points. In such circumstances, children were subsequently placed in institutional care facilities or medical establishments, rather than being immediately processed for family reunification or transfer to Ukrainian competent authorities.

Critically, in these cases, there is no evidence that Russian authorities established timely contact with Ukrainian institutions or undertook meaningful efforts to notify the Ukrainian state regarding the detention of parents or the concurrent relocation of their children. The absence of an effective notification mechanism, particularly during periods of parental detention, resulted in a complete breakdown of communication between the affected families and relevant authorities. This informational vacuum significantly exacerbated the vulnerability of the children involved.

Documented instance violations in this field are the deportation of three children in Mariupol who were trying to leave in an evacuation convoy with their father, the legal guardians of three minors. At a filtration point, the father was detained and transferred to the Olenivka penal colony. At this time, children were removed by social services of the so-called Donetsk People's Republic and relocated to a children's home and then a hospital in the Donetsk region. After that, the children had a long trip to the Russian Federation, together with almost 30 other children, and were accommodated in a camp near Moscow. As soon as his father was released from detention, he found out about the whereabouts of his children. The trip to return the children was challenging, with multiple security and logistical constraints. In this camp, the family saw plenty of Ukrainian children who were waiting for accommodation in Russian families.

Transfers of children in institutions

The third category of incidents concerns children transferred from institutions in Kharkiv, Kherson, and Mykolaiv regions to Crimea, Luhansk region, or the Russian Federation. In all documented cases, neither parents, legal guardians, nor institution staff consented to the transfers. Children themselves also expressed strong objections. The official justification provided by Russian authorities was temporary rest, treatment, or rehabilitation.

In practice, Russian authorities replaced uncooperative institution directors with loyalists and used threatening language toward staff who resisted. Parents who managed to establish contact

with their children were required to undertake long and complicated travel through multiple countries to retrieve them, with no cooperation or assistance from russian authorities. As a result, family separations lasted up to three months.

Three documented incidents illustrate this pattern. In the Mykolaiv region, fifteen children under institutional guardianship were forcibly transferred to Crimea despite repeated objections from their legal guardian, who had consistently communicated that the children had relatives in Ukrainian-controlled territory. In the Kherson region, approximately eighty children and young adults with disabilities were transferred in three groups to Crimea and other russian-controlled locations, in several cases without parental consent being obtained at all. In the Kharkiv region, thirteen children with disabilities were removed by the russian armed forces without notifying their families. One mother learned of her son's whereabouts only through a media video.

Witnesses consistently reported that numerous other children remained in similar situations, without family contact and without a viable path to return.

Chapter 2. Mechanism of returning Ukrainian children

In major cases, the success of returning Ukrainian children is the merit of the Ukrainian party and parents or legal guardians. Russian authorities did not establish any system to facilitate the return of the children to their families or country, and consistently refuse to cooperate in this field. Moreover, russian authorities have required individual family members to pick up their children in person, which caused a long and complicated road, up to one week one way, sometimes requiring transit through several countries. Also, some family members faced a lack of finances, inadequate travel documents, a dire security situation, and logistical difficulties. These factors prolonged the duration of family separation; in some cases, it took weeks or up to several months.

Referring to International Humanitarian Law, the Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts (5). In addition, unjustifiable delay in the repatriation of prisoners of war or civilians regarded as war crimes (6). Convention on the Rights of the Child states that in all actions concerning children, the best interests of the child shall be a primary consideration (7). The child has the right to be cared for by his or her parents (8). States Parties shall ensure that a child shall not be separated from his or her parents against their will (9).

Children, parents, and extended family members have encountered profound and sustained impediments in their efforts to establish, maintain, or restore contact following the deportation or forcible transfer of minors. Owing to the persistent non-cooperation of the Russian Federation with Ukrainian competent authorities, there exists no transparent, verifiable, or procedurally adequate mechanism for the systematic disclosure of information regarding the whereabouts, legal status, custodial arrangements, or welfare conditions of affected children. In numerous documented instances, parents have been deprived of direct notification and instead acquire fragmented or indirect information concerning their children through media reporting, investigative disclosures, or third-party intermediaries, thereby exacerbating informational asymmetry and deepening the psychological burden borne by affected families.

Empirical testimonies provided by children and family members indicate that, in multiple cases, representatives of social service institutions operating within temporarily occupied territories or the territory of the Russian Federation have communicated to minors that they would be placed into foster care, prospective adoption arrangements, or institutional guardianship structures. Such disclosures, often delivered in conditions lacking procedural transparency or familial consultation, contribute to heightened affective destabilisation and uncertainty among children, particularly in contexts where prospects for family reunification remain obscured or actively obstructed. Furthermore, corroborated accounts consistently indicate substandard material and caregiving conditions, including inadequate nutritional provision, deficient access to hygienic infrastructure, and insufficient accommodation standards. In cases involving children with disabilities, there are recurrent reports of systemic deficiencies in access to essential medical treatment, rehabilitative services, and pharmacological support, thereby producing deleterious consequences for both somatic health outcomes and developmental trajectories.

Beyond material deprivation, the psychosocial and psychotraumatological impact of these experiences is substantial and multifaceted. Affected children frequently exhibit sustained states of anticipatory anxiety, uncertainty regarding familial reunification, and an impaired capacity to construct stable future-oriented expectations. This condition of chronic informational deprivation and existential ambiguity constitutes a significant source of psychological trauma, compounded by reported instances of coercive communication practices and intimidation within certain institutional environments. Collectively, these factors contribute to a complex trauma profile characterized by prolonged stress exposure, disrupted attachment systems, and adverse impacts on emotional regulation, cognitive development, and long-term psychosocial functioning.

In this regard, children in institutions, the youngest or those with disabilities, have almost no chance to return. This is an enormous violation determined by Additional Protocol I to the Geneva Conventions (5) where the authorities of the Party arranging for the evacuation must facilitate returning children to their families and country and provide for each child a card with photographs and main information as a name and surname, place and date of birth, nationality, native language, family address of the child's family ect (10).

Long-term placement of children: foster placements or adoptions

Despite Russia's attempts to convince the world that the deportation is temporary and committed first of all for safety and welfare of children, the evidence collected by the Independent International Commission of Inquiry on Ukraine refutes these statements.

From the first day of "evacuation," Russian authorities declared that the preferred option for deported and transferred children from Ukraine would be adoption, and plenty of Russian citizens express a strong willingness to adopt these children. For this aim, already two days before the full-scale invasion of the Russian Federation, the occupying country started considering a practical mechanism of legal adoption and coordinated action in administrative challenges. Based on the update on the website of the Presidential Commissioner for Children's Rights of the Russian Federation, particular attention was paid to parental carelessness of children who were deported or forcibly transferred from institutions in the Donetsk and Luhansk region to the Russian Federation(11). Besides, the Commissioner under the President of the Russian Federation for Children's Rights, Ms. Lvova-Belova, said: *"We, in turn, together with colleagues from other departments, will work out the issue of how this can be done legally"*(11), that underline outrageous intentions of the Occupying Part to seek a legally appropriate way to formalize child abduction.

Within the legal framework governing the adoption of a child who is a foreign national, the consent of the competent authorities of the child's state of citizenship is a fundamental prerequisite under both domestic adoption regimes and international legal standards. This requirement is designed to safeguard the sovereignty of the child's country of origin and to ensure that intercountry adoption procedures comply with established principles of international law, including the best interests of the child and protections against unlawful transfer or exploitation.

In an effort to circumvent these legal safeguards, Russian authorities have systematically facilitated the expedited conferral of Russian citizenship upon deported Ukrainian children

originating from occupied territories and other regions of Ukraine affected by the ongoing armed conflict. This practice has been widely reported in official public statements, corroborated by investigative documentation, and further substantiated through testimonies provided by parents and children who have been returned or escaped. The granting of russian citizenship in such contexts appears to function as a legal mechanism intended to retroactively regularize unlawful transfers and to eliminate the requirement for consent from Ukrainian state authorities, thereby undermining established norms of intercountry adoption and child protection.

A particularly concerning dimension of this process is the extent to which these actions appear to be institutionalized and endorsed at the highest levels of state authority. Reports indicate that russian officials have actively promoted, incentivized, and publicly celebrated foster placements and adoptions of Ukrainian children. Such practices have included formal ceremonies in which children are presented with certificates of gratitude, symbolic awards, and material benefits, including financial incentives directed toward adoptive or foster families. These state-sponsored initiatives not only normalize the integration of displaced Ukrainian minors into russian families but also raise serious legal and ethical concerns regarding coercion, consent, and the broader violation of international norms governing the protection of children in armed conflict.

However, the practice of adoption or placement in russian families of children deported from Ukraine's areas is not new for the russian federation. From the first days of the invasion in 2014, russia started illegal actions of forcible transfer that were officially approved by the European Court for Human Rights (12). In its opinion is noted that there is no doubt that committed continuous sequence of acts aimed at removing Ukrainian children from occupying territory and their further placement in russian families occurred between 2014 and 2022.

After warrants of arrest issuance by the International Criminal Court against Mr. Putin and Ms. Lvova-Belova (13) for the war crime of unlawful deportation and transfer of children from Ukraine, the rhetoric of the occupying state has changed dramatically. From March 2023, the Russian part started denying any cases of adoption of Ukrainian children and generally stopped referring to “adoption”.

Despite these statements, according to the (14) evidence of the Independent International Commission of Inquiry on Ukraine, russian authorities never stopped placing deported children from Ukrainian regions in russian families, including long-term types of arrangements such as adoption. Moreover, since 2022, a russian online adoption database has been uploading profiles of deported children, indicating that they can be adopted or placed in foster families.

The pattern of conduct described above leaves no room for ambiguity. Russia's systematic effort to place deported Ukrainian children into Russian families through adoption and foster care arrangements is not a spontaneous humanitarian response – it is a deliberate, state-orchestrated policy that has been pursued continuously since 2014 and accelerated following the full-scale invasion of 2022.

These acts constitute a grave violation of international humanitarian law and represent one of the most serious ongoing crimes committed against the Ukrainian people – the systematic erasure of the identity and future of an entire generation of children.

Conclusion

The deportation and forcible transfer of Ukrainian children by the Russian Federation constitute one of the most serious and systematic violations of international humanitarian law and international human rights law arising from the ongoing armed conflict against Ukraine. These practices not only infringe upon the fundamental rights of children as protected under the Geneva Conventions, the Convention on the Rights of the Child, and other international legal instruments, but also undermine the core principles of civilian protection during armed conflict. The removal of children from their families, communities, and national environment exposes them to profound psychological, social, cultural, and legal harms, the consequences of which may extend across generations.

The process of locating and securing the return of deported children presents extraordinary challenges for Ukrainian parents, guardians, and state authorities. Families seeking information about missing children frequently encounter significant obstacles, including the detention and interrogation of civilians at Russian filtration checkpoints, restrictions on freedom of movement, limited access to reliable information regarding the whereabouts of deported minors, and substantial administrative barriers associated with cross-border travel. These difficulties are further exacerbated by policies aimed at the forced integration of Ukrainian children into Russian social, educational, and legal systems. Reports indicate that many Ukrainian minors have been subjected to the imposition of Russian citizenship, changes to personal documentation, and placement within Russian foster care or adoption frameworks, thereby complicating identification procedures and creating additional legal impediments to their eventual repatriation.

The gravity of these actions has received increasing recognition within the international legal community. On 12 March 2026, the Independent International Commission of Inquiry on

Ukraine, established on 4 March 2022 with a mandate to investigate violations of international law committed in the context of the conflict, formally concluded that the deportation and forcible transfer of Ukrainian children constitute both war crimes and crimes against humanity. This determination represents a significant development in the ongoing effort to establish individual criminal responsibility for serious violations of international law. Moreover, it reinforces the principle that those responsible for planning, ordering, facilitating, or implementing such acts must be held accountable through appropriate national and international legal mechanisms.

The Commission's findings also underscore the broader obligations of the international community under international law. States, international organizations, and relevant institutions bear a collective responsibility to prevent the continuation of such practices, to support investigations and accountability processes, and to assist in restoring the rights of affected children and their families. Effective responses require sustained cooperation among governments, international judicial bodies, humanitarian organizations, and civil society actors to ensure that evidence is preserved, victims are identified, and avenues for legal redress remain accessible.

In light of these developments, the international community must intensify diplomatic, political, and legal efforts aimed at compelling the Russian Federation to comply with its international obligations. Such efforts should include the strengthening of sanctions and accountability measures, the expansion of mandates for international monitoring and investigative mechanisms, enhanced support for documentation and tracing initiatives, and increased coordination among states and international organizations engaged in child protection activities. Particular attention should be devoted to supporting Ukrainian initiatives dedicated to the identification, recovery, and reintegration of deported children, including the Bring Kids Back UA platform and related humanitarian mechanisms.

Ultimately, the safe, voluntary, and dignified return of every unlawfully transferred or deported Ukrainian child must remain a central and non-negotiable objective of international humanitarian action and international justice efforts. Achieving this goal is not only essential for restoring the rights and well-being of individual children and their families but also for upholding the integrity of the international legal order and reaffirming the fundamental principle that grave violations of children's rights during armed conflict cannot be tolerated with impunity. Continued international engagement, effective accountability mechanisms, and unwavering support for victim-centred recovery processes will remain indispensable until all abducted children are returned and full justice is achieved.

Bibliography

1. <https://childrenofwar.gov.ua/>
2. Geneva Convention relative to the Protection of Persons in Time of War, article 49
3. Report of the Independent International Commission of Inquiry on Ukraine to the Human Rights Council (A/HRC/61/61)
4. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, article 78 (1)
5. Additional Protocol I to the Geneva Conventions, article 74.
6. Additional Protocol I to the Geneva Conventions, article 85(4)(b),(5)
7. Convention on the Rights of the Child, Preamble, articles 3
8. Convention on the Rights of the Child, Preamble, article 7
9. Convention on the Rights of the Child, Preamble, article 9 (1)
10. Additional Protocol I to the Geneva Conventions, article 78 (3)
11. Official website of the Presidential Commissioner for Children's Rights of the Russian Federation, "We have never abandoned our own people - a conference call of children's ombudsmen on assistance to children and families from the LPR and DPR was held", 22 February 2022
12. European Court of Human Rights, Ukraine and the Netherlands v. Russia, Applications nos. 8019/16, 43800/14, 28525/20 and 11055/22, Judgment, 9 July 2025, paras. 1588 and 1599
13. <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>
14. <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiukraine/a-hrc-61-crp-8.pdf>

MANDATORY REQUIREMENTS AS A FORM OF SANCTION TO FINANCIAL ENTITIES

PAULIUS BAREIKA*

Abstract

This article examines the relationship between mandatory requirements and administrative sanctions as supervisory tools applied to financial entities under Lithuanian and European Union law. Drawing on the Single Supervisory Mechanism (SSM) framework, the ECHR jurisprudence on the Engel criteria, and the proportionality doctrine as developed in CJEU case law and academic scholarship, the article argues that the formal distinction between these two categories of supervisory tools is increasingly difficult to sustain in practice. The functional convergence of mandatory requirements and administrative sanctions (with respect to their purpose, directionality, and economic impact) raises significant questions regarding compliance with the ne bis in idem principle enshrined in Article 50 of the Charter of Fundamental Rights of the European Union (Charter). It is submitted that a substance-over-form approach is required when assessing the nature of supervisory tools and their sequential application.

Keywords: administrative sanctions, mandatory requirements, supervisory tools, ne bis in idem.

Introduction

Under Lithuanian law, both mandatory requirements and administrative sanctions applicable to financial entities derive from a common regulatory source: Article 37 of the Law on Public Administration of the Republic of Lithuania (1999), which defines "measures of influence" (lith. *poveikio priemonės*) and establishes the overarching requirements for their application. This shared statutory basis is not merely a legislative coincidence; it reflects a deliberate normative choice to place both categories of supervisory tools within the same administrative law framework, subject to identical procedural guarantees, publication requirements, and proportionality obligations.

At the same time, because Lithuania forms part of the Single Supervisory Mechanism (SSM), the regulation of credit institutions is primarily governed by European Union law — in particular, Capital Requirements Directive IV (CRD IV) and the Capital Requirements Regulation (CRR). The Lithuanian legislator has accordingly established a *lex specialis* regime for financial entities, supplementing EU requirements through the Law on Banks of the Republic of Lithuania (2004) and the Law on the Bank of Lithuania (1994). Within this special regime, supervisory tools (referred to hereinafter as "the Tools") are formally divided into two principal categories: mandatory requirements and administrative sanctions.

* PhD candidate (2nd year) at Vilnius University, Faculty of Law. Lithuania E-mail: paulius.bareika@tf.stud.vu.lt

Scholars often regard both categories as belonging to the same family of sanctioning activities.¹ Although this formal distinction is not always clear,² and a three-tier analytical structure, comprising investigatory powers, supervisory measures, and administrative penalties, has been proposed in academic literature,³ the boundaries between these categories remain contested in both doctrine and practice.

The legal grounds for applying the two Tools, while overlapping in important respects, are not entirely identical. Article 67(3) of the Law on Banks provides that mandatory requirements may be applied where: (1) the supervisor identifies infringements of legal acts or other deficiencies in banking activities; (2) the supervisor has evidence that within the next twelve months the institution may infringe applicable legal acts; or (3) there is a real threat to the stability or reliability of the bank, public interest, or the interests of the bank's clients. By contrast, Article 73(1) of the same law enumerates sixteen distinct grounds for the imposition of administrative sanctions, one of which expressly combines grounds (1) and (3) listed above. This structural arrangement formally demarcates the conditions under which each Tool is to be applied; however, the overlap between several grounds for application establishes a normative grey area, in which the supervisor retains a degree of discretion to choose between the two categories of Tools. This discretion, as will be demonstrated below, is not procedurally neutral: since the same procedural safeguards apply to both Tools and the law expressly permits their sequential application, the question of their legal nature – and whether their combined imposition may violate the *ne bis in idem* principle – becomes both analytically and practically significant.

1. Purpose, Nature, and Functional Convergence

Both mandatory requirements and administrative sanctions may serve preventative and corrective purposes. A tripartite classification of administrative supervisory tools has been proposed in the literature,⁴ distinguishing between administrative liability measures, administrative preventative measures, and administrative restraint measures – the last of which typically involve instructions issued during an inspection, requirements to refrain from certain activities, or obligations to produce documents. Whilst such a classification has analytical merit,

¹ Deviatnikovaitė, I. (2021). *Administracinė teisė: teorija ir praktika*. Vilnius.

² Lackhoff, K. (2017). *Single Supervisory Mechanism: A practitioner's guide*. C.H. Beck/Hart/Nomos.

³ Gortsos, C.V. (2015). *The Single Supervisory Mechanism (SSM): Legal aspects of the first pillar of the European Banking Union*. European Public Law Organization.

⁴ Deviatnikovaitė, I. (2021). *Administracinė teisė: teorija ir praktika*. Vilnius.

its application to the Lithuanian framework reveals that many properties of the Tools overlap to a degree that renders clean categorical separation elusive in practice.

This overlap is particularly visible in Articles 67(2) and 72(1) of the Law on Banks, which contain Tools of a corrective nature applicable to analogous factual circumstances: for example, mandatory requirements to remedy already-identified infringements of the law, improve risk management processes, or enhance internal controls. Both provisions may be triggered by similar factual predicates and may produce materially comparable burdens on the regulated entity.

The most analytically productive distinction between the two Tools lies in their primary orientation. Mandatory requirements are fundamentally institution-directed: they explicitly and with immediate operational effect instruct the financial entity as to what it must do: raise capital to a prescribed level, limit dividend payouts, refrain from concluding certain categories of contract, or discontinue a defined line of activity. The obligation is internal to the entity's own organisation and risk profile. Administrative sanctions, by contrast, are predominantly outward-oriented: pecuniary fines, public warnings, withdrawals of authorisation, and restrictions on shareholders' voting rights do not prescribe a course of operational conduct but instead impose a punitive consequence with external reputational, financial, and governance effects. On this basis, one might argue that it is the punitive orientation of sanctions that constitutes their distinguishing feature *vis-à-vis* mandatory requirements.

However, this distinction cannot be maintained as an absolute one. The line between the Tools may be blurred by the severity of the burden that a mandatory requirement imposes in practice. A requirement to remedy identified infringements may give rise to remediation costs that considerably exceed the amount of any fine that might have been imposed for the same infringements. More significantly, certain mandatory requirements – most notably capital surcharges, special liquidity requirements, mandatory increases in the frequency of external audits, and fit-and-proper disqualifications of management – are sufficiently burdensome and sufficiently responsive to specific instances of individual misconduct that they are, in functional terms, materially indistinguishable from sanctions, even if formally classified otherwise. The mandatory requirement to hold additional own funds, for example, directly restricts the entity's commercial freedom, diverts capital from productive use, imposes ongoing compliance costs, and may signal to the market the existence of supervisory concerns – effects that are, in all relevant respects, punitive in character.

Furthermore, some Tools in both categories produce direct adverse effects on shareholders: the requirement to limit dividend payouts and the sanction restricting voting rights are structurally similar in their negative impact on the investment value and governance rights of the entity's owners, even if their formal classification differs. This further illustrates that the functional effects of the two categories of Tools frequently converge in a manner that cannot be explained away by reference to their formal legal labels alone.

The question of whether the punitive character of a given Tool engages the criminal limb of the European Convention on Human Rights (ECHR) must, in accordance with the methodology established by the European Court of Human Rights (ECtHR), be assessed by reference to the criteria articulated in *Engel and Others v. the Netherlands* (1976).⁵ This analysis is not confined to measures formally classified as administrative sanctions but must equally be applied to mandatory requirements whose severity and punitive character bring them within the ambit of those criteria.⁶ The implications of this analysis for the *ne bis in idem* principle are examined in Section 5 below.

2. Bi-Directional Application: *Ex Ante* and *Ex Post* Effects

A further dimension of the functional similarity between the two categories of Tools is their shared capacity for both *ex ante* and *ex post* application – that is, their deployment either in anticipation of future harm or in response to harm that has already occurred or is ongoing. This bi-directionality is a feature of both categories, and its presence in each undermines any attempt to draw a categorical distinction between mandatory requirements and administrative sanctions on the basis of temporal orientation alone.

Among mandatory requirements, measures with a predominantly *ex ante* character include requirements to raise capital or enhance liquidity buffers (which address prospective risks to financial stability), restrictions on permissible business activities (which prevent the materialisation of identified risks), and fit-and-proper assessments (which pre-empt the harm that may flow from unsuitable management). Conversely, requirements to remedy identified infringements such as instructions to rectify deficient internal controls or to correct

⁵ European Court of Human Rights. (1976, June 8). *Engel and Others v. the Netherlands*, Applications Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, Series A No. 22.

⁶ D'Ambrosio, R. (2013). *Due process and safeguards of the persons subject to SSM supervisory and sanctioning proceedings* (Quaderni di Ricerca Giuridica No. 74). Banca d'Italia. <https://www.bancaditalia.it/pubblicazioni/quaderni-giuridici/2013-0074/>; D'Ambrosio, R. (2021). The legal review of SSM administrative sanctions. In C. Zilioli & K.-P. Wojcik (Eds.), *Judicial review in the European Banking Union* (pp. 316–332). Edward Elgar.

misclassified assets are *ex post* in character, in that they respond to harm that has already been caused or is in the process of occurring.

Similarly, within the category of administrative sanctions, temporary prohibitions on activities and the removal or disqualification of management personnel operate primarily *ex ante*: they are triggered by past or ongoing conduct, but their operative purpose is to prevent further harm from materialising. Pecuniary fines and public warnings, on the other hand, are typically *ex post* in character, constituting a punitive response to completed infringements.

It should, however, be noted that the *ex ante/ex post* distinction, while analytically useful, does not operate symmetrically across the two categories of Tools. Mandatory requirements are more consistently oriented towards risk reduction, ongoing correction, and the prospective management of the entity's risk profile; administrative sanctions, by contrast, are more consistently oriented towards punitive responses to completed infringements. Nevertheless, this tendency does not rise to the level of a structural distinction capable of reliably separating the two categories. As noted above, both Tools may be deployed for either purpose, and the choice between them in any given case falls within the supervisor's administrative discretion.

A further asymmetry concerns the scope of deterrent effect. Because administrative sanctions (particularly pecuniary fines and withdrawals of authorization) are typically disclosed publicly and carry significant reputational consequences, their *ex ante* deterrent effect extends beyond the sanctioned entity to the financial market as a whole. Mandatory requirements, being institution-specific and directed at the internal organisation of the regulated entity, generally produce a lower market-wide deterrent effect, even where their financial burden on the individual entity is comparable to or greater than that of a sanction. This distinction has implications for the proportionality analysis discussed in the following section.

3. The Proportionality Principle and Its Application to Supervisory Tools

The principle of proportionality constitutes a fundamental constraint on the exercise of supervisory discretion in the application of both categories of Tools. The Court of Justice of the European Union (CJEU) has established that restrictions on rights and freedoms may be permissible only if they pursue a legitimate objective compatible with the Treaty on the Functioning of the European Union (TFEU) and are justified by overriding reasons of public interest, provided that they are appropriate for ensuring the attainment of the objective pursued

and do not exceed what is necessary to achieve it.⁷ This formulation, which draws directly on the proportionality doctrine as developed across the CJEU's jurisprudence, defines the outer limits of permissible supervisory action.

In the academic literature, four components of the proportionality principle have been identified: proper purpose, rational connection, necessary means, and proportionality *stricto sensu*.⁸ The first component requires that the measure pursue a legitimate aim; the second, that there be a rational connection between the measure and its aim; the third, that the measure be the least restrictive means available for achieving the aim; and the fourth (the balancing component) requires that the benefits of the measure outweigh its costs to the affected party and to the broader legal order. All four components must be satisfied cumulatively in order for a legal restriction to be justified.⁹

The CJEU's foundational treatment of proportionality in the context of fundamental rights restrictions was established in *Liselotte Hauer v. Land Rheinland-Pfalz* (1979),¹⁰ in which the Court first articulated the requirement that restrictions on fundamental rights pursue general interests of sufficient weight to justify the burden imposed on the individual. Subsequent case law has consistently endorsed a balancing approach that takes into account general interest, the common good, and collective objectives, which must outweigh the adverse consequences imposed on the addressee. This approach aligns closely with the Barak framework, and it may therefore be maintained that EU public law and, by extension, Lithuanian administrative law, recognises proportionality *stricto sensu* as an operative standard when assessing the legality of supervisory measures. This is further confirmed by the fact that proportionality balancing is expressly required by the Lithuanian Law on Public Administration (1999, Art. 37(1)), which directs the supervisor to have regard to the nature of the infringement and the extent of harm caused when selecting and calibrating the applicable Tool.¹¹

The Law on the Bank of Lithuania (1994, Art. 43²(5) and Art. 43³(11)) reinforces this requirement by mandating that all decisions imposing sanctions and mandatory requirements

⁷ Court of Justice of the European Union. (2023, September 7). *SC Cartrans Preda SRL v. Direcția Generală Regională a Finanțelor Publice Ploiești*, Case C-461/21, ECLI:EU:C:2023:634.

⁸ Barak, A. (2012). *Proportionality: Constitutional rights and their limitations* (D. Kalir, Trans.), pp. 243, 245–370. Cambridge University Press. <https://doi.org/10.1017/CBO9781139035293>.

⁹ *Ibid.*, p. 131.

¹⁰ Court of Justice of the European Union. (1979, December 13). *Liselotte Hauer v. Land Rheinland-Pfalz*, Case 44/79, ECLI:EU:C:1979:290, [1979] ECR 3727.

¹¹ Lietuvos Respublikos viešojo administravimo įstatymas [Law on Public Administration of the Republic of Lithuania], No. VIII-1234. (1999, June 17). *Valstybės žinios* [State Gazette]. (As amended), Art. 37(1).

be reasoned and substantiated, and that the choice of Tool be made having regard to the circumstances established in the supervisory process.¹² In principle, therefore, every supervisory decision issued by the Bank of Lithuania carries a presumption of proportionality, arising from the obligation of substantiation. In practice, however, the application of proportionality is invariably mediated by the exercise of administrative discretion in selecting which Tool is appropriate in each individual case. The supervisor's discretion in this regard is not unlimited: it is constrained by the four-component proportionality test, the principle of equal treatment, and, as argued in Section 5 below, the *ne bis in idem* prohibition. The risk of disproportionate cumulation arises precisely at the point where the supervisor, relying on its discretion, selects a mandatory requirement and a subsequent sanction for the same or substantially related factual circumstances, without adequately accounting for the aggregate burden imposed on the regulated entity.

4. Substance Over Form: The Characterisation of Supervisory Measures

The question of whether a supervisory measure should be characterised as a sanction regardless of its formal classification has been addressed both in comparative practice and in CJEU jurisprudence. A particularly instructive illustration of the economic reality underlying supervisory action is provided by the case of *Banca Privada d'Andorra* (BPA). On 10 March 2015, the Financial Crimes Enforcement Network (FinCEN) issued a notice identifying BPA as a foreign financial institution of primary money laundering concern pursuant to Section 311 of the USA PATRIOT Act.¹³ The notice was formally characterised as a preliminary finding of a non-binding nature. Nevertheless, its practical consequences were immediate and severe: BPA was effectively cut off from global dollar-denominated correspondent banking relationships, and the Andorran supervisory authority, Institut Nacional Andorrà de Finances (INAF), initiated a supervisory review that culminated in the appointment of special administrators, the revocation of the authority of all management, and the eventual liquidation of the institution.¹⁴ BPA's shareholders challenged the FinCEN notice in the United States Court of Appeals for the D.C. Circuit, arguing that it constituted a *de facto* sanction requiring the procedural protections applicable to formal sanctions. The Court rejected this argument, holding that the notice was a

¹² Lietuvos Respublikos Lietuvos banko įstatymas [Law on the Bank of Lithuania], No. I-678. (1994, December 1). *Valstybės žinios* [State Gazette]. (As amended), Art. 43²(5) and Art. 43³(11).

¹³ Financial Crimes Enforcement Network (FinCEN). (2015, March 10). *FinCEN names Banca Privada d'Andorra a foreign financial institution of primary money laundering concern* [Press release]. U.S. Department of the Treasury. <https://www.fincen.gov/news/news-releases/fincen-names-banca-privada-dandorra-foreign-financial-institution-primary-money>.

¹⁴ Institut Nacional Andorrà de Finances (INAF). (2015, March 11–12). *Supervisory intervention at Banca Privada d'Andorra* [Regulatory decision]. INAF.

non-binding preliminary finding that did not engage the due process requirements applicable to formal administrative sanctions.¹⁵

The BPA case illustrates a broader principle of considerable relevance to the present analysis: where a supervisory measure (regardless of its formal characterization) produces consequences of a severity and irreversibility comparable to those of a formal sanction, the formal label applied to that measure may be insufficient to insulate it from scrutiny under the substantive standards applicable to sanctions. Any form of negative supervisory publicity carries significant negative economic consequences for financial entities, given the heightened scrutiny to which such entities are subject by market participants, counterparties, and correspondent institutions. The close relationship between supervisory disclosure and the sanctioning effect it produces therefore calls for a substance-over-form approach to the characterisation of supervisory action.

This substance-over-form principle has been directly endorsed by the CJEU. In *Ilmārs Rimšēvičs and European Central Bank v. Republic of Latvia* (Joined Cases C-202/18 and C-238/18, 2019),¹⁶ the Grand Chamber was called upon to assess the legality of a decision by Latvia's Anti-Corruption Office to temporarily suspend the Governor of the Latvian national central bank from the exercise of his functions. The Court held that a temporary prohibition on the exercise of official functions must be subject to judicial review under Article 14(2) of the Statute of the ESCB, notwithstanding its formally precautionary character. Crucially, the Court reasoned that to exempt temporary precautionary measures from review would be to enable a series of formally provisional measures to operate in practice as a *de facto* permanent sanction, thereby circumventing the TFEU's guarantee of institutional independence. This reasoning constitutes an authoritative recognition, at the highest level of EU law, that the characterisation of a measure as temporary or precautionary does not, of itself, exclude it from the substantive legal framework applicable to measures of a sanctioning character.

Furthermore, it is worth noting that under Lithuanian law, both categories of Tools are subject to the same procedural safeguards and the same publication requirements (with reasonable exceptions), thereby reinforcing the conceptual coherence of treating them as elements of a single supervisory continuum. The fact that the Bank of Lithuania must reason and substantiate both sanctions and mandatory requirements, and that both are subject to public disclosure, further supports the view that the formal distinction between them does not entail a

¹⁵ United States Court of Appeals for the D.C. Circuit. (2017, May 23). *Cierco v. Mnuchin*, No. 15-5196.

¹⁶ Court of Justice of the European Union. (2019, February 26). *Ilmārs Rimšēvičs and European Central Bank v. Republic of Latvia*, Joined Cases C-202/18 and C-238/18, ECLI:EU:C:2019:139.

correspondingly sharp difference in their substantive legal nature or their effects on the regulated entity.

5. Sequential Application of the Tools and the *Ne Bis in Idem* Principle

The functional convergence of mandatory requirements and administrative sanctions described in the preceding sections acquires acute legal significance when the two Tools are applied sequentially in respect of the same factual circumstances. The *ne bis in idem* principle, enshrined in Article 50 of the Charter of Fundamental Rights of the European Union,¹⁷ prohibits the imposition of criminal proceedings or sanctions on a person who has already been finally acquitted or convicted of a criminal offence. The CJEU has consistently interpreted this provision in light of the *Engel* criteria established by the ECtHR, which determine whether a measure is criminal in substance regardless of its formal classification in national law.

In *Engel and Others v. the Netherlands* (1976), the ECtHR identified three criteria for determining the criminal character of a measure: (1) the classification of the offence in domestic law; (2) the nature of the offence, assessed by reference to whether the applicable norm addresses the general public or a specific, defined group; and (3) the nature and severity of the potential penalty. The second and third criteria are alternative rather than cumulative: satisfaction of either one is sufficient to engage the criminal limb of Article 6 ECHR, although the Court may also apply them cumulatively where neither is individually conclusive.

The CJEU applied and refined this framework in the context of financial market regulation in Criminal proceedings against *Luca Menci* (C-524/15, 2018) and *Garlsson Real Estate SA and Others v. Consob* (C-537/16, 2018).¹⁸ In both cases, the Court held that the *ne bis in idem* principle under Article 50 of the Charter precludes the duplication of criminal and administrative proceedings in respect of the same acts where the administrative proceedings are criminal in nature within the meaning of the *Engel* criteria. Crucially, the Court in *Menci* also clarified that a limitation of the *ne bis in idem* guarantee may be justified under Article 52(1) of the Charter — provided that it respects the essence of the right, pursues an objective of general interest, and satisfies the principle of proportionality. This qualification introduces a further

¹⁷ Charter of Fundamental Rights of the European Union, 2012/C 326/02. (2012). *Official Journal of the European Union*, C 326, 391–407, Art. 50.

¹⁸ Court of Justice of the European Union. (2018, March 20). *Criminal proceedings against Luca Menci*, Case C-524/15, ECLI:EU:C:2018:197; Court of Justice of the European Union. (2018, March 20). *Garlsson Real Estate SA and Others v. Commissione Nazionale per le Società e la Borsa (Consob)*, Case C-537/16, ECLI:EU:C:2018:193.

layer of proportionality analysis that the supervisory authority must undertake before sequentially applying the two categories of Tools.

It has been argued in the literature that certain administrative measures applicable to financial institutions are of sufficient severity to be classified as criminal sanctions within the meaning of the Engel criteria,¹⁹ in a manner analogous to the analysis conducted by the ECtHR in *Grande Stevens and Others v. Italy* (2014) and *Menarini Diagnostics S.R.L. v. Italy* (2011).²⁰ In *Grande Stevens*, the Court found that Italian administrative sanctions imposed by the financial market regulator CONSOB for market manipulation constituted criminal sanctions within the meaning of Article 6 ECHR, given the severity of the fines involved, their deterrent and punitive purpose, and the reputational consequences of public disclosure. Particularly significant for the present analysis is the Court's finding that a sanction designed to deter future conduct (and not merely to repair past harm) is criminal in *Engel* terms; this functional definition of the punitive character of a measure maps directly onto the *ex ante* deterrent effect that, as argued in Section 3 above, is shared by both categories of Tools.

It is submitted that the logic of this analysis should not be confined to administrative sanctions in the strict sense, but must equally be applied to mandatory requirements whose severity and punitive effect bring them within the scope of the third *Engel* criterion. Capital surcharges, activity restrictions, and fit-and-proper disqualifications in particular may, depending on their magnitude and the specific circumstances of their imposition, produce economic and reputational consequences of such severity that a substance-over-form analysis compels their classification as criminal measures. Where this is the case, the subsequent imposition of an administrative sanction for the same factual circumstances would engage the *ne bis in idem* prohibition under Article 50 of the Charter.

It follows that the principle of *ne bis in idem* must be applied on a case-by-case, *ad hoc* basis, with close attention to the substance of each Tool as applied in the specific factual context, rather than by reference to its formal classification. The supervisory authority must, in each case, assess whether the aggregate burden imposed by the sequential application of a mandatory requirement and a subsequent sanction – having regard to the economic impact, the punitive purpose, the degree of public disclosure, and the deterrent effect on the regulated entity and on

¹⁹ D'Ambrosio, R. (2021). The legal review of SSM administrative sanctions. In C. Zilioli & K.-P. Wojcik (Eds.), *Judicial review in the European Banking Union* (pp. 316–332). Edward Elgar.

²⁰ European Court of Human Rights. (2014, March 4). *Grande Stevens and Others v. Italy*, Application No. 18640/10, ECLI:CE:ECHR:2014:0304JUD001864010; European Court of Human Rights. (2011, September 27). *Menarini Diagnostics S.R.L. v. Italy*, Application No. 43509/08, ECLI:CE:ECHR:2011:0927JUD004350908.

the financial market as a whole – is consistent with the prohibition on double punishment. Failure to conduct this assessment risks not only a violation of Article 50 of the Charter but also a failure of proportionality under the framework established in *Menci*, insofar as the cumulation of measures may exceed what is necessary to achieve the supervisory objectives pursued.

Conclusions

1. The formal distinction between mandatory requirements and administrative sanctions is blurry: both categories of Tools derive from a shared legal basis, are subject to identical procedural safeguards and publication requirements, and are capable of producing materially comparable burdens on the regulated entity. Many supervisory actions that are formally classified as mandatory requirements may, in substance, constitute sanctions in the broad sense of the term.
2. Mandatory requirements and administrative sanctions share a common capacity for both preventative and corrective application. Their bi-directional temporal orientation, spanning both *ex ante* and *ex post* effects, means that the directionality of a measure cannot serve as a reliable criterion for distinguishing between the two categories. The deterrent effect of supervisory action, in particular, is a shared functional characteristic that carries normative significance for the purposes of the *Engel* analysis.
3. The substance-over-form principle, as endorsed by the CJEU in *Rimšēvičs and Others v. Latvia* (2019), requires that the legal characterisation of a supervisory measure be determined by reference to its actual effects rather than its formal label. Capital surcharges, activity restrictions, and fit-and-proper disqualifications may, depending on the circumstances of their imposition, may satisfy the third *Engel* criterion and thereby engage the procedural guarantees of Article 6 ECHR and the *ne bis in idem* prohibition of Article 50 of the Charter.
4. Where a mandatory requirement is of sufficient severity to be classified as criminal in substance under the *Engel* criteria, its sequential combination with an administrative sanction imposed for the same or substantially related factual circumstances will raise a *prima facie* violation of the *ne bis in idem* principle. The supervisory authority must therefore conduct a rigorous proportionality and *ne bis in idem* assessment on a case-by-case, ad hoc basis before applying the Tools sequentially, having regard to the aggregate burden imposed, the degree of overlap in the factual predicates of each measure, and the overall objectives pursued.

5. The present regulatory framework, while formally permitting the sequential application of both categories of Tools, does not provide sufficiently clear normative guidance on how the *ne bis in idem* principle is to be applied in the context of their cumulative use. Legislative clarification (or, at a minimum, supervisory guidance from the Bank of Lithuania) as to the criteria governing the sequential deployment of mandatory requirements and sanctions is desirable in order to ensure legal certainty and the effective protection of the rights of regulated entities.

Bibliography

1. Barak, A. (2012). *Proportionality: Constitutional rights and their limitations* (D. Kalir, Trans.). Cambridge University Press. <https://doi.org/10.1017/CBO9781139035293>
2. Charter of Fundamental Rights of the European Union, 2012/C 326/02. (2012). *Official Journal of the European Union*, C 326, 391–407. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>
3. Court of Justice of the European Union. (1979, December 13). *Liselotte Hauer v. Land Rheinland-Pfalz*, Case 44/79, ECLI:EU:C:1979:290, [1979] ECR 3727.
4. Court of Justice of the European Union. (2018, March 20). *Criminal proceedings against Luca Menci*, Case C-524/15, ECLI:EU:C:2018:197.
5. Court of Justice of the European Union. (2018, March 20). *Garlsson Real Estate SA and Others v. Commissione Nazionale per le Società e la Borsa (Consob)*, Case C-537/16, ECLI:EU:C:2018:193.
6. Court of Justice of the European Union. (2019, February 26). *Ilmārs Rimšēvičs and European Central Bank v. Republic of Latvia*, Joined Cases C-202/18 and C-238/18, ECLI:EU:C:2019:139.
7. Court of Justice of the European Union. (2023, September 7). *SC Cartrans Preda SRL v. Direcția Generală Regională a Finanțelor Publice Ploiești*, Case C-461/21, ECLI:EU:C:2023:634.
8. D'Ambrosio, R. (2013). *Due process and safeguards of the persons subject to SSM supervisory and sanctioning proceedings* (Quaderni di Ricerca Giuridica No. 74). Banca d'Italia. <https://www.bancaditalia.it/pubblicazioni/quaderni-giuridici/2013-0074/>
9. D'Ambrosio, R. (2021). The legal review of SSM administrative sanctions. In C. Zilioli & K.-P. Wojcik (Eds.), *Judicial review in the European Banking Union* (pp. 316–332). Edward Elgar.
10. Deviatnikovaitė, I. (2021). *Administracinė teisė: teorija ir praktika*. Vilnius.
11. European Court of Human Rights. (1976, June 8). *Engel and Others v. the Netherlands*, Applications Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, Series A No. 22.
12. European Court of Human Rights. (2011, September 27). *Menarini Diagnostics S.R.L. v. Italy*, Application No. 43509/08, ECLI:CE:ECHR:2011:0927JUD004350908.
13. European Court of Human Rights. (2014, March 4). *Grande Stevens and Others v. Italy*, Application No. 18640/10, ECLI:CE:ECHR:2014:0304JUD001864010.
14. Financial Crimes Enforcement Network (FinCEN). (2015, March 10). *FinCEN names Banca Privada d'Andorra a foreign financial institution of primary money laundering concern* [Press release]. U.S. Department of the Treasury. <https://www.fincen.gov/news/news-releases/fincen-names-banca-privada-dandorra-foreign-financial-institution-primary-money>
15. Gortsos, C.V. (2015). *The Single Supervisory Mechanism (SSM): Legal aspects of the first pillar of the European Banking Union*. European Public Law Organization.
16. Institut Nacional Andorrà de Finances (INAF). (2015, March 11–12). *Supervisory intervention at Banca Privada d'Andorra* [Regulatory decision]. INAF.
17. Lackhoff, K. (2017). *Single Supervisory Mechanism: A practitioner's guide*. C.H. Beck/Hart/Nomos.
18. Lietuvos Respublikos bankų įstatymas [Law on Banks of the Republic of Lithuania], No. IX-2085. (2004, March 30). *Valstybės žinios* [State Gazette]. (As amended).

19. Lietuvos Respublikos Lietuvos banko įstatymas [Law on the Bank of Lithuania], No. I-678. (1994, December 1). *Valstybės žinios* [State Gazette]. (As amended).
20. Lietuvos Respublikos viešojo administravimo įstatymas [Law on Public Administration of the Republic of Lithuania], No. VIII-1234. (1999, June 17). *Valstybės žinios* [State Gazette]. (As amended).
21. Treaty on the Functioning of the European Union, 2012/C 326/01. (2012). *Official Journal of the European Union*, C 326, 47–390. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>
22. United States Court of Appeals for the D.C. Circuit. (2017, May 23). *Cierco v. Mnuchin*, No. 15-5196.

THE RESILIENCE OF LEGAL TENDER: A COMPARATIVE STUDY OF MANDATORY CASH ACCEPTANCE IN SELECTED DEVELOPED ECONOMIES

VILIAM PONIŠT*

Abstract

This paper examines the emerging legislative trend of mandatory cash acceptance as a tool to preserve the functional role of legal tender - cash in modern payment systems. Through a comparative analysis of selected developed economies, the study explores how different jurisdictions approach the obligation to accept cash and to what extent such obligations strengthen the resilience of legal tender. Attention is paid to the relationship between the formal status of legal tender and its actual acceptability in practice. The paper argues that legal tender status alone is insufficient to ensure widespread usage, and that explicit legal frameworks mandating acceptance play a crucial role in maintaining financial inclusion, trust in central bank money, and the overall stability of payment systems.

Keywords: legal tender, resilience, cash, payments, financial law

Introduction

The traditional concept of legal tender, historically associated with physical forms of money – cash issued by a monetary authority (typically a central bank) – has long been regarded as a fundamental pillar of the monetary system. In recent years, however, it has been facing a gradual erosion of its practical significance (partly accelerated, for instance, by the COVID-19 pandemic), because of the dynamic development of digital payment instruments, financial technology innovations, and, above all, the changing preferences of us – the users.

A response to these challenges is the gradually emerging legislative trend that goes beyond the traditional understanding of legal tender as a mere legal status and moves towards its material reinforcement through an explicit obligation enshrined in legislation – namely, the obligation to accept it, or not to refuse it without legally defined grounds. From the perspective of tax collection, it would be advantageous for the state if all payments were carried out exclusively electronically, as they are traceable (electronic payments always leave a trace) and therefore more easily monitored. This could increase the collection of value-added tax and potentially also improve income tax compliance. At least, this appears to be the case. However, the correlation between restricting cash payments or imposing strict limits on them and reducing the shadow economy or tax fraud is highly questionable. On the other hand, there are also initiatives that favour cash and reintroduce it into legal systems with newly defined or explicitly articulated attributes. Several developed economies are moving towards the normative

* Mgr. Viliam Poništ, PhD., 1st year, PhD. candidate, viliamponist@gmail.com, Charles University in Prague, Czechia, Faculty of Law, Department of Financial Law and Financial Science.

anchoring of the obligation to accept cash to preserve the inclusiveness of the payment system, strengthen its resilience to crises, and maintain public trust in central bank money.

The present paper focuses on a comparative analysis of legal frameworks governing the obligation to accept cash in selected developed economies – namely Australia, Belgium, Norway, the United States, and the European Union as such. These jurisdictions were selected due to their differing legal approaches to the status of legal tender and the obligation to accept cash, as well as their high levels of economic development and payment system digitalisation. The selection includes jurisdictions with varying degrees of normative entrenchment of legal tender. Such a design allows for the identification of both common trends and fundamental differences in understanding and strengthening the resilience of legal tender in modern economies.

In addition to comparative, analytical, and descriptive methods, the paper also seeks to critically assess whether legislative efforts to strengthen the position of legal tender – cash represent an adequate response to current challenges or rather a symptomatic reaction to deeper structural changes in money and payment systems.

In any case, given that the approach to legal tender and its attributes may differ across countries, it can be assumed that the design of the obligation to accept legal tender will also vary accordingly. One of the hypotheses of this paper is that the mere status of legal tender may not be sufficient in modern economies to ensure its practical acceptance. Its real use is sustainable only if the status of legal tender is complemented by an explicit legal obligation to accept it. At the same time, it may be hypothesised that any partial, selective, or conditional strengthening of the right to pay in legal tender paradoxically weakens its general societal adoption – if such acceptance is to exist – since fragmentation of the acceptance framework undermines both the normative and functional resilience of legal tender.

1. On the concept of „legal tender“

This concept is understood differently across jurisdictions (that is, depending on how it is regulated by the monetary law of a given state), and accordingly may be subject to divergent interpretations. However, the notion of compulsory or legal tender (*gesetzliches Zahlungsmittel*, *cours légal*) as a component of the modern monetary system is universal. For instance, in the Czech Republic, legal tender (as lawful money) is defined in Section 16(1) of Act No. 6/1993 Coll. on the Czech National Bank, as amended, which provides that valid banknotes and coins issued by the Czech National Bank constitute legal money at their nominal

value for all payments within the Czech Republic. Referring to doctrinal interpretations, Kotáb¹ adds that these are tangible objects (banknotes and coins) that may be used to discharge payment obligations denominated in the currency they represent (in this case, Czech koruna) at their face value.

Legal tender is therefore often understood as money that a seller is obliged to accept as payment, even to the extent that a purchaser could compel its acceptance, or that money may only be accepted if it qualifies as legal tender. Goldberg, however, argues that such an interpretation is incorrect, because „*its practical importance as the legal foundation of the monetary system, if there is one, comes from its implication on tax payments.*“² Whether this aspect is indeed the most decisive element in determining legal tender status remains debatable. There are jurisdictions where legal tender is defined as money intended to settle both private and public obligations (e.g., Liberia, the United States), while there are also states in which taxes are not levied, yet monetary circulation still exists. It is therefore difficult to assert that legal tender is primarily significant in relation to tax obligations.

Siekmann defines legal tender as „*the formal qualification of an instrument of payment by an act of the competent sovereign which has to be accepted both by government entities and private persons to discharge monetary claims.*“³ According to this definition, it is immaterial whether the money in question has forced circulation, consists of precious metal coinage, or even takes a digital form. While a means of payment may acquire the status of legal tender only if it constitutes a form of money, not all forms of money acquire such status. In most jurisdictions, legal tender status is reserved for state-issued currency in the form of banknotes and coins, and more recently also certain digital assets (including, in some cases, crypto-assets).

The concept of legal tender has also been addressed by the Court of Justice of the European Union. In paragraph 46 of its judgment of 26 January 2021 in joined cases C-422/19 and C-423/19 (Johannes Dietrich and Norbert Häring v Hessischer Rundfunk), the Court held that „*the concept of „legal tender“ as a means of payment expressed in a monetary unit means, in its ordinary sense, that that means of payment cannot generally be refused in settlement of a debt denominated in the same monetary unit at its full face value, with the effect of discharging the payment obligation.*“⁴

¹ See Kotáb, P. (2018). K některým aspektům výlučnosti měny na státním území. *AUC IURIDICA*, 2018(1), p. 46;

² Goldberg, D. (2009). Legal tender, Working Paper, No. 2009-04, Bar-Ilan University, Department of Economics, Ramat-Gan, p. 2;

³ Siekmann, Helmut (2018). Legal tender in the euro area, IMFS Working Paper Series, No. 122, Goethe University Frankfurt, Institute for Monetary and Financial Stability (IMFS), Frankfurt a. M., p. 7;

⁴ Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62019CJ0422>

The content of this concept is thus potentially very broad but ultimately depends on the specific legal framework (or tradition) that gives it substance. What may nevertheless be regarded as traditional is that legal tender is associated with certain attributes linked to mandatory acceptance and exceptions thereto – that is, the possibility of refusing legal tender. This attribute, however, does not appear to be universally recognized, nor can it be considered absolute.

Norway provides an illustrative example. There, banknotes and coins issued by the central bank (Norges Bank) constitute legal tender. It has traditionally been assumed that their status as legal tender entails mandatory acceptance, and correspondingly, a right to pay in such form, mirrored by an obligation on the recipient to accept them. As Marthinussen⁵ observes, however, while the law designates coins and banknotes as legal tender, it does not specify what this entails – let alone establish a right to make payments in cash.

It is not necessary, however, to look beyond domestic jurisdictions to question mandatory acceptance as a defining feature of legal tender. Article 39a(2) of the Constitution of the Slovak Republic, for instance, simultaneously establishes an obligation to accept cash as legal tender while also permitting its refusal (within the same provision⁶). Moreover, the CJEU, in the mentioned judgment, does not require absolute acceptance as a condition of legal tender status, but only acceptance in principle. At the same time, it is not necessary – particularly for the effective use of the euro as a single currency – that the EU legislature exhaustively and uniformly define all exceptions to this basic obligation, provided that every debtor is generally guaranteed the possibility of discharging a monetary obligation through payment in cash.

2. On the concept of the „resilience“ of legal tender

It is not necessary In the context of this paper, the resilience of legal tender does not refer merely to its formal legal status, but rather to its capacity to sustainably fulfil its core functions under evolving technological, economic, and societal conditions. It is thus a multidimensional concept encompassing several interrelated layers.

First, resilience may be understood as legal resilience, i.e. the extent to which the status of legal tender is not only formally enshrined in legal norms but also effectively implemented and enforceable in practice. It is open to debate whether the mere formal designation of a

⁵ See Marthinussen, H., F. (2019). Rett til å betale kontant? In: LOV OG RETT, vol. 58, 2019 (9), p. 560;

⁶ However, specific legislation is required to enforce either of these rights; thus, they do not directly establish rights and obligations, nor do they create more legal uncertainty than is necessary.

particular asset as legal tender is sufficient to ensure its universal acceptance, or whether such acceptance requires explicit normative articulation of its defining attributes – most notably a clearly established obligation to accept it and a corresponding prohibition on refusal.

Closely linked to legal resilience is functional (practical) resilience, which relates to the ability of legal tender to remain widely usable in everyday transactions. This dimension reflects the actual behavior of economic actors – merchants, consumers, and public institutions – and encompasses factors such as the overall availability of cash, the infrastructure supporting its distribution (e.g. ATMs and bank branches), and the degree to which it is accepted in the provision of goods and services. A gradual refusal of cash in certain market segments may therefore be seen as indicative of a weakening of the functional resilience of legal tender.

A further dimension is systemic resilience, which is associated with the economic properties of money and the role of legal tender as a fallback mechanism (albeit strictly a store-of-value function) in the event of disruption or failure of digital payment systems. Cash – generally perceived as the paradigmatic form of legal tender – constitutes, in this regard, a key element in ensuring the continuity of economic relations, particularly in crisis situations such as power outages, cyberattacks, or technical failures of payment infrastructure. In this sense, the resilience of legal tender manifests itself in its capacity to preserve the basic operability of the economy under adverse conditions.

Finally, one may also speak of social and inclusive resilience, which captures the significance of legal tender for population groups that lack full access to digital payment instruments or choose not to use them for various reasons. In this respect, resilience entails the preservation of a universally accessible, non-discriminatory means of payment that does not require technological equipment, digital literacy, or intermediation by third parties. This dimension is particularly central to the present paper, as financial inclusion is frequently invoked to justify varying degrees, systemic changes in the legal regulation of cash payments.

In sum, the resilience of legal tender may be defined as the capacity of this institution to retain its normative relevance, practical usability, systemic reliability, and social inclusiveness within an environment increasingly shaped by digitalization and technological innovation. Examining the extent to which the legislative entrenchment of an obligation to accept cash contributes to strengthening these dimensions of resilience constitutes one of the central inquiries of this paper (with particular emphasis on financial inclusion, as indicated above).

3. Mandatory acceptance of legal tender as its core attribute

What renders a particular asset distinctive is, *inter alia*, its designation as legal tender. However, for this designation to transcend a merely formal label, it must possess substantive content – namely, a set of defining attributes and qualities. It is precisely these attributes that confer upon legal tender its distinctive character. Foremost among them should be the principle of mandatory acceptance, i.e. the general obligation to accept legal tender in settlement of payments, coupled with the corollary prohibition of refusal.

At the same time, empirical and comparative experience demonstrates that the mere designation of an asset as legal tender does not necessarily entail its universal mandatory acceptance. Indeed, this attribute is not inherent to legal tender in all jurisdictions. A classic example is that of Scottish banknotes, which, although often colloquially regarded as legal tender, do not in fact give rise to any legal obligation of acceptance – even within Scotland itself. Their issuance and acceptance are instead grounded primarily in longstanding custom and practice.

A more contemporary example of legal tender without a general obligation of acceptance is Bitcoin. In El Salvador, Bitcoin was initially granted legal tender status accompanied by a comprehensive obligation of acceptance – requiring all economic actors to accept it as payment in both private and public law relations. Subsequently, however, El Salvador was compelled to revise its position, retaining Bitcoin’s formal status as legal tender while removing the obligation of acceptance. No party is therefore currently required to accept it. It follows that the status of legal tender may, in certain cases, amount to a purely formal designation, devoid of any substantive rights or obligations traditionally associated with it.

3.1 Mandatory acceptance of legal Tender *de lege lata et de lege ferenda* in the EU

Legal tender in the euro area consists, pursuant to Article 128(1) of the Treaty on the Functioning of the European Union and Article 10 of Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro, of euro banknotes, and, pursuant to Article 11 of the same Regulation of euro coins. Although EU law clearly defines what constitutes legal tender, its substantive content, scope, and effects have historically been open to divergent interpretation, reflecting the heterogeneous approaches of Member States to legal tender in general – traditionally banknotes and coins denominated in their respective national currencies. These national conceptions have, in turn, informed the treatment of euro banknotes and coins.

An attempt to address this fragmentation was made through the Commission Recommendation of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins (2010/191/EU) (hereinafter the „Recommendation“), which, however, is not legally binding. As stated in recital 3 of the Recommendation, uncertainty persisted within the euro area regarding the scope and effects of legal tender, prompting its adoption – eight years after the introduction of euro cash. It should be noted that certain divergences persist to this day, as national legal frameworks continue to fill regulatory gaps not addressed at the EU level, arguably beyond their proper remit. The Recommendation provides that, where an obligation to pay exists, legal tender should entail mandatory acceptance (absent agreement on alternative means of payment), acceptance at full face value, the capacity to discharge a payment obligation, and the acceptance of euro banknotes (including high denominations) and coins in retail transactions.

The proposal for a regulation of the European Parliament and of the Council on euro banknotes and euro coins as legal tender (hereinafter the „Euro cash regulation proposal“) reaffirms the status of cash – euro banknotes and coins – as legal tender. Article 4 of the proposal delineates the core attributes of legal tender. Foremost among these is the obligation to accept euro banknotes and coins at their full-face value, thereby enabling the discharge of a payment obligation. A payee may not refuse euro banknotes and/or coins offered in settlement of such an obligation. Acceptance at face value further implies that the monetary value of the banknotes and coins tendered corresponds to the euro amount indicated on them. That said, even *de lege ferenda*, acceptance of cash is not conceived as absolute: the Euro cash regulation proposal, *inter alia*, limitations in the context of online transactions, as well as the possibility of refusal on justified or temporary grounds.

In parallel, the proposal for a regulation of the European Parliament and of the Council on the establishment of a digital euro (hereinafter the „Digital euro proposal“) envisages that the digital euro will enjoy legal tender status (Article 7(1)). This status is associated with specific attributes, most notably an obligation of acceptance, albeit accompanied by a broader set of exceptions and limitations than those contemplated in the Euro cash regulation proposal. The conferral of legal tender status may enhance the diffusion and usability of the digital euro for payment purposes. From a strictly legal perspective, however, such status is not indispensable. As Pfister observes that *„in developed economies, where agents have a wide scope of payment instruments at their disposal, legal tender appears nowadays as a barbarous*

relic.“⁷ In principle, an obligation to accept the digital euro could be introduced independently of its formal legal tender status, as illustrated by the imposition of obligations to accept cashless payments in certain jurisdictions, including Slovakia. Nevertheless, as Zilioli argues that „*in the case of the digital euro, it is evident that legal tender will be considered a key and necessary feature for its recognition as digital form of the euro currency.*“⁸ It would entail mandatory acceptability, albeit not in absolute terms.

3.2 Mandatory acceptance of legal tender in Norway

Norway’s approach to legal tender has already been briefly outlined above. It is therefore appropriate to build upon this foundation by examining subsequent developments in this area. In June 2024, there was enacted an amendment to Section 2-1, third paragraph of the Financial Contracts Act, clarifying consumers' right to pay with cash: „In sales premises where a business regularly sells goods or services to consumers, the consumer shall be offered the option to pay with legal tender if it is possible to pay for the goods or services with other payment solutions in or in immediate connection to the sales premises. If the business has available change, it must also offer to provide change in connection with the payment, unless there is a clear discrepancy between the banknote offered as payment and the amount to be paid. The first and second sentences do not apply to the sale of goods from vending machines, sales in unstaffed premises, and sales in premises to which only a limited group of people have access. The first and second sentences also do not apply when the amount to be paid exceeds 20,000 kroner.“⁹

Where Norway as mentioned has as an example of a jurisdiction that recognises legal tender without clearly defining its substantive content, the recent amendment to the Norwegian Financial Contracts Act marks a shift from a merely declaratory conception towards one of concrete normative enforceability in private-law relations. In particular, it establishes an explicit linkage between the status of legal tender and consumer rights. Cash is no longer understood solely as an abstract means of discharging a monetary obligation (e.g. in the repayment of a debt), but as a payment instrument that must be actively enabled in the context

⁷ Pfister, CH. (2024). Digital Euro: The Case Against Legal Tender, SUERF Policy Brief, No 799, February 2024, p. 4;

⁸ Zilioli, CH. (2023). Central Bank Digital Currencies: Central Bank Money reaches a new frontier. In: Christos V. Gortsos, CH. V. – Sethe, R. (2023) Central Bank Digital Currencies (CBDCs) - Proceedings of a colloquium, Zürich, EIZ Publishing, p. 76.

⁹ https://lovdata.no/dokument/NL/lov/2020-12-18-146/KAPITTEL_2#KAPITTEL_2

of consumer transactions. Put differently, the legal framework transforms legal tender from a passive legal concept into a subjective right of the consumer to pay in cash.

At the same time, the universality traditionally associated with legal tender is relativised. While legal tender is classically linked to the principle of general acceptance, the Norwegian regime introduces a number of exceptions (e.g. vending machines, unattended premises, closed environments, and high-value transactions exceeding NOK 20,000). It follows that the obligation to accept cash is not general in scope; moreover, even where it applies mandatorily, it is not absolute but subject to legislatively defined limitations reflecting practical and security considerations.

From a systemic perspective, this development may be understood as part of a broader trend whereby legal tender is increasingly deployed as an instrument of consumer protection and financial inclusion, rather than merely as a technical-legal component of the monetary system. It thus appears that the mere status of legal tender is insufficient to ensure the practical functionality of the asset so designated; what is decisive is the attachment of specific attributes – rights and obligations – that secure its effective acceptance within the economy.

3.3 Mandatory acceptance of legal tender in Australia

The Australian model of mandatory cash acceptance (recently introduced) represents, from a legal perspective, a highly specific and, to a certain extent, markedly minimalist approach to ensuring the usability of legal tender. Even prior to the new regulation, Australia did not impose a specific obligation to accept legal tender; rather, legal tender was largely confined to a formal designation. While legislation defined what constituted legal tender, it did not articulate its substantive attributes.¹⁰

The reform, effective as of 1 January 2026, introduces an obligation to accept cash (with banknotes and coins regarded as legal tender, albeit not invariably) only in respect of the sale of „essential items“ (i.e. basic goods and services), notably groceries and fuel, and even then only for selected categories of merchants (those with turnover exceeding AUD 10 million). The obligation is thus limited both in scope and in application: it covers only specific categories of goods (groceries, fuel), leaving most of the economy outside its ambit, and applies only to transactions up to AUD 500. Moreover, small businesses are not required to accept cash even

¹⁰ Banknotes: Reserve Bank Act 1959, section 36 - <https://www.legislation.gov.au/C1959A00004/latest/text> and coins: Currency Act 1965, section 16 - https://classic.austlii.edu.au/au/legis/cth/consol_act/ca1965120/s16.html

for these essential items. The statutory obligation is therefore concentrated on larger market participants.

The introduction of mandatory cash acceptance in Australia is not a systemic consequence of the legal tender status of cash, but rather the result of a targeted regulatory intervention. Resilience is not conceived as an absolute property of the system, but as a minimum standard of cash availability for essential needs. In practice, this falls short of genuine financial inclusion; rather, it ensures, at best, that individuals wishing to pay in cash – that is, in legal tender – are guaranteed access to basic subsistence. Mandatory acceptance of cash does not flow from the intrinsic nature of legal tender, but from a deliberate legislative choice reflecting a compromise between the ongoing digitalisation of the economy and the need to preserve a minimum level of financial inclusion and systemic resilience. In the Australian case, however, this model appears excessively minimalist.

3.4 Mandatory acceptance of legal tender in Belgium

As a Member State of the European Union and the euro area, Belgium is, in matters of monetary policy, primarily governed by the supranational legal framework. Nevertheless, Belgium has introduced Article VI.7/5 into its Code of Economic Law (*Wetboek van economisch recht*), thereby establishing an obligation to accept cash. This provision, however, does not appear to constitute an autonomous national regulation of the status of cash as legal tender; rather, it reiterates the fundamental principles of EU law. This interpretation is confirmed by the explanatory memorandum and is reflected in the wording of the provision itself, which explicitly refers to the relevant provisions of European law.

In accordance with Article 128(1) TFEU, which confers legal tender status on the euro, and Articles 10 and 11 of Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro, a business is required to accept payment in cash from a consumer where the payment in euro is made in the simultaneous physical presence of both parties. Within the EU, it is further established that the reproduction in a national provision of a EU obligation that is directly applicable in the legal order of the Member State may create uncertainty both as to the legal nature of the applicable obligation and as to the date of its entry into force. So this probably won't align with the uniform application and interpretation of EU law throughout the EU itself.¹¹

¹¹ See for instance Judgment of the Court of Justice of 7 February 1973, *Commission v Italy*, C-39/72, EU:C:1973:13, paragraphs 16 and 17.

It should, however, be noted in the same breath that this national provision is, in comparison with EU law, restrictive in scope, as it limits the obligation to accept cash to the consumer–business relationship.¹² The European Central Bank (hereinafter the „ECB“), in its opinion of 23 October 2023 on the obligation for enterprises to accept payment in cash from consumers (CON/2023/33),¹³ paragraph 2.2.5, acknowledged *„that the Belgian legislator does not intend to regulate the procedures for settling pecuniary obligations; the Belgian legislator's intention is rather to facilitate the application in Belgium of the obligation in principle to accept banknotes and coins denominated in euro for payment purposes, in line with the case-law of the Court of Justice of the European Union. In principle, however, such reiteration should be avoided.“* In paragraph 2.2.6 of the opinion ECB *„recalls that the incorporation of some elements of obligations of Union law into national law is warranted only in exceptional circumstances for the sake of coherence and in order to make them comprehensible to the persons to whom they apply. If such exceptional circumstances do exist, the reproduction of elements of directly applicable obligations of Union law should be done precisely, by incorporation or reference, and only to the extent warranted by the exceptional circumstances. However, such exceptional circumstances do not exist if the directly applicable obligations of Union law are sufficiently coherent and comprehensive, making it unnecessary to repeat or reflect them in national law. The ECB understands that the reiteration in national law of the obligation in principle under Union law to accept payments in euro cash aims at making such obligation more explicit to Belgian enterprises and consumers and at providing for a fine under national law for any breach of this obligation.“* And finally in the paragraph 2.2.7 of the opinion it *„considers that the reproduction of the obligation of mandatory acceptance of euro cash is warranted as it provides a connection to the introduction of the fine for breach of the obligation.“* In this respect, the ECB effectively endorses national legislation that partially reproduces provisions of EU law, albeit in a more limited scope. This position is, to some extent, justified by the objective of enhancing the clarity of applicable EU rules (for businesses and consumers) and of introducing a (selective) national sanction for their infringement.

3.5 Mandatory acceptance of Legal Tender in the United States de lege ferenda

At the outset, it should be emphasised that, much like the European Union, the United States does not exhibit a fully uniform approach to the regulation of legal tender usage. At the federal

¹² In addition, there is a limit on cash payments, which is set at 3,000 euros in Belgium.

¹³ Available: <https://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:52023AB0033>;

level Section 31 U.S.C. 5103, entitled „Legal tender,“ states: „United States coins and currency [including Federal Reserve notes and circulating notes of Federal Reserve Banks and national banks] are legal tender for all debts, public charges, taxes, and dues.“¹⁴

The inscription stating that banknotes are legal tender for debts is likewise found on the notes themselves. However, this provision essentially conveys only that such money constitutes a valid means of discharging debts, not that it must be mandatorily accepted in all transactions. At the federal level, there is currently no statute imposing a general obligation to accept legal tender, notwithstanding several legislative attempts in this direction.¹⁵ At the same time, a number of states and municipalities have introduced, within their respective jurisdictions, certain obligations to accept cash.¹⁶ Notably, these measures are often accompanied by a prohibition of discrimination against individuals who choose to pay in cash. Most recently, such efforts are reflected in the proposed Payment Choice Act, which likewise seeks to establish a minimum standard for the usability of legal tender. The bill would require retail businesses to accept cash as a form of payment for in-person transactions up to USD 500 and would prohibit charging higher prices to customers paying in cash as compared to those using non-cash payment methods. The proposed legislation applies to businesses engaged in the retail sale or offering of goods or services to the public and that accept in-person payments at physical locations.

In comparison with the regulatory framework already in force in Australia, the U.S. approach is evidently broader in scope: it is not limited to specific categories of goods but applies across retail transactions more generally. Although the monetary threshold is broadly comparable, the obligation to accept cash would apply to all relevant entities, irrespective of their annual turnover.

Once again, this constitutes a distinctly pro-consumer regulatory approach, even though the consumer is not explicitly referenced in the text of the proposal. It is nonetheless apparent that the regulation is primarily intended to govern the relationship between businesses and consumers.

¹⁴ <https://www.law.cornell.edu/uscode/text/31/5103>

¹⁵ For instance “CASH Act proposal”, available: <https://www.congress.gov/bill/116th-congress/house-bill/2630/text> or the Payment Choice Act proposal, available: <https://www.congress.gov/bill/116th-congress/house-bill/2630/text>;

¹⁶ For instance Massachusetts - <https://law.justia.com/codes/massachusetts/part-iii/title-iv/chapter-255d/section-10a/> or New Jersey - <https://law.justia.com/codes/new-jersey/title-56/section-56-8-2-33/>;

Conclusions

The comparative analysis confirms that, in certain jurisdictions, the obligation to accept cash has historically been grounded more in custom and practice than in explicit legal prescription. The status of legal tender, as such, is thus no longer sufficient to ensure the acceptance of a given asset in payment transactions. Increasingly, jurisdictions are seeking to reinforce this attribute through legislative means, particularly in the context of consumer relations. Consequently, the normative resilience of legal tender is becoming contingent upon the existence of specific subjective rights and obligations that secure its practical usability.

From the perspective of resilience, it may be observed that while individual regulatory frameworks formally strengthen the acceptance of legal tender – cash – they simultaneously fragment its societal and economic role. The obligation to accept cash is frequently confined to specific contexts (e.g. consumer transactions only, selected categories of goods, low-value payments), which may, over time, prove counterproductive. Rather than reinforcing its role, such measures risk a gradual „sectoral confinement“ of cash to segments of the economy. The result is a paradoxical effect: legislative efforts to strengthen the right to pay in cash may, in practice, erode its traditional characteristic as a universally accepted means of payment.

Indeed, where the legislature explicitly mandates the acceptance of legal tender in certain areas, it may implicitly suggest that such acceptance is not required elsewhere. It thus becomes evident that, in the context of the ongoing transformation of money and payment systems, most legislators are not pursuing comprehensive systemic solutions, but rather establishing a baseline framework aimed at safeguarding the use of cash, particularly for more vulnerable groups of the population. Legal tender is increasingly framed as an element of consumer protection law, with financial inclusion as its primary objective. The European Union, under the current Euro cash regulation proposal, appears to be pursuing a somewhat different approach, although the ongoing legislative process leaves room for further evolution.

The findings of this study also support the hypothesis that, in a digitalised economy, the status of legal tender is not capable of ensuring its practical function without the introduction of specific obligations governing its acceptance – as illustrated, inter alia, by the Digital euro proposal. Legal tender is thus evolving beyond a purely monetary-law concept, assuming the role of an instrument of social policy and a regulatory mechanism designed to ensure an inclusive and resilient payments ecosystem. In the contemporary environment shaped by digitalisation, the mere formal designation of legal tender proves insufficient to guarantee the practical acceptance of cash in everyday economic transactions.

Bibliography

1. Goldberg, D. (2009). Legal tender, Working Paper, No. 2009-04, Bar-Ilan University, Department of Economics, Ramat-Gan, 10 p.
2. Kotáb, P. (2018). K některým aspektům výlučnosti měny na státním území. AUC IURIDICA, 2018(1), 43–53. <https://doi.org/10.14712/23366478.2017.37>
3. Marthinussen, H., F. (2019). Rett til å betale kontant? In: LOV OG RETT, vol. 58, 2019 (9), 559 574 p. ISSN: 1504-3061; <https://doi.org/10.18261/issn.1504-3061-2019-09-03>
4. Siekmann, H.(2018). Legal tender in the euro area, IMFS Working Paper Series, No. 122, Goethe University Frankfurt, Institute for Monetary and Financial Stability (IMFS), Frankfurt a. M., 62 p.
5. Pfister, CH. (2024). Digital Euro: The Case Against Legal Tender, SUERF Policy Brief, No 799, February 2024, 5 p.
6. Zilioli, CH. (2023). Central Bank Digital Currencies: Central Bank Money reaches a new frontier. In: Christos V. Gortsos, CH. V. – Sethe, R. (2023) Central Bank Digital Currencies (CBDCs) - Proceedings of a colloquium. Zürich, EIZ Publishing,, p. 68 – 84. ISBN 978-3-03805-620-1 <https://doi.org/10.36862/eiz-619>
7. European central bank opinion of 23 October 2023 on the obligation for enterprises to accept payment in cash from consumers (CON/2023/33)
8. Commission Recommendation of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins (2010/191/EU)
9. The proposal for a regulation of the European Parliament and of the Council on euro banknotes and euro coins as legal tender
10. The proposal for a regulation of the European Parliament and of the Council on the establishment of a digital euro
11. Wetboek van economisch recht

FREEDOM OF MOVEMENT IN THE NATIONAL LAW TRADITION

POLINA MALESH*

Abstract

*The paper examines the natural law foundations of the right to freedom of movement and traces the development of this concept in early modern political and legal philosophy. The study focuses on the works of key representatives of the natural law tradition, including Francisco de Vitoria, Hugo Grotius, Samuel von Pufendorf, Emer de Vattel, and Immanuel Kant. Particular attention is devoted to the concepts of *ius peregrinandi*, innocent passage, and the right to emigrate, which formed the doctrinal basis for understanding mobility as an inherent human freedom. Although these thinkers recognized the existence of political sovereignty and the possibility of certain limitations, they generally viewed movement, communication, and peaceful interaction between nations as elements of the natural law of nations (*ius gentium*). The analysis demonstrates that the natural law tradition established the philosophical and legal foundations for later international human rights standards concerning freedom of movement.*

Keywords: *freedom of movement, natural law, *ius peregrinandi*, freedom, human right.*

Introduction

The right to freedom of movement is traditionally characterized as a right guaranteed by constitutions, national, and international law, a right that is not absolute, that is, subject to limitations subject to proportionality. However, few works and few doctrinal teachings analyze freedom of movement and the guarantee of such freedom as a holistic concept.

Nevertheless, it is necessary to note that two main lines clearly emerge in the doctrinal understanding of the right to freedom of movement. On the one hand, it is interpreted as an immanent (natural) human right, stemming from the very essence of man and predating the emergence of the state. On the other hand, it is interpreted as an instrument of political regulation, sovereign will, and social control.

1. De Vitoria's *ius peregrinandi*

Thus, it is worth beginning with Francisco de Vitoria, who is recognized not only as one of the founders of international law but also as one of the first philosophers to substantiate the modern concept of freedom of movement through the concept of *ius peregrinandi*. This term was introduced in his seminal work, "Relecciones sobre los indios" (1539).

The concept of *ius peregrinandi*, as understood by Francisco de Vitoria, represents a natural, pre-state (in other words, independent of state regulations or beyond the state and its sovereign) human right to move, remain, and interact peacefully with other peoples, deriving

* PhD. 2nd year of study, Trnava University, Slovakia, Assistant at Uzhhorod National University, Ukraine, polina.malesh@uzhnu.edu.ua

from the very nature of human society. Its philosophical foundation lies in the idea that the world was originally created as the common property of all people, and therefore no one has an absolute right to isolate their territory from others without sufficient reason. Freedom to travel, communicate, trade, and cross borders exists objectively, independent of positive legislation and the political decisions of states¹; It is not granted by power, but belongs to a man by their very nature and is realized with the aim of either finding new opportunities or avoiding adverse conditions.

The essence of *ius peregrinandi* encompasses several interrelated elements. First and foremost, it is the right to temporarily remain in a foreign territory, as well as the right of "innocent passage," according to which transit cannot be denied to those seeking refuge or salvation and causing no harm.

The key condition for the implementation of *ius peregrinandi* is the principle of *innocentii*, namely, the absence of harm. By harm, de Vitoria primarily meant physical damage or direct infringement, rather than cultural influence or a change in the social order. If newcomers act peacefully and cause no harm, their expulsion or the forcible termination of their presence is considered a violation of natural law². The argument was also based on the principle of reciprocity: if some nations do not have the right to prohibit the peaceful presence of foreigners, then others cannot do so without justification. In a historical context, this meant that refusing to allow Spaniards to engage in peaceful intercourse and trade could be interpreted as a violation of the law of nations.

However, to fully argue de Vittoria's approach, it is important to understand the historical context of his work³. Francisco's work was written in the context of the heated political, legal, and moral debates that erupted within the Spanish monarchy following the discovery and conquest of the Americas. Amid Spain's colonial expansion in the 16th century, it was necessary to theoretically justify the Spanish presence in the New World without relying solely on papal bulls or the idea of religious superiority. It is here that Vittoria develops the concept of *ius peregrinandi* as an element of the natural law of nations.

To substantiate this concept, the author argued that the Indians were the true owners of their lands and possessed political power, and therefore the Spanish Crown had no automatic

¹ Nuzzo, L., Pifferi, M., Speciale, G., & Vano, C. (Eds.). (2025). *Legal responses to mass migration: From the nineteenth century to World War II* (1st ed., p. 61). Routledge. <https://doi.org/10.4324/9781003560937>

² Ibid. Nuzzo, p. 63.

³ Lemos, A. (2024). Ius gentium and the right to migrate: A historical retrieval of the Spanish scholastics (Part 1: Francisco de Vitoria). *Europe in the World*. <https://eitw.nd.edu/articles/ius-gentium-and-the-right-to-migrate-a-historical-retrieval-of-the-spanish-scholastics-part-1-francisco-de-vitoria/>

sovereignty over their territories. Hence, within this context *ius peregrinandi et degendi* emerges, namely, the right of peoples to travel freely, communicate, trade, and sojourn temporarily in foreign territories, as long as this does not cause harm. According to de Vittoria, since the world is by nature common to humanity, no people can completely isolate themselves from others without sufficient justification. Consequently, Spaniards have the right to enter the Americas, conduct trade, and establish peaceful contacts. If they are denied this natural right without justification, it can be considered a violation of *ius gentium*.

However, it is important to emphasize the duality of his position. On the one hand, he recognized the political agency of the Indians and limited the arbitrary exercise of colonial power. On the other hand, the concept of *ius peregrinandi* potentially opened the door to conflict: if the Indians resisted the Spanish presence, this could be interpreted as a violation of natural law, theoretically justifying the use of force. Thus, his understanding of *ius peregrinandi* reflected an attempt to reconcile the moral critique of colonial violence with the interests of the Spanish monarchy and became an important step in the formation of the early theory of international law.

2. Right to emigrate by Hugo Grotius

In the development of the concept of freedom of movement, the doctrine of Hugo Grotius, who systematized the natural law foundations of the law of nations and gave them a more coherent legal form, is particularly significant. In his works, particularly in "Mare Liberum" (1609) and "De Jure Belli ac Pacis" (1625), the idea of freedom of movement receives an extensive theoretical justification as an element of natural law and the law of nations (*ius gentium*).

Contrary to de Vittoria, who considered the right to communication and travel primarily in the context of the Spanish presence in the New World, Grotius sought to construct a universal framework applicable to all peoples. He proceeded from the premise that the land and its resources were originally the common property of humanity. The subsequent establishment of private and public property did not completely destroy the original right of common use, so long as such use did not cause harm to others. From this logic, he derived the principle of freedom of communication among peoples, including the right to travel, trade, and peaceful passage through the territories of other states.

Grotius sets forth the standing that every nation has the right to communicate with every other, and that prohibiting peaceful movement without sufficient justification is contrary to natural law. The concept of "innocent passage" occupies a special place in his doctrine: passage

through another nation's territory is permissible if it does not cause harm and is carried out for a reasonable reason⁴. Thus, freedom of movement is understood not as an arbitrary privilege granted by the state, but as a derivative of the more fundamental principle of the natural community and interconnectedness of humanity.

In "On the Law of War and Peace," Grotius develops this argument and extends it not only to short-term transit but also to temporary sojourn in a foreign state. He allows for the possibility of staying in another nation's territory for legitimate reasons, such as trade, the search for a livelihood, or the need for safety. Moreover, if there is no harm to the owner, even temporary residential use of the land is permitted. Although Grotius acknowledges the existence of sovereign authority and does not deny the state's right to impose reasonable restrictions, he views the refusal of admission or passage without good cause as a violation of natural law.

Grotius's significant contribution is also his justification of the right to emigrate⁵. He argues that a person should not be forced to remain in a state against their will. He distinguishes between individual emigration, which is considered permissible, and mass exodus, which could destroy the political community. This position demonstrates an attempt to reconcile the natural freedom of the individual with the demands of political stability.

In analyzing this approach, we also cannot overlook the historical and, more importantly, personal context for understanding this philosophical concept. On the one hand, Grotius's vision was formed against the backdrop of the Dutch struggle for independence from Spain and the emergence of the Republic of the United Provinces as a maritime and commercial power⁶. For the young republic, the principle of free navigation and trade was not abstract, but vital. This is why, in "Mare Liberum", he justifies freedom of the seas as a legal principle: no state may monopolize the ocean and impede the peaceful movement and trade of other peoples⁷. Economic competition and colonial expansion prompted him to develop the idea of free communication as a norm of the law of nations. On the other hand, his personal experience of exile and political persecution heightened his attention to the problem of secession from the state and the legitimacy of such movement. He viewed the right to leave the country and seek

⁴ Grotius, H. (n.d.). *On the law of war and peace (De jure belli ac pacis)* (p. 49). https://www.files.ethz.ch/isn/125492/5004_Law%20of%20War%20and%20Peace.pdf

⁵ Chetail, V. (2016). Sovereignty and migration in the doctrine of the law of nations: An intellectual history of hospitality from Vitoria to Vattel. *European Journal of International Law*, 27(4), 901–922. <https://doi.org/10.1093/ejil/chw059>

⁶ Wilde de, M. (2019). Seeking refuge: Grotius on exile, expulsion and asylum. *Journal of the History of International Law / Revue d'histoire du droit international*, 20(4), 471–500. <https://doi.org/10.1163/15718050-12340094>

⁷ Papastavridis, E. (2011). The right of visit on the high seas in a theoretical perspective: Mare liberum versus mare clausum revisited. *Leiden Journal of International Law*, 24(1), 45–69. <https://doi.org/10.1017/S0922156510000580>

safety elsewhere as an element of natural individual freedom, albeit within limits compatible with the existence of a political community.

3. Justification of *jus transitus* by Samuel von Pufendorf

In the context of a naturalistic approach, we cannot omit mentioning Samuel von Pufendorf. In his work "De jure naturae et gentium" (1672), von Pufendorf has developed ideas of natural law, including issues of freedom of movement, examining them through the prism of the relationship between the individual and the state. He recognized the possibility of peaceful passage of foreigners through state territory (*jus transitus*), while emphasizing that this right is not automatic and is always limited by the state's sovereignty and its security⁸. Unlike Grotius, who attached a more cosmopolitan significance to the right of transit, Pufendorf linked it to the interests of the state, seeking to balance the principles of natural law with the reality of political power. Nevertheless, he still viewed freedom of movement as a natural human right, limited only by the need to protect public order and security.

This difference is determined rather by the fact that in the period following the Thirty Years' War, the situation was characterized by profound political fragmentation: within the Holy Roman Empire, there were numerous autonomous principalities, cities, and kingdoms, each of which strictly controlled its borders and security. Under such conditions, the right of foreigners to pass through state territory could not be considered an absolute or automatic right, and Pufendorf emphasized the need to consider the interests of the sovereign and ensure order within the state.

At the same time, Pufendorf drew on the tradition of European naturalistic law, inheriting the idea that humans, as social beings, possess natural rights. These rights include the right to self-preservation and, consequently, the freedom to move, especially in cases of life-threatening or other extraordinary circumstances. However, unlike more cosmopolitan-minded thinkers such as Hugo Grotius, Pufendorf introduced the principle of balance between the natural rights of the individual and the sovereignty of the state, considering freedom of movement limited by the security, order, and interests of the territorial community⁹. This also applies to his understanding of asylum and exile, where Pufendorf noted that the state can accept those fleeing danger for humanitarian reasons.

⁸ Pufendorf, S. von. (n.d.). *De jure naturae et gentium* (p. 238). <https://books.google.com.ua/books?id=7MchAQAAMAAJ>

⁹ Kul, S., & Gözen Ercan, P. (2025). Legal universalism and colonial legitimacy: Grotius, Pufendorf, Wolff, and de Vattel in comparative perspective. *Hacettepe Hukuk Fakültesi Dergisi*, 15(2), 98–128. <https://doi.org/10.32957/hacettepehdf.1670207>

It was precisely because of the social and humanitarian context, which also significantly influenced his views as Pufendorf witnessed mass migrations, populations fleeing war, epidemics, and famine, that he introduced the moral dimension of *humanitas*, according to which the state could grant temporary asylum to refugees for humanitarian reasons. However, he emphasized that this was not a legal obligation, but a moral duty, reflecting his approach to integrating natural law with the realities of political power. Thus, the state retains discretion, and the admission of foreigners is justified only by humanitarian motives, not by strict legal norms.

The principle of extreme necessity (*necessitas*) occupies a special place in his conception. Pufendorf allowed that in cases of life-threatening famine, or other extraordinary circumstances, the natural right of self-preservation can justify temporary access to foreign territory or resources. This emphasizes that freedom of movement remains a natural human right, which is applied as an exception in emergency situations and is always balanced with the sovereignty of the state.

4. The definition of emigrants by Emer de Vattel

A definitive legal and doctrinal formulation of the question regarding the right to freedom of movement and emigration as a natural human right can be found in the works of Emer de Vattel, specifically in his work "Le Droit des gens" (1758). Developing the naturalistic tradition, he specifically introduces the category of "emigrants", that is, individuals who leave their country "for a legitimate reason", intending to settle elsewhere with their family and property¹⁰. This definition itself is fundamental: it concerns neither fugitives nor violators, but subjects exercising a legitimate claim.

De Vattel explicitly states that the right to emigrate may have several sources, but the primary one remains the natural right, "reserved to each individual in the very contract by which civil society was founded."¹¹ He thereby asserts that the social contract does not completely destroy the original freedom of man. By entering into civil status, an individual assumes obligations, but does not become an object of power or the "private property" of the sovereign. Furthermore, de Vattel systematizes the positive legal forms of enshrining this right: it can be guaranteed by the fundamental law of the state, voluntarily granted by the sovereign, or stem from an international treaty.

¹⁰ Vattel, E. de. (n.d.). The law of nations (p. 106). https://tile.loc.gov/storage-services/service/ll/llmlp/DeVattel_LawOfNations/DeVattel_LawOfNations.pdf

¹¹ Ibid Vattel, E. de., p. 106.

His critique of the previous practice, according to which states were not allowed to accept the subjects of another power as their citizens, is also of fundamental importance. De Vattel attributes the origins of this practice to the "slavish condition" of peoples and the notion of subjects as the property of the ruler. He emphasizes that such an approach demeans human nature and, in its understanding, treats individuals not as an element of the state's demographic resource, but as independent bearers of rights. Consequently, the ban on the admission of emigrants cannot be justified by invoking the sovereign's "property right" over its subjects.

In this regard, de Vattel emphasizes that if a sovereign prevents those entitled to emigrate, it inflicts an injustice on them. In such a case, these individuals have the right to seek protection from another power willing to accept them. This provision is extremely important, as it links the individual right to emigrate with international responsibility. Violations of freedom of emigration cease to be an exclusively internal matter for the state and can become grounds for legitimate intervention in the form of protection.

5. Kant's *Weltbürgerrecht*

At the same time, while Samuel Pufendorf and Emer de Vattel viewed the movement of foreigners primarily through the prism of state sovereignty (and in opposition to it) and mutual benefit between peoples, freedom of movement remained primarily a discretionary right of the state, not a subjective right of the individual. Immanuel Kant, in his treatise "Toward Perpetual Peace" (1795), developed this concept further, shifting the focus from the state to the individual and formulating the so-called "cosmopolitan right" (*Weltbürgerrecht*).

Although he does not use the modern term "freedom of movement," instead introducing the concept of "universal hospitality" (*Wirtbarkeit*), it is defined as the legal right of a foreigner "not to be received with hostility" upon arriving on the territory of another state¹². This right is not an act of philanthropy or moral kindness, but is grounded in the idea of shared ownership of the Earth's surface: since the Earth is limited, no people can completely exclude the presence of others.

Kant makes a fundamental distinction between the "right to visit" (*Besuchsrecht*) and the "right to stay" (*Gastrecht* in the narrow sense)¹³. While the former is the natural, minimal right of every person to peaceful access to another community and the opportunity to interact,

¹² Kant, I. (n.d.). *Toward perpetual peace and other writings on politics, peace, and history* (P. Kleingeld, Ed.; D. L. Colclasure, Trans.; p. 82). https://platypus1917.org/wp-content/uploads/2011/07/kant_towardperpetualpeacebook.pdf

¹³ Dayal, S. (2019). Normative materialist cosmopolitanism. In *New cosmopolitanisms, race, and ethnicity* (p. 123). https://www.academia.edu/68031301/Normative_Materialist_Cosmopolitanism

free from hostility or violence, the latter is a right to settle or permanent residence, dependent on positive law and the will of the state and taking on the character of a contractual or legally regulated regime. Thus, Kant's cosmopolitan right does not negate state sovereignty, but limits it to a minimal norm of peaceful behavior.

Freedom of movement, as Kant understood it, does not mean unlimited immigration. It acts as a guarantee of peaceful access to interaction between peoples, creating the precondition for the gradual rapprochement of states, the formation of a federation of free states, and, ultimately, the prevention of war. In this sense, Kant radicalizes and humanizes the traditional law of nations, transforming it into a universal minimum of legal protection for individuals at the global level, while maintaining a balance between universalism and state sovereignty.

Conclusions

Based on an analysis of the works of such figures as de Vittoria, Grotius, Pufendorf, Vattel, and Kant, thinkers of the natural law era, we have seen that the right to freedom of movement, in light of their writings, was understood as a natural human right that arises from one's belonging to a common humanity and the minimal norms of peaceful coexistence, ensuring a cosmopolitan minimum of legal protection independent of the will of the state

Bibliography

1. Nuzzo, L., Pifferi, M., Speciale, G., & Vano, C. (Eds.). (2025). *Legal responses to mass migration: From the nineteenth century to World War II* (1st ed., p. 61). Routledge. <https://doi.org/10.4324/9781003560937>
2. Lemos, A. (2024). Ius gentium and the right to migrate: A historical retrieval of the Spanish scholastics (Part 1: Francisco de Vitoria). *Europe in the World*. <https://eitw.nd.edu/articles/ius-gentium-and-the-right-to-migrate-a-historical-retrieval-of-the-spanish-scholastics-part-1-francisco-de-vitoria/>
3. Grotius, H. (n.d.). *On the law of war and peace (De jure belli ac pacis)* (p. 49). https://www.files.ethz.ch/isn/125492/5004_Law%20of%20War%20and%20Peace.pdf
4. Chetail, V. (2016). Sovereignty and migration in the doctrine of the law of nations: An intellectual history of hospitality from Vitoria to Vattel. *European Journal of International Law*, 27(4), 901–922. <https://doi.org/10.1093/ejil/chw059>
5. Wilde de, M. (2019). Seeking refuge: Grotius on exile, expulsion and asylum. *Journal of the History of International Law / Revue d'histoire du droit international*, 20(4), 471–500. <https://doi.org/10.1163/15718050-12340094>
6. Papastavridis, E. (2011). The right of visit on the high seas in a theoretical perspective: Mare liberum versus mare clausum revisited. *Leiden Journal of International Law*, 24(1), 45–69. <https://doi.org/10.1017/S0922156510000580>
7. Pufendorf, S. von. (n.d.). *De jure naturae et gentium* (p. 238). <https://books.google.com.ua/books?id=7MchAQAAMAAJ>
8. Kul, S., & Gözen Ercan, P. (2025). Legal universalism and colonial legitimacy: Grotius, Pufendorf, Wolff, and de Vattel in comparative perspective. *Hacettepe Hukuk Fakültesi Dergisi*, 15(2), 98–128. <https://doi.org/10.32957/hacettepehdf.1670207>

9. Vattel, E. de. (n.d.). *The law of nations* (p. 106). https://tile.loc.gov/storage-services/service/ll/llmlp/DeVattel_LawOfNations/DeVattel_LawOfNations.pdf
10. Kant, I. (n.d.). *Toward perpetual peace and other writings on politics, peace, and history* (P. Kleingeld, Ed.; D. L. Colclasure, Trans.; p. 82). https://platypus1917.org/wp-content/uploads/2011/07/kant_towardperpetualpeacebook.pdf
11. Dayal, S. (2019). Normative materialist cosmopolitanism. In *New cosmopolitanisms, race, and ethnicity* (p. 123). https://www.academia.edu/68031301/Normative_Materialist_Cosmopolitanism

INTERNATIONAL SECTION

PRIVATE LAW

IS THE HUNGARIAN NOTARY PUBLIC A JUDGE? “OTHER AUTHORITIES” IN THE APPLICATION OF THE EU SUCCESSION REGULATION

CSILLA RÁCZ*

Abstract

This study examines the functioning of Hungarian notaries in order to determine whether Hungarian notaries are equivalent to courts within the meaning of the EU Succession Regulation. The question arises as to whether Hungarian notaries actually have judicial jurisdiction in the sense of national law and whether the concept of a court applies to them within the scope of the European Succession Regulation. The national legal status of Hungarian notaries in relation to the legal status of judges is under scrutiny. To this end the study refers to the relevant case law of the Court of Justice of the European Union.

Keywords: *EU Succession Regulation, succession law, notary public, probate proceedings, “other authorities.”*

Introduction

There are currently 313 notaries operating in Hungary.¹ Their function is to avoid litigation, which requires money, time and causes stress, but in Hungary, litigation is a folk tradition. Even the right to hear birdsong can be a source of dispute,² as our national poet János Arany wrote in his poem, titled "Fülemüle" ("Nightingale").³ Hungarian people prefer to turn to the courts and lawyers rather than notaries, mainly because 98% of people are unaware that notaries are also available to resolve disputes. If they knew about it or trusted the notaries, it would not be such a burden on the courts because of the 1.5 million lawsuits per year. However, notarial proceedings are easier, faster, cheaper and do not interfere with family life.⁴ This is reflected in the motto of the notarial board: "Justice without dispute".⁵ The question arises as to whether Hungarian notaries actually have judicial jurisdiction in the sense of national law and whether the concept of a court applies to them within the scope of the European Succession Regulation.

There is no present without a past. Therefore, before we review the current regulation, it is important to review concisely what authorities have acted in Hungary throughout history to

* dr. jur. Csilla Rác PhD Student. Doctoral School of Law and Political Sciences, University of Szeged, Hungary, Department of Private International Law. ORCID ID: 0009-0004-3524-7887 (csillamonikaracz@gmail.com.) Supervisors: Prof. Dr. Csongor István Nagy Ph.D., LL.M., S.J.D., Dr. Gábor Hajdu Senior Lecturer, Ph.D.

¹ 15/1991. (XI. 26.) IM rendelet „A közjegyzői állások számáról és a közjegyzők székhelyéről”. [Decree 15/1991 (XI. 26.) IM "On the number of notary positions and the location of notaries"]

Net jogtár - Wolters Kluwer. <https://net.jogtar.hu/jogszabaly?docid=99100015.im>

² Attila Badó: A jogrendszerek világa. [The World of Legal Systems.] Pro talentis Universitatis Alapítvány. Szeged, 2020. 227. ISBN 978 615 00 8812 9

³ János Arany: Fülemüle. [Nightingale] Képzőművészeti alap kiadóvállalat, Budapest, 1957. ISBN2399980284462

⁴ Badó (2020) 227.

⁵ Mihály Pulinka: A közjegyzőség új hatáskörei vagy az új közjegyzőség hatáskörei. [The new powers of notaries or the powers of the new notary system.] Közjegyzők Közlönye, 2017/4., 43

settle the fate of the legacy. The aim is to be able to integrate the functioning of the Hungarian notary public into the system of rules of jurisdiction of the Succession Ordinance and to be able to compare it or distinguish it from the status of a judge.

1. Is a notary public a judge? Authorities in the Hungarian probate proceedings.

Historical roots

Until the Middle Ages, the ‘ipso iure’ principle prevailed in Hungary. There was no need for general inheritance proceedings. Only for the protection of persons unable to represent their own interests (orphans, disabled) and to ensure the succession of the king was a judicial route to enforcement the rights.⁶ As I see, the roles of judge and notary public were combined from the very beginning. In the Middle Ages, the rule of succession was regulated by custom law, and only in 1836 was the first law that intervened in the traditional regulation of inheritance law. The right to appeal to the courts as a legal remedy in inheritance disputes was introduced. (Act XIV of 1836, Section 12.)⁷ Act LIV of 1868 was the first Hungarian law to regulate the inheritance procedure in a separate chapter and also referred it to the jurisdiction of the courts. The courts continued to be responsible for ex officio proceedings; securing and inventorying the estate; and presenting and announcing the will.⁸ During the Austro-Hungarian Monarchy, Austrian regulations came into force. It was a non-litigation procedure, but the competent judge was obliged to act ex officio in all inheritance matters, regardless of whether there was a legal dispute or not. It was stipulated that "judicial transfer is necessary for the lawful acquisition of all inheritances."⁹

2. The first probate regulations and the Royal Notaries.

Act XXXV of 1874 on “Royal Notaries”¹⁰ established the Hungarian civil notarial profession and regulated its activities for the first time.¹¹ Pursuant to Section 124, the court may also entrust the notary with the conduct of probate proceedings.¹² Section 127 states that "any appeal arising in the course of inheritance proceedings conducted by a notary public shall in

⁶ Rudolf László: A hagyatéki eljárás története Magyarországon. [The history of probate proceedings in Hungary.] *Közjegyzők Közlönye*, 2013/.7.

⁷ Rudolf (2013) 7.

⁸ Rudolf (2013) 9.

⁹ Rudolf (2013) 8.

¹⁰ 1874. évi XXXV törvénycikk a királyi közjegyzőkről. [XXXV of 1874 on Royal Notaries.] <https://net.jogtar.hu/ezer-ev-torveny?docid=87400035.TV&searchUrl=/>

¹¹ Badó (2020) 278.

¹² Tibor Szőcs: A nemzetközi öröklési jog szabályainak kommentárja. [Commentary on the rules of international inheritance law.] Budapest, 2021. ORAC Kiadó. ISBN: 978 693 258 5208.

all cases be submitted to the probate court." Thus, it was possible to appeal to the court against the notary's proceedings, and the notary's independent jurisdiction appeared in Section 18. According to this "the heirs may also entrust the notary public with the administration of the estate in cases where there is no place for official court proceedings."¹³

An important step forward in the history of the notary was the Act XVI of 1894 "On the inheritance procedure" was enacted to resolve the situation.¹⁴ This, in turn, referred inheritance proceedings back to the jurisdiction of the royal district courts (Section 6). The court initiated the probate proceedings, obtained the documents, announced the will, and then the municipal leader prepared the probate inventory.¹⁵ Many decades later, Act XVI of 1894 was repealed by Act III of 1952 on civil procedure, but many of its provisions and legal institutions can still be found in Act XXXVIII of 2010 on probate proceedings¹⁶ which is currently in force.

Based on the above, it can be said that throughout Hungarian history, the powers of the courts and notaries have repeatedly overlapped, been interchanged or even intertwined in probate proceedings. The following chapter examines whether Hungarian notaries are "judges." First, national level regulations are reviewed, followed by EU-level regulations in light of the European Succession Regulation¹⁷

3. The legal status of Hungarian notaries in relation to the legal status of judges.

The Hungarian notary public office, established in 1874, was nationalized in 1949 as a "bourgeois" legal institution and integrated into the court system. The notary public was separated from the court system on 1 January 1992, when Act XLI of 1991 on Notaries Public (Kjtv.)¹⁸ came into force, which is still in effect today. The law established a new, freelance, Latin-type notarial organization, characterized by the fact that notaries practice their profession as freelancers, but with obligations similar to those of judges.¹⁹

¹³ 1874. évi XXXV törvény cikk a királyi közjegyzőkről. [XXXV of 1874 on Royal Notaries.]

<https://net.jogtar.hu/ezer-ev-torveny?docid=87400035.TV&searchUrl=/>

¹⁴ 1894. évi XVI. törvény cikk az örökösödési eljárásról

[Act XVI of 1894 on inheritance proceedings.] <https://net.jogtar.hu/ezer-ev-torveny?docid=89400016.TV&searchUrl=/ezer-ev-torvenyei%3Fpagenum%3D34>

¹⁵ Rudolf (2013) 10.

¹⁶ 2010. évi XXXVIII. törvény a hagyatéki eljárásról. [Act XXXVIII of 2010 on probate proceedings.]

<https://njt.hu/jogszabaly/2010-38-00-00>

¹⁷ REGULATION (EU) No 650/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL EU SUCCESSION REGULATION.

¹⁸ 1991. évi XLI. törvény a közjegyzőkről [Act XLI of 1991 on notaries.]

<https://net.jogtar.hu/jogszabaly?docid=99100041.tv>

¹⁹ 3/2004.sz. Kúria Polgári Jogegységi Határozat. Indoklás III. fejezet. [No 3/2004. Supreme Curia Court Decision on Civil Law Uniformity. Reasoning Chapter III.]

<https://kuria-birosag.hu/hu/joghat/32004-szamupje-hatarozat>

The Fundamental Law of Hungary (25 April 2011)²⁰ specifically mentions judges. Act CLXI of 2011 on the organization and administration of courts (Bjt.) regulates the legal status of judges; the establishment and termination of their service; their rights and obligations; the rules governing their disciplinary responsibility and their remuneration. A judge is a jurist who exercises public authority and administers justice. Independent and subject only to the law and cannot be instructed in the judicial activities.²¹ The Fundamental Law does not expressly mention notaries public. The legal status of notaries, the organisation of notaries (including the establishment and termination of notarial service), and notarial activities are defined by the above-mentioned separate law, the Kjt. ²²Section 1(1) of the Notarial Code: "The law confers public authority on notaries to provide impartial legal services to the parties in order to prevent legal disputes."²³ The Constitutional Court (Alkotmánybíróság AB) has stated in several decisions that "Notaries perform law applicative activities that form part of the administration of justice." Through the public documents they prepare, they provide legal services to prevent legal disputes, thereby relieving the burden on the courts. (Decision 944/B/1994 AB).²⁴

Based on the rules of the Kjt. concerning the legal status of notaries, it can be concluded that, in terms of their legal status under public law, notaries are remarkably similar to judges (and prosecutors). The conditions for appointment (Section 17), conflicts of interest, the requirement to demonstrate expected conduct, the prohibition of relocation, and the upper age limit for service are identical. These rules are the same as the rules applicable to judges. The rules on the exclusion of judges set out in Act CXXX of 2016 on civil procedure shall apply to the exclusion of notaries. (Section 4). The profession of notary public is also incompatible with participation in political life (Section 24/A) and is also subject to a declaration of assets. (Section 7 (5)). Similar to the courts, notaries public are entitled to use the coat of arms of the Republic of Hungary as a sign of their public authority. Notaries are also public officials, official persons (Section 137 of the Criminal Code). Like judges, they are independent, subject

²⁰ The Fundamental Law of Hungary (25 April 2011) <https://www.parlament.hu/irom39/02627/02627.pdf>

²¹ 2011. évi CLXI. törvény a bíróságok szervezetéről és igazgatásáról. (Bjt.) [Act CLXI of 2011 on the Organization and Administration of Courts] <https://njt.hu/jogszabaly/2011-161-00-00>

²² Kinga Judit Kultsár: A bírói és közjegyzői kinevezés feltételrendszeréről dióhéjban. [Nutshell overview of the conditions for appointment as a judge or notary public] (KK, 2025/1., pp. 102-117.) 104-105. <https://szakcikkkadatbazis.hu/doc/1626846>

²³ 1991. évi XLI. törvény a közjegyzőkről. ELSŐ RÉSZ. ALAPVETŐ RENDELKEZÉSEK I. fejezet. általános szabályok. Általános elvek. 1.§. (1 9 [Act XLI of 1991 on Notaries Public. PART ONE. basic provisions Chapter I. General Rules. General Principles. Section 1. (1)] <https://net.jogtar.hu/jogszabaly?docid=99100041.tv>

²⁴ 3/2004.sz. Kúria Polgári Jogegységi Határozat. Indoklás III. fejezet. [No. 3/2004. Supreme Court Decision on Civil Law Uniformity. Reasoning Chapter III]. <https://kuria-birosag.hu/hu/joghat/32004-szamu-pje-hatarozat>

only to the law and cannot be instructed. (Section 2) Notaries enjoy public credibility (Section 1(1)) and public trust. They must be impartial and unbiased (Section 1(1) and (2)), just like judges.²⁵

It is clear that the Hungarian legal system has strong historical roots, particularly in the area of inheritance law. Comparing Act XXXV of 1874 with the Kjt., the same conditions were required in the past and still are today to become a notary public, such as a law degree, a bar or judicial examination, full Hungarian citizenship, and proficiency in the official language of the state. The judicial examination requirement also demonstrates how closely related the legal institutions of judges and notaries are in Hungarian national law.

4. Hungarian notaries in the European network of notaries.

Through their application of the law, individual European notaries are connected to and interact with a Europe-wide regulatory network, the EU legal system, which also includes their own member state legal networks. The European organisation of notaries, the CNUE, interacts with the chambers of notaries in the Member States, but it is difficult to demonstrate interaction between individual European notaries.²⁶ The reason for this is that, although notaries are now connected to the European network of notaries (CNUE) thanks to modern technology and online platforms and databases, their operation can vary greatly from one Member State to another. What is more, the institution of notaries public is unknown in Denmark and Cyprus. In Finland, municipal officials perform notarial tasks. In other parts of Europe, in Anglo-Saxon countries (United Kingdom, Ireland), there are no notarial deeds. However, the notaries of the Continent have the common feature of drawing up public documents. Hungarian notaries can only prepare public documents, which have full probative force and are immediately enforceable. This is in contrast to notaries in many other EU member states, who can also issue private documents. The tasks of Hungarian notaries include ordering enforcement, while in most CNUE countries there is no need for a formal order of enforcement. The legitimacy of the enforcement order, the Hungarian and European order for payment procedures,²⁷ the enforcement of the order for payment, and the non-contentious

²⁵ 3/2004.sz. Kúria Polgári Jogegységi Határozat. Indoklás IV. fejezet. [No. 3/2004. Supreme Court Decision on Civil Law Uniformity. Reasoning Chapter IV]

²⁶ Tamás: Parti: Közjegyzői hálózatok az Európai Unióban. [Notary networks in the European Union] Közjegyzők közlönye 2019/4., 5-11. <https://adatkutatoalintezet.hu/publik%C3%A1ci%C3%B3ink/parti-tamas-kozjegyzoi-halozatok-az-europai-unioban/>

²⁷ 5/2018. (II. 13.) IM rendelet „a közjegyzői vizsga részletes szabályairól”. 2.§. (c.). [Decree No. 5/2018 (II. 13.) Ministry of Justice on the detailed rules of the notary public examination. Section 2 (c).] Wolters Kluwer netjogtár. <https://net.jogtar.hu/jogszabaly?docid=a1800005.im>

nature of the probate procedure establish that the Hungarian notary public is closer to a judge than to a notary public in the traditional sense.²⁸

5. The concept of 'court' in the application of the EU Succession Regulation. ²⁹

Hungarian notaries play the strongest role in probate proceedings in the European Union. This is in contrast to France and Belgium, for example, where non-contentious proceedings similar to Hungarian probate proceedings are unknown. In Hungary, notaries function as first instance judges as defined by law, while in Austria, the Czech Republic and Croatia, for example, they act on the basis of a mandate. It is interesting to note that in Germany, notaries play a minor role in non-contentious probate proceedings, while in Slovenia they play no role at all. ³⁰

The Succession Regulation does not introduce a uniform 'European succession procedure' and does not oblige Member States to change their procedural and organisational systems. According to recital 20, the Regulation must respect the different systems of Member States in the field of succession. The national courts of the Member States dealing with succession matters fall within the scope of the jurisdiction rules of the Succession Regulation. Article 3(2)³¹ of the Regulation provides a comprehensive answer to the question of who is covered by the term "court." The term "court" includes judicial authorities operating within the framework of the state court system in the narrow sense. (This is confirmed by the German version of the Regulation, which uses the word 'Gerichte'). As well as authorities and legal professionals who have jurisdiction in succession matters under the national law.³² Section (2) sets out five requirements which must be met cumulatively in order for other authorities and officials acting in inheritance matters to be considered "courts": 1.) it must be part of the judicial system of the Member State concerned and perform judicial functions. Or it must act under its authority or supervision. 2.) the principle of impartiality should prevail. 3.) the parties' right to be heard. 4.) the possibility of legal remedy against their decisions. 5.) their decisions have the same effect and legal force as decisions taken by judicial authorities in the same case.³³

²⁸ Dr. Tamás Sajben: Közjegyzők Európában. [Notaries in Europe] Ügyvédvilág folyóirat 2016. február.

<https://jogaszvilag.hu/vilagjogasz/kozjegyzok-europaban/>

²⁹ Szócs (2021) 147.-149.

³⁰ Dr. Tamás Sajben: Közjegyzők Európában. [Notaries in Europe] Ügyvédvilág folyóirat 2016. február. <https://jogaszvilag.hu/vilagjogasz/kozjegyzok-europaban/>

³¹ REGULATION (EU) No 650/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 4 July. EUR LEX. The Official Journal of the European Union L 201/107. Article 3 (2) Definitions. <https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=CELEX%3A32012R0650>

³² Szócs (2021) 149.

³³ Szócs (2021) 150.

The European Commission requested a statement from Member States regarding the provision of the Succession Regulation on “other authorities and professionals.” Six Member States have announced which other authorities and professionals fall under the scope of Article 3(2). According to this, in the Czech Republic, Greece, Croatia, Latvia, Hungary, Portugal, and Spain, it is a notary public; in Finland, it is a court-appointed estate administrator; and in Sweden, it is the tax authority, estate administrator, estate executor, and special estate administrator. Thus, notaries public are most often included in the extended concept of "court".³⁴

6. Is a notary a judge? An overview of the European Union.

As mentioned above, in 1991, the Latin-type notary system was introduced in Hungary, which is characterised by the participation of notaries in the conduct of probate proceedings. This institution is known in most EU Member States, but as already referred, only a few have designated notaries as ‘courts.’³⁵ This is justified by the fact that the activities of notaries vary between Member States. In some countries, they perform judicial functions in the course of their work. ‘In order to settle the legal status of the opened succession, the order of succession is determined in non-contentious proceedings, in accordance with the rules of succession law.’³⁶ At the same time, Member States that have introduced the Latin notarial system do not consider notaries to be part of the judicial system. Notaries only prepare documents and have no judicial role. There is no legal institution in their national law that is equivalent to the Hungarian probate procedure.³⁷ This is referred to in paragraphs 21 and 22 of the Preamble to the Succession Regulation, according to which not all Member States' national notarial organisations fall within the scope of the Succession Regulation under the 'concept of court'.

This has two legal consequences. Firstly, notaries who fall within the fall under the concept of ‘court’ are bound by the uniform rules of jurisdiction set out in Chapter II of the Regulation, in the same way as ordinary courts of Member States in the narrow sense. Their acts are ‘decisions’ which may have legal effect through their recognition and enforcement in another Member State. (Chapter IV. 20.. 6.-14.) The other legal consequence is that legal acts of notaries who do not qualify as "courts" are considered "public documents" within the scope of the Regulation (Section 22(16)) and are enforced in other Member States in accordance

³⁴ Szöcs (2021) 150.

³⁵ Szöcs. (2021.) 151.

³⁶ Szöcs. (2021.) 151-152.

³⁷ Szöcs (2021) 152

with the rules of Chapter V of the Regulation.³⁸ Thus, in general, notaries in Member States, with the exception of Hungarian notaries, draw up authentic instruments.³⁹, ⁴⁰

7. EU Court precedents – in relation to the definition of the term ‘court’.

1.) C-658/17. – WB ⁴¹

Cases relating to succession regulations are rare in Hungarian court practice, but difficulties in interpreting the law have arisen on several occasions in other Member States.⁴²

In the lawsuit, the CJEU had to decide whether the notary public issuing the certificate of inheritance performs judicial functions; whether the document issued by the notary public is a public document, a copy of which can be attached to the standard form under the European Succession Regulation for use in another Member State. The CJEU found that Poland had not notified the Commission that notaries perform judicial functions, but that this did not preclude them from being regarded as courts within the meaning of Article 3(2) if they fulfilled the conditions laid down in the Regulation. “They ensure that the principle of mutual trust in the administration of justice in the Member States is respected” – this is the basis for the application of Chapter V. on the recognition of decisions.⁴³

In the opinion of the CJEU, the administration of justice includes the power to make decisions *ex officio* and to adjudicate legal disputes. "This is not the case if the legal professional's authority depends solely on the intentions of the parties." According to the CJEU, Polish notaries do not exercise decision-making powers, as they issue certificates of inheritance at the request of the parties, but in the absence of agreement, this does not affect the powers of the courts. According to the judgment, a Polish notary who issues a certificate of succession in notarial proceedings does not qualify as a "court" within the meaning of the

³⁸ Szöcs (2021) 152.

³⁹ Parti Tamás: Signature authentication, certified signature. Notarius Hungaricus. MOKK Data Research Institute 2017. No. 3. <https://adatkutatoalintezet.hu/publik%C3%A1ci%C3%B3ink/alairas-hitelesites/>

⁴⁰ A characteristic feature of notarial public documents is that the notary's signature authentication procedure assigns the signatory to the signed document with the probative force of a public document. Notarial signature authentication is the fact that a signature has been made, certified by a public document. See: Tamás Parti: 3. Signature authentication, authenticated signature. Notarius Hungaricus. MOKK Data Research Institute. 2017. No. 3. <https://adatkutatoalintezet.hu/publik%C3%A1ci%C3%B3ink/alairas-hitelesites/>

⁴¹ WB case – C658/17. ECLI: EU. C: 2019:444. InfoCuria. Case law. <https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-658/17>

⁴² Ágnes Bucsi: The EU Succession Regulation in practice (CSJ, 2023/2., pp. 51-54.) <https://szakcikkadatbazis.hu/doc/6363542>

⁴³ WB case, grounds for the judgment, points 39-49. Also see in: Szöcs (2021) 153.

Succession Regulation, and the certificate of succession issued by them does not qualify as a "decision" in succession matters.⁴⁴

2.) C-80/19. - EE case. ⁴⁵

The main legal issue in the case concerned the jurisdiction (legal competence) of the Lithuanian authorities (courts or notaries) in relation to the Succession Regulation and the applicable law.⁴⁶

The CJEU ruled that Article 3(2) of Regulation 650/2012 must be interpreted as meaning that, subject to the examination to be conducted by the referring court, Lithuanian notaries do not perform judicial functions when issuing national certificates of succession. It left it to the courts of the Member States to decide whether Lithuanian notaries act on the basis of a mandate or under the supervision of a judicial authority and whether they can be considered 'courts.' If the referring court considers that Lithuanian notaries are 'courts' within the meaning of Article 3(1)(g) of Regulation No 650/2012, the certificate of succession issued by them can be considered a 'decision' and notaries can apply the rules on jurisdiction laid down in Chapter II of the Regulation. ⁴⁷

The CJEU has repeatedly held that the Succession Regulation must respect the systems governing succession matters in the Member States. Consequently, the concept of 'court' must be interpreted broadly for the purposes of the Regulation. This should include not only courts performing judicial functions in the strict sense of the term, but also notaries and registry offices which perform judicial functions similar to those of courts in inheritance matters or perform judicial functions on the basis of a court authorization. ⁴⁸

Based on the judgments in the above proceedings, it can be concluded that neither Polish nor Lithuanian notaries perform a judicial role in probate proceedings. The following is an

⁴⁴ Minősülhet-e a közjegyző bíróságnak? – Az Európai Bíróság ítéletet hozott. [Can a notary public be considered a court? – The European Court of Justice has issued a ruling.] Jogi Fórum / Európai Unió Bírósága 23 May 2019. <https://www.jogiforum.hu/hir/2019/05/23/minosulhet-e-a-kozjegyzobirosagnak-az-europai-birosag-iteletet-hozott/>

⁴⁵ (Case C-80/19) Official Journal of the European Union. C 297/12 EN. ECLI:EU C: 2020:230. 7.9.2020 Judgment of the Court (First Chamber) of 16 July 2020 (request for a preliminary ruling from the <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2020:297:FULL>

⁴⁶ "The Supreme Court of Lithuania (Lietuvos Teismai) in a case concerning cross-border succession civil case." (Naujienos Lietuvos Aukščiausiasis Teismas išnagrinėjo civilinę bylą dėl tarpvalstybinio paveldėjimo) Website of the Supreme Court of Lithuania News. 4 november 2020 <https://www.lat.lt/naujienos/lietuvos-auksciausiasis-teismas-isnagrinejo-civiline-byla-del-tarpvalstybiniopaveldėjimo/1024>

⁴⁷ (Case C-80/19) Official Journal of the European Union. C 297/12 EN. 7.9.2020 Judgment of the Court (First Chamber) of 16 July 2020 (request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas [Lithuania]) — Proceedings brought by E. E. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2020:297:FULL>

⁴⁸ (Case C-80/19) Official Journal of the European Union. C 297/12 EN. 7.9.2020.

overview of a case in which the European Commission brought Hungary to court in relation to one of the criteria for practising the profession of notary public. Are Hungarian notaries public considered to be judges in the opinion of the European Commission, Hungary, and the Court of Justice of the European Union?

3.) C-392/15 – EU Court of Justice and EU Commission v Hungary.⁴⁹

The focus of the case was on Section 17(1)(a) of the Notaries Act (Kjtv.), which stipulates that only Hungarian citizens may be appointed as notaries.⁵⁰ At the same time, the "judicial status" of Hungarian notaries is also being questioned.

In the case, the Commission and Hungary presented several arguments pro and contra.⁵¹

In the Commission's view, the activities conducted by Hungarian notaries do not constitute participation in the exercise of public authority within the meaning of Article 51(1) TFEU. The tasks performed by notaries do not involve decision-making, coercive or enforcement powers. Their activities are merely preventive, auxiliary, or preparatory in nature compared to the exercise of public authority, public power.

Hungary argued that notarial activities do not fall within the scope of Article 49 TFEU, as they constitute the exercise of public authority within the meaning of the first paragraph of Article 51 TFEU. The legal status of notaries in Hungary is similar to that of judges and other persons involved in the exercise of public authority. Notaries conduct non-contentious proceedings to prevent legal disputes and thus form part of the administration of justice.

Section 2 (1) of Act XXXVIII of 2010 on probate proceedings⁵² states that it is a non-contentious civil procedure. Pursuant to Section 2(2), the proceedings of a notary public have the same effect as those of a court of first instance. Pursuant to Section 10, the notary public shall decide on issues arising during the probate proceedings by means of an order, thus the legal effect of the notary legal acts shall be equivalent to that of court decisions. Similar to a court, they act independently, have discretionary and decision-making powers, and their decisions can be enforced by state coercion. Hungary stated that the finding of the Commission is correct, that there is indeed room for legal remedy in the order for payment procedure, but this does not mean that the decision of the notary public is "weaker" than that of the court, but only that the legitimacy of the decision is debatable. Otherwise, the notary conducts the

⁴⁹ CURIA Case Law Database. European Commission v Hungary. Case C-392/15. ECLI:EU:C: 2017:73. JUDGMENT OF THE COURT (First Chamber) 1 February

<https://eur-lex.europa.eu/legal-content/HU/TXT/PDF/?uri=CELEX:62015CJ0392>

⁵⁰ Act XLI of 1991 on notaries. (Kjt.) <https://net.jogtar.hu/jogszabaly?docid=99100041.tv>

⁵¹ 62015CJ0392 Judgment of the Court (First Chamber) of 1 February 2017. European Commission v Hungary. Case C- 392/15. CELEX: 62015CJ0392 <https://jogkodex.hu/doc/2242254>.

⁵² Act XXXVIII of 2010 on probate proceedings. Hungarian Gazette No. 35 of 2010.

probate proceedings completely independently and issues a decree of succession. Unlike Austrian notaries, Hungarian notaries are not court officials but make all decisions on their own authority.

The number of courts appeals against notarial decisions in probate proceedings is negligible.

However, according to the judgment of the CJEU, the activities of Hungarian notaries do not constitute direct and specific participation in the exercise of public authority under Hungarian law. To substantiate this, it listed numerous other cases from other Member States, ignoring the fact that the legal status of Hungarian notaries and their role in the administration of justice is uniquely strong among European legal systems.⁵³

Finally, the EU Court of Justice ruled against Hungary, stating that the citizenship requirement for the appointment of notary public constitutes discrimination prohibited by Article 49 TFEU. Based on the above, it can be said that, in the interpretation of the CJEU, the Hungarian notary public is probably "not a judge".

Conclusion

The research showed that the legal status, procedures, and role of Hungarian notaries in the administration of justice are just as difficult to explain to other Member States or even to the Court of Justice of the European Union as, for example, the legal institution of „ascendant property” which is also unknown in other European legal systems. Just as it was not possible to convince the CJEU why Hungarian citizenship is a fundamental criterion for holding the office of notary public, for example, as it is for judicial appointment. We can conclude that Hungary continues to adhere to the criteria for the notarial profession (including Hungarian citizenship) and the prominent role in civil non-contentious proceedings in its legal system, which is based on customary law and historical roots. Although the CJEU ruled against Hungary in the above-mentioned case, Hungarian notaries continue to exercise the rights and powers of a "court of first instance" in certain procedures specified by law. For the purposes of the EU Succession Regulation, only notaries can be considered ‘courts’ in Hungary under Article 3(2), as Hungary has only notified notaries as ‘other authorities’ under Article 79.⁵⁴ Article 3(2)(b) of the EU Succession Regulation does not require that decisions by “other authorities” considered to be ‘courts’ have the same legal effects as those of ordinary courts. Furthermore, it is not a prerequisite that the judgment be final. On this basis, the Hungarian

⁵³Dr. Tamás Sajben: Közjegyzők Európában. [Notaries in Europe] Ügyvédvilág folyóirat 2016. február. <https://jogaszvilag.hu/vilagjogasz/kozjegyzok-europaban/>

⁵⁴Anka Tibor: Inheritance law, probate proceedings. ORAC Kiadó. Budapest, 2023. ISBN: 978 963 258 581 9

notary public plays the same role in non-contentious probate proceedings as the "probate court" in other Member States.

Bibliography

1. ANKA, T.: Inheritance law, probate proceedings. ORAC Kiadó. Budapest, 2023. ISBN: 978 963 258 581 9
2. ARANY, J.: FÜLEMILE. [Nightingale] Képzőművészeti alap kiadóvállalat 1957. ISBN2399980284462
3. BADÓ, A.: A jogrendszerek világa. [The World of Legal Systems.] Pro talendis Universitatis Alapítvány. Szeged, 2020. 227. ISBN 978 615 00 8812 9
4. BUCSI, Á.: Az EU Öröklési Rendelet a gyakorlatban. [The EU Succession Regulation in practice] (CSJ, 2023/2., 51-54.) <https://szakcikkadatbazis.hu/doc/6363542>
5. KULTSÁR, K.J.: A bírói és közjegyzői kinevezés feltételrendszeréről dióhéjban. [Nutshell overview of the conditions for appointment as a judge or notary public] (KK, 2025/1., 102-117.) 104-105. <https://szakcikkadatbazis.hu/doc/1626846>
6. PARTI, T.: Közjegyzői hálózatok az Európai Unióban. [Notary networks in the European Union] Közjegyzők közlönye 2019/4., 5-11. <https://adatkutatoalintezet.hu/publik%C3%A1ci%C3%B3ink/parti-tamas-kozjegyzoi-halozatok-az-europai-unioban/>
7. PARTI, T.: Aláírás- hitelesítés, hitelesített aláírás [Signature authentication, certified signature.] Notarius Hungaricus. MOKK Adatkutató Alintézet. 2017. No. 3. <https://adatkutatoalintezet.hu/publik%C3%A1ci%C3%B3ink/alairas-hitelesites/>
8. PULINKA, M.: A közjegyzőség új hatáskörei vagy az új közjegyzőség hatáskörei. [The new powers of notaries or the powers of the new notary system.] Közjegyzők Közlönye, 2017/4., 43.
9. RUDOLF, L.: A hagyatéki eljárás története Magyarországon. [The history of probate proceedings in Hungary.] Közjegyzők Közlönye, 2013/7
10. SZŐCS, T.: A nemzetközi öröklési jog szabályainak kommentárja. [Commentary on the rules of international inheritance law.] Budapest, 2021. ORAC Kiadó. ISBN: 978 693 258 5208.
11. SAJBEN, T. DR.: Közjegyzők Európában. [Notaries in Europe] Ügyvédvilág folyóirat 2016. február. <https://jogaszvilag.hu/vilagjogasz/kozjegyzok-europaban/>
12. 15/1991. (XI. 26.) IM rendelet „A közjegyzői állások számáról és a közjegyzők székhelyéről”. [Decree 15/1991 (XI. 26.) IM "On the number of notary positions and the location of notaries"] Net jogtár - Wolters Kluwer. <https://net.jogtar.hu/jogszabaly?docid=99100015.im>
13. 1874. évi XXXV törvénycikk a királyi közjegyzőkről. [Act XXXV of 1874 on Royal Notaries.] <https://net.jogtar.hu/ezer-ev-torveny?docid=87400035.TV&searchUrl=/>
14. 1874. évi XXXV törvénycikk a királyi közjegyzőkről. [Act XXXV of 1874 on Royal Notaries.] <https://net.jogtar.hu/ezer-ev-torveny?docid=87400035.TV&searchUrl=/>
15. 1894. évi XVI. törvénycikk az örökösödési eljárásról [Act XVI of 1894 on inheritance proceedings.] <https://net.jogtar.hu/ezer-ev-torveny?docid=89400016.TV&searchUrl=/ezer-ev-torvenyei%3Fpagenum%3D34>
16. 2010. évi XXXVIII. törvény a hagyatéki eljárásról. [Act XXXVIII of 2010 on probate proceedings.] <https://njt.hu/jogszabaly/2010-38-00-00>
17. 1991. évi XLI. törvény a közjegyzőkről (Kjt.) [Act XLI of 1991 on notaries.] <https://net.jogtar.hu/jogszabaly?docid=99100041.tv>
18. 3/2004.sz.Kúria Polgári Jogegységi Határozat. Indoklás III. fejezet. [No 3/2004.Supreme Curia Court Decision on Civil Law Uniformity. Reasoning Chapter III] <https://kuria-birosag.hu/hu/joghat/32004-szamupje-hatarozat>
19. The Fundamental Law of Hungary (25 April 2011) <https://www.parlament.hu/irom39/02627/02627.pdf>
20. 2011. évi CLXI. törvény a bíróságok szervezetéről és igazgatásáról. (Bjt.) [Act CLXI of 2011 on the Organization and Administration of Courts] <https://njt.hu/jogszabaly/2011-161-00-00>

21. 3/2004.sz. Kúria Polgári Jogegységi Határozat. <https://kuria-birosag.hu/hu/joghat/32004-szamu-pje-hatarozat>
22. 5/2018. (II. 13.) IM rendelet „a közjegyzői vizsga részletes szabályairól”. 2.§. (c.). [Decree No. 5/2018 (II.13.) Ministry of Justice on the detailed rules of the notary public examination. Section 2 (c).] Wolters Kluwer netjogtár. <https://net.jogtar.hu/jogszabaly?docid=a1800005.im>
23. REGULATION (EU) No 650/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 4 July. EUR LEX. The Official Journal of the European Union L 201/107. Article 3 (2) Definitions. <https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=CELEX%3A32012R0650>
24. WB case – C658/17. ECLI: EU. C: 2019:444. InfoCuria. Case law. <https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-658/17>
25. Minősülhet-e a közjegyző bíróságnak? – Az Európai Bíróság ítéletet hozott. [Can a notary public be considered a court? – The European Court of Justice has issued a ruling.] Jogi Fórum / Európai Unió Bírósága 23 May 2019. <https://www.jogiforum.hu/hir/2019/05/23/minosulhet-e-a-kozjegyzobirosagnak-az-europai-birosag-iteletet-hozott/>
26. (Case C-80/19) Official Journal of the European Union. C 297/12 EN. ECLI:EU C: 2020:230. 7.9.2020
Judgment of the Court (First Chamber) of 16 July 2020 (request for a preliminary ruling <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2020:297:FULL>
27. ‘The Supreme Court of Lithuania (Lietuvos Teismai) in a case concerning cross-border succession civil case.’ (Naujienos Lietuvos Aukščiausios Teismas išnagrinėjo civilinę bylą dėl tarpvalstybinio paveldėjimo) Website of the Supreme Court of Lithuania News. 4 november 2020. <https://www.lat.lt/naujienos/lietuvos-auksciausiasis-teismas-isnagrinejo-civiline-byla-del-tarpvalstybiniopaveldejimo/1024>
28. CURIA Case Law Database. European Commission v Hungary. Case C-392/15. ECLI:EU:C: 2017:73. JUDGMENT OF THE COURT (First Chamber) 1 February <https://eur-lex.europa.eu/legal-content/HU/TXT/PDF/?uri=CELEX:62015CJ0392>
29. 62015CJ0392 Judgment of the Court (First Chamber) of 1 February 2017. European Commission v Hungary. Case C- 392/15. CELEX: 62015CJ0392 <https://jogkodex.hu/doc/2242254>.
30. 2010 évi XXXVIII. tv. a hagyatéki eljárásról. [Act XXXVIII of 2010 on probate proceedings.] Magyar Közlöny. 35 of 2010. <https://net.jogtar.hu/jogszabaly?docid=a1000038.tv>

THE ROLE OF COPYRIGHT IN THE PROTECTION OF CREATIVITY

KOROLIANCHUK IRYNA *

Abstract

The article considers the content of copyright as a key tool of modern private law and its role in ensuring legal protection of the results of creative activity. In the course of the work, the main elements of copyright were considered, namely personal non-property and property rights of the author, the peculiarities of their origin and implementation. The impact of digital technologies on the development of copyright law is analyzed and the modern challenges associated with copying works are emphasized. Particular attention is paid to the international aspect of legal regulation and the need to harmonize national legislation with international standards. The economic importance of copyright as a factor in the development of creative industries and stimulation of innovative activity is highlighted. The problem of plagiarism and the importance of observing academic integrity are also considered.

Keywords: Copyright, intellectual property, personal non-property rights, property rights, digital technologies, the Internet, legal protection, plagiarism, international law, licensing.

Relevance of the topic

Copyright is one of the most important mechanisms of modern private law, aimed at ensuring legal protection of the results of human creativity. In the legal system, it performs not only the function of protecting the interests of authors, but also contributes to the general development of culture, science and information space. With the advent of digital technology, the role of copyright has grown significantly, as intelligent products become readily available for copying, distribution, and modification.

Copyright is the set of legal norms that regulate social relations related to the creation, use and protection of works of science, literature and art, as a result of the creative activity of their authors. It arises from the moment of creation of the work in an objective form and does not require special registration to come into force. Copyright provides protection of both personal non-property rights of the author, such as: right of authorship, right to name, right to inviolability of the work and property rights related to the use of the work, for example: reproduction, distribution, public performance, translation, etc. Its main goal is to ensure legal protection of creative results, stimulate intellectual activity and establish a balance between the interests of authors and society in the field of access to cultural and scientific values

In his work, the scientist Bondarenko S.V. defines the features of copyright, such as the fact that its object is recognized as the result of creative activity, regardless of the possibility of

* 2nd year student, Faculty of Law, Yuriy Fedkovych Chernivtsi National University, Ukraine; Scientific supervisor – Kiriak Oksana, PhD in Law, Associate Professor at the Department of Private Law, Faculty of Law, Yuriy Fedkovych Chernivtsi National University

its industrial and any other application. Also, the emergence of copyright is related to the fact of the creation of the work, and not the recognition of its existence by the decision of the relevant state body.[5] The modern effective legal mechanism of regulation in the field of intellectual property becomes a key prerequisite for ensuring a harmonious balance between the interests of creators and society.[1] The main content of copyright is the recognition of the author of a certain set of personal non-property and property rights to the work created by him. The former include the rights to authorship, name, inviolability of the work and other powers that are inextricably linked to the very personality of the creator.

In turn, property rights allow you to receive remuneration for the use of the work, and also allow you to control its distribution, reproduction, public performance and other methods of application. Such a comprehensive approach provides simultaneous protection of both personal creative and economic interests of the author. The protective function of copyright is manifested in the established legal guarantees for the preservation of the integrity and inviolability of intellectual property.

In case of violation of such rights, the author may seek in court the termination of the illegal use of his work and compensation for damages. Thus, copyright performs both preventive and compensatory functions, promoting general respect for the results of intellectual work and the formation of a culture of law-abiding use of creative developments.

The peculiarity of legal regulation in this area is that copyright arises automatically from the moment of creation of the work and does not require mandatory registration. This greatly simplifies the protection process and guarantees instant protection regardless of compliance with formal procedures. However, the state registration of copyright can be used as additional evidence in the case of legal disputes, which strengthens the author's position.

In today's conditions of rapid development of the information society, special attention is drawn to the problems of digital copying and online dissemination of works.[2] The Internet significantly facilitates the process of instant public access to creative products without the consent of the copyright holders, creating numerous challenges for controlling intellectual property. In this regard, the mechanisms of technical protection, licensing and effective law enforcement in the digital environment are important. To achieve this goal, legislative regulation must evolve in accordance with technical and social changes, contributing to the optimal protection of creativity in the conditions of a globalized information space. At the same time, such harmonization of legal approaches contributes to the development of international cultural exchange and expansion of access to creative results on a global scale. It provides effective mechanisms for protecting the rights of authors in cases of violations arising in the

digital environment, where the distribution of works is not limited by state borders. In addition, international standards stimulate the improvement of national legal systems, raising the level of legal culture and ensuring an appropriate balance between the interests of authors, users and society as a whole. Thus, the international component of copyright law is an important factor in the integration of states into the world legal and cultural space and guarantees effective protection of creativity in the context of globalization.

The international component of copyright law plays an important role in ensuring the mutual recognition and protection of copyrights beyond national borders. The participation of states in international agreements forms common standards for the protection of intellectual property, contributing to the protection of the rights of authors in a cross-border context. The harmonization of national legislation with international norms strengthens legal certainty and predictability in the creative sphere. Copyright also performs a stimulating function: the guarantee of receiving a reward for the use of the work encourages the creation of new creative ideas. In this context, the economic aspect plays a key role, because the protection of the intellectual product supports the development of creative industries, which make up a significant part of the modern economy.[3] Proper protection of copyrights becomes a driving force for attracting investments in cultural and educational initiatives, which in turn contributes to the disclosure of the innovative potential of society.

However, copyright is not absolute and provides for certain restrictions and exceptions. The legislation allows the free use of works in certain cases, for example, for educational, scientific or informational purposes. Such provisions are important to maintain a balance between the interests of the author and society, avoiding excessive monopolization of intellectual resources. Separately, the problem of plagiarism should be highlighted as a violation of copyright. Appropriation of the results of other people's work without proper indication of sources undermines the foundations of academic integrity and legal ethics. Effective fight against plagiarism includes not only legal mechanisms, but also the formation of a high level of legal awareness among educators and scientists. It is thanks to copyright law that it is possible to establish a clear basis of responsibility for such violations.

The development of digital technologies and social platforms raises additional challenges regarding the management of content that may violate copyright. It becomes important to improve the procedures for detecting and blocking illegal material, as well as a quick response through the mechanisms of reporting and removing violations.[4] However, it is extremely important to maintain a balance between ensuring the rights of authors and protecting the legitimate interests of users, avoiding abuse during the implementation of these procedures.

Regarding copyright infringement, Grabovska V.M. determines that copyright infringement is:

- A) plagiarism - the publication of a work under someone else's name;
- B) piracy - publication, reproduction, as well as distribution of copies of the work;
- C) import into the territory of Ukraine and export of copies of the work without the permission of the persons who own the copyright;
- D) actions that create a threat of copyright infringement; e) actions to consciously circumvent the technical means of copyright protection.

One of the most common cases of infringement of property rights is piracy, especially in the field of software, and plagiarism, which indicates the imperfection of the copyright protection system. The fight against piracy is important from both a political and an economic point of view. As for the political nature, it consists in accusations of a low level of copyright protection on the part of the international community. The quality of pirated products is on par with legal. The appearance of printing, reproduction equipment, magnetic tape and other electronic media made it possible to produce printed counterfeit products by: photographing a legal edition and making a series of copies that are facsimile copies of the original work; reproduction of a legal edition in computer memory and its subsequent production; production by photocopying of the matrix of the legal edition with subsequent reproduction

With the help of fast printing; direct photocopying of the legal edition with the subsequent sale of its copies.[6] In the field of judicial protection of copyright, difficulties arise when proving the fact of violation and assessing the amount of losses. In particular, the identification of damage in the digital environment is often complicated. In order to simplify the compensation process, the legislation provides for the possibility of collecting fixed compensation, which significantly increases the effectiveness of the protection of authors' rights.

Copyright plays a key role in shaping a positive image of the country at the international level. States that provide an adequate level of intellectual property protection become more attractive to investors and international partners. This creates favorable conditions for integration into the world economic system and strengthening positions in international trade in cultural products. At the same time, it is important to consider the issue of interaction between copyright and freedom of expression. On the one hand, it is necessary to reliably protect the rights of authors, and on the other hand, to avoid unjustified restrictions on freedom of speech. Achieving harmony between these aspects becomes a difficult but extremely important task for legislators and law enforcement agencies, who must constantly improve the relevant legal mechanisms. Thus, copyright is the main tool for legal support of the interests of creators, performing protective, stimulating and regulatory functions at the same time. It contributes to achieving a

balance between the interests of authors and society, supports the development of culture, science and economy, and adapts to the challenges of the digital age.

It is also the fundamental institution of the legal system that provides comprehensive protection of the results of intellectual and creative activity and balances the interests of the author and society. It not only guarantees legal recognition of authorship and grants exclusive property and personal non-property rights, but also creates effective mechanisms for controlling the use of works, preventing their unauthorized reproduction and distribution. In the scientific dimension, copyright is considered an important tool for stimulating innovative activity, as it provides economic motivation for the creation of new cultural and scientific products. At the same time, its functioning contributes to the formation of a civilized information space, where the principles of knowledge accessibility and proper protection of the rights of creators are combined. Consequently, copyright is a necessary condition for the sustainable development of the creative sphere, the intellectual potential of society and integration into the global system of circulation of intellectual values.

Bibliography

1. Khodiko Yu. V. The criterion of creativity (originality) as a condition for the protection of the copyright object // Law of Ukraine. 2021. №No. 8. S. 45–53. URL: <https://plaw.nlu.edu.ua/article/view/228802>
2. Kulynych O. V., Kondyk D. The influence of artificial intelligence on the criteria of originality in copyright // Scientific Bulletin of the University. Series: Right. 2022. Issue 93–94. S. 43–56. URL: https://unz.univer.km.ua/article/view/93-94_43-56
3. Shapochka O. O. Intellectual property and copyright: theoretical and practical aspects // Young scientist. 2020. №No. 12 (234). S. 78–83. URL: <https://mosjournal.com/index.php/journal/article/view/109>
4. Gachkevych A. Synthetic creativity of generative artificial intelligence as a challenge for legal protection of copyright and related rights // Electronic scientific Bulletin of Lviv National University named after. Frank. 2023. №No. 15. S. 112–120. URL: <https://ena.lpnu.ua/handle/ntb/124677>
5. Bondarenko S. V. Copyright and related rights: a course of lectures. Kyiv: Institute of Intellectual Property and Law of the National Educational, Scientific and Production Complex "Academy of Intellectual Property" of the Ministry of Education and Science of Ukraine, [year of publication not specified]. P. 11. URL: https://pdf.lib.vntu.edu.ua/books/2021/Bondarenko_Avtorske_pravo_2008_288.pdf
6. Hrabovska V. M. Sposoby ta formy zakhystu avtorskoho prava // Seriya "Pravo". Issue 19. Vol. 2. P. 39. URL: <https://dspace.uzhnu.edu.ua/server/api/core/bitstreams/cb3385c0-8c66-4f61-b29b-cafb871fe3e2/content>

INTERNATIONAL LEGAL APPROACHES TO THE PROTECTION OF PERSONAL NON-PROPERTY RIGHTS IN THE CONTEXT OF AI TECHNOLOGIES

MAKSYMILIANA-ELLANTA ROMANIUK*

Abstract

We are currently experiencing a phase of rapid development of AI technologies, which can potentially be used with harmful intent. The article highlights the risks posed by the unauthorized use of a person's likeness and voice to create manipulative content, which can lead to violations of the rights to dignity, honour, privacy and the security of biometric data. The article also reviews attempts by various countries to regulate relations between users of such technologies and those affected by their use. Based on the analysis, the article proposes ways to improve Ukrainian civil legislation to ensure an effective legal order in the digital age.

Keywords: *personal non-property rights, likeness, artificial intelligence, deep synthesis technologies, deepfake.*

Introduction

The modern world lives not only in real life, but also in virtual. The number of hours spent on the Internet for some may significantly exceed the time devoted to live communication. In addition to consuming Internet content, many people are also engaged in its creation and filling the network with it.

Nowadays, artificial intelligence (AI) is gaining popularity. Because it is a great instrument, which was created to optimize certain processes. It can be useful in any field.

AI is already available to a wide variety of population groups. Consequently, it is becoming a tool not only for noble purposes, such as science or education, but also for entertainment and the commission of offenses. Some students use AI to "cheat" on exams. People also frequently turn to AI when writing texts, which sometimes leads to copyright infringement. However, it is also important to highlight that quite often users of AI violate the personal non-property rights of individuals.

Chapter 1

The Civil Code of Ukraine defines personal non-property rights belong to every natural person from birth or by law, have no economic content, are closely linked to the individual, and are inherent, inalienable, and are held by the natural person for life. The list of personal non-property rights is endless. The essence of a personal non-property right constitutes the ability

* 2nd year of study, Full-time, romaniuk.maksymiliana-ellanta@chnu.edu.ua Faculty of Law, Yuriy Fedkovych Chernivtsi National University, Ukraine
Academic Supervisor Assoc. prof. Oksana Kiriak, PhD. Associate Professor at the Department of Private Law

of an individual to freely, at their own discretion, determine their behavior in the sphere of their private life [1].

The Internet is saturated with photo and video materials created by AI using the appearance and voices of real people (deepfakes). Such content is usually created for entertainment. However, in this way users of AI spread false information that violates individuals' rights to respect for dignity and honor.

An interesting example is the exploitation of the likeness of Anila Bisha (an Albanian actress) by the government of Albania to create an "AI Minister" – a virtual member of the cabinet. Anila Bisha had not given consent for such use of her likeness. The actress filed a lawsuit against the government because such actions of the government led to unwanted attention on the street and online harassment [2].

Now it is becoming increasingly difficult to distinguish AI from recordings of real people. This can be used to intentionally mislead content consumers, for example, for political campaigning. There is also the possibility of using AI to bypass security systems by forging person's biometric data, which can lead not only to the violation of personal non-property rights but also to the commission of more serious crimes.

Establishing norms at the legislative level to regulate such relationships is necessary to ensure the rule of law in every state.

Chapter 2

An important regulatory act governing relations in the field of AI is Regulation (EU) 2024/1689 of the European Parliament and of the Council of June 13, 2024 (the AI Act). This document classifies AI systems and defines various requirements for them depending on the level of risk. [3].

The Preamble (paragraph 10) and general provisions of the Act emphasize that this Regulation applies without prejudice to existing EU data protection legislation, in particular the GDPR (General Data Protection Regulation). A person's likeness and physiological characteristics are their personal (and often biometric) data. Creating a deepfake of a specific real individual involves the processing of this data. Under GDPR rules, such processing is unlawful by default without the explicit, informed, and revocable consent of the data subject.

Chapter IV, Article 50 of the AI Act defines transparency obligations for providers and users of certain AI systems. Paragraph 2 of this article obligates providers of systems that generate synthetic audio, image, video or text to ensure the machine-readable marking of outputs. Such marking must allow to detect artificially created or manipulated content.

Exceptions include systems for standard editing, algorithms that do not significantly alter the substance of input data, and law enforcement tools authorized by law.

Paragraph 4 concerns the use of AI to create deepfakes or manipulate images, audio, or video. Users of such systems must disclose that the content is of artificial origin. The Act makes an exception for obvious artistic, satirical (e.g., parodies) or fictional works, but even in such cases, transparency must be ensured in a manner that does not impede the display of the work while not misleading the audience [4].

The French approach is distinguished by harsh penalties. While European laws focus more on moderation and transparency, France directly criminalizes the creation and distribution of deepfakes without individual's permission.

In May 2024, a law was adopted amending Article 226-8 of the French Penal Code. The creation and distribution of deepfakes without the person's consent became a criminal offense. The rule applied if the artificiality of the material was not obvious or was not openly declared. Platforms must promptly remove illegal materials upon receiving notification of them [5]. Violation of these rules entails serious sanctions. The illegal creation or distribution of deepfakes is punishable by up to one year in prison and a fine of up to 15,000 euros. If the offense is committed via public online services, the penalty increases to two years in prison and a 45,000 euro fine. Enforcement of the law is monitored by the French judicial system with the support of regulatory bodies [6].

In June 2025, the Danish Ministry of Culture and several political parties agreed to amend the copyright law ("Agreement on Protection Against Digital Imitations Containing Personal Characteristics" (Aftale om et værn mod digitale efterligninger indeholdende personlige kendetegn)). They proposed two new levels of protection against the distribution of digital imitations without a person's consent.

The first mechanism will protect the general public from the unauthorized use of realistic forgeries of personal characteristics, such as appearance or voice. The second mechanism is designed specifically to protect performers from the distribution of generated imitations of their performances [7].

The main goal of these innovations is to create a clear legal framework that will allow anyone to demand that social networks and other platforms remove forged materials.

Ordinary users who distribute such materials will not be subject to criminal or administrative penalties, although victims will be able to seek damages through the courts. Instead, heavy fines may threaten the platforms themselves if they ignore complaints and requests to remove such content. These rules will apply exclusively within the territory of

Denmark; thus, content removed there may remain accessible from other countries. This law will enter into force on March 31, 2026 [8].

The Austrian Deepfake Action Plan (Aktionsplan Deepfake) is a government document developed by the Ministry of the Interior (BMI) in 2022 [9]. Protection of likeness is based on the right to one's own image according to Section 78 of the Copyright Act. This norm protects an individual against the publication of manipulations that affect a person's legitimate interests, degrade their dignity, or grossly interfere with their private life. Particular attention is paid to countering sexualized violence. Using a face to create fake pornography is defined as a direct violation of the rights to sexual self-determination, privacy and human dignity. The Deepfake Action Plan also extends the scope of protection to voice and speech, recognizing that audio deepfakes can violate the right to one's own speech and the privacy of communication.

Criminal and civil liability for such actions is provided by articles on cyberbullying – namely, persistent harassment via computer systems. Norms on defamation, insult to honor and damage to business reputation are also applied.

The Deepfake Action Plan provides for a simplified judicial protection procedure, known as mandate proceedings under Section 549 of the Code of Civil Procedure. This allows for a faster response to cases where a deepfake significantly degrades human dignity.

A separate priority is the development of technical tools for detecting manipulations, specifically through the Defalsif-AI project, so victims can obtain evidence for court. In addition, large online platforms are assigned obligations under the Digital Services Act regarding risk assessment and the removal of intentional manipulations that harm people.

Politicians and media figures have somewhat limited protection, as their lives are often the subject of public discussion, and satirical depictions may be protected by the freedom of art. However, this protection is not absolute: it ceases to apply if the deepfake has no factual basis, contains excessive insult, or interferes with a deeply personal, intimate sphere of an individual's life.

The British Data (Use and Access) Act 2025 (DUAA) significantly supplements the Online Safety Act 2023, filling a critical gap in the protection of personal rights. The most important innovation is Section 138 of the Data (Use and Access) Act 2025. It amends criminal legislation (specifically the Sexual Offences Act).

Now, the creation of an intimate deepfake of an adult without their consent is a standalone crime, even if the deepfake was never distributed and was kept only on the author's device. The article also prohibits ordering or asking another person (or an AI service) to create such content. The law uses the term "purported intimate image." This means it does not matter

if the image is a real photo. If AI generated content that "appears to be" an image of a particular person in an intimate context, it is a violation.

DUAA 2025 introduces changes to the UK General Data Protection Regulation (UK GDPR) that strengthen an individual's control over their digital identity. According to Articles 17 and 21 of the UK GDPR, as amended by the DUAA, an individual has the right to demand the deletion of their data (voice/face) from AI training datasets if they were collected without proper consent.

Articles 22A–22D of the UK GDPR establish a person's right to "human intervention" if an AI system uses their likeness or voice to create content that has a significant impact on their life.

The DUAA also amends the Data Protection Act 2018 (Sections 164A, 164B), thereby simplifying the procedure for filing complaints directly with the owners of AI models [10].

Chapter 3

The South Korea's Basic Act on the Development of Artificial Intelligence and the Establishment of a Foundation for Trustworthiness protects an individual's likeness through preventive mechanisms: transparency, labeling, and human rights impact assessment.

Article 31, paragraph 3 states that if an AI system generates virtual audio, images or video that are difficult to distinguish from real content, the AI operator is obliged to clearly notify the user (for example, by using watermarks or metadata) that this content is AI-generated. This makes it impossible or particularly hard to use another individual's likeness for fraud, creating fake news or discrediting a person as the content is immediately identified as artificial. This norm is a direct analogue of Article 50 of the EU AI Act, which also requires clear labeling of deepfakes and artificially generated content. Both jurisdictions make an exception for creative/artistic works.

According to Article 35, paragraph 1, business operators providing High-Impact AI systems must attempt to conduct an advance assessment of the potential impact on fundamental human rights (which include the right to privacy, appearance and voice).

The law stimulates corporate self-control instead of the direct censorship. According to Article 28, private autonomous AI ethics committees (which companies can create voluntarily) are empowered with the direct function of "investigating methods to prevent human rights violations." This means that a company developing a video or voice generator must internally block the possibility of cloning real people without their consent to comply with ethical principles.

Article 27, paragraph 1 says that the government establishes AI Ethical Principles, which explicitly require that the development and application of AI "do not cause harm to human life, physical well-being, or mental health" [11]. Creating intimate or defamatory deepfakes using a person's appearance causes exactly such severe psychological harm, making such tools violators of the basic principles of the law.

On November 25, 2022, People's Republic of China issued the Provisions on the Administration of Deep Synthesis Internet Information Services jointly by the Cyberspace Administration of China, the Ministry of Industry and Information Technology and the Ministry of Public Security of the PRC. The document regulates the activities of all services within PRC that use deep synthesis technologies (AI generation of text, voice, images, video, "deepfakes," virtual scenes). The main goal is the protection of national security, public interests and citizens' rights.

Developers of AI must implement a real-name user registration system (via phone number or state ID). They are obligated to monitor content: checking both input data and generation results. If harmful or illegal content is detected, the provider must immediately delete it, block the offender's account and inform regulatory authorities.

Furthermore, developers must create mechanisms for refuting rumors generated by their systems. If the technology allows for the editing of biometric information (face or voice), developers are obligated to remind users of the need to obtain separate consent from the individuals whose data is being used. Providers must also ensure the security of training data and regularly conduct assessments of the ethicality and safety of their algorithms.

Also developers of AI must take technical measures to add hidden identifiers (metadata) to all generated content. If an AI product can mislead people (e.g., realistic voice synthesis, face swapping, or creation of virtual scenes), it must bear a clear and prominent label. Users are strictly prohibited from removing, forging or hiding these marks.

App stores are obligated to check deepfake applications for compliance with safety norms before publication. The state conducts regular audits of algorithms. Administrative and criminal liability is provided for violations of the rules. In case of serious risks to information security, authorities may suspend the service's operation until violations are fully resolved [12].

Chapter 4

In the USA, Congress is implementing nationwide standards to combat disinformation. The TAKE IT DOWN Act (2025) criminalizes the distribution of intimate deepfakes or digital forgeries [13].

Referred to the House Committee on Financial Services (02/27/2025) the Preventing Deep Fake Scams Act is aimed at combating financial fraud using voice cloning [14].

The NO FAKES Act (2025) proposed to establish a federal right to protect voice and likeness, allowing for lawsuits over the unauthorized use of digital replicas. Fines for violating platforms could reach \$750,000 [15].

Several states are implementing their own strict rules. For example, California acts AB 2655 and AB 2839 obligate platforms and politicians to remove or label election-related deepfakes. However in 2026 they are blocked by courts due to potential violations of freedom of speech and the right to satire. Parallely, law SB 942 requires AI developers (such as Google or OpenAI) to implement digital watermarks and provide free tools to verify the origin of content [16].

New York updated its laws for 2025–2026. Now contracts cannot replace humans with digital replicas without special conditions, and advertisements with synthetic actors must contain a disclaimer (fine up to \$5,000) [17].

Eleven states of the USA have restricted the usage of AI in political advertising.

Texas requires mandatory labeling for advertising creators.

Wisconsin introduced disclosure mandates for AI use.

Minnesota established liability for the dissemination of deepfakes [18].

Conclusion

The development of artificial intelligence and the emergence of realistic deepfakes have endangered fundamental human rights to individual's likeness and privacy, forcing the world's leading nations to develop various legal protection strategies.

The approaches of the European Union, South Korea and PRC are based on the principle of transparency, where AI developers are obligated to mark artificial content with metadata or watermarks to prevent users from being misled. The strategies, chosen by France, Great Britain and the USA, involves strict criminalization of creating intimate forgeries even without their distribution as well as protecting the digital identity of artists from commercial exploitation. The direction, represented by the experiences of Denmark and Austria, focuses on the liability of online platforms for removing illegal content and the implementation of special technical tools for judicial verification of manipulations.

Global trends indicate that an individual's likeness should now be considered as digital assets and critical biometric data requiring protection as a classic personal data. The effectiveness of each approach to protecting personal non-property rights can be assessed over

time by the action of regulatory legal acts adopted by different countries and the repeated application of their norms. However, in our opinion, ensuring transparency through a dedicated legal norm is the first step required to regulate these relations. Therefore, Ukraine ought to take an example from the European Union and South Korea, in particular, because they create an obligation to label content for both AI system providers and users. Moreover, the AI Basic Act of Korea, which encourages institutions that develop, research, and use AI to create ethics committees that must ensure that the activities of institutions are ethical, safe, and do not violate human rights, is also useful for implementation in Ukraine. Also such international experiences must become a basis for updating the Civil Code of Ukraine, particularly regarding the formalization of rights to a digital image and the establishment of consent withdrawal procedure for the use of biometrics.

Bibliography

1. Civil Code of Ukraine: Code of January 16, 2003. № 435-IV. URL: <https://zakon.rada.gov.ua/laws/show/435-15#Text>
2. Fatos Bytyci, Florion Goga. (February 13, 2026). Albanian actor sues government for using her image as "AI minister". Reuters. URL: <https://www.reuters.com/business/media-telecom/albanian-actor-sues-government-using-her-image-ai-minister-2026-02-13/>
3. Tambiama Madiaga. (September, 2024). Artificial intelligence act (Briefing PE 698.792). European Parliamentary Research Service. URL: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698792/EPRS_BRI\(2021\)698792_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698792/EPRS_BRI(2021)698792_EN.pdf)
4. Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act). Official Journal of the European Union, L, 2024/1689. URL: <https://eur-lex.europa.eu/eli/reg/2024/1689/oj/eng>
5. LOI n° 2024-449 du 21 mai 2024 visant à sécuriser et à réguler l'espace numérique (1). Legifrance. URL: <https://www.legifrance.gouv.fr/loda/id/LEGIARTI000049565828/2024-05-23>
6. Code pénal. Legifrance. URL: https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070719/LEGISCTA000006165310/#LEGISCTA000006165310
7. Værn mod deling af digitale efterligninger af personlige kendetegn. Kulturministeriet, 2025. URL: https://kum.dk/fileadmin/_kum/1_Nyheder_og_presse/2025/Vaern_mod_deling_af_digitale_fterligninger.pdf
8. Udkast. Forslag til Lov om ændring af lov om ophavsret (Indførelse af en præstationsbeskyttelse og beskyttelse mod digitalt genererede efterligninger mv.). Lovforslag. København. Kulturministeriet, 2025. URL: [https://prodstoragehoeringspo.blob.core.windows.net/92ca118f-cd2c-4558-a6a9-f590c111bd67/Forslag%20til%20lov%20om%20%C3%A6ndring%20af%20lov%20om%20ophavsret%20\(Indf%C3%B8relse%20af%20en%20pr%C3%A6stationsbeskyttelse%20og%20beskyttelse%20mod%20digitalt%20genererede%20efterligninger%20mv.\).pdf](https://prodstoragehoeringspo.blob.core.windows.net/92ca118f-cd2c-4558-a6a9-f590c111bd67/Forslag%20til%20lov%20om%20%C3%A6ndring%20af%20lov%20om%20ophavsret%20(Indf%C3%B8relse%20af%20en%20pr%C3%A6stationsbeskyttelse%20og%20beskyttelse%20mod%20digitalt%20genererede%20efterligninger%20mv.).pdf)
9. Aktionsplan Deepfake. Wien : Bundesministerium für Inneres, 2022. URL: https://www.bmi.gv.at/bmi_documents/2779.pdf
10. Data (Use and Access) Act 2025. URL: <https://www.legislation.gov.uk/ukpga/2025/18/contents>
11. AI Basic Act of Korea : Official Portal. 2025. URL: <https://aibasicact.kr/explorer/#introduction>
12. Order No. 12 of the State Internet Information Office, the Ministry of Industry and Information Technology of the People's Republic of China, and the Ministry of Public Security of the People's

- Republic of China. (November 25, 2022). Cyberspace Administration of China website. URL: https://www.gov.cn/zhengce/zhengceku/2022-12/12/content_5731431.htm
13. TAKE IT DOWN Act, S. 146, 119th Cong. (2025). URL: <https://www.congress.gov/bill/119th-congress/senate-bill/146/text>
 14. Preventing Deep Fake Scams Act, H.R. 1734 119th Cong. (2025). URL: <https://www.congress.gov/bill/119th-congress/house-bill/1734/text>
 15. No Fakes Act of 2025, S. 1367, 119th Cong. (2025). URL: <https://www.congress.gov/bill/119th-congress/senate-bill/1367/text>
 16. California AI Transparency Act, SB 942. (2024). URL: https://www.leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB942
 17. New York State Senate Bill S8420A. (2025). URL: <https://www.nysenate.gov/legislation/bills/2025/S8420/amendment/A>
 18. David Oxenford. (April 22, 2024). 11 States Now Have Laws Limiting Artificial Intelligence, Deep Fakes, and Synthetic Media in Political Advertising – Looking at the Issues. Broadcast Law Blog. URL: <https://www.broadcastlawblog.com/2024/04/articles/11-states-now-have-laws-limiting-artificial-intelligence-deep-fakes-and-synthetic-media-in-political-advertising-looking-at-the-issues/>

EU COMPETENCE IN LABOUR LAW: THE IMPLICATIONS OF THE CJEU JUDGMENT IN CASE C-19/23

TOMA BILIENĖ*

Abstract

This paper aims to assess the legal implications of the CJEU judgment in Case C-19/23 for the distribution of EU competences in labour law, focusing on the interpretation of Article 153(5) TFEU. Using a combination of historical, linguistic, comparative, and logical analysis methods, the paper examines how the CJEU defines the limits of EU competence in labour matters. Particular attention is given to the Direct Interference Test adopted by the CJEU when determining whether a measure that affects labour relations falls within the scope of EU competence or remains within the exclusive regulatory domain of the Member States. The paper finds that, while the judgment does not formally modify the allocation of competences, it provides significant interpretative guidance clarifying the scope of permissible EU intervention. It highlights the central role of judicial interpretation in balancing social policy objectives with Member States' regulatory autonomy.

Keywords: Minimum Wage Directive, Pay, Right of Association, EU competence, Social Policy, Labour Law

Introduction

The delimitation of competences between the European Union (hereinafter – EU) and its Member States in the field of labour matters remains a sensitive and contested area of European integration. Although the Treaties provide a legal basis for EU action in social policy, the scope of that competence is carefully limited. Article 153 of the Treaty on the Functioning of the European Union (hereinafter – TFEU) empowers the EU to support and complement Member States' activities in areas such as working conditions, social protection of workers, and information and consultation within undertakings. At the same time, Article 153(5) TFEU explicitly excludes certain core aspects of labour law – including pay, the right of association, the right to strike, and the right to impose lock-outs – from EU legislative competence. This constitutional compromise reflects the historically strong connection between labour regulation and national social models. Nevertheless, the evolving jurisprudence of the Court of Justice of the European Union (hereinafter – CJEU) demonstrates that the practical boundaries of EU competence in labour law continue to develop through judicial interpretation.

Against this background, the judgment of the CJEU in Case C-19/23 *Kingdom of Denmark v European Parliament and Council of the European Union* (hereinafter – Case C-19/23) provides an important opportunity to reassess the scope and limits of EU competence in labour-related matters. The ruling raises fundamental questions regarding the extent to which EU

* PhD candidate (year II), Faculty of Law, Vilnius University, Lithuania
toma.biliene@tf.stud.vu.lt

institutions may regulate labour issues indirectly – particularly those relating to the internal market – and the degree to which Member States retain regulatory autonomy in the organisation of their national labour law systems.

The EU's competence in social policy is diverse and may be analysed from different perspectives. In order to explore the judicial impact on the allocations of competences, the object of this paper is defined as the delimitation of competences between the EU and the Member States in the field of labour law. The aim of this paper is to assess the implications of the CJEU judgment in Case C-19/23 for the distribution of EU competences in labour law, with particular regard to the interpretation of Article 153(5) TFEU. In order to achieve this aim, the analysis is carried out through the following selected research objectives:

1. To explicate the legal context of the factors influencing minimum wage policy within the EU and to analyse the regulatory framework established by Directive (EU) 2022/2041 on Adequate Minimum Wages (hereinafter – Directive (EU) 2022/2041).
2. To reveal the importance of the CJEU's judgment in Case C-19/23 concerning the interpretation of the scope and limits of EU competence in labour law matters, by identifying the legal and methodological approach applied by the CJEU in examining the regulatory scope of Article 153 TFEU.

In order to achieve the stated objectives, the principal methods employed in this study, which are applied in a complementary and integrated manner, are the historical, linguistic, comparative, and methods of logical and systemic analysis.

The paper consists of an introduction, two substantive parts, and conclusions. The introduction addresses the relevance of the subject under examination, sets out the aim and objectives of the research, defines the object of the paper, and identifies the research methods employed. The first part of the paper is devoted to an analysis of the legal context of minimum wages in the EU, highlighting the factors influencing the minimum wages and the adoption of Directive (EU) 2022/2041. The second part examines the reasoning of the CJEU in Case C-19/23 and its judicial interpretation of Article 153 TFEU.

1. The Legal Context of Minimum Wages in the EU

Minimum wages constitute a core element of the EU's social policy framework, reflecting both the EU's commitment to social protection and the need to ensure the proper functioning of the internal market. The legal context of minimum wages is shaped by decades of economic, social, and political developments. The historical and legal evolution of minimum wages in the EU

and their materialisation in Directive (EU) 2022/2401 is important for understanding the dynamics of the judicial decision in Case C-19/23 across the EU.

1.1 Influences on wages in the EU

The evolution of minimum wages in the EU over the past decades has been significantly influenced by economic cycles, social policy developments, and supranational initiatives. During the period 2008–2013/2014, the EU and its Member States faced the global economic crisis, which led to fiscal pressure and the need for budgetary consolidation. In this context, wage moderation and limitations on minimum wage increases were widely adopted as measures to support fiscal consolidation. Statutory minimum wages should serve as an instrument for the protection of workers and the regulation of the labour market (Schulten, 2010), however, the measures implemented during the economic crisis exposed vulnerabilities in the social protection of low-paid workers and highlighted the limitations of existing mechanisms to ensure an adequate minimum income. Around that time, proposals were made to introduce a coordinated minimum wage initiative at the European level. A structural increase in minimum wage levels would not only ensure that many workers receive wages above the subsistence level, but would also make a significant contribution to mitigating the effects of the economic crisis (Schulten, 2008). In mid-2009 also the International Labour Organization (ILO) highlighted the central role of minimum wages, because they not only directly affect the earnings of low-wage workers but also serve as a benchmark for overall wage development (International Labour Organization (ILO), 2009).

In 2017, the European Pillar of Social Rights (hereinafter – EPSR) marked a turning point in EU social policy. Principle 6(b) of the developed EPSR explicitly recognises the right to adequate minimum wages, stating that such wages shall be ensured in the way that meets the needs of workers and their families in light of national economic and social contexts, while safeguarding both employment access and work incentives. Importantly, the EPSR also emphasises the prevention of in-work poverty, reflecting a more integrated approach to social protection and labour market inclusion (European Commission, Directorate-General for Employment, Social Affairs and Inclusion, 2021).

The period 2020–2022 saw the adoption of Directive (EU) 2022/2401, which represents a culmination of EU efforts to establish a more coherent framework for minimum wage protection. The Directive (EU) 2022/2401 pursues a primary social objective – to ensure better living and working conditions by guaranteeing adequate and accessible statutory and

collectively bargained minimum wages. A secondary economic objective is also embedded in the Directive (EU) 2022/2041, namely the promotion of the proper functioning of the Single Market and support for economic recovery after the COVID-19 pandemic. The Directive (EU) 2022/2041 represents arguably the most ambitious social legislation enacted by the EU in recent years, carrying significant symbolic weight. It constitutes a central moment in the evolution of European wage and social policy (Menegatti, 2025a).

The legal basis for EU action in the area of minimum wages is Article 153(1)(b) TFEU. In general, Article 153 TFEU sets out the EU's competence in the field of social policy, specifying the areas in which the EU may act. These areas include, *inter alia*, the improvement of the working environment to protect health and safety, the regulation of working conditions, social security and social protection, safeguards for workers whose employment contracts are terminated, and mechanisms for worker information, consultation, and representation. Notably, Article 153(5) TFEU expressly excludes pay, the right of association, the right to strike, and the right to impose lock-outs from the scope of EU competence in social policy, thereby preserving Member States' autonomy in these fields (European Union, 2016). Nevertheless, legal developments in recent decades, as reflected in the EPSR and Directive (EU) 2022/2041, illustrate that the EU may influence wage policies indirectly through the regulation of working conditions.

1.2 Regulatory Framework of the Directive (EU) 2022/2041 on Adequate Minimum Wages

Directive (EU) 2022/2041, adopted on the basis of the EU's competence in the field of working conditions under Article 153(2)(b) TFEU, in conjunction with Article 153(1)(b) TFEU, establishes a framework for ensuring the adequacy of minimum wages across the EU while respecting national practices and Member States' competence. Articles 4 and 5 of the Directive (EU) 2022/2041 form the core regulatory provisions. Article 5 (applicable to all Member States with statutory minimum wages) sets out procedures, requiring to establish clear and transparent mechanisms for setting and updating these wages. Member States must define criteria for determining adequacy in accordance with national practices, deciding on the relative weight of these criteria (European Parliament and Council of the European Union, 2022, Art. 5(1)). At a minimum, the criteria include the purchasing power of statutory minimum wages (taking account of cost of living), the general level of wages and their distribution, the growth rate of wages, and long-term national productivity levels and developments (European Parliament and

Council of the European Union, 2022, Art. 5(2)). The Directive (EU) 2022/2041 also permits the use of automatic indexation mechanisms and recommends indicative reference values, such as 60% of the gross median wage or 50% of the gross average wage, to guide Member States in assessing adequacy (on the condition that the application of this mechanism does not cause the statutory minimum wage to decrease) (European Parliament and Council of the European Union, 2022, Art. 5(3)). In addition to statutory minimum wages, the Directive (EU) 2022/2041 promotes collective bargaining as a complementary mechanism for wage-setting. Article 4 encourages the expansion of collective bargaining coverage, the strengthening of social partners' capacity to negotiate, and the facilitation of constructive, informed wage negotiations (European Parliament and Council of the European Union, 2022, Art. 4(1)). Member States with collective bargaining coverage below 80% are required to provide enabling frameworks and establish action plans to promote collective bargaining at sectoral or cross-industry levels (European Parliament and Council of the European Union, 2022, Art. 4(2)).

Importantly, the Directive (EU) 2022/2041 does not aim to harmonise minimum wages across the EU or to establish uniform mechanisms for setting them (European Parliament and Council of the European Union, 2022, Recital 19). It explicitly preserves the autonomy of social partners to negotiate wages and the competence of Member States to decide whether to implement statutory minimum wages, rely on collective agreements, or adopt a combination of both (European Parliament and Council of the European Union, 2022, Art. 1(2) and Art. 1(3)). The Directive (EU) 2022/2041 does not oblige any Member State to introduce statutory minimum wages or to declare collective agreements universally applicable (European Parliament and Council of the European Union, 2022, Art. 1(4)). In this way, the Directive (EU) 2022/2041 balances the social objective of ensuring adequate wages with respect for national diversity and institutional autonomy in wage-setting. This Directive (EU) 2022/2041 represents a significant and potentially transformative development in the field of social policy, aiming to realise the long-standing social progress objectives enshrined in Article 3 TEU. Its adoption also conveyed a strong political signal from the EU and its Member States, meaning that the "Age of Austerity", during which wage-setting and collective bargaining decentralisation were actively promoted, has been decisively left behind (Countouris, 2025). Although the Directive (EU) 2022/2041 does not require Member States to establish a statutory minimum wage, it sets out a framework to ensure that any existing minimum wage is adequate. Since its adoption the Directive (EU) 2022/2041 has been controversial.

In essence, the legal context of minimum wages in the EU reflects decades of economic pressures, social policy developments, and evolving legal instruments. From the fiscal constraints imposed by the economic crisis to the establishment of the EPSR and the adoption of Directive (EU) 2022/2041, the EU has gradually developed a framework to promote adequate minimum wages while respecting the prerogatives of Member States and the autonomy of social partners. This dual focus – on social protection and the proper functioning of the Single Market – frames ongoing debates on the allocation of competences in social policy and provides the necessary context for analysing the implications of the CJEU judgment in Case C-19/23.

2 The CJEU Judgment in Case C-19/23

2.1 The Danish Annulment Action and the Opinion of the Advocate General

The adoption of Directive (EU) 2022/2041 provoked a significant legal challenge before the CJEU in Case C-19/23. Denmark (supported by Sweden at a later stage in the judicial process) initiated annulment proceedings under Article 263 TFEU against the Directive (EU) 2022/2041 in its entirety, or, alternatively, of Article 4(1)(d) and/or Article 4(2). The core of Denmark's first plea was an assertion that the EU legislature lacked competence to adopt the Directive (EU) 2022/2041 because it allegedly infringed the express exclusion of competence relating to pay and the right of association under Article 153(5) TFEU.

Notably, the Advocate General delivered an opinion, supporting the Danish action. The Advocate General concluded that the Directive (EU) 2022/2041 should be annulled in its entirety, or subsidiarily that key provisions – particularly Articles 4(1)(d) and 4(2) – should be invalidated. Central to this conclusion was an expansive interpretation of the pay exclusion under Article 153(5) TFEU, extending it beyond wage levels to encompass wage-setting procedures and modalities (Opinion of Advocate General Emiliou, 2025). Building on this, the Advocate General formulated a broad Direct Interference Test, whereby any EU measure regulating aspects of pay – whether directly or through coordination mechanisms – would fall outside EU competence (Countouris, 2025). The Advocate General's reasoning attracted significant criticism. It was claimed that the Advocate General's opinion relies predominantly on a literal interpretation of the Directive's text and Article 153 TFEU. This narrow approach, however, fails to reflect the broader objectives the Directive (EU) 2022/2041 seeks to achieve within the EU's social policy framework (Menegatti, 2025a). The opinion of the Advocate General was also criticized as failing sufficiently take into consideration the relevant and important historical, contextual and theological elements (ETUC, 2025).

Considering the arguments of the Danish government and the Advocate General, the initiated case highlights a significant constraint on the EU's legislative scope in social policy, limiting EU-level initiatives to shape minimum wage policies or strengthen the European social dimension. Following their reasoning, it could lead to a reduced capacity of the EU to promote coordinated social standards.

2.2 The Direct Interference Test applied by the CJEU

The CJEU's analysis, grounded in established case-law on competence limits, clarifies the permissible boundaries of EU action within social policy and contributes to a refined understanding of the interaction between Articles 153(1) – (4) and the exception in Article 153(5) TFEU. The CJEU began its assessment by reaffirming that Articles 153(1) – (4) TFEU cannot be used as a legal basis to circumvent the explicit exclusions in Article 153(5). In particular, where a matter falls within the express exclusions – such as pay – the EU may not legislate directly on that matter, even if it relates to broader fields listed in Article 153(1) (*Kingdom of Denmark v European Parliament and Council of the European Union*, 2025, paras. 54, 55). The interpretative framework applied by the CJEU was the Direct Interference Test, a methodological approach developed in the previous CJEU's case-law.

Under this test, direct interference with pay occurs when EU law prescribes substantive rules governing the amount, structure, or determination of wages. This includes uniform wage levels, constituent components of pay, forms of remuneration, and the methods by which wages are established (*Impact v Minister for Agriculture and Food and Others*, 2008; *Istituto nazionale della previdenza sociale (INPS) v Tiziana Bruno and Massimo Pettini (C-395/08)* and *Daniela Lotti and Clara Matteucci (C-396/08)*, 2010; *Thomas Specht and Others v Land Berlin and Bundesrepublik Deutschland*, 2014; *Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud*, 2007). By contrast, indirect interference – such as establishing general principles affecting working conditions – remains permissible where it falls within the EU's competence under Article 153(1) TFEU. In terms of pay, indirect interference shall be possible, since pay is nevertheless an essential aspect of working conditions (*Kingdom of Denmark v European Parliament and Council of the European Union*, 2025, para. 72). In general, the CJEU applies restrictive interpretation of the competence exception stated in Article 153(5) and emphasizes, that it cannot be that the exceptions are extended to any question involving any sort of link with pay, otherwise, some areas referred to in Article 153(1) TFEU would be deprived of much of their substance (*Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud*, 2007, para. 41; *Impact v Minister for Agriculture and Food and Others*, 2008, para.

125; *Istituto Nazionale Della Previdenza Sociale (INPS) v Tiziana Bruno and Massimo Pettini; Daniela Lotti and Clara Matteucci*, 2010, para. 37; *Thomas Specht and Others v Land Berlin and Bundesrepublik Deutschland*, 2014, para. 33; *Kingdom of Denmark v European Parliament and Council of the European Union*, 2025, para. 68). Notably, the CJEU applies the Direct Interference Test for the first time beyond pay to other areas excluded from EU competence under Article 153(5) TFEU, namely, the right of association (Menegatti, 2025b).

The CJEU's application of the Direct Interference Test underscores the importance of a methodical, structured approach in determining the limits of EU competence in social policy. This methodological approach, developed in the CJEU's case-law, was further refined in Case C-19/23, adding an additional judicial layer to interpretative practice. By doing so, the CJEU reinforced the distinction between direct and indirect interference with pay, providing greater clarity on the scope of EU legislative authority in social policy matters.

2.3 EU Competence relating to pay

Applying this analytical lens of the Direct Interference Test, the CJEU examined specific provisions of the Directive (EU) 2022/2041. The CJEU held the provisions in Article 5(1) – requiring Member States with statutory minimum wages to establish procedures for setting and updating those wages, allowing them to define certain criteria – as merely preserving a significant margin of discretion for Member States, and thus do not constitute direct interference with pay. The concept of adequacy under this provision was not treated as an autonomous EU law concept (*Kingdom of Denmark v European Parliament and Council of the European Union*, 2025, paras. 89, 90). In terms of Article 5(2), which specifies certain criteria for Member States to include in their calculation processes (such as the purchasing power of statutory minimum wages, the general level of wages and their distribution, wage growth rate, and long-term productivity developments), the CJEU found this to amount to harmonisation of constituent elements of wages. Such harmonisation, in the CJEU's view, falls within the prohibited domain of direct interference with pay (*Kingdom of Denmark v European Parliament and Council of the European Union*, 2025, paras. 95, 96). Although Member States may use automatic indexation mechanisms to adjust statutory minimum wages, the qualifying sentence “*provided that the application of that mechanism does not lead to a decrease of the statutory minimum wage*” in Article 5(3) was regarded as a direct interference, since it has a tangible impact on wage levels (*Kingdom of Denmark v European Parliament and Council of the European Union*, 2025, paras. 97, 98). Article 5(4) (use of indicative reference values), Article 5(5) (requirement for regular updates), and Article 5(6) (designation of consultative bodies) were upheld as

non-interfering. These provisions were understood to involve external assessment parameters freely established by Member States and thus remain within permissible constraints (*Kingdom of Denmark v European Parliament and Council of the European Union*, 2025, paras. 99, 100).

After this safeguarding of Directive (EU) 2022/2041 by conceding some less essential content of the Directive in favour of Denmark's position, it can be said that some progress has been made in improving the adequacy of statutory minimum wages. However, the broader goal of a gradual increase in wages across Member States has largely failed, leading instead to increased fragmentation and confirming that wage policy remains primarily a national competence. The judgment of the CJEU further reinforces this limitation by clarifying that Directive (EU) 2022/2041 cannot impose wage adequacy. A potential solution would be to expand EU competences, as the exclusion of pay from EU regulation hinders effective action and appears outdated in light of existing economic coordination and monetary integration. However, in the current context, such reform is politically unrealistic (Menegatti, 2025a).

Through this analysis, the CJEU drew a line between permissible EU influence on wage adequacy – via procedural and structural guidance – and impermissible direct regulation of pay levels or substantive wage elements. Accordingly, EU competence remains anchored in working conditions rather than the direct determination of pay.

2.4 EU Competence relating to the right of association

Denmark argued that Article 4(1)(d) and Article 4(2) of the Directive (EU) 2022/2041 violated this exclusion of competence relating to the right of association set out in Article 153(5) by touching upon the organisation and functioning of collective bargaining structures. The CJEU, however, drew important distinctions between the right of association and related but conceptually distinct right on collective bargaining. No direct interference was stated by the CJEU. The CJEU interpreted the right of association narrowly as referring exclusively to the freedom of workers and employers to form, join, or leave organisations, including trade unions (*Kingdom of Denmark v European Parliament and Council of the European Union*, 2025, para. 115). This right does not encompass the substantive right to collective bargaining, which is recognized under Article 153(1)(f) TFEU as part of the EU's competence to support and complement Member State activity in worker representation and collective defence (*Kingdom of Denmark v European Parliament and Council of the European Union*, 2025, para. 109).

Applying this interpretative distinction of Article 4(1)(d) of the Directive (EU) 2022/2041 – which provides for taking measures to protect trade unions and employer

organisations participating in collective bargaining against interference – was held not to constitute direct interference with the right of association. The CJEU emphasised that this provision does not govern the content of collective agreements nor mandate their outcomes, and therefore does not encroach on the freedom of association itself (*Kingdom of Denmark v European Parliament and Council of the European Union*, 2025, para. 122). Article 4(2) – which obliges Member States with collective bargaining coverage below 80% to provide enabling frameworks and establish action plans – was likewise upheld. The CJEU clarified that the 80% threshold is indicative only, triggering obligations as to means (frameworks and plans) rather than as to results. It neither compels trade union membership nor governs collective agreement content, and thus respects both social partner autonomy and Member State competence (*Kingdom of Denmark v European Parliament and Council of the European Union*, 2025, paras. 79, 81, 84).

The judgment affirms that, although the EU is empowered to adopt measures fostering collective bargaining and strengthening social dialogue frameworks, it cannot encroach upon the core dimension of the freedom of association, which is excluded from its competence under Article 153(5) TFEU. The autonomy to negotiate, conclude, or abstain from collective agreements thus remains firmly within the regulatory domain of the Member States and the social partners.

Conclusions

1. The legal context of EU minimum wage policy highlights the interaction between economic pressures, social policy developments, and EU regulatory competencies. The historical trajectory reveals both the vulnerabilities of low-paid workers and the limitations of national and EU mechanisms in ensuring adequate wages. Directive (EU) 2022/2041 represents a measured response, establishing a regulatory framework that indirectly shapes wage policy. It reflects a careful calibration of social objectives with the limits of EU competence and the functioning of the Single Market.
2. By applying a systematically grounded approach, the CJEU distinguished between permissible indirect interference and the exclusion of direct interference with pay and the right of association. The reasoning of the CJEU in Case C-19/23 clarifies the boundaries of EU competence, reaffirming the core exclusions of Article 153(5) TFEU while allowing flexible interpretation where labour measures overlap with EU objectives. With this judgment, the CJEU underscores the careful balancing of EU-level social objectives with

Member State autonomy and, through this judicial interpretation, safeguards EU competence in social policy without unduly narrowing the scope of future legislative initiatives aimed at strengthening the European social dimension.

Bibliography

Legislation

1. International Labour Organization (ILO) (2009). *Recovering from the Crisis: A Global Jobs Pact*, adopted by the International Labour Conference at its 98 Session, Genf, 19. Juni. https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_108456.pdf
2. European Union (2016). *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2016/C 202/01)*. *Official Journal of the European Union*, C 202, 1–388. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2016:202:TOC>
3. European Commission, Directorate-General for Employment, Social Affairs and Inclusion (2021). *European pillar of social rights action plan* (COM(2021) 102 final). Publications Office of the European Union. <https://op.europa.eu/webpub/empl/european-pillar-of-social-rights/en/>
4. European Parliament and Council of the European Union (2022). *Directive (EU) 2022/2041 of 19 October 2022 on adequate minimum wages in the European Union*. *Official Journal of the European Union*, L 275, 33–47. <https://eur-lex.europa.eu/eli/dir/2022/2041/oj>

Case-law

5. Court of Justice of the European Union (2007). *Yolanda Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* (Case C-307/05, ECLI:EU:C:2007:509). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62005CJ0307>
6. Court of Justice of the European Union (2008). *Impact v Minister for Agriculture and Food and Others* (Case C-268/06, ECLI:EU:C:2008:223). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62006CJ0268>
7. Court of Justice of the European Union (2010, June 10). *Istituto Nazionale Della Previdenza Sociale (INPS) v Tiziana Bruno and Massimo Pettini; Daniela Lotti and Clara Matteucci* (Joined Cases C-395/08 & C-396/08, ECLI:EU:C:2010:329). https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=CELEX:62008CJ0395_SUM
8. Court of Justice of the European Union (2014). *Thomas Specht and Others v Land Berlin and Bundesrepublik Deutschland* (Joined Cases C-501/12 to C-506/12, C-540/12 C-541/12, ECLI:EU:C:2014:2005). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62012CJ0501>
9. Court of Justice of the European Union (2025). *Opinion of Advocate General Emiliou delivered on 14 January 2025* (Case C-19/23, ECLI:EU:C:2025:11). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62023CC0019>
10. Court of Justice of the European Union (2025). *Kingdom of Denmark v European Parliament and Council of the European Union* (Case C-19/23, ECLI:EU:C:2025:865). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62023CJ0019>

Secondary sources

11. Countouris, N. (2025). Avoiding another ‘*Viking and Laval*’ moment – a critical analysis of the AG opinion on the Adequate Minimum Wage Directive, Case C-19/23. *European Labour Law Journal*, 16(2), 315–322. <https://doi.org/10.1177/20319525251328648>
12. ETUC (2025). ETUC Counter-opinion to the opinion of Advocate General Emiliou delivered on 14 January 2025 in the case Denmark v EP and Council, Case C-19/23, 24.02.2025. <https://www.etuc.org/sites/default/files/press-release/file/2025-03/ETUC%20Counter->

- Opinion%20in%20the%20AMWD%20case%20-%2024%20February%202025%20final%20clean%20%282%29.pdf
13. Menegatti, E. (2025a). All’s well that ends well? The Court’s “saving” of the Adequate Minimum Wage Directive. *Italian Labour Law E-Journal*, 18(2), 1–19. <https://doi.org/10.6092/ISSN.1561-8048/23534>
 14. Menegatti, E. (2025b). Why the Directive on Adequate Minimum Wages does fit within EU competence. *ETUI Research Paper - Policy Brief*. <https://doi.org/10.6092/ISSN.1561-8048/23534>
 15. Schulten, T. (2008). Towards a European Minimum Wage Policy? Fair Wages and Social Europe. *European Journal of Industrial Relations*, 14(4), 421–439. <https://doi.org/10.1177/0959680108097494>
 16. Schulten, T. (2010). WSI-Mindestlohnbericht 2010—Unterschiedliche Strategien in der Krise. *WSI-Mitteilungen*, 63(3), 152–160. <https://doi.org/10.5771/0342-300X-2010-3-152>

PECULIARITIES OF FULFILING OBLIGATIONS UNDER THE MARTIAL LAW

OLHA ORYSHCHUK*

Abstract

This document evaluates the shift from rigid contractual compliance to adaptive legal mechanism forced by Martial Law with a motive to alleviate the substantial change of circumstances and impossibility of performance. Obligation Law has constantly been the central cornerstone of the civil commerce's stability and legal relations, strongly connected to any developed legal system. Governed by the main principle pacta sunt servanda - the agreement must be followed, it helped civilians to interact with each other and resolve a dispute diplomatically. However, with times of armed conflicts's commence around the world, Law of Obligation has undergone significant changes during each cataclysm in human history. By assessing the Hardship mechanism's case this research exhibits influence of total warfare on the work of Obligation Law through Russo-Ukrainian war, World War I and World War II.

Key words: Obligation Law. Russo-Ukrainian war. World War I. World War II. Hardship mechanism. Martial Law.

Introduction

In our modern reality it is quite useful to comprehend how does the main principle of Obligation Law - pacta sunt servanda functions. Because if you know your rights and responsibilities, it is more facile to mitigate legal risks, is not it?

World War I and II have already been examining this fundamental tenet. But with the onset of armed conflict in the 21st century, in the centre of Europe - Ukraine, this ancient and resilient principle has being introduced to unprecedented "stress test". In this article will be provided a detailed analyze about the evolution of Obligation Law in the course of different convulsion stages in the global community.

The following section will exhibit the contrasting case studies by exploring the distinctive historical and contemporary applications of pacta sunt servanda through the prism of the First and Second World Wars, as well as present-day Ukrainian experience.

Usage of Obligation Law during historical timeline - World War First and Second

World War First was a period of the legal transformation, national and international relations have been subjected to certain modifications. Pacta sunt servanda, the ancient principle of Obligation Law was reinterpreted by global actors on the international arena. Great Britain,

* Academic Supervisor Assoc. prof. Oksana Kiriak, PhD. Associate Professor at the Department of Private Law Faculty of Law, Yuriy Fedkovych Chernivtsi National University, Ukraine

become one of the first states to officially launch an act, which forbade the fulfilment of any obligations in favour of the enemy's side - "Trading with the Enemy Act (1914, UK)". According to this normative legal document chapter 87, clause 1, subclauses a & b said next: *"Any person who during the present war traces or has, since the fourth day of August nineteen hundred and tracing with fourteen, traded with the enemy within the meaning of this Act shall be guilty of a misdemeanour, and shall – (a) on conviction under the Summary Jurisdiction Acts, be liable to imprisonment with or without hard labour for a term not exceeding twelve months, or to a fine not exceeding five hundred pounds, or to both such imprisonment and fine ; or (b) on conviction on indictment, be liable to penal servitude for a term not exceeding seven or less than three years or to imprisonment with or without hard labour for a term not exceeding two years, or to a fine, or to both such penal servitude or imprisonment and fine ; and the court may in any case order that any goods or money, in respect of which the offence has been committed, be forfeited"* [1]. This normative legal act is considered as an example how obligations in the form of not signing any trade treaties, which include adversary of England, must be followed, and what were the consequences of its negligence. Indeed, it is a good illustration of the then-war's influence on the image of the enemy and formation of their perception among British people. Anyone who would breach an agreement had had to receive a punishment, there were two procedures depended on what and how law was violated, a summary jurisdiction and indictment. A punishment for the summary jurisdiction involved imprisonment with or without hard labour for a term not exceeding twelve months; a fine not exceeding five hundred pounds. or a liability to both such imprisonment and fine. Instead, indictment concluded penal servitude for a term not exceeding seven or less than three years; imprisonment with or without hard labour for a term not exceeding two years; a fine; liability to both such penal servitude or imprisonment and fine.

However, there were certain responsibilities created during the World War First between international subjects, the most recognisable contracts with the *pacta sunt servanda* were "Treaty of Versailles (1919)"[2], "Treaty of Saint-Germain-en-Laye (1919)"[3], "Metropolitan Water Board v Dick, Kerr and Co Ltd (1918)"[3]. "Treaty of Versailles" was approved in the Paris Peace Conference through a complex diplomatic process, which began in January 1919 and engaged in months of intense negotiations among the Allied powers. League of Nations played a key role in the elaboration of the international legal draft. This agreement was signed by the the Allied and associated powers, Germany, France and Britain. Interestingly, this international contract was called "The Diktat" by Germany (from deutsch Das Diktat) due to German delegation was not allowed to participate in the negotiations – finished text was

established to them as a fact for signing under the threat of renewing the war. Moreover, famous economist John Maynard Keynes popularised the term “The Carthaginian Peace” and named this international treaty “appeasing moderation” he compared the “Treaty of Versailles”(1919) with the complete defeat of Carthage by Rome, emphasizing the excessive cruelty of the conditions towards Germany. [5]. Despite above information, by reading this international legal agreement it can be easy to spot the obligations which were imposed on Germany for a mandatory execution. Practically, every article begins with the words: “Germany undertakes”, “Germany agrees that” etc. For instance: article 275 of “Versailles Treaty 1919” claims that: *“Germany undertakes on condition that reciprocity is accorded in these matters to respect any law, or any administrative or judicial decision given in conformity with such law, in force in any Allied or Associated State and duly communicated to her by the proper authorities, defining or regulating the right to any regional appellation in respect of wine or spirits produced in the State to which the region belongs, or the conditions under which the use of any such appellation may be permitted; and the importation, exportation, manufacture, distribution, sale or offering for sale of products or articles bearing regional appellations inconsistent with such law or order shall be prohibited by the German Government and repressed by the measures prescribed in the preceding Article”* [2] .

Beyond “Versailles Treaty 1919”, it is worth considering a “Treaty of Saint-Germain-en-Laye” (1919) due to the presence of the principle binding force of treaties and the obligations. “Treaty of Saint-Germain-en-Laye” was signed on September 10th, 1919 and came into force on July 16th, 1920, it officially recorded the collapse of the Austro-Hungarian Empire. But this treaty is noteworthy because of the presence of a compelling article which reveals the impact of the situation on Obligation Law in the international field. Article 14 of the agreement shows the side of legal responsibilities that were imposed on Czecho-Slovakia: “Czecho-Slovakia agrees that the stipulations of Chapters I and II so far as they affect persons belonging to racial, religious or linguistic minorities constitute obligations of international concern and shall be placed under the guarantee of the League of Nations. They shall not be modified without the assent of a majority of the Council of the League of Nations. The United States, the British Empire, France, Italy and Japan hereby agree not to withhold their assent from any modification in these Articles which is in due form assented to by a majority of the Council of the League of Nations” [3]. This document resembles in certain moments the “Versailles Treaty (1919)”, but in that one there were Austria and allies with fixation of succession instead of Germany and allies, which had to pay reparations, albeit both of the countries were tight to the Law of Obligation under Martial Law.

World War Second was quite opposite to the World War First not only because of the availability of weapons of mass destruction but attitudes towards the belligerent parties. Hardship mechanism has demonstrated the devastation of human kind, total destruction of cities and international law violations. Global leaders suddenly grasped the implications of the disastrous situation, after that European Recovery Program or Marshall Plan was created [6]. The importance of the program lies in the fact that it had elements of Law of Obligation, especially conditional liabilities, bilateral agreement, counterpart funds. Furthermore, there were obligations that did not arise in view of guilt - tort, but due to a contract - voluntary consent. Plan of Marshall was a multi-stage process of legal and economic engineering, formal legal establishment was on April 3, 1949. The United States of America did not just give money but has signed contracts with each European country that fostered mutual commitments, the USA had to deliver resources and European states had to comply with concrete economical reforms. It was one of the principle of law of agreement: *do ut des* (from latin – I give in order that you may give). According to the information which was established in the contract between France and the United States - №302 Economic Cooperation Agreement (with annex). Signed at Paris, on 28 June 1948, article 4, clause 2 “Local currency” stipulated next: “ 2. *The Government of France will establish a special account in the Bank of France in the name of the Cr dit National (hereinafter called the Special Account) and will make deposits in francs to this account as follows: a) The unencumbered balance at the close of business on the day of the signature of this Agreement in the Special Account in the Bank of France in the name of the Credit National established pursuant to the Agreement between the Government of the United States of America and the Government of France made on January 2, 1948, and any further sums which may, from time to time, be required by such agreement to be deposited in the Special Account. It is understood that subsection (e) of Section 114 of the Economic Cooperation Act of 1948 constitutes the approval and determination of the Government of the United States of America with respect to the disposition of such balance, referred to in that Agreement. b) The unencumbered balances of the deposits made by the Govern ment of France pursuant to the exchange of notes between the two Governments dated April 22, 1948. c) Amounts commensurate with the indicated dollar cost to the Government of the United States of America of commodities, services and technical information (including any costs of processing, storing, transporting, repairing or other services incident there to made available to France on a grant basis by any means authorized under the Economic Cooperation Act of 1948 less, however, the amount of the deposits made pursuant to the exchange of notes referred to in subparagraph (b). The Government of the United States of America shall from time to time notify the Government*

of France of the indicated dollar cost of any such commodities, services and technical information, and the Government of France will thereupon deposit in the Special Account a commensurate amount of francs computed at a rate of exchange which shall be the par value agreed at such time with the International Monetary Fund provided that this agreed value is the single rate applicable to the purchase of dollars for imports into France. If at the time of notification a par value for the franc is agreed with the Fund and there are one or more other rates legally available in France for the purchase of dollars, or, if at the time of notification no par value for the franc is agreed with the Fund, the rate or rates for this particular purpose shall be mutually agreed upon between the Government of France and the Government of the United States of America, each of which rates shall be an actual or average rate currently available in France at the time of notification, in accordance with French laws and regulations. The Government of France may at any time make advance deposits in the Special Account which shall be credited against subsequent notifications pursuant to this paragraph” [7]. There was a clear and observable trajectory: the mutual obligations illustrated here evidence of the historical shift from punitive liability to contractual commitment.

Along with above agreement, on October 24, 1945 was founded a fundamental source of international law, to which all international players, diplomats, lawyer continue to refer even now - the United Nations Charter. Pursuant to article 102, clause 1 of the UN Charter: “Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it” [8]. This provision demonstrates how undertaking in the form of drawing up any contract after signing the UN Charter must be registered with the Secretariat and publicized immediately. Furthermore, seven out of ten basic principles of international law are included in the UN Charter, which are served as a good example of necessary obligations to the international subjects. These standards sounds next: “1. *The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations* 1) *Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.* 2) *A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.* 3) *In accordance with the purposes and principles of*

the United Nations, States have the duty to refrain from propaganda for wars of aggression. 4) Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States... 2. The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered 1) Every State shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered. 2) States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute. 3) The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them...4. The duty of States to co-operate with one another in accordance with the Charter 1) States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences...5. The principle of equal rights and self-determination of peoples 1) By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter...6. The principle of sovereign equality of States 1) All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature...7. The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter:- 1) Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations. 2) Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law... “[11].

The United Nations Charter is modeled to maintain international peace and security, save succeeding generations from the scourge of war, and establish a framework for

international cooperation. And most of all it provides the guidance for countries, international governmental and non-governmental organizations a list of actions what they must do and which principles must be followed.

Pacta sunt servanda in the context of Russo-Ukrainian war

From the information above it is evident that contractual framework imposes reciprocal obligations on both parties. But does historical conventions, international methods work as well as they are written? On 20th of February, 2014 the world had an opportunity to observe war in the heart of Europe, with silence and no consequences for aggressor, which evidenced the international law obligations lack the capacity to uphold the security and safety among the globe. In the first months of armed aggression from the Russia's side Ukraine appealed to the international allies about breach of agreement - Budapest Memorandum, 1994 and violation of the principle - pacta sunt servanda [9]. It was mere instrument but a Memorandum on security assurances in connection with Ukraine's accession to the treaty on the non-proliferation of nuclear weapons which set forth obligations for the "allies": *"...Ukraine, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, Welcoming the Accession of Ukraine to the Treaty on the Non-Proliferation of Nuclear Weapons as a non-nuclear-weapon state, Taking into account the commitment of Ukraine to eliminate all nuclear weapons from its territory within a specified period of time, Noting the changes in the world-wide security situation, including the end of the Cold War, which have brought about conditions for deep reductions in nuclear forces, Confirm the following:*

- 1. The Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America reaffirm their commitment to Ukraine, in accordance with the principles of the CSCE Final Act, to respect the independence and sovereignty and the existing borders of Ukraine.*
- 2. The Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America reaffirm their obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and that none of their weapons will ever be used against Ukraine except in self-defense or otherwise in accordance with the Charter of the United Nations.*
- 3. The Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America reaffirm their commitment to Ukraine, in accordance with the Principles of the CSCE Final Act, to refrain from economic coercion designed to subordinate*

to their own interest the exercise by Ukraine of the rights inherent in its sovereignty and thus to secure advantages of any kind.

4. The Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America reaffirm their commitment to seek immediate United Nations Security Council action to provide assistance to Ukraine, as a non-nuclear-weapon state party to the Treaty on the Non-Proliferation of Nuclear Weapons, if Ukraine should become a victim of an act of aggression or an object of a threat of aggression in which nuclear weapons are used.

5. The Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America reaffirm, in the case of Ukraine, their commitment not to use nuclear weapons against any non-nuclear-weapon state party to the Treaty on the Non-Proliferation of Nuclear Weapons, except in the case of an attack on themselves, their territories or dependent territories, their armed forces, or their allies, by such a state in association or alliance with a nuclear weapon state.

6. Ukraine, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America will consult in the event a situation arises which raises a question concerning these commitments...”

Indeed, it was perfectly composed, everything was as democratic, Ukraine-oriented as, unfortunately, false. Ukraine has ended up in the attack from one of the allies in 2014, commence of full-scale invasion in 2022 and occupation of the Crimean People's Republic. After that there was raised a question about not only of non-fulfilment of Obligation Law, principles of international law, but international law's effectiveness as an instrument of solving certain disputes connected to the aggressors.

In addition, Ukraine has complied with all of the international contract to which has been connected, especially the Geneva Conventions of 1949 [10] as well as they could. Regardless that, Russian's soldiers who even got out of Ukrainian's captivity were healthier looking than the way they were captured. Opposite to that Ukrainians prisoners in the enemy's captivity were tortured, beaten, raped, mentally devastated and starved to death. However, other allies such as the United Kingdom of Great Britain and Northern Ireland, and the United States of America, European Union, and even particular countries from Asian's side - Taiwan have supported Ukraine during this hard times. None of the agreements from the Russian Federation were followed. Olenivka prisoner massacre was a horrible tragedy: a war crime by the Russian Federation that occurred on the night of July 29, 2022 in the occupied Donetsk region. In correctional colony No. 120, an explosion occurred in a barracks where Ukrainian prisoners of war were held, including defenders of Azovstal. More than 50 defenders were killed, more than

130 were injured [12]. That was made by the Russian Federation to hide the consequences of torturing Ukrainian soldiers because they were Ukrainians and loved their Motherland – Ukraine.

Russo-Ukrainian war illustrated that no diplomatic obligations with aggressor works, only sanctions, unity with the European Union, highly developed countries, people around the world who cares about Ukrainian nation can stop this armed conflict which occurred in the 21st century.

Conclusion

Obligation Law is an ancient branch of private law that governs the legal necessity for one party (the debtor) to perform a specific act or service for another party (the creditor). During different timelines it had evolved via various mechanisms, World War First showed that obligations were created through guilt, albeit World War Second that most of them were made because of contract performance. Each of the time periods demonstrated the usage and constitution of the principle - *pacta sunt servanda* which is considered to be the main one in the binding commitments.

However, in the contemporary reality the obligation law on the experience of Russo-Ukrainian war substantiate its lack of effectiveness linked to international law. Legal nature of security assurances remains a complex issue within the Law of Obligations. The analysis of the Budapest Memorandum, in pertaining with Russia's full-scale invasion in Ukraine's territory, reveals a significant gap between ostensibly democratic rhetoric and enforceable legal guarantees.

Bibliography

1. Trading with the Enemy Act (1914, UK): https://www.legislation.gov.uk/ukpga/Geo5/4-5/87/pdfs/ukpga_19140087_en.pdf.
2. Treaty of Versailles (1919): <https://avalon.law.yale.edu/imt/partviii.asp>.
3. Treaty of Saint-Germain-en-Laye (1919): <https://history.state.gov/historicaldocuments/frus1919Parisv13/ch30>.
4. Metropolitan Water Board v Dick, Kerr and Co Ltd (1918): <https://www.acerislaw.com/wp-content/uploads/2025/07/Metropolitan-Water-board-v-Dick-Kerr-Co-1918-AC-119.pdf>.
5. John Maynard Keynes famous economist's popularization of the term "The Carthaginian Peace": <https://www.jstor.org/stable/1404025>.
6. Marshall Plan: <https://catalog.archives.gov/id/299857>.
7. Economic Cooperation Agreement (with annex). Signed at Paris, on 28 June 1948: <https://treaties.un.org/doc/Publication/UNTS/Volume%2019/volume-19-I-302-English.pdf>.
8. The United Nations Charter: <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.
9. Budapest Memorandum: <https://treaties.un.org/doc/Publication/UNTS/Volume%203007/Part/volume-3007-I-52241.pdf>.

10. Geneva Conventions of 1949: <https://elearning.icrc.org/healthcareindanger-legal-framework/en/media/attachements/chapter-1/gva-conv.pdf>.
11. 1970 DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS (GAR 2625) Adopted by the UN General Assembly Resolution 2625 (XXV) of 24 October 1970: <https://www.ilsa.org/Jessup/Jessup15/DeclarationonFriendlyRelations.pdf>
12. UN confirms Russia's responsibility for Olenivka prisoner massacre of Ukrainian POWs: <https://www.ukrainianworldcongress.org/un-confirms-russias-responsibility-for-olenivka-prisoner-massacre-of-ukrainian-pows/>.

SMART CONTRACTS AS AN EMERGING FORM OF AGREEMENT: LEGAL NATURE AND REGULATORY PERSPECTIVES

VLASIUK YEVHEN*

Abstract

This research investigates the legal nature and regulatory prospects of smart contracts as a transformative form of agreement in the digital age. By analyzing the tension between autonomous blockchain protocols and traditional contract law doctrines, the paper explores whether the "code is law" principle can be harmonized with established judicial standards. The study identifies critical challenges such as jurisdictional ambiguity, the rigidity of immutable code, and the "oracle problem" in automated enforcement. Ultimately, the author advocates for a hybrid regulatory framework that balances technological efficiency with essential legal safeguards, ensuring that algorithmic execution remains subject to human-centered justice and accountability.

Keywords : *Smart contracts, Oracle, Blockchain technology.*

Introduction

The rapid evolution of the digital economy and the Fourth Industrial Revolution have necessitated a fundamental re-evaluation of traditional legal concepts. As global commerce increasingly shifts toward decentralized platforms, blockchain technology has emerged as a transformative force, introducing the concept of smart contracts. First proposed by Nick Szabo in the mid-1990s, smart contracts have evolved from theoretical constructs into practical tools that automate complex transactions without the need for traditional intermediaries.

The relevance of this research stems from the growing gap between rapid technological advancement and the relatively static nature of contract law. While software developers often operate under the radical doctrine of "Code is Law," legal scholars and practitioners face significant challenges in reconciling autonomous, self-executing algorithms with established civil law principles. The primary tension lies in the "immutability" of blockchain protocols, which provides unprecedented security but lacks the inherent flexibility of human-centered legal systems, such as the ability to modify or terminate agreements based on equity or unforeseen circumstances.

The purpose of this paper is to analyze the legal nature of smart contracts as an emerging form of agreement. It seeks to determine whether a smart contract should be classified as a standalone type of contract, a digital form of a traditional agreement, or merely a sophisticated

* Євген Павлович Власюк vlasiuk.yevhen@chnu.edu.ua 1st-year Master's Student of the Faculty of Law, Yuriy Fedkovych Chernivtsi National University Scientific Advisor: Oksana Kiriak PhD in Law, Associate Professor of the Department of Privat Law, Yuriy Fedkovych Chernivtsi National University Ukraine

mechanism for contractual performance. Furthermore, this research explores the regulatory perspectives within the international legal landscape, focusing on how jurisdictions can integrate these decentralized tools while ensuring consumer protection, accountability, and the rule of law.

Chapter I

In 1996, Nick Szabo was one of the first to propose the concept of smart contracts, describing them as follows: «Whether enforced by a government, or otherwise, the contract is the basic building block of a free market economy. Over many centuries of cultural evolution has emerged both the concept of contract and principles related to it, encoded into common law. Algorithmic information theory suggests that such evolved structures are often prohibitively costly to recompute. If we started from scratch, using reason and experience, it could take many centuries to redevelop sophisticated ideas like property rights that make the modern free market work.

The success of the common law of contracts, combined with the high cost of replacing it, makes it worthwhile to both preserve and to make use of these principles where appropriate. Yet, the digital revolution is radically changing the kinds of relationships we can have. What parts of our hard-won legal tradition will still be valuable in the cyberspace era? What is the best way to apply these common law principles to the design of our on-line relationships? Computers make possible the running of algorithms heretofore prohibitively costly, and networks the quicker transmission of larger and more sophisticated messages. Furthermore, computer scientists and cryptographers have recently discovered many new and quite interesting algorithms. Combining these messages and algorithms makes possible a wide variety of new protocols. New institutions, and new ways to formalize the relationships that make up these institutions, are now made possible by the digital revolution. I call these new contracts "smart", because they are far more functional than their inanimate paper-based ancestors. No use of artificial intelligence is implied. A smart contract is a set of promises, specified in digital form, including protocols within which the parties perform on these promises» (Szabo, 1996).

Apparently, today everything related to the word «smart» is perceived as something made by artificial intelligence, but in the case of smart contracts, this word is used because this type of contract is executed automatically, under certain conditions, and does not require intermediaries.

«Many kinds of contractual clauses (such as collateral, bonding, delineation of property rights, etc.) can be embedded in the hardware and software we deal with, in such a way as to make breach of contract expensive (if desired, sometimes prohibitively so) for the breacher. A canonical real-life example, which we might consider to be the primitive ancestor of smart contracts, is the humble vending machine. Within a limited amount of potential loss (the amount in the till should be less than the cost of breaching the mechanism), the machine takes in coins, and via a simple mechanism, which makes a freshman computer science problem in design with finite automata, dispense change and product according to the displayed price. The vending machine is a contract with bearer: anybody with coins can participate in an exchange with the vendor. The lockbox and other security mechanisms protect the stored coins and contents from attackers, sufficiently to allow profitable deployment of vending machines in a wide variety of areas.

Smart contracts go beyond the vending machine in proposing to embed contracts in all sorts of property that is valuable and controlled by digital means. Smart contracts reference that property in a dynamic, often proactively enforced form, and provide much better observation and verification where proactive measures must fall short.»- Nick Szabo (Szabo, 1997). *"The most fundamental shift that smart contracts introduce is the movement of legal enforcement from ex post to ex ante. In a traditional legal system, a party who believes the contract has been breached must seek a remedy after the fact, usually through a court. A smart contract, by contrast, is designed to ensure that the promised performance occurs automatically. The enforcement is built into the initiation of the relationship. This effectively removes the possibility of a breach in the traditional sense, as the code executes according to its terms regardless of the subsequent will of the parties."* (Werbach & Cornell, 2017).

Smart contracts make any breach of contract impossible, and although on the one hand this is a purely positive feature, on the other hand it sets too strict a framework for the parties, because the parties are people and people are subject to various force majeure events, which cannot be incorporated into the smart contract code.

"Legal standards are often intentionally vague. Terms like 'best efforts,' 'reasonableness,' or 'good faith' allow the law to be flexible and to account for circumstances that the parties could not have anticipated at the time of formation. Programming code, however, cannot easily accommodate such ambiguity. A smart contract requires a degree of precision that traditional legal drafting often avoids. By forcing parties to translate complex human intentions into binary 'if-then' statements, smart contracts may inadvertently strip away

the equitable protections that the legal system has developed over centuries to prevent injustice." (Werbach & Cornell, 2017).

In addition, the issue of smart contracts includes the question of whether they should be considered contracts at all, because in fact they are only a way of executing a contract, not creating a new agreement. *"It is a mistake to think of a smart contract as a digital version of a legal contract. Rather, a smart contract is a mechanism for performance. It is a piece of software that can be used to satisfy the requirements of a legal agreement, but it does not necessarily contain the agreement itself. While a smart contract may be evidence of an underlying agreement, the legal contract exists in the shared intent of the parties, whereas the smart contract exists only in the code. Therefore, the code is not the contract; it is the execution of the contract."* (Werbach & Cornell, 2017).

However, there are cases where there is nothing at all besides the code. For example, buying an NFT on a marketplace, in which case a smart contract should be considered a contract.

Chapter II

Smart contracts were widely popularized thanks to the Ethereum ecosystem and its creator Vitalik Buterin.

However, along with the popularization came new challenges and the first failures. Already in the first years of the ecosystem's operation, a precedent was set that still gives critics of smart contracts grounds for critical judgments.

A classic example of exploiting a smart contract vulnerability was the attack on The DAO (Decentralized Autonomous Organization) in June 2016. The attacker used what is known as “reentrancy”: the contract allowed the withdrawal function to be called multiple times before the internal balance was updated. As a result, about 3.6 million ETH were withdrawn to a child contract. The funds could not be withdrawn immediately due to a built-in delay, which gave the community time to react. Later, the Ethereum network hardforked to return funds to investors; this led to the chain being split into Ethereum and Ethereum Classic.

"The 'Code is Law' doctrine assumes that the code is perfect. However, humans write code, and humans make mistakes. Legal intervention is necessary when the code does not reflect the parties' intent."- Vitalik spoke later.

The issue of state regulation and its prospects is also quite complex and ambiguous. If for a programmer the mere fact of working code is success, then for a lawyer this is not enough.

The code must comply with the law and be accurate and transparent, and in the context of smart contracts, this is almost impossible to do, due to the specifics of the blockchain.

"The legal system does not exist merely to enforce agreements that go well; it exists to resolve disputes when things go wrong. Because human foresight is limited and programming is fallible, there will always be situations where the outcome of a smart contract is perceived as unjust, fraudulent, or mistaken. In these cases, the state—through its judicial branch—retains the ultimate authority to look behind the code. The court's role is to ensure that the technological execution aligns with the legal intentions of the parties and the overarching mandates of public policy. To suggest that a smart contract could entirely bypass judicial review is to misunderstand the fundamental protective function of the law in a civilized society." (Werbach & Cornell, 2017).

A smart contract is a "technical fact" and a court decision is a "legal truth." If they conflict, the state will always give priority to the legal truth.

"We must resist the temptation to anthropomorphize smart contracts as autonomous actors. They are tools created by humans to serve human ends. As such, they remain subject to the law of agency and the law of contracts. If a smart contract produces an outcome that no rational person would have agreed to, the law provides doctrines such as unconscionability or mutual mistake to rectify the situation. The role of the state is to provide a 'safety net' that prevents the mechanical rigidity of code from producing outcomes that are socially or economically destructive. In this sense, the law is not an obstacle to smart contracts, but a necessary condition for their widespread adoption and legitimacy." (Werbach & Cornell, 2017).

Chapter III

The problem of regulating smart contracts lies in the nature of smart contracts. This type of contractual relationship was created in order to avoid any intermediaries between the parties, and the state, by interfering in them and trying to regulate, becomes such an intermediary. It doesn't matter if the state will force to add «Kill Switch» to the code as proposed by the European Union, for example or create backdoors for law enforcement, in any case the nature and architecture of smart contracts will be changed.

However, it is still worth considering that smart contracts create a dangerous space for fraud, because in conditions where the state cannot intervene in public relations, the advantage is on the side of the fraudster. Of course, anything the state touches stops working as originally intended, but in the case of smart contracts, this is likely to be less negative than if the state did

not intervene at all. If the state cannot guarantee the safety and protection of the parties to the contract, then such social relations put the foundations of law and the state in general in an unstable position.

The European Union is generally one of the first to regulate smart contracts at such a high level, and it is worth mentioning here EU Data Act (Regulation (EU) 2023/2854). Applies from 12 September 2025, it sets new, harmonized rules on who can access and use data generated by connected devices (IoT) and related services. It aims to foster a fair data economy by empowering users—both consumers and businesses—to access, use, and share their generated data, specifically enabling aftermarket and reducing reliance on manufacturers.

The vendor of an application using smart contracts or, in the absence thereof, the person whose trade, business or profession involves the deployment of smart contracts for others in the context of executing an agreement or part of it, to make data available shall ensure that those smart contracts comply with the following essential requirements of:

- (a) robustness and access control, to ensure that the smart contract has been designed to offer access control mechanisms and a very high degree of robustness to avoid functional errors and to withstand manipulation by third parties;

- (b) safe termination and interruption, to ensure that a mechanism exists to terminate the continued execution of transactions and that the smart contract includes internal functions which can reset or instruct the contract to stop or interrupt the operation, in particular to avoid future accidental executions;

- (c) data archiving and continuity, to ensure, in circumstances in which a smart contract must be terminated or deactivated, there is a possibility to archive the transactional data, smart contract logic and code in order to keep the record of operations performed on the data in the past (auditability);

- (d) access control, to ensure that a smart contract is protected through rigorous access control mechanisms at the governance and smart contract layers; and

- (e) consistency, to ensure consistency with the terms of the data sharing agreement that the smart contract executes (European Parliament and Council of the European Union, 2023).

Conclusion

However, smart contract regulation is still in its infancy and requires future refinements and improvements. The introduction of smart contracts can indeed facilitate many aspects of contractual relations, but due to certain disadvantages of this type of contract execution, it can

also entail difficulties and unforeseen force majeure. In addition, the use of smart contracts eliminates the flexibility of contractual relations, which also negatively affects the terms of the contract. Human error, unforeseen circumstances, and general misunderstanding of the contract are not taken into account by the automatic process when using smart contracts, so in such cases the parties are more vulnerable.

Bibliography

1. European Parliament and Council of the European Union. (2023). Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data (Data Act). <https://eur-lex.europa.eu/eli/reg/2023/2854/oj>
2. Szabo, N. (1996). Smart contracts: Building blocks for digital markets.
3. Szabo, N. (1997). The idea of smart contracts.
4. Werbach, K., & Cornell, N. (2017). Contracts ex machina. *Duke Law Journal*, 67(2), 313–382.

EXERCISE OF SHAREHOLDER'S RIGHTS DURING PROBATE PROCEEDING IN THE CZECH REPUBLIC

BARBORA ZEMANOVÁ*

Abstract

Death of a shareholder may significantly affect functioning of a business corporation. Between decedent's death and the court decision, there is legal uncertainty who owns the decedent's share and is authorized to manage it. However, during the probate proceeding, the business corporation must continue to operate. For this reason, the law provides that shareholder's rights associated with the decedent's share are exercised by the administrator of decedent's estate. However, he is entitled only to preserve decedent's share in the state as it was at the time of decedent's death and is not empowered to alter its essentiality. The article provides basic overview of problems arising in connection with the administration of the share.

Keywords: share, inheritance, probate proceeding, corporation, administration of a share

INTRODUCTION

Death of a shareholder may significantly affect functioning of a business corporation, especially in a case of corporation with a small number of shareholders where personal relationships play a significant role. Inheritance of a share is an interesting topic from a legal point of view, as it requires consideration of both inheritance law and corporate law. Procedural law also plays an important role, as an estate of every deceased person must be settled within a framework of probate proceeding in the Czech Republic. The necessity of combining these legal frameworks leads to complex problems for which neither Czech judicial practice nor doctrine provides adequate solutions.

This article aims to provide an overview of practical issues related to the administration of a share and the exercise of shareholder's rights in the course of probate proceedings under Czech law. I would like to point out that this article does not aim to solve these problems or provide exhaustive answers to all the issues raised. Objective of this article is to identify the principal areas of concern associated with the issue, while possible solutions will be explored in future research.

* PhD candidate, Department of Commercial Law, Faculty of Law, Masaryk University, Brno, Czech Republic, Junior Associate Notary, ORCID number: 0009-0004-7755-0446.

1. BASIC PRINCIPLES OF CZECH INHERITANCE LAW

Before addressing the specific problems, it is necessary to introduce basic principles on which Czech inheritance law is based. The first of them is the principle of public authority interference in acquisition of inheritance.¹ This is manifested by the fact that after death of each person, a probate proceeding is initiated *ex officio*. The purpose of the proceeding is to ascertain estate of the deceased, to identify his heirs, and to issue a decision by which the court confirms the heir's acquisition of the inheritance.²

However, what happens to the decedent's estate in the period between decedent's death and the court decision? The Czech legislature has chosen not to adopt the concept of *hereditas iacens*. Instead, there is a concept of a co-ownership of the decedent's estate by community of all heirs during this interim period.³ Therefore, from perspective of substantive law, the decedent's estate is collectively owned by all heirs in the period between the decedent's death and the court decision.⁴ The court decision in the end of the probate proceeding constitutively changes the co-ownership of the community of all heirs into the individual ownership of the one heir, to whom the inheritance of a particular item from decedent's estate has been assigned by the court.⁵ The court decision has retroactive effect, operating from the moment of decedent's death.⁶ Accordingly, once the court confirms that certain heir has inherited a share, that heir is deemed to have been the owner of the share from the moment of decedent's death.

2. ESTATE ADMINISTRATOR

Several months (in complicated cases even several years) usually pass between the decedent's death and the court decision. During this time, there is legal uncertainty who owns the decedent's estate and who is authorized to manage it.

Decedent may appoint, by a will, a person to manage the decedent's estate during probate proceeding, known as *the administrator*. If the decedent did not appoint the administrator but appointed an executor of his will, the executor is entitled to administer decedent's estate.⁷ If the

¹ About principles on which Czech inheritance law is based cf. Melzer, 2024, pp. 3-33.

² § 185 of the Act No. 292/2013 Coll., on Special Civil Proceedings.

³ Melzer, 2024, p. 15.

⁴ § 1236 of Act No. 89/2012 Coll., the Civil Code.

⁵ Melzer, 2024, p. 59.

⁶ § 185/1 of Act on Special Civil Proceedings.

⁷ § 1677/1 of the Civil Code.

decedent does not do so, the court in probate proceeding may appoint the administrator.⁸ If the administrator is not appointed by the decedent or the court, the decedent's estate is administered by all eligible heirs.⁹ However, this is paradoxical, since the question *who are decedent's heirs* can be resolved only by the court decision at the end of the probate proceeding. All persons who may administer decedent's estate during probate proceeding shall hereinafter be referred collectively as *the administrator*.

According to Czech law a share passes to heirs, unless articles of association prohibit or restrict it.¹⁰ However, during the probate proceeding, the business corporation must continue to operate, even if the court has not yet confirmed which heir inherited the decedent's share. For this reason, the law provides that shareholder's rights are exercised by the administrator.¹¹ It might therefore seem that, once it is established who manages the share, the corporation may treat the administrator as its shareholder. However, such a conclusion would be overly simplistic. The authorisation of the administrator to exercise all rights associated with decedent's share must be interpreted in context of general principles of estate administration, under which the administrator may perform only acts of a simple administration.¹²

The purpose of the simple administration is to preserve decedent's estate in the state as it was at the time of decedent's death.¹³ The administrator is therefore authorized only to perform acts necessary for the preservation of decedent's estate and is not empowered to alter its essentiality or dispose of it at his discretion.¹⁴ Acts exceeding the simple administration may the administrator perform only with consent of all heirs or approval of the court.¹⁵

3. GENERAL MEETING DURING PROBATE PROCEEDING

3.1. Convening the General Meeting

If the decedent owned a share, the question arises as to how the rules of the simple administration limit the administrator in exercising the shareholder's rights, e.g. the voting rights at the general meeting. Before addressing this question in greater detail, let me first

⁸ § 157 of the Act on Special Civil Proceedings, § 1677/2 of the Civil Code.

⁹ § 1677/1 of the Civil Code.

¹⁰ § 42/1 of the Act No. 90/2012 Coll., on Commercial Companies and Cooperatives (Business Corporations Act).

¹¹ § 42/2 Business Corporations Act.

¹² Eichlerová, 2024, pt. 14; Havel, 2020, pp. 125-126.

¹³ Svoboda and Klička, 2023, p. 210; Bernard, 2024, p. 1202.

¹⁴ § 1406-1408 of the Civil Code.

¹⁵ § 1678/1 and § 1679/2 of the Civil Code.

consider the issue of how the general meeting should be convened during the probate proceeding.

In the case of a corporation whose shareholders do not have close personal ties, it is possible that the corporation may not even know about the death of its shareholder for a long time, because state authorities are not obliged to register death of a shareholder into the Commercial Register. As a result, the corporation may in good faith send an invitation to the general meeting to the deceased shareholder, rather than to the administrator. This creates a risk that the validity of the general meeting's resolutions may be challenged on the ground that the administrator was not properly invited.¹⁶

Although the corporation is aware of shareholder's death, it may be difficult to determine who is the administrator of decedent's estate and therefore entitled to be invited to the general meeting. This uncertainty is especially acute in the weeks immediately following the shareholder's death, when it remains unclear whether the decedent appointed an administrator or executor by will, whether the court will appoint one, or who probable heirs are. If the general meeting is convened during this period, there is a significant risk that its resolutions may be invalid.

3.2. Exercise of the Voting Rights

Even if the administrator is properly invited to the general meeting, problems do not end. As I mentioned above, the administrator is entitled only to perform acts necessary for the preservation of the share and is not empowered to alter its essentiality. However, what exactly means the rules of simple administration for voting rights at the general meeting?

As a result of some resolutions of the general meeting the essence of the share may change. For the corporation's legal certainty, it is therefore important to define which resolutions of the general meeting belongs within the category of matters exceeding the simple administration. Eichlerová states that from simple administration exceed extraordinary resolutions of the general meeting that change the essence of the business corporation (e.g. voting for a change of the articles of association or for a sale of a substantial part of the corporation's assets).¹⁷ This author therefore defines this category as a substantial change in the corporation, not directly as a change of the share itself. This concept makes sense, as the share represents the shareholder's

¹⁶ About invalidity of the general meetings resolution as a result of errors in convening cf. Decision of the Czech Supreme Court no. 27 Cdo 1725/2017.

¹⁷ Eichlerová, 2024, pt. 14.

participation in the business corporation, so changes in the corporation have an impact on the share.

However, I am of the view that the categorisation of the general meeting's resolutions according to whether they exceed the scope of the simple administration requires further elaboration. For example, not all resolutions of the general meeting amending the articles of association affect the essence of the share (e.g. resolution to relocate the corporation's registered office to a neighbouring city). It is therefore necessary to provide legal practice with a clear criterion by which it may assess, in respect of each general meeting's resolution, whether the decision under consideration exceeds simple administration of the share or not.

If the administrator is to exercise voting rights at the general meeting at which a resolution exceeding the scope of the simple administration is to be voted on, he should obtain the consent of all heirs or the court approval. It is, however, highly likely that the administrator may not be able to obtain such consent in time. An invitation to a general meeting of a limited liability company or a cooperative must be delivered 15 days in advance;¹⁸ in a case of a joint-stock company 30 days in advance.¹⁹ If the administrator and the heirs are not in contact with each other or are in conflict, it is very likely that the administrator may not be able to obtain the necessary consent in this short time. Even obtaining judicial approval for the act exceeding the simple administration is unlikely in such a brief time, as the court is not obliged to decide within a clearly defined time limit.

Questions therefore arise: how should the administrator proceed? Should he vote against the proposed resolution, or abstain from voting altogether? And what are the legal consequences if the administrator votes in favour of the resolution altering the essentiality of the share without necessary consent? Should such vote be counted at all? Could such defect be ground for challenging the validity of the general meeting's resolution?

4. ADMINISTRATOR'S PROCEDURAL INSTRUMENTS

When discussing the potential invalidity of the general meeting's resolutions, the question comes to mind whether the administrator is authorized to apply procedural instruments for protection of shareholder's rights. That specifically means whether he has the right to file the lawsuit claiming invalidity of the general meeting's resolution? Or the *actio pro socio*?

¹⁸ § 184 and § 636 of the Business Corporations Act.

¹⁹ § 406 of the Business Corporations Act.

The law provides that the administrator is entitled to exercise all rights connected with the administrated share.²⁰ Czech judicial practice has held, with regard to the procedural instruments available to the administrator of decedent's estate in general (i.e. not specifically in relation to the share), that filing actions is in the scope of the simple administration, since without procedural instruments to protect the decedent's rights, the administrator would be unable to properly perform the administration.²¹

4.1 Declaration of Invalidity of the General Meeting's Resolution

According to Mrázová, the administrator has all information, property and control rights connected with the administrated share, including the right to file the lawsuit claiming invalidity of the general meeting's resolution.²² This conclusion is derived from the decision of the High Court in Prague, the subject matter of which, however, was not whether the administrator was entitled to bring the action, but rather the corporation's obligation to transfer the shares owned by the deceased shareholder to the administrator's property account.²³

One of the fundamental principles of corporate law is the principle of limited judicial intervention in the internal affairs of the business corporation.²⁴ An expression of this principle is the limitation of persons who are entitled to file the lawsuit claiming invalidity of the general meeting's resolution.²⁵ The law provides exhaustive list of persons vested with the right to bring such action, among whom the administrator is not included. Other subjects do not have the right to seek declaration of invalidity of the general meeting's resolution,²⁶ as the basis of this right is the specific relationship between entitled persons and the corporation.²⁷

For these reasons the question whether the administrator is entitled to file the action claiming invalidity of the general meeting's resolution cannot be considered as resolved by one sentence in the court decision (moreover other court than the Supreme Court), which was said as *obiter dictum* and lacks any detailed argumentation.

²⁰ § 42 of the Business Corporations Act.

²¹ Decision of the Czech Supreme Court no. 24 Cdo 1778/2025; Decision of the Czech Supreme no. 24 Cdo 2335/2021.

²² Mrázová, 2025, p. 157.

²³ Decision of the High Court in Prague no. 6 Cmo 185/2023.

²⁴ Šuk, 2017, pp. 21-24.

²⁵ Przeczek, 2023, p. 169.

²⁶ Šuk, 2020, p. 484; Pokorná, 2021, par. 191; Lokajíček and Josková, 2024, pts. 46.; Decision of the Czech Supreme Court no. 29 Odo 11/2002.

²⁷ Štenglová, 2023, pp. 519–520.

4.2 *Actio pro Socio*

In the case of the *actio pro socio* the question of authorization of the administrator to file it is even more complicated. Derivative action differs from the other types of claims in that the claim belongs to the corporation, not to the shareholder.²⁸ The authorization to file *actio pro socio* on behalf of the corporation is an expression of the relationship between the shareholder and the corporation and the shareholder is bound by the duty of loyalty when filing it.²⁹ The task of the administrator is, however, to exercise the rights belonging into the decedent's estate, not the rights of the corporation. Moreover, the administrator probably does not have the duty of loyalty to the corporation unlike the shareholder.

On the other hand, denying the administrator this procedural instrument creates difficulties in view of the limitation period applicable to this claim. In lengthy probate proceeding, it could easily happen that by the time the heir is confirmed by the court as having acquired the share, the right is already time-barred.

For the reasons outlined above, it is necessary to consider this question more thoroughly, including the issue of whether, if the decedent filed the action during his lifetime and passed away, the case should continue with the administrator acting as the decedent's legal successor.

5. DEFENCE OF THE HEIRS

If it were concluded that the administrator possesses broadly defined rights, it would be necessary to consider whether the heirs, as proprietary owners of the share,³⁰ have any means of protection during the probate proceeding against the manner, in which the administrator exercises the rights associated with the share.

If the heirs are dissatisfied with the conduct of the administrator of their choice, they may obviously remove him and appoint another administrator. In the case of the court-appointed administrator or the administrator designated by the decedent's will, the administrator may be removed by the court; however, such removal requires that the breach of administrator's duty be culpable and reach a certain degree of seriousness.³¹ In any case, the administrator's dismissal has effects only for the future.

However, during the administration of the share a situation may arise when it is necessary to react to the administrator's actions that have already taken place and with which the heirs disagree. This can be demonstrated on the following example: the administrator votes at the

²⁸ Ruban, 2017, pp. 19-20.

²⁹ Ibid.

³⁰ § 1236 of the Civil Code.

³¹ Decision of the Czech Supreme Court no. 24 Cdo 1063/2024.

general meeting on the adoption of the resolution that changes the type of the managed share into the non-voting share. If the administrator votes in this way without the consent of all heirs or without the court approval, it is likely that the scope of simple administration is exceeded, as this resolution significantly changes the essence of the managed share. The question is whether the heirs may defend themselves against the general meeting's resolution that was adopted on such defective vote in any way, which would have corporate effects? That means – are the heirs entitled to file the lawsuit claiming the invalidity of the general meeting's resolution?

Argument for the negative answer is that during the probate proceeding, although the heirs are owners of the share,³² they are not shareholders of the corporation and the shareholder's rights may be exercised only by the administrator.³³ However, if we were to conclude that the heirs do not have this right, it would effectively deny protection against the administrator's actions made contrary to the rules of simple administration, as it is very likely that by the time the heirs become shareholders and will be entitled to file this lawsuit, the right will have already been precluded,³⁴ or the problem may arise that the required objection was not raised at the general meeting.³⁵

For these reasons, it is necessary to deal in more detail with the question of what control mechanisms the heirs have against the administrator's actions and whether there are also such control instruments that would have corporate effects.

CONCLUSION

The exercise of shareholder's rights during probate proceedings gives rise to a range of legal challenges that are not yet adequately addressed under Czech law. Further scholarly attention is therefore required to systematically identify these issues and to propose adequate solutions.

Bibliography

1. Bernard, P. (2024) '§ 1678' in Melzer, F. and Tégl, P. et al. *Občanský zákoník § 1475-1720*, 1st edn. Prague: C. H. Beck, pp. 1201-1205.
2. Eichlerová, K. (2024) '§ 42: Přechod podílu' in Lokajíček, J., et al. *Zákon o obchodních korporacích. Vybraná ustanovení*, 1st edn. Prague: C. H. Beck, pts. 1-17.
3. Havel, B. (2020) '§ 42: Přechod podílu' in Štenglová, I., et al. *Zákon o obchodních korporacích*, 3rd edn. Prague: C. H. Beck, pp. 123-126.

³² § 1236 of the Civil Code.

³³ § 42/2 Business Corporations Act.

³⁴ There is three-months subjective preclusion period and one-year objective preclusion period for this action, cf. § 259 of the Civil Code and § 191, § 428 and § 663 of the Business Corporations Act.

³⁵ § 192/2 and § 434/1 Business Corporations Act.

4. Lokajíček, J. and Josková, L. (2024) '§ 428 [Neplatnost usnesení valné hromady].' in Lokajíček, J. et al. *Zákon o obchodních korporacích. Vybraná ustanovení*, 1st edn. Prague: C. H. Beck, pts. 1-69.
5. Melzer, F. (2024) 'Úvodní výklad před § 1475' in Melzer, F. and Tégl, P. et al. *Občanský zákoník § 1475-1720*, 1st edn. Prague: C. H. Beck, pp. 3-33.
6. Mrázová, Ž. (2025) 'Správce části dědictví - obchodného podielu' in Csach, K. and Havel, B. et al. *Mezigenerační nástupnictví v podnikání*, 1st edn. Prague: Wolters Kluwer, pp. 151-165.
7. Pokorná, J. (2021) '§ 191: Oprávnění dovolat se neplatnosti usnesení valné hromady' in Lasák, J. et al. *Zákon o obchodních korporacích: Komentář*, 2nd edn. Prague: Wolters Kluwer; par. 191.
8. Przewczek, M. (2023) 'Aktivní legitimace k podání návrhu na vyslovení neplatnosti usnesení valné hromady', *Obchodněprávní revue*, 2023/3, pp. 169-173.
9. Ruban, R. (2017) *Derivativní žaloby. Disertační práce*, Brno: Masaryk University, 166 p.; <https://is.muni.cz/th/jxdv8/>
10. Svoboda, J. and Klička, O. (2023) *Dědické právo v praxi*, 2nd edn. Prague: C. H. Beck, 478 p.
11. Štenglová, I. (2023) '9.2 Okruh aktivně legitimovaných osob' in Štenglová, I. et al. *Akciové společnosti*, 1st edn. Prague: C. H. Beck, pp. 517-521.
12. Šuk, P. (2017) 'Ingerence soudů do vnitřních poměrů obchodních korporací', *Bulletin advokacie*, 2017/11, pp. 21-24.
13. Šuk, P. (2020) '§ 191 [Neplatnost usnesení valné hromady]' in Štenglová, I. et al. *Zákon o obchodních korporacích*, 3rd edn. Prague: C. H. Beck, s. 482-502.

CIVIL LAW CLASSIFICATION OF DIGITAL CONTENT IN THE CONTEXT OF HARMONIZATION OF UKRAINIAN LEGISLATION WITH EUROPEAN UNION

INNA KOZMA*

Abstract

The digital transformation of modern society challenges traditional civil law constructs formed in the context of material circulation. Digital content and digital services, due to their intangible nature, require new approaches to their legal classification. This study analyses the civil law classification of digital content in the context of the harmonization of Ukrainian legislation with European Union law. Particular attention is paid to the provisions of Directive (EU) 2019/770 and its role in regulating digital content and digital services. The research methodology is based on a comparative legal analysis of the Civil Code of Ukraine and European Union regulatory frameworks to identify necessary legislative adaptations for the digital economy. The paper also examines the legal relationship between users and digital platforms where personal data may function as a form of contractual consideration.

Keywords: *Digital content, Digital services, civil law, EU law, Ukrainian legislation, digital economy.*

Introduction

The digital transformation of the 21st century calls into question traditional civil law constructs formed in the context of material circulation. The classic categories of “object,” “property right,” and “service” demonstrate their institutional inability to fully cover digital assets. Traditional property protection mechanisms are unable to protect users in social networks and streaming platforms, where access, rather than ownership, prevails.

Digital content, characterized by its intangibility, non-rivalrous nature, and reproducibility, does not fit into the classic model of substantive legal regulation, which causes legal uncertainty for both digital businesses and consumers. In this context, the harmonization of Ukrainian legislation with EU law within the framework of the Association Agreement and Ukraine's integration into the Single Digital Market requires the implementation of the latest standards. That is why the civil law classification of digital content should be based on Directive 2019/770, which creates a digital foundation for regulating modern digital services and ensures a balance of interests between global platforms and end consumers.

* 1st-year Master's Student Of the Faculty of Law Yuriy Fedkovych Chernivtsi National University Ukraine; Scientific Advisor: Oksana Kiriak PhD in Law, Associate Professor of the Department of Privat Law, Yuriy Fedkovych Chernivtsi National University

1. Definition and Type of Digital Content under UE Law

The European Union's modern digital law is based on a clear distinction between objects according to their functional nature. The main regulatory instrument in this area is Directive 2019/770, which was implemented into Ukrainian law in August 2023. This allowed Article 177 of the Civil Code of Ukraine to be supplemented with a new type of object – “digital objects” that can exist exclusively in a digital environment.¹ According to Article 179-1 of the Civil Code of Ukraine, a digital object is a good that is created and exists exclusively in a digital environment and has property value. Digital object includes virtual assets, digital content, and other goods to which the provisions of part one of this article apply.² Such regulation provides grounds for applying a system of regulation of property rights to digital objects.

An analysis of the Directive allows these objects to be classified according to several criteria. The first is the functional nature of the object. According to Article 2 (paragraph 1) of Directive 2019/770, “digital content” is defined as data that is produced and provided in digital form. This term covers static objects: music files, e-books, videos, and software. However, for modern platforms, namely social media, the concept of “digital services” is more relevant, as it allows consumers not only to access data, but also to “create, process, store, or interact with data.”

The rapid evolution of digital technologies often outpaces formal legal definitions, creating a gray area where some objects share characteristics of both content and services. Therefore, a flexible interpretation of these categories is essential to prevent legal gaps that could leave users without adequate protection in emerging digital market

In addition, the duration of their provision plays an important role in distinguishing between digital objects. The directive distinguishes between one-off supply, which is typical for static content, such as downloading a single file, and continuous supply, during which the service is provided for a certain period of time, requiring the provider to maintain its compliance and functionality throughout the term of the contract. Thus, the clear distinction between digital content and services is not merely a theoretical exercise but a practical necessity for determining the appropriate legal regime and the specific obligations of digital providers in a rapidly evolving market.

¹ Civil Code of Ukraine 2003

² Ibid

2. Civil Law Qualification of Digital Content as an Object of Civil Rights

However, the Directive clearly states that its provisions shall in no way infringe or affect intellectual property rights. Accordingly, digital objects of civil rights should be considered taking into account their content and purpose of use in civil circulation, since current trends in the legal regulation of intangible assets in the digital environment suggest that digital objects that have or may have property value can be traded as property, even though they are intangible assets.³

The central problem of modern civil law is the distinction between digital content as a static result of intellectual activity and digital services as a dynamic technological process of its provision and use. Within the meaning of Article 2 of Directive 2019/770, digital content is data that is produced and provided in digital form.⁴ In this case, digital services are essentially a functional environment. The difference lies in the scope of user rights: in the case of content, the consumer seeks to access specific information, while in the case of digital services, the object of interest is the ability to create, process, store, or interact with data.

An important step in Ukrainian legislation was the recognition of digital objects specifically through the category of “property” This allows for the inclusion of objects that have property value but lack physical substance, which correlates with the European concept of “fair balance,” where a legal mechanism is considered effective if it takes into account the interests of both the owner and the user: a mechanism is now deemed fair if it sets a fair balance between conflicting interests.⁵

This problem is most evident in the field of social networks, as such platforms combine the creation of digital content by users with the provision of complex digital services for its placement, processing, and distribution.

Using Instagram as an example, the difference between content and service becomes apparent due to the duration and nature of the interaction. While a photo or video reel uploaded by a user is an act of content creation, the functioning of the entire account with its reach algorithms, interactive stories, and advertising tools is a continuous service. In this relationship, the provider (Meta Platforms, Inc.) is obliged to ensure the proper functioning of the service for the consumer. The integration of digital assets into the category of “property” reflects a shift

³ Zozulyak O. I., Maksymiv L. (2024, p. 44.)

⁴ Directive (EU) 2019/770 (2019)

⁵ Sganga (2024, p.13)

towards a more flexible civil law system that can adapt to technological progress without losing its foundational principles of projection and stability.

3. Classification by the Nature of Consideration: Payment vs Personal Data

According to Article 3(1) of Directive 2019/770, digital content is also classified according to the legal nature of the relationship regarding its provision. For example, the scope of the Directive covers contracts where the consumer does not pay a monetary price but provides their personal data.⁶ In other words, the “data economy” model is being legalized, where user information is the actual equivalent of the value of a digital product. A striking example of such a model is social networks and online platforms, where the user gains access to digital services without monetary payment, but instead provides the provider with personal data that is used to form advertising algorithms and monetize the platform.

At the same time, we can conditionally distinguish between “active consumers” (content creators) and “passive” ones (viewers). Regardless of their role, the account is a complex digital asset for them, access to which is paid for not with money, but with personal data. The user's personal data, including information about their behavior on the platform, interests, and history of interaction with content, is used to generate algorithmic recommendations and personalized advertising, which is the main economic model for the functioning of such services.

This approach allows us to consider the relationship between the platform and the user not only through the prism of copyright, but also through the mechanisms of civil law protection of consumer rights, which ensures stable access to digital content.

The recognition of social networks, such as Instagram, as a complex digital service raises the issue of remuneration for such relationships. A key aspect is the legalization of a model in which personal data is a legitimate consideration. This aspect is being considered as part of the implementation of the EU's Digital Single Market strategy and the EU4Digital initiative. In addition, according to Article 3 (paragraph 1) of Directive 2019/770, the scope of digital content legislation covers contracts where the consumer does not pay a monetary price but instead provides the supplier with their personal data.⁷

Thus, this approach by the European Union allows relationships arising from the use of social networks, which at first glance appear to be free, to be classified as full-fledged civil law

⁶ Directive (EU) 2019/770 (2019)

⁷ Directive (EU) 2019/770 (2019)

relationships. In other words, the actual equivalent of the value of a digital product is the provision of information about the user regarding their geolocation, preferences, interaction history, etc. This allows consumer protection tools to be activated, because if the data is recognized as payment, then the provider (e.g., Meta Platforms, Inc.) is legally responsible for the compliance and functionality of the service. Ultimately, the conceptual shift forces a reassessment of the “free” nature of digital services, highlighting that in the digital age, privacy and personal information have become significant economic assets that deserve robust legal safeguarding.

4. Legal Qualification of Click-Wrap Agreements in Digital Environment

The legal qualification of the procedure for a user to access digital content or a digital service is an important aspect of the functioning of digital platforms. Such legal relations arise through the conclusion of so-called click-wrap agreements, when the user confirms their agreement with the terms of use of the service by clicking the “Accept” or “I agree” button.

Furthermore, the standard nature of these agreements often places the consumer in a “take in or leave it”, which raises Important questions about the actual equality of the parties in digital contracting. Thile the click-wrap format is efficient for mass-market services, the legal system must remain vigilant to ensure that such speed does not come at the expense of substantive fairness and transparency.

In legal doctrine, such contracts are defined as a form of electronic agreement used in a digital environment, in which the parties express their will through electronic action. It is important that the user's method of signifying assent or rejection should be clear and unambiguous. Examples include clicking a button or icon containing the words of assent or rejection or typing in the specified words of assent or rejection.⁸

At the same time, the problem with such agreements is related not only to the provision of consent, but also to the scope of legal consequences that arise for the user after pressing the confirmation button. The terms of use of digital services often contain provisions that determine the procedure for resolving disputes, the applicable law, and jurisdiction. In particular, the doctrine emphasizes that such provisions are relatively automatic in the structure of the contract: choice-of-forum clauses, as well as choice-of-law clauses and arbitration agreements, may be submitted to particular solutions differing from general trends. As a matter of fact, the

⁸ Sanches Lorenzo (2021, p. 281).

ancillary character of such clauses leads to their autonomy and severability, so that they must be considered as independent contracts within the main contract.⁹ The challenge remains to ensure that the speed and convenience of such digital agreements do not undermine the core requirement of informed consent, which is essential for maintaining a fair contractual balance.

5. Directions for harmonization of Ukrainian Civil Legislation with EU Law

This qualification is particularly important in the process of Ukraine's European integration. In the Ukrainian legal field, this concept was enshrined in the Resolution of the Cabinet of Ministers No. 774-r of September 5, 2023, which approved the list of indicators of the Digital Economy and Society Index (DESI), which is a key tool for monitoring Ukraine's readiness for the Single Digital Market.¹⁰ Harmonization in this area is understood as a process of purposeful convergence of legal systems by eliminating contradictions between them and forming minimum legal standards through the establishment of common legal principles, which involves bringing the legislation of member states and non-member countries into line with the requirements of international law on the basis of international treaties.¹¹

Harmonization of legislation is a process of purposeful convergence of legal systems by eliminating contradictions between them and forming minimum legal standards through the establishment of common legal principles, which involves bringing the legislation of member states and non-member countries into line with the requirements of international law on the basis of international treaties. Such convergence in the field of digital services requires not just the mechanical implementation of European norms, but a profound adaptation of national civil law institutions to the requirements of the digital era, based on the provisions of Directive (EU) 2019/770.

The central focus of the reform is to strengthen legal compatibility between the country and the EU, which should ensure consumer access to high-quality digital services and stimulate the development of the digital economy. At the current stage of the process of harmonizing Ukrainian legislation with the norms of European Union law (EU), it can be stated that the main focus is on legal relations that are regulated by EU Directives but remain unregulated under current Ukrainian legislation.¹² Although the Law of Ukraine “On Digital Content and Digital Services” already partially complies with European standards, it needs further adaptation in

⁹ Sanches Lorenzo (2021, p. 267).

¹⁰ Order of the Cabinet Ministers of Ukraine No. 774-r (2023).

¹¹ Parkhomenko (2012, p. 340-341).

¹² Valko (2024, p.86).

terms of detailing the technical obligations of providers. In particular, it is critical to regulate the obligation to provide updates to maintain the functionality and security of content, which is currently not fully reflected in national legislation. In addition, there is insufficient implementation of the “reasonable period” principle, which in EU law is assessed objectively depending on the nature of the digital product.

At the same time, general consumer protection legislation also needs to be reformed to take into account the specific nature of the digital environment. It is important to establish a liability mechanism in accordance with Directive (EU) 2019/770: any compensation that the contractor must pay to the consumer as a result of a price reduction or withdrawal from the contract must be made without undue delay and, in any case, within 14 days.¹³ This directly correlates with the concept of a “fair balance,” as a legal mechanism is considered effective only if it takes into account the interests of both parties.

A separate challenge is the adaptation of the Digital Services Act (DSA), according to which Internet platforms are also required to organize their interface in such a way that they can comply with EU legislation on consumer and product safety.¹⁴ In this context, the click-wrap procedure must ensure that the user's method of signifying assent or rejection is clear and unambiguous.¹⁵ Active work on this compliance will contribute to the creation of favorable conditions for the development of digital legal relations and accelerate Ukraine's integration into the Single Digital Market. Thus, the recognition of personal data as a form of payment and the harmonization of procedures for joining services is a guarantee of effective protection of the rights of subjects in modern civil circulation. Therefore, the success of Ukraine's integration into the Single Digital Market will depend on a balanced approach that combines strict compliance with EU standards with a nuanced understanding of national legal tradition

Conclusion. The Role of Harmonization on Establishing a Unified Legal Regime for Digital Objects

In conclusion, it should be noted that the development of the digital economy necessitates a rethinking of traditional civil law categories formed within the framework of material circulation. An analysis of the provisions of Directive (EU) 2019/770 indicates the formation

¹³ Directive (EU) 2019/770 (2019)

¹⁴ Valko (2024, p.48).

¹⁵ Sanches Lorenzo (2021, p. 281).

of digital legal relations, within which digital content and digital services are considered as independent objects of civil rights.

The practice of modern digital platforms demonstrates the need for a clear distinction between digital content as the result of the creation of digital content data and digital services as the technological environment for their processing and distribution. The example of social networks shows that such platforms combine both elements, forming complex digital legal relations between the user and the service provider.

In this context, further harmonization of Ukrainian legislation with European Union law should be aimed not only at the formal implementation of the provisions of EU Directive 2019/770, but also at adapting national civil law institutions to the specifics of the digital environment. This approach will contribute to the formation of an effective legal regime for digital objects, ensuring a balance of interests between users and providers of digital services, and the development of Ukraine's digital economy.

Bibliography

1. Civil Code of Ukraine, No. 435-IV (2003). <https://zakon.rada.gov.ua/laws/show/435-15#Text>
2. Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services. (2019). *Official Journal of the European Union*. <https://eur-lex.europa.eu/eli/dir/2019/770/oj/eng>
3. Order of the Cabinet of Ministers of Ukraine № 774-r "On approval of the list of indicators of the Digital Economy and Society Index (DESI)". (2023). <https://zakon.rada.gov.ua/laws/show/774-2023-%D1%80#Text>
4. Parkhomenko N.M.(2012). Harmonization of Ukrainian legislation with European and international law: methods, stages, types. *Journal of Kyiv University of Law*,1, 338–343.
5. Sánchez Lorenzo, S.A. (2021). Justice, Trade, Security, and Individual Freedoms in the Digital Society. In F. Esteban de la Rosa et al. (Eds). Editorial Aranzadi, S.A.U <https://digibug.ugr.es/bitstream/handle/10481/71643/Separata%20Sixto%20A.%20S%C3%A1nchez%20Lorenzo%20Cap%C3%ADtulo%207.pdf?sequence=1&isAllowed=y>
6. Sganga, C. (2024). The past, present and future of EU copyright flexibilities. *IIC – International Review of Intellectual Property and Competition Law*. 55(1), 5-36. <https://doi.org/10.1007/s40319-023-01413-9>
7. Valko L. A. (2024) Harmonization of Ukrainian and EU legislation in the field of consumer protection for digital services. *Scientific Bulletin of Uzhhorod National University. Series: Law*. 86(2), 85–90. <https://doi.org/10.24144/2307-3322.2024.86.2.7>
8. Zozulyak O. I., Maksymiv L. M.(2024) Digital things as objects of civil rights: updated regulatory approaches. *Law and Society*, 6, 40-47. <https://doi.org/10.32842/2078-3736/2024.6.7>

JURISDICTIONAL CHALLENGES IN HOLDING TRANSNATIONAL CORPORATIONS ACCOUNTABLE

ALINA BATRAMIEIEVA*

Abstract

The exponential growth of Transnational Corporations (TNCs) has significantly outpaced the development of international regulatory frameworks, leading to a complex jurisdictional puzzle. As TNCs operate across multiple borders through intricate networks of subsidiaries, holding them legally accountable for human rights violations or environmental damage remains a formidable challenge. This paper examines the legal hurdles associated with establishing jurisdiction over TNCs, focusing on the doctrine of forum non conveniens and the complexities of piercing the corporate veil. By analyzing recent landmark cases and the interplay between domestic law and international soft-law instruments (such as the UN Guiding Principles), the research highlights the inadequacies of the current state-centric legal order. Ultimately, the contribution proposes potential pathways for legal reform, including the adoption of binding international treaties and the expansion of extraterritorial jurisdiction, to ensure effective legal remedies for victims of corporate misconduct.

Keywords: transnational corporations, jurisdictional challenges, forum non conveniens, corporate veil, extraterritorial jurisdiction, UN Guiding Principles

Introduction

Globalisation has fundamentally reshaped not only the world economy but also the internal logic of legal regulation. Transnational corporations (TNCs) today operate through extensive networks of subsidiaries, branches, and contractual partners spread across dozens of jurisdictions simultaneously. As Muchlinski demonstrates, multinational enterprises have evolved into complex transnational business organizations that transcend traditional legal boundaries, making their business structures entirely lawful and commercially rational, yet legally elusive.¹ This structural evolution raises a fundamental legal question: who bears responsibility, and where, when something goes wrong?

Private international law has traditionally answered two core questions — which state's law governs a relationship with a foreign element, and which court has jurisdiction to hear the dispute. However, as Mills argues, the conventional characterisation of private international law as purely national law is deeply flawed in the modern era; instead, it must be understood as affecting the international constitutional ordering of regulatory authority.² Traditional conflict-of-laws tools were developed at a time when the typical subjects of private law relations were individuals or companies with a clear national identity. TNCs are a different kind of entity

* Alina Batramieieva – 2nd year student, Bachelor's degree, full-time study, Faculty of Law Yuriy Fedkovych Chernivtsi National University, Ukraine e-mail: batramieieva.a@gmail.com

¹ Muchlinski, P. T. (2007). *Multinational enterprises and the law* (2nd ed.). Oxford: Oxford University Press.

² Mills, A. (2009). *The confluence of public and private international law: Justice, pluralism and subsidiarity in the international constitutional ordering of private law*. Cambridge: Cambridge University Press.

altogether: the parent company is incorporated in one state, its operations are based in another, and the harm occurs in a third. None of the existing rules were designed to handle this level of pluralistic corporate complexity.

This is where what might be called a jurisdictional vacuum emerges. The state of incorporation of the parent company typically invokes the principle of territoriality and refuses to extend its jurisdiction to the conduct of foreign subsidiaries. Conversely, the state where the harm occurred often lacks both the procedural tools and the political will to hold a foreign corporate giant accountable. The result is a legal landscape where, formally, multiple jurisdictions exist – but none of them is prepared to actually hear the case on its merits and deliver systemic justice.

This vacuum is sustained by two well-established legal mechanisms. First, the doctrine of *forum non conveniens* gives courts discretionary power to decline jurisdiction on the grounds that another forum is more appropriate. In practice, this means that a claimant who brings proceedings in the state of the parent company's incorporation may be redirected to the courts of the state where the harm occurred – and vice versa. Second, the principle of separate legal personality shields the parent company from liability for the conduct of its subsidiaries, despite the existence of real corporate control. Piercing the corporate veil remains an exception in most legal systems, not a standard remedy.

The international community is not unaware of the problem. The UN Guiding Principles on Business and Human Rights of 2011, known as the "Protect, Respect and Remedy" Framework³, made a significant contribution to shaping corporate responsibility standards and introduced the concept of due diligence. However, their non-binding nature severely limits their practical effect. Deva and Bilchitz critically engage with this framework, highlighting a profound chasm between 'is' and 'ought' in corporate human rights obligations.⁴ They argue that a corporation that ignores these principles faces no legal consequences under international law because soft law, while an important reference point, completely fails to adequately address the challenges of enforcement and cannot substitute for binding regulation.

This paper examines these jurisdictional challenges through the lens of private international law and judicial practice, and proposes concrete directions for reform — in

³ Ruggie, J. G. (2011). Guiding principles on business and human rights: Implementing the United Nations "protect, respect and remedy" framework. Geneva: United Nations Human Rights Council.

⁴ Deva, S., & Bilchitz, D. (Eds.). (2013). Human rights obligations of business: Beyond the corporate responsibility to respect? Cambridge: Cambridge University Press.

particular, the expansion of extraterritorial jurisdiction and the adoption of a binding international treaty on TNC accountability to close the current governance gap.

1. The Regulatory Gap and Jurisdictional Hurdles

The contemporary architecture of private international law confronts a fundamental challenge: the stark incongruity between a globally integrated economic reality and a deeply state-centric system of legal regulation. According to the United Nations Conference on Trade and Development (UNCTAD), global foreign direct investment (FDI) flows reached \$1.3 trillion in 2022, with developing countries accounting for 70% of this total.⁵ While transnational corporations operate as unified economic entities with cross-border reach, they remain legally tethered to fragmented national jurisdictions. This imbalance engenders a "regulatory gap," within which TNCs can maximize profits in host states while minimizing legal risks for their parent companies.

The primary substantive hurdle to holding TNCs accountable lies in the classical doctrine of separate corporate personality and the corollary concept of the "corporate veil." As highlighted in the report by the Office of the United Nations High Commissioner for Human Rights (OHCHR), this doctrine is recognized in the vast majority of jurisdictions and stipulates that every incorporated entity exists independently of its owners and managers.⁶ Consequently, a parent company holding shares in a subsidiary is generally not held legally liable for the acts, omissions, or obligations of that subsidiary solely by virtue of its shareholding.⁷ In the context of private international law, this implies that legal liability rarely extends beyond the subsidiary, thereby allowing the parent company to artificially ring-fence its assets and evade accountability for harm inflicted in foreign jurisdictions.

Even when claimants find legal grounds to pierce the corporate veil, they inevitably encounter formidable procedural barriers, most notably the doctrine of *forum non conveniens*. Drawing upon the analysis of tort litigation against TNCs by Richard Meeran, this doctrine emerges as a central obstacle in most common law jurisdictions outside the European Union.⁸ It functions as a procedural mechanism to limit extraterritorial jurisdiction, enabling home state

⁵ UNCTAD, *World investment report 2023: Investing in sustainable energy for all* (2023), p. 2.

⁶ OHCHR, *Improving accountability and access to remedy for victims of business-related human rights abuse*, A/HRC/32/19 (2016).

⁷ *Ibid.*

⁸ R. Meeran, "Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States", *City University of Hong Kong Law Review*, 3(1) (2011), pp. 1-41.

courts to decline jurisdiction on the premise that the courts of the host state constitute a "more appropriate forum" for dispute resolution.⁹

In practice, however, such jurisdictional displacement frequently results in a de facto denial of justice. As Meeran's practical insights reveal, victims' access to judicial remedy against a parent company is critically contingent upon securing adequate funding and specialized legal representation capable of navigating protracted, costly, and highly risky litigation.¹⁰ Claimants in developing host states typically lack both the requisite financial resources and access to effective procedural mechanisms, such as class actions, rendering the pursuit of justice financially unviable. Ultimately, the confluence of substantive constraints – namely, the impenetrable corporate veil – and procedural hurdles creates a vicious circle that reinforces corporate impunity and systematically deprives victims of effective legal remedies.

2. Case Law and Soft Law in Practice

Despite the resilience of the substantive and procedural barriers discussed previously, recent jurisprudence in the home states of transnational corporations demonstrates a gradual evolution of mechanisms for holding parent companies accountable. Since directly piercing the corporate veil remains an exceptional measure in corporate law, claimants have increasingly relied on tort law, specifically invoking the concept of a direct duty of care.

A fundamental shift in this direction occurred within English jurisprudence. In the landmark case of *Chandler v Cape plc* (2012), the Court of Appeal of England and Wales held that a parent company could owe a direct duty of care to the employees of its subsidiary. The Court established that such a duty does not arise by disregarding separate legal personality, but rather stems from the parent company's actual level of control over health and safety policies across the corporate group.¹¹

The Supreme Court of the United Kingdom significantly expanded this approach in *Lungowe v Vedanta Resources plc* (2019). The Court confirmed that a parent company's publication and implementation of global sustainability policies can engender a duty of care toward communities adversely affected by its foreign subsidiary's operations.¹² Crucially from a private international law perspective, the Supreme Court in *Vedanta* rejected the corporate defendant's reliance on the doctrine of *forum non conveniens*. The Justices recognized that

⁹ Ibid.

¹⁰ Ibid.

¹¹ *Chandler v Cape plc* [2012] EWCA Civ 525.

¹² *Lungowe & Ors v Vedanta Resources plc & Anor* [2019] UKSC 20.

while Zambia was the jurisdiction where the harm occurred, the claimants would face a de facto denial of justice there due to the absence of requisite funding and specialized legal representation.¹³ This ruling directly addressed the systemic issue of access to justice in host states.

Parallel to the evolution of case law, the normative weight of international soft law instruments is undergoing a significant transformation. The UN Guiding Principles on Business and Human Rights introduced the core concept of human rights due diligence.¹⁴ While these principles do not inherently create binding legal obligations, domestic courts have begun deploying them as an authoritative benchmark for interpreting tort law standards.

A prominent illustration of this "hardening" of soft law is the 2021 judgment by the Hague District Court in *Milieudefensie et al. v Royal Dutch Shell plc*. The Court ordered the parent company to reduce the global CO2 emissions of the entire corporate group by net 45% by 2030.¹⁵ In establishing the existence of an unwritten standard of care under Dutch tort law, the Court explicitly invoked the UNGPs, asserting that they reflect a universally endorsed global standard of corporate responsibility.

Nevertheless, despite these landmark judicial victories, relying exclusively on ad hoc tort litigation does not offer a systemic resolution. Such proceedings necessitate years of litigation, immense financial resources, and the continuous navigation of complex jurisdictional obstacles at every procedural stage. The current trajectory of case law merely highlights the inadequacies of the fragmented regulatory regime, underscoring the pressing necessity for a binding international legal framework.

3. Pathways for Reform

As demonstrated, relying exclusively on ad hoc tort litigation and soft law instruments fails to provide a systemic safeguard against corporate abuse. The prohibitive costs, protracted nature, and unpredictability of such claims necessitate a shift from reactive judicial intervention to proactive statutory regulation. Recognizing these structural deficits, the international community has initiated a transition toward binding legal frameworks, unfolding across national, regional, and global tiers.

The first major precedent converting voluntary corporate responsibility into a statutory duty emerged at the national level. In 2017, France enacted the Duty of Vigilance Law (Loi

¹³ Ibid.

¹⁴ Ruggie, J. G. (2011). Guiding principles on business and human rights: Implementing the United Nations "protect, respect and remedy" framework. Geneva: United Nations Human Rights Council.

¹⁵ *Milieudefensie et al. v Royal Dutch Shell plc*, C/09/571932 / HA ZA 19-379 (District Court of The Hague, 2021).

relative au devoir de vigilance).¹⁶ This legislation pioneered the requirement for large French corporations to establish, publish, and implement a "vigilance plan" to identify risks and prevent severe human rights and environmental violations not only within their own operations but also across their global subsidiaries, subcontractors, and suppliers.¹⁷ The French model proved that the corporate veil can be legislatively circumvented by imposing a direct, statutory duty on the parent company to oversee its global value chain.

National initiatives subsequently catalyzed an unprecedented supranational response. In 2024, the European Union adopted the Corporate Sustainability Due Diligence Directive (CSDDD).¹⁸ This instrument fundamentally alters the European regulatory framework by crystallizing UN due diligence standards into strict legal obligations for major companies operating within the EU internal market. Crucially, the Directive goes beyond mandating the integration of human rights and environmental oversight into corporate policies; it introduces explicit civil liability provisions.¹⁹ Consequently, victims are equipped with an actionable legal mechanism to bring claims against European parent companies in the courts of EU member states, substantially mitigating barriers to justice.

However, regulating transnational corporations exclusively at national or regional levels inevitably causes legal fragmentation. Divergent jurisdictional rules create opportunities for forum shopping by corporate actors, who might relocate headquarters to states with less stringent oversight. Therefore, resolving the jurisdictional vacuum permanently requires the adoption of a universal binding treaty.

Since 2014, the UN Open-ended Intergovernmental Working Group (OEIGWG) has been negotiating a Legally Binding Instrument (LBI) to regulate the activities of transnational corporations under international human rights law. According to the updated 2023 draft, this treaty specifically targets the core obstacles of private international law.²⁰ It aims to guarantee access to remedy, dismantle procedural barriers such as forum non conveniens, and establish uniform criteria for the legal liability of entities exercising de facto control over transnational business operations.²¹

¹⁶ Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

¹⁷ Ibid.

¹⁸ Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

¹⁹ Ibid.

²⁰ Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG), Updated draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (2023).

²¹ Ibid.

The current legal paradigm is thus undergoing active transformation. The evolution from voluntary initiatives to rigorous domestic statutes, the adoption of the EU Directive, and the ongoing UN treaty negotiations indicate that the era of uncontested corporate immunity is drawing to a close. Establishing a comprehensive architecture of mandatory regulation is no longer a theoretical proposition but an imminent phase in the development of international law, directly informing the final conclusions of this research.

Conclusion

The era of corporate immunity, sustained by the rigid application of the "corporate veil" and jurisdictional shields, is reaching a point of systemic recalibration. For decades, the international legal order operated under a paradox where transnational corporations (TNCs) possessed the economic power of sovereign states but lacked equivalent legal accountability. This research underscores that the current shift in private international law is not merely a technical adjustment of rules, but a fundamental move toward a more transparent and justice-oriented global economy.

The judicial breakthroughs in the United Kingdom and the Netherlands represent a critical departure from normative inertia. By prioritizing the "direct duty of care," courts have sent a clear signal: corporate structures can no longer serve as a vacuum for liability. However, the true transformation lies in the transition from judicial activism to systemic legislative mandates. The adoption of the EU Corporate Sustainability Due Diligence Directive (2024) and the ongoing negotiations for a UN Binding Treaty reflect a growing global consensus that human rights are non-negotiable externalities. We are witnessing the birth of a new "social contract" for the 21st century, where transparency is not a voluntary corporate choice but a mandatory legal prerequisite for operating in the global market.

The ultimate solution to the "governance gaps" discussed in this study lies in the harmonization of these standards. While national laws like the French *Loi de Vigilance* are pioneering, they are only fragments of a larger puzzle. To prevent "jurisdictional shopping" and ensure that the victims of corporate abuse have a meaningful right to a remedy, the international community must finalize a universal legal architecture. The movement toward a binding international instrument is the only pathway to ensuring that the corporate form facilitates global development without compromising human dignity.

In closing, the trajectory of international law is clear: the shield of legal personality is becoming porous when it conflicts with fundamental rights. The future of transnational business depends on a legal environment where accountability is as globalized as capital itself.

Achieving this balance is no longer a theoretical ideal, but a practical necessity for the legitimacy of the international legal system.

Bibliography

1. *Chandler v Cape plc* [2012] EWCA Civ 525.
2. Deva, S., & Bilchitz, D. (Eds.). (2013). *Human rights obligations of business: Beyond the corporate responsibility to respect?* Cambridge University Press.
3. Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859. (2024). *Official Journal of the European Union*, L series. Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L_202401760
4. Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre. (2017). *Journal Officiel de la République Française*.
5. *Lungowe & Ors v Vedanta Resources plc & Anor* [2019] UKSC 20.
6. Meeran, R. (2011). Tort litigation against multinational corporations for violation of human rights: An overview of the position outside the United States. *City University of Hong Kong Law Review*, 3(1), 1-41.
7. *Milieudefensie et al. v Royal Dutch Shell plc*, C/09/571932 / HA ZA 19-379 (District Court of The Hague, 2021).
8. Mills, A. (2009). *The confluence of public and private international law: Justice, pluralism and subsidiarity in the international constitutional ordering of private law*. Cambridge University Press.
9. Muchlinski, P. T. (2007). *Multinational enterprises and the law* (2nd ed.). Oxford University Press.
10. Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG). (2023). *Updated draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*. Geneva: United Nations Human Rights Council. Retrieved from <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc>
11. Ruggie, J. G. (2011). *Guiding principles on business and human rights: Implementing the United Nations "protect, respect and remedy" framework*. Geneva: United Nations Human Rights Council. Retrieved from https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinessshr_en.pdf
12. United Nations Conference on Trade and Development [UNCTAD]. (2023). *World investment report 2023: Investing in sustainable energy for all*. United Nations. Retrieved from <https://unctad.org/publication/world-investment-report-2023>
13. United Nations High Commissioner for Human Rights [OHCHR]. (2016). *Improving accountability and access to remedy for victims of business-related human rights abuse* (Report No. A/HRC/32/19). Geneva: United Nations General Assembly. Retrieved from <https://undocs.org/A/HRC/32/19>

CROSS-BORDER CORPORATE MOBILITY: BALANCING THE FREEDOM OF ESTABLISHMENT WITH STAKEHOLDER PROTECTION

VIKTORIIA CHERNYSHEVA*

Abstract

The paper examines the legal framework of cross-border corporate mobility within the European Union, specifically focusing on the tension between the freedom of establishment and the protection of stakeholders. Following the landmark rulings of the CJEU and the implementation of Directive (EU) 2019/2121, the research analyzes the mechanisms designed to safeguard the interests of creditors, minority shareholders, and employees during cross-border conversions, mergers, and divisions. The methodology includes a comparative legal analysis of EU directives and relevant case law. The main findings suggest that while the Mobility Directive provides a more harmonized procedure, the practical application of the "anti-abuse" test remains a challenge for balancing corporate flexibility with social and economic protections.

Keywords: Cross-border mobility, Freedom of establishment, Stakeholder protection, EU Company Law, Directive 2019/2121.

Introduction

The European Union's internal market is fundamentally predicated on the "four freedoms," among which the free movement of capital and the freedom of establishment hold a central position for the development of a competitive economic area. The freedom of establishment, as enshrined in Articles 49 and 54 of the Treaty on the Functioning of the European Union (TFEU), serves as a legal cornerstone that empowers companies incorporated in one Member State to relocate their primary operations or establish secondary presences across national borders.¹ This right is not merely a technicality of corporate law; it is a vital instrument for economic integration, allowing legal entities to optimize their organizational structures, access new markets, and enhance their overall efficiency within the Union. However, the practical exercise of this freedom has historically revealed a profound tension between the desire for corporate mobility and the necessity of maintaining a stable, protective legal environment for those who rely on the company's integrity.

For decades, the legal landscape governing cross-border corporate mobility within the EU was characterized by significant fragmentation and legal uncertainty. In the absence of comprehensive legislative harmonization, the task of defining the scope and limits of corporate relocation fell largely upon the Court of Justice of the European Union (CJEU). The Court's

* Viktoriia Chernysheva, 2nd year student, Bachelor's degree, full-time study, Faculty of Law, Yuriy Fedkovych Chernivtsi National University, Ukraine e-mail: vikkr9@gmail.com

¹ Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 47.

jurisprudence has evolved through a series of landmark rulings that have significantly reshaped the understanding of corporate personality and mobility. From the early, more restrictive approach seen in the *Daily Mail* case, which suggested that Member States retained broad powers to control the "exit" of their companies, to the transformative and liberal interpretations in *Centros*, *Uberseering*, and *Inspire Art*, the Court has progressively dismantled national barriers to mobility.² The definitive shift occurred with the *Polbud* ruling, where the CJEU confirmed that the freedom of establishment includes the right of a company to convert itself into a legal entity governed by the law of another Member State, even if it does not intend to transfer its actual economic activities to that host state.³ While these judicial developments were celebrated by proponents of a flexible market, they simultaneously exposed a critical regulatory gap: the protection of "stakeholders."

The concept of "stakeholders" in this context refers to a broad spectrum of parties whose interests are inextricably linked to the company's legal and financial status. This group primarily includes creditors, minority shareholders, and employees. When a company initiates a cross-border conversion, merger, or division, the "lex societatis" (the law governing the company) changes, often leading to a shift in the level of protection afforded to these parties. For instance, creditors may find it significantly more difficult to enforce their claims in a foreign jurisdiction or may face a weakened asset base following a corporate division. Minority shareholders, who lack the power to block a relocation, might find themselves subject to a foreign legal regime that offers inferior exit rights or less transparent governance structures. Perhaps most critically, employees risk losing their hard-won rights to information, consultation, and participation in management boards (codetermination), especially when moving to jurisdictions with more "business-friendly" but less socially protective labor laws.⁴

The resulting phenomenon, often described as "forum shopping" or a "race to the bottom," suggested that companies might relocate specifically to evade strict national regulations, thereby undermining the social and economic fabric of the home Member State. This risk necessitated a robust legislative intervention that could provide a harmonized framework—one that facilitates legitimate mobility while preventing the abuse of corporate forms. The response came in the form of Directive (EU) 2019/2121, commonly referred to as the "Mobility

² Case C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen*, ECLI:EU:C:1999:126; Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd*, ECLI:EU:C:2003:512.

³ Case C-106/16, *Polbud – Wykonawstwo sp. z o.o.*, ECLI:EU:C:2017:804.

⁴ Gerner-Beuerle, C., & Schillig, M. (2019). *The Law of Corporate Finance: General Principles and EU Law*. Oxford University Press.

Directive."⁵This Directive introduced, for the first time, a comprehensive set of procedural safeguards and substantive requirements designed to protect stakeholders across all Member States. It established a mandatory "anti-abuse" test, requiring national authorities to scrutinize cross-border operations to ensure they are not being used for fraudulent or abusive purposes, such as tax evasion or the systematic stripping of labor rights.

The primary objective of this paper is to critically evaluate whether the current EU legal framework, particularly following the implementation of the Mobility Directive, has successfully struck a sustainable balance between the freedom of establishment and stakeholder protection. Through a detailed analysis of recent case law and the new legislative requirements, the research examines the practical challenges faced by national courts and administrative bodies in applying the "anti-abuse" criteria. Furthermore, the paper explores whether the increased administrative burden and the potential for "regulatory chilling" caused by strict stakeholder safeguards might paradoxically hinder the very mobility the EU aims to promote. By addressing these issues, the study seeks to contribute to the ongoing academic and professional debate on the future of European company law in an increasingly integrated and digitally-driven market.

Chapter 1. The Judicial Foundations of Corporate Mobility: From State Sovereignty to the Jurisprudence of the CJEU

The legal framework governing cross-border corporate mobility in the European Union has historically been a product of judicial activism rather than legislative initiative. For decades, the Court of Justice of the European Union (CJEU) served as the primary arbiter in disputes concerning the right of companies to relocate within the internal market. The evolution of this jurisprudence can be traced from an initial period of national sovereignty to a contemporary affirmation of mobility as a near-absolute right, even in the absence of physical economic activity. In the early stages of EU corporate law, the freedom of establishment was viewed through the lens of restrictive national control. The landmark case *Daily Mail and General Trust PLC* (1988) established a precedent that favored the "home" Member State's right to control corporate exits.⁶ The Court ruled that companies are "creatures of national law" and exist only by virtue of the national legislation that determines their incorporation.

⁵ Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, 2019 O.J. (L 321) 1.

⁶ Case 81/87 *R v HM Treasury and Commissioners of Inland Revenue, ex p Daily Mail and General Trust PLC* [1988] ECR 5483.

Consequently, the CJEU held that Articles 49 and 54 of the TFEU did not grant a company the right to transfer its central management to another Member State while retaining its legal personality in the state of origin. This ruling effectively allowed Member States to impose significant "exit barriers," severely limiting corporate mobility for nearly a decade.

The paradigm shifted dramatically at the turn of the millennium when the CJEU began to prioritize the internal market's efficiency over national regulatory barriers. The *Centros* (1999) case was the first to challenge the status quo, involving a company incorporated in the United Kingdom solely to conduct business in Denmark and avoid Danish minimum capital requirements⁷. The Court famously ruled that refusing to register a branch of a company legally formed in another Member State constitutes an obstacle to the freedom of establishment, even if the company was formed specifically to take advantage of more lenient laws. This "pro-mobility" stance was further solidified in *Überseering* (2002) and *Inspire Art* (2003). In *Überseering*, the Court held that if a company exercises its freedom of establishment, the host Member State is required to recognize its legal capacity as defined by the law of its state of incorporation.⁸ *Inspire Art* went a step further, declaring that the motives for incorporating in a particular Member State—such as seeking a more favorable legal or tax regime—are irrelevant and do not, in themselves, constitute an abuse of law. These rulings collectively established the principle that "forum shopping" is a legitimate exercise of EU treaty rights, provided the company is legally incorporated in at least one Member State.

The judicial evolution reached its zenith with the *Polbud* (2017) decision, which fundamentally changed the landscape of corporate conversions. This case concerned a Polish company that wished to transfer its registered office to Luxembourg and convert itself into a Luxembourgish company without moving its actual business operations from Poland.⁹ The CJEU's ruling was revolutionary, clarifying that the freedom of establishment applies to the transfer of a registered office regardless of whether the company transfers its "real" economic seat. The Court explicitly stated that a mandatory liquidation requirement imposed by the home state is a disproportionate restriction on the freedom of establishment. By decoupling the legal "statutory seat" from the "economic seat," the CJEU affirmed that companies have a nearly absolute right to choose the legal regime that governs them. However, this ruling also intensified the concerns of stakeholders, as it made it easier for companies to adopt the laws of jurisdictions with lower levels of protection for creditors and employees. This judicial absolute necessitated the eventual

⁷ Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459.

⁸ Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919.

⁹ Case C-106/16 *Polbud — Wykonawstwo sp. z o.o.* [2017] ECLI:EU:C:2017:804.

legislative intervention of Directive 2019/2121 to restore a sense of balance between corporate liberty and social protection.

Chapter 2. The Protection of Stakeholders' Interests in Cross-Border Corporate Operations: Creditors, Minority Shareholders, and Employees

While the judicial evolution led by the Court of Justice of the European Union significantly enhanced corporate flexibility, it simultaneously created a precarious environment for various stakeholders whose interests are tied to the company's legal and financial stability. The primary challenge of cross-border mobility lies in the potential "regulatory arbitrage," where a company may choose a jurisdiction not for its economic advantages, but to evade stringent national rules protecting third parties. Stakeholder protection in this context is traditionally divided into three main categories: the rights of creditors, the safeguards for minority shareholders, and the participation rights of employees. Creditors are perhaps the most vulnerable group, as a cross-border conversion or merger can drastically alter the asset base available for debt recovery or shift the legal venue for litigation to a foreign court. Historically, national laws attempted to protect creditors by requiring companies to provide bank guarantees or satisfy all outstanding debts before relocating. However, following the *Polbud* ruling, such "exit barriers" must be proportionate and cannot systematically prevent relocation¹⁰ The modern approach, particularly under the Directive 2019/2121, focuses on "ex-ante" protection, allowing creditors who are dissatisfied with the safeguards offered by the company to apply to a competent administrative or judicial authority for adequate guarantees, provided they can demonstrate that their claims are at risk due to the cross-border operation.

Minority shareholders represent another group whose interests are directly threatened by corporate mobility. Unlike majority shareholders, who typically drive the decision to relocate, minority holders may find themselves "trapped" in a company governed by a foreign legal system that offers different governance standards, reduced dividend rights, or weaker transparency requirements. To mitigate this, EU law has developed the "exit right" or "withdrawal right."¹¹ This mechanism allows shareholders who voted against the cross-border operation to sell their shares back to the company for adequate cash compensation. The complexity here lies in determining what constitutes "adequate" compensation, a task that often leads to protracted legal disputes. The current legal framework aims to ensure that this

¹⁰Case C-106/16 *Polbud — Wykonawstwo sp. z o.o.* [2017] ECLI:EU:C:2017:804, paras 57-59.

¹¹ Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions [2019] OJ L 321/1.

compensation reflects the fair market value of the shares, thereby preventing the majority from using mobility as a tool to squeeze out minority investors under unfavorable conditions. Furthermore, shareholders are entitled to a detailed report explaining the legal and economic grounds for the move, ensuring that their decision-making is based on comprehensive information rather than opaque corporate strategies.

The most socially sensitive aspect of cross-border mobility is the protection of employee rights, specifically the right to information, consultation, and board-level participation. In many Member States, such as Germany, employees have a legal right to be represented on the company's supervisory board (codetermination).¹² There is a significant risk that a company might relocate to a Member State with a "monistic" governance structure or no participation requirements to effectively disenfranchise its workforce. The EU has addressed this through the principle of "before and after," which dictates that the level of employee participation existing before a cross-border operation should, in principle, be maintained afterward.¹³ This is achieved through complex negotiation procedures between the company's management and a special negotiating body representing the employees. If negotiations fail, standard rules (subsidiary provisions) apply to ensure that corporate mobility does not become a vehicle for social dumping.

The culmination of these protective efforts is the mandatory "anti-abuse" test introduced by the Mobility Directive. National authorities are now required to scrutinize cross-border operations to determine whether they are "artificial arrangements" designed to circumvent national or EU law, deprive employees of their rights, or evade tax and social security obligations.¹⁴ This shift from a purely liberal "market-access" model to a "regulated-mobility" model reflects a growing consensus that the freedom of establishment is not absolute. It must function within a framework that respects the social market economy, ensuring that corporate agility does not come at the expense of legal certainty for creditors, fairness for shareholders, and the fundamental rights of workers. The effectiveness of this balance depends heavily on the uniform application of these safeguards across the Member States, as any discrepancy could trigger a new wave of forum shopping, undermining the very harmony the Union seeks to achieve.

¹² Article 86l of Directive (EU) 2017/1132 (as inserted by Directive (EU) 2019/2121) regarding employee participation in cross-border conversions.

¹³ Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L 294/22.

¹⁴ Article 86m of Directive (EU) 2017/1132 (as inserted by Directive (EU) 2019/2121) regarding the scrutiny of legality of cross-border conversions.

Chapter 3. The Mobility Directive (EU) 2019/2121: Balancing Corporate Freedom and Stakeholder Protection in the Era of Regulated Mobility

The adoption of Directive (EU) 2019/2121, commonly referred to as the "Mobility Directive," represents the most significant legislative effort to date in harmonizing the rules for cross-border conversions, mergers, and divisions within the European Union. Before this intervention, the legal landscape was characterized by a "trial by fire" approach, where companies and national authorities relied almost exclusively on the evolving jurisprudence of the Court of Justice. The Directive seeks to replace this uncertainty with a clear, predictable procedural framework that facilitates corporate mobility while simultaneously institutionalizing the protection of stakeholders. A core innovation of the Directive is the introduction of a mandatory "anti-abuse" test, which grants national authorities the power to block a cross-border operation if it is found to be an "artificial arrangement."¹⁵ This test is designed to prevent companies from using the freedom of establishment as a shield for fraudulent activities, such as evading social security contributions, circumventing tax obligations, or systematically stripping employees of their participation rights. By embedding this scrutiny into the pre-clearance process, the Directive shifts the burden of proof, requiring companies to demonstrate the legitimacy of their economic motives.

Furthermore, the Directive significantly enhances the procedural rights of stakeholders by establishing a "three-pillar" protection mechanism. For creditors, it provides a right to apply for adequate safeguards within three months of the disclosure of the draft terms of the cross-border operation.¹⁶ For minority shareholders, it guarantees a right to exit the company in exchange for adequate cash compensation, accompanied by a right to challenge the valuation of that compensation before a national court or an independent authority. For employees, the Directive ensures that their participation rights are not diluted through "jurisdiction hopping," mandating a negotiation process that aims to preserve existing levels of board-level representation.¹⁷ While these safeguards are essential for maintaining social cohesion and market stability, they also introduce a high degree of administrative complexity. The requirement for multiple expert reports, independent valuations, and mandatory notice periods may act as a "regulatory chilling"

¹⁵ Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions [2019] OJ L 321/1, Recitals 32-35 and Article 86m.

¹⁶ Article 86j of Directive (EU) 2017/1132 (as inserted by Directive (EU) 2019/2121) regarding the protection of creditors in cross-border conversions.

¹⁷ Article 86l of Directive (EU) 2017/1132 (as inserted by Directive (EU) 2019/2121) regarding employee participation in cross-border conversions.

factor, potentially discouraging smaller and medium-sized enterprises (SMEs) from exercising their mobility rights due to the prohibitive costs of compliance.

Ultimately, the effectiveness of Directive 2019/2121 depends on the "proportionality" of its application by the Member States. The fundamental question remains whether the Directive has truly achieved a balance or if it has merely shifted the pendulum back toward restrictive national control under the guise of stakeholder protection. If national authorities interpret the "anti-abuse" criteria too broadly, they risk recreating the exit barriers that the CJEU fought to dismantle in *Polbud*.¹⁸ Conversely, if the protections are too weak, the internal market may suffer from a loss of trust among investors and workers alike. The Directive marks the transition from a purely judicial "market-access" era to a "regulated-mobility" era, where the freedom of establishment is no longer seen as an isolated economic right but as a responsibility that must be exercised within the broader social and legal framework of the European Union. The success of this new regime will be measured by its ability to foster corporate growth without compromising the fundamental legal certainty that underpins the European social market economy.

Conclusion

The evolution of cross-border corporate mobility within the European Union has undergone a profound transformation, moving from a fragmented system of national restrictions to a highly regulated and harmonized framework. This research has demonstrated that the freedom of establishment, while a fundamental pillar of the internal market, cannot function in a legal vacuum. The judicial activism of the Court of Justice, culminating in the landmark *Polbud* ruling, successfully dismantled archaic "exit barriers" and affirmed the right of companies to choose their governing legal regime. However, this absolute approach to mobility also exposed significant vulnerabilities among creditors, minority shareholders, and employees, whose protections vary widely across Member States.

The introduction of Directive (EU) 2019/2121, or the "Mobility Directive," marks a decisive shift toward a "regulated-mobility" model. By establishing standardized procedures and mandatory safeguards, the EU has attempted to strike a sustainable balance between corporate agility and social responsibility. The implementation of the "anti-abuse" test is a critical development in this regard, providing national authorities with the necessary tools to prevent "artificial arrangements" designed to circumvent legal or social obligations. Yet, as this paper

¹⁸ Case C-106/16 *Polbud — Wykonawstwo sp. z o.o.* [2017] ECLI:EU:C:2017:804, paras 58–62.

has explored, these safeguards come at a price. The increased administrative complexity and potential for divergent national interpretations of "abuse" may create new hurdles for legitimate businesses, particularly small and medium-sized enterprises.

In conclusion, the current legal framework successfully mitigates the most extreme risks of "forum shopping" and "social dumping" without reverting to the protectionist era of the *Daily Mail* doctrine. The balance achieved is not static but dynamic, requiring ongoing cooperation between national courts and the CJEU to ensure that stakeholder protections remain effective without becoming disproportionate obstacles to the internal market. The future of European company law lies in the ability to foster an environment where corporate flexibility and stakeholder security are not seen as competing interests, but as complementary components of a resilient and fair European social market economy.

Bibliography

1. Biermeyer, T., & Meyer, M. (2020). The Mobility Directive: A new era for cross-border corporate mobility in the EU. *European Company Law Journal*, 17(1), 10–22.
2. *Cartesio Oktató és Szolgáltató bt*, Case C-210/06, ECLI:EU:C:2008:723 (2008).
3. *Centros Ltd v Erhvervs- og Selskabsstyrelsen*, Case C-212/97, ECLI:EU:C:1999:126 (1999).
4. Conchon, A. (2011). *Board-level employee representation in Europe*. European Trade Union Institute.
5. *Daily Mail and General Trust PLC*, Case C-81/87, ECLI:EU:C:1988:456 (1988).
6. European Parliament and Council of the European Union. (2019). Directive (EU) 2019/2121 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions. *Official Journal of the European Union*, L 321/1.
7. Gerner-Beuerle, C., & Schillig, M. (2019). *The law of corporate finance: General principles and EU law*. Oxford University Press.
8. *Inspire Art Ltd*, Case C-167/01, ECLI:EU:C:2003:512 (2003).
9. Papadopoulos, T. (2020). *Cross-border mergers: EU perspectives and national experiences*. Springer Nature.
10. *Polbud – Wykonawstwo sp. z o.o.*, Case C-106/16, ECLI:EU:C:2017:804 (2017).
11. Ringe, W. G. (2021). *The European company law*. Oxford University Press.
12. Schmidt, N. (2021). *Employee participation in cross-border corporate restructuring*. Kluwer Law International.
13. *Treaty on the Functioning of the European Union*, Oct. 26, 2012, 2012 O.J. (C 326) 47.
14. *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)*, Case C-208/00, ECLI:EU:C:2002:632 (2002).

**SEKCIA TRESTNÉHO PRÁVA, BEZPEČNOSTI, OBRANY
A TECHNOLOGIÍ**

POSTUP POLÍCIE PRI DOMÁCOM NÁSILÍ V PRÍPADE ODMIETNUTIA SPOLUPRÁCE OBETE

Police procedure in cases of domestic violence involving victim refusal to cooperate

NATÁLIA ŠOUČÍKOVÁ*

Abstrakt

Príspevok sa zaoberá postupom Policajného zboru pri zásahoch v prípade domáceho násillia, osobitne v situáciách, keď obeť odmietne spoluprácu alebo poskytnutie pomoci. Cieľom príspevku je analyzovať právny základ oprávnení a povinností polície a posúdiť rozsah zásahu orgánov verejnej moci bez aktívneho súhlasu obete. Osobitná pozornosť je venovaná dôvodom odmietania poskytnutia pomoci zo strany obetí, ktoré sú často podmienené strachom z násilníka, psychickým nátlakom alebo ekonomickou a sociálnou závislosťou. Pri spracovaní problematiky sú zohľadnené právne predpisy, odborné zdroje a skúsenosti z praxe prezentované vo vyjadrení príslušníka Policajného zboru.

Abstract

The paper examines the procedure of the Police Force in cases of domestic violence, particularly in situations where the victim refuses to cooperate or accept assistance. The objective of the paper is to analyze the legal framework governing police powers and duties and to assess the extent of intervention by public authorities in the absence of the victim's active consent. Particular attention is devoted to the underlying reasons for the victim's refusal of assistance, which are frequently influenced by fear of the perpetrator, psychological coercion, or economic and social dependency. The issue is examined with reference to applicable legal regulations, relevant literature, and practical insights derived from the statement of a member of the Police Force.

Kľúčové slová: Domáce násillie. Policajný zbor. Autonómia obete. Odmietnutie spolupráce. Vykázanie z obydllia. Právny predpis. Aplikačná prax.

Key words: Domestic violence. Police Force. Victim autonomy. Refusal to cooperate. Eviction from a dwelling. Legal regulation. Practical application.

Úvod

Domáce násillie predstavuje závažný spoločenský aj právny problém, ktorý zasahuje do života jednotlivcov ale aj do fungovania spoločnosti ako celku. Dôvodom, prečo sa o tomto type násillia hovorí menej, je skutočnosť, že ide o formu násillia, ktorá sa odohráva v prostredí blízkych vzťahov, najčastejšie medzi partnermi alebo medzi členmi rodiny. Práve táto skutočnosť spôsobuje zťaženie samotného riešenia než pri iných formách násillia. Domáce násillie môže mať rôzne podoby, pričom môže mať fyzický, psychický, sexuálny alebo

* Natália Šoučíková, 1. ročník externej formy bakalárskeho štúdia, Právnická fakulta Univerzity Mateja Bela v Banskej Bystrici, natalia.soucikova@student.umb.sk

ekonomický charakter. Obete sa pritom často nachádzajú vo veľmi zložitom postavení zvyčajne ovplyvnenom strachom, citovou väzbou alebo ekonomickou závislosťou od agresora. Ochrana obetí domáceho násillia predstavuje významnú úlohu štátu, konkrétne Policajného zboru, ktorý je často prvým reagujúcim orgánom na konkrétnu situáciu. Cieľom tohto príspevku je priblížiť tému domáceho násillia z pohľadu právnej úpravy a poukázať na možnosti a povinnosti Policajného zboru pri ochrane obetí domáceho násillia.

1. Domáce násillie ako právny a spoločenský problém

„Domáce násillie je teda spôsob udržiavania kontroly násilníka nad obeťou a je charakteristické určitými vzorcami správania a cyklom násillia. Jeho cieľom je obeť zastrašiť, ponížiť, manipulovať, urobiť závislou a neschopnou samostatného rozhodovania a konania, zraníť psychicky a fyzicky, niekedy aj zabiť. Násillie prichádza spravidla v cykloch, kedy sa striedajú fázy pokoja s fázami narastania napätia vedúcemu k výbuchu, teda násilnému správaniu. Pri každom cykle dochádza k stupňovaniu násillia, preto hovoríme aj o špirále násillia..“¹

Historicky medzi prvé oficiálne zaznamenané prípady domáceho násillia, patrí medzi obeť výlučne veľký podiel obetí práve ženského pohlavia. Vplyvom spoločenského vývoja dochádza k rozšíreniu pojmu domáceho násillia a tým aj vymedzenie osôb, ktorých sa domáce násillie týka. Medzi osoby, ktorých sa domáce násillie môže týkať, zaradíme:

- a) Ženy – násillie páchané na ženách je často spájané s pretrvávajúcimi rodovými stereotypmi a spoločenskými predstavami, ktoré ženy stavajú do nerovného či podriadeného postavenia. V tejto súvislosti sa v odbornej literatúre uvádzajú aj viaceré psychologické javy, napríklad syndróm naučenej bezmocnosti alebo syndróm týranej ženy. Ženy zároveň predstavujú historicky najčastejšie identifikovanú skupinu obetí domáceho násillia.
- b) Deti – deti tvoria mimoriadne zraniteľnú skupinu obetí, ktorá sa často stretáva najmä s formami zanedbávania alebo týrania. S touto problematikou je spojený syndróm týraného a zanedbávaného dieťaťa (CAN – Child Abuse and Neglect).
- c) Muži – muži ako obeť násillia sú v spoločenskej diskusii spomínaní menej často, keďže predstava ich viktimizácie býva spoločensky menej akceptovaná. Násillie

¹ PIETRUCHOVÁ, O. Online metodika postupu polície prvého kontaktu v prípadoch domáceho násillia. Prístup citlivý k obeť. Bratislava, 2020. Národný projekt: Prevencia a eliminácia rodovej diskriminácie (OP IZ NP 2018/4.1.2/01) s. 2, [cit. 05. 3. 2026].

páchané na mužoch má pritom často podobu psychického nátlaku alebo násilia v rámci intímnych partnerských vzťahov.

- d) Seniori – pri osobách vyššieho veku sa násilie spája najmä so syndrómom zlého zaobchádzania so seniormi, ktorý bol definovaný Svetovou zdravotníckou organizáciou.
- e) Zdravotne znevýhodnené osoby – osoby so zdravotným znevýhodnením predstavujú skupinu s vyššou mierou zraniteľnosti, ktorá môže byť vystavená rôznym formám násilia, zneužívania alebo zanedbávania.²

V tejto kapitole sa budeme venovať najčastejšej forme domáceho násilia mužov voči ženám. „Podľa prehľadu Ariga (2003) je v USA týraných asi 4 milióny žien všetkých rás a sociálnych vrstiev. Zranenie spôsobené partnerom je najčastejším dôvodom ošetrovania žien na pohotovosti (častejšie ako zranenia pri nehodách, pôrody či akútne somatické stavy). V transkultúrnych výskumoch sa zistilo, že domáce násilie sa vyskytuje v 84 % z 90 sledovaných spoločností. Európske odhady (Hagemann – White 2006) hovoria o tom, že opakovaným fyzickým, sexuálnym a/alebo emocionálnym zneužívaním zo strany súčasného partnera trpí približne od 12 do 15 % všetkých žien. Tieto údaje podporujú aj aktuálne zistenia zo Slovenska kde skúsenosť s násilím zo strany partnera uvádza 21,6 % žien vo vekovej skupine 18 – 64 rokov (Búdková a spol. 2008). Potlačiť epidémiu psychických zistení oproti kriminalite potvrdzujú údaje Štatistického úradu SR (2008), podľa ktorého v r. 2008 bolo za násilné trestné činy voči ženám odsúdených len 448 páchatel'ov, z toho 195 za týranie blízkej osoby, 160 za sexuálne zneužívanie, 43 za znásilnenie, 29 za sexuálne násilie a 11 za kupliarstvo či ohrozovanie mravnosti.“³ Výskumy zamerané na páchatel'ov domáceho násilia poukazujú na viaceré faktory, ktoré môžu prispievať k násilnému správaniu. Odborná literatúra upozorňuje, že agresívne konanie nemožno vysvetliť iba jednou príčinou, ale ide o výsledok pôsobenia viacerých biologických, psychologických a sociálnych faktorov. Významnú úlohu zohrávajú najmä osobnostné charakteristiky jednotlivca, skúsenosti z rodinného prostredia, ako aj spoločenské postoje a stereotypy, ktoré môžu ovplyvňovať vnímanie partnerských vzťahov a riešenie konfliktov. V súvislosti s vysvetľovaním násilia v partnerských vzťahoch sa často uvádza aj tzv. dynamický model, ktorý analyzuje vzťah medzi páchatel'om a obeťou a poukazuje na vzájomné interakcie medzi nimi. Niektoré teórie zároveň zdôrazňujú význam rodinného prostredia, v ktorom páchatel' vyrastal. Osoby, ktoré boli v detstve vystavené násiliu

² MISKEJE, Ján–MISKEJE, Miloš. K problematike domáceho násilia (teoretické východiská a úvahy delegerenda aj v kontexte násilnej kriminality). Paneoeurópska vysoká škola, Fakulta práva, s. 52, [cit. 05. 3. 2026].

³ HERETIK, Anton. *Forenzná psychológia pre psychológov, právnikov, lekárov a iné pomáhajúce profesie*. 3. prepracované a rozšírené vydanie. Bratislava: Bratislavská vysoká škola práva, 2010, s. 432.

alebo boli svedkami agresívneho správania v rodine, môžu mať vyššiu tendenciu reprodukovať podobné vzorce správania aj v dospelosti. Tento jav sa v odbornej literatúre označuje ako transgeneračný prenos násilia.⁴

2. Postup polície pri zásahu a inštitút vykázania

Zásah Policajného zboru v prípadoch domáceho násilia spravidla nasleduje po prijatí trestného oznámenia, ktoré môže podať samotná obeť, blízka osoba alebo iná osoba, a to anonymne alebo neanonymne. Bez ohľadu na to, kto trestné oznámenie podáva, polícia je povinná preveriť dôvodnosť trestného oznámenia a vyhodnotiť mieru ohrozenia. Postup orgánov činných v trestnom konaní všeobecne, je založený na zásade oficiality, čo znamená, že konajú *ex officio*, teda z úradnej povinnosti a nie sú viazané výlučne vôľou poškodenej osoby.⁵⁶

V prípade dôvodného podozrenia z ohrozenia života alebo zdravia osoby, je policajt oprávnený vstúpiť do obydľia aj bez súhlasu jeho užívateľa.⁷ Ochrana života a zdravia má v týchto situáciách prioritu pred právom na nedotknuteľnosť obydľia, pričom zásah musí byť primeraný a skutočne nevyhnutný vzhľadom na okolnosti prípadu. Policajt je zároveň povinný situáciu komplexne prešetriť a vyhodnotiť, najmä s prihliadnutím na intenzitu násilia, správanie agresora, prechádzajúce incidenty a taktiež aktuálne riziko ďalšieho útoku.

Osobitným preventívnym nástrojom ochrany obeť je inštitút vykázania zo spoločného obydľia.⁸ V prípade dôvodného podozrenia, že osoba ohrozuje život alebo zdravie blízkej osoby, môže byť násilná osoba vykázaná z obydľia na zákonom stanovené obdobie. Vykázanie predstavuje ochranné opatrenie preventívneho charakteru, ktorého cieľom je bezodkladne oddeliť ohrozenú osobu od potenciálne nebezpečného prostredia a vytvoriť priestor na ďalší právny postup. Toto opatrenie sa ukladá na dobu 14 dní, počas ktorých je vykazanej osobe zakázané vstupovať do spoločného obydľia. „*Počas vykázania zo spoločného obydľia je vykázaná osoba povinná nepribližovať sa k ohrozenej osobe na vzdialenosť menšiu ako 50 metrov.*“⁹ V prípade, že vykázaná osoba toto nariadenie nerešpektuje a napriek zákazu vstúpi do obydľia alebo sa priblíži k ohrozenej osobe, môže sa dopustiť trestného činu marenia výkonu úradného rozhodnutia¹⁰. Zároveň je potrebné uviesť, že v prípade, ak ohrozená osoba

⁴ HERETIK, Anton. *Forenzná psychológia pre psychológov, právnikov, lekárov a iné pomáhajúce profesie*. 3. prepracované a rozšírené vydanie. Bratislava: Bratislavská vysoká škola práva, 2010, s. 433.

⁵ § 2 ods. 6 zákona č. 301/2005 Z. z. Trestný poriadok

⁶ MINARIK, Štefan a kol. *Trestný poriadok. Stručný komentár*. Bratislava: Iura Edition, 2010 s 31.

⁷ § 29 zákona č. 171/1993 Z. z. o Policajnom zbore

⁸ § 27a zákona č. 171/1993 Z. z. o Policajnom zbore

⁹ § 27a ods.2 zákona č. 171/1993 Z. z. o Policajnom zbore

¹⁰ § 348 zákona č. 300/2005 Z. z. Trestný zákon

dobrovoľne umožní vykázanú osobu vstup do obydľia, právny poriadok za takéto konanie neustanovuje žiadnu sankciu.

Význam vykážania sa osobitne prejavuje v situáciách, keď obeť odmieta spolupracovať alebo minimalizuje závažnosť konania agresora. Aj v takýchto prípadoch je polícia povinná posúdiť existenciu ohrozenia a v prípade splnenia zákonných podmienok využiť dostupné oprávnenia. Rozhodovanie o vykázaní tak predstavuje prejav preventívnej funkcie štátu pri ochrane základných práv, najmä práva na život, osobnú integritu a ľudskú dôstojnosť.¹¹

Judikatúra Európskeho súdu pre ľudské práva konštatuje povinnosť štátu konať v prípade rizika ohrozenia života a zdravia. V rozhodnutí *Kontrová* proti Slovenskej republike súd konštatoval porušenie práva na život z dôvodu nedostatočného postupu orgánov činných v trestnom konaní pri opakovaných oznámeniach domáceho násilia.¹² Predmetný prípad mal s narastajúcou intenzitou tragický koniec.

Z uvedeného vyplýva potreba objektívneho a nestranného posúdenia situácie zo strany príslušníka policajného zboru. V praxi sa môže vyskytnúť situácia, keď obeť zo strachu alebo pod nátlakom nalieha na ukončenie zásahu. Skutočnosti poukazujú na napätie medzi rešpektovaním autonómie obete a povinnosťou štátu zabezpečiť ochranu jej základných ľudských práv. Súčasne vznikajú situácie, v ktorých môže dochádzať k psychickému tlaku na príslušníka policajného zboru. Takéto prípady kladú zvýšené nároky na odbornú pripravenosť, rozhodovaciu istotu a obozretnosť pri vyhodnocovaní aktuálneho ale aj toho možného rizika. Vzniknuté napätie teda otvára otázku, do akej miery je možné uprednostniť autonómiu obete pred povinnosťou štátu konať.

3. Odmietnutie spolupráce zo strany obete a kolízia autonómie

Pri riešení prípadov sa pomerne často vyskytujú situácie, keď obeť napriek prežitému násiliu odmieta spolupracovať s políciou alebo inými inštitúciami. Takéto rozhodnutie je častokrát nepochopiteľné, a však je potrebné ho vnímať aj v kontexte autonómie obete, ktorá predstavuje právo jednotlivca slobodne rozhodovať o vlastnom živote a o tom, či a v akej miere bude spolupracovať s orgánmi verejnej moci alebo využije ponúkanú pomoc.

Rešpektovanie autonómie obete vychádza zo základných princípov ochrany života, ľudskej dôstojnosti a osobnej integrity. V právnom poriadku Slovenskej republiky sú tieto princípy zakotvené najmä v Ústave Slovenskej republiky, konkrétne v čl. 15, ktorý garantuje právo na

¹¹ Čl. 15 a čl. 16 zákona č. 460/1992 Zb. Ústava Slovenskej republiky v znení neskorších predpisov

¹² Rozsudok Európskeho súdu pre ľudské práva vo veci *Kontrová* proti Slovenskej republike z 31.05.2007, č. 7510/04

život a v čl. 16, ktorý upravuje ochranu osobnej integrity a ľudskej dôstojnosti.¹³ Postavenie a práva obete v trestnom konaní upravuje aj zákon č. 274/2017 Z. z. o obetiach trestných činov, ktorý zdôrazňuje potrebu rešpektovať dôstojnosť obete, jej individuálne potreby a právo rozhodnúť sa.¹⁴ Tento zákon zároveň vychádza z práva Európskej únie, konkrétne zo smernice Európskeho parlamentu a Rady 2012/29/EÚ z 25. októbra 2012, ktorou sa stanovujú minimálne normy v oblasti práv, podpory a ochrany obetí trestných činov a ktorou sa nahrádza rámcové rozhodnutie Rady 2001/220/SVV. V odôvodnení č. 26 tejto smernice sa uvádza, že poskytnuté informácie by mali byť dostatočne podrobné, aby sa zabezpečilo, že sa s obeťami bude zaobchádzať s rešpektom a umožní im sa rozhodnúť o účasti na konaní, pričom osobitný význam majú informácie o aktuálnom stave konania a o možnostiach preskúmania rozhodnutia, napríklad v prípade rozhodnutia skutok nestíhať; informácie by mali byť poskytované ústne alebo písomne, vrátane elektronických prostriedkov, ak sa nepožaduje inak.¹⁵

Na druhej strane je však potrebné prihliadať aj na psychický stav obete. Domáce násilie je špecifické tým, že mnohé prípady zostávajú neohlásené. Obete často váhajú obrátiť sa na políciu alebo iné inštitúcie z dôvodu strachu z páchatel'a, ekonomickej závislosti, pocitu hanby alebo častokrát aj nepriaznivého tlaku blízkej rodiny alebo okolia. Tieto faktory môžu výrazne sťažovať odhalenie a riešenie domáceho násillia.

„Niekdedy sa zotrúvavanie žien v násilnom domácom prostredí vysvetľuje aj tzv. Štokholmským syndrómom, ktorý pôvodne vznikol na vysvetlenie prekvapujúceho správania obetí únosu voči únoscom. (Unesení sa po istom čase identifikovali s únoscami, schvaľovali ich správanie, odmietali proti nim vypovedať.) Podobne ako unesení ľudia, aj týrané ženy žijú v neustálom ohrození, majú pocit, že nemôžu uniknúť, sú izolované od iných ľudí a manipulované správaním páchatel'a (epizódy pozornosti a náklonnosti). Hermanová (2001) upozorňuje na fakt, že opakované prežívanie hrôzy a vzápätí úľavy, izolácia od okolia, vytvárajú patologickú väzbu, v ktorej sa obeť stáva závislá na všemocnej autorite násilníka. Týrané ženy uvádzajú, že žili v akomsi výlučnom a iluzórnom svete.“¹⁶

V odbornej literatúre sa poukazuje aj na predstavu tzv. „súdržnej rodiny“, ktorá môže viesť k presvedčeniu, že rodinu je potrebné zachovať za každú cenu, aj keď v nej dochádza k násilliu. Takáto predstava zdôrazňuje význam rodiny, dobrého mena či reputácie a môže prispievať k

¹³ Čl. 15 a čl. 16 zákona č. 460/1992 Zb. Ústava Slovenskej republiky v znení neskorších predpisov

¹⁴ Zákon č. 274/2017 Z. z. o obetiach trestných činov

¹⁵ Smernica Európskeho parlamentu a Rady 2012/29/EÚ z 25. októbra 2012, ktorou sa stanovujú minimálne normy v oblasti práv, podpory a ochrany obetí trestných činov a ktorou sa nahrádza rámcové rozhodnutie Rady 2001/220/SVV (Ú. v. EÚ L 315, 14. 11. 2012, s. 57 – 73), odôvodnenie 26

¹⁶ HERETIK, Anton. *Forenzná psychológia pre psychológov, právnikov, lekárov a iné pomáhajúce profesie*. 3. prepracované a rozšírené vydanie. Bratislava: Bratislavská vysoká škola práva, 2010, s. 434.

prehliadaniu alebo opakovaniu násilných vzorcov správania. Obet' tak vtedy upadá do stavu naučenej bezmocnosti. Naučená bezmocnosť, ako hlavný príznak syndrómu týranej ženy sa môže prejavovať na emocionálnej úrovni napríklad úzkosťou, v správaní pasivitou a v kognitívnej oblasti neschopnosťou riešiť nové situácie. Osoba, ktorá opakovane zažíva násilie alebo iné traumatické udalosti, môže postupne nadobudnúť presvedčenie, že nemá kontrolu nad tým, čo sa deje. Tento spôsob uvažovania sa označuje ako naučený atribučný štýl. Obet' môže následne interpretovať násilie ako vlastné zlyhanie (za všetko môžem ja sama), ako bežný jav medzi partnermi alebo ako situáciu, ktorú nie je možné zmeniť.¹⁷ Medzi ďalšie charakteristické prejavy týraných žien patrí posttraumatická stresová porucha (PTSP) a výskyt sebadeštruktívnych reakcií, ktoré môžu byť dôsledkom dlhodobého a opakovaného vystavovania sa násiliu a opakovaného odmietnutia pomoci orgánov činných v trestnom konaní najmä polície.¹⁸ Obet' môže na prežívanú psychickú záťaž reagovať aj požívaním alkoholu alebo iných návykových látok. Ide o nevhodný spôsob zvládania, ktorým sa snaží zmierniť negatívne emócie, ako sú strach, úzkosť alebo bezmocnosť.

Nesmieme ale opomenúť, že týrané ženy sa môžu taktiež stať páchatelkami vražd alebo ťažkého ublíženia na zdraví. V tomto prípade sa obet' týranej ženy chápe viac vinná ako páchatel'. Práve súd a výklad poskytnutý znalcami majú kompetenciu rozhodnúť o motivácií, či sa obet' nachádzala v krajnej núdzi alebo konala v sebaobrane.¹⁹

4. Aplikačná prax

Za účelom priblíženia praktického fungovania právnej úpravy bol uskutočnený rozhovor s príslušníkom Policajného zboru, ktorý sa vo svojej služobnej činnosti stretáva so zásahmi pri podozrení na domáce násilie. Rozhovor prebehol dňa 05.03.2026.

Z vyjadrenia príslušníka Policajného zboru vyplýva, že zásahy pri podozrení na domáce násilie sa v praxi vyskytujú pomerne pravidelne. Na úrovni oddelenia ide približne o 10 zásahov mesačne, pričom z pohľadu jednotlivého príslušníka ide približne o dva až tri prípady mesačne, najčastejšie počas víkendov. Podľa jeho skúseností sú obeťami domáceho násillia vo väčšine prípadov ženy, počas svojej služby zaznamenal len ojedinelý prípad, keď obeťou bol muž. V prípade domáceho násillia páchaného na ženách majú obeť možnosti obrátiť sa na krízové centrá, ako je napríklad organizácia Žena v tiesni. V prípade mužov však podľa príslušníka Policajného zboru podobne špecializované centra prakticky neexistujú. Ak sa prípad

¹⁷ HERETIK, Anton. *Forenzná psychológia*, 2010, s. 433.

¹⁸ Dostupné na: <https://www.priznaky-projevy.cz/psychiatrie-sexuologie/621-syndrom-tyrane-zeny-priznaky-projevy-symptomy>, [cit. 15. 3. 2026].

¹⁹ HERETIK, Anton. *Forenzná psychológia*, 2010, s. 433.

dotýka aj maloletých detí, situáciu rieši orgán sociálnoprávnej ochrany detí a sociálna kuratela. Polícia je k takýmto prípadom najčastejšie privolaná na základe oznámenia susedov alebo iných tretích osôb, ktoré upozornia na krik, hádky alebo hluk, ktorý vychádza z domácnosti. Vyjadrenie príslušníka Policajného zboru potvrdzuje, že najčastejším spúšťačom konfliktov býva najmä požitie alkoholu alebo iných návykových látok. Z pohľadu dokazovania je však najvýznamnejšie, ak políciu privolá samotná obeť, keďže ide o najpriamejší zdroj informácií o priebehu incidentu a zároveň slúži ako priamy dôkaz.

V praxi sa pomerne často vyskytujú situácie, keď obeť po príchode polície odmietne spolupracovať alebo popiera, že k násiliu došlo. Podľa vyjadrenia príslušníka sa takáto situácia vyskytuje približne v 60 % zásahov. Medzi najčastejšie dôvody patrí najmä strach z páchatel'a, finančná závislosť alebo snaha vyhnúť sa ďalšiemu konfliktu. Policajt zároveň uviedol, že v niektorých prípadoch je zrejmé, že obeť koná pod psychickým tlakom alebo v obave z ďalšieho násillia. Za nezvyčajnú situáciu možno považovať aj prípad, keď obeť nalieha na vykázanie agresora zo spoločného obydli'a, avšak nedokáže preukázať dôvod ani bližšie vysvetliť okolnosti konfliktu. Podľa vyjadrenia príslušníka bývajú takéto prípady neraz ovplyvnené požitím alkoholu alebo silnými emóciami prítomnými pri konflikte.

Ak obeť odmietne podať trestné oznámenie, polícia situáciu preveruje a vyhodnocuje jej závažnosť. V niektorých prípadoch môže byť konanie kvalifikované ako priestupok, avšak ak existujú dôkazy o závažnejšom konaní, môže byť vec posudzovaná ako trestný čin, pričom orgány činné v trestnom konaní postupujú z úradnej povinnosti (ex officio). Súčasťou zásahu je aj preverenie dostupných informácií v databázach Ministerstva vnútra a vyhodnotenie rizika ďalšieho násillia prostredníctvom osobitného dotazníka.

Polícia môže v prípade zistenia domáceho násillia pristúpiť aj k vykázaniu násilnej osoby zo spoločného obydli'a, a to aj v situácii, keď obeť samotná existenciu násillia popiera. Pri posudzovaní prípadu môže byť významným faktorom aj minulosť agresora. Za poľahčujúcu okolnosť môže byť považované napríklad to, že ide o prvý podobný incident. Naopak, ak sa násilné správanie opakovalo aj v minulosti alebo bol prípad riešený orgánmi činnými v trestnom konaní či súdom, pristupuje sa k situácii prísnejšie. V praxi sa zároveň môže stať, že obeť v minulosti svoju výpoveď zmenila alebo trestné oznámenie stiahla. Takéto okolnosti môžu ovplyvniť hodnotenie dôkaznej situácie a vierohodnosť tvrdení, čo môže mať vplyv na ďalší postup orgánov činných v trestnom konaní a na posudzovanie závažnosti prípadu.

V prípade vykázania agresora zo spoločného obydli'a je určená zákonná lehota, počas ktorej sa agresor nesmie do obydli'a vrátiť. Ak by sa do obydli'a v tomto období vrátil, dopúšťa sa protiprávneho konania samotný agresor, a nie obeť, aj keby ho do obydli'a pustila. V takýchto

prípadoch je zároveň možné podať návrh na nariadenie neodkladného opatrenia, ktoré môže viesť k predĺženiu vykázania agresora zo spoločného obydlija. O ďalšom postupe môže rozhodovať vedenie príslušného útvaru Policajného zboru alebo prokuratúra, ktoré posudzujú závažnosť prípadu, minulosť páchateľa, jeho povest', prípadné použitie zbrane či ďalšie okolnosti konkrétneho skutku.

Z pohľadu príslušníka Policajného zboru predstavuje jeden z najväčších problémov v praxi najmä nedostatočná spolupráca zo strany obete. Policajt na záver uviedol, že obeť sa snaží vždy poučiť o ich právach a poskytuje im informácie o možnostiach pomoci, vrátane kontaktov na krízové centrá. Zároveň poukázal na potrebu zlepšenia informovanosti verejnosti a rozšírenia siete krízových centier pre všetky skupiny obetí, ktoré by obetiam poskytovali účinnejšiu pomoc.²⁰

Záver

Na základe uvedených poznatkov možno konštatovať, že domáce násilie predstavuje komplexný spoločenský a právny jav, ktorého riešenie si vyžaduje citlivý a zároveň rozhodný prístup zo strany orgánov verejnej moci. Skúsenosti z praxe aj odborná literatúra poukazujú na to, že domáce násilie je podmienené viacerými sociálnymi, psychologickými a osobnostnými faktormi a jeho dôsledky môžu zasahovať nielen jednotlivca, ale aj širšie spoločenské prostredie. Z jeho pomerne častého výskytu zároveň vyplýva, že ide o jav, ktorý sa priamo alebo nepriamo dotýka značnej časti spoločnosti. V kontexte policajnej praxe sa ako častá javí najmä situácia, keď obeť odmieta spolupracovať s orgánmi verejnej moci. V takýchto prípadoch je nevyhnutné hľadať rovnováhu medzi rešpektovaním autonómie obete a povinnosťou štátu zabezpečiť ochranu života, zdravia a ľudskej dôstojnosti. Pri zásahu je preto potrebné prihliadať nielen na prejavenu vôľu obete, ale aj na jej aktuálny psychický stav a schopnosť racionálne posúdiť mieru ohrozenia, keďže obeť domáceho násilia často konajú pod silným psychickým tlakom, v strachu alebo v stave naučenej bezmocnosti. Z tohto dôvodu je veľmi dôležité, aby bolo pri zásahu polície konanie dôsledné a správne vyhodnotené, keďže práve prvotná reakcia orgánov môže mať zásadný význam pre ochranu obete, prevenciu ďalšieho násilia a ďalší postup pri riešení situácie. Z aplikačnej praxe zároveň vyplýva aj nedostatočná dostupnosť špecializovaných krízových centier a podporných služieb pre obeť domáceho násilia.

²⁰ GALLO, Ján. Rozhovor s príslušníkom Policajného zboru SR, (podpráporčík, OPZ, Martin-Východ), realizovaný dňa 5.3.2026

Posilnenie siete týchto zariadení by mohlo významne prispieť k účinnejšej pomoci obetiam a k zlepšeniu spolupráce s orgánmi verejnej moci.

Zoznam bibliografických odkazov

Monografie a skriptá

1. MINÁRIK, Štefan a kol. *Trestný poriadok. Stručný komentár: druhé, prepracované a doplnené vydanie*. Bratislava: Iura Edition, 2010. ISBN 978-80-8078-369-3.
2. HERETIK, Anton. *Forenzná psychológia pre psychológov, právnikov, lekárov a iné pomáhajúce profesie. 3. prepracované a rozšírené vydanie*. Bratislava: Bratislavská vysoká škola práva, 2010. ISBN 978-80-10-01841-3.

Právne predpisy

3. Zákon č. 301/2005 Z. z. Trestný poriadok
4. Zákon č. 171/1993 Z. z. o Policajnom zbore
5. Ústavný zákon č. 460/1992 Zb. Ústava Slovenskej republiky v znení neskorších predpisov
6. Zákon č. 300/2005 Z. z. Trestný zákon
7. Zákon č. 274/2017 Z. z. o obetiach trestných činov
8. Smernica Európskeho parlamentu a Rady 2012/29/EÚ z 25. októbra 2012, ktorou sa stanovujú minimálne normy v oblasti práv, podpory a ochrany obetí trestných činov a ktorou sa nahrádza rámcové rozhodnutie Rady 2001/220/SVV (Ú. v. EÚ L 315, 14. 11. 2012, s. 57 – 73)

Internetové zdroje

9. MISKEJE, Jan–MISKEJE, Miloš. K problematike domáceho násillia (teoretické východiská a úvahy de lege ferenda aj v kontexte násilnej kriminality) [online]. Dostupné na internete: miskeje_jan_miskeje_milos_k_problematike_domaceho_nasilia.pdf
10. PIETRUCHOVÁ, Oľga. Online metodika postupu polície prvého kontaktu v prípadoch domáceho násillia: Prístup citlivý k obeti. Inštitút pre výskum práce a rodiny, 2020 [online]. Dostupné na internete: On-line metodika postupu polície prvého kontaktu v prípadoch domáceho násillia. Prístup citlivý k obeti (Oľga Pietruchová, 2020) – Inštitút pre výskum práce a rodiny
11. Syndróm týranej ženy – príznaky, prejavy, symptómy. Príznaky a prejavy chorôb [online]. Dostupné na: <https://www.priznaky-projevy.cz/psychiatrie-sexuologie/621-syndrom-tyrane-zeny-priznaky-projevy-symptomy>

Judikatúra

12. KONTROVÁ proti Slovenskej republike. Rozsudok Európskeho súdu pre ľudské práva z 31.05.2007, sťažnosť č. 7510/04

Iné zdroje

13. GALLO, Ján. Podpráporčík Policajného zboru SR, referent OPZ Martin–východ. Osobný rozhovor, 05.03.2026

ÚČINNÁ LÚTOSŤ PRI DAŇOVÝCH TRESTNÝCH ČINOCH: SYSTÉMOVÝ POSUN TRESTNOPRÁVNEJ REAKCIE ŠTÁTU?

Effective Remorse in Tax Offences: A Systemic Shift in the State's Criminal Law Response?

VLADIMÍR PETRILA*

Abstrakt

Príspevok sa zaoberá postavením inštitútu účinnej ľútosti v oblasti daňových trestných činov a jeho významom v kontexte trestnoprávnej ochrany fiškálnych záujmov štátu. Osobitná pozornosť je venovaná možnosti uplatnenia účinnej ľútosti. Cieľom príspevku je analyzovať, či vývoj v súvislosti s aplikáciou účinnej ľútosti predstavuje systémový posun v prístupe štátu k postihu daňovej trestnej činnosti smerom k posilneniu restoratívnych prvkov trestného práva, alebo či môže viesť k oslabeniu jeho represívnej a preventívnej funkcie. Príspevok zároveň poukazuje na možné riziká spojené s extenzívnym uplatňovaním účinnej ľútosti pri ekonomicky motivovanej trestnej činnosti a formuluje úvahy de lege ferenda smerujúce k vyváženiu fiškálnych a represívnych cieľov trestného práva.

Abstract

The paper examines the position of the institution of effective remorse in the field of tax criminal offences and its significance in the context of the criminal law protection of the state's fiscal interests. Particular attention is devoted to the possibility of applying effective remorse. The aim of the paper is to analyse whether developments related to the application of effective remorse represent a systemic shift in the state's approach to the prosecution of tax crime towards strengthening the restorative elements of criminal law, or whether they may lead to a weakening of its repressive and preventive functions. The paper also highlights potential risks associated with the extensive application of effective remorse in economically motivated crime and formulates de lege ferenda considerations aimed at balancing the fiscal and repressive objectives of criminal law.

Kľúčové slová: Účinná ľútosť. Daňové trestné činy. Hospodárska kriminalita. Zánik trestnosti. Restoratívna justícia. Trestnoprávna represia.

Keywords: Effective remorse. Tax offences. Economic crime. Extinction of criminal liability. Restorative justice. Criminal repression.

Úvod

Inštitút účinnej ľútosti predstavuje v systéme trestného práva osobitný dôvod zániku trestnosti, ktorý reflektuje pragmatický prístup štátu k postihu určitého okruhu protiprávnych konaní. Jeho podstata spočíva v tom, že páchatel' po spáchaní trestného činu dobrovoľne odstráni alebo napraví škodlivý následok, čím sa eliminuje potreba represívneho zásahu zo strany štátu.

Inštitút účinnej ľútosti v oblasti daňových trestných činov prechádza v poslednom období zásadným vývojom, ktorý vyvoláva otázku, či ide o racionálnu optimalizáciu trestnej politiky alebo o nebezpečný systémový posun v trestnoprávnej reakcii štátu.

* JUDr. Vladimír Petrila, 3. ročník, denná forma, III. stupeň štúdia, vladimir.petrila@student.upjs.sk, Katedra trestného práva, Právnická fakulta, Univerzita Pavla Jozefa Šafárika v Košiciach, interný doktorand

Tento mechanizmus v sebe nesie hlbokú vnútornú diskrepanciu, ktorú možno označiť za jeho dvojakú povahu. Na jednej strane vystupuje ako vysoko efektívny nástroj hospodárskej sily štátu, ktorý zabezpečuje okamžitú obnovu verejných financií v rádoch miliónov eur ročne, pričom drasticky odbreňuje justičný systém od nákladných a dôkazne komplikovaných súdnych procesov. Na strane druhej však vytvára priestor pre morálny hazard, kedy páchatel' môže inštitút vnímať ako formu „bezúročnej pôžičky“ od štátu, čo pri systémovo nesprávnom nastavení deformuje hospodársku súťaž.

Uvedená ambivalentná povaha inštitútu účinnej ľútosti tak vyvoláva potrebu jeho dôsledného právneho uchopenia a kritickej reflexie, najmä v kontexte jeho aktuálneho legislatívneho vývoja a aplikačnej praxe. Pre posúdenie jeho skutočného významu a limitov je nevyhnutné vychádzať z jeho normatívneho zakotvenia, ktoré determinuje podmienky jeho uplatnenia, ako aj jeho systematické zaradenie v rámci trestného práva hmotného.

1. Zákonný rámec účinnej ľútosti v podmienkach Slovenskej republiky

Inštitút účinnej ľútosti predstavuje v slovenskom trestnom práve kľúčový prienik medzi represívnou funkciou štátu a jeho fiškálnymi záujmami. Jeho podstata spočíva v prioritizácii dodatočného splnenia daňovej povinnosti pred samotným potrestaním páchatel'a, čím sa sleduje primárny cieľ – obnova verejných financií bez zaťaženia justičného aparátu zdĺhavými procesmi. Inými slovami zhrnuté účinná ľútosť predstavuje prostriedok preferujúci reparáciu pred represívnou reakciou štátu.¹

Účinná ľútosť patrí medzi tradičné inštitúty trestného práva hmotného, ktorého základnou funkciou je motivovať páchatel'a k dobrovoľnej náprave následkov trestného činu. Ide o výnimku z princípu nevyhnutnosti trestnej represie, keďže zákonodarca pripúšťa, že za určitých okolností je možné upustiť od potrestania páchatel'a, ak dôjde k obnoveniu porušených spoločenských vzťahov. T. z., že ide o výraz preferencie materiálneho hľadiska trestnosti pred formálnym.² Trestný zákon v normatívne úprave účinnej ľútosti obdobne ako pri iných druhoch trestných činoch, tak aj pri uplatnení účinnej ľútosti v prípade daňových trestných činov taxatívne vymedzuje, o aké skutkové podstaty ide, a to:

- Skrátene dane a poistného³
- Neodvedenie dane a poistného⁴ a

¹ Burda, E., Čentéš, J., Kolesár, J., et al. (2019). *Trestný zákon. Veľký komentár*. EUROKÓDEX.

² Šámal, P., & kol. (2019). *Trestní zákoník. Komentář* (2. vyd.). C. H. Beck.

³ § 276 Trestného zákona

⁴ § 277 Trestného zákona

- Nezaplatenie dane a poistného.⁵

Uvedené vymedzenie odráža zámer zákonodarcu aplikovať účinnú ľútosť predovšetkým na tie trestné činy, pri ktorých je možné dosiahnuť plnú reparáciu škodlivého následku, teda obnovu fiškálnych záujmov štátu. Práve táto skutočnosť odlišuje daňové trestné činy od iných druhov kriminality, pri ktorých nie je vždy možné následok úplne odstrániť.

Podľa ustanovenia § 85 Trestného zákona zaniká trestnosť trestného činu, ak páchatel dobrovoľne napravil škodlivý následok alebo ho odstránil, pričom zákon stanovuje aj ďalšie podmienky, ktoré musia byť splnené kumulatívne. V prípade daňových trestných činov ide najmä o dodatočné zaplatenie dlžnej sumy vrátane príslušenstva.

Kľúčovým prvkom aplikácie účinnej ľútosti je pritom požiadavka dobrovoľnosti konania páchatel'a. Táto podmienka predstavuje materiálne jadro celého inštitútu, keďže jej účelom je zabezpečiť, aby k náprave došlo z vlastnej iniciatívy páchatel'a, a nie výlučne pod tlakom hroziaceho trestného postihu. Súčasne je potrebné zdôrazniť, že účinná ľútosť sa uplatňuje len do určitého štádia trestného konania, čo má zabezpečiť rovnováhu medzi záujmom štátu na reparácii a zachovaním represívnej funkcie trestného práva.

Hoci účinná ľútosť prináša viaceré praktické benefity, prostredníctvom tohto článku si dovoľujeme poukazovať aj na jej problematické aspekty, najmä pokiaľ ide o otázku skutočnej dobrovoľnosti konania, načasovanie jej uplatnenia a jej využívanie v rámci organizovaných foriem daňovej trestnej činnosti.⁶ Tieto atribúty účinnej ľútosti pri daňových trestných činoch vyvolávajú pochybnosti o tom, či súčasná právna úprava dostatočne zabezpečuje zachovanie preventívnej a represívnej funkcie trestného práva.

2. Limity a riziká aplikácie účinnej ľútosti pri daňových trestných činoch

Významnú zmenu v právnej úprave predstavuje aj modifikácia podmienok, ktoré bránia aplikácii účinnej ľútosti, resp. zmenu v prípade uplatnenia negatívnej podmienky vyjadrenej v ustanovení § 86 ods. 2 Trestného zákona. Kým predchádzajúca právna úprava vylučovala jej uplatnenie už v prípade, ak bol páchatel' v predchádzajúcich dvoch rokoch „postihnutý“ za obdobné konanie v rámci daňového konania, súčasná právna úprava túto prekážku zužuje. Po novelizácii predmetného ustanovenia sa ako relevantná prekážka uplatní len právoplatné odsúdenie alebo zastavenie trestného stíhania z dôvodu predchádzajúceho využitia účinnej

⁵ § 278 Trestného zákona

⁶ Pozn. autora: Pred novelizáciou Trestného zákona, t. j. do dňa 06.08.2024 bola v ustanovení § 86 ods. 1 písm. d) tohto vymedzená negatívna podmienka účinnej ľútosti, a to tak, že účinnú ľútosť pri trestných činoch podľa § 276, § 277 a § 278 nebolo možné uplatniť v prípade, ak páchatel' spáchal trestný čin ako člen organizovanej skupiny.

ľútosti v rovnakom časovom období, t. j. za predchádzajúcich dvadsaťštyri mesiacov.⁷ Takéto nastavenie z nášho pohľadu nepochybne rozširuje priestor pre aplikáciu tohto inštitútu, čím posilňuje jeho praktický význam, avšak zároveň vyvoláva otázky z hľadiska zachovania preventívnej funkcie trestného práva.

Osobitne problematickým aspektom sa javí možnosť uplatnenia účinnej ľútosti aj v prípade páchatel'ov konajúcich v rámci organizovaných štruktúr, resp. formou organizovanej skupiny. V podmienkach daňovej trestnej činnosti, ktorá je svojou povahou často koordinovaná a realizovaná viacerými subjektmi, môže mať takáto úprava významné dôsledky, a to najmä v prípade práve trestnej činnosti spočívajúcej v oblasti daní, resp. na dani z pridanej hodnoty, kde sa vyžaduje aktivita minimálne troch participujúcich subjektov.⁸ V prípade zložitých daňových schém, ako sú napríklad načrtnuté tzv. „karuselové podvody“ na dani z pridanej hodnoty, môže vyšetrovanie trvať aj niekoľko mesiacov alebo až dokonca niekoľko rokov. Počas tohto obdobia môžu páchatelia využívať zadržané finančné prostriedky vo svoj prospech, čím získavajú neoprávnenú konkurenčnú výhodu voči subjektom, ktoré si riadne plnia svoje daňové povinnosti.⁹

Je pravda, že normy daňového práva umožňujú zadržať neoprávnený nadmerný odpočet v prípade daňovej kontroly¹⁰, prípadne môžu využiť prostriedky akým napríklad je predbežné opatrenie¹¹, avšak komplikovanejšie to je v prípade, kedy sú subjektu „vyplatené“ finančné prostriedky, ktoré sa z prvého počiatku javili ako legitímne a oprávnené.

Z hľadiska trestného práva je pritom potrebné rozlišovať medzi organizovanou skupinou a zločineckou skupinou. Organizovaná skupina predstavuje združenie najmenej troch osôb, ktoré koordinovane spolupracujú na páchaní trestnej činnosti, pričom jednotliví členovia majú rozdelené konkrétne úlohy. Naproti tomu zločinecká skupina sa vyznačuje vyššou mierou štruktúrovanosti, dlhodobjším fungovaním a užším zameraním na páchanie taxatívne vymedzených trestných činov s cieľom dosiahnuť majetkový alebo iný prospech.¹² V aplikačnej praxi je však dokazovanie existencie zločineckej skupiny spravidla podstatne náročnejšie než v prípade organizovanej skupiny, čo vedie k častejšiemu kvalifikovaniu konania ako činnosti organizovanej skupiny.

⁷ § 86 ods. 2 Trestného zákona

⁸ Petrila, V. (2024). *Zneužitie práva a daňový podvod v kontexte judikatúry Súdneho dvora Európskej únie*. Západočeská univerzita v Plzni.

⁹ Slemrod, J. (2007). Cheating ourselves: The economics of tax evasion. *Journal of Economic Perspectives*, 21(1), 25–48.

¹⁰ § 79 zákona č. 222/2004 Z. z. o dani z pridanej hodnoty

¹¹ § 50 zákona č. 563/2009 Z. z. o správe daní (daňový poriadok) a o zmene a doplnení niektorých zákonov

¹² Šámal, P., et al. (2019). *Trestní zákoník. Komentář*. C. H. Beck.

V kontexte uvedeného sa javí ako diskutabilné, či by mali mať páchatelia pôsobiaci v organizovaných štruktúrach rovnaký prístup k inštitútu účinnej ľútosti ako individuálni páchatelia. Pri špecifickom druhu daňovej kriminality, akým sú napríklad karuselové podvody, je totiž prakticky vylúčené, aby bol trestný čin spáchaný jedinou osobou. Rozšírenie možnosti uplatnenia účinnej ľútosti aj na tieto prípady preto môže viesť k systematickému zvýhodňovaniu organizovanej ekonomickej kriminality.¹³

Osobitnú pozornosť si vyžaduje aj otázka časového momentu uplatnenia účinnej ľútosti. V aplikačnej praxi sa objavujú situácie, keď páchatel pristúpi k náprave až po oboznámení sa s výsledkami vyšetrovania, teda v čase, keď je už jeho trestnoprávna zodpovednosť de facto odhalená. V tejto súvislosti vyvstáva zásadná otázka, či je ešte možné hovoriť o dobrovoľnosti konania páchatel'a, alebo ide skôr o kalkulované rozhodnutie motivované snahou vyhnúť sa trestnému postihu. Dobrovoľnosť je potrebné posudzovať striktne, keďže predstavuje kľúčovú podmienku aplikácie účinnej ľútosti.¹⁴ Ak právna úprava umožňuje uplatniť účinnú ľútosť aj v takto pokročilom štádiu konania, vytvára sa významný priestor pre taktické správanie páchatel'ov. Inštitút, ktorý má primárne smerovať k restoratívnej justícii, sa tak v mnohých prípadoch stáva nástrojom čisto pragmatického kalkulu, kedy páchatel' vyčkáva na mieru svojho usvedčenia a k náprave pristupuje až vtedy, keď je trestný postih takmer nevyhnutný.

Táto skutočnosť zároveň otvára širšiu otázku samotného účelu trestného práva v oblasti daňovej kriminality. Je legitímne, aby trestné právo plnilo funkciu nástroja na zabezpečenie príjmov štátneho rozpočtu, alebo ide o odklon od jeho primárnej represívnej a preventívnej funkcie? Je nepochybné, že efektívny boj proti daňovej kriminalite si vyžaduje rovnováhu medzi sankčnými a preventívnymi mechanizmami.¹⁵ Ak je však hlavným cieľom dosiahnutie dodatočného zaplatenia dane, trestné právo sa môže postupne transformovať na nástroj sekundárneho vymáhania daňových povinností, čím dochádza k jeho funkčnému posunu mimo jeho tradičné systematické zaradenie.

Uvedenú tendenciu ilustrujú aj legislatívne úvahy prezentované v rámci tzv. „*karasovej novely*“, ktorá uvažovala o rozšírení možnosti uplatnenia účinnej ľútosti až do 90 dní od momentu vznesenia obvinenia: „*podľa platného znenia § 86 ods. 1 písm. d) stačilo páchatel'om vybraných daňových trestných činov počkať na výsledok vyšetrovania, ktoré buď neodhalilo ich*

¹³ Alm, J. (2012). Measuring, explaining, and controlling tax evasion: Lessons from theory, experiments, and field studies. *International Tax and Public Finance*, 19(1), 54–77.

¹⁴ Ivor, J., et al. (2021). *Trestné právo hmotné. Osobitná časť*. Wolters Kluwer.

¹⁵ OECD. (2010). *Tax administration 2010: Comparative information on OECD and other advanced and emerging economies*. OECD Publishing. Dostupné z: https://www.oecd.org/content/dam/oecd/en/publications/reports/2011/03/tax-administration-in-oecd-and-selected-non-oecd-countries-comparative-information-series-2010_89206985/7b15854f-en.pdf

daňovú trestnú činnosť a aj v prípade, že ju odhalilo, tak sa páchatel' mohol vyhnúť trestnej zodpovednosti dodatočným zaplatením dane a jej príslušenstva v rozsahu, v akom bola táto trestná činnosť vyšetrovaním odhalená. Pritom ide o úmyselné trestné činy, pri ktorých si páchatel' úmyselne upraví daňové priznanie tak, aby mu vyšla nižšia daň. V § 86 ods. 1 písm. d) sa skracaie lehota na dodatočné zaplatenie splatnej dane a jej príslušenstva alebo poistného pre uplatnenie účinnej ľútosti do 90 dní od právoplatnosti vznesenia obvinenia a nie až potom, čo sa vykoná celé náročné vyšetrovanie. Ustanovenie sa rozširuje aj o príslušenstvo splatnej dane vo výške polovice splatnej dane v prípade, ak nebolo o príslušenstve právoplatne rozhodnuté a lehota na rozhodnutie uplynula. Obdobná úprava sa zavádza aj ohľadom cla¹⁶. Takéto nastavenie by v podstate eliminovalo možnosť páchatel'a „vyčkávať“ na výsledok trestného konania a až následne sa rozhodnúť pre dodatočné splnenie svojej povinnosti.

Za súčasného znenia ustanovení Trestného zákona o účinnej ľútosti, sa v tomto kontexte dobrovoľnosť konania dostáva do výrazného napätia s jeho účelovosťou, keďže konanie páchatel'a by bolo motivované skôr procesnou situáciou než skutočnou snahou o nápravu. Takáto zákonná úprava z nášho pohľadu zároveň oslabuje generálnu prevenciu, keďže signalizuje, že porušenie daňových povinností nemusí viesť k reálnemu trestnoprávnemu postihu, pokiaľ dôjde k ich dodatočnému splneniu.

Z uvedeného vyplýva, že hoci súčasná právna úprava účinnej ľútosti prináša významné benefity z hľadiska efektivity a rýchlej reparácie škody spôsobenej štátu, zároveň vytvára priestor pre jej potenciálne zneužívanie. Tento problém by bol ešte výraznejší v prípade prijatia legislatívnych riešení umožňujúcich jej uplatnenie v pokročilých štádiách trestného konania. De lege ferenda preto možno uvažovať o precizovaní podmienok jej aplikácie, najmä prostredníctvom striktnejšieho posudzovania dobrovoľnosti konania, časového obmedzenia jej uplatnenia na skoršie štádiá konania, zavedenia povinnosti aktívnej spolupráce páchatel'a s orgánmi činnými v trestnom konaní, ako aj obmedzenia jej využitia v prípadoch organizovanej trestnej činnosti. Takéto opatrenia by mohli prispieť k zachovaniu rovnováhy medzi fiškálnymi záujmami štátu a základnými funkciami trestného práva.

Záver

Je dôvodné konštatovať, že inštitút účinnej ľútosti predstavuje v oblasti daňových trestných činov významný nástroj trestnoprávnej politiky štátu, ktorý reflektuje snahu o

¹⁶ Národná rada Slovenskej republiky. (2023). *Návrh zákona, ktorým sa mení a dopĺňa zákon č. 300/2005 Z. z. Trestný zákon (parlamentná tlač č. 1493)*. Dostupné z: <https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=527158>

efektívnu ochranu fiškálnych záujmov prostredníctvom preferencie reparácie pred represiou. Jeho praktický význam spočíva najmä v schopnosti zabezpečiť rýchlu obnovu verejných financií a zároveň znížiť zaťaženie orgánov činných v trestnom konaní.

Súčasne však takto nastavený mechanizmus vyvoláva zásadnú otázku, či trestné právo v tejto oblasti nezačína suplovať funkciu daňového práva, ktorého primárnym cieľom je výber a správa verejných príjmov. Ak sa totiž účinnosť trestnoprávnej reakcie meria predovšetkým objemom dodatočne uhradených finančných prostriedkov, dochádza k posunu od tradičného chápania trestného práva ako ultima ratio k jeho instrumentalizácii v prospech fiškálnych cieľov štátu. Takýto prístup môže viesť k oslabeniu jeho represívnej a preventívnej funkcie, keďže sankcia prestáva byť centrálnym prvkom reakcie na protiprávne konanie.

V tejto súvislosti je namieste aj úvaha, či možno účinnú ľútosť v jej súčasnej podobe považovať za prejav restoratívneho prístupu v pravom slova zmysle. Kým restoratívna justícia je tradične založená na obnove narušených vzťahov a aktívnej participácii poškodeného a páchatel'a, v prípade daňových trestných činov ide primárne o finančnú reparáciu vo vzťahu k štátu. Otázne preto zostáva, či ide skutočne o hodnotovo orientovaný restoratívny mechanizmus, alebo skôr o pragmatický nástroj ekonomickej efektivity, ktorý len formálne napĺňa znaky reparácie. Uvedené skutočnosti naznačujú, že ďalší vývoj tohto inštitútu by mal smerovať k hľadaniu rovnováhy medzi jeho fiškálnou efektivitou a zachovaním základných funkcií trestného práva, aby nedochádzalo k jeho redukcii na prostriedok sekundárneho výberu verejných príjmov. Súčasne však nemožno opomenúť, že aktuálny vývoj právnej úpravy a aplikačnej praxe posúva tento inštitút do polohy, ktorá vyvoláva legitímne pochybnosti z hľadiska zachovania základných funkcií trestného práva. Rozšírenie možností jeho uplatnenia, najmä vo vzťahu k organizovaným formám daňovej kriminality či k časovému momentu jeho využitia, vytvára priestor pre strategické a kalkulované správanie páchatel'ov. V extrémnych prípadoch tak môže účinná ľútosť pôsobiť skôr ako nástroj minimalizácie rizika trestného postihu než ako prejav skutočnej snahy o nápravu.

Kľúčovým problémom sa v tejto súvislosti javí otázka dobrovoľnosti konania páchatel'a, ako aj samotné načasovanie uplatnenia účinnej ľúlosti. Ak je možné tento inštitút využiť až po oboznámení sa s výsledkami vyšetrovania, jeho materiálny základ sa oslabuje a dochádza k posunu od spontánnej nápravy k účelovému konaniu motivovanému hrozbou sankcie. Takéto nastavenie zároveň otvára širšiu systémovú otázku, či trestné právo v tejto oblasti nezačína suplovať funkciu daňového práva, čím sa oslabuje jeho represívna a preventívna funkcia.

Z pohľadu hospodárskej súťaže je potrebné zdôrazniť, že extenzívne uplatňovanie účinnej ľúlosti môže viesť k deformácii podnikateľského prostredia, keďže subjekty porušujúce

daňové povinnosti môžu dočasne disponovať finančnými prostriedkami, ktoré im nepatria, a následne sa vyhnúť trestnoprávnym dôsledkom. Tento aspekt nadobúda osobitný význam najmä pri organizovaných formách daňovej kriminality, ktoré sú svojou povahou systematické a ekonomicky motivované.

De lege ferenda sa preto javí ako vhodné zvážiť precizovanie podmienok aplikácie účinnej ľútosti, a to najmä vo vzťahu k striktnejšiemu posudzovaniu dobrovoľnosti konania, obmedzeniu jej využitia v prípadoch organizovanej trestnej činnosti, ako aj k zavedeniu povinnosti aktívnej spolupráce páchateľa s orgánmi činnými v trestnom konaní. Takéto opatrenia by mohli prispieť k vyváženiu fiškálnych záujmov štátu s požiadavkou zachovania spravodlivej a efektívnej trestnoprávnej reakcie.

Na záver možno uviesť, že účinná ľútosť ako inštitút nepochybne predstavuje dôležitý prvok moderného trestného práva, avšak jej ďalší vývoj by mal byť sprevádzaný dôsledným monitorovaním aplikačnej praxe a odbornou diskusiou, aby nedochádzalo k jej transformácii na nástroj, ktorý by namiesto ochrany právneho poriadku umožňoval jeho systematické obchádzanie.

Zoznam použitej literatúry

1. Alm, J. (2012). Measuring, explaining, and controlling tax evasion: Lessons from theory, experiments, and field studies. *International Tax and Public Finance*, 19(1), 54–77.
2. Burda, E., Čentěš, J., Kolesár, J., et al. (2019). *Trestný zákon. Veľký komentár*. EUROKÓDEX.
3. Ivor, J., et al. (2021). *Trestné právo hmotné. Osobitná časť*. Wolters Kluwer.
4. Národná rada Slovenskej republiky. (2023). *Návrh zákona, ktorým sa mení a dopĺňa zákon č. 300/2005 Z. z. Trestný zákon (parlamentná tlač č. 1493)*. Dostupné z: <https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=527158>
5. OECD. (2010). *Tax administration 2010: Comparative information on OECD and other advanced and emerging economies*. OECD Publishing. Dostupné z: https://www.oecd.org/content/dam/oecd/en/publications/reports/2011/03/tax-administration-in-oecd-and-selected-non-oecd-countries-comparative-information-series-2010_89206985/7b15854f-en.pdf
6. Petrila, V. (2024). *Zneužitie práva a daňový podvod v kontexte judikatúry Súdneho dvora Európskej únie*. Západočeská univerzita v Plzni.
7. Slemrod, J. (2007). Cheating ourselves: The economics of tax evasion. *Journal of Economic Perspectives*, 21(1), 25–48.
8. Šámal, P., & kol. (2019). *Trestní zákoník. Komentář (2. vyd.)*. C. H. Beck.
9. Zákon č. 222/2004 Z. z. o dani z pridanej hodnoty v znení neskorších predpisov
10. Zákon č. 563/2009 Z. z. o správe daní (daňový poriadok) a o zmene a doplnení niektorých zákonov v znení neskorších predpisov
11. Zákon č. 300/2005 Z. z. Trestný zákon v znení účinnom do dňa 06.04.2024.
12. Zákon č. 300/2005 Z. z. Trestný zákon v znení neskorších predpisov

UMELÁ INTELIGENCIA A REGULAČNÉ TECHNOLOGIE (REGTECH) AKO NÁSTROJ PLNENIA REGULAČNÝCH POVINNOSTÍ VO FINANČNOM SEKTORE: PRÁVNE A PRAKTICKÉ ASPEKTY

Artificial intelligence and regulatory technologies (RegTech) as a tool for regulatory compliance in the financial sector: legal and practical aspects

PETER BEŇO*

Abstrakt

Článok sa venuje využívaniu umelej inteligencie v regulačných technológiách (RegTech) vo finančnom sektore. Zameriava sa na analýzu toho, ako finančné inštitúcie nasadzujú AI nástroje na plnenie svojich regulačných povinností, napr. v oblasti boja proti praniu špinavých peňazí, regulačného reportingu, compliance monitoringu, riadenia rizík a pod. Článok analyzuje právny rámec, v ktorom sa RegTech pohybuje a skúma, aké špecifické právne výzvy tento vývoj prináša. Porovnáva prístupy k RegTech vo vybraných jurisdikciách a identifikuje rozdiely medzi jednotlivými modelmi fungovania. Osobitná pozornosť sa venuje vzťahu medzi RegTech a dohľadovými technológiami (SupTech). Cieľom článku je ponúknuť systematický prehľad o tom, kde AI v compliance reálne pomáha, aké právne mantinely musí rešpektovať a aké princípy môžu prispieť k jej zodpovednému využívaniu v regulovanom prostredí finančného trhu.

Abstract

The article examines the use of artificial intelligence in regulatory technologies (RegTech) in the financial sector. It focuses on analysing how financial institutions deploy AI tools to fulfil their regulatory obligations, for instance in the areas of anti-money laundering, regulatory reporting, compliance monitoring, risk management and similar fields. The article analyses the legal framework within which RegTech operates and explores the specific legal challenges that this development brings. It compares approaches to RegTech across selected jurisdictions and identifies differences between individual operational models. Particular attention is devoted to the relationship between RegTech and supervisory technologies (SupTech). The aim of the article is to provide a systematic overview of where AI genuinely contributes to compliance, what legal boundaries it must respect and what principles may support its responsible use within the regulated financial market environment.

Kľúčové slová: regulačné, technológie, RegTech, umelá, inteligencia

Key words: regulatory, technologies, RegTech, artificial, intelligence

Úvod

Finančné inštitúcie (nielen) v Európskej únii čelia významnému regulačnému zaťaženiu. Obdobie po globálnej finančnej kríze prinieslo množstvo nových regulačných požiadaviek, napr. sprísnených prudenciálnych pravidiel, komplexných požiadaviek na regulačný reporting a regulácie v oblasti boja proti praniu špinavých peňazí a financovaniu terorizmu. Objem, komplexnosť a dynamika týchto požiadaviek narastajú rýchlosťou, ktorú tradičné compliance procesy založené na manuálnej práci a izolovaných IT systémoch nedokážu dlhodobo absorbovať. Podľa dostupných údajov, predstavovali náklady na

* Doktorand, Univerzita Komenského v Bratislave, Právnická fakulta, Katedra finančného práva

dodržiavanie regulačných požiadaviek v EÚ priemerne 2 až 4 % celkových prevádzkových nákladov bánk,¹ pričom celkové náklady na compliance naprieč hlavnými globálnymi trhmi dosiahli v roku 2024 sumu 206 miliárd USD a pokuty za regulačné porušenia 4,6 miliardy USD.²

V tomto prostredí sa regulačné technológie (RegTech) javia ako jedna z najdynamickejšie rastúcich oblastí finančných inovácií, ponúkajúc finančným inštitúciám nástroje na efektívnejšie, rýchlejšie a presnejšie plnenie ich regulačných povinností. Európsky orgán pre bankovníctvo (EBA) definuje RegTech ako aplikáciu technologicky podporovanej inovácie na plnenie regulačných, compliance a reportingových požiadaviek.³

Článok si kladie za cieľ systematicky zmapovať právne a praktické aspekty využívania umelej inteligencie v regulačných technológiách v európskom finančnom sektore. Téma je aktuálna v kontexte niekoľkých súbežných regulačných počínov. Akt o umelej inteligencii, ktorý nadobudol účinnosť v auguste 2024, vytvára nový horizontálny rámec s priamymi dopadmi na RegTech riešenia, najmä na tie, ktoré spadajú do kategórie vysokorizikových AI systémov.⁴ Nariadenie DORA, uplatniteľné od januára 2025, zavádza komplexné požiadavky na digitálnu prevádzkovú odolnosť vrátane riadenia rizík spojených s outsourcingom IKT služieb,⁵ čo priamo ovplyvňuje spôsob, akým finančné inštitúcie obstarávajú a využívajú RegTech riešenia od externých poskytovateľov. Zároveň Rada pre finančnú stabilitu upozorňuje, že hoci existujúce regulačné rámce pokrývajú mnohé zraniteľnosti spojené s AI, môže byť potrebná ďalšia práca na zabezpečení ich dostatočnosti.⁶

1. Vymedzenie pojmov: RegTech, SupTech a úloha AI

Pre účely tohto článku je nevyhnutné jasne odlíšiť dva príbuzné, no odlišné pojmy. RegTech (*regulatory technology*, *regulačná technológia*) je subdivízia sektora finančných technológií (FinTech), ktorá využíva moderné technológie na uľahčenie plnenia regulačných požiadaviek

¹Grassi, L., & Lanfranchi, D. (2022). RegTech in public and private sectors: The nexus between data, technology and regulation. *Journal of Industrial and Business Economics*, 49(3), 441–479. <https://doi.org/10.1007/s40812-022-00226-0>.

²FinTech Magazine. (2025, november 5). *How AI is revolutionising RegTech and compliance*. <https://fintechmagazine.com/news/how-ai-is-revolutionising-regtech-and-compliance>.

³European Banking Authority. (2021, jún 29). *Analysis of RegTech in the EU financial sector* (EBA/REP/2021/17). https://www.eba.europa.eu/sites/default/files/document_library/Publications/Reports/2021/1015484/EBA%20analysis%20of%20RegTech%20in%20the%20EU%20financial%20sector.pdf

⁴Nariadenie Európskeho parlamentu a Rady (EÚ) 2024/1689 z 13. júna 2024, ktorým sa stanovujú harmonizované pravidlá pre umelú inteligenciu (akt o umelej inteligencii). Ú. v. EÚ L, 2024/1689.

⁵Nariadenie Európskeho parlamentu a Rady (EÚ) 2022/2554 zo 14. decembra 2022 o digitálnej prevádzkovej odolnosti finančného sektora (DORA). Ú. v. EÚ L 333, 27.12.2022.

⁶Financial stability board: The Financial Stability Implications of Artificial Intelligence. Basel: Financial Stability Board, 14. november 2024. Správa konštatuje, že existujúce regulačné a dohľadové rámce pokrývajú mnohé zraniteľnosti spojené s AI, ale môže byť potrebná ďalšia práca na zabezpečení ich dostatočnosti.

efektívnejšie a účinnejšie než tradičné kapacity.⁷ Podľa britského úradu Financial Conduct Authority (FCA) ide o využitie nových technológií, ktoré umožňujú konzistentne procesovať a implementovať požiadavky na riadenie dohľadu.⁸ Inštitút pre medzinárodné financie (IIF) definuje RegTech ako súbor vznikajúcich nástrojov zameraných na efektívne riešenie regulačných výziev a výziev v oblasti compliance.⁹

SupTech (*supervisory technology, dohľadová technológia*) zas označuje technológie používané samotnými dohľadovými orgánmi na výkon dohľadu a regulácie.¹⁰ ESMA takisto definuje RegTech ako technológiu používanú v kontexte regulačného súladu a SupTech ako technológiu používanú dohľadovými orgánmi.¹¹ Toto rozlíšenie je kľúčové, pretože určuje perspektívu článku.

Novým fenoménom, ktorý je potrebné v tomto kontexte zohľadniť je rapídny nárast využívania umelej inteligencie (ďalej aj „AI“). Umelá inteligencia sa v rámci RegTech uplatňuje napríklad prostredníctvom strojového učenia (*machine learning*), ktoré umožňuje automatickú identifikáciu vzorov napr. v transakčných dátach, deteciu anomálií a prediktívne modelovanie rizík. Ďalej sa AI využíva na spracovania prirodzeného jazyka (*natural language processing, NLP*), ktoré umožňuje automatickú analýzu textov, extrakciu informácií z neštruktúrovaných dokumentov a monitoring regulačných zmien. V neposlednom rade môže ísť o tzv. prediktívnu analytiku, ktorá dokáže predvídať prípadné riziká skôr, než sa materializujú.¹²

Dynamika trhu potvrdzuje rastúci význam AI v RegTech. Trh s AI v regulačných technológiách dosiahol v roku 2024 hodnotu takmer 1,9 miliardy USD s predpokladaným rastom na 9,1 miliardy USD do roku 2029 pri zloženej ročnej miere rastu približne 37 %.¹³ Podľa prieskumu RegTech Association z januára 2025 viac ako 73 % respondentov predpokladá, že generatívna

⁷Anagnostopoulos, I. (2018). Fintech and regtech: Impact on regulators and banks. *Journal of Economics and Business*, 100, 7–25. <https://doi.org/10.1016/j.jeconbus.2018.07.003>.

⁸Wang, J.-S., & Chen, Y.-T. (2024). Configuring the RegTech business model to explore implications of FinTech. *Egyptian Informatics Journal*, 26, 100483. <https://doi.org/10.1016/j.eij.2024.100483>.

⁹Li, Y., Xia, Y., Shi, H., He, L., & Li, Y. (2026). Can bank regulatory technology alleviate financial mismatch? Causal evidence from double-debiased machine learning on bank-firm matched data. *The North American Journal of Economics and Finance*, 83, 102604. <https://doi.org/10.1016/j.najef.2026.102604>.

¹⁰Arner, D. W., Barberis, J., & Buckley, R. P. (2017). FinTech, RegTech, and the reconceptualization of financial regulation. *Northwestern Journal of International Law & Business*, 37(3), 371–413. <https://scholarlycommons.law.northwestern.edu/njilb/vol37/iss3/2>.

¹¹European Securities and Markets Authority. (2024). *Digital finance and innovation – RegTech and SupTech*. <https://www.esma.europa.eu/esmas-activities/digital-finance-and-innovation>

¹²Prenio, J. (2024). *Peering through the hype – assessing suptech tools' transition from experimentation to supervision* (FSI Insights on Policy Implementation, No. 58). Bank for International Settlements. <https://www.bis.org/fsi/publ/insights58.htm>; Kothandapani, H. P. (2024). Automating financial compliance with AI: A new era in regulatory technology (RegTech). *International Journal of Science and Research Archive*, 11(1), 2646–2659. <https://doi.org/10.30574/ijrsra.2024.11.1.0040>

¹³Proximity. (2026, február). *The future of compliance: Emerging RegTech trends for 2026*. <https://www.proximity.io/views/the-future-of-compliance-emerging-regtech-trends/>.

AI bude mať významný dopad na RegTech v nasledujúcich dvoch rokoch, pričom strojové učenie už v nejakej forme zaviedlo 62 % a spracovanie prirodzeného jazyka 50 % oslovených poskytovateľov.¹⁴ Finančné inštitúcie označujú za hlavné prínosy AI v rámci RegTech zlepšené riadenie rizík, lepšie monitorovacie kapacity a zníženie ľudských chýb.¹⁵

2. Právny rámec pre AI-podporovaný RegTech v EÚ

RegTech riešenia využívajúce AI sa v Európskej únii pohybujú v komplexnom regulačnom prostredí, v ktorom sa prelína horizontálna regulácia AI so sektorovým finančno-právnymi predpismi a pravidlami ochrany osobných údajov. Akt o umelej inteligencii,¹⁶ zavádza rizikovú klasifikáciu AI systémov s priamymi dôsledkami pre RegTech. Medzi vysokorizikové použitia, na ktoré sa vzťahuje najprísnejší režim povinností, patria AI systémy na hodnotenie úverovej bonity fyzických osôb a na hodnotenie rizika a tvorbu cien v životnom a zdravotnom poistení. Naopak, AI systémy používané na odhaľovanie finančných podvodov sú z tejto klasifikácie výslovne vyňaté, rovnako ako systémy na výpočet kapitálových požiadaviek.¹⁷ Poskytovatelia a subjekty nasadzujúce vysokorizikové AI systémy musia splniť rozsiahle požiadavky na systém riadenia rizík, správu dát, technickú dokumentáciu, transparentnosť, ľudský dohľad a kybernetickú bezpečnosť.¹⁸

Akt o AI však nepôsobí izolovane. RegTech riešenia musia súbežne rešpektovať požiadavky sektorovej finančnej legislatívy, ako sú prudenciálny rámec CRD/CRR pre úverové inštitúcie, pravidlá pre investičné služby podľa MiFID II, požiadavky pre poisťovne podľa Solventnosti II, rámec boja proti praniu špinavých peňazí podľa AML smerníc a pripravovaný AML balík zahŕňajúci zriadenie AMLA.¹⁹ Osobitný význam má nariadenie DORA o digitálnej prevádzkovej odolnosti finančného sektora, uplatniteľné od januára 2025, ktoré stanovuje komplexné požiadavky na riadenie IKT rizík, bezpečnosť a dohľad nad kritickými

¹⁴Iacovcich, S. (2025, február 4). RegTech in 2025: What's next for financial services? *FStech*. https://www.fstech.co.uk/fst/Regtech_in_2025_what_next_for_financial_services.php.

¹⁵European Banking Authority. (2021). *Analysis of RegTech in the EU financial sector* (EBA/REP/2021/17). https://www.eba.europa.eu/sites/default/files/document_library/Publications/Reports/2021/1015484/EBA%20analysis%20of%20RegTech%20in%20the%20EU%20financial%20sector.pdf

¹⁶Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act). OJ L, 2024/1689. Dostupné na: <https://eur-lex.europa.eu/eli/reg/2024/1689/oj>

¹⁷Príloha III, bod 5 písm. b) a c) nariadenia 2024/1689. Pozri bližšie: Mazzini, G., & Bagni, M. (2023). *Considerations on the regulation of AI systems in the financial sector by the AI Act*. *European Economy – Banks, Regulation, and the Real Sector*. <https://pmc.ncbi.nlm.nih.gov/articles/PMC10676199>

¹⁸Čl. 9–15 nariadenia 2024/1689.

¹⁹Smernica 2013/36/EÚ (CRD); nariadenie 575/2013 (CRR); smernica 2014/65/EÚ (MiFID II); smernica 2009/138/ES (Solvency II); smernica (EÚ) 2018/843 (5AMLD); smernica (EÚ) 2018/1673 (6AMLD). K pripravovanému AML balíku pozri návrh nariadenia o prevencii využívania finančného systému na pranie špinavých peňazí (AMLR) a nariadenie o zriadení AMLA.

poskytovateľmi služieb tretích strán, čo priamo ovplyvňuje obstarávanie a nasadzovanie externých RegTech riešení.²⁰

Kľúčovým zistením je, že akt o AI a sektorová finančná legislatíva sú vzájomne komplementárne. EBA v novembri 2025 publikovala výsledky mapovania požiadaviek aktu o AI voči existujúcej bankovej a platobnej legislatíve a došla k záveru, že medzi oboma rámcami neexistujú významné rozpory.²¹ Existujúci prudenciálny rámec už poskytuje komplexný systém riadenia rizík, ktorý sa dá aplikovať aj na AI systémy.²² Európsky parlament v uznesení z roku 2025 vyzval na proporcionálne usmernenia namiesto nových pravidiel a na lepšiu spoluprácu orgánov pri implementácii.²³

Horizontálnym limitom pre všetky RegTech riešenia je GDPR, najmä čl. 22, ktorý obmedzuje rozhodnutia založené výlučne na automatizovanom spracovaní vrátane profilovania, ak majú právne účinky alebo podobne významný vplyv na dotknutú osobu.²⁴ Toto ustanovenie je osobitne relevantné pre RegTech riešenia v oblasti kreditného skórovania, AML profilovania a automatizovaného hodnotenia rizikôv, kde algoritmus priamo ovplyvňuje postoj inštitúcie k finančnej službe poskytovanej konkrétnej osobe. Požiadavky GDPR na právo dotknutej osoby na zmysluplné informácie o logike rozhodovania sa prelínajú s požiadavkami aktu o AI na transparentnosť a vysvetliteľnosť, čo vytvára kombináciu povinností, ktorým musí RegTech riešenie vyhovieť súčasne.²⁵

3. Oblasti nasadenia AI v RegTech praxi

Nasadenie umelej inteligencie v regulačných technológiách sa v európskom finančnom sektore sústreďuje hlavne do niekoľkých kľúčových oblastí. EBA identifikovala päť

²⁰Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector (DORA). OJ L 333, 27.12.2022. Uplatniteľné od 17. januára 2025.

²¹European Banking Authority. (2025, November 21). AI Act: Implications for the EU banking and payments sector – Factsheet. <https://www.eba.europa.eu/sites/default/files/2025-11/d8b999ce-a1d9-4964-9606-971bbc2aaf89/AI%20Act%20implications%20for%20the%20EU%20banking%20sector.pdf>

²²European Banking Authority. (2025, December 17). Letter to European Commission – Outcome of EBA's AI Act mapping exercise. <https://www.eba.europa.eu/publications-and-media/press-releases/>

²³Bird & Bird. (2026). Recent developments on the interplay between AI and financial institutions. <https://www.twobirds.com/en/insights/2026/recent-developments-on-the-interplay-between-ai-and-financial-institutions>

²⁴Nariadenie Európskeho parlamentu a Rady (EÚ) 2016/679 z 27. apríla 2016 o ochrane fyzických osôb pri spracovaní osobných údajov (GDPR). Čl. 22 GDPR zakazuje rozhodnutia založené výlučne na automatizovanom spracovaní vrátane profilovania, ak majú právne účinky alebo podobne významný vplyv na dotknutú osobu, s výnimkami podľa ods. 2.

²⁵Azzutti, A., Batista, P. M., & Ringe, W.-G. (2024). Good administration in AI-enhanced banking supervision: A risk-based approach. *Columbia Journal of European Law*, 29(3). <https://ssrn.com/abstract=4430642>.

najfrekvencovanejších kategórií RegTech riešení: boj proti praniu špinavých peňazí a financovaniu terorizmu (AML/CFT), detekciu a prevenciu podvodov, prudenciálny reporting, IKT bezpečnosť a riadenie kreditného rizika.²⁶ AI sa v rôznej miere uplatňuje vo všetkých týchto oblastiach, pričom miera adoptácie sa líši podľa veľkosti inštitúcie, jurisdikcie a konkrétneho prípadu použitia.

3.1 AML/CFT compliance

Boj proti praniu špinavých peňazí predstavuje oblasť s najvýraznejším potenciálom pre RegTech využívajúci AI. Tradičné systémy transakčného monitoringu založené na statických pravidlách generujú vysoký počet falošných pozitívnych upozornení, čo zaťažuje compliance tímy a znižuje celkovú efektívnosť. Modely strojového učenia dokážu analyzovať transakcie v kontexte zákazníckeho správania v čase, identifikovať zložité vzory a anomálie a dynamicky sa adaptovať na nové typológie finančnej kriminality. Podľa prieskumu EY Nordic Transaction Monitoring Survey 2025 už 30 % severoeurópskych bánk implementovalo AI v transakčnom monitoringu a 75 % plánuje ďalšie investície.²⁷ V praxi niektoré veľké inštitúcie hlásia zníženie falošných pozitívnych upozornení až o 60 % pri súčasnom zlepšení presnosti detekcie.²⁸

AI sa čoraz viac uplatňuje aj v screeningu sankcií a politicky exponovaných osôb, kde algoritmy založené na NLP zlepšujú presnosť párovania mien a entít naprieč jazykmi a variantnými zápismi. V oblasti KYC/CDD (*Know Your Customer / Customer Due Diligence*) AI umožňuje automatickú extrakciu údajov z neštruktúrovaných dokumentov, overovanie identity a kontinuálne prehodnocovanie rizikového profilu klientov. Významnou medzinárodnou iniciatívou je Projekt Aurora BIS Innovation Hub, ktorý skúma využitie AI a zdieľaných dát na boj proti praniu peňazí naprieč inštitúciami a hranicami.²⁹

3.2 Regulačný reporting a prudenciálne hlásenia

Regulačný reporting je tradične jednou z nákladovo najnáročnejších compliance funkcií. AI nástroje tu prispievajú automatizáciou extrakcie dát z rôznorodých interných systémov, kontrolou kvality a konzistentnosti dát pred odoslaním hlásení a automatickým generovaním

²⁶European Banking Authority. (2021). Analysis of RegTech in the EU financial sector (EBA/REP/2021/17), s. 18–25.

https://www.eba.europa.eu/sites/default/files/document_library/Publications/Reports/2021/1015484/EBA%20analysis%20of%20RegTech%20in%20the%20EU%20financial%20sector.pdf

²⁷EY. (2025, November 12). *How AI is reshaping the future of transaction monitoring*. Prieskum EY Nordic Transaction Monitoring Survey 2025 https://www.ey.com/en_se/insights/financial-services/how-ai-is-reshaping-the-future-of-transaction-monitoring

²⁸FinTech Magazine. (2025, November 5). *How AI is revolutionising RegTech and compliance*. <https://fintechmagazine.com/news/how-ai-is-revolutionising-regtech-and-compliance>

²⁹BIS Innovation Hub. (2023). Project Aurora: The power of data, technology and collaboration to combat money laundering across institutions and borders. https://www.bis.org/about/bisih/topics/suptech_regtech/aurora.htm

reportov v požadovaných formátoch. FSB konštatuje, že finančné inštitúcie využívajú AI predovšetkým na zlepšenie interných operácií a regulačného súladu.³⁰ Na strane orgánov dohľadu prebiehajú paralelne iniciatívy smerujúce k štandardizácii a digitalizácii reportingu. ESMA nasadzuje strojové učenie na overovanie kvality reportovaných dát,³¹ EBA rozvíja dátovú infraštruktúru EUCLID a Pillar 3 data hub³² a spoločne s EIOPA pracujú na Data Point Model 2.0.³³ Konvergencia k strojovo čitateľnej regulácii a štandardizovaným taxonómiám vytvára predpoklady pre efektívnejšiu automatizáciu reportingu na strane regulovaných subjektov.³⁴

3.3 Compliance monitoring

Dynamika regulačných zmien predstavuje pre finančné inštitúcie permanentnú výzvu. AI nástroje na báze NLP umožňujú automatické monitorovanie regulačných textov z množstva zdrojov, interpretáciu nových pravidiel, krížové porovnávanie s internými politikami a identifikáciu medzier v compliance rámcoch. Tieto platformy na sledovanie zmien v regulácii (*regulatory change management*) dokážu spracovať tisíce strán regulácií za zlomok času potrebného pri manuálnom spracovaní, pričom automaticky generujú odporúčania na aktualizáciu interných postupov. Podľa prieskumu RegTech Association patria práve compliance monitoring a adresovanie regulačných zmien medzi najfrekventovanejšie prípady využitia AI v RegTech.³⁵³⁶

3.4 Riadenie rizík

V oblasti riadenia rizík sa AI uplatňuje predovšetkým v úverovom skórovaní, stresovom testovaní a validácii interných modelov. EBA v správe o využívaní strojového učenia v

³⁰FSB. (2024, November 14). The financial stability implications of artificial intelligence, s. 12–15. <https://www.fsb.org/2024/11/the-financial-stability-implications-of-artificial-intelligence/>

³¹ESMA. (2025). Report on the quality and use of data 2024. ESMA nasadzuje strojové učenie a pokročilú analytiku na identifikáciu anomálií a overovanie konzistentnosti naprieč reportingovými tokmi. Pozri: AQMetrics. (2025, May 2). ESMA's 2024 data quality report: A new era for market oversight. <https://aqmetrics.com/blog/esma-2024-data-quality-report-signals-a-new-era-for-market-oversight/>

³²European Banking Authority. (2025). *Single programming document 2026–2028* (bod 28). [https://www.eba.europa.eu/sites/default/files/2025-12/cad43874-c741-4a61-bccb-f590c3eaf60b/Single%20Programming%20Document%202026-2028%20\(final\)%20\(1\).pdf](https://www.eba.europa.eu/sites/default/files/2025-12/cad43874-c741-4a61-bccb-f590c3eaf60b/Single%20Programming%20Document%202026-2028%20(final)%20(1).pdf)

³³European Banking Authority & European Insurance and Occupational Pensions Authority. (2023). *Data Point Modelling Standard 2.0*. <https://www.eba.europa.eu/publications-and-media/press-releases/eba-and-eiopa-publish-data-point-modelling-standard-20-foster>

³⁴Interoperable Europe Portal. Fintech and Regtech Standardisation. <https://interoperable-europe.ec.europa.eu/collection/rolling-plan-ict-standardisation/fintech-and-regtech-standardisation>

³⁵Kothandapani, H. P. (2024). Automating financial compliance with AI: A new era in regulatory technology (RegTech). *International Journal of Science and Research Archive*, 11(1), 2646–2659. <https://doi.org/10.30574/ijrsa.2024.11.1.0040>

³⁶Iacovcich, S. (2025, január 30). RegTech in 2025: What's next for financial services? *FStech*. [https://www.fstech.co.uk/fst/Regtech in 2025 what next for financial services.php](https://www.fstech.co.uk/fst/Regtech%20in%2025%20what%20next%20for%20financial%20services.php)

interných ratingových modeloch analyzovala špecifické výzvy, ktoré modely založené na strojovom učení prinášajú pre dohľadový rámec ,najmä v oblasti vysvetliteľnosti, validácie a rozlišovania medzi údržbou a zmenami modelov.³⁷ Podľa dát z EBA Risk Assessment Questionnaire približne 40 % bánk v EÚ už využíva AI na báze všeobecných modelov, pričom využívanie dosahuje významné úrovne aj v optimalizácii interných procesov vrátane riadenia rizík.³⁸

3.5 Ochrana klienta a monitorovanie obchodného správania

V oblasti ochrany klienta a obchodného správania sa AI využíva na monitorovanie súladu investičných služieb s požiadavkami MiFID II, kontrolu vhodnosti produktov pre klientov a detekciu zneužití trhu. ESMA v úvode k svojmu verejnému vyhláseniu identifikovala viacero potenciálnych využití AI pokrytých požiadavkami MiFID II. Od zákazníckej podpory a detekcie podvodov cez riadenie rizík a compliance, až po podporu pri poskytovaní investičného poradenstva a správy portfólií.³⁹ ESMA tiež systematicky analyzuje využívanie AI v investičných fondoch a skúma, či AI stratégie generujú skutočnú pridanú hodnotu pre investorov.⁴⁰

Osobitným aspektom je využívanie AI v algoritmickej obchodovaní, kde ESMA vo februári 2026 vydala dohľadové usmernenie objasňujúce očakávania v oblasti pred-obchodných kontrol, správy a testovania.⁴¹ Z hľadiska RegTech sú relevantné predovšetkým AI nástroje na detekciu podozrivých obchodných vzorov (či už ide o insider trading, manipuláciu trhu alebo tzv. „layering“), ktoré využívajú strojové učenie na identifikáciu komplexných vzorov v reálnom čase, čo výrazne presahuje kapacity tradičných systémov založených na vopred pevne stanovených pravidlách.

³⁷European Banking Authority. (2023, august 4). *Follow-up report on the use of machine learning for internal ratings-based models* (EBA/REP/2023/28). https://www.eba.europa.eu/sites/default/files/document_library/Publications/Reports/2023/1061483/Follow-up%20report%20on%20machine%20learning%20for%20IRB%20models.pdf

³⁸European Banking Authority. (2025, september 25). *Rising application of AI in EU banking and payments sector*. <https://www.eba.europa.eu/sites/default/files/2025-09/146b3558-d026-47bf-a872-f05e93ed30d2/Rising%20application%20of%20AI%20in%20EU%20banking%20and%20payments%20sector.pdf>

³⁹European Securities and Markets Authority. (2024, máj 30). *Public statement on the use of AI in the provision of retail investment services* (ESMA35-335435667-5924). https://www.esma.europa.eu/sites/default/files/2024-05/ESMA35-335435667-5924_Public_Statement_on_AI_and_investment_services.pdf

⁴⁰European Securities and Markets Authority. (2025, február 25). *TRV Risk Analysis – Artificial intelligence in EU investment funds* (ESMA50-43599798-9923). https://www.esma.europa.eu/sites/default/files/2025-02/ESMA50-43599798-9923_TRV_Artificial_intelligence_in_EU_investment_funds.pdf

⁴¹European Securities and Markets Authority. (2026, február 26). *Supervisory briefing on algorithmic trading in the EU* (ESMA74-1505669079-10311). https://www.esma.europa.eu/sites/default/files/2026-02/ESMA74-1505669079-10311_Supervisory_Briefing_on_Algorithmic_Trading_in_the_EU.pdf

Celkovo možno konštatovať, že AI v RegTech už nie je v štádiu čisto experimentálnom. V oblasti AML a transakčného monitoringu dochádza k reálnemu nasadeniu v produkčnom prostredí. V ostatných oblastiach, najmä, však veľká časť inštitúcií stále operuje na úrovni pilotov alebo čiastočného nasadenia. Rýchlosť miery využívania AI závisí od kvality dát, dostupnosti odborných kapacít, pripravenosti interných systémov a prístupu zo strany príslušných dohľadových orgánov.

4. Porovnanie prístupov k RegTech využívajúcemu AI vo vybraných jurisdikciách

Ďalšou významnou skutočnosťou je fakt, že naprieč európskymi a medzinárodnými jurisdikciami sa prístupy jednotlivých dohľadových orgánov výrazne líšia. Niektoré orgány majú za cieľ primárne podporovať inovácie, iné sa skôr orientujú na šandardizáciu a ďalšie sú orientované na riadenie rizík. Každý z nich reflektuje odlišnú filozofiu vzťahu medzi regulátorom a regulovaným subjektom v kontexte technologických inovácií. Samozrejme, tieto prístupy sa aj prelínajú.

Najvýraznejším predstaviteľom prístupu primárne podporujúceho inovácie je britský Úrad pre finančné správanie (Financial Conduct Authority, ďalej len „FCA“), ktorý vo svojej stratégii na roky 2025 – 2030 deklaruje ambíciu stať sa čoraz viac technologicky orientovaným regulátorom s pozitívnym postojom k technologickému pokroku.⁴² FCA v októbri 2024 zriadil laboratórium pre umelú inteligenciu (AI Lab), ktoré predstavuje komplexnú platformu zahŕňajúcu možnosť živého testovania systémov umelej inteligencie pod priamym regulačným dohľadom, a to aj pre subjekty poskytujúce RegTech riešenia.⁴³ FCA zároveň jednoznačne odmieta zavedenie osobitných pravidiel pre umelú inteligenciu a spolieha sa na existujúce regulačné rámce ako je ochrana spotrebiteľa, režim zodpovednosti vyšších riadiacich pracovníkov a požiadavky na prevádzkovú odolnosť.⁴⁴ Partnerstvo so spoločnosťou Nvidia v rámci projektu regulačného experimentálneho prostredia s rozšírenými výpočtovými kapacitami (*Supercharged Sandbox*), ktoré poskytuje firmám prístup k pokročilým nástrojom umelej inteligencie v kontrolovanom prostredí, ilustruje ochotu FCA aktívne napomáhať technologickým inováciám v oblasti RegTech.⁴⁵

⁴²Financial Conduct Authority. (2025, September). AI and the FCA: Our approach. <https://www.fca.org.uk/firms/innovation/ai-approach>

⁴³Financial Conduct Authority. (2025, September). Feedback Statement FS25/5 on AI Live Testing. FCA prijala 67 odpovedí od regulovaných firiem (vrátane bánk, poisťovní a správcov majetku) a neregulovaných subjektov (AI špecialisti, RegTech firmy, akademici). <https://www.fca.org.uk/firms/ai-financial-services>

⁴⁴FCA. (2024, April). AI Update. <https://www.fca.org.uk/publication/corporate/ai-update.pdf>

⁴⁵PwC UK. (2025). Tech-positive in practice: The FCA's evolving approach to AI. <https://www.pwc.co.uk/industries/financial-services/understanding-regulatory-developments/tech-positive-in-practice-the-fcas-evolving-approach-to-ai.html>

ECB a EBA presadzujú model, v ktorom je kľúčom k efektívnemu využitiu technológií regulačnej zhody štandardizácia dátových formátov a reportingových rámcov. EBA rozvíja centralizovanú dátovú infraštruktúru s cieľom vytvoriť jednotný ekosystém pre zber, analýzu a zdieľanie prudenciálnych dát.⁴⁶ EIOPA sa podieľa na vývoji kolaboratívnych platforiem pre správu metadát a dátové modelovanie, ktoré umožňujú užívateľom krížovo overovať porozumenie dátovým požiadavkám a rýchlo implementovať rôzne reportingové balíky v rámci spoločnej taxonómie.⁴⁷ Konvergencia k strojovo čitateľnej regulácii prostredníctvom štandardizovaných elektronických formátov finančného výkazníctva vytvára predpoklady, ktoré umožňujú poskytovateľom technológií RegTech budovať efektívnejšie automatizované riešenia⁴⁸

BaFin predstavuje najexplicitnejší príklad modelu založeného na riadení rizík spojených s AI. V decembri 2025 publikoval usmernenie k IKT rizikám pri používaní AI, ktoré klasifikuje AI systémy ako kombináciu IKT aktív a infraštruktúry podliehajúcu v plnom rozsahu rámcu DORA.⁴⁹ Usmernenie vyžaduje od inštitúcií prijatie AI stratégie schválenej štatutárnym orgánom, jasné zodpovednosti v rámci troch línií obrany a komplexné riadenie rizík naprieč celým životným cyklom AI. Hoci je formálne nezáväzná, v praxi sa očakáva jeho uplatňovanie ako de facto benchmarku.⁵⁰ Holandská DNB volí prístup založený na princípoch SAFEST – Soundness, Accountability, Fairness, Ethics, Skills, Transparency.⁵¹ Prezident DNB Klaas Knot otvorene priznáva limity dohľadových znalostí v oblasti AI a zdôrazňuje, že inovácia musí

⁴⁶European Banking Authority. (2025). *Single Programming Document 2026–2028*, [https://www.eba.europa.eu/sites/default/files/2025-01/85df6492-5d9a-4c6f-9219-7f7b1295645c/Single%20Programming%20Document%202026-2028%20\(initial\)%20\(1\).pdf](https://www.eba.europa.eu/sites/default/files/2025-01/85df6492-5d9a-4c6f-9219-7f7b1295645c/Single%20Programming%20Document%202026-2028%20(initial)%20(1).pdf)

⁴⁷K Data Point Model 2.0 a spolupráci EBA-EIOPA na metadata management pozri: Central Banking. (2024, November 8). Suptech adoption: Strategy and capacity building drives supervisory transformation. <https://www.centralbanking.com/fintech/7962603/suptech-adoption-strategy-and-capacity-building-drives-supervisory-transformation>

⁴⁸Interoperable Europe Portal. Fintech and Regtech Standardisation. Európska komisia prijala v septembri 2020 RTS o European Single Electronic Format (ESEF) pre digitálny formát (XHTML) a štruktúru (iXBRL) finančných správ. <https://interoperable-europe.ec.europa.eu/collection/rolling-plan-ict-standardisation/fintech-and-regtech-standardisation>

⁴⁹BaFin. (2025, December 18). Guidance on ICT risks in the use of artificial intelligence at financial entities (35 strán). https://www.bafin.de/SharedDocs/Downloads/EN/Anlage/neu/dl_Anlage_orientierungshilfe_IKT_Risiken_bei_KI_en.pdf

⁵⁰Jones Day. (2026, January). BaFin's expectations for ICT risk management and the use of AI. Hoci je usmernenie formálne nezáväzná, v praxi sa očakáva, že bude slúžiť ako de facto benchmark. <https://www.jonesday.com/en/insights/2026/01/bafins-expectations-for-ict-risk-management-and-the-use-of-ai>

⁵¹Stibbe. (2025). DNB's AI guidance: Balancing innovation with prudence. Princípy SAFEST: Soundness, Accountability, Fairness, Ethics, Skills, Transparency. <https://www.stibbe.com/publications-and-insights/dnbs-ai-guidance-balancing-innovation-with-prudence>

prichádzať z finančných inštitúcií, pričom dohľad zabezpečuje mantinely zodpovedného nasadenia.⁵²

Na globálnej úrovni prispieva k rozvoju AI-RegTech viacerými platformami. BIS Innovation Hub prostredníctvom Projektu Aurora skúma využitie AI a zdieľaných dát na cezhraničný boj proti praniu peňazí⁵³ a prostredníctvom Projektu AISE vyvíja AI nástroje na zefektívnenie dohľadových procesov.⁵⁴ Global Financial Innovation Network (GFIN) umožňuje cezhraničné testovanie inovatívnych finančných produktov vrátane RegTech riešení. FSB v správe o monitorovaní využívania AI formuluje odporúčania pre národné orgány na zlepšenie monitorovacích prístupov a riešenie dátových medzier.⁵⁵

Napriek odlišným prioritám všetky analyzované jurisdikcie zdieľajú jeden základný predpoklad: existujúce regulačné rámce sú v zásade dostatočné na pokrytie rizík spojených s AI v compliance a prioritou nie je tvorba nových pravidiel špecifických pre AI, ale jasnejší výklad a proporcionálne uplatnenie už existujúcich.

5. Princípy zodpovedného využívania AI v RegTech a odporúčania

Na základe predchádzajúcej analýzy možno formulovať základné princípy, ktoré by mali usmerňovať zodpovedné využívanie AI v regulačných technológiách. Proporcionalita vyžaduje, aby rozsah požiadaviek na riadenie, testovanie a monitorovanie AI bol úmerný rizikovosti činnosti na ktorú, ktorú sa AI využíva. Teda iné nároky sú odôvodnené pri AI systéme na kreditné skórovanie a iné pri internom chatbote pre zamestnancov.⁵⁶ Transparentnosť voči dohľadu znamená, že finančná inštitúcia musí byť schopná dohľadovému orgánu preukázať, ako jej AI systém funguje, na akých dátach bol trénovaný, aké výstupy produkuje a ako sú tieto výstupy využívané v rozhodovacích procesoch; to predpokladá vedenie komplexnej dokumentácie.⁵⁷ Zachovanie ľudského dohľadu predstavuje univerzálny princíp

⁵²DNB. (2024, October 4). 2024: An AI Odyssey. Prejav prezidenta DNB Klaasa Knota. <https://www.dnb.nl/en/general-news/speech-2024/2024-an-ai-odyssey/>

⁵³BIS Innovation Hub. (2023). Project Aurora: The power of data, technology and collaboration to combat money laundering across institutions and borders. https://www.bis.org/about/bisih/topics/suptech_regtech/aurora.htm

⁵⁴BIS Innovation Hub. (2025). Project AISE: Enhancing financial supervision with AI-powered tools. https://www.bis.org/about/bisih/topics/suptech_regtech/aise.htm

⁵⁵FSB. (2025, October 10). Monitoring adoption of artificial intelligence and related vulnerabilities in the financial sector. <https://www.fsb.org/2025/10/monitoring-adoption-of-artificial-intelligence-and-related-vulnerabilities-in-the-financial-sector/>

⁵⁶ESMA. (2024, May 30). Public statement on the use of AI in the provision of retail investment services (ESMA35-335435667-5924) [https://www.esma.europa.eu/sites/default/files/2024-05/ESMA35-335435667-5924_Public Statement on AI and investment services.pdf](https://www.esma.europa.eu/sites/default/files/2024-05/ESMA35-335435667-5924_Public%20Statement%20on%20AI%20and%20investment%20services.pdf)

⁵⁷K požiadavkám na transparentnosť a dokumentáciu pozri čl. 11–13 nariadenia 2024/1689 (akt o AI). BaFin. (2025, December 18). Guidance on ICT risks in the use of AI at financial entities, kapitola 4: BaFin očakáva vedenie model inventory, dokumentáciu dátových vstupov, tréningových procedúr a rozhodovacích procesov.

naprieč všetkými analyzovanými jurisdikciami. AI má slúžiť ako nástroj podpory odborného úsudku zodpovedného zamestnanca, nie ako jeho náhrada. Zodpovedný zamestnanec si musí zachovať schopnosť porozumieť výstupom AI, kriticky ich zhodnotiť a prijať konečné rozhodnutie.⁵⁸ Kontinuálne testovanie a monitorovanie zabezpečuje, že AI modely používané v compliance procesoch zostávajú presné, aktuálne a funkčné aj v meniacom sa regulačnom a trhovom prostredí. To zahŕňa pravidelnú validáciu, monitorovanie výkonnosti a mechanizmy spätnej väzby. Nediskriminácia vyžaduje systematickú prevenciu algoritmickej zaujatosti, najmä v procesoch dotýkajúcich sa fyzických osôb, či už ide o KYC profilovanie, kreditné hodnotenie, cenotvorba poistného, teda tam kde AI môže reprodukovať alebo zosilniť existujúce diskriminačné vzory obsiahnuté v historických dátach.⁵⁹

Z hľadiska regulačných odporúčaní je možno identifikovať tri priority. Po prvé, existuje naliehavá potreba konkrétnych usmernení zo strany európskych dohľadových orgánov k prijateľným spôsobom použitia AI v compliance. Finančné inštitúcie potrebujú regulačnú istotu v otázkach, či a za akých podmienok dohľady akceptujú výstupy vytvorené AI ako dôkaz súladu. Európsky parlament v uznesení z roku 2025 výslovne vyzval na proporcionálne usmernenia namiesto nových pravidiel.⁶⁰ Po druhé, harmonizácia prístupov naprieč EÚ je nevyhnutná na predchádzanie fragmentácii. EBA deklaruje zámer presadzovať v rokoch 2026–2027 spoločný dohľadový prístup medzi vnútroštátnymi orgánmi.⁶¹ Po tretie, efektívne využívanie AI vyžaduje obojstrannú investíciu. Finančné inštitúcie musia zabezpečiť vysvetliteľnosť a auditovateľnosť svojich AI systémov a dohľadové orgány musia budovať vlastné kapacity na porozumenie a hodnotenie týchto systémov.⁶²

https://www.bafin.de/SharedDocs/Downloads/EN/Anlage/neu/dl_Anlage_orientierungshilfe_IKT_Risiken_bei_KI_en.pdf

⁵⁸K princípu ľudského dohľadu pozri čl. 14 nariadenia 2024/1689. ECB Banking Supervision. (2025, October 14). Artificial intelligence and supervision: Innovation with caution. <https://www.bankingsupervision.europa.eu/press/speeches/date/2025/html/ssm.sp251014~5bc6e60334.en.html>

⁵⁹BaFin. (2024). AI at banks and insurers: Automatically fair? BaFinJournal. https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2024/fa-bj_0801_KI_Finanzindustrie_en.html. Pozri tiež: FCA. (2024, December). Research note: Bias in supervised machine learning. <https://www.fca.org.uk/publications/research-notes/ai-uk-financial-services>

⁶⁰Európsky parlament. (2025). Uznesenie o vplyve umelej inteligencie na finančný sektor (A10-0225/2025).. https://www.europarl.europa.eu/doceo/document/A-10-2025-0225_EN.html

⁶¹European Banking Authority. (2025, November 21). AI Act: Implications for the EU banking and payments sector – Factsheet. <https://www.eba.europa.eu/sites/default/files/2025-11/d8b999ce-a1d9-4964-9606-971bbc2aaf89/AI%20Act%20implications%20for%20the%20EU%20banking%20sector.pdf>

⁶²Bird & Bird. (2026). Recent developments on the interplay between AI and financial institutions. <https://www.twobirds.com/en/insights/2026/recent-developments-on-the-interplay-between-ai-and-financial-institutions>

Záver

Využívanie umelej inteligencie v regulačných technológiách v európskom finančnom sektore sa nachádza v štádiu prechodu od experimentovania k postupnému nasadzovaniu v produkčnom prostredí. Článok ukázal, že tento proces prebieha v komplexnom regulačnom prostredí, kde sa prelína horizontálna regulácia umelej inteligencie so sektorovou finančno-právnou legislatívou a pravidlami ochrany osobných údajov.

Z analýzy vyplývajú tri kľúčové zistenia. Po prvé, existujúce regulačné rámce sú v zásade dostatočné na pokrytie rizík spojených s AI v compliance. Tento záver zdieľajú naprieč všetkými analyzovanými jurisdikciami tak dohľadové orgány, ako aj európske inštitúcie. Prioritou nie je tvorba nových pravidiel špecifických pre AI, ale jasnejší výklad a proporcionálne uplatnenie už existujúcich. Po druhé, miera využívania AI v RegTech je nerovnomerná. Po tretie, prístupy jednotlivých jurisdikcií sa výrazne líšia (od aktívnej podpory inovácií cez dôraz na standardizáciu až po prístup založený na riadení rizík), no všetky konvergujú k spoločnému presvedčeniu o potrebe zachovania ľudského dohľadu, proporcionality a transparentnosti.

Ďalší vývoj bude závisieť od toho, ako úspešne sa podarí zabezpečiť regulačnú istotu pre finančné inštitúcie využívajúce AI v compliance, harmonizovať dohľadové prístupy naprieč členskými štátmi EÚ a vybudovať dostatočné odborné kapacity na oboch stranách, tak u regulovaných subjektov, ako aj u orgánov dohľadu. Zodpovedanie týchto výziev bude rozhodujúce pre to, či AI v regulačných technológiách naplní svoj potenciál znížiť náklady na compliance, zvýšiť jeho efektívnosť a v konečnom dôsledku prispieť k stabilnejšiemu a odolnejšiemu finančnému systému.

Zoznam bibliografických odkazov

Periodiká (časopisy) a zborníky resp. state v nich uverejnené

1. Anagnostopoulos, I. (2018). Fintech and regtech: Impact on regulators and banks. *Journal of Economics and Business*, 100, 7–25. <https://doi.org/10.1016/j.jeconbus.2018.07.003>.
2. Anagnostopoulos, I. (2018). Fintech and regtech: Impact on regulators and banks. *Journal of Economics and Business*, 100, 7–25. <https://doi.org/10.1016/j.jeconbus.2018.07.003>.
3. Arner, D. W., Barberis, J., & Buckley, R. P. (2017). FinTech, RegTech, and the reconceptualization of financial regulation. *Northwestern Journal of International Law & Business*, 37(3), 371–413. <https://scholarlycommons.law.northwestern.edu/njilb/vol37/iss3/2>.
4. Azzutti, A., Batista, P. M., & Ringe, W.-G. (2024). Good administration in AI-enhanced banking supervision: A risk-based approach. *Columbia Journal of European Law*, 29(3). <https://ssrn.com/abstract=4430642>.

5. Grassi, L., & Lanfranchi, D. (2022). RegTech in public and private sectors: The nexus between data, technology and regulation. *Journal of Industrial and Business Economics*, 49(3), 441–479. <https://doi.org/10.1007/s40812-022-00226-0>.
6. Iacovcich, S. (2025, február 4). RegTech in 2025: What's next for financial services? *FStech*. https://www.fstech.co.uk/fst/Regtech_in_2025_what_next_for_financial_services.php.
7. Iacovcich, S. (2025, január 30). RegTech in 2025: What's next for financial services? *FStech*. https://www.fstech.co.uk/fst/Regtech_in_2025_what_next_for_financial_services.php
8. Kothandapani, H. P. (2024). Automating financial compliance with AI: A new era in regulatory technology (RegTech). *International Journal of Science and Research Archive*, 11(1), 2646–2659. <https://doi.org/10.30574/ijrsra.2024.11.1.0040>
9. Li, Y., Xia, Y., Shi, H., He, L., & Li, Y. (2026). Can bank regulatory technology alleviate financial mismatch? Causal evidence from double-debiased machine learning on bank-firm matched data. *The North American Journal of Economics and Finance*, 83, 102604. <https://doi.org/10.1016/j.najef.2026.102604>.
10. Mazzini, G., & Bagni, M. (2023). *Considerations on the regulation of AI systems in the financial sector by the AI Act. European Economy – Banks, Regulation, and the Real Sector*. <https://pmc.ncbi.nlm.nih.gov/articles/PMC10676199>
11. Wang, J.-S., & Chen, Y.-T. (2024). Configuring the RegTech business model to explore implications of FinTech. *Egyptian Informatics Journal*, 26, 100483. <https://doi.org/10.1016/j.eij.2024.100483>.

Publikácie európskych a medzinárodných inštitúcií

1. BaFin. (2024). AI at banks and insurers: Automatically fair? *BaFinJournal*. https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2024/fabj_0801_KI_Finanzindustrie_en.html.
2. BaFin. (2025, December 18). Guidance on ICT risks in the use of artificial intelligence at financial entities (35 strán). https://www.bafin.de/SharedDocs/Downloads/EN/Anlage/neu/dl_Anlage_orientierungshilfe_IKT_Risiken_bei_KI_en.pdf
3. BIS Innovation Hub. (2023). Project Aurora: The power of data, technology and collaboration to combat money laundering across institutions and borders. https://www.bis.org/about/bisih/topics/suptech_regtech/aurora.htm
4. BIS Innovation Hub. (2023). Project Aurora: The power of data, technology and collaboration to combat money laundering across institutions and borders. https://www.bis.org/about/bisih/topics/suptech_regtech/aurora.htm
5. BIS Innovation Hub. (2025). Project AISE: Enhancing financial supervision with AI-powered tools. https://www.bis.org/about/bisih/topics/suptech_regtech/aise.htm
6. Čl. 9–15 nariadenia 2024/1689.
7. DNB. (2024, October 4). 2024: An AI Odyssey. Prejav prezidenta DNB Klaasa Knota. <https://www.dnb.nl/en/general-news/speech-2024/2024-an-ai-odyssey/>
8. ECB Banking Supervision. (2025, October 14). Artificial intelligence and supervision: Innovation with caution. <https://www.bankingsupervision.europa.eu/press/speeches/date/2025/html/ssm.sp251014~5bc6e60334.en.html>
9. ESMA. (2024, May 30). Public statement on the use of AI in the provision of retail investment services (ESMA35-335435667-5924) https://www.esma.europa.eu/sites/default/files/2024-05/ESMA35-335435667-5924_Public_Statement_on_AI_and_investment_services.pdf
10. ESMA. (2025). Report on the quality and use of data 2024. ESMA nasadzuje strojové učenie a pokročilú analytiku na identifikáciu anomálií a overovanie konzistentnosti naprieč reportingovými tokmi. Pozri: AQMetrics. (2025, May 2). ESMA's 2024 data quality report: A new era for market oversight. <https://aqmetrics.com/blog/esma-2024-data-quality-report-signals-a-new-era-for-market-oversight/>

11. European Banking Authority & European Insurance and Occupational Pensions Authority. (2023). *Data Point Modelling Standard 2.0*. <https://www.eba.europa.eu/publications-and-media/press-releases/eba-and-eiopa-publish-data-point-modelling-standard-20-foster>
12. European Banking Authority. (2021). *Analysis of RegTech in the EU financial sector* (EBA/REP/2021/17). https://www.eba.europa.eu/sites/default/files/document_library/Publications/Reports/2021/1015484/EBA%20analysis%20of%20RegTech%20in%20the%20EU%20financial%20sector.pdf
13. European Banking Authority. (2021). *Analysis of RegTech in the EU financial sector* (EBA/REP/2021/17), s. 18–25. https://www.eba.europa.eu/sites/default/files/document_library/Publications/Reports/2021/1015484/EBA%20analysis%20of%20RegTech%20in%20the%20EU%20financial%20sector.pdf
14. European Banking Authority. (2021, jún 29). *Analysis of RegTech in the EU financial sector* (EBA/REP/2021/17). https://www.eba.europa.eu/sites/default/files/document_library/Publications/Reports/2021/1015484/EBA%20analysis%20of%20RegTech%20in%20the%20EU%20financial%20sector.pdf
15. European Banking Authority. (2023, august 4). *Follow-up report on the use of machine learning for internal ratings-based models* (EBA/REP/2023/28). https://www.eba.europa.eu/sites/default/files/document_library/Publications/Reports/2023/1061483/Follow-up%20report%20on%20machine%20learning%20for%20IRB%20models.pdf
16. European Banking Authority. (2025). *Single programming document 2026–2028* (bod 28). [https://www.eba.europa.eu/sites/default/files/2025-12/cad43874-c741-4a61-bccb-f590c3eaf60b/Single%20Programming%20Document%202026-2028%20\(final\)%20\(1\).pdf](https://www.eba.europa.eu/sites/default/files/2025-12/cad43874-c741-4a61-bccb-f590c3eaf60b/Single%20Programming%20Document%202026-2028%20(final)%20(1).pdf)
17. European Banking Authority. (2025). *Single Programming Document 2026–2028*, [https://www.eba.europa.eu/sites/default/files/2025-01/85df6492-5d9a-4c6f-9219-7f7b1295645c/Single%20Programming%20Document%202026-2028%20\(initial\)%20\(1\).pdf](https://www.eba.europa.eu/sites/default/files/2025-01/85df6492-5d9a-4c6f-9219-7f7b1295645c/Single%20Programming%20Document%202026-2028%20(initial)%20(1).pdf)
18. European Banking Authority. (2025, December 17). Letter to European Commission – Outcome of EBA’s AI Act mapping exercise. <https://www.eba.europa.eu/publications-and-media/press-releases/>
19. European Banking Authority. (2025, November 21). AI Act: Implications for the EU banking and payments sector – Factsheet. <https://www.eba.europa.eu/sites/default/files/2025-11/d8b999ce-a1d9-4964-9606-971bbc2aaf89/AI%20Act%20implications%20for%20the%20EU%20banking%20sector.pdf>
20. European Banking Authority. (2025, November 21). AI Act: Implications for the EU banking and payments sector – Factsheet. <https://www.eba.europa.eu/sites/default/files/2025-11/d8b999ce-a1d9-4964-9606-971bbc2aaf89/AI%20Act%20implications%20for%20the%20EU%20banking%20sector.pdf>
21. European Banking Authority. (2025, september 25). *Rising application of AI in EU banking and payments sector*. <https://www.eba.europa.eu/sites/default/files/2025-09/146b3558-d026-47bf-a872-f05e93ed30d2/Rising%20application%20of%20AI%20in%20EU%20banking%20and%20payments%20sector.pdf>
22. European Securities and Markets Authority. (2024). *Digital finance and innovation – RegTech and SupTech*. <https://www.esma.europa.eu/esmas-activities/digital-finance-and-innovation>
23. European Securities and Markets Authority. (2024, máj 30). *Public statement on the use of AI in the provision of retail investment services* (ESMA35-335435667-5924). https://www.esma.europa.eu/sites/default/files/2024-05/ESMA35-335435667-5924_PublicStatementonAIandinvestmentservices.pdf
24. European Securities and Markets Authority. (2025, February 25). *TRV Risk Analysis – Artificial intelligence in EU investment funds* (ESMA50-43599798-9923). https://www.esma.europa.eu/sites/default/files/2025-02/ESMA50-43599798-9923_TRVArticleArtificialintelligenceinEUinvestmentfunds.pdf
25. European Securities and Markets Authority. (2026, február 26). *Supervisory briefing on algorithmic trading in the EU* (ESMA74-1505669079-10311). https://www.esma.europa.eu/sites/default/files/2026-02/ESMA74-1505669079-10311_SupervisoryBriefingonAlgorithmicTradingintheEU.pdf

26. Európsky parlament. (2025). Uznesenie o vplyve umelej inteligencie na finančný sektor (A10-0225/2025).. https://www.europarl.europa.eu/doceo/document/A-10-2025-0225_EN.html
27. FCA. (2024, April). *AI Update*. <https://www.fca.org.uk/publication/corporate/ai-update.pdf>
28. Financial Conduct Authority. (2025, September). AI and the FCA: Our approach. <https://www.fca.org.uk/firms/innovation/ai-approach>
29. FCA. (2024, December). Research note: Bias in supervised machine learning. <https://www.fca.org.uk/publications/research-notes/ai-uk-financial-services>
30. Financial Conduct Authority. (2025, September). Feedback Statement FS25/5 on AI Live Testing. FCA prijala 67 odpovedí od regulovaných firiem (vrátane bánk, poisťovní a správcov majetku) a neregulovaných subjektov (AI špecialisti, RegTech firmy, akademici). <https://www.fca.org.uk/firms/ai-financial-services>
31. Financial stability board: The Financial Stability Implications of Artificial Intelligence. Basel: Financial Stability Board, 14. november 2024. Správa konštatuje, že existujúce regulačné a dohľadové rámce pokrývajú mnohé zraniteľnosti spojené s AI, ale môže byť potrebná ďalšia práca na zabezpečení ich dostatočnosti.
32. FSB. (2024, November 14). The financial stability implications of artificial intelligence, s. 12–15. <https://www.fsb.org/2024/11/the-financial-stability-implications-of-artificial-intelligence/>
33. FSB. (2025, October 10). Monitoring adoption of artificial intelligence and related vulnerabilities in the financial sector. <https://www.fsb.org/2025/10/monitoring-adoption-of-artificial-intelligence-and-related-vulnerabilities-in-the-financial-sector/>
34. Prenio, J. (2024). *Peering through the hype – assessing suptech tools' transition from experimentation to supervision* (FSI Insights on Policy Implementation, No. 58). Bank for International Settlements. <https://www.bis.org/fsi/publ/insights58.htm>

Internetové zdroje

1. Bird & Bird. (2026). Recent developments on the interplay between AI and financial institutions. <https://www.twobirds.com/en/insights/2026/recent-developments-on-the-interplay-between-ai-and-financial-institutions>
2. Bird & Bird. (2026). *Recent developments on the interplay between AI and financial institutions*. <https://www.twobirds.com/en/insights/2026/recent-developments-on-the-interplay-between-ai-and-financial-institutions>
3. EY. (2025, November 12). *How AI is reshaping the future of transaction monitoring*. Prieskum EY Nordic Transaction Monitoring Survey 2025 https://www.ey.com/en_se/insights/financial-services/how-ai-is-reshaping-the-future-of-transaction-monitoring
4. FinTech Magazine. (2025, november 5). *How AI is revolutionising RegTech and compliance*. <https://fintechmagazine.com/news/how-ai-is-revolutionising-regtech-and-compliance>
5. FinTech Magazine. (2025, November 5). *How AI is revolutionising RegTech and compliance*. <https://fintechmagazine.com/news/how-ai-is-revolutionising-regtech-and-compliance>
6. Interoperable Europe Portal. Fintech and Regtech Standardisation. <https://interoperable-europe.ec.europa.eu/collection/rolling-plan-ict-standardisation/fintech-and-regtech-standardisation>
7. Jones Day. (2026, January). BaFin's expectations for ICT risk management and the use of AI. <https://www.jonesday.com/en/insights/2026/01/bafins-expectations-for-ict-risk-management-and-the-use-of-ai>
8. Central Banking. (2024, November 8). *Suptech adoption: Strategy and capacity building drives supervisory transformation*. <https://www.centralbanking.com/fintech/7962603/suptech-adoption-strategy-and-capacity-building-drives-supervisory-transformation>
9. Proxymity. (2026, február). *The future of compliance: Emerging RegTech trends for 2026*. <https://www.proxymity.io/views/the-future-of-compliance-emerging-regtech-trends/>
10. PwC UK. (2025). *Tech-positive in practice: The FCA's evolving approach to AI*. <https://www.pwc.co.uk/industries/financial-services/understanding-regulatory-developments/tech-positive-in-practice-the-fcas-evolving-approach-to-ai.html>

11. Stibbe. (2025). DNB's AI guidance: Balancing innovation with prudence. Princípy SAFEST: Soundness, Accountability, Fairness, Ethics, Skills, Transparency. <https://www.stibbe.com/publications-and-insights/dnbs-ai-guidance-balancing-innovation-with-prudence>

Právne predpisy

1. Nariadenie Európskeho parlamentu a Rady (EÚ) 2016/679 z 27. apríla 2016 o ochrane fyzických osôb pri spracovaní osobných údajov (GDPR)..
2. Nariadenie Európskeho parlamentu a Rady (EÚ) 2022/2554 zo 14. decembra 2022 o digitálnej prevádzkovej odolnosti finančného sektora (DORA).
3. Nariadenie Európskeho parlamentu a Rady (EÚ) 2024/1689 z 13. júna 2024, ktorým sa stanovujú harmonizované pravidlá pre umelú inteligenciu (akt o umelej inteligencii).

TELEMEDICINE

Telemedicine

VLADIMÍRA HOUDEK BĚHALOVÁ*

Abstrakt

Telemedicina predstavuje dynamicky sa rozvíjajúcu oblasť zdravotnej starostlivosti, ktorá využíva informačno-komunikačné technológie na poskytovanie zdravotných služieb na diaľku. Cieľom tejto práce je analyzovať právnu úpravu telemedicíny, so zameraním na povinnosti poskytovateľa zdravotnej starostlivosti a jeho zodpovednosť pri poskytovaní telemedicínskych služieb. Práca sa zaoberá aktuálnym legislatívnym rámcom. Výsledkom práce je zhodnotenie súčasného stavu právnej úpravy telemedicíny a návrh odporúčaní de lege ferenda smerujúcich k jej efektívnejšiemu a jednoznačnejšiemu zakotveniu v právnom poriadku, s cieľom zabezpečiť právnu istotu pre poskytovateľov aj pacientov.

Abstract

Telemedicine is a dynamically developing area of healthcare that uses information and communication technologies to provide health services remotely. The aim of this thesis is to analyze the legal regulation of telemedicine, focusing on the obligations of the healthcare provider and his responsibility in providing telemedicine services. The thesis deals with the current legislative framework. The result of the thesis is an assessment of the current state of the legal regulation of telemedicine and a proposal of de lege ferenda recommendations aimed at its more effective and unambiguous incorporation into the legal order, in order to ensure legal certainty for both providers and patients.

Kľúčové slová: *Telemedicina. Zdravotná starostlivosť. Poskytovateľ zdravotnej starostlivosti. Zodpovednosť. Informovaný súhlas. Ochrana osobných údajov. Zdravotná dokumentácia.*

Key words: *Telemedicine. Healthcare. Healthcare provider. Liability. Informed consent. Personal data protection. Medical documentation.*

Úvod

Telemedicina v posledných rokoch zaznamenáva výrazný rozvoj, ktorý je podmienený najmä technologickým pokrokom a rastúcou potrebou zabezpečiť dostupnosť zdravotnej starostlivosti aj na diaľku. Využívanie informačno-komunikačných technológií umožňuje efektívnejšiu komunikáciu medzi pacientom a poskytovateľom zdravotnej starostlivosti, čím sa rozširujú možnosti diagnostiky, liečby a monitorovania zdravotného stavu pacienta. Tento trend bol výrazne akcelerovaný aj globálnymi udalosťami, ako bola pandémia ochorenia COVID-19, ktorá poukázala na význam a potenciál telemedicíny v modernom zdravotníctve.

S rozvojom telemedicíny však vznikajú aj nové právne otázky a výzvy, ktoré si vyžadujú adekvátnu legislatívnu reakciu. Poskytovanie zdravotnej starostlivosti na diaľku prináša špecifiká najmä v oblasti ochrany osobných údajov, zabezpečenia kvality poskytovanej starostlivosti, ako aj v otázkach zodpovednosti za prípadnú škodu spôsobenú pacientovi. Právna úprava telemedicíny

* JUDr. Vladimíra Houdek Běhalová IV. ročník, externá forma dizertačného štúdia na Právnickej fakulte UPJŠ Košice

preto musí reflektovať tieto špecifiká a zabezpečiť rovnováhu medzi inováciami a ochranou práv pacientov.

Cieľom príspevku je analyzovať právnu úpravu telemedicíny so zameraním na povinnosti poskytovateľa zdravotnej starostlivosti a jeho zodpovednosť. Príspevok sa sústreďuje na identifikáciu kľúčových právnych aspektov súvisiacich s poskytovaním telemedicínskych služieb a na posúdenie ich dopadu na právne postavenie poskytovateľa. Zároveň sa snaží poukázať na nedostatky súčasnej právnej úpravy a navrhnúť možné riešenia *de lege ferenda*, ktoré by prispeli k väčšej právnej istote a efektívnosti v tejto oblasti.

1. Pojem „telemedicína“

Slovo telemedicína spája latinské *tele* (ďaleko, na diaľku) a latinské *medicina* (liečenie), teda telemedicína je poskytovanie zdravotnej starostlivosti na diaľku s využitím moderných technológií.

Za krajinu, ktorá má najväčšie skúsenosti s telemedicínou možno považovať USA. Už v roku 1993 tu vzniklo neziskové združenie Americká asociácia telemedicíny (American Telemedicine Association, skratka ATA). Ako jediná organizácia v USA, ktorá sa zameriava na pokrok v telemedicíne, sa ATA zaviazala zabezpečiť, aby mal každý prístup k bezpečnej, cenovo dostupnej a vhodnej starostlivosti, kedykoľvek a kdekoľvek ju potrebuje. ATA predstavuje širokú a inkluzívnu členskú sieť popredných systémov poskytovania zdravotnej starostlivosti, akademických inštitúcií, poskytovateľov technologických riešení, ako aj partnerských organizácií a aliancií, ktorí pracujú na presadzovaní priemyselného prijatia telemedicíny, presadzujú zodpovednú politiku, obhajujú vládu a normalizáciu trhu a poskytujú vzdelanie a zdroje na pomoc pri integrácii virtuálnej starostlivosti do vznikajúcich modelov poskytovania založených na hodnote.¹ Na pôde Európskej únie je významným dokumentom Oznámenie Komisie Európskemu parlamentu, Rade, Európskemu hospodárskemu a sociálnemu výboru a Výboru regiónov o telemedicíne v prospech pacientov, systémov zdravotnej starostlivosti a spoločnosti zo dňa 4.11.2008, ktoré vymedzilo pojem telemedicína. Telemedicína je poskytovanie služieb zdravotníckej starostlivosti pomocou využívania IKT v situácii, keď sa zdravotnícky pracovník a pacient (alebo dvaja zdravotnícki pracovníci) nenachádzajú na tom istom mieste. Predpokladom je bezpečný prenos zdravotníckych údajov a informácií v podobe textu, zvuku, obrázkov alebo v inej forme, potrebných na prevenciu, diagnostikovanie, ošetrovanie a následnú starostlivosť o pacientov.

¹ American Telemedicine Association. (n.d.). *About us*. <https://www.americantelemed.org/about-us/>

Telemedicina zahŕňa širokú škálu služieb. Vo vzájomných hodnoteniach sa najčastejšie uvádza telerádiológia, telepatológia, teledermatológia, telekonzultácie, telemonitorovanie, telechirurgia a teleoftalmológia. Medzi ďalšie možné služby patria strediská služieb po telefóne/centrá online informácií pre pacientov, konzultácie na diaľku/elektronické domáce návštevy alebo videokonferencie zdravotníckeho personálu. Portály zdravotníckych informácií, systémy elektronických zdravotných záznamov, elektronický prenos predpisov alebo výmenných lístkov sa na účely tohto oznámenia za telemedicínske služby nepovažujú.²

Členské štáty sa mali zamerať na tri strategické súbory opatrení:

- vybudovanie dôvery občanov v telemedicínu a jej prijatie
- vytvorenie právnej čistoty
- vyriešenie technických otázok a zjednodušenie rozvoja trhu.³

V zmysle Oznámenia sú dôležité aspekty ochrany súkromia a bezpečnosti. Ochrana práva a základných slobôd, ako je základné právo na súkromie a ochrana osobných údajov, musí byť zaručená počas zhromažďovania a spracúvania osobných údajov, predovšetkým keď ide o oblasť zdravia. Ako aj všetky iné prenosy osobných údajov týkajúcich sa zdravotného stavu, aj telemedicina môže predstavovať riziko pre právo na ochranu údajov (v tom zmysle, že zverejnenie zdravotného stavu alebo diagnózy by mohlo nepriaznivo ovplyvniť súkromný a profesionálny život jednotlivcov). Pri poskytovaní telemedicínskych služieb by sa systematicky mali posudzovať aspekty ochrany osobných údajov. Je mimoriadne dôležité, aby sa dodržiavali ustanovenia členských štátov a Spoločenstva o ochrane osobných údajov.

Podľa Svetovej zdravotníckej organizácie (WHO) telemedicina nemá nahradiť osobný kontakt s pacientom. Telemedicina má byť pre lekárov určitým pomocníkom, a to najmä v monitorovaní pacientov, ktorých zdravotný stav je lekárom dobre známy. Ide napr. o pacientov s vysokým krvným tlakom, cukrovkou, tráviacimi ochoreniami. Stáva sa však, že telemedicina je aplikovaná aj v prípadoch, ak lekár pacienta nepozná, napr. na lekára sa obráti posádka ponorky alebo astronauti, alebo osoba žijúca mimo civilizácie, ktorá ešte nikdy u lekára nebola. V tomto prípade pomoc lekára má prednosť pred dôvernosťou, teda lekár má pomôcť, aj keď predtým pacienta nepoznal a jeho zdravotný stav mu predtým známy nebol.

² Európska komisia. (2008). *Oznámenie Komisie Európskemu parlamentu, Rade, Európskemu hospodárskemu a sociálnemu výboru a Výboru regiónov o telemedicíne pre prínos pacientom, zdravotníckym systémom a spoločnosti* (KOM(2008) 689 v konečnom znení).

<https://eur-lex.europa.eu/legal-content/SK/TXT/PDF/?uri=CELEX:52008DC0689>

³ tamtiež

2. Právna úprava telemedicíny na Slovensku

S postupom času a rozvojom technológií bolo potrebné aj na Slovensku dať telemedicíne právny rámec. Otázka sa stala mimoriadne aktuálnou v čase COVIDU-19, kedy veľké množstvo lekárov poskytovalo zdravotnú starostlivosť na diaľku, nakoľko osobný kontakt s pacientom bol mnohokrát obmedzený. Zákomom č.125/2020 Z.z. účinným od 21.5.2020 bol do zákona č. 576/2004 Z.z. o zdravotnej starostlivosti, službách súvisiacich s poskytovaním zdravotnej starostlivosti a o zmene a doplnení niektorých zákonov (ďalej len „zákon o zdravotnej starostlivosti“) doplnený § 49k s názvom Prechodné ustanovenia počas trvania krízovej situácie, ktorý znie: Počas krízovej situácie je všeobecný lekár alebo lekár so špecializáciou oprávnený po overení totožnosti osoby a poistného vzťahu s jej príslušnou zdravotnou poisťovňou poskytnúť osobe konzultáciu prostredníctvom elektronickej komunikácie bez prítomnosti osoby v ambulancii. Poskytnutie konzultácie prostredníctvom elektronických komunikácií musí lekár zapísať do zdravotnej dokumentácie osoby.

Novela zákona o zdravotnej starostlivosti, zákon č. 360/2024 Z.z., ktorá vstúpila do platnosti 1. januára 2025, zakotvuje telemedicínu ako súčasť zdravotnej starostlivosti. To znamená, že lekári a pacienti môžu komunikovať a dostávať starostlivosť na diaľku, čo zjednodušuje a urýchľuje prístup k zdravotnej starostlivosti. Novela tiež znižuje administratívnu záťaž zdravotníckeho personálu tým, že umožňuje spracovávanie a poskytovanie údajov zo zdravotnej dokumentácie aj osobám, ktoré nie sú zdravotníckymi pracovníkmi.

Telemedicína je v § 2 ods. 46 zákona o zdravotnej starostlivosti definovaná ako zdravotná starostlivosť a ošetrovateľská starostlivosť poskytovaná na diaľku prostredníctvom informačných a komunikačných technológií, ktorá zahŕňa prenos informácií v zvukovej, obrazovej alebo zvuko-obrazovej podobe alebo dátovej forme na účely

- a) konzultácie medzi osobou a zdravotníckym pracovníkom formou telekonzultácií alebo videokonzultácií,
- b) konzultácie medzi zdravotníckymi pracovníkmi formou telekonzultácií alebo videokonzultácií,
- c) diagnostiky na diaľku,
- d) monitorovania, analýzy a vyhodnotenia telesných funkcií a zdravotného stavu osoby,
- e) zostavovania liečebných plánov a sledovania ich dodržiavania,
- f) vykonávania diagnostických testov na diaľku,

- g) podpory pri rozhodovaní o liečbe vrátane elektronického predpisu liekov, dietetických potravín a zdravotníckych pomôcok.

Telemedicína môže byť poskytovaná online – prebieha v reálnom čase cez telefón alebo videohovor, prípadne online monitorovanie funkcií alebo offline - najčastejšie cez e-mail. Unikátnym je slovenský informačný systém Telemon ako pomôcka slúžiaca na vzdialený monitoring pacientov využívaný ako prvou Fakultnou nemocnicou s poliklinikou F. D. Roosevelta v Banskej Bystrici. Telemon ako softvérová platforma od spoločnosti Goldmann Systems je určená na kontinuálne monitorovanie zdravotného stavu pacientov v reálnom čase. Aplikácia umožňuje sledovať vitálne funkcie, ako je teplota, tlak, EKG či hladina glukózy. V roku 2024 získal Telemon medzinárodný certifikát zdravotníckej pomôcky. Ďalšou platformou na vzdialené monitorovanie pacientov je aplikácia MEDDI app. Aplikácia MEDDI je telemedicínska platforma na bezpečné 24/7 spojenie pacientov s lekármi, dostupná od roku 2020. Umožňuje videohovory, chat, konzultácie, zasielanie zdravotných správ a podporuje aj monitorovanie diabetu či meranie životných funkcií (tlak, tep, kyslík) cez funkciu BioScan. Ako prvý ju v pilotnej prevádzke použil primár Kliniky pneumológie a ftizeológie univerzitnej nemocnice v Martine počas liečby covidových pacientov. Počas prvých troch mesiacov používania aplikácie sa pomocou aplikácie odliečilo niekoľko desiatok pacientov. Takmer všetci z nich mali covidový zápal pľúc. 85 percent pacientov nevyžadovalo vôbec hospitalizáciu. Pri priemernej dĺžke hospitalizácie 12 dní s ochorením COVID-19 v nemocnici Martin sa ušetrilo viac ako 800 lôžkodní za tri mesiace.⁴

Telemedicínu možno chápať ako formu poskytovania zdravotnej starostlivosti (§ 2 ods. 46 a §7 ods. 1 písm.f) zákona o zdravotnej starostlivosti) aj ako zdravotný výkon.⁵ V zmysle § 2 ods. 2 zákona o zdravotnej starostlivosti zdravotný výkon je ucelená činnosť zdravotníckeho pracovníka, ktorá predstavuje základnú jednotku poskytovania zdravotnej starostlivosti. Zdravotným výkonom je aj činnosť zdravotníckeho pracovníka podľa prvej vety poskytovaná formou telemedicíny. V zmysle ust. § 3 ods. 24 zák.č. 577/2004 Z.z. o rozsahu zdravotnej starostlivosti uhrádzanej na základe verejného zdravotného poistenia a o úhradách za služby súvisiace s poskytovaním zdravotnej starostlivosti na základe verejného zdravotného poistenia sa uhrádzajú zdravotné výkony poskytované formou telemedicíny v rozsahu ustanovenom osobitným predpisom.

⁴ Slovenská technická univerzita v Bratislave. (2022, 3. apríl). *Slovenská aplikácia pomôže s monitorovaním pacientov na diaľku v reálnom čase [TV TA3]*. https://www.stuba.sk/sk/verejnost-a-media/dianie-na-stu/stu-v-mediach-1/slovenska-aplikacia-pomoze-s-monitorovanim-pacientov-na-dialku-v-realnom-case-tv-ta3.html?page_id=14881#:~:text=Slovensk%C3%A1%20aplik%C3%A1cia%20pom%C3%B4%C5%BEE%20s%20monitorovan%C3%ADm%20na%20dia%C4%BEku%20v%20re%C3%A1lno%C4%B4%Dase%20%5BTv%20TA3%5D

⁵ HUMENÍK, I. (2025) Webinár: Chcete využívať telemedicínu v ambulancii? Je to oficiálne – konečne dostala v zákone zelenú! YouTube *bez časového údaj*

V súčasnosti evidujeme tieto zdravotné výkony uhrádzané z verejného zdravotného poistenia:

- vystavenie lekárskeho predpisu a /alebo lekárskeho poukazu elektronicky na základe žiadosti prostredníctvom elektronickej pošty, SMS alebo telefónu
- krízová psychoterapeutická intervencia prostredníctvom elektronickej komunikácie
- konzultácia prostredníctvom rozšírenej elektronickej komunikácie v online prostredí (webová aplikácia, videohovor)
- konzultácia prostredníctvom elektronickej pošty alebo telefonicky
- krízová konzultácia psychiatrom a psychológom prostredníctvom elektronickej komunikácie.⁶

3. Povinnosti poskytovateľa zdravotnej starostlivosti pri využívaní telemedicíny

Výkony telemedicíny predstavujú individualizovanú formu poskytovania zdravotnej starostlivosti, ktorá musí byť poskytnutá správne (lege artis), za dodržania práv pacienta a len s poučením a informovaným súhlasom pacienta a so záznamom v zdravotnej dokumentácii pacienta. Výkon telemedicíny musí dosahovať minimálnu úroveň výkonu, ktorý by bol realizovaný pri klasickom osobnom styku s pacientom – poskytovateľ zdravotnej starostlivosti nesie právnu zodpovednosť za zdravotnú starostlivosť poskytnutú formou telemedicíny, ako aj za ochranu údajov a celej elektronickej komunikácie počas výkonu telemedicíny. Lekár by mal urobiť všetko, čo je v jeho silách, aby informačné a komunikačné technológie fungovali⁷. Lekári musia zabezpečiť, aby starostlivosť poskytovaná prostredníctvom telemedicíny bola aspoň na takej vysokej úrovni ako starostlivosť poskytovaná osobne, pričom sa berú do úvahy faktory, ako je spoľahlivosť technológie a potenciálne obmedzenia.

Povinnosti poskytovateľa zdravotnej starostlivosti môžeme rozdeliť do týchto oblastí:

a) Ochrana osobných údajov a GDPR

Zdravotnícke dáta obsahujú citlivé informácie o zdravotnom stave, diagnózach, liečbe a anamnéze pacientov. Tieto údaje sú extrémne cenné na čiernom trhu a stávajú sa atraktívnym cieľom pre kybernetické útoky. Únik takýchto dát predstavuje významné riziko pre súkromie pacientov a môže nevratne poškodiť dôveryhodnosť poskytovateľa.

⁶ konsolidovaný zoznam zdravotných výkonov pre Pilot 1 (platný od 1.9.2025) Ministerstvo zdravotníctva SR. (n. d.). Zoznam zdravotných výkonov (ZZV). <https://www.health.gov.sk/?ZZV>

⁷ Konečný, R. (n. d.). *Právne aspekty telemedicíny* [PDF]. PAIN.sk. https://pain.sk/ambulancie/Právne%20aspekty%20telemedicíny_JUDr_Ing_Radovan%20Konečný.pdf

Poskytovatelia musia zaviesť masívne technické a organizačné opatrenia k ochrane osobných údajov v súlade s GDPR. Medzi kľúčové opatrenia my mali patriť:

- Šifrovanie komunikácie: Všetky prenášané údaje musia byť šifrované.
- Zabezpečenie identity: Spoľahlivé overenie identity komunikujúcich strán (pacienta i poskytovateľa).
- Minimum údajov: Spracovávať iba nevyhnutné údaje pre daný účel.
- Pseudonymizácia dát: Nahradenie priamo identifikovateľných údajov kódom, aby bolo znížené riziko re-identifikácie.
- Interná smernica a preškolenie personálu: Jasne zdokumentované procesy pre nakladanie s dátami a pravidelné školenia všetkých zamestnancov.
- Zrozumiteľné informácie pre pacientov: Transparentné a jasné informovanie pacientov o tom, ako sú ich údaje spracovávané.

b) Poučenie pacienta a informovaný súhlas pacienta

Informovaný súhlas je základom vzťahu poskytovateľa s pacientom a v telemedicíne je jeho úloha ešte významnejšia.

V telemedicíne je kľúčová jasnosť a zrozumiteľnosť informácií, aby pacient plne chápal povahu digitálnej starostlivosti. Súhlas by mal byť preto čo najviac zrozumiteľný a mal by obsahovať:

- Účel a povahu telemedicínskej služby
- Predpokladaný prospech a možné riziká/následky
- Alternatívne možnosti starostlivosti (napr. prezenčné vyšetrenie)
- Práva pacienta, vrátane práva odmietnuť starostlivosť alebo odvolať súhlas
- Podrobné informácie o ochrane osobných údajov
- Spôsob overenia identity pacienta a poskytovateľa

Akým spôsobom má byť udelené poučenie a informovaný súhlas? Jednou z možností je udelenie súhlasu priamo vo videohovore. Nahrávanie telemedicínskej komunikácie (napr. videohovorů) je však možné iba s výslovným súhlasom pacienta. Tento súhlas musí byť zaznamenaný v zdravotníckej dokumentácii. Transparentnosť a možnosť odmietnuť nahrávanie sú kľúčové pre budovanie dôvery pacienta.

Ďalšou možnosťou je zaslanie podpísaného dokumentu obsahujúceho informovaný súhlas cez e-mail. Tu však môžeme naraziť na problematiku elektronickej identifikácie a autentifikácie totožnosti, ktoré sú vo virtuálnom prostredí potrebné na zistenie a overenie totožnosti fyzickej osoby.⁸ Problém by zrejme odpadol, ak by bol dokument obsahujúci informovaný súhlas podpísaný kvalifikovaným elektronickým podpisom. Koľko slovenských pacientov ale používa elektronický občiansky preukaz a podpisuje sa kvalifikovaným elektronickým podpisom? Ďalšou možnosťou je, že poučenie bude dané ústne a informovaný súhlas bude udelený taktiež ústne za prítomnosti svedka – napr. sestry. Je možné udeliť aj písomný súhlas s budúcim využitím telemedicínskych služieb pri prezenčnom vyšetrení v ordinácii lekára.

c) Záznam v zdravotnej dokumentácii

Záznam v zdravotnej dokumentácii má byť čo najpresnejší obsahujúci všetky údaje poskytnuté pacientom. Je potrebný zápis do zdravotnej dokumentácie vedenej v listinnej podobe podľa § 20 ods. 2 zákona o zdravotnej starostlivosti alebo postačuje zápis do elektronickej zdravotnej knižky podľa § 20 ods. 1 zákona o zdravotnej starostlivosti? Podľa § 20 ods. 2 písm.c) zákona o zdravotnej starostlivosti zdravotná dokumentácia u poskytovateľa sa vedie v písomnej forme, ak ide o zdravotné záznamy nad rámec elektronických zdravotných záznamov v elektronickej zdravotnej knižke. Podľa § 5 ods. 1 písm. b) bod 8 zákona č. 153/2013 Z.z. o národnom zdravotníckom informačnom systéme a o zmene a doplnení niektorých zákonov (ďalej len „zákon o NZIS“) v znení účinnom od 1.1.2025 elektronická zdravotná knižka obsahuje elektronické zdravotné záznamy, a to aj záznam o poskytnutej ambulantnej zdravotnej starostlivosti vrátane zdravotnej starostlivosti poskytnutej formou telemedicíny. Na základe vyššie uvedeného postačuje záznam do elektronickej zdravotnej knižky.

d) Poistenie zodpovednosti: Nevyhnutná ochrana pre každého poskytovateľa

Zákon č. 578/2004 Z.z. o poskytovateľoch zdravotnej starostlivosti, zdravotníckych pracovníkoch, stavovských organizáciách v zdravotníctve a o zmene a doplnení niektorých zákonov ukladá poskytovateľom povinnosť uzavrieť poisťnú zmluvu pre zodpovednosť za škodu spôsobenú pri poskytovaní zdravotných služieb. Vzhľadom k novým rizikám telemedicíny (napr. pochybenie v diagnostike na diaľku, kybernetické útoky vedúce k úniku dát, chyby v softvéri) je poistenie

⁸ Sopúchová, S. (2022). *Elektronické zdravotníctvo v Slovenskej republike: e-Health a telemedicína*. Wolters Kluwer

nevyhnutné pre ochranu pred finančnými dopadmi prípadných sporov a náhrad škody. Je dôležité overiť, či existujúce poistenie poskytovateľa pokrýva špecifiká telemedicíny.

e) Cezhraničná telemedicína

Rozvoj telemedicíny prináša i otázku cezhraničného poskytovania služieb v rámci Európskej únie. EU aktívne podporuje digitalizáciu zdravotnej starostlivosti a usiluje o vytvorenie Európskeho priestoru pre zdravotné dáta (EHDS), ktorý má uľahčiť výmenu dát medzi členskými štátmi a podporiť digitálne zdravotné služby.

Pri cezhraničnom poskytovaní služieb je kľúčové riešiť zložité otázky jurisdikcie, rozhodného práva a vzájomného uznávania kvalifikácií zdravotníckych pracovníkov. Poskytovateľ musí starostlivo analyzovať právne predpisy tak krajiny, odkiaľ službu poskytuje, tak krajiny, kde sa nachádza pacient, aby sa vyhol neúmyselnému porušeniu zákonov.

4. Zodpovednosť poskytovateľa zdravotnej starostlivosti pri využívaní telemedicíny

Zodpovednosť lekára pri telemedicíne je rovnaká ako pri osobnej (“klasickej”) liečbe. Telemedicína nemení mieru zodpovednosti lekára, mení iba technický spôsob výkonu povolania. I keď je zodpovednosť lekára rovnaká, riziká sú väčšie:

1. Obmedzené vyšetrovacie možnosti

- nemožnosť fyzikálneho vyšetrenia (palpácia, auskultácia, reflexy, odbery priamo na mieste),
- riziko nesprávnej alebo neúplnej diagnózy.

2. Oneskorenie pri akútnych stavoch

- ak lekár nerozpozna urgentný stav cez video/telefón (napr. CMP, infarkt), môže dôjsť k oneskoreniu liečby → zodpovednosť za následky
- oneskoriť sa môže aj elektronická komunikácia medzi zdravotníckymi pracovníkmi pri stanovení diagnózy

3. Technické chyby

- výpadok spojenia, nekvalitný obraz/zvuk, problém s prenosom dokumentácie,
- ak sa kvôli tomu oneskorí diagnóza alebo liečba, zodpovednosť nesie stále poskytovateľ

4. Regulácia softvéru a ochrana pred kybernetickými útokmi

- poskytovateľ spracováva citlivé údaje, preto musí zabezpečiť ochranu dát pri elektronickej komunikácii a zvoliť bezpečný komunikačný systém s pacientom
- poskytovateľ musí vedieť, či softvér, ktorý používa nespadá pod reguláciu zdravotníckych pomôcok v zmysle Nariadenia (EÚ) 2017/745 o zdravotníckych pomôckach (MDR), a splniť všetky súvisiace požiadavky na certifikáciu a dokumentáciu

5. Nedostatočná identifikácia pacienta

- ak lekár nezabezpečí správnu identifikáciu pacienta, hrozí, že správna starostlivosť sa nedostane správne pacientovi

5. Nedostatočné poučenie pacienta

- ak pacient nie je jasne informovaný, že telemedicína má limity a pri zhoršení stavu musí ihneď vyhľadať osobnú pomoc, môže byť lekár braný na zodpovednosť.

6. Dokumentačné riziká

- ak nie je presne zdokumentované, aké údaje mal lekár k dispozícii, je ťažšie sa obhájiť, že postupoval lege artis.

Nedodržanie týchto pravidiel môže viesť k závažným sankciám vrátane odňatia oprávnenia na poskytovanie zdravotných služieb, vysokých finančných pokút a povinnosti nahradiť ujmu pacientovi.

Záver

Slovenská právna úprava telemedicíny je novou a doposiaľ málo prepracovanou.

Na Slovensku chýba vykonávací predpis o technických požiadavkách na kvalitu a bezpečnosť telekomunikačného kanálu. Chýba úprava o spôsobe identifikácie komunikujúcich strán. Chýba úprava o spôsobe poučenia pacienta, o spôsobe udelenia informovaného súhlasu s poskytovaním poskytovania zdravotnej starostlivosti formou telemedicíny, o spôsobe prejavu a záznamu súhlasu alebo nesúhlasu s nahrávaním záznamu komunikácie medzi poskytovateľom a pacientom. Na Slovensku chýba odborné usmernenie Ministerstvom zdravotníctva SR pre ochranu poskytovateľov vo forme štandardných diagnosticko-terapeutických postupov, ktoré by stanovili postupy aj pri využívaní telemedicínskych služieb.⁹

⁹ Humeník, I. (2022). *Čo prebehne myslou zdravotníckeho právnika, keď sa povie telemedicína?* [Konferenčný

Vydanie vykonávacieho predpisu (vyhlášky), ktorý by jasne stanovil povinnosti, štandardy a pravidlá pre poskytovateľov zdravotnej starostlivosti pri využívaní telemedicíny, je z dlhodobého hľadiska a pre plnohodnotnú implementáciu v praxi nevyhnutné.

Hoci od 1. januára 2025 vstúpila do platnosti novela zákona o zdravotnej starostlivosti, ktorá telemedicínu definuje ako plnohodnotnú súčasť zdravotnej starostlivosti, táto legislatíva je vnímaná skôr ako základný rámec.

Zoznam použitej literatúry

1. Sopúchová, S. (2022). *Elektronické zdravotníctvo v Slovenskej republike: e-Health a telemedicina*. Wolters Kluwer
2. Táboorský, M. et al. (2022) *Digitální medicína*. EEZY Publishong s.r.o.
3. American Telemedicine Association. (n. d.). *About us*. <https://www.americantelemed.org/about-us/>
4. Európska komisia. (2008). *Oznámenie Komisie Európskemu parlamentu, Rade, Európskemu hospodárskemu a sociálnemu výboru a Výboru regiónov o telemedicíne pre prínos pacientom, zdravotníckym systémom a spoločnosti (KOM(2008) 689 v konečnom znení)*. <https://eur-lex.europa.eu/legal-content/SK/TXT/PDF/?uri=CELEX:52008DC0689>
5. Slovenská technická univerzita v Bratislave. (2022, 3. apríla). *Slovenská aplikácia pomôže s monitorovaním pacientov na diaľku v reálnom čase* [TV TA3]. <https://www.stuba.sk/sk/verejnost-a-media/dianie-na-stu/stu-v-mediach-1/slovenska-aplikacia-pomoze-s-monitorovanim-pacientov-na-dialku-v-realnom-case-tv->
6. Ministerstvo zdravotníctva SR. (n. d.). *Zoznam zdravotných výkonov (ZZV) – konsolidovaný zoznam zdravotných výkonov pre Pilot 1 (platný od 1. 9. 2025)*. <https://www.health.gov.sk/?ZZV>
7. Humeník, I. (2025). *Chcete využívať telemedicínu v ambulancií? Je to oficiálne – konečne dostala v zákone zelenú!* [Webinár]. YouTube.
8. Humeník, I. (2022). *Čo prebehne myslou zdravotníckeho právnika, keď sa povie „telemedicina“?* [Konferenčný príspevok]. Konferencia Telemedicina 2022. <https://www.konferencia-telemedicina.sk/program-2022>
9. Zákon č. 576/2004 Z. z. o zdravotnej starostlivosti a službách súvisiacich s poskytovaním zdravotnej starostlivosti a o zmene a doplnení niektorých zákonov. (2004). *Slov-Lex – eZbierka právnych predpisov*. <https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2004/576/20260101>
10. Zákon č. 577/2004 Z. z. o rozsahu zdravotnej starostlivosti uhrádzanej na základe verejného zdravotného poistenia a o úhradách za služby súvisiace s poskytovaním zdravotnej starostlivosti (2004). *Slov-Lex – eZbierka právnych predpisov*. <https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2004/577/20250701>
11. Zákon č. 578/2004 Z. z. o poskytovateľoch zdravotnej starostlivosti, zdravotníckych pracovníkoch, stavovských organizáciách v zdravotníctve a o zmene a doplnení niektorých zákonov (2004). *Slov-Lex – eZbierka právnych predpisov*. <https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2004/578/20260301>
12. Zákon č. 153/2013 Z. z. o národnom zdravotníckom informačnom systéme a o zmene a doplnení niektorých zákonov (2013). *Slov-Lex – eZbierka právnych predpisov*. <https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2013/153/20260101>

AI AKO TICHÝ „PÁCHATEL“: PRÁVNE DÍLEMY MODERNEJ DOBY

AI AS A SILENT "PERPETRATOR": LEGAL DILEMMAS OF THE MODERN AGE

DALIBOR VNENČÁK *

Abstrakt

Príspevok sa zaoberá právnymi dilemami spojenými s nasadzovaním systémov umelej inteligencie (AI) v spoločnosti, a to osobitne z hľadiska otázok zodpovednosti, subjektivity a regulácie. Cieľom článku je analyzovať aktuálny stav právnej diskusie o postavení AI ako potenciálneho „páchateľa“ v kontexte trestného, občianskeho a správneho práva, pričom osobitná pozornosť sa venuje regulačnému rámcu Európskej únie, najmä nariadeniu (EÚ) 2024/1689 (AI Akt). Autor dochádza k záveru, že súčasné právne systémy nie sú plne pripravené na autonómne konanie strojov a že otázka zodpovednosti za škody spôsobené AI systémami si vyžaduje zásadnú legislatívnu reformu.

Abstract

The paper addresses the legal dilemmas associated with the deployment of artificial intelligence (AI) systems in society, with particular emphasis on issues of liability, legal personality, and regulation. The aim of the article is to analyse the current state of legal discourse concerning the status of AI as a potential “offender” within the context of criminal, civil, and administrative law. Special attention is devoted to the regulatory framework of the European Union, particularly Regulation (EU) 2024/1689 (the AI Act). The author concludes that contemporary legal systems are not yet fully prepared to address the autonomous conduct of machines and that the issue of liability for damages caused by AI systems requires substantial legislative reform.

Kľúčové slová: umelá inteligencia, právna zodpovednosť, AI Akt, trestná zodpovednosť, právna subjektivita, regulácia AI

Keywords: artificial intelligence, legal liability, AI Act, criminal liability, legal subjectivity, AI regulation

Úvod

V posledných rokoch zaznamenávame exponenciálny nárast záujmu o právne implikácie rozvoja umelej inteligencie. Pokiaľ ešte pred dekadou sa tieto otázky javili ako teoretická špekulácia zaujímavá skôr pre oblasti sci-fi literatúry, dnes predstavujú reálne a naliehavé výzvy pre právnu prax i zákonodarcu.¹

Príklady z reálneho sveta dokumentujú, že AI systémy sú schopné konať spôsobmi, ktoré vedú k závažným následkom: priemyselný robot riadený AI systémom usmrtil pracovníka na výrobnéj linke, autonómne vozidlá boli účastníkmi dopravných nehôd s fatálnymi

* Mgr. Dalibor Vnenčák, 1. ročník, denná forma 3. stupeň štúdia, dalibor.vnencak@umb.sk, Katedra trestného práva, kriminológie, kriminalistiky a forenzných disciplín PrF UMB, denný doktorand

¹VOJTUŠ, F. – KORDÍK, M. – DRAŽOVÁ, P. Umelá inteligencia, jej využívanie a trestnoprávna zodpovednosť – výzvy, problémy a možné riešenia. Právnik. 2023, roč. 162, č. 6, s. 549–570. Dostupné na: https://www.ilaw.cas.cz/upload/web/files/pravnik/issues/2023/6/5_DISKUSE_Vojtus%20et%20al_549-570_6_2023.pdf.

následkami pre chodcov, a hlasový asistent navigoval dieťa k nebezpečnému konaniu.² Tieto udalosti zásadným spôsobom otvorili otázku: kto zodpovedá za škodlivé konanie stroja?

Predložený príspevok si kladie za cieľ systematicky zmapovať hlavné právne dilemy súvisiace s vývojom AI, a to v troch vzájomne prepojených rovinách: *primo* otázka právnej subjektivity AI; *secundo* zodpovednostné modely v kontexte trestného a civilného práva; *tertio* regulačný rámec Európskej únie a jeho praktické dôsledky. Príspevok využíva metódu komparatívnoprávnej analýzy a kritického rozboru relevantnej literatúry a normatívnych dokumentov.³

2. Právna subjektivita umelej inteligencie: problém definície a klasifikácie

2.1 Definičné problémy

Akýkoľvek právny diskurz o zodpovednosti AI musí nevyhnutne začínať otázkou, čo umelá inteligencia vôbec je. Absencia jednotnej legálnej definície patrí k najvýznamnejším prekážkam efektívnej právnej regulácie. V odbornej literatúre sa stretávame s celým spektrom prístupov – od funkcionálnych definícií zdôrazňujúcich schopnosť systému napodobňovať ľudské kognitívne funkcie, cez technické vymedzenia odkazujúce na strojové učenie a neurónové siete, až po normatívne prístupy zameriavajúce sa na mieru autonómnosti a nepredvídateľnosti správania systému.⁴

Nariadenie (EÚ) 2024/1689, všeobecne označované ako AI Akt, definuje systém umelej inteligencie ako strojom prevádzkovaný systém, ktorý je navrhnutý na prevádzku s rôznymi úrovňami autonómnosti a ktorý môže prejavovať adaptabilitu po nasadení, a ktorý na explicitné alebo implicitné ciele odvodzuje z prijatých vstupov, ako generovať výstupy, akými sú predpovede, obsah, odporúčania alebo rozhodnutia, ktoré môžu ovplyvniť fyzické alebo virtuálne prostredie.⁵ Toto vymedzenie je síce funkčne adekvátne, no pre účely zodpovednostného práva ponecháva otvorené zásadné interpretačné otázky.

²HALLEVY, G. The Criminal Liability of Artificial Intelligence Entities – from Science Fiction to Legal Social Control. Akron Intellectual Property Journal. 2010, vol. 4, iss. 2, s. 171–201. Dostupné na: <https://ideaexchange.uakron.edu/akronintellectualproperty/vol4/iss2/1>.

³MESARČÍK, M. – GYURÁSZ, Z. Umelá inteligencia a právna úprava zdravotníctva v Slovenskej republike. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2020. ISBN 978-80-7160-567-0.

⁴Nariadenie Európskeho parlamentu a Rady (EÚ) 2024/1689 z 13. júna 2024, ktorým sa stanovujú harmonizované pravidlá týkajúce sa umelej inteligencie (akt o umelej inteligencii). Úradný vestník EÚ, L 2024/1689, 12. 7. 2024.

2.2 AI ako subjekt práva?

Otázka právnej subjektivity AI sa v akademickej obci teší čoraz väčšej pozornosti. Tradicionalistický prístup odmieta akúkoľvek formu právnej osobnosti pre nehumánne entity a striktne trvá na dichotómii právnická osoba – vec. AI systémy by v takomto ponímaní zostali objektmi právnych vzťahov, teda vecami v právnom zmysle, ktorých prostredníctvom zodpovednosť niesli ich tvorcovia, prevádzkovatelia alebo používatelia.⁶

Progressívnejší prúd v právnej vede, reprezentovaný okrem iných aj Drachovskou, navrhuje uvažovať o forme obmedzenej alebo derivatívnej právnej subjektivity AI, analogickej postaveniu právnických osôb v súkromnom práve. Právnická osoba je, koniec koncov, tiež fikciou – abstraktnou konštrukciou umožňujúcou pripisovanie práv a povinností entite, ktorá nie je fyzickou osobou.⁷ Tento argument má svoju logiku, no zákonodarca k nemu v platnej právnej úprave dosiaľ nesiahnul.

Zibner v tejto súvislosti upozorňuje, že akceptácia právnej osobnosti AI by síce mohla elegantne riešiť niektoré zodpovednostné dilemy, no zároveň by otvorila množstvo nových otázok – napríklad ohľadom majetkovej základne AI subjektu, možnosti uvalenia trestu či formy exekúcie voči takejto entite.⁸ Práve tieto praktické ťažkosti svedčia o tom, že cesta k právnej subjektivite AI nebude jednoduchá ani rýchla.

3. Zodpovednostné modely: AI ako „tichý páchatel”

3.1 Trestnoprávna rovina

Vojtuš, Kordík a Dražová identifikujú v otázke trestnoprávnej zodpovednosti pri konaní AI systémov tri základné konceptuálne modely.⁹ Prvý – model nepriameho páchatel'stva – vníma AI ako nástroj v rukách trestne zodpovednej osoby (programátora, prevádzkovateľa, používateľa). Tento prístup je kompatibilný so súčasnou trestnoprávnou doktrínou a nevyžaduje legislatívne zmeny. Jeho slabina však spočíva v tom, že pri autonómnych systémoch s vysokou mierou nepredvídateľnosti správania môže byť príčinná súvislosť medzi konaním konkrétnej osoby a škodlivým výsledkom len ťažko preukázateľná.

⁶ZIBNER, J. Akceptace právní osobnosti v případě umělé inteligence. *Revue pro právo a technologie*. 2018, roč. 9, č. 17, s. 19–49. Dostupné na: <https://doi.org/10.5817/RPT2018-1-2>.

⁷DRACHOVSKÁ, K. Umělá inteligence jako nositelka základních práv? *Právník*. 2021, roč. 160, č. 4, s. 273–284.

⁸ZIBNER, J. Akceptace právní osobnosti v případě umělé inteligence. *Revue pro právo a technologie*. 2018, roč. 9, č. 17, s. 19–49. Dostupné na: <https://doi.org/10.5817/RPT2018-1-2>.

⁹VOJTUŠ, F. – KORDÍK, M. – DRAŽOVÁ, P. Umělá inteligencia, jej využívanie a trestnoprávna zodpovednosť – výzvy, problémy a možné riešenia. *Právník*. 2023, cit., s. 555–558.

Druhý model – *perpet behind the act* – bol rozpracovaný najmä Hallevym a predpokladá zodpovednosť programátora alebo prevádzkovateľa v prípade, ak títo vedeli alebo mali vedieť, že systém môže konať protiprávnym spôsobom.¹⁰ Hallevy v tejto súvislosti predkladá podrobný rozbor, v ktorom rozlišuje tri kategórie scenárov: (a) priame použitie AI ako nástroja zločinu, (b) nedbanlivostné vytvorenie podmienok umožňujúcich protiprávne konanie AI, a (c) situácie, kedy AI koná plne autonómne mimo akejkoľvek predvídateľnej kontroly ľudského operátora.

Tretí model, najradikálnejší, predpokladá zavedenie *sui generis* zodpovednosti pre AI systémy samotné. Tento prístup ostáva v rovine *de lege ferenda* a naráža na zásadné dogmatické prekážky: trestná zodpovednosť tradične predpokladá zavinenie (*mens rea*), t. j. psychický vzťah páchatelia k jeho konaniu a jeho následku. Umelej inteligencii však v súčasnom právnom a filozofickom chápaní chýba subjektívna stránka konania v klasickom zmysle.¹¹

3.2 Civilnoprávna zodpovednosť

V rovine civilného práva je diskusia o zodpovednosti za škodu spôsobenú AI systémami v európskom kontexte ovplyvnená návrhom smernice o zodpovednosti v oblasti AI (AI Liability Directive), ktorý Európska komisia predložila v septembri 2022.¹² Tento návrh, hoci bol napokon v roku 2025 stiahnutý z legislatívneho procesu, nastolil kľúčovú otázku: ako riešiť dôkazné bremeno v prípadoch, keď poškodený nemá prístup k internej dokumentácii AI systému potrebnej na preukázanie príčinnej súvislosti?

Noto La Diega a Bezerra argumentujú, že aj bez špeciálnej smernice o zodpovednosti AI ponúka deliktuálne právo dostatočný priestor na konštruovanie nárokov na náhradu škody – a to najmä prostredníctvom princípu zodpovednosti za výrobok a všeobecnej prevenčnej povinnosti.¹³ Autori pritom zdôrazňujú, že *ex post* zodpovednosť (t. j. zodpovednosť uplatniteľná až po vzniku škody) je sama osebe nedostatočným stimulom na dostatočne bezpečný vývoj AI, a preto musí byť doplnená *ex ante* regulačnými mechanizmami.

Von Westphalen upozorňuje na špecifickú problematiku zodpovednosti v dodávateľských reťazcoch AI, kde môžu byť zapojení vývojári základných modelov,

¹⁰HALLEVY, G., The Criminal Liability of Artificial Intelligence Entities – from Science Fiction to Legal Social Control. Akron Intellectual Property Journal. 2010. cit., s. 180–185.

¹¹FUNTA, R. Umeľá inteligencia a trestná zodpovednosť? Justičná revue. 2019, roč. 71, č. 1, s. 73–83.

¹²Návrh smernice Európskeho parlamentu a Rady o zodpovednosti za škodu spôsobenú umelou inteligenciou (smernica o zodpovednosti v oblasti AI), COM(2022) 496 final, 28. 9. 2022..

¹³NOTO LA DIEGA, G. – BEZERRA, L. C. T. Can there be responsible AI without AI liability? Incentivizing generative AI safety through ex-post tort liability under the EU AI liability directive. International Journal of Law and Information Technology. 2024, vol. 32., Dostupné na: <https://doi.org/10.1093/ijlit/eaee021>

poskytovatelia infraštruktúry, integrátori a koncoví používatelia.¹⁴ Určenie zodpovedného subjektu v takomto viacčlánkovom reťazci predstavuje jeden z najzložitejších praktických problémov.

3.3 Ochrana osobných údajov a AI

Osobitnou kapitolou zodpovednostného diskurzu je ochrana osobných údajov. AI systémy pracujú s rozsiahlymi súbormi dát, medzi ktorými sa takmer nevyhnutne nachádzajú osobné údaje v zmysle nariadenia GDPR.¹⁵ Žul'ová v tejto súvislosti analyzuje výzvy spojené s využívaním AI pri výbere zamestnancov – teda v kontexte, ktorý sa priamo dotýka ľudskej dôstojnosti a zákazu diskriminácie.¹⁶

Funta poukazuje na schopnosť AI systémov „dešifrovať“ identitu a osobnostný profil jednotlivca na základe veľkého množstva sekundárnych dát, ktoré samy osebe nie sú osobnými údajmi.¹⁷ Tento jav, označovaný ako inferenčná identifikácia, predstavuje závažnú hrozbu pre súkromie, pričom ani GDPR ani AI Akt neponúkajú na tento fenomén úplne adekvátnu odpoveď.

4. Regulačný rámec Európskej únie

4.1 AI Akt ako priekopnícky legislatívny počin

Nariadenie (EÚ) 2024/1689, ktoré nadobudlo účinnosť 1. augusta 2024, predstavuje prvý komplexný právny rámec pre reguláciu umelej inteligencie na svete. AI Akt je postavený na rizikovom prístupe: čím vyššie riziko predstavuje konkrétne využitie AI, tým prísnejšie sú naň kladené normatívne požiadavky. Nariadenie rozlišuje štyri kategórie: (1) zakázané systémy (napr. sociálne skórovanie obyvateľov verejnými orgánmi alebo systémy podprahovej manipulácie), (2) vysokorizikové systémy, (3) systémy s obmedzeným rizikom a (4) systémy s minimálnym alebo žiadnym rizikom.¹⁸

Pre vysokorizikové AI systémy, medzi ktoré patria napríklad systémy využívané v oblasti kritickej infraštruktúry, vzdelávania, zamestnávania, základných súkromných a verejných služieb, presadzovania práva, správy migrácie a výkonu súdnictva – AI Akt zavádza

¹⁴VON WESTPHALEN, G. F. Otázky zodpovednosti pri použití umělé inteligence. Justičná revue. 2019, roč. 71, č. 10, s. 1042–1051.

¹⁵Nariadenie Európskeho parlamentu a Rady (EÚ) 2016/679 z 27. apríla 2016 o ochrane fyzických osôb pri spracúvaní osobných údajov a o voľnom pohybe takýchto údajov (GDPR). Úradný vestník EÚ, L 119, 4. 5. 2016, s. 1–88.

¹⁶ŽUL'OVÁ, J. Používanie umelej inteligencie pri výbere zamestnancov z perspektívy GDPR. Justičná revue. 2021, roč. 73, č. 1, s. 30–39.

¹⁷FUNTA, R. Dešifrovanie človeka umelou inteligenciou. Justičná revue. 2019, roč. 71, č. 3, s. 249–261.

¹⁸Nariadenie (EÚ) 2024/1689 (AI Act), cit. vyššie v pozn. č. 4, čl. 6–9.

rozsiahle povinnosti: posúdenie zhody, registráciu do databázy EÚ, transparentnosť voči používateľom a dohľad nad ľudskou kontrolou.

4.2 Kritika a limity rizikového prístupu

Kretschmer a kolektív autorov CEPR argumentujú, že čisto rizikový prístup AI Aktu nie je sám osebe dostatočný, pokiaľ nie je doplnený robustným zodpovednostným mechanizmom.¹⁹ Regulácia ex ante (teda pred uvedením systému na trh) je síce nevyhnutnou podmienkou, nie však podmienkou postačujúcou. Systém môže spĺňať všetky požiadavky zhody, a predsa v konkrétnom nasadení spôsobiť nepredvídateľnú škodu.

Výskumníci z oblasti práva a technológií tiež upozorňujú na tzv. problém čiernej skrinky (*black box problem*): vnútorné rozhodovanie hlbokých neurónových sietí nie je transparentné ani pre ich tvorcov. Toto zásadne komplikuje ex post preukazovanie zodpovednosti, keďže ani odborný znalec nemusí byť schopný rekonštruovať kauzálny reťazec vedúci k škodlivému výsledku.

4.3 Inštitucionálne zabezpečenie dohľadu

AI Akt zriadil Európsky výbor pre umelú inteligenciu (European Artificial Intelligence Board) ako koordinačný orgán na úrovni Únie, pričom dohľad na národnej úrovni majú zabezpečovať príslušné národné orgány dohľadu.²⁰ Na Slovensku je táto problematika v štádiu budovania kapacít: slovenský akademický priestor identifikuje ako závažný nedostatok absenciu špecializovaného právneho vzdelávania v oblasti AI, pričom v rámci akreditovaných právnických štúdijných programov dosiaľ neexistuje systematická výučba tohto predmetu.²¹

5. Autorstvo, duševné vlastníctvo a generatívna AI

Generatívna AI nastolila celkom novú kategóriu právnych dilemách v oblasti duševného vlastníctva. Otázka, či výstup generovaný AI systémom môže byť predmetom autorského práva, resp. kto je nositeľom takéhoto práva, nadobúda v praxi čoraz väčšiu naliehavosť.²²

V súvislosti s tréňovaním generatívnych modelov na autorsky chránených dielach bez súhlasu a bez kompenzácie autorov boli v rokoch 2022–2023 podané prvé žaloby v Spojených

¹⁹KRETSCHMER, M. et al. The Risks of Risk-Based AI Regulation: Taking Liability Seriously. CEPR Discussion Paper No. 18517. Paris: CEPR Press, 2023. Dostupné na: <https://cepr.org/publications/dp18517>.

²⁰Nariadenie (EÚ) 2024/1689 (AI Act), cit. vyššie v pozn. č. 4, čl. 99–111.

štátoch a Spojenom kráľovstve. Tieto spory sú zásadné nielen pre samotných žalobcov, ale aj pre nastavenie celospoločenských pravidiel v tejto oblasti.

Európska únia vytvorila prostredníctvom smernice o autorskom práve na digitálnom jednotnom trhu výnimku umožňujúcu vyťažovanie textu a dát pre komerčné aj nekomerčné účely, pokiaľ nositeľ práv nevzniesol námietku (opt-out mechanizmus). Tento prístup však čelí kritike pre svoju obmedzenosť: nositeľ práv musí aktívne konať, aby si ochranu zachoval, čo je pre väčšinu autorov prakticky neúnosné.²³

6. Perspektívy de lege ferenda: smerom k holistickej regulácii AI

Analýza súčasného stavu právnej regulácie AI poukazuje na niekoľko kritických medzier, ktoré si vyžadujú legislatívnu odpoveď. Po prvé, chýbajúca harmonizácia zodpovednostného práva na úrovni EÚ: stiahnutie návrhu smernice o zodpovednosti AI v roku 2025 zanechalo zodpovednostnoprávnu problematiku v stave neistoty.²⁴

Po druhé, absentujúca procesná úprava: v prípadoch škôd spôsobených AI systémami naráža poškodený na zásadné procesné prekážky pri preukazovaní príčinnej súvislosti. Noto La Diega a Bezerra navrhujú zavedenie prezumpcie kauzality v prípadoch, keď žalobca preukáže, že AI systém nesplnil relevantné povinnosti podľa AI Aktu, pričom je na žalovanom, aby túto prezumpciu vyvrátil.²⁵

Po tretie, otázka kompenzácie: v prípade škôd spôsobených plne autonómnymi systémami bez jasne identifikovateľného ľudského rozhodovania sa diskutuje o zavedení povinného poistenia AI systémov s vysokým rizikom, analogicky k povinnému zmluvnému poisteniu motorových vozidiel.²⁶

Po štvrté, potreba medzinárodnej koordinácie: AI systémy sú zo svojej povahy cezhraničné, no právna regulácia ostáva prevažne teritoriálna. Efektívna odpoveď na výzvy AI si vyžaduje nielen koordináciu v rámci EÚ, ale aj širší medzinárodnoprávny dialóg.²⁷

²³DRACHOVSKÁ, K., Umělá inteligence jako nositelka základních práv? Právník. 2021. cit., s. 278–282.

²⁴ Tamtiež

²⁵NOTO LA DIEGA, G. – BEZERRA, L. C. T., Can there be responsible AI without AI liability? Incentivizing generative AI safety through ex-post tort liability under the EU AI liability directive. International Journal of Law and Information Technology. 2024. cit., s. 34.

²⁶VOJTUŠ, F. – KORDÍK, M. – DRAŽOVÁ, P., Umělá inteligencia, jej využívanie a trestnoprávna zodpovednosť – výzvy, problémy a možné riešenia. Právník. 2023. cit., s. 560–565.

7. Záver

Problematika umelej inteligencie ako potenciálneho „tichého páchatel’a“ predstavuje jednu z najvýznamnejších výziev súčasnej právnej vedy. Dynamický rozvoj autonómnych systémov postupne narúša tradičné koncepcie právnej subjektivity, zavinenia a atribúcie zodpovednosti, ktoré boli historicky budované na predpoklade existencie človeka ako výlučného nositeľa práv a povinností. Hoci súčasné systémy umelej inteligencie nemožno považovať za subjekty práva v pravom zmysle slova, ich rastúca autonómnosť vyvoláva otázky, na ktoré platné právne poriadky neposkytujú jednoznačné odpovede.

Analýza jednotlivých modelov zodpovednosti ukazuje, že existujúce trestnoprávne a civilnoprávne mechanizmy sú schopné riešiť iba časť situácií spojených s nasadzovaním systémov umelej inteligencie. V prípadoch vysokej miery autonómnosti a obmedzenej predvídateľnosti správania algoritmov dochádza k vzniku tzv. zodpovednostnej medzery, ktorá môže v praxi komplikovať identifikáciu subjektu nesúceho právnu zodpovednosť za vzniknuté škody alebo iné protiprávne následky. Osobitné problémy pritom vyvoláva netransparentnosť rozhodovacích procesov moderných systémov strojového učenia, ktorá významne sťažuje dokazovanie príčinnej súvislosti a zavinenia.

Prijatie nariadenia Európskeho parlamentu a Rady (EÚ) 2024/1689 (AI Act) predstavuje historicky prvý komplexný pokus o vytvorenie jednotného regulačného rámca pre umelú inteligenciu. Rizikovo orientovaný prístup, ktorý nariadenie zavádza, možno považovať za významný krok smerom k zabezpečeniu bezpečného a dôveryhodného využívania systémov AI. Napriek tomu samotná preventívna regulácia nie je schopná odstrániť všetky problémy súvisiace so zodpovednosťou za škody spôsobené autonómnymi systémami. Absencia osobitnej európskej úpravy zodpovednosti za umelú inteligenciu preto naďalej predstavuje významný deficit súčasného právneho rámca.

De lege ferenda možno uvažovať o viacerých možnostiach ďalšieho vývoja, medzi ktoré patrí predovšetkým harmonizácia zodpovednostných pravidiel na úrovni Európskej únie, zavedenie osobitných dôkazných mechanizmov reflektujúcich špecifiká algoritmického rozhodovania, ako aj vytvorenie systému povinného poistenia pre vysokorizikové systémy umelej inteligencie. Rovnako nemožno vylúčiť, že ďalší technologický vývoj otvorí diskusiu o potrebe vytvorenia osobitných foriem právnej subjektivity pre vysoko autonómne systémy, hoci súčasný stav právnej vedy a pozitívneho práva takémuto riešeniu zatiaľ nenasvedčuje.

Možno preto konštatovať, že umelá inteligencia nepredstavuje „páchateľ“ v klasickom trestnoprávnom ponímaní, ale skôr nový fenomén, ktorý odhaľuje limity tradičných právnych kategórií. Budúcnosť právnej regulácie umelej inteligencie bude nevyhnutne závisieť od schopnosti zákonodarcu, právnej teórie a aplikačnej praxe vytvoriť taký normatívny rámec, ktorý dokáže zabezpečiť rovnováhu medzi podporou technologických inovácií a ochranou základných hodnôt demokratického právneho štátu, predovšetkým právnej istoty, spravodlivosti a ľudskej dôstojnosti.

Zoznam bibliografických odkazov

1. DRACHOVSKÁ, K. Umělá intelligence jako nositelka základních práv? Právník. 2021, roč. 160, č. 4, s. 273–284.
2. FUNTA, R. Dešifrovanie človeka umelou inteligenciou. Justičná revue. 2019, roč. 71, č. 3, s. 249–261.
3. FUNTA, R. Umelá inteligencia a trestná zodpovednosť? Justičná revue. 2019, roč. 71, č. 1, s. 73–83.
4. HALLEVY, G. The Criminal Liability of Artificial Intelligence Entities – from Science Fiction to Legal Social Control. Akron Intellectual Property Journal. 2010, vol. 4, iss. 2, s. 171–201. Dostupné na: <https://ideaexchange.uakron.edu/akronintellectualproperty/vol4/iss2/1>.
5. KRETSCHMER, M. et al. The Risks of Risk-Based AI Regulation: Taking Liability Seriously. CEPR Discussion Paper No. 18517. Paris: CEPR Press, 2023. Dostupné na: <https://cepr.org/publications/dp18517>.
6. MESARČÍK, M. – GYURÁSZ, Z. Umelá inteligencia a právna úprava zdravotníctva v Slovenskej republike. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2020. ISBN 978-80-7160-567-0.
7. NOTO LA DIEGA, G. – BEZERRA, L. C. T. Can there be responsible AI without AI liability? Incentivizing generative AI safety through ex-post tort liability under the EU AI liability directive. International Journal of Law and Information Technology. 2024, vol. 32,. Dostupné na: <https://doi.org/10.1093/ijlit/eaee021>.
8. VOJTUŠ, F. – KORDÍK, M. – DRAŽOVÁ, P. Umelá inteligencia, jej využívanie a trestnoprávna zodpovednosť – výzvy, problémy a možné riešenia. Právník. 2023, roč. 162, č. 6, s. 549–570.
9. VON WESTPHALEN, G. F. Otázky odpovědnosti při použití umělé inteligence. Justičná revue. 2019, roč. 71, č. 10, s. 1042–1051.
10. ZIBNER, J. Akceptace právní osobnosti v případě umělé inteligence. Revue pro právo a technologie. 2018, roč. 9, č. 17, s. 19–49. Dostupné na: <https://doi.org/10.5817/RPT2018-1-2>.
11. ŽUEOVÁ, J. Používanie umelej inteligencie pri výbere zamestnancov z perspektívy GDPR. Justičná revue. 2021, roč. 73, č. 1, s. 30–39.

Právne predpisy a dokumenty EÚ

12. Nariadenie Európskeho parlamentu a Rady (EÚ) 2024/1689 z 13. júna 2024, ktorým sa stanovujú harmonizované pravidlá týkajúce sa umelej inteligencie (akt o umelej inteligencii). Úradný vestník EÚ, L 2024/1689, 12. 7. 2024.
13. Nariadenie Európskeho parlamentu a Rady (EÚ) 2016/679 z 27. apríla 2016 o ochrane fyzických osôb pri spracúvaní osobných údajov a o voľnom pohybe takýchto údajov (GDPR). Úradný vestník EÚ, L 119, 4. 5. 2016, s. 1–88.
14. Návrh smernice Európskeho parlamentu a Rady o zodpovednosti za škodu spôsobenú umelou inteligenciou (smernica o zodpovednosti v oblasti AI), COM(2022) 496 final, 28. 9. 2022.

NÁRODNÉ OBRANNÉ SILY SLOVENSKEJ REPUBLIKY – NOVÝ PRVOK V OBRANNOM SYSTÉME A JEHO PRÁVNE IMPLIKÁCIE

The National Defence Forces of the Slovak republic – A new element in the defence system and its legal implications.

ALŽBETA JANÍČKOVÁ*

Abstrakt

Národné obranné sily ozbrojených síl Slovenskej republiky (NOS) predstavujú nový prvok obranného systému, reagujúci na meniace sa bezpečnostné prostredie a potrebu širšieho zapojenia občanov do obrany štátu. Článok na základe doktrínálnej právnej analýzy a komparácie s predchádzajúcou úpravou brannej povinnosti a s profesionálnou zložkou Ozbrojených síl SR skúma ich právny status, úlohy, výcvik a začlenenie do konceptu komplexnej obrany so zameraním na priepustnosť medzi NOS a profesionálnou službou. V závere formuluje de lege ferenda návrhy na spresnenie kompetencií a štandardov tak, aby bola posilnená právna istota príslušníkov a zabezpečená hladká integrácia NOS do systému obrany štátu.

Abstract

The National Defence Forces of the Slovak Republic (NDF) represent a new element of the defence system, responding to the changing security environment and the need for broader citizen involvement in state defence. Based on doctrinal legal analysis and a comparison with the previous regulation of conscription and with the professional component of the Armed Forces of the Slovak Republic, the article examines their legal status, tasks, training and incorporation into the concept of comprehensive defence, with a particular focus on permeability between NDF and professional service. In conclusion, it formulates de lege ferenda proposals aimed at refining competences and standards in order to strengthen legal certainty for members and ensure the smooth integration of NDF into the state's defence system.

Kľúčové slová: Národné obranné sily. Ozbrojené sily Slovenskej republiky. Obrana. Zálohy. Bezpečnosť.

Key words: National defence forces. Armed Forces of the Slovak Republic. Defence. Reserves. Security.

Úvod

Geopolitický a bezpečnostný vývoj v posledných rokoch prinútil krajiny k nárastu aktivity v ich bezpečnostných zložkách viac, ako v takmer akomkoľvek inom období od skončenia Studenej vojny. Najnovšie štatistiky potvrdzujú, že svetové vojenské výdavky v roku 2024 dosiahli približne 2,7 bilióna USD a už celé posledné desaťročie nepretržite rastú a to spolu asi o 37 % oproti roku 2015. Medziročný prírastok za rok 2024, blížiaci sa desiatim percentám, predstavuje najprudší nárast minimálne od konca 80. rokov. Zodpovedajú tomu aj relatívne ukazovatele, kedy „vojenské bremeno“ vzrástlo na približne 2,5 % globálneho HDP. Priemerný podiel obrany vo vládnych rozpočtoch sa pohybuje okolo 7 % a výdavky na obyvateľa dosiahli najvyššiu úroveň od roku 1990 (okolo 330 USD). Rast je pritom viditeľný

* Bc. Alžbeta Janíčková, 1. ročník dennej formy magisterského stupňa štúdia, Právnická fakulta Univerzity Mateja Bela v Banskej Bystrici alzbeta.janickova@student.umb.sk

vo všetkých piatich svetových regiónoch; dlhodobý trend výrazne urýchľuje najmä Európa (vojna na Ukrajine) a Blízky východ (vojna v Gaze a súvisiace konflikty) a viaceré štáty už avizovali ďalšie navýšenia.¹ V takto akcelerujúcom bezpečnostnom prostredí je prirodzené, že reflexy posilňovania obrany a pripravenosti sa premietajú aj do častejšej prítomnosti ozbrojených síl v každodennom živote spoločnosti. V rámci civilného obyvateľstva v Slovenskej republike je citeľný nárast prítomnosti príslušníkov Ozbrojených síl spojený najmä s obdobím pandémie COVID-19 (v podobe pomoci príslušníkov napríklad v miestach odberu vzoriek) a následne v súvislosti zvýšených aktivít spojených s vojnou na Ukrajine. Práve Rusko-Ukrajinský konflikt môže byť považovaný z pohľadu bežného občana za jeden z aspektov zvýšenej aktivity OS SR, pretože prebiehajúci konflikt na hraniciach krajiny má potenciál ohroziť bezpečnosť a územnú celistvosť Slovenskej republiky a ďalších krajín Severoatlantickej aliancie.

Následne približne dva roky od začiatku vojny na Ukrajine sa začali mediálnym priestorom, najmä však priamo od Ministra obrany Slovenskej republiky Róberta Kaliňáka šíriť predstavy o vzniku NOS, ktoré boli predstavené priamo na tlačovej konferencii 17. decembra 2024. Jeho výstup zahŕňal okrem iného aj časť o zriadení NOS, kde predstavil ich plánované zloženie v podobe operačných, pohotovostných a branných záloh.² Slovom Ministra obrany má byť motiváciou suma 3000 € za 14 dní výcviku spolu so stanoveným počtom víkendov a dní v pohotovosti, čo v konečnom dôsledku má nadväzovať na schopnosť NOS ako hlavného záložného vojska ozbrojených síl. V konečnom dôsledku možno konštatovať, že ich vznik má podporiť doposiaľ existujúce personálne kapacity Ozbrojených síl Slovenskej republiky a taktiež otvoriť dvere zapojeniu civilného obyvateľstva do obrany štátu.³

1. Analýza legislatívy a inštitucionálne ukotvenia NOS

Vládny návrh zákona bol napokon doručený 26.2.2025 pod názvom *Zákon o niektorých opatreniach na zvýšenie odolnosti Slovenskej republiky v oblasti obrany a bezpečnosti, o brannej povinnosti a o zmene a doplnení niektorých zákonov*. Zákon prešiel štandardným legislatívnym procesom a v konečnom znení vyšiel v zbierke zákonov 21. júna 2025 ako Zákon č. 150/2025 Z. z..⁴ Stanovisko Vlády Slovenskej republiky k návrhu zákona obsahovalo jeho

¹ Liang, X., Tian, N., Lopes da Silva, D., Scarazzato, L., Karim, Z., & Guiberteau Ricard, J. (2025, April). *Trends in world military expenditure, 2024* (SIPRI Fact Sheet). Stockholm International Peace Research Institute.

² Druhy záloh netvorí štruktúru NOS; prostredníctvom NOS sa zabezpečuje ich tvorba, udržiavanie a navyšovanie pre potreby systému obrany štátu (§1 ods. 2 písm. a)).

³ TASR TV. (2024, 17. december). *Tlačová konferencia ministra obrany SR R. Kaliňáka: Aktuálne témy rezortu obrany* [Video]. YouTube. <https://www.youtube.com/watch?v=RTuv5FHNIts>.

⁴ Národná rada Slovenskej republiky. (2025). *Vládny návrh zákona o niektorých opatreniach na zvýšenie odolnosti Slovenskej republiky v oblasti obrany a bezpečnosti, o brannej povinnosti a o zmene a doplnení*

odôvodnenie v podobe snahy o zabezpečenie plnenia opatrení na zvýšenú odolnosť v oblasti obrany, najmä v otázkach vytvárania, udržiavania a navyšovania kapacít OS SR využiteľných v krízových situáciách, pre plnenie úloh spadajúcich do kompetencie Vojenskej polície a taktiež úloh žandárskeho zboru s víziou jeho budúcej podpory Policajného zboru. NOS na základe tohto stanoviska majú byť novou súčasťou Ozbrojených síl a zároveň nahrádzať doposiaľ existujúci systém tvorby záloh OS SR. Vytvárajú operačné, pohotovostné, branné a ostatné zálohy a zároveň sprostredkujú potrebnú prípravu pre jednotlivé typy záloh podľa potrieb špecifických na ich zaradenie. Vyzdvihovaná bola taktiež ich dostupnosť, keďže sa v zákone rozširuje okruh potenciálnych uchádzačov z radov ozbrojených bezpečnostných zborov a záchranných zložiek.⁵

Z analýzy zákona č. 150/2025 Z. z. možno vyextrahovať zákonnú úpravu jednotlivých typov záloh, ktoré zákon upravuje. Príslušníci operačných záloh sa podľa zákona pripravujú na plnenie úloh ozbrojených síl a taktiež výkon mimoriadnej služby v ozbrojených silách. V období krízovej situácie⁶ plnia úlohy ozbrojených síl v podobe zabezpečovania ochrany a obrany objektov osobitnej dôležitosti, objektov v pôsobnosti Ministerstva obrany, vojenských obvodov, vojenských letísk, objektov a priestorov využívaných na plnenie úloh ozbrojených síl alebo zahraničných ozbrojených síl plniacich úlohy na území Slovenskej republiky v rámci organizácie vzájomnej kolektívnej bezpečnosti a ďalších. Zabezpečujú odstraňovanie následkov výnimočného stavu, núdzového stavu, kontroly hraníc, vykonávajú úlohy potrebné v prípade narušenia verejného poriadku potrebné na jeho zabezpečenie, plnia opatrenia Národného systému reakcie na krízové situácie a môžu plniť úlohy ozbrojených síl mimo územia Slovenskej republiky podľa osobitného predpisu.

Pohotovostné zálohy sa pripravujú na plnenie úloh ozbrojených síl v rozsahu zabezpečovania ochrany a obrany objektov osobitnej dôležitosti a ďalších dôležitých objektov, odstraňovaní následkov výnimočného stavu alebo núdzového stavu a riešenia mimoriadnych udalostí, zabezpečovaní verejného poriadku v prípade jeho porušenia a zabezpečovanie hraníc Slovenskej republiky.

niektorých zákonov (parlamentná tlač 716). Národná rada Slovenskej republiky.

<https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&CisObdobia=9&CPT=716>.

⁵ Vláda Slovenskej republiky. (2025). *Dôvodová správa k vládnemu návrhu zákona o niektorých opatreniach na zvýšenie odolnosti Slovenskej republiky v oblasti obrany a bezpečnosti, o brannej povinnosti a o zmene a doplnení niektorých zákonov*. Národná rada Slovenskej republiky.

<https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=560356>.

⁶ Krízová situácia predstavuje obdobie v rámci ktorého je bezprostredne ohrozená alebo narušená bezpečnosť štátu a ústavné orgány môžu po splnení zákonom stanovených podmienok vypovedať vojnu, vyhlásiť vojnový stav, výnimočný stav alebo núdzový stav

Branné zálohy tvoria príslušníci pripravujúci sa na plnenie úloh ozbrojených síl, výkon mimoriadnej služby v OS SR a plnenie úloh obrany štátu v čase vojny alebo vojnového stavu. Podľa oficiálnej webstránky NOS ide o jednorazový výcvik pre občanov bez vojenských skúseností.⁷

Z uvedeného vyplýva, že zákonne najväčší rozsah úloh spadá na operačné zálohy. Keďže ide o úlohy s vyššími nárokmi na pripravenosť a použiteľnosť personálu, zákon popri vymedzení kompetencií jednotlivých druhov záloh stanovuje aj podmienky zaradenia do záloh. Medzi tieto podmienky patrí výška najvyššieho dosiahnutého vzdelania (ktorá predstavuje predpoklad pre ustanovenie do vybranej vojenskej hodnosti), zdravotná a psychická spôsobilosť, bezúhonnosť a spoľahlivosť.

Otázka finančného príspevku, ktorý predstavuje veľkú motiváciu pre mnohých záujemcov upravuje zákon v § 12 ods. 2 písm. a), kde ho priznáva vo výške 3000 € vojakovi operačných aj pohotovostných záloh za predpokladu účasti na pravidelnom cvičení alebo pri plnení úloh ozbrojených síl v rozsahu 20 dní a vo výške 1500 € vojakovi branných záloh za predpokladu účasti na výcviku branných záloh alebo plnení úloh ozbrojených síl v rozsahu aspoň 14 kalendárnych dní v roku. Upravený je aj prípad, kedy príslušník operačných záloh nebol povolaný na pravidelné cvičenie alebo plnenie úloh ozbrojených síl, čoho následkom je zákonný nárok na motivačný príspevok v sume len 600 €⁸. Ďalej zákon rieši otázky príspevkov za zvýšenie odbornosti, predĺženie záväzku, príspevku na štúdium, príspevok za zvyšovanie fyzickej zdatnosti a ďalšie. Zákonne je stanovený potrebný rozsah a metódy cvičení (viď. Tabuľka 1), ktorých splnenie sa prepočítava vždy na aktuálny kalendárny rok.

Príprava branných záloh má prebiehať vo vojenských výcvikových priestoroch Turecký vrch a Sučany a v posádkovom cvičisku Veľké Ozorovce. Výcvik pokrýva okrem fyzického výcviku aj vzdelávanie v oblasti zdravotníckej, topografickej, spojovacej a ženijnej prípravy, no taktiež venuje pozornosť aj taktike a streleckej príprave, protichemickej ochrane a ďalším oblastiam, ktoré sú nevyhnutné na bezpečné a efektívne pôsobenie príslušníkov záloh v rámci jednotiek OS SR pri riešení krízových situácií.⁹

⁷ Národné obranné sily. (n.d.). *Národné obranné sily*. Retrieved September 24, 2025, from <https://www.noska.sk/>.

⁸ Uvedené sa vzťahuje iba na vojakov prepustených z Ozbrojených síl SR po nadobudnutí účinnosti zákona (t. j. po 1. 7. 2025). Nárok na motivačný príspevok vo výške 600 € vzniká vtedy, ak vojak nebol do 6 mesiacov po prepustení povolaný na pravidelné cvičenie; po uplynutí tejto lehoty sa tento príspevok už neuplatňuje.

⁹ Slovenská republika. (2025, 1. júl). Zákon č. 150/2025 Z. z. o niektorých opatreniach na zvýšenie odolnosti Slovenskej republiky v oblasti obrany a bezpečnosti, o brannej povinnosti a o zmene a doplnení niektorých zákonov. Zbierka zákonov Slovenskej republiky. Citované 24. septembra 2025 z <https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2025/150/20250701.html>.

2. Deklarované ciele NOS v kontexte komplexnej obrany

Účel NOS možno vymedziť ako prispievanie k zvyšovaniu odolnosti Slovenskej republiky v oblasti obrany a bezpečnosti prostredníctvom budovania a posilňovania kapacít prvkov systému obrany štátu. Tento účel sa premieta do deklarovaných cieľov, ktorými sú najmä dopĺňanie personálnych záloh a stabilizácia kapacít relevantných zložiek systému obrany štátu, zvyšovanie pripravenosti príslušníkov záloh na plnenie úloh ozbrojených síl a úloh obrany štátu a rozširovanie schopnosti štátu reagovať na domáce krízové situácie prostredníctvom zapájania záloh do úloh krízového manažmentu. V súlade s tým je príprava príslušníkov záloh zameraná na zvládanie úloh spojených s odstraňovaním následkov krízových udalostí (napr. povodne, zosuny pôdy, havárie) a zároveň na osvojenie základných kompetencií využiteľných v obranných aj nevojenských krízových scenároch, najmä v oblasti manipulácie so zbraňami, práce s technikou, prežitia v prírode, sebaobransy a spolupráce v tíme.¹⁰ Podľa veliteľa NOS brigádneho generála Ladislava Kisela je základný 14-dňový výcvik sústredením najdôležitejších vedomostí a zručností potrebných pre vojaka záloh, keďže v konečnom dôsledku nie je možné do dvojtyždňového výcviku vtesnať celý rozsah základného vojenského výcviku.¹¹ Uvedené ciele a nastavenie prípravy však nevznikli samoúčelne. Konceptne zapadajú do rámca zásad komplexnej obrany, ako ich sumarizuje oficiálny dokument NATO *Comprehensive Defence Handbook, Edition A, Version 1 (Vol. I–II)* z roku 2020 (ďalej len „CDH“), pričom nejde o formálne prevzatie, ale o vecný súlad. CDH rozpracúva problematiku komplexnej obrany ako integrovaného *whole-of-society* prístupu, ktorý prepája štátny, samosprávny, súkromný aj občiansky sektor do jedného funkčného celku. Jeho cieľom je umožniť širokej verejnosti primerane sa podieľať na obrane štátu a zároveň udržať kontinuitu kľúčových služieb a funkcií štátu počas kríz.

Budovanie komplexnej obrany stojí na princípoch: celospoločenského prístupu (obrana nie je výlučne úlohou štátu, ale aj občianskeho a súkromného sektora), dohľadu a legitimacy (opatrenia musia byť vopred pripravené, koordinované a právne zakotvené), viacvrstvovej obrany (vzájomne sa dopĺňajúce prvky tvoria škálovateľný systém reakcie na rôzne hrozby) a univerzálnosti využitia (jednotlivé prvky majú viacnásobné použitie naprieč typmi udalostí). CDH zároveň zdôrazňuje jasné personálne usporiadanie opreté o štyri kategórie osôb: profesionálne sily v plnom úväzku (vrátane právom/kontraktmi viazaných prvkov súkromného sektora a kritickej infraštruktúry), vycvičení dobrovoľníci (neprofesionáli, ale vycvičení, vystrojení a pripravení reagovať), čiastočne vycvičení ne-dobrovoľníci a nevycvičení ne-

¹⁰ Téma národné obranné sily. (2025, august). *Obrana*, 8/2025, 19.

¹¹ Nastavenie a motivácia, rešpekt a uznanie. (2025, august). *Obrana*, 8/2025, 20.

dobrovoľníci. NOS v kontexte CDH vytvárajú, udržiavajú a navyšujú organizovanú bázu trénovaných dobrovoľníkov: dopĺňajú profesionálne OS SR a zároveň prepájajú obranu so spoločenskými a civilnými štruktúrami, čím posilňujú odolnosť štátu. Popri tom existujú čiastočne vycvičení a nevycvičení ne-dobrovoľníci; cieľom je ich podiel systematicky znižovať aj tým, že sa náborom a prípravou branných záloh transformujú do ostatných záloh.

V architektúre viacvrstvovej obrany podľa CDH (odolnosť → tradičná reakcia → home guard (tzv. domobrana) → asymetrická zložka) pokrývajú NOS najmä premostenie medzi 1. a 2. vrstvou. V prvej vrstve (odolnosť) sa podieľajú na krízovom manažmente, podpore a obnove kritickej infraštruktúry, civilnej ochrane a zvyšovaní pripravenosti obyvateľstva (cvičenia, osvetové aktivity). Pri potrebe škálovať kapacity môžu vstupovať do druhej vrstvy (tradičná reakcia) ako dopĺňajúca záložná kapacita OS SR (napr. dlhodobá obrana objektov osobitnej dôležitosti, podpora pri hraniciach, logistika). Práve táto schopnosť „škálovania“ z civilno-odolnostnej vrstvy do vojenskej reakcie tvorí jadro politicky deklarovaného zámeru, aby NOS v konečnom dôsledku nadväzovali na schopnosť vystupovať ako „hlavné záložné vojsko“ Ozbrojených síl SR. Takto chápané NOS napĺňajú kľúčové požiadavky CDH: rozširujú hĺbku odolnosti, poskytujú organizačne uchopiteľnú vrstvu trénovaných dobrovoľníkov, zvyšujú schopnosť využitia v krízovej situácii a pri jasne definovaných kompetenciách a štandardoch umožňujú bezpečné, legitímne a efektívne zapojenie občanov do obrany štátu.¹² Vyššie uvedené umožňuje spresniť aj význam politického označenia NOS ako „hlavného záložného vojska“ ozbrojených síl. Z hľadiska zákona nejde o jednu homogénnu zložku, ale o rámec, ktorý pracuje s odlišnými druhmi záloh, s odlišnou prípravou a s diferencovanou použiteľnosťou. Ťažisko pripravenosti pre úlohy ozbrojených síl nesú operačné a pohotovostné zálohy, zatiaľ čo branné zálohy plnia predovšetkým funkciu rozširovania personálnej základne a vstupnej prípravy občanov bez vojenskej skúsenosti. V kontexte CDH možno NOS chápať ako „organizačne uchopiteľnú“ vrstvu trénovaných dobrovoľníkov, ktorá je schopná pôsobiť v odolnostnej vrstve (krízový manažment, civilná ochrana, kritická infraštruktúra) a pri potrebe škálovania podporiť tradičnú reakciu ozbrojených síl. Práve v tomto vecnom zmysle možno ministerské označenie interpretovať ako ambíciu vytvoriť stabilný a použiteľný personálny rezervoár, ktorý je právne ukotvený, pripravený a využiteľný aj v období „sedej zóny“, nielen v čase vojny.

Ak chceme posúdiť, či NOS predstavujú skutočný kvalitatívny posun v budovaní komplexnej obrany, je potrebné vrátiť sa k predchádzajúcej právnej úprave brannej povinnosti.

¹² NATO Special Operations Headquarters. (2020, December 1). *Comprehensive defence handbook: Volume I (Edition A, Version 1)*. NSHQ.

Až do 30. júna 2025 bol základným predpisom v tejto oblasti zákon č. 570/2005 Z. z. o brannej povinnosti a o zmene a doplnení niektorých zákonov, ktorý zákon č. 150/2025 Z. z. výslovne zrušil.

3. Právne a koncepčné limity zákona č. 570/2005 Z. z. ako predobraz NOS

Zákon č. 570/2005 Z. z. bol koncipovaný na predstave plne profesionalizovaných ozbrojených síl, pričom brannú povinnosť chápal ako jeho sekundárny prvok s podpornou funkciou. Jeho ťažiskom bola individualizovaná povinnosť občana v zmysle národnej registrácie, odvodu, posúdenia zdravotnej spôsobilosti a potenciálneho výkonu mimoriadnej alebo alternatívnej služby v období krízovej situácie, vojny alebo vojnového stavu.¹³ Zálohy ozbrojených síl boli definované skôr ako „rezerva“ personálu pre mimoriadnu službu než ako systematicky budovaná, vopred vycvičená a priebežne využívaná súčasť komplexnej obrany štátu.

Práve v tomto nastavení vystupuje do popredia prvý závažný nedostatok starej úpravy, keďže branná povinnosť bola orientovaná najmä na mobilizáciu, nie na budovanie odolnosti. Zákon detailne riešil okamih, keď je občan povolaný do mimoriadnej služby, no výrazne menej pozornosti venoval dlhodobému a škálovateľnému využitiu záloh v „sedej zóne“ medzi stavom bezpečnosti a vojnovým stavom, teda v období, na ktoré sa súčasné koncepty komplexnej obrany zameriavajú najviac. CDH pracuje s kontinuumom od odolnosti po asymetrickú obranu, zatiaľ čo zákon č. 570/2005 Z. z. uvažoval o zálohách v podstate len ako o nástroji pre čas vojny a vojnového stavu.

Druhým nedostatkom bol slabý motivačný a kariérny rozmer záložnej služby. Zákon č. 570/2005 Z. z. nepracoval so zálohami ako s prirodzenou náborovou bázou pre ozbrojené sily, ale skôr ako s pasívnou rezervou ľudských zdrojov, ktorý sa aktivuje až pri vyhlásení mimoriadnej služby. Neboli nastavené systematické finančné a kariérne stimuly, neexistoval jasný mechanizmus uznávania hodností, spôsobilostí a absolvovaného výcviku pri prípadnom prechode do profesionálnej služby. V tomto smere zákon č. 150/2025 Z. z. prináša motivačné príspevky a štruktúrovanejšie typy záloh, no zatiaľ nevyužíva plný potenciál na vytvorenie plynulého kariérneho rebríka od civilného záložníka k profesionálnemu vojakovi.

Uvedené nedostatky (mobilizačne zúžené chápanie brannej povinnosti, nedostatočne rozvinutý inštitút aktívnych záloh, slabý motivačný a kariérny rámec)

¹³ Slovenská republika. (2005). *Zákon č. 570/2005 Z. z. o brannej povinnosti a o zmene a doplnení niektorých zákonov v znení neskorších predpisov*. Zbierka zákonov Slovenskej republiky. <https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2005/570/20220601.html>.

predstavujú dôležité východisko pre interpretáciu zákona č. 150/2025 Z. z. Nová právna úprava posúva ťažisko od „pasívnej rezervy“ k organizovane budovaným a udržiavaným zálohám a vytvára priestor pre ich využiteľnosť aj v krízových situáciách v mierovom období. Zavedenie NOS možno preto považovať za systémový krok smerom ku konceptu komplexnej obrany. Zároveň však zostáva priestor na dopracovanie viacerých oblastí, ktoré sú rozhodujúce pre praktickú funkčnosť systému a právnu istotu jeho adresátov. Ide najmä o terminologickú a systematickú jednoznačnosť režimov prípravy a ich právnych účinkov (najmä odlišenie pravidelného cvičenia od výcviku branných záloh a rozsah účinkov, pri ktorých sa výcvik branných záloh považuje za účasť na pravidelnom cvičení), presnejšie vyjasnenie postavenia a použiteľnosti jednotlivých druhov záloh v rámci NOS tak, aby bolo zrejmé, v akom rozsahu a za akých podmienok možno reálne naplňať ambíciu hlavného záložného vojska, posilnenie kariérnej priechodnosti a uznávania kompetencií nadobudnutých v zálohách, aby sa NOS mohli stať prirodzenou náborovou bázou profesionálnych ozbrojených síl a praktické prepojenie na krízový manažment a civilnú ochranu (kompetencie, koordinácia a štandardy zapojenia), aby sa deklarované ciele premietli do jednotnej aplikačnej praxe. Až pri dopracovaní týchto okruhov možno očakávať, že nový model nebude predstavovať len „novú architektúru“ záloh, ale plnohodnotný a stabilný nástroj komplexnej obrany.

4. Právna priepustnosť medzi NOS a Ozbrojenými silami SR

Zákon č. 150/2025 Z. z. ustanovuje komplexný systém právnej úpravy týkajúcej sa zaradenia občanov do operačných, pohotovostných a branných záloh. Tento zákon stanovuje podmienky zaradenia, organizáciu prípravy, štruktúru dohôd, výšku motivačných príspevkov, ako aj možnosti zapojenia jednotlivcov do plnenia úloh ozbrojených síl v období krízových situácií. Z hľadiska právneho postavenia záložníkov ide o osobitnú kategóriu občanov pripravených na výkon mimoriadnej služby, ktorí sú podrobení cielenej príprave (§ 13 a 14), sú zaradení na konkrétne funkcie s vojenskou hodnotou podľa dosiahnutého vzdelania (§ 8 a 11) a ich vzťah k štátu je formalizovaný prostredníctvom písomnej dohody o zaradení (§ 9). Zákon zároveň ustanovuje inštitút mimoriadneho povolania na plnenie úloh ozbrojených síl (§ 15), čím zabezpečuje ich využiteľnosť v rámci krízového riadenia štátu a systémov kolektívnej obrany.

Napriek rozsiahlemu normatívnemu rámcu, ktorý upravuje výcvik, organizáciu, právne postavenie a aj motivačné mechanizmy záložníkov, zákon č. 150/2025 Z. z. neobsahuje explicitnú právnu úpravu, ktorá by systematicky riešila alebo podporovala prechod vojakov záloh do profesionálnej štátnej služby v rámci Ozbrojených síl Slovenskej republiky (OS SR).

Prechod zo zálohy do aktívnej služby možno tak len odvodiť nepriamo – najmä prostredníctvom všeobecných ustanovení o prijímaní osôb do štátnej služby podľa zákona č. 281/2015 Z. z. o štátnej službe profesionálnych vojakov. Tento zákon síce umožňuje, aby osoba vstúpila do aktívnej služby po splnení kvalifikačných, zdravotných a psychických požiadaviek, avšak nezohľadňuje špecifiká statusu záložníka, teda jeho predchádzajúci výcvik, hodnosť, alebo zaradenie zálohách ako relevantný náborový predpoklad.¹⁴

Tento nedostatok normatívneho premostenia medzi záložnou a profesionálnou zložkou možno považovať za legislatívnu medzeru, ktorá v praxi spôsobuje neistotu vo vzťahu k ďalšiemu profesijnému smerovaniu motivovaných príslušníkov záloh. Záložníci tak nie sú systematicky vnímaní ako „pred-výberová“ alebo náborová kategória, hoci ich výcvik, disciplína a overená spoľahlivosť by mohli predstavovať výhodu v rámci systému obrany štátu.

Z pohľadu systémového budovania obranyschopnosti a náborovej stratégie Ozbrojených síl SR je žiaduce, aby došlo k doplneniu legislatívy v podobe explicitného mechanizmu prechodu záložníkov do profesionálnej štátnej služby. Možné riešenia by mohli zahŕňať:

- Vloženie samostatného paragrafu do zákona č. 281/2015 Z. z. o štátnej službe profesionálnych vojakov a o zmene a doplnení niektorých zákonov, ktorý by priznával preferenčné postavenie uchádzačom s absolvovaným výcvikom NOS.
- Oslobodenie od niektorých fáz výberového konania, najmä ak záložník absolvoval hodnotené cvičenie a získal kladné odporúčanie od vojenského veliteľa.

Nie je však realistické ani systémovo žiaduce stotožňovať status záložníka so statusom profesionálneho vojaka OS SR. Hoci záložníci absolvovali základnú úroveň výcviku, preukázali dostatočný stupeň disciplíny a pripravenosti, rozsah ich pôsobenia, trvania služby a právneho postavenia je zásadne odlišný od profesionálnych síl viazaných štátnou službou. Z tohto dôvodu nemožno uvažovať o automatickom prechode bez ďalšieho posúdenia a doplnenia spôsobilostí. Racionálnym kompromisom je preto vytvorenie systému výhod a preferencií pre záložníkov, ktorý im umožní vstúpiť do profesionálnej služby za zvýhodnených podmienok - nie však bez dodatočného preverenia a doškolenia, ktoré zabezpečí, že ich výkon bude plne v súlade so štandardmi a operačnými požiadavkami Ozbrojených síl SR.

¹⁴ Národná rada Slovenskej republiky. (2015, 25. september). *Zákon č. 281/2015 Z. z. o štátnej službe profesionálnych vojakov a o zmene a doplnení niektorých zákonov*. Zbierka zákonov Slovenskej republiky. <https://static.slov-lex.sk/static/SK/ZZ/2015/281/20260101.html>.

Záver: Návrhy *de lege ferenda* k posilneniu právneho rámca a funkčnosti NOS

Zriadenie NOS prostredníctvom zákona č. 150/2025 Z. z. predstavuje významný posun v budovaní obranyschopnosti Slovenskej republiky. Nový model tvorby, udržiavania a navyšovania záloh má ambíciu vytvoriť pružnú, dostupnú a efektívnu rezervu Ozbrojených síl SR, schopnú zapojiť sa do krízového manažmentu. Zákon síce podrobne upravuje proces zaradenia, prípravy, hodnotenia a motivácie záložníkov, avšak normatívne prostredie obrany štátu zostáva roztrieštené: chýba explicitné legislatívne premostenie medzi záložnou a profesionálnou zložkou, princípy komplexnej obrany vystupujú prevažne implicitne a väzby na krízové riadenie nie sú dostatočne konkretizované prostredníctvom jasných kompetencií a štandardov spolupráce. Analýza právneho a koncepčného východiska zákona č. 570/2005 Z. z., ako aj súčasnej úpravy v zákone č. 150/2025 Z. z. ukazuje, že prijatím zákona č. 150/2025 došlo skôr k významnému posunu v terminológii a architektúre záloh, než k úplnému odstráneniu identifikovaných aplikačných a koncepčných nedostatkov pri budovaní komplexnej obrany. *De lege ferenda* sa preto javí ako potrebné dopracovať viacero oblastí právnej úpravy tak, aby NOS nepredstavovali len nové označenie rezervných zložiek, ale plnohodnotný nástroj na zvyšovanie odolnosti štátu, jeho celkovej obranyschopnosti a zároveň na navyšovanie kapacít OS SR.

V prvom rade je žiaduca silnejšia normatívna väzba medzi konceptom komplexnej obrany a vnútroštátnou právnou úpravou. Zákon č. 150/2025 Z. z. síce vecne smeruje k princípom zakotveným v NATO Comprehensive Defence Handbook, tieto však v texte zákona vystupujú skôr implicitne. Do všeobecných ustanovení zákona by bolo vhodné doplniť explicitný odkaz na komplexnú obranu ako rámcový princíp, vrátane základnej definície odolnosti štátu a zásad „whole-of-society“ prístupu. Takéto zakotvenie by umožnilo systematickejší výklad úloh NOS nielen v čase krízovej situácie, ale aj v preventívnej rovine - najmä pri vzdelávaní obyvateľstva, organizovaní cvičení a prepojení na civilnú ochranu či kritickú infraštruktúru.

Kľúčovou otázkou je tiež normatívne premostenie medzi záložnou a profesionálnou zložkou ozbrojených síl. Zákon č. 150/2025 Z. z. síce detailne upravuje právne postavenie záložníkov, systematicky však nerieši ich ďalšie kariérne smerovanie smerom k štátnej službe profesionálnych vojakov. Potenciál NOS ako prirodzenej náborovej bázy pre Ozbrojené sily SR sa tak využíva len čiastočne. *De lege ferenda* by bolo vhodné doplniť do zákona č. 281/2015 Z. z. o štátnej službe profesionálnych vojakov explicitné ustanovenie, ktoré by uchádzačom s absolvovaným výcvikom v NOS priznalo preferenčné postavenie, napríklad formou zvýhodnenia vo výberovom konaní alebo skrátenia niektorých jeho fáz, a zároveň

zakotvilo mechanizmus čiastočného uznávania absolvovaného výcviku a dosiahnutej vojenskej hodnosti pri vstupe do aktívnej služby, spojený s povinnosťou absolvovať doplňujúci odborný kurz.

V závere možno zvážiť posilnenie väzieb medzi NOS a civilným prostredím aj mimo kríz, najmä prostredníctvom štandardizovanej spolupráce so samosprávou pri cvičeniach, zapojenia do preventívnych vzdelávacích aktivít a koordinácie s integrovaným záchranným systémom. Takéto opatrenia by priblížili NOS ideálu „home guard“ v zmysle komplexnej obrany a podporili spoločenskú akceptáciu.

Pri udržaní politickej podpory sa môžu NOS stať stabilnou súčasťou obranného systému. Aby však dlhodobo plnili úlohu nástroja komplexnej obrany, je potrebné odstrániť identifikované legislatívne medzery, posilniť prepojenie na krízový manažment a vytvoriť jasný a motivačný rámec priepustnosti medzi zálohami a profesionálnou službou. Len tak bude možné naplno využiť potenciál občanov ochotných aktívne sa podieľať na obrane štátu.

PRÍLOHY

Tabuľka 1 Prehľad prípravy vojakov v zálohe

Typ zálohy	Rozsah prípravy	Metódy prípravy záloh:	Výška motivačného príspevku
Operačné zálohy (§4)	20 – 30 kalendárnych dní	• Primárny výcvik • Zdokonaľovací výcvik • Odborný výcvik • Odborný/špecializačný kurz	3000 € (§ 12 ods. 2 písm. a))
Pohotovostné zálohy (§5) *pre vojaka, ktorý nie je príslušníkom zboru alebo finančnej správy	20 – 30 kalendárnych dní	• Primárny výcvik • Zdokonaľovací výcvik • Odborný výcvik • Odborný/špecializačný kurz	3000 € (§ 12 ods. 2 písm. a))
Branné zálohy (§ 6)	Najmenej 14 kalendárnych dní	• Výcvik branných záloh • Odborné semináre • Tematické cvičenia	1500 € (§ 12 ods. 2 písm. b))

Zoznam bibliografických odkazov

1. Liang, X., Tian, N., Lopes da Silva, D., Scarazzato, L., Karim, Z., & Guiberteau Ricard, J. (2025, April). *Trends in world military expenditure, 2024* (SIPRI Fact Sheet). Stockholm International Peace Research Institute.
2. Národná rada Slovenskej republiky. (2025). *Vládny návrh zákona o niektorých opatreniach*
3. *na zvýšenie odolnosti Slovenskej republiky v oblasti obrany a bezpečnosti, o brannej*
4. *povinnosti a o zmene a doplnení niektorých zákonov (parlamentná tlač 716)*. Národná rada Slovenskej republiky.
<https://www.nrsr.sk/web/Default.aspx?sid=zakony/zakon&CisObdobia=9&CPT=716>
5. Vláda Slovenskej republiky. (2025). *Dôvodová správa k vládnemu návrhu zákona o*
6. *niektorých opatreniach na zvýšenie odolnosti Slovenskej republiky v oblasti obrany a*
7. *bezpečnosti, o brannej povinnosti a o zmene a doplnení niektorých zákonov*. Národná rada Slovenskej republiky.
<https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=560356>
8. Ministerstvo spravodlivosti Slovenskej republiky. (n.d.). *Krízová situácia* [tezaaurus – termín]. Slov-Lex. <https://www.slov-lex.sk/tezaury/terminy/01914ed8-c738-470a-8845-4d27c9b7038d>
9. Zákon č. 150/2025 Z. z. (2025, júl 1). *O niektorých opatreniach na zvýšenie odolnosti Slovenskej republiky v oblasti obrany a bezpečnosti, o brannej povinnosti a o zmene a doplnení niektorých zákonov*. Slov-Lex. <https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2025/150/20250701.html>
10. Slovenská republika. (2005). *Zákon č. 570/2005 Z. z. o brannej povinnosti a o zmene a doplnení niektorých zákonov v znení neskorších predpisov*. Zbierka zákonov Slovenskej republiky.
<https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2005/570/20220601.html>
11. Národná rada Slovenskej republiky. (2015, 25. september). *Zákon č. 281/2015 Z. z. o štátnej službe profesionálnych vojakov a o zmene a doplnení niektorých zákonov*. Zbierka zákonov Slovenskej republiky. <https://static.slov-lex.sk/static/SK/ZZ/2015/281/20260101.html>
12. TASR TV. (2024, 17. december). *Tlačová konferencia ministra obrany SR R. Kaliňáka: Aktuálne témy rezortu obrany* [Video]. YouTube. <https://www.youtube.com/watch?v=RTuv5FHNIts>
13. Národné obranné sily. *Národné obranné sily*. Dostupné na: <https://www.noska.sk/>. Téma národné obranné sily. (2025, august). *Obrana*, 8/2025, 19.
14. *Nastavenie a motivácia, rešpekt a uznanie*. (2025, august). *Obrana*, 8/2025, 20.
15. NATO Special Operations Headquarters. (2020, December 1). *Comprehensive defence handbook: Volume I (Edition A, Version 1)*. NSHQ.

KOMPARÁCIA PRÁVA NA PRIMERANÚ DĹŽKU TRESTNÉHO KONANIA V NORMÁCH MEDZINÁRODNÉHO PRÁVA

Comparison of the right to a reasonable duration of criminal proceedings in international law

MATEJ BIROŠ*

Abstrakt

Článok „Komparácia práva na primeranú dĺžku trestného konania v normách medzinárodného práva“ analyzuje, ako je právo na prejednanie trestnej veci v primeranej lehote normatívne zakotvené a konceptuálne chápané v kľúčových univerzálnych a regionálnych nástrojoch ochrany ľudských práv. Vychádza z komparácie Európskeho dohovoru o ľudských právach a ekvivalentných garancií v Medzinárodnom pakte o občianskych a politických právach, v Americkom dohovore o ľudských právach, Africkej charte práv človeka a národov, pričom poukazuje aj na špecifickú ochranu a mechanizmy reagujúce na neprimeraných prieťahov. Článok uzatvára, že napriek odlišným inštitucionálnym rámcom sa v medzinárodnom práve konsenzuálne presadil štandard, podľa ktorého neprimeraná dĺžka trestného konania sama osebe predstavuje autonómne porušenie práva na spravodlivý proces a vyžaduje efektívne kompenzačné a preventívne mechanizmy na vnútroštátnej úrovni.

Abstract

The article “Comparison of the right to a reasonable duration of criminal proceedings in international law” analyzes how the right to have a criminal case heard within a reasonable time is normatively enshrined and conceptually understood in key universal and regional human rights instruments. It is based on a comparison of the European Convention on Human Rights and equivalent guarantees in the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights, while also highlighting the specific features of protection and mechanisms addressing unreasonable delays. The article concludes that despite differing institutional frameworks, a consensus has emerged in international law that the excessive length of criminal proceedings which constitutes an autonomous violation of the right to a fair trial and requires effective compensatory and preventive mechanisms at the national level.

Kľúčové slová: trestné konanie, primeraná dĺžka, medzinárodná zmluva, spravodlivý proces

Key words: criminal proceeding, reasonable length, international treaty, fair trial

Úvod

Princíp ultima ratio v trestnom práve zahŕňa aj obmedzenia spojené s časovým odstupom, ktorý uplynul od spáchania skutku alebo vykonania úkonu až po samotné uloženie trestnej sankcie. Účinnosť inštitútov trestného práva v čase klesá¹, v dôsledku čoho

* Mgr. Ing. Matej Biroš, LL.M., Interný doktorand, Katedra trestného práva, Právnická fakulta, Univerzita P. J. Šafárika v Košiciach Mail: matej.biros@protonmail.com

¹ Uvedené je reflektované okrem iného aj v §39 ods. 1 Zákona č. 300/2005 Z. z. Trestný zákon, cit.: „Ak súd vzhľadom na okolnosti prípadu ... možno páchatelovi uložiť trest aj pod dolnú hranicu trestu ustanoveného týmto zákonom.“ v spojitosti s §40 Zákona č. 300/2005 Z. z. Trestný zákon interpretujúc rozsudkom Najvyššieho súdu R 10/2011, parafráza „Dĺžka konania, ktorá s prihliadnutím na obťažnosť vecí, postoj obvineného k trestnému stíhaniu a procesný postup orgánov činných v trestnom konaní výrazne a neprimerane presahuje dĺžku konania v

zákonodarca i súdna prax vyžadujú dodržiavanie princípu rýchlosti konania a časovej primeranosti pri uplatňovaní trestnoprávných noriem².

Právo na prerokovanie vecí v primeranej lehote predstavuje integrálnu súčasť nielen Dohovoru o ochrane ľudských práv a základných slobôd a nadväzujúcich vnútroštátnych právnych poriadkov, ale je tiež široko akceptovanou zásadou zakotvenou v ďalších medzinárodnoprávných dokumentoch garantujúcich ochranu ľudských práv naprieč rôznymi jurisdikciami. Tento inštitút predstavuje kľúčovú procesnú garanciu zameranú na elimináciu neodôvodnených prieťahov v konaní, upevnenie právnej istoty a ochranu dotknutých osôb pred nepriaznivými psychologickými a sociálnymi dôsledkami plynúcimi z prolongovaného stavu právnej neistoty subjektov trestného procesu.

1 Európsky dohovor o ľudských právach (článok 6)

Článok 6 EDLP predstavuje jedno z najrelevantnejších ustanovení tohto dohovoru, ktoré konštituuje fundamentálny rámec záruk spravodlivého procesu záväzný pre všetky zmluvné štáty Rady Európy³. Článok 6 odsek 1 je EDLP je normatívnym vyjadrením práva na spravodlivé a verejné konanie v primeranej lehote pred nezávislým a nestranným súdom zriadeným zákonom, cit.: *„Každý má právo na to, aby jeho vec bola spravodlivo, verejne a v primeranej lehote prejednaná nezávislým a nestranným súdom zriadeným zákonom, ktorý rozhodne o jeho občianskych právach alebo záväzkoch alebo o akomkoľvek trestnom čine, z ktorého je obvinený. Rozsudok musí byť vyhlásený verejne, ale tlač a verejnosť môžu byť vylúčené buď po dobu celého alebo časti procesu v záujme mravnosti, verejného poriadku alebo národnej bezpečnosti v demokratickej spoločnosti, keď to vyžadujú záujmy maloletých alebo ochrana súkromného života účastníkov alebo, v rozsahu považovanom súdom za úplne nevyhnutný, pokiaľ by vzhľadom na osobitné okolnosti mohla byť verejnosť konania na ujmu záujmom spravodlivosti.“*

Ustanovenia nasledujúcich odsekov článku 6 EDLP⁴ podrobnejšie špecifikujú jednotlivé parciálne práva subjektov v procesnom postavení osoby, proti ktorej sa vedie trestné stíhanie, vrátane prezumpcie nevinu, práva byť informovaný o obvineniach, práva na primeraný čas a

porovnateľných veciach je takou okolnosťou prípadu, ktorá odôvodňuje pri ukladaní trestu použiť mimoriadne zmierňovacie ustanovenie podľa § 40 ods. 1 Tr. zák., účinného do 1. januára 2006 (§ 39 ods. 1 Tr. zák.) a uloženie trestu odňatia slobody pod dolnú hranicu trestu ustanoveného týmto zákonom s obmedzením uvedeným v ustanovení § 40 ods. 4 Tr. zák. účinného do 1. januára 2006 (§ 39 ods. 3 Tr. zák.).“

² Pozri aj základné zásady trestného konania vyjadrené v §2 Zákona č. 301/2005 Z. z. Trestný zákon, explicitne aj ods. 6.

³ Pozri kapitolu 2 v CAMERON, I.: *Úvod do Európskeho dohovoru o ľudských právach*. Bratislava: Vydavateľstvo VEDA. 2000. 158s. ISBN 80-968528-1-7.

⁴ Pozri Čl. 6 ods. 2 a 3, Európsky dohovor o ľudských právach

prostriedky na prípravu obhajoby, práva na právnu pomoc, práva vypočúvať svedkov a práva na tlmočníka.

Aspekt primeranej lehoty je etablovaný v širšom rámci procesnej spravodlivosti s cieľom garantovať nielen samotný výkon judikátornej činnosti, ale aj jej realizáciu v takom časovom horizonte, ktorý eliminuje excesívnu záťaž pre dotknutý subjekt a všeobecný právny poriadok. Predmetom práva na primeranú lehotu trestného konania je chrániť jednotlivcov pred negatívnymi dôsledkami prolongovaného výkonu spravodlivosti. Právo konania v primeranej lehote vychádza z právnej úvahy, že odloženie spravodlivosti pre jednotlivca v dôsledkoch de facto znamená jej odmietnutie. Neodôvodnené priťahy v konaní podrobujú erózii dôveru verejnosti v systém trestnej justície a súčasne môžu negatívne ovplyvniť integritu a stabilitu súdnych rozhodnutí. V trestnom procese sú konzekvencie nečinnosti orgánov osobitne naliehavé, nakoľko zásahy do základných práv a slobôd dotknutých subjektov, predovšetkým tie s povahou trestnoprávnej represie, predstavujú z hľadiska intenzity najzávažnejšie štátno-mocenské opatrenia.

ESLP vo svojich rozhodnutiach explicitne vyjadruje názor, že už neprimeraná dĺžka trestného konania môže aj samostatne predstavovať porušenie článku 6, a to aj v prípade, že súbežne nedošlo k ďalším porušeniam záruk obsiahnutých v EDLP alebo v Trestnom poriadku. ESLP vo svojej rozhodovacej praxi opakovane konštatoval, že primeranosť dĺžky konania sa musí posudzovať individuálne v každom jednotlivom prípade na základe osvedčených kritérií.

Ak ESLP zistí porušenie článku 6 z dôvodu neprimeranej dĺžky konania, primárnym opravným prostriedkom je spravodlivé odškodnenie podľa článku 41 EDLP⁵, zvyčajne vo forme finančnej náhrady. V ojedinelých prípadoch ESLP pri zistení systémových nedostatkov v procesnoprávnej úprave odporučil zmluvnej strane procesné zmeny alebo prijatie všeobecných opatrení s cieľom zamedziť systémovým zdrojom porušenia práva na primeranú lehotu, avšak tieto odporúčania nedisponujú priamym normatívnym účinkom a bezprostrednou záväznosťou, akú vykazujú rozhodnutia Súdneho dvora Európskej únie.⁶

ESLP vo svojej judikatúre sformuloval taxatívne vymedzené hodnotiace kritériá na skúmanie primeranosti dĺžky konania, ktoré aplikuje v procese skúmania dôvodnosti

⁵ Článok 41 – Spravodlivé zadostučinenie, Európsky dohovor o ľudských právach, cit.: „Ak súd dospeje k záveru, že došlo k porušeniu dohovoru alebo jeho protokolov a v prípade, že vnútroštátne právo dotknutej Vysokej zmluvnej strany umožňuje len čiastočnú nápravu, súd prizná v prípade potreby poškodenej strane spravodlivé zadostučinenie.“

⁶ Pozri Rozsudok Súdneho dvora (veľká komora) z 5. júna 2018 (návrh na začatie prejudiciálneho konania, ktorý podal Specializiran nakazatelen sąd – Bulharsko) – trestné konanie proti Nikolajovi Kolevovi, Milkovi Christovovi, Stefanovi Kostadinovovi (Vec C-612/15)

namietaných priesťahov. Z pohľadu konania o sťažnosti na EŠLP pre porušenie práv sťažovateľa podľa článku 6 EDP sa teda každé porušenie práva na primeranú dĺžku konania posudzuje individuálne, pričom tento hodnotiaci proces spravidla konfrontuje s objektívnymi kritériami, a to zložitost' prípadu, správanie sa navrhovateľa, správanie sa orgánov štátnej moci a súčasne aj toho, ako je pre sťažovateľa prejednávacia vec závažná.

EŠLP teda takto vytvoril podrobný a konzistentný rámec na posudzovanie, či bolo porušené právo na konanie v primeranej lehote, ako je zakotvené v článku 6 ods. 1 EDP. Uvedený rámec nadobúda kľúčový význam v trestnom procese, v ktorom môžu mať priesťahy významné negatívne dopady na subjekt v postavení obvineného, vrátane zásahov do osobnej slobody, poškodenia jeho reputácie a sprievodnej sociálnej stigmatizácie.⁷

Prvým hodnotiacim kritériom, ktorý Európsky súd pre ľudské práva na skúmanie sťažnosti aplikuje, je zložitost' prípadu, a to ako z právneho, tak aj z faktického hľadiska. Procesná zložitost' veci môže byť determinovaná charakterom právnych otázok prítomných v posudzovanom prípade, zahŕňajúc nielen aspekty trestnoprávnej povahy, ale aj otázky ústavnoprávnej interpretácie, výkladu bezprostredne aplikovateľných medzinárodnoprávných noriem či celkovú materiálnu a procesnú komplexnosť konania, ktoré je predmetom podanej sťažnosti. Faktickú zložitost' možno v užšom zmysle subsumovať pod skutkovú zložitost', ktorá sa vzťahuje najmä na povahu a objem dôkazov, počet svedkov, potrebu znaleckého skúmania a toho, či sa na prípade podieľa viacero spoluobžalovaných alebo či ide súbor prepojených konaní. EŠLP uznal, že objektívne náročné konanie, determinované zdĺhavým procesom vyhľadávania či vykonávania dôkazov, sťaženým zabezpečením svedkov, či prítomnosťou medzinárodného prvku, môže za určitých okolností odôvodňovať prolongované trvanie procesu. Z postupu orgánov činných v trestnom konaní však musí byť preukázateľné, že vyvíjali náležitú aktivitu smerujúcu k eliminácii týchto prekážok a k plynulému postupu vo veci.

Druhým hodnotiacim kritériom EŠLP sa zameriava na vlastnú procesnú aktivitu sťažovateľa, ktorý tvrdí, že konaním členského štátu malo dôjsť k porušeniu jeho práva na primeranú dĺžku konania. V záujme zamedzenia zneužívania práva sťažovateľom judikatúra EŠLP konštatuje, že porušenie práva na primeranú lehotu zakladajú výlučne tie relevantné priesťahy, ktoré sú objektívne pripísateľné procesnej nečinnosti alebo nesprávne postupu

⁷ LULA, E. A kol.: *Right to a trial within reasonable time – comparative overview*. Vypracované v rámci spoločného programu Európskej únie a Rady Európy „Horizontálny nástroj pre západný Balkán a Turecko na roky 2019 – 2022“ v rámci akcie „Iniciatíva za právnu istotu na západnom Balkáne“. Rada Európy. 2022.

orgánov štátu. Z uvedeného vyplýva, že v prípade, ak sťažovateľ svojím procesným postupom sám participoval na vzniku priesťahov, bez ohľadu na jeho subjektívnu motiváciu, ESLP zohľadní túto skutočnosť pri posudzovaní primeranosti dĺžky konania, čo v konečnom dôsledku oslabuje opodstatnenosť uplatneného nároku sťažovateľa v tejto časti.

Tretím a najdôležitejším kritériom ESLP pri posudzovaní primeranosti dĺžky konania je spôsob, akým štátne orgány, vrátane orgánov činných v trestnom konaní, vyšetrovateľov, prokurátorov a súdov, riadia napádané konanie. Podľa ESLP disponujú zmluvné štáty pozitívnym záväzkom kreovať a usporiadať svoje súdne systémy takým spôsobom, aby súdne orgány boli objektívne schopné reflektovať na normatívnu požiadavku článku 6 EDLP a rozhodovať veci bez zbytočných priesťahov, zvlášť v trestných veciach. To v sebe konštituuje požiadavku na zabezpečenie adekvátneho personálneho substrátu justičných zložiek, ako aj povinnosť eliminovať nadmerný procesný formalizmus a neodôvodnené administratívne či iné systémové bariéry, ktoré by bránili plynulému priebehu trestného konania. V rovine trestného konania je zodpovednosť štátu za vzniknuté priesťahy akcentovaná výraznejšie než v iných druhoch procesov, a to predovšetkým s ohľadom na povahu trestnej represie spojenej s invazívnymi zásahmi do osobnej slobody v priamej korelácii s imperatívom zachovania práva na spravodlivý proces.

Štvrté a záverečné obligatórne kritérium preskúmania zo strany ESLP je späté s požiadavkou na individualizáciu posudzovania podanej sťažnosti, pričom argumentácia sťažovateľa v tomto smere predstavuje síce subjektívny, avšak z hľadiska meritórneho rozhodovania potenciálne relevantný faktor. V kontexte trestného konania ESLP spravidla pristupuje k posudzovaniu významu predmetu konania pre sťažovateľa s vyššou mierou prísnosti ku prijateľnosti priesťahov, reflektujúc závažnosť hroziacej sankcie sťažovateľovi, akými sú výkon trestu odňatia slobody, negatívny dopad na profesionálnu integritu, či riziká spojené so spoločenskou degradáciou. Trestné konanie je z optiky porušovania práva na primeranú lehotu posudzované ESLP najprísnejšie v prípadoch, keď je sťažovateľ stíhaný väzobne. V trestných prípadoch môže ESLP posúdiť rýchlosť konania podľa článku 6 ods. 1 a článku 5 ods. 3 EDLP⁸.

⁸ Vid'. Čl. 5, ods. 3, Európsky dohovor o ľudských právach, cit.: „Každý, kto je zatknutý alebo pozbavený slobody v súlade s ustanovením odseku 1 písm. c) tohto článku, musí byť ihneď predvedený pred sudcu alebo inú úradnú osobu splnomocnenú zákonom na výkon súdnej moci a má právo, aby jeho vec bola prejednaná v primeranej lehote, alebo byť prepustený počas konania. Prepustenie sa môže podmieniť zárukou, že sa takáto osoba dostaví na pojednávanie.“ v spojení s ods. 1, písm. c), cit. spolu: „Každý má právo na slobodu a osobnú bezpečnosť. Nikoho nemožno pozbaviť slobody okrem nasledujúcich prípadov, pokiaľ sa tak stane na základe postupu stanoveného zákonom: (c) zákonné zatknutie alebo pozbavenie slobody za účelom predvedenia pred príslušný súdny

Vo väzobných veciach sa požiadavka na elimináciu prieťahov stáva najnaliehavejšou, nakoľko dochádza k invazívnemu obmedzeniu osobnej slobody obvineného, na ktorého sa v plnom rozsahu vzťahuje status prezumpcie neviny..

Fakultatívnym kritériom v rámci posudzovacieho procesu ESLP pri skúmaní dôvodnosti prieťahov je počet inšancií, ktorými vec prechádza, čo predstavuje relevantný aspekt ovplyvňujúci právnu úvahu súdu pri vyhodnocovaní celkovej dĺžky konania. Trestné konania nie je možné apriórne kvalifikovať ako nedôvodne prolongované, pokiaľ je ich dĺžka dôsledkom riadneho postupu veci cez viaceré procesné stupne v rámci inštančnej postupnosti – v slovenskom trestnom procese sú to postup pred začatím trestného stíhania, prípravné konanie, prvostupňové súdne konanie, odvolacie konanie, dovolacie konanie a konanie o ústavnej sťažnosti. ESLP v rámci svojej prieskumnej právomoci posudzuje temporálnu primeranosť konania ako celku, pričom skúma, či bola celková dĺžka procesu, ktorú štát odôvodňuje náročnosťou inštančného postupu, nevyhnutná, a či orgány na každom stupni jurisdikcie postupovali s náležitou procesnou starostlivosťou. Legislatívno-systematické hromadenie súdnych preskúmaní však nesmie štruktúrne viesť k neprimeraným omeškaniam. Každá procesná fáza konania musí byť realizovaná v primeranom časovom rámci, pričom na orgány štátu sa kladie požiadavka na efektívnu koordináciu ich činnosti tak, aby sa zamedzilo vzniku neopodstatnených prieťahov a zabezpečila kontinuita konania.

2 Medzinárodný pakt o občianskych a politických právach

V medzinárodnoprávnom systéme ochrany základných práv predstavuje jeden z najvýznamnejších pilierov Medzinárodný pakt o občianskych a politických právach, ktorý je súčasťou tzv. Medzinárodnej listiny ľudských práv. Tento kľúčový zmluvný dokument bol v rámci Organizácie Spojených národov prijatý a otvorený na podpisujúcim sa členským štátom dňa 19.12.1966, čím sa položil základ pre univerzálnu právnu ochranu širokého spektra politických slobôd a občianskych práv jednotlivca.. V slovenskom právnom poriadku sa proces jeho normatívneho ukotvenia zavŕšil vyhláškou ministra zahraničných vecí⁹. Medzinárodný pakt o občianskych a politických právach kladie na dodržanie primeranej lehoty v trestných veciach osobitný dôraz, čo potvrdzuje jeho zakotvenie vo viacerých normatívnych ustanoveniach. Tento dokument explicitne chráni jednotlivca v rôznych fázach procesu. Prvým všeobecným ustanovením priamo cieleným pre trestné konanie je v článku 9, ods. 3, cit.:

orgán pre dôvodné podozrenie zo spáchania trestného činu, alebo ak je to dôvodne považované za potrebné za účelom zabránenia spáchaniu trestného činu alebo úteku po jeho spáchaní,

⁹ Vyhláška ministra zahraničných vecí č. 120/1976 Zb. o Medzinárodnom pakte o občianskych a politických právach a Medzinárodnom pakte o hospodárskych, sociálnych a kultúrnych právach z 10. mája 1976

„Každý, kto je zatknutý alebo zadržaný na základe obvinenia z trestného činu, musí sa bez meškania predviesť pred sudcu alebo iného úradníka, ktorý je zákonom splnomocnený vykonávať sudcovskú právomoc, a má právo na trestné konanie v primeranom čase alebo na prepustenie. Nie je všeobecným pravidlom, aby sa osoby čakajúce na trestné konanie držali vo väzbe; prepustenie sa však môže podmieniť zárukami, že sa dostavia na trestné konanie v akoľvek inom štádiu súdneho konania a na vynesenie rozsudku.“ Z uvedeného vyplýva, že Medzinárodný pakt o občianskych a politických právach v tomto ustanovení okrem všeobecného a najmä explicitného práva na trestné konanie v primeranej lehote stanovuje požiadavky na špecifickú efektivitu procesných krokov v samotnom trestnom konaní účastníckeho štátu paktu. Medzinárodný pakt o občianskych a politických právach sa v rámci svojej vnútornej štruktúry a systematického usporiadania venuje podrobnejšej úprave viacerých parciálnych nárokov, ktoré sú vlastné trestnému procesu¹⁰. Druhým všeobecným ustanovením Medzinárodného paktu o občianskych a politických právach priamo cieleným pre trestné konanie je v článku 14, ods. 3, písm. c), ktorý stanovuje, cit. spolu: *„Každý, kto je obvinený z trestného činu, má mať tieto minimálne záruky (c) má byť súdený bez zbytočného odkladu“*.

Vzhľadom na skutočnosť, že Medzinárodný pakt o občianskych a politických právach predstavuje jednu z kľúčových zmlúv prijatých v rámci Organizácie Spojených národov, jeho právna záväznosť a normatívny vplyv majú nesporný globálny dosah. Tento medzinárodnoprávny dokument ukladá všetkým zmluvným stranám, medzi ktoré sa radí aj Slovenská republika, striktnú povinnosť nielen rešpektovať, ale aj aktívne implementovať jeho jednotlivé ustanovenia do vnútroštátnych právnych poriadkov.

Predmetné články paktu kladú osobitný dôraz na imperatív bezodkladnej procesnej aktivity zo strany orgánov štátu, a to špecificky v kontexte trestných vecí, kde sú zásahy do práv jednotlivca najintenzívnejšie. Takto nastavené pravidlá významným spôsobom korelujú so širším konceptom budovania spravodlivého a efektívneho trestného systému, ktorý musí byť schopný garantovať zákonnosť a rýchlosť postupu. Pakt týmto spôsobom definuje medzinárodné štandardy, ktoré slúžia ako ochranný val pred neodôvodnenou pasivitou štátnej moci a prispievajú k posilneniu právnej istoty osôb vystavených trestnému stíhaniu..

¹⁰ Napríklad článok 9, ods. 3, Medzinárodný pakt o občianskych a politických právach, cit.: *„Každý, kto je zatknutý, sa musí v čase zatknutia oboznámiť s dôvodmi svojho zatknutia a musí byť bez meškania informovaný o obvineniach proti nemu vznesených.“* alebo ods. 4, cit.: *„Každý, kto je zatknutý alebo je vo väzbe, má právo na konanie pred súdom, aby súd mohol bez meškania rozhodnúť o právoplatnosti jeho zadržania a nariadiť jeho prepustenie, ak väzba nie je zákonná.“*

3 Americký dohovor o ľudských právach

V rámci inter-amerického systému ochrany ľudských práv je právo na prerokovanie veci v primeranej lehote, spolu so súvisiacimi procesnými garanciami, normatívne zakotvené v Americkom dohovore o ľudských právach¹¹. Americký dohovor o ľudských právach koncipuje právo na prerokovanie veci v primeranej lehote v normatívnej zhode s medzinárodnoprávnymi štandardmi zakotvenými v Európskom dohovore o ľudských právach a Medzinárodnom pakte o občianskych a politických právach. Táto ekvivalencia sa prejavuje v dvoch rovinách, a to jednak vo forme všeobecnej procesnej záruky uplatniteľnej v rámci akéhokoľvek súdneho konania, a súčasne vo forme špecifickej trestnoprávnej garancie, ktorá reflektuje osobitnú naliehavosť ochrany práv osôb v rámci trestného procesu. Vo všeobecnej rovine Americký dohovor o ľudských právach stanovuje právo na primeranú dĺžku konania v článku 8, ods. 1, cit. strojový preklad: *„Každý človek má právo na vypočutie s náležitými zárukami a v primeranej lehote pred príslušným, nezávislým a nestranným súdom, ktorý bol vopred ustanovený zákonom, na preukázanie akéhokoľvek obvinenia trestnej povahy vzneseného proti nemu alebo na určenie jeho práv a povinností občianskej, pracovnej, daňovej alebo akéhokoľvek iného charakteru.“*¹²

Americký dohovor o ľudských právach kladie v rámci svojej normatívnej štruktúry zvýšený dôraz na ochranu procesných práv vybraných subjektov trestného konania, a to najmä v situáciách spojených s priamym zásahom do ich osobnej integrity – jej ochrana je predovšetkým v článku 7, ktorý garantuje právo na osobnú slobodu, kde sa v prípade osôb obmedzených na slobode striktne vyžaduje ich bezodkladné predvedenie pred príslušný súdny orgán. Súčasne tento medzinárodnoprávny inštrument v súvislosti s ochranou pred svojvôľou štátnej moci explicitne konštituuje nárok na meritórne rozhodnutie trestnej veci v primeranej lehote¹³. Americký dohovor o ľudských právach ešte intenzívnejšie formuluje požiadavku rýchlosti v prípade trestného stíhania mladistvých¹⁴, kde dikcia kogentne vylučuje prietahy v stanovenej časti konania. Americký dohovor o ľudských právach prostredníctvom svojich

¹¹ American Convention on Human Rights – Pact of San Jose, Costa Rica (Americký dohovor o ľudských právach), OAS Treaty Series No. 36, 1144 UNTS 123, 9 ILM 99. 1969.

¹² Cit. originálneho znenia: *„Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.“*

¹³ Článok 7, ods. 5, Prvá veta, Americký dohovor o ľudských právach, cit.: *„Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings.“*

¹⁴ Článok 5, ods. 5, Prvá veta, Americký dohovor o ľudských právach, cit.: *„Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minor“*

jednotlivých ustanovení ukladá členským štátom jasnú povinnosť postupovať v súdnych veciach bez zbytočného odkladu a zabezpečiť plynulosť celého procesu. Podobne ako je to v európskom systéme alebo v rámci OSN, aj v tomto dokumente vidíme oveľa silnejší dôraz na rýchlosť konania práve v trestných veciach. Je to dané tým, že trestné stíhanie so sebou prináša najzávažnejšie zásahy do života človeka, a preto právo vyžaduje, aby štát rozhodol o vine či nevine obvineného v čo najkratšom možnom čase. Týmto spôsobom sa má predísť situáciám, kedy by bol jednotlivец vystavený dlhodobému tlaku trestného aparátu bez toho, aby súd právoplatne uzavrel jeho prípad..

4 Africká charta práv človeka a národov

V kontexte afrického kontinentu sa právo na primeranú dĺžku konania a s ním spojenými zárukami nachádza aj v Africkej charte práv človeka a národov¹⁵. Africká charta práv človeka a národov vo svojej normatívnej konštrukcii priamo reflektuje a preberá koncepciu práva na prerokovanie veci v primeranej lehote, pričom pri kreovaní tohto procesného štandardu čerpá inšpiráciu z predchádzajúcich medzinárodnoprávných dokumentov a zavedených právnych obyčajov. Tento regionálny inštrument ochrany ľudských práv v Afrike tak nadväzuje na už existujúce globálne a európske mechanizmy, ktoré definovali časovú primeranosť ako jeden z elementárnych pilierov spravodlivého súdneho procesu. Vo všeobecnej rovine Africká charta práv človeka a národov stanovuje právo na primeranú dĺžku konania v článku 7, ods. 1, písm. d), cit. spolu: „*Každý jednotlivец má právo na to, aby bola jeho vec vypočutá. To zahŕňa (d) právo byť súdený v primeranej lehote nestranným súdom alebo tribunálom.*“¹⁶

Špecifickým rysom Africkej charty práv človeka a národov v komparácii s jej medzinárodnoprávnymi ekvivalentmi je skutočnosť, že tento dokument neobsahuje explicitne prísnejšiu alebo podrobnejšiu právnu úpravu vyhradenú výlučne pre oblasť trestného konania. Napriek absencii takejto špecializovanej dikcie však charta vo svojom texte zakotvuje významnú procesnú záruku, ktorá smeruje k eliminácii rizík spojených s neefektívnosťou vnútroštátnych systémov ochrany základných práv. Tento regionálny dokument totiž výslovne priznáva ochranu pred takými všeobecnými prostriedkami nápravy v právnych poriadkoch zmluvných štátov, ktoré by z hľadiska dodržania primeranej lehoty mohli vykazovať znaky neúčinnosti či procesnej stagnácie. Charta sa tak primárne zameriava na funkčnosť samotných právnych mechanizmov, ktoré majú jednotlivcom slúžiť na ochranu ich nárokov, pričom kladie

¹⁵ African Charter of Human and Peoples' Rights (Africká charta práv človeka a národov), OAU Doc. CAB/LEG/67/3 rev. 5, 1520 UNTS 217. 1981.

¹⁶ Cit. znenia zverejneného v anglickom jazyku: „*Every individual shall have the right to have his cause heard. This comprises (d) the right to be tried within a reasonable time by an impartial court or tribunal.*“

dôraz na to, aby tieto prostriedky neboli len formálne prítomné, ale aby objektívne garantovali včasné a efektívne rozhodovanie v každej právnej veci. Africká charta práv človeka a národov formuluje svoju právomoc podmienene extenzívne v prípade práve potenciálu narušenia práva na primeranú lehotu konania v článku 50, cit.: „*Komisia môže riešiť vec, ktorá jej bola predložená, až po tom, čo sa uistí, že všetky miestne opravné prostriedky, ak existujú, boli vyčerpané, pokiaľ nie je Komisii zrejmé, že konanie na dosiahnutie týchto opravných prostriedkov by sa neprimerane predĺžilo.*“¹⁷ Ekvivalentný prístup je aj v Ďalších ustanoveniach Africkej charty práv človeka a národov¹⁸.

Predmetné ustanovenia Africkej charty práv človeka a národov vykazujú z hľadiska garancie práva účastníka na primeranú dĺžku konania modernejšie normatívne črty v porovnaní s chronologicky staršími medzinárodnoprávnymi dokumentmi obdobného charakteru. Vďaka svojmu progresívnemu prístupu k procesným zárukám slúžia tieto pasáže charty ako dôležitý referenčný rámec a inšpiračný zdroj pre nadchádzajúcu normotvornú činnosť zameranú na zvyšovanie efektivity súdnych procesov v globálnom meradle.

5 Ekvivalencia v regióne ASEAN

V geografickom priestore Ázie doposiaľ absentuje univerzálny normatívny inštrument, ktorý by pre tamojšie štáty konstituoval spoločný a záväzný právny rámec, akým disponujú európsky, americký či africký systém ochrany ľudských práv. Hoci sa v tomto regióne postupne formujú parciálne právne základy, tento proces prebieha bez existencie dostatočne robustných inštitucionálnych a kontrolných mechanizmov, ktoré by garantovali efektívnu vymožiteľnosť a dohľad nad dodržiavaním prijatých štandardov. Inštitucionálne sa problematikou ľudských práv a z nich derivovaných dielčích zásad a princípov zaoberá Medzivládna komisia ASEAN pre ľudské práva (AICHR)¹⁹, avšak odborná verejnosť spolu s mimovládny sektorom kriticky reflektujú postavenie AICHR, ktorú pre absenciu signifikantných kompetencií vnímajú skôr ako konzultačný a propagačný orgán s obmedzeným ochranným mandátom. Tomuto telesu chýba funkčný individuálny sťažnostný mechanizmus, personálna nezávislosť jeho členov, ako aj efektívne procesné inštrumenty, ktoré by umožňovali reálne presadzovanie a ochranu základných ľudských práv v danom geografickom regióne. Poslednou z relevantných

¹⁷ Cit. originálneho znenia: „*The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.*“

¹⁸ Pozri článok 52 a 56, ods. 5 a 6, Africká charta práv človeka a národov

¹⁹ ASEAN Intergovernmental Commission on Human Rights (AICHR) inaugurovaná 23.10.2009 na 15. samite ASEAN v Cha-Am Hua Hin (Thajsko) podľa článku 14 Charty ASEAN (pozn. autora: Charta ASEAN je bez relevancie pre problematiku práva na konanie v primeranej lehote v trestnom konaní)

formálnych aktivít ázijských vlád je ASEAN deklarácia ľudských práv²⁰, ktorá je však výlučne politikou deklaráciou bez právnej záväznosti a súčasne problematiku práva na primeranú lehotu konania neobsahuje pre všeobecnú a ani pre trestnoprávnu oblasť.

Záver

Predložená komparatívna analýza jasne demonštruje, že právo na prerokovanie vecí v primeranej lehote nie je len partikulárnym procesným pravidlom, ale predstavuje univerzálny pilier moderného trestného práva, ktorého cieľom je eliminácia štátnej svojvôle a ochrana individuálnej slobody. Z komparácie európskeho, interamerického a afrického systému, ako aj globálneho rámca OSN vyplýva, že hoci sa normatívne formulácie v jednotlivých dokumentoch líšia, ich teleologický základ zostáva identický. Zaujímavým kontrastom je porovnanie regionálnych systémov s oblasťou Ázie (ASEAN), kde absencia záväzného dokumentu a silného kontrolného mechanizmu typu AICHR s individuálnym sťažnostným mandátom vytvára signifikantné vákuum v ochrane ľudských práv. Kým Africká charta vykazuje progresívne prvky v ochrane proti neefektívnym vnútroštátnym prostriedkom nápravy, ázijský región nateraz zostáva v rovine politických deklarácií bez reálnej právnej vymožitelnosti.

Región / Dokument	Záväznosť	Kľúčový normatívny základ	Špecifiká pre trestné konanie	Inštitucionálna vymožitelnosť
Európa (EDLP)	Áno	Článok 6(1)	Autonómne porušenie, Prísnosť pri väzbe	Vysoká (ESLP, finančné kompenzácie)
OSN (ICCPR)	Áno	Čl. 9(3) a Čl. 14(3)(c)	Zákaz väzby ako pravidla	Stredná (Výbor pre ľudské práva)
Amerika (ACHR)	Áno	Článok 8(1) a Čl. 7	Kogentné vylúčenie prieťahov u mladistvých	Stredná/Vysoká (Interamerický súd)
Afrika (ACHPR)	Áno	Článok 7(1)(d)	Procesný bypass (Čl. 50) pri prieťahoch	Stredná (Africká komisia)
Ázia (ASEAN)	Nie	Politická deklarácia	Žiadna úprava pre trestné právo	Nulová (iba konzultatívny orgán)

Tab. 1 – Komparácia skúmaných medzinárodných zmlúv

Na záver možno konštatovať, že princíp ultima ratio v spojení s časovou primeranosťou konania tvorí nevyhnutnú hrádzu proti erózii právneho štátu. Pre slovenskú trestnoprávnu prax z uvedeného vyplýva imperatív nielen formálneho dodržiavania lehôt, ale najmä povinnosť orgánov činných v trestnom konaní a súdov postupovať s náležitou starostlivosťou tak, aby

²⁰ ASEAN Human Rights Declaration, 19.11.2012

dĺžka konania nebola pre obvineného ďalším, mimoprávnym trestom. Budúci vývoj v tejto oblasti bude nepochybne smerovať k ďalšej precízácii zodpovednosti štátu za prierahy, najmä s ohľadom na využívanie moderných informačných technológií pre zefektívnenie trestného konania.

Zoznam použitej literatúry

1. LULA, E. A kol.: *Right to a trial within reasonable time – comparative overview*. Vypracované v rámci spoločného programu Európskej únie a Rady Európy „Horizontálny nástroj pre západný Balkán a Turecko na roky 2019 – 2022“ v rámci akcie „Iniciatíva za právnu istotu na západnom Balkáne“. Rada Európy. 2022
2. Africká charta práv človeka a národov
3. Americký dohovor o ľudských právach
4. ASEAN deklarácia ľudských práv
5. Európsky dohovor o ľudských právach
6. Medzinárodný pakt o občianskych a politických právach
7. Zákon č. 300/2005 Z. z. Trestný zákon
8. Zákon č. 301/2005 Z. z. Trestný poriadok
9. Vyhláška ministra zahraničných vecí č. 120/1976 Zb. o Medzinárodnom pakte o občianskych a politických právach a Medzinárodnom pakte o hospodárskych, sociálnych a kultúrnych právach z 10. mája 1976
10. Rozsudok Súdneho dvora (veľká komora) z 5. júna 2018 (návrh na začatie prejudiciálneho konania, ktorý podal Specializiran nakazatelen sąd – Bulharsko) – trestné konanie proti Nikolajovi Kolevovi, Milkovi Christovovi, Stefanovi Kostadinovovi (Vec C-612/15)

DEEFAKE PRED SÚDOM: FALOŠNÝ DÔKAZ, NOVÝ TRESTNÝ ČIN, ALEBO OBOJE?

Deepfake in court: False Evidence, a New Crime, or Both?

RÓBERT VITKOVSKÝ* – MÁRIO PIRA**

Abstrakt

Generatívna umelá inteligencia umožňuje v priebehu niekoľkých minút vytvoriť presvedčivé falošné video, zvukovú nahrávku alebo fotografiu, ktoré sú na prvý pohľad nerozoznateľné od skutočnosti. Slovenský Trestný zákon ani Trestný poriadok na tento fenomén výslovne nereagujú, čo spôsobuje závažnú právnu medzeru, a to hneď v dvoch rovinách. Deepfake môže predstavovať jednak nástroj spáchania trestného činu (vydieranie, ohováranie, podvod, manipulácia s dôkazmi), jednak falošný dôkaz predložený v trestnom konaní, pričom existujúce skutkové podstaty tieto situácie pokrývajú len čiastočne a nepredvídateľne. Autori analyzujú, do akých existujúcich skutkových podstát možno fenomén deepfake subsumovať, v čom slovenské právo zlyháva a ktoré prvky je vhodné prevziať z právnych úprav v iných jurisdikciách a na úrovni Európskej únie. Záver formuluje konkrétne návrhy *de lege ferenda*.

Abstract

Generative artificial intelligence makes it possible to create, within minutes, convincing fake videos, audio recordings, or photographs that are indistinguishable from reality at first glance. Neither the Slovak Criminal Code nor the Criminal Procedure Code explicitly addresses this phenomenon, creating a significant legal loophole on two distinct levels. Deepfakes can serve both as a tool for committing a crime (blackmail, defamation, fraud, evidence tampering) and as false evidence presented in criminal proceedings, yet existing criminal offenses cover these situations only partially and unpredictably. The authors analyze which existing criminal offenses the deepfake phenomenon can be subsumed under, where Slovak law falls short, and which elements should be adopted from legal frameworks in other jurisdictions and at the European Union level. The conclusion formulates specific proposals *de lege ferenda*.

Kľúčové slová: Deepfake. Umelá inteligencia. Falšovanie dôkazov. Skutková podstata. Trestné právo. Akt o umelej inteligencii.

Key words: Deepfake. Artificial intelligence. Evidence tampering. Elements of a crime. Criminal law. AI Act

Úvod

Generatívna umelá inteligencia umožňuje dnes komukoľvek s bežne dostupným zariadením vytvoriť za niekoľko minút presvedčivý falošný videozáznam, zvukovú nahrávku alebo fotografiu zobrazujúcu reálnu osobu pri konaní, ktoré sa v skutočnosti nikdy neudialo. Kým ešte pred niekoľkými rokmi si takáto produkcia vyžadovala špecializované technické znalosti, pokrok v oblasti generatívnych neurónových sietí spravil deepfake obsah dostupným pre širokú verejnosť. Táto dostupnosť sa premietla aj do právnej praxe.

* Autor príspevku Bc. Róbert Vitkovský, 2. ročník, denná forma, 2. stupeň, robert.vitkovsky1@gmail.com na Právnickej fakulte Univerzity Mateja Bela v Banskej Bystrici

** Spoluautor príspevku Bc. Mário Pira, 1. ročník, denná forma, 2. stupeň, mmariopira@gmail.com dennej formy na Právnickej fakulte Univerzity Mateja Bela v Banskej Bystrici

Práve táto situácia ilustruje ústredný problém, ktorému sa venuje tento príspevok. Jeho cieľom je analyzovať, pod aké existujúce skutkové podstaty trestných činov možno fenomén deepfake subsumovať, v čom slovenské právo zlyháva a aké konkrétne legislatívne opatrenia *de lege ferenda* sú potrebné.

Na dosiahnutie tohto cieľa príspevok využíva metódu právnej analýzy platného práva, komparatívnu metódu pri porovnaní zahraničných právnych úprav a regulačného rámca Európskej únie, ako aj teleologický výklad pri hodnotení dostatočnosti existujúcich skutkových podstát. Príspevok je štruktúrovaný do piatich kapitol. Prvá kapitola vymedzuje pojem deepfake a jeho trestnoprávny význam vrátane analýzy existujúcich skutkových podstát. Druhá kapitola sa venuje deepfake ako falošnému alebo spornému dôkazu v trestnom konaní. Tretia kapitola identifikuje limity slovenskej právnej úpravy, štvrtá kapitola analyzuje európsky regulačný rámec v podobe *AI Act*-u a piata kapitola formuluje konkrétne návrhy *de lege ferenda*.

Pojem deepfake a jeho trestnoprávny význam

Pojem deepfake označuje umelo vytvorený alebo manipulovaný zvukový, obrazový alebo audiovizuálny obsah vytvorený pomocou umelej inteligencie.¹ Takýto obsah pôsobí navonok autenticky a môže zobrazovať osobu tak, že sa javí, akoby povedala alebo urobila niečo, čo sa v skutočnosti nestalo.² Samotný výraz vznikol ako spojenie anglických slov *deep learning* a *fake* a do širokého povedomia sa dostal v roku 2017 v súvislosti so sfalšovanými videozáznamami šírenými na internetových platformách.³ V odbornej literatúre sa zdôrazňuje, že presvedčivosť výsledného obsahu je práve tým znakom, ktorý z deepfake robí právne a spoločensky závažný jav.⁴

Trestnoprávny význam deepfake sa prejavuje v dvoch rovinách. Po prvé, deepfake môže byť prostriedkom spáchania trestného činu, napríklad pri vydieraní, podvode alebo ohováraní. Trestného činu vydierania podľa § 189 ods. 1 Trestného zákona (ďalej len „TZ“) sa dopustí ten, kto iného násilím, hrozbou násilia alebo hrozbou inej ťažkej ujmy núti, aby niečo konal, opomenul alebo trpel.⁵ Deepfake sa v tomto kontexte typicky objavuje tak, že páchatel' vytvorí

¹ NEGREIRO, M.: Children and deepfakes (Briefing PE 775.855). Brussels: European Parliamentary Research Service, 2025 [cit. 2026-03-28]. Dostupné na: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2025/775855/EPRS_BRI\(2025\)775855_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2025/775855/EPRS_BRI(2025)775855_EN.pdf)

² DOBROWOLSKA, M.: Regulating deep fakes in the Artificial Intelligence Act. In *Academic Journal of Interdisciplinary Studies*, roč. 12, 2023, č. 5, s. 80–92.

³ TAHRAOUI, M. – KRÄTZER, C. – DITTMANN, J. – ADEN, H.: Defending informational sovereignty by detecting deepfakes? In *Weizenbaum Journal of the Digital Society*, roč. 3, 2023, č. 3. Dostupné na: <https://doi.org/10.34669/WI.WJDS/3.3.5>

⁴ DOBROWOLSKA, M., cit. dielo.

⁵ Zákon č. 300/2005 Z. z. Trestný zákon v znení neskorších predpisov, § 189 ods. 1.

kompromitujúci falošný audiovizuálny záznam zobrazujúci obeť a pohrozí jeho zverejnením, ak nesplní jeho požiadavky.⁶ Zákonný znak hrozby inej ťažkej ujmy takéto konanie v zásade pokryje, keďže hrozba zverejnenia kompromitujúceho materiálu je spôsobilá spôsobiť vážnu ujmu na povesti, v zamestnaní alebo v rodinných vzťahoch. Výkladovým problémom zostáva, či na naplnenie skutkovej podstaty postačuje samotné vytvorenie deepfake s vyhrážkou jeho zverejnenia, alebo či je potrebné, aby adresát hrozbu ako reálnu aj vnímal.

Trestného činu ohovárania podľa § 373 ods. 1 TZ sa dopustí ten, kto o inom oznámi nepravdivý údaj spôsobilý značnou mierou ohroziť jeho vážnosť u spoluobčanov, poškodiť ho v zamestnaní, v podnikaní, narušiť jeho rodinné vzťahy alebo spôsobiť mu inú vážnu ujmu.⁷ Deepfake videozáznam zobrazujúci poškodenú osobu pri konaní, ktoré sa v skutočnosti nikdy neudialo, predstavuje nepravdivý údaj v zmysle tohto ustanovenia. Zákonný znak oznámenia je splnený jeho zverejnením alebo sprístupnením tretím osobám. Problém však nastáva pri preukázaní nepravdivosti obsahu, keďže ak je deepfake technicky presvedčivý, dôkazné bremeno opaku môže byť pre poškodeného neúnosné.⁸

Trestného činu podvodu podľa § 221 ods. 1 TZ sa dopustí ten, kto na škodu cudzieho majetku seba alebo iného obohatí tým, že uvedie niekoho do omylu alebo využije niečí omyl.⁹ Deepfake môže slúžiť na uvedenie do omylu napríklad tak, že páchatel' vytvorí falošný videozáznam konateľa spoločnosti vydávajúcí pokyn na prevod finančných prostriedkov, čo je v praxi označované ako *CEO fraud*.¹⁰ Táto forma je pod § 221 TZ subsumovateľná, avšak vyžaduje kumulatívne splnenie majetkového znaku. Bez spôsobenej škody na cudzom majetku skutková podstata podvodu naplnená nie je, čo vylučuje jej aplikáciu na prípady deepfake zameraného výlučne na poškodenie cti alebo procesné zavádzanie súdu.

Po druhé, a pre tento príspevok podstatnejšie, deepfake môže vystupovať ako falošný dôkaz alebo ako dôvod na spochybnenie pravosti aj skutočného audiovizuálneho záznamu, čo odborná literatúra označuje za jednu z najzávažnejších procesných výziev súčasného trestného konania.¹¹

⁶ DELFINO, R. A.: Deepfakes on trial: A call to expand the trial judge's gatekeeping role to protect legal proceedings from technological fakery. In *Hastings Law Journal*, roč. 74, 2023, č. 2, s. 293–348.

⁷ Zákon č. 300/2005 Z. z., § 373 ods. 1.

⁸ SALVI, C.: Deepfake evidence in criminal proceedings [online]. Luxembourg: AI and Criminal Justice Research Group, University of Luxembourg, 2024 [cit. 2026-03-28]. Dostupné na: <https://aiandcriminaljustice.uni.lu/wp-content/uploads/sites/260/2024/11/SALVI-8.711-Deepfake-evidence-Salvi-Crim-AI.pdf>

⁹ Zákon č. 300/2005 Z. z., § 221 ods. 1.

¹⁰ DOBROWOLSKA, M., cit. dielo.

¹¹ SALVI, C., cit. dielo; DELFINO, R. A., cit. dielo.

Deepfake ako falošný alebo sporný dôkaz

V trestnom konaní tradične platí, že audiovizuálne záznamy patria medzi najpresvedčivejšie formy dôkazov. Videozáznam, fotografia alebo zvuková nahrávka pôsobia na súd aj na strany konania ako priamy odraz skutočnosti, keďže zachytávajú zdanlivo objektívny obraz udalosti. Nástup generatívnej umelej inteligencie však túto predpokladanú dôveryhodnosť zásadne spochybňuje. Deepfake obsah môže byť vizuálne a zvukovo na nerozoznanie od autentického záznamu, pričom odhalenie manipulácie si vyžaduje technickú expertízu, nie len pozorné ľudské vnímanie.¹² Dôkaz toho, že ide o reálnu a nie len teoretickú hrozbu dokazuje prípad z roku 2025, v ktorom sudkyňa *Superior Court of California* Victoria Kolakowski zrušila žalobu a udelila procesné sankcie žalobcom po tom, čo forenzná analýza preukázala, že dve videá predložené ako dôkaz boli vytvorené generatívnou umelou inteligenciou. Súd v rozhodnutí výslovne konštatoval nulovú toleranciu voči predkladaniu deepfake obsahu ako pravého dôkazu.¹³ Hoci ide o prípad z občianskoprávneho konania, jeho závery sú plne relevantné aj pre dokazovanie v trestnom konaní.

Trestné konanie pracuje s dôkazom v niekoľkých fázach. Od jeho získania a zabezpečenia, cez predloženie stranami konania až po jeho hodnotenie súdom. V každej z týchto fáz môže deepfake vyvolať odlišné procesné problémy. V štádiu zabezpečovania dôkazov vzniká otázka, ako orgány činné v trestnom konaní overujú integritu a pôvod digitálnych záznamov. V štádiu predkladania dôkazov nastáva riziko, že strana konania predloží sfalšovaný obsah ako pravý. V štádiu hodnotenia dôkazov súdom sa zas objavuje problém opačný, autentický záznam môže byť spochybnený námietkou, že ide o deepfake, hoci sfalšovaný nie je. Tieto tri fázy vzájomne súvisia a vyžadujú si systémovú, nie len prípadovú reakciu právneho poriadku.

V odbornej literatúre sa rozlišujú dve hlavné procesné situácie, v ktorých deepfake priamo vstupuje do trestného konania. Prvou je situácia, keď strana konania vedome predloží deepfake obsah ako pravý dôkaz s cieľom zavádzať súd alebo orgán činný v trestnom konaní. Táto situácia je procesne závažná, no pomerne zreteľná, ide o zámernú manipuláciu s dôkazom, ktorú možno v princípe riešiť existujúcimi nástrojmi trestného práva vrátane trestnej zodpovednosti za marenie spravodlivosti alebo za falšovanie dôkazov. Druhou situáciou je

¹² SALVI, C., cit. dielo.

¹³ AUSTIN, D.: Deepfake videos and images lead to terminating sanctions: eDiscovery case law. In eDiscovery Today [online]. 2025 [cit. 2026-03-28]. Dostupné na: <https://ediscoverytoday.com/2025/09/25/deepfake-videos-and-images-lead-to-terminating-sanctions-ediscovery-case-law/>

spochybnenie autentického záznamu námietkou, že môže ísť o deepfake, a to aj v prípade, keď záznam sfalšovaný nie je.¹⁴

Práve táto druhá situácia predstavuje závažnejší a menej zreteľný problém. V anglickej odbornej literatúre sa opisuje ako *liar's dividend*. Existencia technológie deepfake umožňuje komukoľvek tvrdiť, že pravý dôkaz je sfalšovaný, a tým účelovo vyvolávať pochybnosti tam, kde nie sú opodstatnené.¹⁵ Tento efekt presahuje rámec individuálneho konania. Ak sa obhajoba naučí systematicky spochybňovať digitálne záznamy poukazom na potenciálnu AI manipuláciu, dôveryhodnosť celej kategórie audiovizuálnych dôkazov sa začne postupne erodovať, bez ohľadu na ich skutočnú pravosť. Výsledkom je paradox, technológia určená na vytváranie falšovaného obsahu sa stáva aj nástrojom na ničenie dôveryhodnosti obsahu pravého.

Z hľadiska dokazovania je preto kľúčová otázka, ako má súd a strany konania reagovať na pochybnosť o pravosti audiovizuálneho záznamu. Zahraničná literatúra v tejto súvislosti zdôrazňuje rastúci význam technickej znaleckej analýzy a forenzného overovania, ktoré by malo byť schopné preukázať, či bol záznam vytvorený alebo upravený generatívnymi algoritmami.¹⁶ Zároveň sa poukazuje na to, že ľudské vnímanie nestačí na spoľahlivé odhalenie deepfake obsahu, a to ani u odborne vzdelaných posudzovateľov, čo empiricky potvrdzujú výsledky viacerých experimentálnych štúdií.

Závislosť od vizuálneho hodnotenia bez technickej verifikácie tak prestáva byť dostatočnou zárukou, čo predstavuje ústredný problém, ktorému sa venuje nasledujúca kapitola.

Limity slovenskej právnej úpravy pri hodnotení takéhoto dôkazu

Slovenské trestné právo procesné je kodifikované v zákone č. 301/2005 Z. z. Trestný poriadok (ďalej len „TP“), ktorý upravuje pravidlá získavania, zabezpečovania a hodnotenia dôkazov v trestnom konaní. Tento predpis bol prijatý v roku 2005 a jeho základná koncepcia dokazovania odráža technologický stav doby, v ktorej vznikol. Digitálne dôkazy v ňom síce nie sú výslovne vylúčené, avšak nie sú ani osobitne upravené z hľadiska ich autenticity, integrity alebo overiteľnosti pôvodu. Trestný poriadok pracuje s pojmom listinný dôkaz a vecný dôkaz, pričom audiovizuálny záznam možno subsumovať pod tieto kategórie len výkladom, nie na základe výslovného zákonného zaradenia.

¹⁴ DELFINO, R. A., cit. dielo.

¹⁵ Tamtiež

¹⁶ SALVI, C., cit. dielo.

Základnou zásadou hodnotenia dôkazov v slovenskom trestnom konaní je zásada voľného hodnotenia dôkazov zakotvená v § 2 ods. 12 TP, podľa ktorej orgány činné v trestnom konaní a súd hodnotia dôkazy podľa svojho vnútorného presvedčenia, a to jednotlivo aj v ich súhrne. Táto zásada má nezastupiteľné miesto v demokratickom právnom systéme, pretože bráni formalistickému prístupu k dokazovaniu. Zároveň však vytvára problém v kontexte deepfake. Ak zákon neurčuje žiadne minimálne požiadavky na technické overenie pravosti audiovizuálneho záznamu, vnútorné presvedčenie sudcu sa môže opierať o vizuálny dojem z obsahu, ktorý je navrhnutý práve tak, aby vizuálne pôsobil ako pravý. Voľné hodnotenie dôkazov teda nemôže nahradiť chýbajúcu metodiku technickej verifikácie.

Absencia osobitnej úpravy digitálnych a audiovizuálnych dôkazov by sama osebe nemusela byť fatálna, ak by existovala ustálená a predvídateľná metodika ich overovania. Trestný poriadok síce umožňuje využiť znalecké dokazovanie na posúdenie odborných otázok vrátane technickej analýzy záznamov, avšak neobsahuje žiadne pravidlo, ktoré by výslovne zaväzovalo súd alebo orgány činné v trestnom konaní k technickej verifikácii audiovizuálneho záznamu v situácii, keď existuje pochybnosť o jeho pravosti. Rozhodnutie o tom, či takúto verifikáciu nariadiť, teda zostáva plne v diskrečnej právomoci príslušného orgánu, bez zákonom stanoveného kritéria.

Ďalším nedostatkom je absencia pravidiel upravujúcich reťazec uchovávanía digitálneho dôkazu, teda tzv. *chain of custody*. V prípade fyzického dôkazu existuje zaužívaná prax dokumentovania jeho pohybu od zaistenia po predloženie na súde. Pri digitálnom audiovizuálnom zázname však slovenský TP nestanovuje povinnosť záznamu metadát, hashovania alebo inej technickej metódy, ktorá by overila, že záznam nebol od momentu zaistenia zmenený. V prípade deepfake je táto legislatívna medzera kritická. Ak chýba zdokumentovaný proces nakladania s dôkazom, nie je možné zaručiť, že záznam nebol dodatočne upravený, čím sa stráca jeho hodnota pred súdom.

Trestný zákon taktiež neobsahuje skutkovú podstatu, ktorá by výslovne postihovala vytvorenie alebo použitie deepfake obsahu na účely falšovania dôkazov v trestnom konaní. Konanie, pri ktorom páchateľ predloží orgánom činným v trestnom konaní alebo súdu vedome sfalšovaný deepfake záznam ako pravý dôkaz, možno v zásade subsumovať pod skutkovú podstatu krivej výpovede a krivej prisahy podľa § 346 TZ, pod niektorú formu marenia spravodlivosti alebo pod trestný čin podvodu, ak sú splnené príslušné znaky. Tieto ustanovenia

však boli koncipované pre odlišné skutkové situácie a ich aplikácia na deepfake vyžaduje výkladové úsilie, ktoré v právnej praxi nevyhnutne prináša právnu neistotu.

Trestného činu krivej výpovede a krivej prisahy podľa § 346 ods. 1 TZ sa dopustí ten, kto ako svedok v konaní pred súdom alebo v trestnom konaní uvedie nepravdu o okolnosti, ktorá má podstatný význam pre rozhodnutie, alebo kto takú okolnosť zamlčí. Kľúčovým znakom tejto skutkovej podstaty je, že páchatelom môže byť výlučne osoba vystupujúca v procesnom postavení svedka, teda fyzická osoba podávajúca ústnu výpoveď. Predloženie deepfake videozáznamu ako listinného či vecného dôkazu bez toho, aby o ňom predkladateľ výslovne vypovedal, preto pod túto skutkovú podstatu subsumovať nemožno, keďže nejde o výpoveď osoby pred orgánom, ale o predloženie materiálneho dôkazu.

Zločin marenia spravodlivosti podľa § 344 ods. 1 písm. a) TZ postihuje toho, kto v konaní pred súdom alebo v trestnom konaní predloží dôkaz, o ktorom vie, že je sfalšovaný alebo pozmenený, za účelom použitia ho ako pravý. Z hľadiska deepfake je táto skutková podstata zo všetkých existujúcich ustanovení najprirodzenejšou базou pre trestnú zodpovednosť. Trestný čin je dokonaný už samotným predložením takéhoto dôkazu súdu, teda bez ohľadu na to, či bol súd skutočne uvedený do omylu. Problémom však zostáva, že zákonný atribút „sfalšovaný alebo pozmenený“ bol historicky koncipovaný pre manipuláciu s existujúcim dôkazom, nie pre vytvorenie generovaného záznamu generatívnou umelou inteligenciou, ktorý nikdy nemal autentický originál. Výkladovou otázkou preto zostáva, či deepfake ako čisto umelo vytvorený obsah napĺňa znak falšovania, alebo či ide o medzeru, ktorú zákon nepokrýva.

Osobitným problémom je absencia akéhokoľvek procesného pravidla reagujúceho na tzv. deepfake obranu, teda na situáciu, keď obvinený alebo jeho obhajoba namietajú, že autentický dôkazný záznam bol vytvorený alebo manipulovaný umelou inteligenciou. Slovenský TP v takejto situácii neposkytuje súdu žiadne výslovné procesné pravidlá. Neurčuje, na ktorú stranu sa v prípade takejto námietky presúva dôkazné bremeno, nestanovuje minimálne požiadavky na technickú analýzu záznamu, ani nevymedzuje, aké odborné predpoklady musí spĺňať znalec posudzujúci pravosť audiovizuálneho obsahu vytvoreného alebo potenciálne upraveného AI.

Európsky rámec a AI Act

Regulácia umelej inteligencie na úrovni Európskej únie predstavuje prvý komplexný pokus o zavedenie horizontálneho právneho rámca pre AI systémy, ktorý sa dotýka aj fenoménu

deepfake. Nariadenie Európskeho parlamentu a Rady (EÚ) 2024/1689 o umelej inteligencii, bežne označované ako AI Act, nadobudlo účinnosť v auguste 2024 a zavádza viacúrovňový systém regulácie AI podľa miery rizika, ktoré jednotlivé systémy predstavujú. Deepfake obsah nie je v tomto systéme zaradený medzi vysokorizikové AI systémy, ale je predmetom osobitných povinností v oblasti transparentnosti, čo ho radí do kategórie systémov s obmedzeným rizikom.¹⁷

Kľúčovým ustanovením pre deepfake obsah je článok 50 ods. 4 AI Act-u, ktorý ukladá prevádzkovateľom AI systémov generujúcich alebo manipulujúcich obrazový, zvukový alebo video obsah predstavujúci deepfake povinnosť zverejniť, že takýto obsah bol umelo vytvorený alebo manipulovaný.¹⁸ Toto ustanovenie má priamy dopad na tvorbu a šírenie deepfake obsahu, avšak jeho pôsobnosť je z viacerých hľadísk obmedzená. Po prvé, povinnosť zverejnenia sa nevzťahuje na prípady, keď je použitie deepfake obsahu zákonom autorizované na predchádzanie, odhaľovanie, vyšetrovanie alebo stíhanie trestných činov. Po druhé, ak deepfake obsah tvorí súčasť umeleckého, satirického alebo fikčného diela, transparentná povinnosť je obmedzená len na sprístupnenie informácie o jeho umelom pôvode spôsobom, ktorý nenaruša prezentáciu alebo vnímanie diela.

Nad rámec článku 50 je pre trestnoprávny kontext relevantný aj článok 5 ods. 1 písm. a) AI Actu, ktorý zakazuje uvádzanie na trh, uvedenie do prevádzky alebo používanie AI systémov nasadzujúcich účelovo manipulatívne alebo klamlivé techniky s cieľom alebo s účinkom podstatného skreslenia správania osoby spôsobom, ktorý jej spôsobuje alebo pravdepodobne spôsobí závažnú ujmu. Deepfake obsah vytvorený s cieľom zavádzať súd alebo orgány trestného konania by mohol pod tento zákaz v zásade spadať, keďže je navrhnutý práve tak, aby manipuloval vnímaním adresáta spôsobom presahujúcim jeho schopnosť rozoznať nepravdivosť obsahu. Zároveň však treba zdôrazniť, že článok 5 dopadá na poskytovateľov a prevádzkovateľov AI systémov, nie priamo na fyzické osoby, ktoré tieto systémy zneužívajú na vytváranie falošných dôkazov, čo opäť potvrdzuje, že AI Act sám osebe nestačí ako náhrada chýbajúcej vnútroštátnej trestnoprávnej úpravy.¹⁹

AI Act zároveň ukladá poskytovateľom AI systémov generujúcich syntetický obrazový, zvukový, video alebo textový obsah povinnosť zabezpečiť, aby výstupy týchto systémov boli

¹⁷ DOBROWOLSKA, M., cit. dielo.

¹⁸ Nariadenie (EÚ) 2024/1689, čl. 50 ods. 4.

¹⁹ EUROPEAN COMMISSION: Article 5 – Prohibited AI practices. AI Act Service Desk [online]. [cit. 2026-03-28]. Dostupné na: <https://ai-act-service-desk.ec.europa.eu/en/ai-act/article-5>

označené strojovo čitateľným spôsobom a detekovateľné ako umelo vytvorené alebo manipulované.²⁰ Ide o technickú povinnosť, ktorá má umožniť automatizovanú detekciu syntetického obsahu a vytvoriť technologický základ pre overovanie jeho pôvodu. V kontexte trestného konania je táto povinnosť relevantná, pretože digitálne označenie môže v budúcnosti poskytnúť forenzným expertom technický základ na overenie pravosti záznamu predloženého ako dôkaz. Zároveň však treba podotknúť, že táto povinnosť dopadá len na zákonných poskytovateľov AI systémov, nie na tých, ktorí deepfake vytvárajú prostredníctvom nelegálnych alebo neregulovaných nástrojov, čo je práve prípad mnohých protiprávných konaní.

Preto je potrebné zdôrazniť zásadné obmedzenie AI Act-u z pohľadu trestného práva procesného, nakoľko AI Act nerieši pravidlá dokazovania v trestnom konaní. Jeho cieľom je regulovať tvorbu, nasadzovanie a transparentnosť AI systémov, nie upravovať procesné postavenie deepfake obsahu ako dôkazu pred súdom. Táto skutočnosť potvrdzuje, že európsky regulačný rámec a vnútroštátne trestné právo procesné sa vzájomne nedopĺňajú tak, ako by bolo žiaduce. AI Act síce môže prispieť k obmedzeniu tvorby a šírenia deepfake obsahu, avšak bez zodpovedajúcej reakcie vnútroštátneho procesného práva ostáva otázka hodnotenia deepfake dôkazu pred súdom naďalej otvorená.

Napriek týmto limitom možno v AI Act-e identifikovať inšpiračné podnety pre budúcu právnu úpravu na vnútroštátnej úrovni. Povinnosť technického označovania syntetického obsahu naznačuje, že zákonodarca pripúšťa, že overovateľnosť pôvodu audiovizuálneho záznamu je hodnota hodná právnej ochrany.²¹ Ak tento princíp preniesieme do trestnoprávneho kontextu, môžeme z neho odvodiť argument, že autenticita digitálneho záznamu predloženého ako dôkaz by mala byť overiteľná štandardizovaným postupom, nie len voľným hodnotením súdu. Práve táto myšlienka tvorí základ návrhov, ktoré sú predmetom záverečnej časti tohto príspevku.

Návrhy de lege ferenda

Identifikované nedostatky slovenskej právnej úpravy si vyžadujú reakciu v dvoch rovinách, pričom nasledujúce návrhy vychádzajú z podnetov zahraničnej odbornej literatúry aj z regulačného prístupu európskeho zákonodarcu.

²⁰ Nariadenie (EÚ) 2024/1689, čl. 50 ods. 2.

²¹ DOBROWOLSKA, M., cit. dielo.

Prvý návrh sa týka procesnoprávnej roviny a spočíva vo výslovnom zavedení mechanizmu overovania autenticity digitálnych audiovizuálnych dôkazov do TP. Inšpiráciu možno čerpať z diskusií v americkom prostredí, kde sa navrhuje zavedenie osobitného procesného pravidla upravujúceho tzv. *burden-shifting* pri namietaní deepfake povahy dôkazu. Strana, ktorá namieta sfalšovanie záznamu, by bola povinná predložiť dostatočné indície na podloženie tejto námietky a až po splnení tejto podmienky by sa dôkazné bremeno presúvalo na predkladateľa záznamu, ktorý by musel preukázať jeho pravosť.²² Takýto mechanizmus by zároveň eliminoval riziko zneužívania deepfake námietky ako čisto obštrukčného procesného prostriedku bez reálneho skutkového základu.

Druhý návrh sa týka zavedenia výslovných pravidiel pre reťazec uchovávaní digitálneho dôkazu. Slovenský TP v súčasnosti nestanovuje povinnosť technickej dokumentácie integrity digitálneho záznamu od momentu jeho zaistenia po jeho predloženie na súde. Zahraničné skúsenosti ukazujú, že štandardizácia tejto dokumentácie, napríklad prostredníctvom povinného záznamu hashovacích hodnôt a metadát, výrazne zvyšuje dôveryhodnosť digitálnych dôkazov a zároveň sťažuje ich spätné spochybnenie.²³ Zavedenie takéhoto štandardu by pritom nevyžadovalo zásadnú rekodifikáciu TP, ale mohlo by byť realizované cielene zameranými novelizáciami alebo metodickými usmerneniami.

Tretí návrh sa týka hmotnoprávnej roviny a spočíva vo zvážení doplnenia TZ o kvalifikovanú skutkovú podstatu alebo o príťažujúcu okolnosť pre prípady, keď bol trestný čin spáchaný s využitím umelo vytvoreného audiovizuálneho obsahu vytvoreného generatívnou umelou inteligenciou. Tento prístup je menej invazívny než zavádzanie samostatného trestného činu deepfake, a preto je aj realistickejší z hľadiska legislatívneho procesu. Zároveň by reflektoval zvýšenú spoločenskú nebezpečnosť konaní, pri ktorých je na zavádzanie orgánov alebo obete využitá technológia, ktorej odhalenie presahuje možnosti bežného ľudského vnímania. V súlade s existujúcou štruktúrou § 37 TZ, ktorý taxatívne vymenúva príťažujúce okolnosti zohľadňované pri určovaní druhu a výmery trestu, navrhuje sa doplniť toto ustanovenie o nové písmeno v znení: „spáchal trestný čin s použitím syntetického audiovizuálneho obsahu vytvoreného prostredníctvom systému umelej inteligencie.“ Takto formulovaná príťažujúca okolnosť by bola aplikovateľná naprieč všetkými relevantnými skutkovými podstatami bez potreby ich individuálnej novelizácie a zároveň by vyjadřila zvýšenú spoločenskú nebezpečnosť konaní, pri ktorých páchatel' využíva technológiu

²² DELFINO, R. A., cit. dielo.

²³ SALVI, C., cit. dielo.

presahujúcu schopnosť bežného ľudského vnímania. Porovnateľné legislatívne riešenia pritom nie sú v európskom priestore ojedinelé, napríklad Taliansko zaviedlo trestnú zodpovednosť za šírenie nesúhlasného deepfake obsahu sexuálnej povahy a Spojené kráľovstvo zaradilo vytváranie deepfake intímnych záznamov medzi trestné činy v rámci Data (Use and Access) Act 2025.²⁴ Slovensko má k dispozícii nielen konkrétne legislatívne vzory, ale aj dostatočný normatívny základ na to, aby pristúpilo k obdobným zmenám bez potreby budovať regulačný rámec od základov.

Záver

Deepfake technológia predstavuje pre slovenské trestné právo výzvu, ktorá presahuje rámec bežnej interpretačnej neistoty. Ako ukázala predchádzajúca analýza, slovenský právny poriadok čelí dvojitému deficitu. Na strane hmotného práva absentuje skutková podstata výslovne postihujúca zneužitie syntetického audiovizuálneho obsahu na manipuláciu s dôkazom, a na strane procesného práva chýba mechanizmus predvídateľného overovania pravosti digitálnych záznamov predložených súdu. Tento deficit nie je dôsledkom zámernej legislatívnej voľby, ale dôsledkom toho, že zákonodarca na technologický vývoj v tejto oblasti doposiaľ explicitne nereagoval.

Legislatívny kontext pre takúto reakciu je priaznivý. Zákon č. 329/2025 Z. z. o zhromažďovaní elektronických dôkazov v trestnom konaní, účinný od 1. decembra 2025, naznačuje, že zákonodarca si je vedomý potreby modernizácie procesných pravidiel pre digitálne dôkazy. Národný zákon o umelej inteligencii, ktorý je v súčasnosti v medzirezortnom pripomienkovom konaní s predpokladanou účinnosťou od 1. augusta 2026, vytvorí ďalší inštitucionálny rámec. Efektívna ochrana integrity trestného konania pred zneužitím deepfake technológie si však vyžaduje, aby súčasne s týmto regulačným vývojom zákonodarca zabezpečil aj zodpovedajúce vzdelávacie kapacity.

Zoznam bibliografických odkazov

Vedecké štúdie a články

1. DELFINO, R. A.: Deepfakes on trial: A call to expand the trial judge's gatekeeping role to protect legal proceedings from technological fakery. In *Hastings Law Journal*, roč. 74, 2023, č. 2, ISSN 0017-8322, s. 293–348.
2. DOBROWOLSKA, M.: Regulating deep fakes in the Artificial Intelligence Act. In *Academic Journal of Interdisciplinary Studies*, roč. 12, 2023, č. 5, ISSN 2281-3993, s. 80–92.

²⁴ SEEMAN, M.: Deepfakes – can the AI Act protect Europe? In *International Bar Association* [online]. 2025 [cit. 2026-03-28]. Dostupné na: <https://www.ibanet.org/deepfakes-can-the-ai-act-protect-europe>

3. TAHRAOUI, M. -- KRÄTZER, C. -- DITTMANN, J. -- ADEN, H.: Defending informational sovereignty by detecting deepfakes? In *Weizenbaum Journal of the Digital Society*, roč. 3, 2023, č. 3. ISSN 2748-5986. Dostupné na: <https://doi.org/10.34669/WI.WJDS/3.3.5>

Internetové zdroje

4. AUSTIN, D.: Deepfake videos and images lead to terminating sanctions: eDiscovery case law. In *eDiscovery Today* [online]. 2025 [cit. 2026-03-28]. Dostupné na: <https://ediscoverytoday.com/2025/09/25/deepfake-videos-and-images-lead-to-terminating-sanctions-ediscovery-case-law/>
5. EUROPEAN COMMISSION: Article 5 – Prohibited AI practices. AI Act Service Desk [online]. [cit. 2026-03-28]. Dostupné na: <https://ai-act-service-desk.ec.europa.eu/en/ai-act/article-5>
6. NEGREIRO, M.: Children and deepfakes (Briefing PE 775.855) [online]. Brussels: European Parliamentary Research Service, 2025 [cit. 2026-03-28]. Dostupné na: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2025/775855/EPRS_BRI\(2025\)775855_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2025/775855/EPRS_BRI(2025)775855_EN.pdf)
7. SALVI, C.: Deepfake evidence in criminal proceedings [online]. Luxembourg: AI and Criminal Justice Research Group, University of Luxembourg, 2024 [cit. 2026-03-28]. Dostupné na: <https://aiandcriminaljustice.uni.lu/wp-content/uploads/sites/260/2024/11/SALVI-8.711-Deepfake-evidence-Salvi-Crim-AI.pdf>
8. SEEMAN, M.: Deepfakes – can the AI Act protect Europe? In *International Bar Association* [online]. 2025 [cit. 2026-03-28]. Dostupné na: <https://www.ibanet.org/deepfakes-can-the-ai-act-protect-europe>

Právne predpisy

9. Nariadenie Európskeho parlamentu a Rady (EÚ) 2024/1689 z 13. júna 2024 o umelej inteligencii (akt o umelej inteligencii). In *Úradný vestník Európskej únie*, L, 2024/1689, 12. 7. 2024.
10. Zákon č. 300/2005 Z. z. Trestný zákon v znení neskorších predpisov.
11. Zákon č. 301/2005 Z. z. Trestný poriadok v znení neskorších predpisov.
12. Zákon č. 329/2025 Z. z. o zhromažďovaní elektronických dôkazov v trestnom konaní.

Judikatúra

13. *Mendones v. Cushman & Wakefield, Inc.*, No. 23CV028772 (Cal. Super. Ct. Alameda Cnty., Sept. 9, 2025). Dostupné na: <https://ediscoverytoday.com/2025/09/25/deepfake-videos-and-images-lead-to-terminating-sanctions-ediscovery-case-law/>

ZAMESTNÁVANIE ODSÚDENÝCH OSÔB V ÚVTOS – NOVODOBÁ FORMA OTROCTVA ČI LEGITÍMNA PRÁCA ?

The employment of convicts in prisons – a modern form of slavery or legitimate work?

ALICA BORNAYOVÁ*

Abstrakt

Predkladaný príspevok sa zameriava na skúmanie problematiky zarad'ovania do práce odsúdených osôb vo výkone trestu odňatia slobody a to najmä v kontexte ich odmeňovania. Jeho účelom je prostredníctvom uskutočneného výskumu dospieť k odpovedi na otázku formulovanú už v jeho názve. Hlavným cieľom v rámci jeho prvej časti je podrobenie stavu de lege lata zamestnávania odsúdených osôb vo výkone trestu kritickej analýze za použitia normatívno-právnej metódy a metódy indukcie, s akcentom na systém ich odmeňovania, pričom na jeho dosiahnutie boli stanovené výskumné otázky: 1) Je stav de lege lata zamestnávania odsúdených v podmienkach Slovenskej republiky dostatočným pre potreby 21. storočia ?; 2) Dosahuje aktuálna právna úprava naplnenie deklarovaného cieľa resocializácie páchatel'a trestnej činnosti ?; 3) Aký reálny dopad má súčasný systém odmeňovania pracovne zaradených odsúdených na jednotlivca, jeho rodinu a spoločnosť ?. Príspevok v jeho druhej časti detegované nedostatky komparuje s jestvujúcimi systémovými nastaveniami v iných krajinách, pričom tieto sú následne metódou syntézy zhrnuté do konkrétnych návrhov de lege ferenda, spôsobilých zlepšiť podmienky práce a odmeňovania pracujúcich odsúdených v podmienkach Slovenskej republiky a tak dosiahnutie úspešnej resocializácie odsúdených osôb.

Abstract

This paper focuses on examining the issue of the employment of convicted persons serving prison sentences, particularly in the context of their remuneration. Its purpose is to use the conducted research to answer the question posed in its title. The main purpose of the first part is to subject the de lege lata status of the employment of convicted persons serving prison sentences to a critical analysis using the normative-legal method and the method of induction, with an emphasis on their remuneration system; to achieve this, the following research questions were formulated: 1) Is the current legal framework for the employment of convicts in the Slovak Republic sufficient for the needs of the 21st century?; 2) Does the current legal regulation achieve the declared goal of the resocialization of criminal offenders?; 3) What is the actual impact of the current remuneration system for employed convicts on the individual, their family, and society? In its second part, the paper compares the identified shortcomings with existing systemic arrangements in other countries, which are then synthesized into specific de lege ferenda proposals capable of improving the working conditions and remuneration of working inmates in the Slovak Republic, thereby achieving the successful resocialization of convicted persons.

Kľúčové slová: Výkon trestu odňatia slobody. Zamestnávanie odsúdených. Odmeňovanie pracujúcich odsúdených. Pracovná odmena odsúdených. Resocializácia odsúdených.

Key words: Imprisonment. Employment of convicts. Remuneration of working convicts. Wages of convicts. Resocialization of convicts.

* Bc. Alica Bornayová, študentka 2. ročníka II. stupňa štúdia (Mgr.), dennej formy na Právnickej fakulte Univerzity Mateja Bela v Banskej Bystrici, e-mail: alicabornay@gmail.com.

Úvod

Ľudská práca je v našej spoločnosti prítomná už od nepamäti. Je nielen prostriedkom získavania obživy, ale tiež nástrojom sebarealizácie jedinca, ako aj výchovným prostriedkom a adekvátna odmena za vykonanú prácu je jej neoddeliteľnou súčasťou. Problematika odmeňovania odsúdených pracujúcich vo výkone trestu odňatia slobody (ďalej len ako „VTOS“) je dlhodobým problémom na ktorý poukazujú najmä väznené osoby, ktorý však doposiaľ nedosiahol pozitívnu a výraznú zmenu. Osobné stretnutia a podnetné diskusie s odsúdenými osobami v ústavoch na výkon trestu odňatia slobody (ďalej len ako „ÚVTOS“ alebo „ústav“) nám poskytli vnímanie predkladanej problematiky úplne inou optikou a ukázali nám reálny pohľad na predmetnú oblasť. Práve tieto boli pre nás impulzom pre výber danej problematiky a to najmä preto, aby formovali mnohokrát pomenované nedostatky do komplexnej, štruktúrovanej a odborne podloženej podoby s ponúknutím konkrétnych riešení.

Podmienky väzenia na Slovensku sa snažia sledovať nastolený trend dynamicky sa meniacej modernej spoločnosti, najmä v oblasti dodržiavania medzinárodných štandardov v danej oblasti, no nastavenie nášho systému je v porovnaní s inými krajinami ešte stále zameraný viac na trestanie ako na nápravu a resocializáciu (ÚHP MFSR, 2025, s. 38). Pobyt vo výkone trestu je spojený s mnohými negatívami, pričom jedným z nich je aj vznik finančných problémov, či zhoršenie už jestvujúcej zlej finančnej situácie. Problematika ľudskej práce v sebe obnáša viacero aspektov, pričom mnohé medzinárodné dokumenty zakotvujú požiadavku zákazu pracovného vykorisťovania a potreby vhodných pracovných podmienok, ako aj adekvátnej odmeny za vykonanú ľudskú prácu (Mantouvalou, 2024, s. 411). Aj napriek tomu, že Slovensko je krajinou s pomerne vysokými štandardmi v oblasti zabezpečovania dôstojnej, bezpečnej a adekvátne ohodnotenej práce, my sami však máme akéhosi „kostlivca v skrini“ a tým je práve problematika pracujúcich väznených osôb.

I keď sa táto téma môže na prvý pohľad zdať ako bezvýznamná pre širšiu verejnosť, opak je pravdou. Týmto článkom prinášame komplexný pohľad na dôležitosť vhodného nastavenia odmeňovania pracovne zaradených odsúdených v ÚVTOS aj s jeho širším dopadom na našu spoločnosť. Účelom predkladaného článku nie je ospravedlňovanie trestnej činnosti odsúdených, vyvyšovanie potrieb menovanej sociálnej skupiny nad iné, ani očierňovanie Zboru väzenskej a justičnej stráže (ďalej len ako „ZVJS“ alebo aj ako „zbor“), či konkrétnych ústavov. Odborný článok vo svojej podstate konfrontuje stav *de lege lata* s medzinárodnými štandardami v oblasti väzenia, odbornou literatúrou, relevantnou judikatúrou, ale aj reáliami života dotknutých osôb a poukazuje na význam ich riešenia aj s konkrétno pomenovanými ideami.

1. Aktuálna právna úprava zamestnávania odsúdených vo výkone trestu v slovenskom právnom poriadku vo svetle (ne)odmeňovania vykonanej práce

Významným účelom výkonu trestu deklarovaným priamo v zákone o výkone trestu odňatia slobody (ďalej v len ako „ZoVTOS“) je okrem jeho ochrannej a represívnej funkcie aj resocializácia odsúdených. Táto má byť docielená vytváraním podmienok umožňujúcich podporu a rozvoj pozitívnych osobnostných rezerv a to tak, aby viedli riadny život (Zákon č. 475/2005 Z. z., § 1a). Jednou z takýchto činností, ktorá je významnou a nezastupiteľnou je zamestnávanie odsúdených (ZVJS). V rámci uvedeného je úlohou a poslaním ZVJS vykonávať činnosti zamerané na zamestnávanie väznených osôb (Zákon č. 4/2001 Z. z., § 4 ods. 1 písm. f). Samotný zbor vníma pozitívny vplyv zamestnávania väznených osôb vo viacerých rovinách. Prvou z nich je ekonomický prínos pre odsúdených, ako aj osôb od nich závislých, ale taktiež aj pre štát. Zároveň však má práca pôsobiť pozitívne na osobnosť odsúdeného a na jeho vzťah k hodnotám. Práca má tiež odsúdenému pomôcť na ceste objavovania a zdokonaľovania jeho schopností. Okrem toho má slúžiť aj ako prostriedok redukcie stresu z dlhodobej izolovanosti v uzavretej komunite (ZVJS). Samotná práca v podmienkach VTOS je svojou povahou kontroverznou problematikou a to najmä z povahy veci, keďže v podmienkach modernej demokracie sú štandardy kladené na zamestnávanie pomerne vysoké, najmä v porovnaní s niektorými ázijskými krajinami. Ľudsko-právne dokumenty sa preto snažia nastavovať určité štandardy aj v oblasti zamestnávania väznených osôb a to najmä vymedzením takých podmienok, ktoré vo všeobecnosti zabráňujú vykorisťovateľským praktikám, sledujúc požiadavku zásady *ne bis in idem*, a teda aby samotnými podmienkami VTOS nedochádzalo k ďalšiemu trestaniu (Jarman & Heard, 2023, s. 6). Práca v kontexte Európskych väzenských pravidiel by tak mala byť ponímaná ako pozitívny element väzenského režimu, pričom nikdy nesmie byť použitá ako trest (Pravidlo 26.1). Preto je potrebné vnímať skutočnosť, že práca vo väzení nie je súčasťou trestu, avšak jedným zo základných prostriedkov zaobchádzania spôsobilého napomôcť k opätovnej reintegrácii jedinca do spoločnosti (Mantouvalou, 2024, s. 412). Okrem toho menované pravidlá zdôrazňujú aj to, že poskytovaná práca má byť podľa možnosti takou, ktorá minimálne udržiava, no v lepšom prípade zvyšuje schopnosť väznených osôb zarobiť si na živobytie po prepustení na slobodu (Pravidlo 26.3). Uvedené dopĺňa požiadavka, aby bola odmena za prácu spravodlivou vo všetkých prípadoch (Pravidlo 26.10). Organizácia a metódy práce vo výkone trestu sa majú čo najviac približovať stavu práci vykonávanej v spoločnosti a to z dôvodu, aby boli odsúdení pripravení na podmienky normálneho pracovného života na slobode (Pravidlo 26.7). Väzným osobám sa má následne

umožniť použiť zárobky sčasti na uspokojenie ich vlastných potrieb a potrieb ich rodín (Pravidlo 26.11). Väzenský systém by mal ale zároveň podnecovať odsúdených k vytváraniu úspor z časti odmeny, ktoré budú môcť použiť najmä po prepustení na slobodu (Pravidlo 26.12).

Aj keď stanovenie menovaných štandardov sa javí jasne a zrozumiteľne, tieto narážajú v realite na problém, ktorým je výška pracovných odmien. V danom prípade totiž nejde o pracovnoprávny vzťah, či obdobný pracovnoprávny vzťah v pravom slova zmysle, ale jedná sa o osobitný vzťah medzi odsúdeným a ústavom (Zákon č. 475/2005 Z. z., § 42 ods. 2). Tento právny vzťah *sui generis* spôsobuje, že pracujúci odsúdený aj napriek tomu, že vystupuje v postavení zamestnanca vo vzťahu k zamestnávateľovi – ústavu, nepožíva rovnakú ochranu ako „klasický“ zamestnanec (Tittlová, 2017, s. 178 – 179). Toto sa prejavuje napríklad vo vylúčení väznených osôb z práva na štrajk, práva zakladať odborové organizácie a združovať sa v nich, či vylúčenia (resp. až neexistencie) z pôsobnosti kolektívnych zmlúv (Zákon č. 475/2005 Z. z., § 4 ods. 2). Uvedené má za následok aj odlišný systém odmeňovania za vykonanú prácu, kedy pracujúcemu odsúdenému nevzniká nárok na minimálnu mzdu podľa zákona o minimálnej mzde (Zákon č. 475/2005 Z. z., § 45 ods. 10). Výška pracovnej odmeny, ako aj jej podmienky sa spravujú nariadením vlády Slovenskej republiky č. 7/2023 Z. z. Toto spôsobuje, že zárobky za vykonanú prácu nedosahujú vysoké čiastky, ktoré by boli spôsobilé pokryť životné potreby ich samotných, či ich rodín. Z pracovnej odmeny sú vykonávané zrážky, pričom po ich odčítaní zostáva odsúdenému skutočne len minimálna suma, ktorá sa mu pripisuje na osobné a vreckové konto (Zákon č. 475/2005 Z. z., § 45 ods. 3). V kontexte zamestnávania väznených osôb môže vznikať mylný dojem, že výška ich odmeny za vykonanú prácu nie je až tak dôležitá, keďže ich základné potreby, ako ubytovanie, strava, či základné potreby osobnej hygieny sú uspokojované. Tento názor ale považujeme za neudržateľný, keďže zabezpečenie základných potrieb je realizované zo strany ústavu jednak na úrovni minima ¹, pričom samotný pobyt vo výkone nie je bezplatným, ako často spoločnosťou mylne zaznieva, ale každej odsúdenej osobe vznikajú trovy výkonu trestu, ktoré je táto povinná ústavu hradiť, okrem prípadov kedy dochádza k oslobodeniu od tejto všeobecnej povinnosti (Tittlová, 2017, s. 320 – 321). Keďže pohyb odsúdeného je limitovaný múrmi väznice, zabezpečovanie svojich osobných potrieb, ako je napríklad nákup hygienických potrieb, či nákup potravín nad rámec poskytovaný ústavom je možný len v rámci ústavných predajní, v rámci ktorých je výška cien výrazne vyššia ako v obchodoch v rámci civilného života (Tvnoviny, 2025). Okrem toho môže mať väznená osoba aj iné výdavky, ako je výživné na diéta, resp. finančná podpora osôb na ňu

¹ Napríklad § 17 ods. 1 Ústavného poriadku pre odsúdených v Ústave na výkon trestu odňatia slobody Želiezovce stanovuje počet potrieb osobnej hygieny za určité časové obdobie.

odkázaných, či úhrada pohľadávok (Mantouvalou, 2024, s. 412). Naskytá sa úvaha o samotných pracovných právach, keďže z povahy uväznenia je do značnej miery obmedzená jednak slobodná vôľa toho, či vôbec odsúdený bude pracovať (Tittlová, 2017, s. 178), voľba konkrétnej práce je malá až absentujúca, možnosť odmietnutia práce je často sprevádzaná stratou určitých výsad alebo zmenou zaobchádzania zo strany väzenského personálu (Jarman & Heard, 2023, s. 6). Z dôvodu neexistencie vzniku pracovnoprávneho pomeru, či iného pracovnoprávneho vzťahu u pracujúceho odsúdeného, dochádza k absencii ochrany odsúdeného pred stratou práce, keďže ústav môže zaradenie odsúdeného do práce kedykoľvek ukončiť a to bez uvedenia dôvodu (Zákon č. 475/2005 Z. z., § 42 ods. 2). Menované problémy podčiarkuje aj skutočnosť, že ak sa ocitne vo výkone trestu živel rodiny, jeho rodina stráca významný a mnohokrát jediný príjem. Kritici väzenia doslovne hovoria o tom, že odsudzujúci rozsudok sa netýka len odsúdeného, ale spolu s ním odsudzuje aj jeho rodinu na chudobu a žobráctvo (Foucault, 2004, s. 269). Týmto však nijakým spôsobom neospravedľujeme spáchanie trestnej činnosti, avšak pomenúvame nepriaznivý jav, ktorý vzniká ako sekundárny dôsledok odsúdenia hlavy rodiny. Daná situácia teda spôsobuje, že osoby, ktoré sa trestného činu nedopustili, doplácajú na absencia príjmu rodiča, resp. manžela. Okrem toho je potreba poukázať aj na skutočnosť, že práve rodina je častokrát tou, ktorá finančne podporuje osobu vo výkone trestu, keďže život tam je oproti životu na slobode v mnohých ohľadoch drahší (Tvnoviny, 2025). Najvyšší súd Slovenskej republiky v uznesení sp. zn. 3To/2/2019 zo dňa 23. októbra 2019 v tomto kontexte zdôrazňuje, že trest uložený páchatelovi trestného činu má byť sankciou, ktorá smeruje výlučne voči nemu a teda má postihovať výlučne jeho a to spôsobom, aby bola zabezpečená minimalizácia vplyvu na jeho rodinu a jemu blízke osoby.

Pre lepšie pochopenie aktuálneho systému odmeňovania odsúdených predkladáme konkrétny príklad pracovnej odmeny odsúdeného, ktorý je v produktívnom veku, má tri deti a dosiahol vysokoškolské vzdelanie prvého stupňa. Nepodmienečný trest odňatia slobody vykonával dotknutý odsúdený vo viacerých ÚVTOS. Počas pobytu v ÚVTOS a ÚVV Leopoldov bol zaradený na stredisku vedľajšieho hospodárstva Gomplast, kde bol v pozícii vedúceho zamestnanca. V rámci mesiaca máj roku 2025 menovaný odsúdený odpracoval 150 hodín z celkového fondu pracovného času 176 hodín, pričom jeho hrubá pracovná odmena činila sumu 286,62 € - t. j. sumu 1,91 € na hodinu. Uvedená suma bola ponížená o čiastku 35,52 € na odvody. Nakoľko v roku 2025 predstavovala nezdaniteľná časť základu dane sumu 479,48 € mesačne, nevznikla v jeho prípade daňová povinnosť a jeho čistá pracovná odmena bola 251,10 €. Uvedená odmena mu ale neostala v plnej výške. Keďže tento odsúdený má tri

deti, jeho čistá pracovná odmena bola ponížená o sumu 54,78 € na výživnom, kedy na jedno jeho dieťa pripadala čiastka 18,26 €. Ďalej bola suma čistej pracovnej odmeny ponížená o 112,99 € na úhradu nákladov trov VTOS v prospech ÚVTOS. Vo finále odsúdenému ostala suma 83,33 €, ktorá bola rozdelená tak, že 53,20 € bolo pripísané na osobné konto odsúdeného a suma 30,13 € na vreckové konto. V ÚVV a ÚVTOS Banská Bystrica bol odsúdený zaradený na pracovisko drobné práce a služby. Za mesiac október 2025 odpracoval 183 hodín z celkového fondu pracovného času 184 hodín, pričom jeho hrubá pracovná odmena za túto prácu činila sumu 50,74 €. Odvody do Sociálnej poisťovne z danej odmeny boli vo výške 4,25 € a odvody do zdravotnej poisťovne predstavovali 2,02 €. Čiastkový základ dane po odpočítaní odvodov predstavoval sumu 44,47 € a keďže nezdaniteľná časť základu dane v roku 2025 bola vyššia ako čiastkový základ dane u odsúdeného, ani v tomto mesiaci nevznikla daňová povinnosť a jeho čistá pracovná odmena v danom prípade bola 44,47 €. Na plnenie vyživovacej povinnosti voči jeho trom deťom bola poukázaná v súhrne suma 13,32 €, pričom na jedno dieťa pripadala čiastka 4,44 €. O sumu 20,01 € bola pracovná odmena ponížená na úradu trov VTOS. Zostatková časť vo výške 5,81 € bola pripísaná na osobné konto odsúdeného a suma 5,33 € na vreckové konto odsúdeného. Na demonštrovanom prípade je možné badať, že u konkrétneho odsúdeného jeho zárobok v mesiaci október roku 2025 nedosiahol ani sumu životného minima a to aj napriek tomu, že odpracoval takmer celý fond pracovného času na príslušný mesiac.² I keď sa v čase odmeny väznených osôb zvyšuje podľa valorizácie minimálnej mzdy, túto nemožno považovať za dostatočnú. Útvar hodnoty za peniaze v rámci revízie výdavkov na väzenstvo uvádza, že v roku 2023 priemerná vyplatená mzda pracujúceho väzňa vo vedľajšom hospodárstve bola vo výške 189 € a vo vnútornej prevádzke to bola výške 276 € (ÚHP MFSR, 2025, s. 34). Pre porovnanie, v roku 2024 bola priemerná mesačná pracovná odmena väznených osôb zaradených do práce vo výške 230,97 €, pričom v rámci vnútornej prevádzky bol priemer vo výške 296,49 € a vo vedľajšom hospodárstve 208,27 € (Ročenka ZVJS za rok 2024, s. 127). Je teda na mieste položiť si otázku, či sú tieto sumy spôsobilé obsiahnuť výdavky dospelého jedinca, ktorý potrebuje uspokojiť svoje vlastné potreby, potreby osôb na ňom závislých, ale aj ďalšie výdavky ako sú prípadné pohľadávky veriteľov, či trovy spojené s trestným konaním, samotným výkonom trestu, ako aj náhrada škody v trestnom konaní, či prípadného uloženého peňažného trestu. Ďalšou rovinou je i otázka výška dôchodku u odsúdených, najmä v prípade dlhších trestov, na ktorom sa premietnu nízke zárobky počas pobytu vo VTOS.

² Pre porovnanie, v zmysle § 1 písm. a) Opatrenia Ministerstva práce, sociálnych vecí a rodiny Slovenskej republiky č. 168/2025 Z. z. o úprave životného minima je suma životného minima pre obdobie od 01.07.2025 do 30.06.2026 vo výške 284,13 eura mesačne, ak ide o jednu plnoletú fyzickú osobu.

Odsúdené osoby sa dlhodobo sťažujú na tento negatívny fenomén. Dôvodom nie je len skutočnosť, že aj napriek tomu, že vo výkone trestu pracujú, nedokážu si zabezpečiť svoje aktuálne životné potreby, ale je to aj z dôvodu, že mnohí z nich sa počas pobytu vo VTOS dostávajú do tzv. „dlhových špirál“, keďže okrem bežných výdavkov na život sa k týmto pridružujú aj trovy obhajoby, ako aj výdavky za trovy samotného výkonu trestu, prípadne trovy výkonu väzby (NOVINY, 2022). Navyše aj kriminologické výskumy ukázali, že jednou z významných prekážok resocializácie a na to nadväzujúceho problému recidívy, sú finančné problémy odsúdených, keďže u odsúdených panuje všeobecne značná zadlženosť (Klimek, et al., 2020, s. 151). Vo vzťahu k nastaveniu adekvátnej výšky odmeny za prácu väzňov konštatoval nemecký Spolkový ústavný súd v rozhodnutí 2 BvR 166/16 u. a. zo dňa 20. júna 2023, že v prípade, ak zákonodarca stanovil koncepciu resocializácie a rozhodol akému účelu má v tomto smere slúžiť práca odsúdených a jej odmeňovanie, tak forma a výška odmeny musia byť stanovené tak, aby bolo reálne možné dosiahnuť ciele stanovené v koncepcií, pričom primeranosť výšky odmeny sa posudzuje na základe cieľov sledovaných v koncepcií resocializácie. Preukázateľne negatívnym vplyvom uväznenia je okrem iného aj prerušenie pracovných aktivít a vzťahov (v prípade, že tieto u odsúdeného pred výkonom trestu jestvovali), čím dochádza k tzv. „vykoreneniu“ z bežného života v spoločnosti. Dôsledkom toho je problém opätovného začlenenia sa do spoločnosti po prepustení, obzvlášť v tak dynamicky meniacej sa spoločnosti ako je tomu dnes. Pobyt v ÚVTOS je často spojený s fenoménom tzv. „prizonizácie“, ako negatívnym dôsledkom väzenského prostredia na odsúdeného, čo má bezprostredný vplyv aj na budúcnosť odsúdeného po jeho prepustení na slobodu, bez ohľadu na to, či sa jedná o krátkodobý alebo dlhodobý trest. Väzenské prostredie tak, ako je nastavené v súčasnosti vo veľkej miere produkuje „nefunkčných a zničených jedincov“, ktorí stratia zodpovednosť za seba samého, za svoje chovanie, no taktiež za svoju budúcnosť. Toto následne vedie k tomu, že sa odsúdený dostáva do začarovaného kruhu kriminality, čím dochádza k vzniku recidívy (Korček, 2023). Táto téza je podporená výsledkami kriminologických výskumov, ktoré preukázali koreláciu medzi fungujúcim nastavením penitenciárnej starostlivosti a prevenciou recidívy (Klimek, et al., 2020, s. 151 – 152).³

³ Kriminológia vníma ako významné miesto v systéme prevencie recidívy postpenitenciárnu starostlivosť, pričom zdôrazňuje, že táto sa nedá budovať samostatne. Tým pádom je dôležité, aby penitenciárna a postpenitenciárna starostlivosť boli spojenými nádobami, keďže postpenitenciárna starostlivosť bez fungujúcej a dobre nastavenej penitenciárnej starostlivosti v zásade ani nie je možná, keďže postpenitenciárna starostlivosť sa nevyhnutne začína už vo VTOS. Preto je potrebné, aby všetky aktivity penitenciárnej starostlivosti boli okrem iného zamerané aj na zvýšenie konkurencieschopnosti odsúdeného na trhu práce a u jedincov, ktorí majú ťažkosti s integráciou či reintegráciou na trh práce aj uľahčenie prístupu a návratu do zamestnania (Klimek, et al., 2020, s. 151 - 152).

2. Návrhy *de lege ferenda* v oblasti práce a odmeňovania odsúdených v kontexte procesu resocializácie

Prácu odsúdeného je možné vnímať i v širšom kontexte ako je len aktuálne zabezpečovanie jeho životných potrieb. Máme za to, že zamestnávaním odsúdených vo VTOS za férových podmienok je možné zabezpečiť i vytvorenie pozitívnej konotácie vo vzťahu k práci. Ak ústav ukáže odsúdenému, že za poctivo a kvalitne vykonanú legálnu prácu je schopný si zabezpečiť prostriedky na vedenie dôstojného a spokojného života, vyvolá tak v ňom návyk k legálnej práci. Uvedené má presah aj do roviny zmyslu pre zodpovednosť a schopnosti vážiť si veci. Ak osoba, ktorá doposiaľ žila životom v zmysle „prítomnej chvíle“, kedy nevnímala výhľady do budúcnosti a žila prevažne zo dňa na deň, takpovediac „na doraz“, na dlh, či dokonca nič nevlastnila, nemá osvojený návyk práce a taktiež schopnosť vážiť si vec (Foucault, 2004, s. 244 – 245). Ako hovorí staré čínske príslovie: „*Ak dáš človeku rybu, nakŕmiš ho na jeden deň, no ak ho naučíš loviť ryby, nasýtiš ho na celý život.*“ (A Dictionary of Quotations, 1989). Práve táto nadčasová múdrosť je inšpiratívnou myšlienkou pri kreovaní nápadov na vytvorenie efektívnej, fungujúcej a účelnej legislatívy. Ak vytvoríme u väznených osôb pozitívnu konotáciu, že legálna a poctivá práca je ekvivalentom pre obživu zabezpečujúcu dôstojný život, tak tým docielime požadovaný efekt, ktorý bude benefitom nielen pre ňu samú, ale aj pre jej rodinu a rovnako tak aj našu spoločnosť. U časti väzenskej populácie u ktorej absentujú pracovné návyky, ich tak dokážeme vytvoriť. Dôstojná práca za adekvátnu odmenu je spôsobilá ukázať odsúdeným, že to je cesta, ktorá má zmysel pre ich život, ale taktiež je schopná zabezpečiť významné benefity pre spoločnosť, ktorá bude zo sociálne znevýhodnených jedincov vychovávať sebestačnejších (Jarman & Heard, 2023, s. 12). Nebuďme tými, ktorí chcú opäť vynájsť koleso, zoberme si príklad z okolitých krajín, ktoré nám môžu byť inšpiráciou pri inkorporácii nových inštitútov do našej legislatívy.

V prvom rade považujeme za potrebné realizovať úpravu (ne)existencie pracovného pomeru, resp. obdobného pracovného pomeru smerom k aplikácii jeho vzniku aspoň v akejsi modifikovanej podobe. Týmto by sa podľa našej mienky docielila vyššia pracovnoprávna ochrana, najmä v oblasti aplikácie pôsobnosti zákona o minimálnej mzde na pracujúcich odsúdených a tým možnosť poskytnutia celkového zvýšenia ich pracovných odmien (Mantouvalou, 2024, s. 413 – 414).

Väzenská služba Českej republiky (ďalej len „VS ČR“) je systémovým nastavením motivovaná k úzkej spolupráci so súkromným sektorom a to využívaním zisku zo zamestnávania väznených osôb, ktorý si môže ponechať a následne reinvestovať do zlepšenia

a rozširovania väzenskej práce. VS ČR získava z takéhoto mechanizmu tzv. sprostredkovateľskú prírážku, ktorú si konkrétny ústav dojedná s externým subjektom k hrubej mzde väznenej osoby. ZVJS síce taktiež pri vyjednávaní využíva sprostredkovateľskú prírážku, avšak táto nie je jej príjmom ale príjmom štátneho rozpočtu (ÚHP, 2025, s. 36). Takýto model by spôsobil motiváciu konkrétnych ústavov zamestnávať väzené osoby, pričom by dochádzalo k dosahovaniu reálnych ziskov, ktoré by mohli byť po vzore Českej republiky reinvestované. V danom prípade si dovoľíme konštatovať, že takéto nastavenie by zvýšilo finančnú sebestačnosť ústavov, ktoré by si dokázali pokryť svoj chod do veľkej miery vlastnou činnosťou, čo by odbremenilo do určitej miery štátny rozpočet. Uvedený model považujeme za obojstranne výhodný, keďže tretí subjekt, ktorý disponuje dostatočným kapitálom má finančné zdroje, ktoré dokážu zaplatiť pracovnú silu a na druhej strane bude mať istotu v kvalite zamestnanca – odsúdenom. Keďže odsúdený podlieha režimu ZoVTOS, kedy porušenie pracovnej disciplíny je možné sankcionovať disciplinárnou právomocou, toto vytvára akýsi psychologický efekt na odsúdenú osobu, aby si dôsledne plnila svoju prácu. V prípade, ak by bola táto aj adekvátne zaplatená, jednalo by sa o ďalší motivačný prvok. Ďalším pozitívom je i skutočnosť, že u odsúdených sa z povahy výkonu trestu v zásade nemôže stať, že by sa bez uvedenia dôvodu nedostavili do práce, čo zamestnávateľovi poskytuje významnú istotu, ktorú pri civilnej osobe nie vždy má (Zákon č. 475/2005 Z. z., § 39 písm. e, v spojení s § 48, v spojení s § 52 ods. 2). Rovnako tak z dôvodu absencie možnosti disponovania s mobilným telefónom či inou technológiou, ktorá zamestnancov často pri práci rozptyľuje, je toto ďalší z pozitívnych argumentov výhody odsúdeného, ako zamestnanca. Okrem toho vnímame tento model ako pozitívum z titulu jeho integračného rozmeru, ktorý spočíva v znižovaní predsudkov spoločnosti vo vzťahu k väzenskej populácii (The Ministry of Justice, 2025).

V tomto kontexte považujeme za inšpiratívne rozšírenie sociálnych podnikov aj na zamestnávanie väznených osôb – a teda, aby sa pojem znevýhodnená osoba rozšíril aj o väznenú osobu (Zákon č. 112/2018 Z. z., § 2 ods. 5). Keďže s prevádzkou sociálneho podniku sú spojené určité daňové úľavy, práve toto by mohlo byť pre podnikateľský sektor motivačným prvkom, ktorý v sebe nesie výrazný prínos pri resocializácii odsúdených, ako aj v rámci procesu ich reintegrácie do spoločnosti (Zákon č. 595/2003 Z. z., §30d).

Významným prvkom je i prepojenie penitenciárnej a postpenitenciárnej starostlivosti v oblasti zamestnávania odsúdených a následne prepustených, kedy by týmto osobám bolo umožnené zotrvať u konkrétného podnikateľského subjektu aj po prepustení na slobodu a to až do času kým by si nenašiel stabilnú prácu. Prepustení by v rámci tohto mohli pôsobiť na pozícií vedúcich zamestnancov a mohli by byť pre odsúdených zároveň aj akýmisi mentormi a tzv.

„role models“, čo by najmä na prepustených taktiež mohlo vytvárať pozitívny záväzok snaženia sa a zodpovednosti žiť príkladným spôsobom. Vďaka tomu by sa vedeli odsúdení a prepustení vzájomne motivovať a podporovať na ich osobných cestách vedenia riadneho a usporiadaného života (The Ministry of Justice, 2025).

Ďalšou z možností zamestnávania odsúdených je možnosť vykonávania pomocných prác vo všeobecnom záujme, ako je napríklad výstavba ciest, tunelov, stavba budov vo vlastníctve štátu a podobne. Toto by malo navyše i symbolický charakter a to v tom ohľade, že odsúdená osoba si svoj dlh voči spoločnosti splatí aj tým, že svojou prácou vytvorí niečo, čo bude slúžiť celej našej spoločnosti (HN, 2007).

Rakúsky StVollzG v § 54 upravuje inštitút tzv. rücklage, ktorý vytvára pre odsúdenú osobu akúsi finančnú rezervu, ktorá slúži na zabezpečenie živobytia v počiatočnej fáze po prepustení.⁴ Inšpiratívnym pre nás v danom smere môže byť vytvorenie obdobného systému kreovania finančnej rezervy odsúdeného, ktorého časť pracovnej odmeny by sa mu kumulovala počas pobytu vo VTOS na jeho rezervnom účte. Po prepustení by tak odsúdený mal nejaký finančný obnos, ktorý by bol spôsobilý zabezpečiť mu svoje životné potreby. Keďže systém prostého odkladania peňazí je v dnešnej dobe pomerne nerentabilným pri dlhodobejšom časovom úseku a to najmä s ohľadom na narastajúcu infláciu, ktorá peniaze znehodnocuje, naskytá sa úvaha vytvorenia riešenia, ktoré by určité percento z pracovnej odmeny v čase zhodnocovalo, čím by nedochádzalo k znehodnocovaniu peňažných prostriedkov. Ako zaujímavé a pomerne vhodné riešenie, najmä pri osobách s dlhšími trestami, vnímame poskytnutie možnosti zhodnocovania nasporených peňažných prostriedkov prostredníctvom správcoských spoločností, resp. vytvorenia investičného produktu štátu, kedy odsúdení budú môcť štátu „požičať“ časť svojich peňazí zo svojho rezervného konta, za čo im následne budú poskytované úroky, čím dôjde k zhodnocovaniu peňazí v čase. Uvedené považujeme za pomerne bezpečné možnosti zhodnocovania peňazí, za zohľadnenia miery inflácie (Finančný kompas, 2023). V tejto spojitosti považujeme za prospešné aj neustále zvyšovanie finančnej gramotnosti a to najmä s ohľadom na perspektívu do budúcnosti (ZVJS, 2025).

Záver

⁴ Rücklage (rezerva) je akousi formou sporiaceho konta odsúdeného, pričom sa mu vytvára počas pobytu vo výkone trestu z jeho pracovnej odmeny. Tieto peňažné prostriedky sú zadržované zo strany väznice, pričom ich využitie má slúžiť na preklenovacie obdobie po prepustení odsúdeného na slobodu a to s cieľom zabezpečiť jeho reintegráciu po prepustení – k tomu bližšie pozri § 54 Strafvollzugsgesetz (rakúsky federálny zákon č. 144/1969 o výkone trestu v aktuálnom znení).

Na základe vykonaných zistení možno konštatovať, že stav *de lege lata* v oblasti zamestnávania odsúdených v podmienkach ÚVTOS vykazuje viaceré nedostatky, ktoré sú v rozpore s medzinárodnými štandardmi v oblasti väzenia. Alarmujúco nízke odmeny pracujúcich odsúdených, ktoré mnohokrát nedosahujú ani sumu životného minima nepredstavujú stav, ktorý vytvára u odsúdeného pozitívny vzťah k legálnej práci. Máme za to, že sa možno prikloniť k názoru, že súčasný systém dosahuje intenzitu vykorisťovania a tým pádom môžeme hovoriť o akejsi novodobej forme otroctva. I napriek rozsiahlej legislatívnej zmene ZoVTOS s účinnosťou od 1. júla 2026, ktorej význam je dozaista prínosom a krokom vpred, túto nemožno považovať za revolučnú a prinášajúcu skutočne účinné riešenie na jestvujúci problém. Novelizáciou § 45 ods. 1 sa zakotvuje základná výška pracovnej odmeny zodpovedajúcej 40% sumy minimálnej mzdy, čo však nepovažujeme za dostatočne progresívny krok, avšak oceňujeme aspoň mierny posun.

Zlepšenie podmienok práce odsúdených, najmä s ohľadom na zvýšenie ich pracovných odmien nemožno vnímať ako vytváranie „prepychových“ podmienok pre odsúdených, avšak ako nastolenie dôstojných a spravodlivých podmienok reflektujúcich skutočné potreby zainteresovaných subjektov. Je potrebné si uvedomiť, že spravodlivá odmena za vykonanú prácu nie je prepychom, ale logickým následkom, ktorý dosahuje intenzitu základného práva jednotlivca. Takéto zlepšenie finančnej situácie odsúdeného má pozitívny dopad v prvom rade na poškodeného, ktorému dokáže odsúdený nahradiť škodu, ktorá vznikla v dôsledku spáchania trestného činu. Zároveň sa dokáže odsúdený podieľať vo väčšej miere aj na úrade vlastných nákladov na jeho pobyt vo VTOS. Benefitom ktorý nemožno opomenúť, je aj zmiernenie nepriaznivého ekonomického dopadu na rodinu odsúdenej osoby, ktorej by vďaka väčšej odmene dokázal odsúdený aj spoza mreží finančne prispievať (Mantouvalou, 2024, s. 424).

Výsledky nášho výskumu formulované v rámci konkrétnych návrhov *de lege ferenda* vnímame minimálne najmä v rovine vytvorenia sebestačného jedinca, ktorý nie je odkázaný na sociálnu podporu zo strany štátu, čím logicky dochádza k úspore štátu v oblasti sanácie širokej škály nepriaznivých sociálnych situácií. V nadväznosti na uvedené je logickým vyústením i zníženie výdavkov na väzenie a to v dôsledku zníženia miery páchania trestnej činnosti v dôsledku finančnej núdze za účelom získania obživy. Ďalším z dôsledkov je i zníženie nezamestnanosti a s tým spojený zvýšený výber daní a odvodov do štátneho rozpočtu. Nemenej dôležitým výsledkom je aj podpora rodín a vytváranie hodnôt v našej spoločnosti.

Záverom považujeme za potrebné apelovať na potrebu dodržiavania hodnôt a zásad na ktorých stojí náš právny poriadok a ktoré sú jeho imanentnou a esenciálnou súčasťou. Práve tie

nám majú pripomínať, že sme sa posunuli od práce odsúdených „v uránových baniach s oceľovou guľou na nohe“ a odplácaním zla ešte väčším zlom k humanizácii väznenstva. Práve to je vyjadrením vyspelosti našej spoločnosti a uvedomovania si vlastnej omylnosti, ktorá i napriek tomu, že naše nesprávne skutky neospravedlňuje, je súčasťou našej podstaty. Preto dodržiavaním základných princípov a ľudským prístupom jeden k druhému, obzvlášť u tejto skupine osôb, naplníme nielen idey nášho právneho štátu ale aj dar rozumu, ktorým sa odlišujeme od ostatných živých organizmov.

Zoznam bibliografických odkazov

Knižné publikácie, monografie a skriptá

1. FOUCAULT, M. (2004). *Dozerať a trestať: Zrod väzenia*. Kaligram.
2. JARMAN, B. & HEARD, C. (2023). *Labouring behind bars: Assessing international law on working prisoners*. Institute for Crime & Justice Policy Research. https://www.prisonstudies.org/sites/default/files/resources/downloads/labouring_behind_bars_web_final.pdf.
3. KLIMEK, L. a kol. (2020). *Kriminológia vo vnútroštátnom a medzinárodnom rozmere*. Wolters Kluwer s. r. o.
4. TITLOVÁ, M. (2017). *Zákon o výkone trestu odňatia slobody – komentár*. Wolters Kluwer SR s. r. o.

Periodiká (časopisy) a zborníky resp. state v nich uverejnené

5. KORČEK, F. (2023). Prečo ukladať alternatívne tresty na úkor nepodmienečného trestu odňatia slobody?. *Najprávo*. <https://premium.najpravo.sk/preco-ukladat-alternativne-tresty-na-ukor-nepodmienecneho-trestu-odnatie-slobody/>.
6. MANTOUVALOU, V. (2024). Work in prison: Reintegration or exclusion and exploitation? *European Labour Law Journal* (Volume 15, Issue 3, 409–425). <https://doi.org/10.1177/20319525241270268>.

Právne predpisy a iné normatívne texty

7. Federálny zákon Rakúskej republiky č. 144/1969 Strafvollzugsgesetz (o výkone trestu) v aktuálnom znení. https://www.ris.bka.gv.at/geltendefassung.wxe?abfrage=bundesnormen&gesetzesnummer=10002135&utm_source=chatgpt.com.
8. Nariadenie vlády Slovenskej republiky č. 7/2023 Z. z. o výške pracovnej odmeny a podmienkach jej poskytovania odsúdeným v znení neskorších predpisov.
9. Opatrenia Ministerstva práce, sociálnych vecí a rodiny Slovenskej republiky č. 168/2025 Z. z. o úprave životného minima.
10. Rada Európy. (2006). Odporúčanie Rec(2006)2 Výboru ministrov členským štátom o Európskych väzenských pravidlách. https://www.justice.gov.sk/dokumenty/2021/05/Rec-2006_2sj.pdf.
11. Ústav na výkon trestu odňatia slobody Želiezovce. (2023). *Ústavný poriadok pre odsúdených v Ústave na výkon trestu odňatia slobody Želiezovce*. ZVJS. <https://www.zvjs.sk/api/file/file-preview/3df288d4-c678-44c2-846d-f9a033e192c2.pdf>.
12. Zákon č. 595/2003 Z. z. o dani z príjmov v znení neskorších predpisov.
13. Zákon č. 112/2018 Z. z. o sociálnej ekonomike a sociálnych podnikoch a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.
14. Zákon č. 475/2005 Z. z. o výkone trestu odňatia slobody a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.
15. Zákon č. 4/2001 Z. z. o Zbore väzenskej a justičnej strážie v znení neskorších predpisov.

Judikatúra

16. Beschluss des Bundesverfassungsgerichts 2 BvR 166/16 u. a. zo dňa 20.06.2023. https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2023/06/rs2023062_0_2bvr016616.html.
17. Uznesenie Najvyššieho súdu Slovenskej republiky sp. zn. 3To/2/2019 zo dňa 23.10.2019. <https://www.nsud.sk/data/att/66495.pdf>.

Internetové zdroje

18. Bartleby. *Respectfully Quoted: A Dictionary of Quotations*. 1989. <https://www.bartleby.com/lit-hub/respectfully-quoted/chinese-proverb/>.
19. Finančný kompas. (2023). *Ako a kam odkladať peniaze ? Tipy vďaka ktorým ušetríte a možno aj zarobíte*. <https://www.financnykompas.sk/clanok/ako-a-kam-odkladat-peniaze-tipy-vdaka-ktorym-usetrite-a-mozno-aj-zarobite>.
20. Hospodárne noviny [HN]. (2007). V Sabinove otvorili novú väznicu pre 324 odsúdených. <https://hnonline.sk/dennik/slovensko/168853-v-sabinove-otvorili-novu-vaznicu-pre-324-odsudenych>.
21. NOVINY (2022). Väzni sa sťažujú, že za prácu dostávajú málo peňazí. Niektorí sa dokonca voči štátu za mrežami zadlžia. <https://www.noviny.sk/slovensko/655400-vazni-sa-stazuju-ze-za-pracu-dostavaju-malo-penazi-niektori-sa-dokonca-voci-statu-za-mrezami-zadlzia>.
22. The Ministry of Justice. (2025). Guidance: Employing prisoners and ex-offenders. GOV.UK. <https://www.gov.uk/government/publications/unlock-opportunity-employer-information-pack-and-case-studies/employing-prisoners-and-ex-offenders>.
23. Tvnoviny (2025). *Po kritike odsúdených prišli opatrenia. Ceny vo väzenských bufetoch sú pod väčšou kontrolou*. <https://tvnoviny.sk/ekonomika/clanok/986569-po-kritike-odsudenych-prisli-opatrenia-ceny-vo-vaezenskych-bufetoch-su-pod-vaecsou-kontrolou>.
24. Útvar hodnoty za peniaze Ministerstva financií Slovenskej republiky [ÚHP MFSR]. (2025). *Revízia výdavkov na väzenstvo*. MFSR. https://www.mfsr.sk/files/sk/financie/hodnota-za-peniaze/revizie-vydavkov/revizia_vydavkov_na_vazenstvo.pdf.
25. Zbor väzenskej a justičnej stráže [ZVJS]. (2025). *Ročenka Zboru väzenskej a justičnej stráže za rok 2024*. ZVJS. <https://www.zvjs.sk/api/file/file-preview/4be13e64-3e05-48ee-8f7f-5e3b9d7e214f.pdf>.
26. Zbor väzenskej a justičnej stráže. (2025). *Ako von z dlhov*. <https://www.zvjs.sk/en/blog/ako-von-z-dlhov>.
27. Zbor väzenskej a justičnej stráže. *Zamestnávanie väznených osôb*. <https://www.zvjs.sk/sk/zamestnavanie-odsudenych>.

Iné

28. Výplatná páska odsúdeného z ÚVTOS a ÚVV Leopoldov za mesiac máj roku 2025 (interný zdroj poskytnutý dotknutým odsúdeným, ktorý tvorí prílohu č. 1).
29. Výplatná páska odsúdeného z ÚVV a ÚVTOS Banská Bystrica za mesiac október roku 2025 (interný zdroj poskytnutý dotknutým odsúdeným, ktorý tvorí prílohu č. 2).

Príloha č. 1

ÚVTOS a ÚVV Leopoldov	
	05 / 2025
Typ rozúčtovania	VTOS
Umiestnenie:	
S:VT objekt č. ■, B: ■, C: ■ oddiel OVT ■	
Pracovisko:	
Gomplast - časová	
Odprac.dni / Ospr.abs.	20 / 2
Voľné dni / PN	9 / 0
Sviatky / Neospr.abs	0 / 0
Odpracované hodiny	150,00
Pracovný fond (hod)	176,00
Úrazový príplatok	0,00
Náhrada za bolesť	0,00
Nemocenské	0,00
Finančná odmena celkom	0,00
Hrubá pracovná odmena	286,62
Z toho doplatok	0,00
Poistné na ZP (ZVJS)	31,52
Poistné na NP (ZVJS)	4,01
Poistné na SP (ZVJS)	40,12
Poistné na IP (ZVJS)	8,59
Úrazové poistenie (ZVJS)	2,29
Rezervný fond SP (ZVJS)	13,61
Spolu fondy (ZVJS)	100,14
Poistné na ZP (klient)	11,46
Poistné na NP (klient)	4,01
Poistné na SP (klient)	11,46
Poistné na IP (klient)	8,59
Spolu fondy (klient)	35,52
Základ dane	0,00
Nezdaniteľný základ dane	479,48
Daň preddavková	0,00
RZD	0,00
RZZP	0,00
Daň vyberaná zrážkou	0,00
Čistá pracovná odmena a FO	251,10
Výživné okrem dlhu	54,78
Počet detí	3
Pohľadávky ZVJS	0,00
Pohľadávky cudzích osôb	0,00
NVTOS	112,99
Osobné	53,20
Vreckové	30,13

Vytlačené dňa: 10.6.2025

Príloha č. 2

ÚVV a ÚVTOS Banská Bystrica	
	10 / 2025
Typ rozúčtovania	VTOS
Umiestnenie:	
S:Sektor ■, B:Blok ■, C: ■, O:výkon trestu ■	
Pracovisko:	
Pracovisko drobné PaS	
Odprac.dni / Ospr.abs.	23 / 0
Voľné dni / PN	8 / 0
Sviatky / Neospr.abs	0 / 0
Odpracované hodiny	183,00
Pracovný fond (hod)	184,00
Úrazový príplatok	0,00
Náhrada za bolesť	0,00
Nemocenské	0,00
Finančná odmena celkom	0,00
Hrubá pracovná odmena	50,74
Z toho doplatok	0,00
Poistné na ZP (ZVJS)	5,58
Poistné na NP (ZVJS)	0,71
Poistné na SP (ZVJS)	7,10
Poistné na IP (ZVJS)	1,52
Úrazové poistenie (ZVJS)	0,40
Rezervný fond SP (ZVJS)	2,41
Spolu fondy (ZVJS)	17,72
Poistné na ZP (klient)	2,02
Poistné na NP (klient)	0,71
Poistné na SP (klient)	2,02
Poistné na IP (klient)	1,52
Spolu fondy (klient)	6,27
Základ dane	0,00
Nezdaniteľný základ dane	479,48
Daň preddavková	0,00
RZD	0,00
RZZP	0,00
Daň vyberaná zrážkou	0,00
Čistá pracovná odmena a FO	44,47
Výživné okrem dlhu	13,32
Počet detí	3
Pohľadávky ZVJS	0,00
Pohľadávky cudzích osôb	0,00
NVTOS	20,01
Osobné	5,81
Vreckové	5,33

Vytlačené dňa: 11.11.2025

**SEKCIA PRACOVNÉHO PRÁVA, RODINNÉHO PRÁVA A ĽUDSKÝCH
PRÁV**

ĽUDSKÁ DÔSTOJNOSŤ MATKY A PRÁVA DIEŤAŤA V SITUÁCIÁCH NARÚŠAJÚCICH ZÁSADU „MATER SEMPER CERTA EST“

The human dignity of the mother and the rights of the child in situations violating the principle „Mater semper certa est“

ANDREA MIČUDOVÁ*

Abstrakt

Príspevok sa zaoberá situáciami, ktoré narúšajú klasické ponímanie materstva, ktoré v súčasnosti prislúcha žene, ktorá dieťa porodí. Zameriame sa na anonymné pôrody a náhradné materstvo a na ľudskú dôstojnosť jednotlivých subjektov týchto rodinnoprávných vzťahov. Ako sa zákonodarca vyrovnal s vyvažovaním ich práv pri teste proporcionality?

Abstract

The article deals with situations that disrupt the classic understanding of motherhood, which currently belongs to a woman who gives birth to a child. We will focus on anonymous births and surrogacy and on the human dignity of the individual subjects of these family law relationships. How did the legislature deal with balancing their rights in the proportionality test?

Kľúčové slová: *surrogácia, anonymný pôrod, ľudská dôstojnosť, dieťa, matka*

Key words: *surrogacy, anonymous delivery, human dignity, child, mother*

Úvod

Problematika určovania rodičovstva a právnej regulácie reprodukčných vzťahov predstavuje jednu z najaktuálnejších a zároveň najcitlivejších otázok súčasného rodinného a ústavného práva. Dynamický rozvoj medicínskych technológií, najmä asistovanej reprodukcie, zásadným spôsobom ovplyvnil tradičné chápanie rodičovstva a vytvoril nové právne, etické a spoločenské otázky, na ktoré právny poriadok nie vždy dokáže primerane reagovať. V dôsledku technologického pokroku dochádza k situáciám, v ktorých biologické, genetické a sociálne rodičovstvo už nemusia byť sústredené v jednej osobe, čo vedie k potrebe prehodnotiť viaceré tradičné právne princípy, ktoré boli dlhodobo považované za nemenné.

Rozvoj modernej medicíny však umožnil vznik nových foriem reprodukcie, pri ktorých môže byť genetická matka odlišná od ženy, ktorá dieťa vynosila, a zároveň od osoby, ktorá bude vykonávať rodičovské práva a povinnosti. Takéto situácie významným spôsobom narúšajú

* Mgr. Andrea Mičudová, interná doktorandka, Katedra historického práva a právnej metodológie, Právnická fakulta Trnavskej univerzity v Trnave, ORCID: <https://orcid.org/0009-0001-4284-7598>

tradičné chápanie rodičovstva a vyvolávajú otázku, či je možné zachovať rigidné chápanie zásady „mater semper certa est“ aj v podmienkach súčasnej spoločnosti.

Problematika reprodukčných práv zároveň presahuje rámec klasického rodinného práva a nadobúda výrazný ústavnoprávny rozmer. Reprodukcia, rodičovstvo a rodinný život úzko súvisia s ochranou základných práv a slobôd jednotlivca, predovšetkým s ochranou ľudskej dôstojnosti, právom na súkromný a rodinný život, právom na autonómiu jednotlivca a princípom proporcionality. Každý zásah štátu do reprodukčných práv jednotlivca preto musí byť podrobený dôslednej ústavnoprávnej kontrole a musí rešpektovať princípy demokratického a právneho štátu.

Jednou z najdiskutovanejších otázok súčasnosti je problematika náhradného materstva. Tento inštitút zásadne spochybňuje tradičné chápanie materstva, keďže dochádza k oddeleniu genetického, biologického a sociálneho materstva. Slovenský právny poriadok pristupuje k náhradnému materstvu reštriktívne a prostredníctvom ústavného zákazu fakticky vylučuje dohody o porodení dieťaťa pre inú osobu. Napriek tomu však nemožno ignorovať skutočnosť, že slovenskí občania využívajú služby náhradných matiek v zahraničí, čo následne vyvoláva komplikácie pri určovaní rodičovstva a právnom postavení dieťaťa.

Predmetom skúmania je najmä problematika asistovanej reprodukcie, fragmentácie materstva, náhradného materstva a utajených pôrodov, pričom pre príspevok má významný vplyv ústavnoprávna rovina z dvoch väčších hľadísk. Ako prvú môžeme zdôrazniť právomoc zákonodarcu zakotviť resp. zadefinovať spôsob nahliadania na určitý právny inštitút najvyššou silou – priamo v Ústave (v našom prípade náhradné materstvo), ako aj následnú reguláciu iných inštitútov, narúšajúcich kogentnosť určovania materstva, na zákonnej úrovni, podriaďujúc ich ústavným princípom (v našom prípade anonymné pôrody).

Druhým hľadiskom, ktoré nesie v sebe väčšiu váhu ako samotná právna norma, je spomínaná filozofia, ale najmä etika a morálka, ktorá stojí za jednotlivými dôvodovými správami, ktoré umožňujú rigidné vykládanie zásady „mater semper certa est“ v čase, keď sa javí, že by mala byť spoločnosť značne liberálnejšia. Hneď na začiatku je potrebné vysloviť názor, ktorého sa budeme pridŕžiavať, a to že ústavnoprávny vývoj v oblasti reprodukcie a statusových vzťahov neodstraňuje zásadu mater semper certa est, ale mení jej funkciu z absolútneho určovacieho pravidla na princíp podliehajúci vyvažovaniu s ľudskou dôstojnosťou, reprodukčnou autonómiou a najlepším záujmom dieťaťa.

1. Fragmentácia materstva v právnej dogmatike: Rozpor medzi biológiou, genetikou a vôľou

Tradičná právna veda vychádzala z predpokladu, že materstvo je koncept, v ktorom sa biologický pôvod, genetická identita a sociálna rola prekrývajú v jedinej osobe – v žene, ktorá dieťa porodila. Technologický pokrok v oblasti asistovanej reprodukcie však túto jednotu definitívne rozbil a vniesol do právnej dogmatiky fenomén fragmentácie materstva. V súčasnosti je možné vedecky aj fakticky rozlíšiť medzi matkou genetickou (darkyňa oocyty), matkou gestačnou (nositeľka tehotenstva) a matkou sociálnou či intencionálnou (žena, ktorá má úmysel dieťa vychovávať). Táto podkapitola analyzuje, ako sa slovenské právo v kontexte teórie materiálneho právneho štátu vyrovnáva s touto pluralitou a či je rigidné lipnutie na gestačnom aspekte ústavne udržateľné.

Genetické materstvo, definované odovzdaním DNA, predstavuje v modernom práve silný argumentačný základ pre určovanie statusu. Zatiaľ čo rímske právo o genetike nič nevedelo, súčasná právna veda musí reflektovať, že genetická väzba tvorí podstatnú časť identity dieťaťa. Ak slovenské právo v § 80 zákona o rodine uprednostňuje gestáciu (pôrod) pred genetikou, vytvára tým vedomý rozpor s biologickou realitou v prípadoch darcovstva vajíčok alebo surogácie.

Gestačné materstvo zostáva v slovenskom právnom poriadku primárnym a prakticky jediným uznávaným kritériom pre určenie matky. Táto prioritizácia vychádza z presvedčenia, že pôrod je nezameniteľným faktom, ktorý poskytuje právnu istotu. Avšak v dobe náhradného materstva sa z gestácie stáva funkcia, ktorú je možné oddeliť od úmyslu byť rodičom. Tu narážame na to, čo možno nazvať „biologickým absolutizmom“.

Podľa Krošláka a kol. je ústavná ochrana materstva dynamickým konceptom.¹ Ak sa však gestácia stane jediným legálnym meradlom, právo ignoruje situácie, kedy je gestačná matka od počiatku len „nositeľkou“ bez úmyslu nadviazať s dieťaťom trvalý vzťah. Rigidné trvanie na zásade „mater semper certa est“ v jej gestačnom význame tak vedie k stavu, kedy právo núti ženu do roly matky, ktorú ona sama odmieta, a zároveň dieťaťu vnúti matku, ktorá s ním nemá genetickú ani sociálnu väzbu. Tento prístup sa javí ako prejav selektívneho paternalizmu, kde štát uprednostňuje fyzický akt pred psychickým a vôľovým nastavením subjektov.

¹ KROŠLÁK, Daniel a kol. Ústavné právo. Bratislava: C. H. Beck, 2026.s 142

Najkontroverznejšou, no v zahraničí čoraz akceptovanejšou dimenziou, je materstvo intencionálne. Ide o uznanie statusu matky tej žene, ktorá prejavila úmysel („intent“) stať sa rodičom a iniciovala proces reprodukcie. V slovenskej dogmatike je tento koncept vnímaný s veľkou mierou podozrievavosti, nakoľko evokuje „zmluvné rodičovstvo“, ktoré je v rozpore s čl. 15 ods. 5 Ústavy SR.²

Zásadný vplyv na trieštenie materstva na vyššie spomínané tri kategórie má technologický vývoj. Nástup technológií asistovanej reprodukcie (ART), najmä metódy „in vitro“ fertilizácie (IVF) s využitím darovaných oocytov, postavil slovenskú právnu dogmatiku pred neriešiteľnú ontologickú otázku. Ak rímskoprávna zásada „mater semper certa est“ vychádzala z predpokladu, že pôrod a genetický pôvod sú neoddeliteľné, darcovstvo vajíčok túto jednotu definitívne rozbilo. V slovenskej aplikačnej praxi tak vzniká paradox – právo, ktoré sa v iných oblastiach (napr. pri určovaní otcovstva) dovoľáva biologickej pravdy, v prípade materstva túto pravdu vedome ignoruje v prospech gestačného aktu.

Nastáva tu však určitá gestačná fikcia. Slovenský zákonodarca v § 80 ods. 1 zákona o rodine striktne ustanovil, že „matkou dieťaťa je žena, ktorá dieťa porodila“. Toto ustanovenie je v prípade darcovstva oocytov legálnou fikciou, ktorá zvyšuje proces vynosenia dieťaťa nad genetický základ. Ako uvádza Pavelková, cieľom tejto úpravy bola ochrana právnej istoty a zabránenie sporom o materstvo, ktoré by mohli destabilizovať status dieťaťa.³

Avšak z pohľadu teórie materiálneho právneho štátu, ktorú rozvíja Krošlák, je takáto rigidita problematická. Ak je právny štát charakterizovaný nielen formálnou zákonnosťou, ale aj materiálnou spravodlivosťou, potom ignorovanie genetickej väzby medzi matkou (darkyňou) a dieťaťom môže byť vnímané ako zásah do práva na identitu.⁴ Slovenská aplikačná prax sa tak ocitá v protichodnej situácii – zatiaľ čo pri otcovstve je test DNA „kráľovnou dôkazov“, pri materstve je ten istý genetický dôkaz právne irelevantný. Tento stav potvrdzuje tézu o selektívnom paternalizme, kde štát určuje, kedy je biológia dôležitá a kedy musí ustúpiť technickému pravidlu pôrodu.

Problém fragmentácie materstva na genetickú a gestačnú zložku nie je len vnútroštátnym problémom, ale má silný medzinárodnoprávny rozmer. Európsky súd pre ľudské práva v prípade „Mandet proti Francúzsku“ (2016) zdôraznil, že najlepší záujem dieťaťa zahŕňa aj

² Čl. 15 ods. 5 Ústavy Slovenskej republiky: „Dohoda o porodení dieťaťa pre iného sa zakazuje“

³ PAVELKOVÁ, Bronislava. Zákon o rodine: Komentár. 3. vydanie. Bratislava: C. H. Beck, 2019. s 342

⁴ KROŠLÁK, Daniel. Právny štát – vývoj, princípy, mechanizmy ochrany. Praha: Wolters Kluwer ČR, 2022. s 112

právo na poznanie biologickej pravdy o svojom pôvode. Hoci sa tento prípad týkal otcovstva, jeho argumentačná línia je plne aplikovateľná aj na prípady darčovstva oocytov.

Ak slovenské právo v mene „istoty“ matky absolútne anonymizuje darkyňu oocytu a upiera dieťaťu možnosť dozvedieť sa o svojom genetickom pôvode, naráža na limity článku 8 Dohovoru o ochrane ľudských práv a základných slobôd. Mokrá v tejto súvislosti pripomína, že právo na súkromný život zahŕňa aj právo na formovanie identity, ktorej neoddeliteľnou súčasťou je genetické dedičstvo.⁵ Slovenská prax, ktorá v § 80 zákona o rodine petrifikuje gestačné materstvo, tak vytvára bariéru, ktorá môže byť v budúcnosti napadnutá ako neproporcionálny zásah do osobnostných práv dieťaťa.

Kľúčovým problémom slovenskej úpravy je jej statickosť voči dynamike vedy. Podľa Krošláka musí byť ústavná ochrana materstva a rodiny interpretovaná ako dynamický koncept.⁶ Ak zákonodarca v roku 1963 (a následne v roku 2005) definoval matku cez pôrod, robil tak v dobe, kedy iná možnosť neexistovala. Dnes, kedy je genetické materstvo oddeliteľné od gestačného, sa táto definícia stáva nástrojom ideologického boja.

2. Právomoc zákonodarcu v oblasti regulácie reprodukčných práv

Právomoc zákonodarcu predstavuje jeden zo základných pilierov fungovania demokratického právneho štátu, keďže prostredníctvom normotvornej činnosti dochádza ku konkretizácii ústavných princípov a k úprave spoločenských vzťahov. V oblasti reprodukčných práv, vrátane otázok náhradného materstva a utajených pôrodov, však táto právomoc nadobúda osobitne citlivý charakter, pretože sa dotýka samotnej podstaty ľudskej dôstojnosti, autonómie jednotlivca a ochrany rodinného života. Z tohto dôvodu nie je právomoc zákonodarcu neobmedzená, ale je viazaná ústavnými limitmi vyplývajúcimi z materiálneho chápania ústavy a z princípov právneho štátu.⁷

Zákonodarca je oprávnený upravovať otázky reprodukcie, rodinných vzťahov a bioetických dilemat, pričom disponuje relatívne širokým priestorom na uváženie. Tento priestor, často označovaný ako „*margin of appreciation*“, je uznávaný aj v judikatúre Európskeho súdu pre ľudské práva, ktorá štátom priznáva určitú mieru voľnosti pri riešení

⁵ MOKRÁ, Lucia. *Internal Dimension of Human Rights Law in the EU*. Praha: C. H. Beck, 2021.s 145

⁶ KROŠLÁK, Daniel a kol. Ústavné právo. Bratislava: C. H. Beck, 2026. s 142

⁷ Porov. čl. 1 ods. 1: „Slovenská republika je zvrchovaný, demokratický a právny štát. Neviaže sa na nijakú ideológiu ani náboženstvo.“ a čl. 12 ods. 1: „Ludia sú slobodní a rovní v dôstojnosti i v právach. Základné práva a slobody sú neodňateľné, nescudziteľné, nepremlčateľné a nezrušiteľné.“ Ústavy Slovenskej republiky

morálne a spoločensky citlivých otázok.⁸ Táto voľnosť však nie je absolútna, keďže musí byť vykonávaná v súlade s ochranou základných práv garantovaných Dohovorom o ochrane ľudských práv a základných slobôd, najmä právom na súkromný a rodinný život.⁹

Na vnútroštátnej úrovni je zákonodarca viazaný ústavou ako najvyšším právnym predpisom, pričom jeho normotvorná činnosť podlieha kontrole zo strany Ústavného súdu Slovenskej republiky. Tento súd vo svojej judikatúre opakovane zdôrazňuje, že zásahy do základných práv musia spĺňať požiadavky proporcionality, teda musia sledovať legitímny cieľ, byť vhodné, nevyhnutné a primerané.¹⁰ Tieto požiadavky sa pritom uplatňujú nielen na zákonnú, ale aj na ústavnú úroveň normotvorby, čo znamená, že ani ústavodarca nemôže svojvoľne zasahovať do podstaty základných práv.

V tomto kontexte nadobúda význam koncept materiálneho jadra ústavy, ktorý predstavuje súbor základných princípov a hodnôt, ako sú ľudská dôstojnosť, právny štát a ochrana základných práv a slobôd. Hoci slovenský ústavný poriadok explicitne nevymedzuje materiálne jadro ústavy, jeho existencia je implicitne uznávaná judikatúrou Ústavného súdu Slovenskej republiky.¹¹ Z toho vyplýva, že zákonodarca nemôže ani prostredníctvom ústavného zákona úplne eliminovať alebo poprieť podstatu základných práv, keďže by tým prekročil hranice svojej právomoci. Kľúčovým zistením výskumu je, že ani ústavodarná moc nie je absolútna. Káčer a Neumann vo svojej analýze materiálneho jadra slovenskej ústavy zdôrazňujú, že existujú fundamentálne princípy, ktoré sú imúnne voči ústavným zmenám. Ak novela čl. 15 ods. 5 Ústavy SR zavádza absolútny zákaz surogácie bez možnosti vyvažovania, môže ísť o „neústavnú ústavnú normu“.¹² Tento zákaz totiž apriórne neguje právo na rodinný život spôsobom, ktorý je vnútorne rozporný s inými inštitútmi, ako je utajený pôrod. Podľa Krošláka musí byť v koncepcii materiálneho právneho štátu každá norma v súlade s fundamentálnymi princípmi spravodlivosti a vnútornej bezrozpornosti.¹³

⁸ The margin of appreciation doctrine,

Dostupné na: https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp

⁹ Čl. 8 Dohovoru o ochrane ľudských práv a základných slobôd: „Právo na rešpektovanie súkromného a rodinného života (1.) Každý má právo na rešpektovanie svojho súkromného a rodinného života, obdobia a korešpondencie. (2.) Štátny orgán nemôže do výkonu tohto práva zasahovať s výnimkou prípadov, keď je to v súlade so zákonom a nevyhnutné v demokratickej spoločnosti v záujme národnej bezpečnosti, verejnej bezpečnosti, hospodárskeho blahobytu krajiny, predchádzania nepokojom alebo zločinnosti, ochrany zdravia alebo morálky alebo na ochranu práv a slobôd iných.“ Dostupné na: https://www.echr.coe.int/documents/d/echr/convention_slk

¹⁰ Nález Ústavného súdu Slovenskej republiky PL. ÚS 10/2014

¹¹ KÁČER, M., NEUMANN, J.: Materiálne jadro v slovenskom ústavnom práve. Doktrínálny dissent proti zrušeniu sudcovských previerok. Praha: Leges, 2019, s.93

¹² Ibidem s. 58

¹³ KROŠLÁK, Daniel. Právny štát – vývoj, princípy, mechanizmy ochrany. op. cit. s 134

V súčasnosti je právna úprava reprodukčných inštitútov v Slovenskej republike charakteristická rozdielnou mierou normatívnej intenzity pri jednotlivých formách reprodukčného správania. Kým náhradné materstvo nie je výslovne upravené v samostatnom právnom predpise – iba de facto zakázané na ústavnej úrovni – a jeho právne účinky sú nepriamo vylúčené, utajený pôrod predstavuje zákonom výslovne upravený inštitút. Tento rozdiel je potrebné analyzovať nielen na zákonnej, ale aj na ústavnej úrovni, keďže oba inštitúty zasahujú do základných práv garantovaných Ústavou Slovenskej republiky a medzinárodnými dohovormi.

3. Ľudská dôstojnosť ako „problém“ pri regulácii materstva

Pirie pripomína, že právo nie je len súborom príkazov, ale intelektuálnym systémom, ktorý odráža to, ako spoločnosť vníma samu seba.¹⁴ Slovenský zákaz surogácie je vyjadrením kultúrnej identity, ktorá odmieta fragmentáciu materstva na genetické, gestačné a sociálne. Právna úprava sa tu snaží udržať integritu osoby matky ako nedeliteľnej jednoty. Pripustenie surogácie by znamenalo právne uznanie odcudzenia vlastného tela, čo je v európskej právnej tradícii, silne ovplyvnenej kresťanským a humanistickým personalizmom, vnímané ako neprijateľné. Na druhej strane, anonymné pôrody ukazujú limity právneho purizmu. Právo tu ustupuje pred realitou ľudského utrpenia a hľadá praktické východiská. Funkčný pohľad nám umožňuje vidieť ľudskú dôstojnosť v týchto prípadoch nie ako statickú definíciu, ale ako dynamický argumentačný nástroj.

Tento rozdielny prístup k testu proporcionality odráža aj rozdiel medzi negatívnym a pozitívnym záväzkom štátu. Pri náhradnom materstve má štát negatívny záväzok nepripustiť konanie, ktoré by viedlo k degradácii človeka. Pri anonymných pôrodoch má pozitívny záväzok chrániť život dieťaťa, čo ho oprávňuje k vytvoreniu výnimky z inak prísnych pravidiel o určovaní statusu. Krošlák v tejto súvislosti zdôrazňuje, že princíp právnej istoty vyžaduje, aby štát predvídateľne chránil slabšiu stranu.¹⁵ Pri anonymnom pôrode je slabšou stranou ohrozený novorodenec. Pri surogácii je však situácia zložitejšia – sú slabšou stranou zamýšľaní rodičia trpiaci neplodnosťou, alebo náhradná matka, ktorej hrozí vykorisťovanie? Zdá sa, že slovenský zákonodarca vopred určil odpoveď bez možnosti individuálneho vyvažovania.

Pri skúmaní ústavných limitov prelamovania zásady „mater semper certa est“ nemožno obísť koncept, ktorý v nemeckej právnej vede etabloval Günter Dürig. Jeho tzv. objektová

¹⁴ PIRIE, Fernanda. „The Anthropology of Law“. Oxford: Oxford University Press, 2013. s 45

¹⁵ KROŠLÁK, Daniel. Právny štát – vývoj, princípy, mechanizmy ochrany. op. cit. s 142

formula („Objektformel“) sa stala kľúčovým nástrojom na identifikáciu zásahov do ľudskej dôstojnosti. Podľa tejto tézy dochádza k porušeniu dôstojnosti vtedy, ak je konkrétny človek degradovaný na predmet, na zastupiteľnú veličinu alebo ak sa s ním nakladá ako s prostriedkom na dosiahnutie cieľa, ktorý on sám neurčil. Slovenský ústavodarca a zákonodarca túto formulu implicitne využíva ako hlavný argumentačný štít proti legalizácii náhradného materstva. V slovenskom diskurze sa tvrdí, že surogácia nevyhnutne vedie k inštrumentalizácii náhradnej matky. Ak žena uzatvorí zmluvu, ktorej predmetom je vynosenie dieťaťa pre iný pár, jej telo je vnímané ako biologický prostriedok na uspokojenie potrieb tretích strán. Hapla a Gealfow v tejto súvislosti pripomínajú, že dôstojnosť v kantovskom zmysle je nescudziteľná, a preto ani súhlas matky s takýmto postavením nemôže zhojiť zásah do jej ontologického statusu.¹⁶ Štát tu vystupuje v roli garanta morálnej integrity, ktorý bráni tomu, aby sa reprodukčné schopnosti stali predmetom trhovej výmeny. Zdá sa však, že tento prístup opomína druhú stranu Dürigovho konceptu – subjektivitu. Ak štát žene apriórne zakazuje rozhodnúť o vlastnom tele, nerobí z nej v konečnom dôsledku objekt svojej paternalistickej moci?

Protiargumentom voči striktnej aplikácii objektovej formuly je chápanie dôstojnosti ako sebaurčenia. Ak je človek subjektom práva, musí mať možnosť slobodne formovať svoj životný osud, čo zahŕňa aj altruistické rozhodnutia v oblasti reprodukcie. Krošlák zdôrazňuje, že v materiálnom právnom štáte musí byť každé obmedzenie autonómie vôle podrobené prísnemu testu proporcionality.¹⁷ Ak by sme prijali tézu, že každá forma náhradného materstva je inštrumentalizáciou, museli by sme rovnako prísne posudzovať aj iné formy telesnej práce alebo darcovstva orgánov. Rozpor v slovenskej úprave spočíva v tom, že zatiaľ čo pri utajenom pôrode štát plne rešpektuje autonómiu vôle matky vzdať sa dieťaťa, pri surogácii tú istú autonómiu vníma ako hrozbu pre jej dôstojnosť.

Jedným z najčastejších argumentov (okrem objektovej formuly) proti prelamovaniu zásady „mater semper certa est“ v prospech náhradného materstva je obava z komodifikácie ľudského života. Termín komodifikácia označuje proces, pri ktorom sa s vecami alebo vzťahmi, ktoré majú vnútornú hodnotu, zaobchádza ako s tovarom určeným na predaj. Sobek a kol. varujú, že ak pripustíme trh s reprodukčnými schopnosťami, riskujeme eróziu základných morálnych noriem, na ktorých stojí naša civilizácia.¹⁸ Dieťa sa v tomto vnímaní stáva predmetom zmluvného plnenia, čo je v priamom rozpore s jeho postavením ako subjektu práv.

¹⁶ HAPLA, Martin a J. A. GEALFOW. „Základy právni filozofie“. Praha: Leges, 2026 s. 145

¹⁷ KROŠLÁK, Daniel. Právny štát – vývoj, princípy, mechanizmy ochrany. op. cit.

¹⁸ SOBEK, Tomáš a kol. Právni etika. Praha: Leges, 2019. s 169

Tento argument je nepochybne silný v prípade komerčnej surogácie, kde dochádza k jasnej finančnej transakcii. Otázkou však zostáva, či je aplikovateľný aj na altruistické náhradné materstvo, kde matka koná z túžby pomôcť blízkeľmu človeku bez nároku na zisk prípadne pri kompenzačnom náhradnom materstve, kde sa surogátke nahrádza ušlý zisk či náklady na tehotenstvo. Trimmings a Beaumont argumentujú, že striktný zákaz všetkých foriem surogácie je neproporcionálny, pretože hádže do jedného vreca vykorisťovanie a slobodný prejav solidarity.¹⁹ Ak štát zakazuje aj altruistickú surogáciu, v podstate tvrdí, že žena nie je schopná slobodne sa rozhodnúť pre takýto čin bez toho, aby bola inštrumentalizovaná.

Z hľadiska teórie práva ide o spor o hranice zmluvnej slobody v oblasti statusových vecí. Tradične sa statusové vzťahy vnímali ako niečo, čo stojí mimo dispozície strán. Avšak moderné právo čoraz viac uznáva autonómiu vôle aj v rodinnoprávných vzťahoch (napr. predmanželské zmluvy, dohody o styku). Ak štát uznáva právo ženy vzdať sa dieťaťa pri utajenom pôrode, uznáva tým jej dispozičné právo k jej materskému statusu. Je preto logicky nekonzistentné, ak jej toto dispozičné právo upiera v prípade, keď chce tento status od počiatku delegovať na iné osoby v rámci vopred dohodnutého a regulovaného procesu.

Ako to je s ponímaním ľudskej dôstojnosti v jednotlivých situáciách? Koho ľudskú dôstojnosť zákonodarca chráni? Kde presne sa javí problematickou?

3.1 Surogácia

Z pohľadu objektivej formuly sa surogácia javí ako inštrumentalizácia ženského tela. Náhradná matka sa v rámci surogačnej zmluvy stáva nástrojom na naplnenie reprodukčných túžob iných osôb. Právna argumentácia tu naráža na hranicu zmluvnej slobody. Aj keď náhradná matka so surogáciou súhlasí dobrovoľne, z pohľadu objektívnej hodnoty dôstojnosti je tento súhlas irelevantný, pretože dôstojnosť sa považuje za nescudziteľnú. Štát v tomto prípade vystupuje v roli paternalistického ochrancu, ktorý bráni devalvácii ľudskej bytosti na úroveň biologického inkubátora.

Ešte silnejší argument sa týka dôstojnosti dieťaťa. Surogácia v sebe nesie riziko komodifikácie, teda premeny dieťaťa na tovar alebo predmet plnenia zo zmluvy. Sobek a kol. zdôrazňujú, že určité aspekty ľudskej existencie by mali zostať mimo trhových mechanizmov, aby sa zabránilo devalvácii človeka na predmet zmluvného plnenia.²⁰ Ak je vznik rodinného puta podmienený transakciou, dochádza k narušeniu ontologického statusu dieťaťa ako

¹⁹ TRIMMINGS, Katarina a BEAUMONT Paul. International surrogacy arrangements: an urgent need for legal regulation at the international level. *Journal of Private International Law*. 2011, roč. 7, č. 3, s. 635

²⁰ SOBEK, Tomáš a kol. „Právní etika/. Praha: Leges, 2019. s 162

subjektu práv. PIRIE (2013, s. 13) v rámci antropológie práva poukazuje na to, že právne kategórie nie sú len technickými nástrojmi, ale konštruujú spoločenskú realitu.²¹ Ak právo pripustí, aby sa dieťa stalo predmetom odovzdania na základe vopred uzavretej dohody, mení sa samotná podstata vnímania ľudského života v spoločnosti. Trimmings a Beaumont v tejto súvislosti varujú pred reprodukčným turizmom, ktorý vzniká v dôsledku absencie medzinárodnej regulácie a vedie k právnej neistote detí, ktoré sa ocitajú v stave tzv. krívajúceho rodičovstva („limping parentage“).²²

Možným protiargumentom je tvrdenie, že zákaz náhradného materstva porušuje právo zamýšľaných rodičov na súkromný a rodinný život. V testoch proporcionality, ktoré sa v tejto súvislosti objavujú v judikatúre Európskeho súdu pre ľudské práva (napr. „Mennesson proti Francúzsku“), sa však dôraz presúva od práv rodičov k najlepšiemu záujmu dieťaťa. Slovenský zákonodarca sa v tomto smere drží striktnnej línie: ochrana dôstojnosti dieťaťa pred jeho inštrumentalizáciou preváži nad právom jednotlivcov na biologické rodičovstvo dosiahnuté prostredníctvom tretej osoby. Mokrá však pripomína, že vnútorná dimenzia ľudských práv v EÚ čoraz viac akcentuje právo na súkromný a rodinný život, čo môže v budúcnosti vyvolať tlak na prehodnotenie tohto absolutistického postoja, najmä ak ide o uznávanie statusu detí narodených v zahraničí.²³

Proti striktnému zákazu náhradného materstva možno postaviť niekoľko argumentov, ktoré vychádzajú napr. aj z liberálneho chápania osobnej slobody. Prvým argumentom je právo na reprodukčnú autonómiu. Ak má žena právo rozhodnúť sa o prerušení tehotenstva (čo slovenský právny poriadok v určitých medziach povoľuje), zdá sa byť logicky nekonzistentné, ak jej štát upiera právo rozhodnúť sa, že dieťa vynosí pre niekoho iného. Zákaz surogácie tu

²¹ TRIMMINGS, Katarina a Paul BEAUMONT. International surrogacy arrangements: an urgent need for legal regulation at the international level. op. cit. s. 630

²² Absencia jednotnej medzinárodnej regulácie a striktné národné zákazy prelamovania zásady „mater semper certa est“ viedli k vzniku fenoménu, ktorý právna veda označuje ako „krívajúce rodičovstvo“ („limping parentage“). Ide o stav, kedy je dieťa v krajine svojho narodenia (napr. USA alebo Ukrajina) právne spojené so zamýšľanými rodičmi, avšak v krajine ich pôvodu (napr. Slovensko) je stále považované za dieťa náhradnej matky. Tento stav je v priamom rozpore s princípom právnej istoty, ktorý je jedným zo základných pilierov právneho štátu. Krošlák definuje právnu istotu ako predvídateľnosť konania štátnych orgánov a stabilitu právneho postavenia jednotlivca. V prípade detí zo surogácie je táto istota hrubo narušená. Dieťa sa ocitá v právnom vákuu, nemá jasné štátne občianstvo, dedičské práva ani stabilného zákonného zástupcu. Štát, ktorý v mene ochrany abstraktnej dôstojnosti odmieta uznať realitu takéhoto dieťaťa, v skutočnosti poškodzuje jeho konkrétnu dôstojnosť a bezpečie. Riešenie tohto problému si vyžaduje odklon od rigidného „biologizmu“ smerom k funkčnému vnímaniu rodičovstva. Možno konštatovať, že zásada „mater semper certa est“ už v 21. storočí nemôže plniť funkciu absolútnej a neprekonateľnej bariéry. Jej prelamovanie v podobe anonymných pôrodov ukázalo, že právo je schopné flexibility, ak ide o ochranu života. Rovnaká flexibilita, podložená prísou reguláciou a ochranou najlepšieho záujmu dieťaťa, by mala byť uplatnená aj v diskusii o náhradnom materstve. Ak sa právo nedokáže prispôsobiť technologickému a spoločenskému vývoju, riskuje, že sa stane irelevantným súborom noriem, ktoré namiesto spravodlivosti prinášajú len ďalšie neriešiteľné ľudské tragédie.

²³ MOKRÁ, Lucia. „Internal Dimension of Human Rights Law in the EU.“ op. cit. s 75

vystupuje ako bariéra, ktorá žene bráni disponovať vlastnými biologickými schopnosťami. Ako uvádza Botha, rešpekt k vnútornej dôstojnosti vyžaduje uznanie schopnosti jednotlivca prekonať obmedzenia svojho sociálneho pozadia a formovať autonómnu identitu.²⁴ Ak je identita ženy spojená s pomocou iným prostredníctvom surogácie, štátny zákaz túto identitu potláča.

Druhý argument sa týka spochybnenia samotného konceptu inštrumentalizácie. Odporcovia zákazu tvrdia, že náhradné materstvo nie je o nič viac inštrumentalizujúce než akákoľvek iná forma námezdnnej práce alebo darcovstva. Ak spoločnosť akceptuje, že ľudia využívajú svoje telá na ťažkú fyzickú prácu, ktorá ich môže poškodiť, alebo ak akceptuje darcovstvo orgánov či krvi, prečo by gestačné materstvo malo byť vnímané ako niečo, čo človeka degraduje na vec? Singer by tu zdôraznil, že ak sú podmienky zmluvy férové a nedochádza k nátlaku, nie je dôvod hovoriť o strate dôstojnosti.²⁵ Naopak, pre mnohé ženy v zlej ekonomickej situácii môže byť surogácia preferovanou cestou k zabezpečeniu dôstojných životných podmienok pre ich vlastné rodiny.

Tretím, a možno najzávažnejším argumentom, je záujem dieťaťa na samotnej existencii. Slovenský prístup chráni dôstojnosť dieťaťa tým, že nedovolí, aby vzniklo za podmienok surogácie. Avšak z pohľadu dieťaťa, ktoré by sa takto narodilo, je táto ochrana paradoxná – štát ho chráni pred nedôstojným vznikom tak, že mu vôbec neumožní existovať. Singerov prístup by v tomto prípade uprednostnil existenciu šťastného života pred abstraktnou obavou z jeho komodifikácie. Ak dieťa vyrastá v milujúcej rodine zamýšľaných rodičov, fakt, že bolo vynosené náhradnou matkou, nespôsobuje v jeho živote reálnu ujmu („harm“), ktorá by prevládala hodnotu jeho existencie.

3.2 Anonymné pôrody

Pri anonymných pôrodoch je situácia odlišná. Povedali sme, že slovenský právny poriadok anonymné pôrody (resp. pôrody s utajenou identitou matky) umožňuje a reguluje prostredníctvom zákona o zdravotnej starostlivosti. Tento inštitút predstavuje fascinujúci príklad toho, ako sa zákonodarcovia vyrovnávajú s kolíziou dvoch základných práv – práva dieťaťa poznať svoj pôvod a práva matky na súkromie a ochranu zdravia, pričom nad oboma týmito právami stojí ochrana práva na život. Pri anonymnom pôrode dochádza k vážnemu zásahu do

²⁴ BOTHA, Henk. Human Dignity in Comparative Perspective. „Stellenbosch Law Review“, op. cit. s 218

²⁵ SINGER, Peter. „Practical Ethics“. 2. vyd. Cambridge: Cambridge University Press, 1993. s. 121

dôstojnosti dieťaťa, ktorej súčasťou je podľa mnohých teórií aj vedomie o vlastnej identite a biologických koreňoch. Ak štát inštitucionalizuje proces, v ktorom je dieťa odrezané od informácií o svojom pôvode, koná v zdanlivom rozpore s princípom dôstojnosti ako zdroja identity. Avšak v teste proporcionality tu na druhej strane váh stojí právo dieťaťa na život.

Zákonodarca vychádza z pragmatického, no eticky hlboko podloženého predpokladu, že ak by matka v krízovej situácii nemala možnosť porodiť bezpečne a anonymne, mohlo by dôjsť k ohrozeniu života dieťaťa prostredníctvom nelegálneho potratu, opustenia novorodenca v nevhodných podmienkach alebo dokonca infanticídy. V tomto kontexte sa anonymný pôrod javí ako menšie zlo. Dôstojnosť dieťaťa, hoci oslabená stratou identity, je stále zachovaná v jej najzákladnejšej rovine – v zachovaní fyzickej existencie. Ľalík pri analýze testu proporcionality zdôrazňuje, že v treťom kroku (proporcionality v užšom zmysle) musí zákonodarca vyvážiť intenzitu zásahu do jedného práva s prínosom pre druhé právo.²⁶ V prípade anonymných pôrodov je záchrana života hodnotou tak vysokou, že ospravedlňuje aj trvalú stratu informácií o biologickom pôvode.

Barak pri analýze proporcionality zdôrazňuje, že ústavné hodnoty sa nesmú interpretovať izolovane.²⁷ V prípade anonymných pôrodov sa dôstojnosť matky (jej právo na súkromie a ochranu pred sociálnou stigmu) spája s ochranou života dieťaťa a vytvára silný argumentačný blok, ktorý preváži nad právom na informácie o pôvode. Je však dôležité zdôrazniť, že tento zásah je prípustný len vtedy, ak sú zachované určité procesné záruky, napríklad možnosť dodatočného odtajnenia údajov za presne stanovených podmienok, čo zmierňuje dopad na identitu dieťaťa. Protiargument by mohol spočívať v tvrdení, že štát anonymným pôrodom legitimizuje nezodpovedné správanie matky a porušuje právo otca na určenie otcovstva. Tu však narážame na hierarchiu hodnôt, kde ochrana bezprostredne ohrozeného života novorodenca požíva najvyššiu prioritu.

Pri porovnaní zákazu náhradného materstva a povolenia anonymných pôrodov sa na prvý pohľad môže zdať, že slovenský zákonodarca postupuje nekonzistentne. V oboch prípadoch ide o narušenie tradičnej zásady „mater semper certa est“ a v oboch prípadoch je v hre dôstojnosť dieťaťa a matky. Bližšia analýza však odhaľuje hlbšiu logiku založenú na rozlišovaní medzi inštrumentalizáciou a záchranou. V prípade náhradného materstva je dôstojnosť porušená už v samotnom zámere. Celý proces je od počiatku koncipovaný tak, aby

²⁶ ĽALÍK, Tomáš. Obmedzovanie ľudských práv a test proporcionality: teória a prax. op. cit. s. 112

²⁷ BARAK, Aharon. „Human Dignity: The Constitutional Value and the Constitutional Right“. Cambridge: Cambridge University Press, 2015.s. 156

sa dieťa stalo predmetom dohody a náhradná matka prostriedkom na dosiahnutie cieľa. Ide o vopred naplánovaný zásah do statusových práv, ktorý má komerčný alebo kvázi-komerčný charakter. Test proporcionality tu zlyháva už v prvom kroku (vhodnosť a nevyhnutnosť), pretože cieľ (naplnenie túžby po dieťati) nie je ústavne tak intenzívny, aby ospravedlnil degradáciu človeka na úroveň objektu zmluvy.

Pri anonymných pôrodoch je situácia odlišná. Anonymita nie je cieľom, ale prostriedkom na ochranu najvyššej hodnoty – života. Zákonodarca tu nereaguje na dopyt po novej službe, ale na tragickú sociálnu realitu žien v neriešiteľných situáciách. Zatiaľ čo surrogácia dôstojnosť aktívne popiera v mene individuálnej vôle, anonymný pôrod sa snaží dôstojnosť (v zmysle práva na život) zachrániť v tieni hroziacej katastrofy. Tento rozdiel možno vysvetliť aj cez prizmu sociálneho štátu, podľa ktorej má štát povinnosť vytvárať podmienky pre dôstojný život. Pri anonymných pôrodoch túto povinnosť naplňa poskytnutím bezpečného priestoru pre matku aj dieťa. Pri surrogácii by však štát pripustením trhu s reprodukčnými schopnosťami rezignoval na svoju funkciu garanta morálnych základov spoločnosti.

Z hľadiska dogmatiky práva môžeme konštatovať, že slovenský prístup k týmto inštitútom je koherentný, ak prijmeme tézu o hierarchii komponentov ľudskej dôstojnosti. Fyzická existencia (právo na život) stojí na vrchole tejto hierarchie a jej ochrana ospravedlňuje aj zásahy do identity (anonymné pôrody). Naopak, inštrumentalizácia človeka (náhradné materstvo) predstavuje zásah do samotného jadra dôstojnosti, ktorý nemožno vyvážiť žiadnym individuálnym záujmom iných osôb, nech by bol akokoľvek pochopiteľný. Horák však upozorňuje, že ak sa dôstojnosť používa ako axióma, test proporcionality sa stáva nemožným, pretože jedna strana váh je vopred určená ako absolútna.²⁸

Záver

Predložená analýza vývoja a súčasného stavu zásady „mater semper certa est“ v slovenskom právnom poriadku ukazuje, že tento tradičný rímskoprávny postulát už nemožno vnímať ako neotrasiteľnú dogmu, ale skôr ako východiskový princíp, ktorý v prostredí moderných biotechnológií čelí bezprecedentnej fragmentácii. Hoci slovenský zákonodarca v § 80 zákona o rodine naďalej striktnie petrifikuje gestačné materstvo, tento prístup sa v kontexte materiálneho právneho štátu javí ako čoraz problematickejší. Rozpor medzi genetickou realitou, gestačným aktom a sociálnym úmyslom vytvára právne vákuum, ktoré formálna

²⁸ HORÁK, Filip. Human Dignity in Legal Argumentation: A Functional Perspective. „European Constitutional Law Review“. 2022, roč. 18, s. 254

zákonnosť dokáže preklenúť len za cenu vedomého ignorovania biologickej pravdy a autonómie vôle jednotlivca.

Komparácia inštitútov náhradného materstva a anonymných pôrodov odhalila hlbokú hodnotovú hierarchiu, ktorou sa slovenská právna úprava riadi. Zdá sa, že štát vníma ľudskú dôstojnosť v dvoch odlišných rovinách. Pri anonymných pôrodoch ustupuje právo dieťaťa na identitu a poznanie pôvodu v prospech ochrany jeho fyzickej existencie. Tu sa dôstojnosť interpretuje pragmaticky – ako záchrana života v tieni hroziacej tragédie. Naopak, pri surogácii zákonodarca uplatňuje striktnú kantovskú perspektívu a objektívnu formulu, kde je akýkoľvek zmluvný zásah do statusových vecí vnímaný ako neprípustná inštrumentalizácia ženy a komodifikácia dieťaťa. Tento prístup však v sebe nesie vnútorný paradox: v snahe ochrániť dieťa pred „nedôstojným“ vznikom mu štát apriórne upiera možnosť existovať, čím povyšuje abstraktnú morálnu integritu nad individuálny záujem na živote v milujúcom rodinnom prostredí.

Z hľadiska teórie a dejín štátu a práva možno konštatovať, že dochádza k posunu funkcie skúmanej zásady. Z absolútneho určovacieho pravidla sa stáva nástroj štátneho paternalizmu, ktorý slúži na udržanie tradičného modelu rodiny. Absolútny ústavný zákaz náhradného materstva bez možnosti individuálneho vyvažovania v rámci testu proporcionality však naráža na limity materiálneho jadra ústavy. Ak je súčasťou dôstojnosti aj právo na sebaurčenie a formovanie vlastného osudu, potom totálna negácia reprodukčnej autonómie môže byť vnímaná ako prejav neprimeranej štátnej moci. Navyše, fenomén „krívajúceho rodičovstva“ pri deťoch narodených v zahraničí ukazuje, že vnútroštátna rigidita nedokáže efektívne čeliť globalizovanej realite reprodukčného turizmu, čo v konečnom dôsledku najviac poškodzuje právne postavenie samotného dieťaťa.

Možno predpokladať, že tlak judikatúry Európskeho súdu pre ľudské práva a dynamika spoločenských vzťahov skôr či neskôr prinúti slovenskú aplikačnú prax k nuansovanejšiemu prístupu. Zásada „mater semper certa est“ pravdepodobne nezanikne, no jej uplatňovanie bude musieť reflektovať právo na identitu a najlepší záujem dieťaťa spôsobom, ktorý nebude slepý voči genetickej väzbe a úprimnému rodičovskému úmyslu. Budúci vývoj by sa mal uberať cestou hľadania rovnováhy medzi ochranou pred vykorisťovaním a rešpektovaním nových foriem solidarity v oblasti asistovanej reprodukcie. Právo v tejto oblasti nesmie byť len statickým súborom zákazov, ale živým systémom schopným reagovať na etické dilemy 21. storočia bez toho, aby rezignovalo na ochranu tých najzraniteľnejších subjektov.

Bibliografické zdroje

Knihy a monografie:

1. BARAK, Aharon. Proportionality: Constitutional Rights and their Limitations. Cambridge: Cambridge University Press, 2012. ISBN 978-1-107-00717-8.
2. HAPLA, Martin a Jakub GEALFOW. Lidská důstojnost: konceptualizace a aplikace. Praha: Leges, 2022. ISBN 978-80-7502-614-9.
3. HORÁK, Filip. Lidská důstojnost jako právní pojem. Praha: Leges, 2021. ISBN 978-80-7502-534-0.
4. KÁČER, Marek a Ján NEUMANN. Materiálne jadro Ústavy Slovenskej republiky. Praha: Leges, 2019. ISBN 978-80-7502-354-4.
5. KROŠLÁK, Daniel a kol. Ústavné právo. Bratislava: Wolters Kluwer, 2016. ISBN 978-80-8168-511-8.
6. ĽALÍK, Tomáš. Ústavný súd a parlament v konštitučnej demokracii. Bratislava: Wolters Kluwer, 2015. ISBN 978-80-8168-283-4.
7. MOKRÁ, Lucia. Vnútrošná dimenzia ľudských práv v EÚ. Bratislava: Eurokódex, 2011. ISBN 978-80-89447-49-7.
8. PAVELKOVÁ, Bronislava. Zákon o rodine: komentár. 3. vyd. Praha: C.H. Beck, 2019. ISBN 978-80-7400-756-9.
9. PIRIE, Fernanda. The Anthropology of Law. Oxford: Oxford University Press, 2013. ISBN 978-0-19-969684-0.
10. SINGER, Peter. Practical Ethics. 3rd ed. Cambridge: Cambridge University Press, 2011. ISBN 978-0-521-70768-8.
11. SOBEK, Tomáš a kol. Právní etika. Praha: Leges, 2019. ISBN 978-80-7502-330-8.
12. TRIMMINGS, Katarina a Paul BEAUMONT, ed. International Surrogacy Arrangements: Legal Regulation at the International Level. Oxford: Hart Publishing, 2013. ISBN 978-1-84946-280-8.

Články v časopisoch:

13. BOTHA, Henk. Human Dignity in Comparative Constitutional Context. South African Journal on Human Rights. 2009, roč. 25, č. 2, s. 171–220. ISSN 0258-7203.

Judikatura a právne predpisy:

14. Mandet proti Francúzsku. Rozsudok zo dňa 21. júla 2016, sťažnosť č. 30955/12.
15. Mennesson proti Francúzsku. Rozsudok zo dňa 26. júna 2014, sťažnosť č. 65192/11.
16. Ústava Slovenskej republiky č. 460/1992 Zb. v znení neskorších predpisov.
17. Zákon č. 36/2005 Z. z. o rodine a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.

ZLYHANIE VÝKONU STYKU RODIČA S MALOLETÝM DIEŤAŤOM AKO PORUŠENIE POZITÍVNYCH ZÁVÄZKOV ŠTÁTU PODĽA ČLÁNKU 8 DOHOVORU

Failure to Enforce Parental Contact as a Violation of the State's Positive Obligations under Article 8 of the Convention

LUANA MAZREKU *

Abstrakt

Príspevok sa zaoberá otázkou zlyhania výkonu súdne určeného styku rodiča s maloletým dieťaťom z pohľadu článku 8 Európskeho dohovoru o ľudských právach. Analyzujeme hmotnoprávnu a procesnú dimenziu práva na rešpektovanie rodinného života a doktrínu pozitívnych záväzkov štátu v sporoch týkajúcich sa rodičovských práv. Príspevok vychádza z judikatúry Európskeho súdu pre ľudské práva (ďalej len ESĽP), najmä z rozhodnutí L.B. proti Slovenskej republike, Zawadka proti Poľsku, Strömblad proti Švédsku a S.I. proti Slovinsku. Cieľom je preukázať, že formálna existencia vykonateľného rozhodnutia bez jeho efektívneho výkonu predstavuje porušenie článku 8 Dohovoru a vedie k faktickému odňatiu rodinného života.

Abstract

The article examines the failure to enforce court-ordered parental contact with a minor child from the perspective of Article 8 of the European Convention on Human Rights. It analyses both the substantive and procedural dimensions of the right to respect for family life and the doctrine of the State's positive obligations in parental disputes. The contribution is based on the case-law of the European Court of Human Rights, particularly L.B. v. Slovakia, Zawadka v. Poland, Strömblad v. Sweden and S.I. v. Slovenia. It argues that the mere formal existence of an enforceable judgment without effective execution constitutes a violation of Article 8 and may amount to a de facto deprivation of family life.

Kľúčové slová: Rodinný život. Pozitívne záväzky. Výkon rozhodnutia. Rodičovské práva. Článok 8 Dohovoru.

Key words: Family life. Positive obligations. Enforcement of judgments. Parental rights. Article 8 ECHR.

Úvod

Právo na rešpektovanie rodinného života patrí medzi najintenzívnejšie chránené hodnoty európskeho systému ochrany ľudských práv. Článok 8 Dohovoru o ochrane ľudských práv a základných slobôd (ďalej len Dohovor) garantuje jednotlivcovi ochranu pred zásahmi verejnej moci do rodinných väzieb, no zároveň ukladá štátu aktívnu povinnosť tieto väzby podporovať a chrániť.

Osobitnú citlivosť predstavujú spory týkajúce sa styku rodiča s maloletým dieťaťom. ESĽP opakovane zdôraznil, že v takýchto veciach zohráva rozhodujúcu úlohu čas. Jeho plynutie môže viesť k nenávratnému oslabeniu alebo prerušeniu rodičovsko-detskej väzby, a tým fakticky vyriešiť spor bez ohľadu na jeho právne posúdenie.

* JUDr. Ing. Mgr. Luana Mazreku, LL.M., 3. ročník, denná forma, doktorandský stupeň štúdia, luana.mazreku@icloud.com, Paneurópska Vysoká škola Fakulta práva, ústav súkromného práva, katedra Občianskeho práva.

Cieľom príspevku je analyzovať, či zlyhanie výkonu právoplatného a vykonateľného rozhodnutia o styku predstavuje porušenie pozitívnych záväzkov štátu podľa článku 8 Dohovoru, a to prostredníctvom detailnej komparácie relevantnej judikatúry ESLP s dôrazom na najnovšie rozhodnutie L.B. v. Slovakia z roku 2024.

1. Teoretické východiská: pozitívne záväzky podľa článku 8

1.1 Dvojrozmerná povaha článku 8

Článok 8 Dohovoru obsahuje negatívne aj pozitívne záväzky. Negatívna povinnosť spočíva v tom, že štát nesmie svojvoľne zasahovať do rodinného života. Pozitívna povinnosť znamená, že štát musí prijať opatrenia umožňujúce efektívne zachovanie rodinných väzieb.¹

Harris et al. (2023) uvádzajú, že rozdiel medzi negatívnymi a pozitívnymi záväzkami nie je ostrý, keďže kľúčovým kritériom je zabezpečenie spravodlivej rovnováhy medzi záujmami jednotlivca a verejným záujmom. Posudzovanie tejto rovnováhy si vyžaduje kontextuálnu analýzu, pričom štát disponuje určitou mierou voľnej úvahy (margin of appreciation).

Mowbray (2012) zdôrazňuje, že doktrína pozitívnych záväzkov predstavuje jeden z najvýznamnejších evolučných prvkov výkladu Dohovoru, keďže transformuje ochranu práv z pasívneho modelu na aktívny. Štát teda nie je iba strážcom negatívnej slobody, ale aj aktívnym subjektom zodpovedným za vytváranie podmienok na reálne požívanie zaručených práv.²

1.2 Pozitívne záväzky v rodinnoprávných veciach

V oblasti rodičovských práv pozitívne záväzky zahŕňajú najmä: povinnosť viesť konanie s náležitou starostlivosťou a bez prieťahov, povinnosť zabezpečiť vykonateľnosť rozhodnutí vydaných v záujme ochrany rodinného života, a povinnosť reagovať na obštrukčné správanie jedného z rodičov.³

Guide on Article 8 (Council of Europe, 2023) výslovne uvádza, že štát musí prijať konkrétne kroky smerujúce k obnoveniu styku rodiča s dieťaťom, ak tomu bránia faktické okolnosti alebo správanie druhého rodiča (take measures to facilitate reunion where appropriate).

2. Procesná dimenzia článku 8

ESLP vyvinul koncepciu procesných požiadaviek implicitne obsiahnutých v článku 8. Tieto požiadavky zahŕňajú: spravodlivý proces, dostatočné dokazovanie, odôvodnenosť rozhodnutia

¹ Harris, D., O'Boyle, M., Bates, E., & Buckley, C. (2023). Law of the European Convention on Human Rights (5th ed.). Oxford University Press, s. 415.

² Mowbray, A. (2012). The Development of Positive Obligations under the European Convention on Human Rights. Hart Publishing, s. 183.

³ Council of Europe. (2023). Guide on Article 8 of the European Convention on Human Rights. Strasbourg: Council of Europe, s. 29.

a primeranú dĺžku konania. Nejde teda len o zachovanie formálnych procesných štruktúr, ale o skutočnú účinnosť konaní pri ochrane rodinného života.

V rozhodnutí *Strömblad v. Sweden* (2012) Súd výslovne prepojil procesné požiadavky s hmotnoprávnou ochranou rodinného života a zdôraznil potrebu mimoriadnej starostlivosti (exceptional diligence) zo strany vnútroštátnych orgánov. Konštatoval, že neprijatie účinných opatrení v primeranom čase môže samo osebe predstavovať porušenie článku 8, a to bez ohľadu na to, či formálne rozhodnutie vo veci existuje.⁴

Táto procesná dimenzia je osobitne dôležitá v prípadoch, keď rodič, s ktorým dieťa nežije, nie je schopný zabezpečiť výkon styku vlastnými silami a je odkázaný na súčinnosť štátnych orgánov. Pasivita alebo formalizmus týchto orgánov tak priamo vedie k porušeniu práva na rodinný život.

3. Komparatívna analýza judikatúry ESLP

3.1 Zawadka v. Poland (2005)

V tejto veci matka systematicky marila výkon styku otca s dieťaťom napriek existujúcemu súdnemu rozhodnutiu. Poľské orgány reagovali oneskorene a neefektívne. ESLP konštatoval, že pasívna tolerancia obštrukcie zo strany štátu predstavuje porušenie článku 8.⁵

Kľúčovými závermi rozhodnutia sú: štát musí prijať primerané donucovacie opatrenia na zabezpečenie výkonu styku; samotná existencia rozhodnutia nestačí na splnenie pozitívnych záväzkov; a nečinnosť orgánov je nezlučiteľná s Dohovorom. Súd zdôraznil, že záujem dieťaťa nemôže byť použitý ako univerzálna zámienka na ignorovanie práv nekustodického rodiča.

3.2 Strömblad v. Sweden (2012)

Súd v tomto rozhodnutí systematicky prepojil procesnú efektívnosť s ochranou rodinného života. Zdôraznil princíp mimoriadnej starostlivosti a poukázal na to, že čas môže viesť k nezvratným následkom – postupnej alienácii dieťaťa od rodiča, s ktorým nežije.⁶

Rozhodnutie zaviedlo do judikatúry ESLP jasný štandard: orgány štátu sú povinné konať proaktívne a eskalovať opatrenia v závislosti od dĺžky trvania obštrukcie. Jednorazové formálne kroky nestačia; orgány musia preukázať systematický a dôsledný prístup.

3.3 S.I. v. Slovenia (2011)

V tejto veci konanie o styku trvalo neprimerane dlho a prijaté opatrenia boli neefektívne. ESLP konštatoval porušenie článku 8 pre nedostatočne účinný postup vnútroštátnych orgánov.

⁴ *Strömblad v. Sweden*, no. 3684/07, ECHR 2012, § 34.

⁵ *Zawadka v. Poland*, no. 48542/99, ECHR 2005, §§ 55-67.

⁶ *Strömblad v. Sweden*, no. 3684/07, ECHR 2012, § 80.

Osobitne kritizoval absenciu mechanizmov na urýchlené riešenie situácie a skutočnosť, že vnútroštátne súdy sa nevyrovnali s dlhotrvajúcou absenciou styku.⁷

Rozhodnutie S.I. je pozoruhodné tým, že Súd poukázal na systémový charakter problému: zlyhanie výkonu styku nebolo izolovaným prípadom, ale odrážalo štrukturálne nedostatky slovenského systému ochrany práv detí.

3.4 L.B. v. Slovakia (2024)

Recentné rozhodnutie L.B. v. Slovakia (2024) má mimoriadny význam pre slovenskú prax. Ide o priame posúdenie fungovania slovenských orgánov v kontexte výkonu rodičovských práv.⁸

Súd konštatoval, že orgány neprijali dostatočne účinné opatrenia na zabezpečenie výkonu styku, tolerovali obštrukčné správanie jedného z rodičov a formálne výkonové rozhodnutia nestačia na preukázanie súladu s pozitívnymi záväzkami. Súd výslovne uviedol, že nedostatočná spolupráca medzi rodičmi nezbavuje štát jeho pozitívnych záväzkov.

Rozhodnutie potvrdzuje trend, ktorý ESĽP nastavil ešte vo veci Zawadka, a zdôrazňuje, že Slovenská republika je povinná vytvoriť funkčné mechanizmy zabezpečujúce reálny výkon súdnych rozhodnutí o styku.

3.5 Ignaccolo-Zenide v. Romania (2000)

Rozhodnutie Ignaccolo-Zenide v. Romania predstavuje jeden z prelomových rozsudkov ESĽP v oblasti výkonu rodičovských práv a časovo predchádza neskoršej línii judikatúry potvrdenej vo veciach Zawadka, Strömblad a L.B. Napriek svojmu veku si zachováva plnú doktrínálnu relevantnosť, keďže práve v ňom Súd prvýkrát systematicky artikuloval štandard pozitívnych záväzkov štátu vo vzťahu k medzinárodným únosom detí a výkonu práva na návrat.

Skutkový základ veci spočíval v tom, že francúzska štátna príslušníčka, ktorej deti boli protiprávne zadržované na území Rumunska ich otcom, márne žiadala rumunské orgány o výkon rozhodnutia vydaného v súlade s Haagskym dohovorom o občianskoprávných aspektoch medzinárodných únosov detí z roku 1980. Rumunské orgány síce formálne konali, avšak ich opatrenia boli pomalé, nekoordinované a v konečnom dôsledku neúčinné. Deti zostali odlúčené od matky po dobu niekoľkých rokov.

ESĽP jednomyselne konštatoval porušenie článku 8 Dohovoru. Súd zdôraznil, že primeranosť opatrení prijatých štátom sa posudzuje nielen z hľadiska ich formálnej existencie, ale predovšetkým z hľadiska ich skutočnej účinnosti v čase. Kľúčovým kritériom je, či orgány konali s náležitou starostlivosťou a bez zbytočných prieťahov zodpovedajúcich naliehavosti

⁷ S.I. v. Slovenia, no. 45082/05, ECHR 2011, § 62.

⁸ L.B. v. Slovakia, no. 5541/22, ECHR 2024, § 88.

situácie. Súd výslovne uviedol, že záväzky podľa článku 8 zahŕňajú prijatie všetkých opatrení, ktoré možno od príslušných orgánov rozumne požadovať za účelom uľahčenia reunifikácie rodiča s dieťaťom.¹²

Pre komparatívnu analýzu je rozhodnutie Ignaccolo-Zenide mimoriadne cenné z viacerých dôvodov. Po prvé, explicitne prepája pozitívne záväzky s medzinárodnoprávnymi záväzkami štátu vyplývajúcimi z Haagskeho dohovoru, čím rozširuje ochranný rámec článku 8 nad rámec čisto vnútroštátnych konaní. Po druhé, Súd zaviedol doktrínu proporcionálnej eskalácie – t. j. požiadavku, aby orgány stupňovali intenzitu svojich opatrení úmerne k dĺžke trvania odlúčenia a k opakovanému zlyhaniu predchádzajúcich intervencií. Po tretie, rozhodnutie anticipuje neskorší dôraz na časový faktor, ktorý ESLP systematicky rozvíjal v rozhodnutiach Strömblad a L.B.⁹

V kontexte slovenských prípadov je analogický argument obzvlášť relevantný: ak vnútroštátne orgány opakovane vydávajú formálne rozhodnutia bez reálneho donucovacieho efektu, dopúšťajú sa práve toho typu zlyhania, ktoré Súd identifikoval v Ignaccolo-Zenide – teda systémovej neschopnosti premeniť právny záväzok na faktický výsledok.

4. Komparácia skutkových a právnych prvkov

Na základe analyzovaných rozhodnutí možno identifikovať konzistentný vzorec porušenia článku 8, ktorý Súd posudzuje prostredníctvom nasledovnej komparácie:

Prvok	Zawadka	S.I.	L.B.	Ignaccolo-Zenide	Typický prípad
Existencia rozhodnutia	Ano	Ano	Ano	Ano	Ano
Obštrukcia rodiča	Ano	Ano	Ano	Ano	Ano
Nečinnosť orgánov	Ano	Ano	Ano	Ano	Často
Dlhodobá absencia styku	Ano	Ano	Ano	Ano	Ano
Porušenie čl. 8	Konštatované	Konštatované	Konštatované	Konštatované	Pravdepodobne

Z komparácie vyplýva, že ESLP systematicky posudzuje efektívnosť reakcie štátu, časový faktor a existenciu eskalujúcich opatrení. Kumulácia týchto prvkov vedie k záverom o porušení článku 8. Kritickým aspektom nie je ani tak formálna existencia právnych nástrojov, ako skôr ich skutočné využitie v praxi.

5. De facto odňatie rodičovských práv

⁹ Ignaccolo-Zenide v. Romania, no. 31679/96, ECHR 2000, § 96.

Ak rodič dlhodobo nevidí dieťa napriek existujúcemu vykonateľnému rozsudku, vzniká stav, ktorý možno označiť ako faktické odňatie rodinného života. Tento stav nie je právne formalizovaný, avšak jeho účinky sú z hľadiska ochrany Dohovoru rovnako závažné ako explicitné obmedzenie rodičovských práv.¹⁰

Kilkelly (2001) uvádza, že právo na rodinný život zahŕňa nielen biologické väzby, ale aj reálnu možnosť ich rozvíjať. Dlhodobé prerušenie kontaktu oslabuje citové väzby medzi rodičom a dieťaťom, zvyšuje riziko psychologickej alienácie a vedie k adaptácii dieťaťa na absenciu rodiča, čo spätne komplikuje obnovenie styku.

Takýto stav je v priamom rozpore s pojmom *theoretical and illusory rights*, ktorý ESLP dôsledne odmieta. Súd opakovane zdôrazňuje, že Dohovor zaručuje práva, ktoré sú praktické a účinné, nie abstraktné a iluzórne.¹¹

6. Systémové implikácie pre slovenský právny poriadok

Z analyzovanej judikatúry vyplývajú konkrétne implikácie pre slovenský systém výkonu rodinnoprávných rozhodnutí. Rozhodnutie *L.B. v. Slovakia* (2024) predstavuje imperatív pre legislatívnu a aplikačnú prax.

Identifikovateľné systémové nedostatky zahŕňajú formalizmus výkonových konaní, nedostatočné využívanie dostupných donucovacích prostriedkov, neochotu aplikovať trestnoprávne nástroje v prípadoch chronickej obštrukcie a absenciu mechanizmov na urýchlený postup v prípadoch, kde čas hrá rozhodujúcu úlohu.

Ak výkon súdnych rozhodnutí ostáva symbolický, článok 8 stráca svoju efektívnosť. Ochrana práva na rodinný život nemôže byť deklaratórna – musí byť materiálna, efektívna a včasná. Slovenské súdy a orgány sociálnoprávnej ochrany detí sú povinné zosúladiť svoju prax so štandardmi vyplývajúcimi z judikatúry ESLP, a to pod hrozbou medzinárodnej zodpovednosti štátu.

Záver

Analýza judikatúry ESLP potvrdzuje, že pozitívne záväzky štátu podľa článku 8 Dohovoru zahŕňajú aj zabezpečenie efektívneho výkonu súdne určeného styku rodiča s maloletým dieťaťom. Tieto záväzky nie sú splnené samotným vydaním rozhodnutia; štát je povinný zabezpečiť jeho reálnu realizáciu.

Čas je rozhodujúcim faktorom v sporoch o rodičovské práva – jeho plynutie môže mať nezvratné dôsledky pre rodičovsko-detský vzťah. Pasívna tolerancia obštrukčného správania zo

¹⁰ Kilkelly, U. (2001). The best of both worlds for children's rights? *Human Rights Quarterly*, 23(2), 308-326.

¹¹ *Airey v. Ireland*, no. 6289/73, ECHR 1979, § 24.

strany orgánov vedie k porušeniu článku 8, pričom formálna existencia rozhodnutia bez jeho výkonu predstavuje faktické odňatie rodinného života.

Rozhodnutie *L.B. v. Slovakia* (2024) adresuje tieto otázky priamo vo vzťahu k Slovenskej republike a zaväzuje príslušné orgány k systémovej zmene. Efektívna ochrana práva na rodinný život si vyžaduje nielen adekvátne právne nástroje, ale aj vôľu a kapacitu ich skutočne využívať.

Bibliografia

1. Council of Europe. (2023). Guide on Article 8 of the European Convention on Human Rights. Strasbourg: Council of Europe.
2. Harris, D., O'Boyle, M., Bates, E., & Buckley, C. (2023). Law of the European Convention on Human Rights (5th ed.). Oxford University Press.
3. Kilkelly, U. (2001). The best of both worlds for children's rights? Interpreting the European Convention on Human Rights in the light of the UN Convention on the Rights of the Child. *Human Rights Quarterly*, 23(2), 308-326.
4. Mowbray, A. (2012). The Development of Positive Obligations under the European Convention on Human Rights. Hart Publishing.

Judikatúra

5. *Airey v. Ireland*, no. 6289/73, ECHR 1979.
6. *L.B. v. Slovakia*, no. 5541/22, ECHR 2024.
7. *S.I. v. Slovenia*, no. 45082/05, ECHR 2011.
8. *Strömblad v. Sweden*, no. 3684/07, ECHR 2012.
9. *Zawadka v. Poland*, no. 48542/99, ECHR 2005.

ROZŠIROVANIE VÝKLADU PRIMÁRNEHO PRÁVA – KAM AŽ MÔŽE ZÁJSŤ EXTENZÍVNY VÝKLAD PRÁVA VOĽNÉHO POHYBU OBČANOV EURÓPSKEJ ÚNIE?

*Expanding the interpretation of the primary law – How far can the extensive
interpretation of the free movement of EU citizens may go?*

VERONIKA JANÁKOVÁ*

Abstrakt

V poslednej dekáde je Súdny dvor Európskej únie čím ďalej viac odvážny pri výklade primárneho práva. Tým začína zasahovať aj do oblastí, ktoré sú podľa zakladajúcich zmlúv zverené výlučne členským štátom. V príspevku sa venujem dvom významným rozsudkom SDEÚ vo veci Cupriak-Trojan a Shipov. Oba prípady sa týkajú zmeny údajov občanov EÚ v matrike členského štátu pôvodu v dôsledku využitia práva voľného pohybu a pobytu podľa čl. 20 ods. 2 písm. a) a čl. 21 ods. 1 ZFEÚ. Cieľom príspevku je posúdiť, či argumentácia voľným pohybom osôb stojí na pevných základoch a podporuje integračné myšlienky Európskej únie alebo rozširuje kompetencie Súdneho dvora nežiadúcim spôsobom.

Abstract

In the last decade, the Court of Justice of the European Union has become increasingly bold in its interpretation of the primary law. It is thus beginning to intervene in areas that has been exclusively conferred to the Member States under the Founding Treaties. In this paper, I will discuss two significant judgments of the CJEU in the Cupriak-Trojan and Shipov cases. Both cases concern the change of data of EU citizens in the registry of the Member State of origin as a result of the exercise of their right to move and reside freely under the Art. 20(2)(a) and Art. 21(1) TFEU. The aim of the paper is to assess whether the argumentation of the free movement of persons is based on solid foundations and supports the integration ideas of the European Union or expands the competences of the Court of Justice in an undesirable way.

Kľúčové slová: *Primárne právo, právo voľného pohybu a pobytu, interpretácia, Súdny dvor Európskej únie, národná identita, ultra vires kontrola, integrácia.*

Key words: *Primary law, right to move and reside freely, interpretation, The Court of Justice of the European Union, national identity, ultra vires review, integration.*

Úvod

„United in diversity“ alebo „zjednotená v rozmanitosti“, motto reprezentujúce Európsku úniu od roku 2000 odpovedá základnej myšlienke, ktorá sa prelína všetkými sférami upravenými právom Európskej únie. Motto charakterizujúce snahu o stále väčšie približovanie právnych poriadkov členských štátov prostredníctvom primárneho a sekundárneho práva. Svoju úlohu zohráva v tomto smere aj Súdny dvor Európskej únie („SDEÚ“ alebo „Súdny dvor“), ktorému členské štáty zverili právomoc vykladať primárne aj sekundárne právo.¹ Súdny

* Mgr. Veronika Janáková, doktorandka, 2. ročník, prezenčná forma doktorandského štúdia, Katedra Medzinárodného a európskeho práva, Masarykova univerzita, veronika.janakova@mail.muni.cz.

¹ Čl. 19 ods. 1 Zmluvy o Európskej únii („ZEÚ“), čl. 267 písm. a) Zmluvy o fungovaní Európskej únie („ZFEÚ“).

dvor má špecifické postavenie, ktoré sa nepodobá žiadnemu inému subjektu na poli medzinárodného práva. Má do určitej miery monopol na výklad práva EÚ, pričom jeho faktické ovplyvnenie vonkajšími faktormi (vnútroštátne právo, medzinárodné právo, medzinárodná súdna prax, atď.) je obmedzené jeho vlastnou ochotou k nim pristúpiť.²

Predmetom tohoto príspevku je problematika extenzívneho a kreatívneho výkladu práva EÚ v oblasti voľného pohybu a pobytu občanov Európskej únie. Súdny dvor vydal koncom minulého roku dlho očakávaný rozsudok vo veci *Cupriak-Trojan*³ týkajúci sa zápisu legálne uzavretého manželstva osôb rovnakého pohlavia v inom členskom štáte do matriky v štáte pôvodu. Svoje závery odôvodnil mimo iné tiež právom občanov EÚ na voľný pohyb a pobyt v rámci Únie. V obdobnej argumentačnej línii pokračoval Súdny dvor aj v rozhodnutí *Shipov*.⁴ V ňom zašiel ešte ďalej, keď uviedol, že *ultra vires* kontrola zo strany ústavného súdu je neprípustná. Cieľom príspevku je posúdiť, či spôsob, akým Súdny dvor pristúpil k interpretácii voľného pohybu občanov EÚ v oblasti zverenej do výlučnej právomoci členských štátov obstojí v konfrontácii s národnými hodnotami členských štátov.

Občianstvo EÚ ako cesta k odvodeným právam

Hoci metódy interpretácie a odôvodnenia rozhodnutí SDEÚ nie sú často predmetom kritiky zo strany odbornej verejnosti, niektorí akademici sa prikláňajú k názoru, že SDEÚ začína v poslednej dobe vystupovať navonok viac aktivisticky.⁵ To si ale protirečí so skutočnosťou, že Súdny dvor má pri výklade práva k dispozícii len nástroje, ktoré mu boli zverené prostredníctvom zakladajúcich zmlúv. Vágne a obširne znenie niektorých ustanovení poskytuje SDEÚ dostatok priestoru, aby mohol pristúpiť k extenzívnejšiemu výkladu, než je tomu v prípade vecne obsiahlejších a konkrétnejších ustanovení.⁶ Takým je aj čl. 20 ods. 2 písm. a) a čl. 21 ods. 1 ZFEÚ, ktorým Maastrichtská zmluva rozšírila právo voľného pohybu a pobytu aj na osoby ekonomicky neaktívne. Čl. 20 ods. 2 písm. a) a čl. 21 ods. 1 ZFEÚ poskytuje len veľmi obmedzený rámec toho, čo si pod pojmom voľného pohybu občanov predstaviť. Toto právo je zaradené systematicky do časti druhej ZEÚ, teda medzi práva, ktoré dopĺňujú a dotvárajú už tak existujúce práva na národnej úrovni. Nejedná sa preto o nový inštitút sám

² Sehnálek, D. (2019), p. 79.

³ Rozsudok SDEÚ zo dňa 25. 11. 2025 vo veci C-713/23, Jakub Cupriak-Trojan, Mateusz Trojan proti Wojewoda Mazowiecki,

⁴ Rozsudok SDEÚ zo dňa 12. 3. 2026 vo veci C-43/24, K. M. H. v Obshtina Stara Zagora.

⁵ Conway, G. (2012), pp. 1-2.

⁶ Sehnálek, D. (2019), p. 99.

osebe. Občianstvo EÚ tak nenahrádza štátnu príslušnosť členského štátu, ale dopĺňa ju o ďalšie súvisiace práva.⁷

Súdny dvor pri svojej činnosti postupuje „v zmysle myšlienky európskej integrácie, alebo z pohľadu teleologického výkladu – *argumentum ad Unionis Europaeae*“⁸. Preto sa prikláňam k Sehnámkovi a jeho myšlienke, že síce Súdny dvor musí a mám za to, že aj postupuje pri rozhodovaní nezávisle, nedá sa poprieť, že je úplne nestanný. V judikatúre Súdneho dvoru môžeme sledovať tendenciu prikláňať sa pri výklade primárneho práva práve k myšlienke integrácie národov. O tom svedčí aj skutočnosť, že aj napriek tomu, že občianstvo EÚ predstavuje tzv. sekundárny status k národnému občianstvu⁹, postupom času sa s ním spojili ďalšie pomerne významné práva.¹⁰

Argumentácia voľným pohybom občanov EÚ v rozsudkoch vo veci *Cupriak-Trojan a Shipov*

Predmetom sporu vo veci *Cupriak-Trojan* bolo uznanie manželstva osôb rovnakého pohlavia v Poľsku. Obe osoby, pričom jeden poľskej a druhý poľskej a nemeckej národnosti, pobývali určitú dobu v Nemecku, kde aj legálne uzavreli manželský zväzok. Následne mali v úmysle premiestniť sa do Poľska. Ešte predtým požiadali o prepis sobášneho listu do poľskej matriky. To im nebolo umožnené, pretože Poľsko neumožňuje manželstvo medzi osobami rovnakého pohlavia¹¹ a taký prepis by bol v rozpore so základnými zásadami právneho poriadku Poľskej republiky. Súdny dvor rozhodol, že čl. 20 ods. 2 písm. a) a čl. 21 ods. 1 ZFEÚ v spojení s čl. 7 a čl. 21 Charty základných práv EÚ sa majú vykladať v tom zmysle, že bránia právnej úprave členského štátu, ktorá kvôli tomu, že sama nepovoľuje manželstvo medzi osobami rovnakého pohlavia, neumožňuje ani uznať také manželstvo svojich štátnych príslušníkov uzavreté v inom členskom štáte, ani prepísať za týmto účelom sobášny list do matriky. A to v prípade, že takýto prepis umožňuje jedinú cestu uznania manželstva stanovenú právnym poriadkom tohoto členského štátu.

Vo veci *Shipov* sa jednalo o pôvodne muža K. M. H., bulharského občana, ktorý po konzultácii so psychológom a endokrinológom podstúpil hormonálnu terapiu v Taliansku za účelom vizuálnej zmeny. S ohľadom na ťažkosti spojené s nesúlalom medzi vzhľadom pani K. M. H.

⁷ Barnard, C. (2022), p. 322.

⁸ Sehnálek, D. (2019), p. 10.

⁹ Čl. 20 ods. 1 ZFEÚ.

¹⁰ Cuyvers, A. (2017), pp. 354-364.

¹¹ Čl. 18 Ústavy Poľskej republiky: „*Manželstvo, ako zväzok medzi mužom a ženou, ...*“, viz <https://www.sejm.gov.pl/prawo/konst/angielski/konse.htm>.

a pohlavím uvedeným v rodnom liste, ako aj dokladoch totožnosti, požiadala o zmenu skutočností týkajúcich sa pohlavia, mena a priezviska v osobných dokladoch. Tejto zmene úrady nevyhoveli z dôvodu, že bulharská právna úprava neumožňuje zmenu týchto informácií o osobe v dokladoch z psychologických dôvodov. Zmena pohlavia v dokladoch je možná len v prípade vynútenej telesnej zmeny. Súdny dvor rozhodol, že čl. 21 ZFEÚ a čl. 4 ods. 3 smernice 2004/38/ES¹² sa má vykladať tak, že bránia právnej úprave členského štátu, ktorá neumožňuje zmenu údajov zapísaných v matrike tohoto štátu týkajúcich sa rodu, akými sú pohlavie, priezvisko, patronymum, krstné meno a osobné identifikačné číslo štátneho príslušníka uvedeného členského štátu, ktorý uplatnil svoje právo slobodne sa pohybovať a zdržiavať v inom členskom štáte.

Judikatúra v oblasti voľného pohybu osôb v zmysle čl. 21 ods. 1 ZFEÚ si prešla dlhým vývojom. SDEÚ dovodil, že občania EÚ sa môžu tohoto práva dovoľávať aj voči štátu pôvodu, pokiaľ pobývali v inom členskom štáte Únie.¹³ Napríklad vo veci *Coman* dovodil Súdny dvor odvodené právo na pobyt pre rodinných príslušníkov občanov EÚ, aby mohli spoločne pokračovať v rodinnom živote, ktorý si založili v hostiteľskom štáte. O to viac je podľa Súdneho dvoru potrebné dovodiť potrebný obdobný účinok práv vyplývajúcich z čl. 21 ods. 1 ZFEÚ pre občanov EÚ, ako je tomu v prípade *Cupriak-Trojan* a *Shipov*.¹⁴

Súdny dvor pripustil, že pravidla týkajúce sa manželstva a osobného stavu, ako je rodová identita, meno, alebo priezvisko, spadajú do výlučnej kompetencie členských štátov.¹⁵ Avšak aj v takomto prípade je členský štát povinný postupovať v súlade s právom EÚ, predovšetkým ustanoveniami ZFEÚ. Súčasne sú členské štáty povinné upraviť vnútroštátne normy tak, aby sa mohli občania EÚ, ktorí využili svojho práva voľne sa pohybovať a pobývať na území iného členského štátu, dovoľávať uznania svojho osobného stavu vzniknutého v inom členskom štáte v súlade s právom tohoto štátu.¹⁶ Neuznanie takto uzavretého zväzku alebo zmeny osobného

¹² Smernica Európskeho parlamentu a Rady 2004/38/ES z 29. apríla 2004 o práve občanov Únie a ich rodinných príslušníkov voľne sa pohybovať a zdržiavať sa v rámci územia členských štátov, ktorá mení a dopĺňa nariadenie (EHS) 1612/68 a ruší smernice 64/221/EHS, 68/360/EHS, 72/194/EHS, 73/148/EHS, 75/34/EHS, 75/35/EHS, 90/364/EHS, 90/365/EHS a 93/96/EHS.

¹³ Rozsudok SDEÚ zo dňa 23. 10. 2007 vo veci C-11/06, C-12/06, bod 22; rozsudok SDEÚ zo dňa 5. 6. 2018, vo veci C-673/16, *Coman*, bod 31. Túto zásadu zdôraznil aj Generálny Advokát De La Tur vo svojom stanovisku vo veci *Cupriak-Trojan*.

¹⁴ *Cupriak-Trojan*, bod 46-47, *Shipov*, bod 37.

¹⁵ *Cupriak-Trojan*, bod 48, *Coman*, bod 37, alebo viz rozsudok SDEÚ zo dňa 14. 12. 2021, vo veci C-490/20, *Pančarevo*, bod 52.

¹⁶ *Pančarevo* bod 52, viz ďalej rozsudok SDEÚ zo dňa 4. 10. 2023, vo veci C-4/23, *Mirin*, bod 53.

statusu by mohlo spôsobiť osobám vážne ťažkosti v administratívnej, osobnej aj profesionálnej oblasti, a vytvoriť tak prekážku voľného pohybu a pobytu podľa čl. 21 ods. 1 ZFEÚ.¹⁷

V prípade *Shipov* išiel Súdny dvor pri argumentácii voľným pohybom ešte o niečo ďalej ako v prípade *Cupriak-Trojan*. Pani K. M. H. nemala v hostiteľskom štáte, teda v Taliansku, kde mala bydlisko a kde aj podstúpila hormonálnu liečbu, vydané žiadne dokumenty potvrdzujúce jej novú rodovú identitu. Žiadala tak o zápis zmeny osobného statusu (rodovej identity, mena, priezviska, patronyma, identifikačného čísla) na základe faktickej zmeny, ku ktorej došlo v hostiteľskej krajine, a nie na základe dokumentu potvrdzujúceho túto zmenu.

Extenzívny a kreatívny výklad Súdneho dvoru

Pri interpretácii práva EU sa Súdny dvor viac než na doslovné znenie (jazykový výklad) sústreďuje na účel a cieľ ustanovení (teleologický výklad),¹⁸ ako aj kontext, v rámci ktorého je daná norma zaradená (systematický výklad).¹⁹ Súdny dvor v uvedených rozsudkoch potlačil do istej miery jazykový výklad na úkor teleologického. Zameral sa primárne na účel a zmysel čl. 21 ods. 1 ZFEÚ v spojení s právom na rodinný a súkromný život a zákaz diskriminácie na základe sexuálnej orientácie. Pričom zákaz diskriminácie podľa čl. 19 ZFEÚ použil skôr ako podporný argument, než hlavný. Mimo iné aj preto, že právo voľného pohybu plynúce z občianstva nepotrebuje ďalšiu harmonizáciu na úrovni sekundárneho práva, tak ako zákaz diskriminácie, a môžu sa ho jednotlivci domáhať priamo. Súdny dvor použil tak občianstvo ako „doktrínálnu bránu“ (*doctrinal getaway*) pre ochranu práv plynúcich zo statusových otázok, tentokrát rodovej identity. Vzťahnutím práv na mobilitu na otázky rodinného stavu, sexuálnej orientácie a rodovej identity, vytvára SDEÚ postupne podľa *Belavusau* ústavný priestor, v ktorom sú určité aspekty osobnej identity chránené nepriamo právom EÚ.²⁰

Hľadanie účelu a zmyslu práv vyplývajúcich z európskeho občianstva je prirodzený následok pomerne obširne a vágne znejúceho čl. 21 ods. 1 ZFEÚ. Členské štáty touto jazykovou formuláciou ponechali priestor Súdnemu dvoru nájsť výklad, ktorý sleduje ciele stanovené preambulou zakladajúcich zmlúv. Spôsob, akým Súdny dvor vyložil právo voľného pohybu sleduje najefektívnejší výklad (metoda *effect utile*) k naplneniu podstaty práva pohybu občanov

¹⁷ *Shipov* bod 38, *Mirin* bod 55.

¹⁸ Arnall, A. (2006), p. 612.

¹⁹ Maňko, R. (2017).

²⁰ *Belavusau*, U. (2026).

EÚ. Negatívnym javom však zostáva, že týmto spôsobom *de facto* niektoré normy vytvára a prostredníctvom metódy *effect utile* ich aj legitimizuje.²¹

Dôsledkom kreatívneho výkladu v rozsudkoch *Cupriak-Trojan* a hlavne *Shipov* dochádza k obrátenej diskriminácii. Pretože občania, ktorí zostali v krajine pôvodu a nevyužili svojho práva v zmysle čl. 21 ods. 1 ZFEÚ sa nemôžu tohoto výkladu dovoliavať. Napriek tomu, však Súdny dvor vytvára unikátnu príležitosť pre jednotlivca vybrať si ten právny poriadok, ktorý mu pre naplnenie jeho úmyslu vyhovuje. Podľa Sehnálka môže byť takýto stav v konečnom dôsledku vlastne prospešný, pretože vytvára konkurenčné prostredie pre vznik a testovanie rôznych právnych riešení rovnakých problémov.²² To je v oblasti práv LGBTIQ+ osôb zvlášť dôležité.

Argumentácia voľný pohybom v prípade *Shipov* by si však zaslúžila jasnejšie a podrobnejšie vysvetlenie. Obzvlášť, keď predmetná zmena osobných údajov sa odohráva v čisto vnútroštátnom prostredí. Belavusau správne poukázal na to, že Súdny dvor sa namiesto k dôkladnejšiemu vysvetleniu cezhraničného právneho statusu, priklonil k zásahu tam, kde vnútroštátne pravidlá ohrozujú praktické použitie národných dokladov pri ich využití v členských štátoch.²³ Odôvodniť taký zásah právom na voľný pohyb občanov je prejavom veľmi extenzívneho výkladu, ktorý zasluhuje omnoho konkrétnejšie a presvedčivejšie vysvetlenie. Belavusau si kladie otázku, či tento prístup predstavuje pragmatický vývoj judikatúry v oblasti občianstva alebo sa jedná o kontroverzejšie rozširovanie súdnej právomoci EÚ. Hoci súhlasím, že výklad použitý v rozsudkoch bolo možné prirodzene očakávať, Súdny dvor sa pohybuje na veľmi tenkej hranici. Hlavne, čo sa týka odôvodnenia vo veci *Shipov*, kde je argumentácia voľným pohybom občanov nie úplne presvedčivá.

Následná reakcia ústavných súdov môže byť vo výsledku prekvapujúca, keďže býva ovplyvnená nielen ich ústavným poriadkom, ale aj aktuálnym politickým nastavením.

Vzájomné rešpektovanie hodnôt

Paralelne v oboch rozsudkoch vystupujú na povrch hodnoty a politiky členských štátov, ktoré musí Európska únia, a teda aj Súdny dvor nie len akceptovať, ale aj podporovať. Povinnosťou členských štátov je podľa čl. 4 ZEÚ postupovať lojálne voči EÚ a teda sa aj zasadzovať o užitočný výklad práva EÚ, ktorý sleduje jeho účel a ciele. Pritom to platí *vice*

²¹ *De iure* ich vytvárať ani nemôže, kdeže podľa zakladajúcich zmlúv nie je Súdny dvor považovaný za normotvorcu, viz Sehnálek (2019), p. 124.

²² Sehnálek, D. (2019), pp. 150-151.

²³ Belavusau, U. (2026).

versa a EÚ musí vykonávať zverené právomoci s ohľadom na národnú identitu členských štátov v zmysle čl. 4 ods. 2 ZEÚ.

Aby sa dalo tvrdiť, že rozsudky disponujú presvedčivou právnou analýzou, musí Súdny dvor vo veciach osobného statusu zohľadniť nielen integračné myšlienky EÚ (voľný pohyb a zákaz diskriminácie), ale i legitímne požiadavky členských štátov regulovať si otázky osobného statusu podľa národných ústavných hodnôt. Tieto dva aspekty nepôsobia protichodne. Naopak. Mali by byť vykladané vo vzájomnej súvislosti a nemali by si konkurovať. Dovolím si však tvrdiť, že Súdny dvor sa s touto otázkou nielenže nedostatočne vysporiadal, ale dokonca sa jej úplne vyhol.

V Poľsku je manželstvo medzi osobami rovnakého pohlavia priamo zakázané Ústavou v čl. 18, obdobné ustanovenie nájdeme v maďarskom Základnom zákone v čl. L²⁴. Tieto ústavné zakotvenia reflektujú úmysel národných zákonodarcov uchopiť osobný status jednotlivcov s ohľadom na ústavné hodnoty.²⁵ Súdny dvor však takúto analýzu do svojich rozhodnutí nezahrnul. Bez náležitého a dostatočne presvedčivého odôvodnenia môže takýto postup viesť k vzbure zo strany ústavných súdov, tak ako to poznáme v Nemecku v prípade Spolkového ústavného súdu, ktorý v roku 2020 judikoval v prípade známom ako PSPP, že rozhodnutie Súdneho dvoru o predbežnej otázke bolo aktom *ultra vires* – teda nad rámec kompetencií. Takýto postup zaznamenalo aj Poľsko a Taliansko, kde ústavné súdy spochybnili zásadu prednosti práva EÚ a s odkazom na prekročenie právomocí a ústavnú identitu nerešpektovali rozhodnutie Súdneho dvora.²⁶ Práve vo veci *Shipov* riešil Súdny dvor tiež otázku viazanosti vnútroštátneho súdu výkladom ústavného súdu, ktorý je v rozpore s výkladom práva Únie zo strany SDEÚ. Shipov tak nadväzuje na dlho očakávaný rozsudok Súdneho dvora vo veci *Komisija proti Poľsku*, v ktorom Súdny dvor jednoznačne odmietol doktrínu *ultra vires*.²⁷ Zdôvodnil to tým, že podľa zakladajúcich zmlúv prináleží len Súdnemu dvoru rozhodovať o rozsahu právomociach zverených Únii, ako aj o rešpektovaní týchto právomocí, a že konečný a záväzný výklad práva EÚ je v kompetencii Súdneho dvoru. Súdny dvor zdôraznil, že

²⁴ Základný zákon, článok L. <https://codices.coe.int/codices/documents/constitution/E92D6B12-66B2-4899-976E-D2C95F4AE565?lang=eng>.

²⁵ PASQUA, M. (2025).

²⁶ Príkladom je rozsudok Spolkového ústavného súdu (Bundesverfassungsgericht) zo dňa 5. 5. 2020, sp. zn. 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, viz. https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200505_2bvr085915.html; rozsudok Ústavného súdu v Taliansku zo dňa 31. 5. 2018, viz. https://www.cortecostituzionale.it/documenti/comunicatistampa/CC_CS_20180531112725.pdf; rozsudok Ústavného súdu Českej republiky zo dňa 14. 2. 2012, sp. zn. Pl. ÚS 5/12, viz. https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Aktualne_prilohy/2012_02_14.pdf.

²⁷ Rozsudok SDEÚ zo dňa 18. 12. 2025 vo věci C-448/23, Komisia vs. Poľsko.

na základe jeho ustálenej judikatúry vyplýva nemožnosť pripustiť, aby pravidla vnútroštátneho práva, hoci aj ústavnej povahy, narušili jednotu a účinnosť práva EÚ.

Záver

Hoci má právo EÚ v sebe silno zakorenené integračné myšlienky, súčasne uznáva, že právomoci členských štátov musia byť rešpektované. To ale však za predpokladu, že sa vykonávajú bez toho, aby bola ohrozená podstata práv EÚ. Obecne sleduje rozhodnutie vo veci *Cupriak-Trojan* ako aj *Shipov* pozitívny smer a prispieva k súdnemu trendu, v rámci ktorého sa nároky na rovnosť menšín LGBTIQ+ čoraz viac presadzujú nie na základe „tradičných“ pravidiel zákazu diskriminácie, ale prostredníctvom alternatívnych právnych ciest podľa práva EÚ.²⁸ V tomto prípade právom voľného pohybu občanov EÚ.

Súdny dvor pristúpil tentoraz k interpretácii práv plynúcich z práva voľne sa pohybovať a pobývať v členských štátov celkom zoširoka. Judikoval totiž, že sa tohoto primárneho práva môže jednotlivец dovolávať aj v prípade žiadosti o zmenu osobného statusu, ktorého úprava spadá principiálne do výlučnej právomoci členského štátu pôvodu. Tým rozšíril rozsah a dosah práv plynúcich z občianstva EÚ. Zároveň je však vplyv rozhodnutia luxemburského súdu vo veci *Cupriak-Trojan* v súčasnosti obmedzený osobnou pôsobnosťou²⁹ a nemá vplyv na statických občanov, ktorí by chceli uzavrieť zväzok s osobou rovnakého pohlavie. Súčasne Súdny dvor nezaložil rozsudkom povinnosť členských štátov uznávať manželstvá uzavreté podľa právneho poriadku hostiteľského štátu v štáte pôvodu bez obmedzenia. Povinnosť uznať manželstvo prepisom sobášneho listu vyslovil Súdny dvor len pre prípad, že takýto prepis je jedinou možnosťou ako umožniť také uznanie. Takto špecifickou odpoveďou si ponechal SDEÚ otvorené dvere pre ostatné prípady. Napríklad, pokiaľ členský štát neumožňuje manželstvo medzi osobami rovnakého pohlavia, ale povoľuje registrované partnerstvo alebo inú formu zväzku. Pokiaľ bude Súdny dvor pokračovať v nastavenej argumentačnej línii, je na mieste očakávať obdobnú argumentáciu aj v ostatných prípadoch. Rozhodnutie *Cupriak-Trojan* preto svoj vplyv ešte len ukáže.

To sa však nedá povedať o prípade *Shipov*. Tam Súdny dvor našiel cezhraničný prvok v podobe mobility občianky Bulharska v takmer výlučne vnútroštátnom spore. Prípád *Shipov* je ukázkovým príkladom extenzívneho výkladu, kedy však dobrá myšlienka nemusí mať kýžený výsledok. Na jednej strane vidieť pozitívny aspekt integrácie v podobe rozšírenia práv pre

²⁸ Lamprinoudis, K. (2025).

²⁹ Warnez, M. (2025).

transrodové osoby, čo je určite žiadúca tendencia. Na druhej strane nedostatočne odôvodnená argumentácia Súdneho dvoru môže vyvolať nesúhlas zo strany ústavných súdov. Najmä, keď sa Súd nevenoval náležite argumentom ústavnej identity a rešpektovaním národných hodnôt. Aj napriek jednoznačnému odmietnutiu kontroly prostredníctvom doktríny *ultra vires* vo veciach *Shipov* a Komisia proti Poľsku, nie je možné bez ďalšieho uzavrieť, že spor o posledné slovo medzi Súdnyim dvorom EÚ a ústavnými súdmi členských krajín je skončený.

Bibliografia

1. Arnull, A. (2006). *The European Union and Its Court of Justice*, 2nd ed., Oxford University Press.
2. Barnard, C. (2022). Free Movement of Persons and Services. *The Substantive Law of the EU, The Four Freedoms*, 7th edition. Oxford University Press.
3. Belavusau, U. (2026). Sexual Citizenship via Free Movement: Gender Identity and EU Citizenship after Shipov Case (C-43/24, 2026), *VerfassungsBlog*. <https://verfassungsblog.de/sexual-citizenship-via-free-movement/>, DOI: [10.59704/eabe2b4bd88b910e](https://doi.org/10.59704/eabe2b4bd88b910e).
4. Conway, G. (2012). The Limits of Legal Reasoning and the European Court of Justice. *Cambridge Studies in European Law and Policy*. Cambridge University Press. <https://doi.org/10.1017/CBO9780511735929>.
5. Cuyvers, A. (2017). Free Movement of Persons in the EU. *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. Leiden Boston: Brill Nijhoff. https://doi.org/10.1163/9789004322073_023.
6. Lamprinoudis, K. (2025). The Trojan Horse of Free Movement Law: Unfolding Non-Discrimination on Grounds of Sexual Orientation in “Trojan”, *Verfassungs Blog*, <https://verfassungsblog.de/trojan-discrimination-cjeu/>, DOI: [10.59704/400ef82167e89a18](https://doi.org/10.59704/400ef82167e89a18).
7. Maňko, R. (2017). *The EU as a community of law Overview of the role of law in the Union*. European Parliament. [https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599364/EPRS_BRI\(2017\)599364_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599364/EPRS_BRI(2017)599364_EN.pdf).
8. PASQUA, M. (2025). AG De La Tour’s Opinion in Wojewoda Mazowiecki on Poland’s Refusal to Transcribe a Same-Sex Marriage Certificate. *The European Association of Private International Law*. <https://eapil.org/2025/04/22/ag-de-la-tours-opinion-in-wojewoda-mazowiecki-on-polands-refusal-to-transcribe-a-same-sex-marriage-certificate/comment-page-1/>.
9. PASQUA, M. (2026). CJEU: Free Movement and Legal Gender in Shipov (C-43/24). *The European Association of Private International Law*. <https://eapil.org/2026/03/18/cjeu-free-movement-and-legal-gender-in-shipov-c-43-24/>.
10. Sehnálek, D. (2019). *Specifika výkladu práva Evropské unie a jeho vnitrostátní důsledky*. C. H. Beck.
11. Warnez, M. (2025). The CJEU Providing Ammo in the ECtHR Rainbow Fight: Commentary on the CJEU’s Judgment in Cupriak-Trojan (C-713/23), *Verfassungs Blog*, <https://verfassungsblog.de/ammo-in-the-rainbow-fight/>, DOI: [10.59704/50165a6e4cbc30bb](https://doi.org/10.59704/50165a6e4cbc30bb).

OCHRANA SÚKROMIA HIV POZITÍVNYCH ZAMESTNANCOV V PRACOVNOPRÁVNÝCH VZŤAHOCH

Protection of the Privacy of HIV-Positive Employees in Employment Relationships

SOŇA KAŠICKÁ*

Abstrakt

Príspevok sa zaoberá právnym postavením zamestnancov žijúcich s vírusom HIV v pracovnoprávných vzťahoch, pričom osobitnú pozornosť venuje aj rozhodovacej činnosti súdov. Predmetom analýzy sú situácie, v ktorých dochádza k zásahu do práva na súkromie zamestnanca, najmä v súvislosti so zverejnením alebo spracúvaním informácií o jeho zdravotnom stave, ako aj potenciálny dopad takýchto zásahov na vznik, existenciu a výkon pracovnoprávneho vzťahu. Príspevok zároveň reflektuje problematiku diskriminácie zamestnancov z dôvodu ich HIV statusu a analyzuje právne dôsledky týchto zásahov z pohľadu ochrany základných práv. Osobitná pozornosť je venovaná judikatúre Európskeho súdu pre ľudské práva a jej významu pre interpretáciu a aplikáciu princípov ochrany súkromia, rovnosti a zákazu diskriminácie v pracovnoprávnom kontexte, ako aj pre vymedzenie rozsahu a prostriedkov právnej ochrany dostupných zamestnancom žijúcim s HIV.

Abstract

The paper examines the legal status of employees living with HIV within employment relationships, with particular attention also given to judicial decision-making. The analysis focuses on situations in which an interference with an employee's right to privacy occurs, particularly in connection with the disclosure or processing of information concerning their health status, as well as the potential impact of such interference on the establishment, existence, and performance of the employment relationship. The paper also reflects on the issue of discrimination against employees based on their HIV status and analyses the legal consequences of such interference from the perspective of the protection of fundamental rights. Attention is devoted to the case law of the ECHR and its significance for the interpretation and application of the principles of privacy protection, equality, and non-discrimination in the employment context, as well as for defining the scope and means of legal protection available to employees living with HIV.

Kľúčové slová: súkromie, diskriminácia, HIV, pracovnoprávny vzťah, ochrana

Key words: privacy, discrimination, HIV, employment relationship, protection

Úvod

Súkromie zamestnanca predstavuje jednu z kľúčových hodnôt moderného pracovnoprávneho práva a jeho ochrana je zakotvená naprieč právnymi poriadkami, od medzinárodných dokumentov až po národnú legislatívu. Osobitnú pozornosť si vyžadujú situácie, v ktorých je zamestnanec nositeľom citlivých zdravotných informácií, ako je status HIV. Pred zistením tejto informácie zamestnávateľom alebo kolegami je zamestnanec rovnocenným účastníkom pracovnoprávneho vzťahu, no od okamihu, keď sa jeho zdravotný

* Mgr. Soňa Kašická, druhý ročník, interná doktorandka, sona.kasicka@flaw.uniba.sk, Katedra pracovného práva a práva sociálneho zabezpečenia, Právnická fakulta Univerzity Komenského v Bratislave

stav stane známym, sa do tohto vzťahu často vnášajú obavy, nedôvera a stigmatizácia. V dôsledku toho môže dôjsť k zmene vnímania zamestnanca, ktorý sa z bežného pracovníka stáva osobou, ktorá je nesprávne považovaná za nespôsobilú, čo často vedie k diskriminácii, obmedzeniu pracovných príležitostí alebo dokonca k ukončeniu pracovného pomeru. Tento stav otvára zásadnú otázku: akým spôsobom je možné právne a eticky nakladať s informáciami o zdravotnom stave zamestnanca, aby bola zachovaná rovnováha medzi ochranou súkromia a oprávnenými záujmami zamestnávateľa? Cieľom príspevku je preto preskúmať súčasnú judikatúru a právne princípy, ktoré definujú hranice ochrany súkromia zamestnancov žijúcich s HIV, a poukázať na možnosti ich právnej ochrany v prostredí pracovnoprávných vzťahov. Analýza taktiež umožňuje identifikovať oblasti, kde dochádza k napätiu medzi právami zamestnanca a oprávnenými záujmami zamestnávateľa, čo je kľúčové pre formovanie rovnováhy medzi ochranou osobných údajov a efektívnym fungovaním pracovného prostredia.

HIV pozitívny zamestnanec

HIV je vírus ľudskej imunodeficiencie, teda vírus spôsobujúci oslabenie imunitného systému človeka.¹ Napáda bunky imunitného systému, ktoré sú zodpovedné za obranu organizmu proti infekciám. V dôsledku toho sa schopnosť tela bojovať proti chorobám postupne znižuje a človek sa stáva náchylnejším na rôzne infekcie a ochorenia. Ak sa HIV nelieči, môže viesť k ochoreniu AIDS. Vírus HIV zostáva v tele celý život, pretože zatiaľ neexistuje liek, ktorý by ho úplne odstránil. Existuje však účinná liečba antiretrovírusová terapia, ktorá dokáže znížiť množstvo vírusu v krvi na veľmi nízku, až nedetekovateľnú úroveň. Pri pravidelnom užívaní liekov môžu ľudia s HIV žiť dlhý a zdravý život. HIV sa prenáša kontaktom s určitými telesnými tekutinami infikovanej osoby (napr. krvou). K prenosu najčastejšie dochádza pri nechránenom pohlavnom styku alebo pri zdieľaní injekčného vybavenia na užívanie drog.² HIV sa nedá preniesť z človeka na človeka bežným každodenným kontaktom, napríklad bozkávaním, objímaním, podávaním rúk či zdieľaním osobných predmetov. Nakaziť sa ním taktiež nie je možné ani prostredníctvom jedla alebo vody.³ Preto sa ním nemožno nakaziť ani pri bežnom výkone pracovných činností.

¹ JILICH, D. a KULÍŘOVÁ, V. a kol. *Infekce HIV*. Praha: Maxdorf, Jesenius. 2021, s. 34

² HIV GOV. *What Are HIV and AIDS?* [online]. [cit. 2026-03-14]. Dostupné na: <https://www.hiv.gov/hiv-basics/overview/about-hiv-and-aids/what-are-hiv-and-aids>

³ WORLD HEALTH ORGANIZATION. *HIV and AIDS* [online]. [cit. 2026-03-14]. Dostupné na: <https://www.who.int/news-room/fact-sheets/detail/hiv-aids>

V roku 2024 žilo na svete približne 40,8 milióna ľudí s HIV, z toho 39,4 milióna dospelých vo veku 15 rokov a viac.⁴ Podľa údajov Svetovej zdravotníckej organizácie bolo v európskom regióne v roku 2022 zaznamenaných 110 486 nových prípadov HIV, pričom medziročný nárast evidovalo 37 zo 49 krajín regiónu.⁵ HIV vo veľkej miere postihuje osoby v produktívnom veku, teda ľudí ekonomicky aktívnych a zapojených do pracovného procesu. Napriek dostupnosti medicínskych informácií sa s vírusom HIV stále spájajú mýty a stigmatizácia, ktoré prenikajú aj do pracovnoprávnych vzťahov. Stigmatizácia sa prejavuje otvorenou diskrimináciou voči homosexuálnym a bisexuálnym mužom, ako aj voči osobám žijúcim s HIV. V minulosti často vyústila do závažných prejavov nespravodlivého zaobchádzania zo strany rodiny, blízkeho okolia či inštitúcií (napr. verejných orgánov, zamestnávateľov).⁶ Zamestnávatelia pritom často uvádzajú ako dôvody proti zamestnávaniu osôb s HIV alebo AIDS obavy z ich pracovnej spôsobilosti, možného zhoršenia zdravotného stavu, reakcií okolia či rizika prenosu nákazy.⁷

Európsky súd pre ľudské práva vo svojej judikatúre zdôraznil, že osoby žijúce s HIV predstavujú zraniteľnú skupinu vzhľadom na predsudky a stigmatizáciu zo strany spoločnosti. Z toho dôvodu by štáty mali disponovať len úzkym priestorom na uváženie pri prijímaní opatrení, ktoré by túto skupinu odlišovali alebo jej poskytovali odlišné zaobchádzanie na základe HIV statusu. Takéto rozhodnutia sú preto podrobené prísnej kontrole proporcionality a musia rešpektovať právo na súkromie a zákaz diskriminácie.⁸

Ochrana súkromia predstavuje pre HIV pozitívnych zamestnancov kľúčovú otázku každodenného života. Dôvodom je skutočnosť, že samotná právna úprava nedokáže vždy účinne ochrániť jednotlivca pred spoločenskou ostrakizáciou či diskrimináciou. Táto ochrana

⁴ UNAIDS. *Global HIV & AIDS statistics — Fact sheet*. [online]. [cit. 2026-03-14]. Dostupné na: < <https://www.unaids.org/en/resources/fact-sheet> >

⁵ WORLD HEALTHY ORGANIZATION. On the frontline of the fight against HIV: Ukraine's resilience and WHO's support [online]. [cit. 2026-03-14]. Dostupné na internete: < <https://www.who.int/europe/news/item/19-12-2023-on-the-frontline-of-the-fight-against-hiv--ukraine-s-resilience-and-who-s-support> >

⁶ PURCELL, D. W. 2021. Forty Years of HIV: The Intersection of Laws, Stigma, and Sexual Behavior and Identity. *American Journal of Public Health* [online]. American Public Health Association, 111(7): 1231-1233 [cit. 2026-03-15]. DOI: 10.2105/ajph.2021.306335. ISSN 0090-0036. Dostupné na : <https://pmc.ncbi.nlm.nih.gov/articles/PMC8493181/>

⁷ KOTIRA, P. Zamestnanci s HIV/AIDS - ako ďalej? In: *PRACOVNÍ PRÁVO 2012 na téma Závislá práca a její podoby. Zborník z konferencie*. Masarykova univerzita: ACTA UNIVERSITATIS BRUNENSIS IURIDICA No 440. 2012, s. 233

⁸ EUROPEAN COURT OF HUMAN RIGHTS. Guide on Article 14 of the Convention (prohibition of discrimination) and on Article 1 of Protocol No. 12 (general prohibition of discrimination) [online]. 2024 [cit. 2026-03-15]. s. 47. Dostupné na: https://ks.echr.coe.int/documents/d/echr_ks/guide_art_14_art_1_protocol_12_eng

má osobitný význam najmä v oblasti zdravotnej starostlivosti,⁹ pričom v mnohých prípadoch je zamestnanec zároveň aj pacientom, čo ešte viac zdôrazňuje význam ochrany jeho súkromia.

Garancie súkromia HIV pozitívnych zamestnancov

Právo na súkromie patrí medzi základné ľudské práva a je zakotvené v rôznych medzinárodných dokumentoch. Medzinárodný pakt o občianskych a politických právach ustanovuje, že „*nikto nesmie byť vystavený svojvoľnému zasahovaniu do súkromného života, rodiny, domova alebo korešpondencie ani útokom na svoju česť a povesť.*“¹⁰ Podľa čl. 8 ods. 1 Európskeho dohovoru o ľudských právach má každý právo na rešpektovanie svojho súkromného a rodinného života, obydlia a korešpondencie.

Ochrana súkromia podľa Európskeho dohovoru o ľudských právach sa uplatňuje najmä pri zabezpečení dôvernosti informácií o HIV, keďže ich zverejnenie môže mať závažné dôsledky pre súkromný, rodinný, sociálny aj pracovný život jednotlivca a môže viesť k stigmatizácii či vylúčeniu. Zásah do dôvernosti takýchto údajov je preto prípustný len výnimočne, ak je odôvodnený prevažujúcim verejným záujmom, záujmom dotknutej osoby alebo bezpečnosťou zdravotníckeho personálu. Neodôvodnené zverejnenie citlivých zdravotných údajov, napríklad v potvrdeniach predkladaných pri získaní vodičského oprávnenia alebo pri uchádzaní sa o zamestnanie, sa považuje za neprimerané a neodôvodnené vo vzťahu k akémukoľvek legitímnemu cieľu. Ochrana súkromia podľa článku 8 sa pritom nevzťahuje len na ochranu osobných údajov, ale aj na širší rámec súkromného života, ktorý zahŕňa napríklad rodovú identitu, meno, sexuálnu orientáciu či sexuálny život ako podstatné súčasti osobnej sféry jednotlivca podľa čl.8 Európskeho dohovoru o ľudských právach.¹¹

Komisia OSN pre ľudské práva sa prvýkrát vyjadrila proti diskriminácii a stigme súvisiacej s HIV/AIDS vo svojej rezolúcii č. 1995/44, prijatej 3. marca 1995 na 53. zasadnutí, ktorá sa zaoberala ochranou ľudských práv v kontexte HIV a AIDS. Komisia vyzýva štáty, aby zabezpečili, že ich zákony, politiky a postupy rešpektujú právo jednotlivcov na súkromie a osobnú integritu, zakazujú diskrimináciu spojenú s HIV/AIDS a zároveň nebrzdia prevenciu ani poskytovanie starostlivosti ľuďom žijúcim s týmto vírusom.¹²

Medzinárodná organizácia práce v rámci svojej činnosti prijala viacero odporúčaní a kódexov týkajúcich sa zamestnávania osôb žijúcich s HIV, pričom sa v nich zdôrazňuje aj

⁹ PÍRY, M. HIV - legálne aspekty diagnózy. Banská Bystrica: Belianum, 2024. Právnická fakulta. s. 22-23

¹⁰ Čl. 17 Medzinárodný pakt o občianskych a politických právach

¹¹ EUROPEAN COURT OF HUMAN RIGHTS. Guide on Article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence [online]. 2025 [cit. 2026-03-15]. s. 54, 66-67. Dostupné na: https://ks.echr.coe.int/documents/d/echr_ks/guide_art_14_art_1_protocol_12_eng

¹² Rozhodnutie ESELP zo dňa 15. septembra 2011, Kiyutin proti Rusku, sťažnosť. Č. 2700/10

ochranou ich súkromia, napríklad v súvislosti s testovaním na účely zamestnávania. V tejto súvislosti zdôrazňuje, že testovanie na HIV v rámci pracovnoprávných vzťahov musí byť vždy dobrovoľné a vykonané bez nátlaku, pri rešpektovaní dôvernosti, poradenstva a informovaného súhlasu. Výsledky takéhoto testovania musia zostať dôverné a nesmú mať negatívny vplyv na prístup k zamestnaniu, výkon práce ani kariérny postup. Zároveň platí, že pracovníci a uchádzači o zamestnanie nemajú povinnosť zverejňovať svoj HIV status ani status iných osôb, pričom prístup k takýmto údajom sa riadi pravidlami dôvernosti vyplývajúcimi z medzinárodných noriem. Štáty sú zároveň povinné zabezpečiť dostupné mechanizmy riešenia sporov, aby bolo možné účinne napraviť porušenie práv na dôvernosť a súkromie. Uvedené pravidlá tak prispievajú k ochrane integrity, súkromia a rovnakých príležitostí všetkých pracovníkov.¹³

Ochrana súkromia zamestnancov s HIV v rozhodovacej činnosti

Porušením práva na súkromie v kontexte diskriminácie sa zaoberá viacero rozhodnutí, a to najmä v judikatúre Európskeho súdu pre ľudské práva (ďalej ako aj „ESLP“), Súdneho dvora Európskej únie, ako aj v niektorých vnútroštátnych rozhodnutiach, napríklad v Českej republike.

Rozhodnutie ESLP vo veci I.B. proti Grécku¹⁴ predstavuje dôležitý krok v ochrane práv ľudí žijúcich s HIV na pracovisku. Prípád sa týkal zamestnanca, ktorý bol prepustený po tom, čo jeho kolegovia zistili jeho HIV pozitívny status a požadovali od zamestnávateľa odchod zamestnanca. Napriek tomu, že zamestnávateľ prijal opatrenia, ako konzultácie s lekárom a pokusy o presunutie zamestnanca na iné pracovisko, nakoniec sa zamestnávateľ rozhodol ukončiť jeho pracovný pomer.

ESLP pripomína, že pojem „súkromný život“ je veľmi široký a nemožno ho vyčerpávajúco vymedziť. Zahŕňa fyzickú aj morálnu integritu jednotlivca a často zahŕňa aj aspekty jeho fyzickej a sociálnej identity, vrátane práva nadväzovať a rozvíjať vzťahy s ostatnými, práva na osobný rozvoj či práva na sebaurčenie. V tomto prípade bolo žalobcovi poskytnuté menej priaznivé zaobchádzanie než jeho kolegom, a to výlučne z dôvodu jeho HIV-pozitívneho statusu. ESLP zdôrazňuje, že hoci zamestnávateľ tvrdil, že jeho cieľom bolo obnoviť pokoj na pracovisku, tento záujem vznikol z postojov kolegov voči žalobcovi zdravotnému stavu.

¹³ Bod 24-29 Odporúčania Medzinárodnej organizácie práce o HIV a AIDS a svet práce č. 200 z roku 2010

¹⁴ Rozhodnutie ESLP zo dňa 3. októbra 2013, I.B. v. Grécko, sťažnosť č. 552/10

ESLP v tomto prípade rozhodol, že zásahy do pracovnoprávných záležitostí osoby žijúcej s HIV, zasahujú do jej súkromného života, predstavujú zásah do práva podľa článku 8 Európskeho dohovoru o ľudských právach a musia byť posudzované prísne z hľadiska proporcionality. Rozhodnutie zdôraznilo, že akékoľvek odlišné zaobchádzanie vyplývajúce výlučne zo zdravotného stavu zamestnanca, bez objektívneho a primeraného dôvodu, môže predstavovať diskrimináciu zakázanú článkom 14 a nemožno ho považovať za oprávnený zásah do súkromia. ESLP poznamenal, že prepustenie zamestnanca viedlo k stigmatizácii osoby, ktorá, hoci bola HIV-pozitívna, neprejavovala žiadne klinické príznaky ochorenia. Takéto opatrenie malo závažné dôsledky pre jeho osobnostné práva, úctu, ktorá mu patrí, a napokon aj pre jeho súkromný život.

Ďalším rozhodnutím ESLP je prípad I. proti Fínsku¹⁵ z roku 2008. Medzi rokmi 1989 a 1994 pracovala sťažovateľka ako zdravotná sestra vo verejnej nemocnici a súčasne sa liečila po tom, čo jej bola v roku 1987 diagnostikovaná HIV infekcia. Zamestnanci nemocnice mali prístup k patientskemu registru obsahujúcemu citlivé zdravotné údaje. V roku 1992 sa u sťažovateľky objavili podozrenia, že niektorí kolegovia mohli neoprávnene nahliadnuť do jej zdravotných záznamov. Po podaní žiadosti o kontrolu prístupov jej bolo v roku 1996 oznámené, že systém neuchováva informácie o tom, kto konkrétne záznamy prezeral.

ESLP v tomto rozhodnutí zdôraznil, že ochrana osobných údajov, najmä zdravotných informácií, je nevyhnutná pre to, aby jednotlivci mohli uplatňovať svoje právo na súkromie a rodinný život. Zachovanie dôvernosti zdravotných údajov je základom právnych systémov a zároveň udržiava dôveru pacientov v lekársku profesiu a zdravotnícke služby. Tento prístup je obzvlášť dôležitý pri informáciách o HIV, vzhľadom na citlivosť súvisiacu s týmto ochorením. Vnútroštátne právne predpisy preto musia poskytovať primerané záruky, aby sa zabránilo neoprávnenému zverejňovaniu alebo oznamovaniu takýchto citlivých údajov.

Dôležitým je aj rozhodnutie Súdneho dvora Európskej únie vo veci ochrany súkromia HIV pozitívneho uchádzača je prípad X proti Komisii Európskych spoločenstiev.¹⁶ Žalobca sa uchádzal o dočasné pracovné miesto a súčasťou pohovoru bola povinná lekárska prehliadka, ktorá zahŕňala aj testy na HIV. Žalobca tento test odmietol, no lekár napriek tomu využil zvyšok odobranej krvi na vyšetrenie, ktoré mohlo nepriamo naznačiť prítomnosť vírusu, a následne ho vyhlásil za nespôsobilého na výkon práce.

Súdny dvor v tomto rozhodnutí zdôraznil, že právo na rešpektovanie súkromného života podľa článku 8 Európskeho dohovoru o ľudských právach patrí medzi základné práva chránené

¹⁵ Rozhodnutie ESLP zo dňa 17. júla 2008, I v. Fínsko, sťažnosť č. 20511/03

¹⁶ X proti Komisii Európskych spoločenstiev, rozsudok z 5. októbra 1994. EU:C-404/92 P

právom EÚ a zahŕňa aj právo jednotlivca zachovať dôvernosť informácií o svojom zdravotnom stave. Toto právo môže byť obmedzené len v prípade, že zásah je odôvodnený verejným záujmom a primeraný sledovanému cieľu. Lekárska prehliadka pred nástupom do zamestnania slúži na posúdenie zdravotnej spôsobilosti uchádzača, avšak nesmie byť vykonaná proti jeho vôli. Ak uchádzač po riadnom poučení odmietne vyšetrenie, ktoré lekár považuje za nevyhnutné, inštitúcia nie je povinná niesť riziko jeho prijatia. Súd tiež uviedol, že výslovné odmietnutie testu na HIV/AIDS musí byť plne rešpektované. Inštitúcia nemôže vykonať ani iné vyšetrenia, ktoré by mohli nepriamo odhaliť prítomnosť ochorenia, pretože by to predstavovalo zásah do práva na súkromie

V rámci Českej republiky existuje prípad týkajúci sa zamestnávania osoby žijúcej s HIV a neštandardného spôsobu skončenia služobného pomeru. Zamestnanec namietal, že zamestnávateľ sa dozvedel o jeho HIV statuse a následne sa túto skutočnosť snažil overiť prostredníctvom zdravotnej prehliadky spojenej s posúdením zdravotnej spôsobilosti na výkon práce. V rámci tejto prehliadky však bol vykonaný iba test na HIV, bez uskutočnenia ďalších zdravotných úkonov. Na základe výsledku testu lekár následne konštatoval, že zamestnanec nie je spôsobilý na výkon služby v Policajnom zbore.¹⁷ Hoci sa uvedený prípad primárne týka otázky diskriminácie a dôvodu skončenia služobného pomeru, z predchádzajúcej judikatúry, ako aj z relevantnej medzinárodnoprávnej úpravy možno vyvodíť, že vykonanie výlučne testu na HIV v rámci zdravotnej prehliadky nie je v súlade s odporúčaniami Medzinárodnej organizácie práce a zároveň môže takéto testovanie predstavovať neoprávnený zásah do práva na súkromie dotknutej osoby.

Dopad zásahov do súkromia na pracovnoprávne vzťahy

Právo na súkromie a jeho ochrana predstavujú fundamentálny právny inštitút, ktorý zohráva kľúčovú úlohu pri zabezpečovaní ochrany jednotlivca pred diskrimináciou a stigmatizáciou osôb žijúcich s HIV v pracovnoprávných vzťahoch. Toto právo je neoddeliteľne späté s ochranou ľudskej dôstojnosti a osobnej integrity, pričom jeho význam sa osobitne zvyrazňuje v kontexte spracúvania údajov o zdravotnom stave.

Z rozhodovacej činnosti súdov vyplýva, že zistenie HIV pozitívneho statusu zamestnanca alebo uchádzača o zamestnanie predstavuje zásadnú skutočnosť pri posudzovaní konkrétnych prípadov. Táto okolnosť v praxi často determinovala ďalší postup zamestnávateľa, ktorý v niektorých prípadoch pristupoval k neoprávnenému zisťovaniu alebo overovaniu

¹⁷ Zpráva o šetření Propuštění ze služebního poměru z důvodu diagnostikování onemocnění virem HIV Sp. zn.: 157/2012/DIS/JŠK

informácií o zdravotnom stave dotknutej osoby, napríklad prostredníctvom testovania bez existencie zákonného dôvodu alebo relevantného pracovnoprávneho opodstatnenia.

Z rozhodcovej praxe zároveň vyplýva, že zistenie HIV pozitívneho statusu bolo neraz bezprostredným impulzom pre prijatie rozhodnutí smerujúcich voči HIV pozitívnemu zamestnancovi, ako napríklad skončenia pracovného pomeru alebo neprijatia uchádzača do zamestnania. Takéto konanie je potrebné kvalifikovať nielen ako porušenie zásady rovnakého zaobchádzania a zákazu diskriminácie, ale aj ako neoprávnený zásah do práva na súkromie, keďže ide o spracúvanie citlivých údajov bez existencie zákonného titulu.

Zamestnávateľ nie je oprávnený zisťovať zdravotný stav zamestnanca ani uchádzača o zamestnanie, vrátane informácie o infekcii vírusom HIV. Informácie o zdravotnom stave patria do osobitnej kategórie osobných údajov podliehajúcú zvýšenej právnej ochrane. Ak si zdravotný stav zamestnanca vyžaduje primeranú úpravu pracovných podmienok, zamestnanec nie je povinný konkretizovať svoju diagnózu, rozhodujúca je samotná potreba úpravy. Pri rizikových prácach je zamestnávateľ povinný zabezpečiť primeranú úroveň ochrany zdravia pri práci, vrátane preventívnych opatrení a informovanosti o víruse HIV, s cieľom minimalizovať riziko prenosu a predchádzať diskriminácii.

Ochrana práva na súkromie v uvedenom kontexte tak nepredstavuje len individuálne subjektívne právo, ale aj významný preventívny nástroj, ktorého cieľom je predchádzať diskriminačným praktikám a zabezpečiť rovné a spravodlivé podmienky v pracovnoprávných vzťahoch. Ochrany práva na súkromie sa možno domáhať prostredníctvom súdov. V prípade diskriminácie prichádza do úvahy najmä antidiskriminačná žaloba, nárok na náhradu nemajetkovej ujmy, ako aj možnosť domáhať sa neplatnosti skončenia pracovného pomeru spolu s náhradou ušlej mzdy pri skončení pracovného pomeru z dôvodu zistenia positivity na HIV.

Záver

Ochrana súkromia zamestnancov žijúcich s HIV predstavuje významný právny prostriedok na predchádzanie diskriminácii a stigmatizácii. V kontexte pracovnoprávných vzťahov je nevyhnutné vychádzať z vedecky podloženého poznania, podľa ktorého pri štandardnom pracovnom kontakte neexistuje reálne riziko prenosu infekcie, a to osobitne za predpokladu, že osoba žijúca s HIV podstupuje riadnu antiretrovírusovú liečbu a pravidelný lekársky dohľad.

K zásahom do súkromia dochádza najčastejšie v dôsledku neoprávneného získania alebo zverejnenia informácie o HIV statuse zamestnanca. Takéto konanie môže predstavovať

porušenie práva na rešpektovanie súkromného života podľa článku 8 Európskeho dohovoru o ľudských právach. Súčasne ide o okolnosť, ktorá vytvára predpoklady pre vznik diskriminačného zaobchádzania v pracovnoprávných vzťahoch, potenciálne eskalujúceho až do skončenia pracovného pomeru.

Z medicínskeho ani právneho hľadiska samotná existencia vírusu HIV v organizme zamestnanca neznamena jeho pracovnú nespôsobilosť. Z uvedeného dôvodu nemôže HIV status predstavovať legitímny ani objektívne odôvodniteľný dôvod na skončenie pracovného pomeru. V prípade, že by k takémuto skončeniu došlo výlučne na základe HIV statusu zamestnanca, išlo by o neprípustnú diskrimináciu v zmysle článku 14 Európskeho dohovoru o ľudských právach, a to v spojení s porušením práva podľa článku 8 tohto dohovoru.

Zoznam bibliografických odkazov

Knižné zdroje

1. JILICH, D. a KULÍŘOVÁ, V. a kol. *Infekce HIV*. Praha: Maxdorf, Jesenius. 2021, s. 176
2. KOTIRA, P. Zamestnanci s HIV/AIDS - ako ďalej? In: *PRACOVNÍ PRÁVO 2012 na téma Závislá práce a její podoby. Zborník z konferencie*. Masarykova univerzita: ACTA UNIVERSITATIS BRUNENSIS IURIDICA No 440. 2012, s. 232-243
3. PÍRY, M. *HIV - legálne aspekty diagnózy*. Banská Bystrica: Belianum, 2024. Právnická fakulta. s. 144. ISBN 978-80-557-2178-1.
4. PURCELL, D. W. 2021. Forty Years of HIV: The Intersection of Laws, Stigma, and Sexual Behavior and Identity. *American Journal of Public Health* [online]. American Public Health Association, 111(7): 1231-1233 [cit. 2026-03-15]. DOI: 10.2105/ajph.2021.306335. ISSN 0090-0036. Dostupné na : <https://pmc.ncbi.nlm.nih.gov/articles/PMC8493181/>

Legislatíva a súdne rozhodnutia

5. Európsky dohovor o ochrane ľudských práv a základných slobôd
6. Medzinárodný pakt o občianskych a politických právach
7. Odporúčania Medzinárodnej organizácie práce o HIV a AIDS a svet práce č. 200 z roku 2010
8. Rozhodnutie ESĽP zo dňa 15. septembra 2011, Kiyutin proti Rusku, sťažnosť. Č. 2700/10
9. Rozhodnutie ESĽP zo dňa 17. júla 2008, I v. Fínsko, sťažnosť č. 20511/03
10. Rozhodnutie ESĽP zo dňa 3. októbra 2013, I.B. v. Grécko, sťažnosť č. 552/10
11. X proti Komisii Európskych spoločenstiev, rozsudok z 5. októbra 1994. EU:C-404/92 P
12. Zpráva o šetření Propuštění ze služebního poměru z důvodu diagnostikování onemocnění virem HIV sp. zn.: 157/2012/DIS/JŠK

Internetové zdroje

13. EUROPEAN COURT OF HUMAN RIGHTS. Guide on Article 14 of the Convention (prohibition of discrimination) and on Article 1 of Protocol No. 12 (general prohibition of discrimination) [online]. 2024 [cit. 2026-03-15]. Dostupné na: https://ks.echr.coe.int/documents/d/echr_ks/guide_art_14_art_1_protocol_12_eng
14. EUROPEAN COURT OF HUMAN RIGHTS. Guide on Article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence [online]. 2025 [cit. 2026-03-15]. Dostupné na: https://ks.echr.coe.int/documents/d/echr_ks/guide_art_14_art_1_protocol_12_eng

15. HIV GOV. *What Are HIV and AIDS?* [online]. [cit. 2026-03-14]. Dostupné na: <https://www.hiv.gov/hiv-basics/overview/about-hiv-and-aids/what-are-hiv-and-aids>
16. UNAIDS. *Global HIV & AIDS statistics — Fact sheet*. [online]. [cit. 2026-03-14]. Dostupné na: < <https://www.unaids.org/en/resources/fact-sheet> >
17. WORLD HEALTH ORGANIZATION. *HIV and AIDS* [online]. [cit. 2026-03-14]. Dostupné na: <https://www.who.int/news-room/fact-sheets/detail/hiv-aids>
18. WORLD HEALTHY ORGANIZATION. On the frontline of the fight against HIV: Ukraine's resilience and WHO's support [online]. [cit. 2026-03-14] . Dostupné na internete: < <https://www.who.int/europe/news/item/19-12-2023-on-the-frontline-of-the-fight-against-hiv--ukraine-s-resilience-and-who-s-support> >

PRÁVO NA ODPOJENIE AKO VÝZVA VYMEDZENIA PRACOVNÉHO ČASU V DIGITALIZOVANEJ SPOLOČNOSTI

The right to disconnect as a challenge to defining working hours in a digitalized society

LAURA JAROTTOVÁ*

Abstrakt

Vývoj pracovného práva úzko súvisí s prechodom od tradičného chápania spoločnosti k digitálnej spoločnosti, ktorá zásadne ovplyvňuje spôsob výkonu práce. Dôsledkom tejto transformácie je zvýšená dostupnosť zamestnancov v online priestore za použitia digitálnych nástrojov. Článok „Právo na odpojenie ako výzva vymedzenia pracovného času v digitalizovanej spoločnosti“ sa zameriava na novodobý pracovnoprávny inštitút právo na odpojenie, ktorý predstavuje reakciu na rastúce problémy spojené s oslabením oddelenia pracovného a súkromného života, čo vyvoláva potrebu posilnenia právnej ochrany zamestnancov. Bližšie skúma špecifiká pracovného času i jeho rozvrhovanie pri atypických formách práce v porovnaní so štandardným stanovením pracovného času. Následne sa článok zameriava na právo na odpojenie v kontexte európskej legislatívy s analýzou jednotlivých právnych predpisov a ich implementáciou v komparácii so slovenskou právnou úpravou. Zároveň sa článok orientuje na podporu rovnováhy medzi pracovným a súkromným životom, s dôrazom na skúmanie mechanizmov a odporúčani pre efektívne rozvrhnutie pracovného času pri online práci, umožňujúce zamestnancom harmonicky zosúladiť pracovné a osobné povinnosti. Poukazuje na nedostatočné legislatívne vymedzenie práva na odpojenie v slovenskej právnej úprave a zároveň predkladá návrhy jeho doplnenia v intenciách de lege ferenda, prispievajúc k efektívnejšej ochrane atypických zamestnancov.

Abstract

The development of labour law is closely linked to the transition from a traditional understanding of society to a digital society, which fundamentally influences the way work is performed. The result of this transformation is increased availability of employees in the online space using digital tools. The article "The right to disconnect as a challenge to defining working time in a digitalized society" focuses on the modern labour law institution of the right to disconnect, which is a response to the growing problems associated with the blurring of the boundaries between work and private life, which necessitates strengthening the legal protection of employees. It examines in detail the specifics of working time and its scheduling in atypical forms of work in comparison with the standard determination of working time. The article then focuses on the right to disconnect in the context of European legislation, analysing individual legal regulations and their implementation in comparison with Slovak legislation. At the same time, the article focuses on promoting work-life balance, with an emphasis on examining mechanisms and recommendations for the effective scheduling of working time in online work, enabling employees to harmoniously reconcile their work and personal responsibilities. It points to the insufficient legislative definition of the right to disconnect in Slovak legislation and at the same time submits proposals for its amendment in the spirit of de lege ferenda, contributing to more effective protection of atypical employees.

Kľúčové slová: Atypické formy zamestnávania. Digitalizácia. Pracovný čas. Rovnováha. Súkromný a pracovný život. Ochrana zamestnanca.

Key words: Atypical forms of employment. Digitalization. Working hours. Work-life balance. Private and professional life. Employee protection.

* Bc. Laura Jarottová, 1. ročník dennej formy magisterského stupňa štúdia, Právnická fakulta Univerzity Mateja Bela v Banskej Bystrici, jarottovalaura@gmail.com.

Úvod

Digitálna transformácia zásadne mení spôsob fungovania spoločnosti. Posilnenie globálneho rastu príjmov i zefektívnenie životnej úrovne spoločnosti stvára kladnú dikciu 4. priemyselnej revolúcie.¹ Virtuálne napĺňanie personálnych požiadaviek cez online vzdelávanie, certifikácie, nakupovanie produktov, objednávanie služieb či realizácie pracovnej činnosti sú jednými z dominantných predností digitálnej revolúcie.² Súčasné moderné technológie sa stávajú imanentnou súčasťou všetkých spoločenských vzťahov, prostredníctvom ktorých sa menia aj právne vzťahy reflektujúce nové spôsoby interagovania medzi ľuďmi. Konštantná aplikácia internetovej siete vedie k prelínaniu dvoch svetov, a to fyzického a virtuálneho, čo sa prejavuje aj prostredníctvom Statistu, jedným z popredných globálnych dátových a trhových platforiem, ktorý vo svojej štatistike, k októbru 2025, uvádza údajové zastúpenie internetových používateľov na 6,04 miliardy ľudí, čo predstavuje 73,2 % svetovej populácie.³ Univerzálna dostupnosť internetového pripojenia predstavuje kľúčový benefit nadobúdajúci rastúci význam, v oblasti pracovného práva, u zamestnancov i zamestnávateľov. Poňatie klasického pracovného pomeru determinujúce fixne určený pracovný čas, nemenné miesto výkonu práce s jednoznačne stanovením oddelenia pracovného a osobného života, ustupuje do pozadia v dôsledku intenzívnejšieho využívania neštandardných foriem zamestnávania. Avšak, je potrebné zdôrazniť, že popri pozitívnych prínosoch, ktoré Industry 4.0 do pracovnoprávných vzťahov prináša, existujú potenciálne riziká či negatívne dôsledky, najmä v podobe redukcie pracovných miest, v závislosti od uvoľňovania ľudskej práce prostredníctvom implementácie technológií do pracovných procesov, taktiež dopady spojené s narušením sociálnych práv, či už cez sociálnu disproporciu medzi jednotlivými zamestnancami, najmä čo sa týka zaobstarania si technológií, ktoré bezprostredne súvisia s výkonom atypických foriem zamestnávania⁴ alebo naštrením práv viazaných na odpočinok po práci, čo zapríčiňuje neadekvátne odčlenenie života pracovného i súkromného v kontexte využívaných neštandardných spôsobov zamestnania.

¹ Industry4.sk, *Čo je Industry 4.0*, n.d. Dostupné na: [O čom je štvrtá priemyselná revolúcia - Industry 4.0](#) [cit. 02. 12. 2025].

² Furbify, P. (2023). *Digitálna revolúcia a jej vplyv na náš každodenný život*. Dostupné na: [Digitálna revolúcia a jej vplyv na náš každodenný život | furbify](#) [cit. 02. 12. 2025].

³ Statista. (2025). *Global internet user penetration*. Dostupné na: [Internet penetration worldwide 2025 | Statista](#) [cit. 02. 12. 2025].

⁴ Furbify, P. (2023). *Digitálna revolúcia a jej vplyv na náš každodenný život*. Dostupné na: [Digitálna revolúcia a jej vplyv na náš každodenný život | furbify](#) [cit. 02. 12. 2025].

1 Osobitosti pracovného času pri atypických formách zamestnania

Dynamické zmeny odvetvia pracovného práva, prostredníctvom vplyvu digitalizácie spoločnosti, zavádzaním informačno-komunikačných prostriedkov podmieňujúce vzostup realizácie flexibilných pracovných režimov, ktoré možno charakterizovať, v negatívnej konštrukcii, ako formy zamestnania mimo štandardného pracovného pomeru bez orientácie neurčitého pracovného času i vzájomnej prítomnosti plného pracovného úväzku.⁵ Medzi tieto formy práce sa zaraďuje najmä domácka práca, telepráca či príležitostná práca (home office). Identifikačné prvky, oddeľujúce tradičné poňatie pracovnoprávných vzťahov, zahŕňajú predovšetkým miesto výkonu práce a spôsob určenia pracovného času vyjadrujúce flexibilitu pracovného režimu. Uvedené črty pristupujú k realizácii pracovných úloh s osobitnou povahou v porovnaní s tradičnými prístupmi v pracovnoprávných vzťahoch. Príkladmo telepráca, ktorá symbolizuje atribút flexibility tým, že pri výkone tohto typu práce, zamestnanci vykonávajú pracovné úlohy mimo sídla zamestnávateľa, a teda svoju činnosť môžu vykonávať z akéhokoľvek miesta s pripojením na internet. Významná je aj povaha alternatívneho rozvrhnutia pracovného času, ktorého reguláciu stanovuje aj Zákonník práce.⁶

Úpravu pracovného času, ktorú výrazne diferencuje vnímanie štandardných od atypických foriem zamestnania, možno chápať v užšom poňatí i vo všeobecnom vymedzení, pričom užšie poňatie pracovného času predstavuje len čas pridelený na prácu, resp. čas určený pracovným harmonogramom. Širší výklad zahŕňa celkovú dobu, počas ktorej zamestnanec plní svoje pracovné úlohy.⁷ Podľa platnej právnej úpravy zamestnanec, v rámci jedného dňa, môže odpracovať najviac 8 hodín, okrem toho Zákonník práce určuje rozsah práce v dlhšom období, teda týždenný pracovný čas, ktorý nesmie prekročiť 40 hodín.⁸ Fixné stanovený pracovný čas v spolupôsobení s konkrétne určeným pracoviskom je špecifické pre štandardný pracovný pomer, pričom pri atypických formách zamestnania je určenie pracovného času podstatne flexibilnejšie. Vzhľadom na to, že zamestnanec realizuje pracovnú činnosť mimo pracoviska zamestnávateľa umožňuje sa uplatnenie pružnejšieho časového režimu, napriek tomu Zákonník práce reglementuje zachovať rozsah týždenného pracovného času, v spomínanej dĺžke 40 hodín.⁹ Pracovný čas predstavuje v oboch typoch pracovnoprávných vzťahov, teda v klasických aj atypických formách, pravidelnú náležitosť pracovnej zmluvy. V prípade domáckej práce alebo telepráce Zákonník práce v § 52 ods. 4 výslovne predpokladá uzatvorenie dohody medzi

⁵ Barancová, H. (2019). *Teoretické a praktické súvislosti pracovného práva EÚ*, s. 250. Bratislava: Sprint 2 s.r.o.

⁶ Zákonník práce, zákon č. 311/2001 Z. z., § 52 ods. 1.

⁷ Toman, J. (2015). *Individuálne pracovné právo*, s. 43. Bratislava: Friedrich Ebert Stiftung, zastúpenie v SR.

⁸ Zákonník práce, zákon č. 311/2001 Z. z., § 85 ods. 4–5.

⁹ Zákonník práce, zákon č. 311/2001 Z. z., § 52 ods. 1.

účastníkmi pracovného pomeru o pracovnom čase. Na tento čas možno aplikovať dve koncepcie, a to samostatné plánovanie času či rozvrhnutie v podobe pružného pracovného času. Pružný pracovný čas umožňuje zamestnancovi flexibilne plánovať začatie a ukončenie práce v jednotlivých dňoch a pozostáva z týchto častí:

- a) základný pracovný čas,
- b) voliteľný pracovný čas.

Základný pracovný čas možno definovať ako povinnú prítomnosť zamestnanca na pracovisku zamestnávateľa v rámci pevne stanoveného časového úseku, zatiaľ čo pri voliteľnom čase poskytuje zamestnancovi možnosť prispôbiť začiatok a koniec pracovnej doby, avšak len v rámci tohto voliteľného úseku.¹⁰ Príkladom, v zmysle aplikačnej praxe, zamestnanec si určí základný pracovný čas, v rámci ktorého musí byť prítomný na pracovisku, od 09:00 do 14:00 hod., voliteľný pracovný čas si zamestnanec môže stanoviť podľa individuálnych potrieb, napríklad od 06:00 do 09:00 hod. alebo od 14:00 do 17:00 hod., avšak je dôležité zdôrazniť, že celková dĺžka pracovného času za deň musí zostať v súlade s výmerou maximálnej dennej dĺžky tohto času, čo predstavuje 8 hodín.

Pri netradičných formách zamestnania si zamestnanci môžu svoj pracovný čas naplánovať aj individuálne, o čo sa opiera aj ustanovenie § 52 ods. 6 Zákonníka práce, pri tom však sú zamestnanci povinní zachovávať hranice denného i týždenného odpočinku. Je nevyhnutné poukázať na to, že v prípade individuálneho určovania času sú determinované určité odchýlenia od bežného pracovného režimu, predovšetkým ide o zásadu rovnakého zaobchádzania, ktorá v prípade sociálnych práv neštandardných zamestnancov v porovnaní s klasickými zamestnancami vykonávajúcimi pracovnú činnosť v prevádzke zamestnávateľa, upadá do čoraz väčšej kolízie. Kontrast sa týka predovšetkým otázok v spojitosti s prekážkami v práci, teda právne významné okolnosti dopadajúce na pracovný čas zamestnanca, ktoré zdôvodňujú dočasné neplnenie pracovných povinností. Predsa však, pri uskutočňovaní domáckej práce či telepráce sa ukazuje nesúlad vyplývajúci z nemožnosti uplatniť si prestoje, teda akýsi krátkodobý nedostatok spôsobený technickou chybou. Na podklade čoho je nevyhnutné upriamiť pozornosť na skutočnosť, že objektívne prekážky môžu nastať tak zamestnancom pracujúcim priamo v prevádzke zamestnávateľa, ako aj tým, ktorí aplikujú prácu z domu,¹¹ príkladom výpadok elektriny, porucha služobných zariadení, zlyhanie pracovných systémov a pod. Rovnako, Zákonník práce považuje za jedinú akceptovateľnú

¹⁰ Barancová, H. (2012). *Pracovný čas a judikatúra Súdneho dvora EÚ*, s. 23. Bratislava: Sprint 2 s.r.o.

¹¹ Žulová, J. (2025). Sociálne práva zamestnancov vykonávajúcich teleprácu. In *Pracovné právo v digitálnej dobe*, s. 91. Dostupné na: [Pracovné právo v digitálnej dobe_TISK2.pdf](#) [cit. 10. 12. 2025].

relevantnú udalosť na priznanie mzdového nároku úmrtie rodinného člena.¹² Vzhľadom na uvedené je účelné vyjadriť akceptačné stanovisko s docentkou Janou Žulovou, v spojitosti s príspevkom *Sociálne práva zamestnancov vykonávajúcich teleprácu*, v ktorom sa rieši konflikt medzi pracovným a rodinným životom, vyplývajúci z nepochybnnej prítomnosti viacerých neočakávaných vonkajších okolností, ktoré by mali byť *pro futuro* v zmysle *de lege ferenda* adekvátne vynahradené a právne posilnené dodatočnou úpravou. Obdobné kontroverzie sa týkajú aj odmien pre zamestnancov vykonávajúcich atypické podoby práce. Na týchto zamestnancov sa nevzťahujú mzdové príplatky za nadčasy, nočné zmeny alebo víkendovú prácu či prácu počas sviatkov.¹⁴ Napriek tomu však môže vzniknúť situácia, keď zamestnávateľ zadá viac práce, než je možné splniť v rámci bežného fondu pracovného času, a zamestnanec musí pracovať nadčas. Aktuálne nastavenie právnej úpravy však takúto situáciu neprimerane zjednodušuje a eliminuje nárok na zodpovedajúcu odmenu.¹³ Systém odmeňovania by mal reflektovať dôraz medzi pružnosťou a objektivnosťou pri oceňovaní za vykonanú prácu. Preto by sa, v intenciách *de lege ferenda*, z ustanovení Zákonníka práce, malo explicitne vychádzať z toho, že pravidlá práce nadčas sa majú uplatňovať rovnakým spôsobom aj na zamestnancov pracujúcich atypickými formami, s dôrazom na jeden z kľúčových princípov pracovného práva súvisiaci s rovnomerným odmeňovaním.

Aktuálna legislatíva signalizuje zreteľné medzery, ktoré implicitne uprednostňujú štandardné zamestnanecké vzťahy, zatiaľ čo osoby atypických foriem zamestnania majú častokrát obmedzený prístup k ochrane poskytovanej pracovným právom. Možno konštatovať, že pri kreovaní súčasnej úpravy zákonodarca nebral do úvahy, že aj atypické formy zamestnania môžu viesť k podobným problémom charakteristických pre klasické pracovné pomery, čo zvyšuje riziko sociálnej nerovnosti i oslabenia tohto druhu zamestnancov. V intenciách *de lege ferenda* je žiaduce zváženie aktuálnej revízie, zo strany zákonodarcu, niektorých pracovnoprávných nárokov a pristúpenie k ich zrušeniu či zásadnému zúženiu ich rozsahu, nakoľko právna úprava by mala reflektovať jednotnú minimálnu garantovanú ochranu aplikovateľnú vo všetkých typoch závislej práce, ak to ich charakter objektívne umožňuje.

¹² Zákonník práce, zákon č. 311/2001 Z. z., § 52 ods. 7 písm. c). ¹⁴

Zákonník práce, zákon č. 311/2001 Z. z., § 52 ods. 7 písm. d).

¹³ Žulová, J. (2025). Sociálne práva zamestnancov vykonávajúcich teleprácu. In *Pracovné právo v digitálnej dobe*, s. 93. Dostupné na: [Pracovné právo v digitálnej dobe_TISK2.pdf](#) [cit. 10. 12. 2025].

2 Zakotvenie práva na odpojenie v európskom kontexte

V kontexte dynamického vývoja pracovnoprávných vzťahov nadobúda právo na odpojenie čoraz väčšiu relevanciu, najmä reakciou na rastúci vplyv digitalizácie a flexibilných foriem zamestnania, pričom neoddeliteľnou súčasťou zostáva ochrana pracovnoprávných štandardov i súkromného života zamestnancov, preto možno konštatovať potrebu explicitného zakotvenia tohto inštitútu v jednotlivých právnych poriadkoch. Legálna definícia daného inštitútu nie je jednoznačne obsiahnutá, avšak z teoretického hľadiska, v zmysle *de lege ferenda*, ju možno determinovať ako právo zamestnanca zdržať sa mimo pracovného času aplikovania digitálnych komunikačných prostriedkov súvisiacich s plnením pracovných úloh, s cieľom ochrany zamestnanca pred nadmerným pracovným zaťažením.

Prvotná výslovná implementácia práva na odpojenie v právnom poriadku bola aplikovaná Francúzskom, v roku 2017. Opodstatnenosť regulácie právnej úpravy, vyplývajúcej aj z tvrdení Ministerstva práce, spočívala najmä v eliminácii nežiadúcich následkov spojených s online prácou, vzhľadom na skutočnosť, že mnohí zamestnanci realizujú pracovnú činnosť aj mimo rozsah ustanoveného pracovného času.¹⁴ Právo na odpojenie, v zmysle francúzskeho Zákonníka práce, reflektuje akúsi prevenciu v spolupôsobení s predchádzaním nepriaznivých účinkov vedúcim k dlhodobému psychickému preťaženiu, vyhoreniu či stresu, radených medzi prvotné neduhy atypických foriem zamestnávania. Na základe týchto skutočností vyvstáva zamestnávateľovi povinnosť zaistiť ochranu bezpečnosti a zdravia neštandardných zamestnancov.¹⁵ Spomínaný inštitút sa vzťahuje na každú spoločnosť, v ktorej pôsobí aspoň 50 zamestnancov, na základe čoho možno povinnosti spoločností s odborovými sekciami konštituovať ako:

- každoročné rokovanie o rovnosti medzi ženami a mužmi, o zlepšení pracovných podmienok a životnej pohody zamestnancov,
- záruka vypnutia pracovného zariadenia v kooperácii s odpojením sa od práce,
- zavedenie pravidiel pre používanie digitálnych nástrojov chrániace voľný čas zamestnancov,
- podpora bilancie medzi pracovným životom a súkromím, vrátane času na oddych

¹⁴ Ženy v Meste. (2016, január 9). *Francúzi zaviedli právo offline: Zamestnanci nemusia odpovedať na emaily a telefonáty po práci*. Dostupné na: <https://www.zenyvmeste.sk/francuzi-zaviedli-pravo-offline-zamestnancinemusia-odpovedat-na-emaily-a-telefonaty-po-praci/> [cit. 18. 12. 2025].

¹⁵ France, *Code du travail*, art. L2242-8 (as amended 2017). Légifrance. Dostupné na: <https://www.legifrance.gouv.fr>.

a rodinu.¹⁶

Belgická jurisdikcia taktiež obsahuje právo na odpojenie. Daný inštitút má pôsobnosť vo vzťahu k zamestnancom vykonávajúcich prácu u zamestnávateľa, ktorý zamestnáva aspoň 20 zamestnancov. Uplatňovanie tohto práva je viazané na kolektívnu dohodu, ktorá vymedzuje spôsob jeho realizácie, a teda zamestnanec, v zmysle uvedeného má právo na:

- nekontaktovanie mimo dohodnutého pracovného času,
- ustanovenie pravidiel používania digitálnych pracovných nástrojov v spolupôsobení s uplatnením si práva na odpočinok či dovolenku,
- školenia zamerané na zvyšovanie povedomia o používaní digitálnych nástrojov
- osvetu o používaní digitálnych technológií v súvislosti s prevenciou rizík pri nadmernej digitálnej dostupnosti.¹⁷

Aj španielska legislatíva reflektuje potrebu ochrany súkromia zamestnanca v španielskom organickom zákone č. 3/2018, pričom spomínané právo sa vzťahuje na všetkých zamestnancov. Ide o konkrétne ustanovenie daného zákona, ktoré v čl. 88 nachádza svoj základ v:

- 1) garancii voľného času zamestnancov,
- 2) urovnaní pracovného života s osobným,
- 3) dikcii kolektívnej zmluvy,
- 4) internej politike zamestnávateľa,
- 5) edukácii a zvyšovaní povedomia,
- 6) dbaní na práva pri flexibilných formách práce.¹⁸

Na rozdiel od belgickej legislatívy, španielsky právny poriadok stanovuje sankcie v prípade, že zamestnávateľ poruší svoje povinnosti týkajúce sa práva na odpojenie a uloženia finančnej sankcie v rozmedzí 751 až 7 500 € zo strany Inšpektorátu práce. Okrem toho, zamestnanec nadobúda právo podať sťažnosť na príslušné orgány alebo si uplatniť nárok na náhradu vzniknutej škody.¹⁹ Právo na odpojenie sa v Slovenskej republike začalo právne regulovať

¹⁶ Travail emploi.gouv.fr. (2025, december 4). Le droit à la déconnexion. Ministère du Travail, de l'Emploi et des Solidarités. Dostupné na: <https://travail-emploi.gouv.fr/le-droit-la-deconnexion> [cit. 19. 12. 2025].

¹⁷ Mayer Brown. (2025, February-March). Belgium: The right to disconnect Q&A. Mayer Brown. Dostupné na: <https://www.mayerbrown.com/en/insights/publications/2025/03/belgium-the-right-to-disconnect-qa> [cit. 19. 12. 2025].

¹⁸ España. (2018, 5 de diciembre). Ley Orgánica 3/2018, de Protección de Datos Personales y garantía de los derechos digitales, Artículo 88. Boletín Oficial del Estado. Dostupné na: <https://www.boe.es/eli/es/lo/2018/12/05/3/con>.

¹⁹ Bonilla, J., & Campos, A. (2025, February-March). Spain: The right to disconnect Q&A. Mayer Brown. Dostupné na: <https://www.mayerbrown.com/en/insights/publications/2025/03/spain-the-right-to-disconnect-qa> [cit. 19. 12. 2025].

najmä v súvislosti s rastúcim uplatňovaním neštandardných foriem zamestnania, ktoré bolo výrazne ovplyvnené pandémiou COVID-19. Dikcia Zákonníka práce absentuje explicitnou úpravou práva na odpojenie, avšak novelizácia z 1. marca 2021 reglementuje právo zamestnanca zdržať sa používania pracovných prostriedkov mimo pracovného času pri domáckej práci i telepráce, na základe čoho je zamestnávateľ povinný rešpektovať odmietnutie výkonu práce po skončení pracovnej doby.²⁰ Avšak, je nevyhnutné upozorniť na to, že predmetné právo je garantované len pri výkone domáckej práce alebo telepráce, a preto možno konštatovať, v intenciách *de lege ferenda*, uplatnenie tejto právnej úpravy voči všetkým zamestnancom.

3 Ochrana osobného života zamestnanca

Uznesenie Európskeho parlamentu o práve na odpojenie reaguje na rastúcu digitalizáciu spoločnosti a rozširovanie práce na diaľku, ktoré vedú k neodôvodnenému očakávaniu nepretržitej dostupnosti zamestnancov, čo spôsobuje rozplývanie hraníc medzi pracovným a súkromným životom. Parlament zdôrazňuje, že vysoké pracovné požiadavky v kombinácii s očakávaním neustálej dostupnosti majú negatívny vplyv na základné práva pracovníkov, ich fyzické a duševné zdravie, pohodu či spomínanú rovnováhu medzi pracovným a súkromným životom. Parlament upozorňuje, že zasahovanie do osobného času či predlžovanie pracovnej doby zvyšujú riziko neplatených nadčasov, pracovnej únavy, psychosociálnych problémov, úzkosti, depresie, vyhorenia i technologického stresu, čo negatívne vplyva na bezpečnosť a ochranu zdravia pri práci. Z tohto dôvodu považuje právo na odpojenie za kľúčový prostriedok na ochranu fyzického a psychického zdravia zamestnancov a zdôrazňuje potrebu hodnotenia psychosociálnych rizík a podpory duševného zdravia na pracovisku. Zároveň zdôrazňuje, že podľa platnej legislatívy a judikatúry Súdneho dvora EÚ zamestnanci nemajú povinnosť byť nepretržite k dispozícii zamestnávateľovi a že medzi pracovným časom a časom odpočinku existuje jasné rozlíšenie. Vzhľadom na to, že právo na odpojenie zatiaľ nie je v európskom práve výslovne upravené a členské štáty pristupujú k problematike odlišne, Európsky parlament vyzýva Európsku komisiu i členské štáty na vzájomnú spoluprácu a vypracovanie jednotnej právnej úpravy, ktorá bude dominovať na úrovni Európskej únie.²¹

²⁰ Zákonník práce, zákon č. 311/2001 Z. z., § 52 ods. 10.

²¹ Európsky parlament. (2021, január 21). *Resolution on the right to disconnect*. Dostupné na: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_SK.html.

Work-life balance predstavuje zásadný faktor pre ochranu zdravia zamestnancov, efektívnosť pracovnej výkonnosti i minimalizáciu rizika vyhorenia a jeho dodržiavanie predstavuje praktickú realizáciu práva na súkromný život a čas odpočinku mimo pracovnej doby. Na základe uvedeného je možné tvrdiť, že relevancia práva na súkromný život je aj v kontexte pracovnoprávných vzťahov. Dohovor o ľudských právach a základných slobodách uznáva dané právo ako základné ľudské právo prvej generácie.²² Ústava SR rovnako priznáva význam práva na súkromie tým, že zaručuje nedotknuteľnosť osoby a ochranu jej súkromnej sféry.²³ V rámci pracovnoprávných vzťahov to znamená, že zamestnávateľ nesmie bez vážnych dôvodov hodných osobitného zreteľa zasahovať do súkromia jeho zamestnanca, pričom rešpektovanie tejto zásady je nevyhnutné na zachovanie ľudskej dôstojnosti či osobnej autonómie a work-life balance. Právo na súkromný život je neoddeliteľne prepojené s právom zamestnanca na odpočinok po práci, keďže dostatočný čas na regeneráciu a osobný život je nevyhnutný pre zachovanie fyzického a psychického zdravia. Podľa Zákonníka práce je zamestnávateľ povinný pri organizácii pracovného času zabezpečiť:

- a) nepretržitý denný odpočinok (12-hodinový odpočinok v priebehu 24 hodín),
- b) nepretržitý týždenný odpočinok (dva po sebe idúce dni odpočinku, zvyčajne v sobotu a nedeľu).²⁴

A teda, udržiavanie rovnováhy medzi pracovným a súkromným životom je nevyhnutné pre spomínané fyzické a psychické zdravie zamestnancov či ich pracovnú výkonnosť. V súčasnom flexibilnom a digitálne prepojenom pracovnom prostredí sa pracovné povinnosti a osobný čas často prekrývajú, čo častokrát vedie k vyhoreniu a zvýšenému stresu. Z tohto dôvodu je významné identifikovať, v zmysle aplikačnej praxe, konkrétnu stratégiu, ktorá umožní efektívne oddeliť pracovnú a súkromnú sféru, a tým prispieť k celkovej pohode a profesijnému rozvoju jednotlivých zamestnancov. Na danú problematiku reagovalo aj *Generálne riaditeľstvo pre zamestnanosť, sociálne záležitosti a začlenenie*, ktoré sa v článku zameralo na odporúčania, ako dosiahnuť rovnováhu medzi pracovným a súkromným životom. V podstate sa jedná o:

- 1) nastavenie zreteľných pravidiel,
- 2) optimalizácia plánovania a prioritizovanie úloh,
- 3) rutina pre ukončenie pracovného dňa,

²² Barancová, H., Švec, M., & Bulla, M. (2012). *Ochrana zamestnanca a budúcnosť pracovného práva*, s. 42. Bratislava: Sprint 2 s.r.o.

²³ Ústava Slovenskej republiky, čl. 16, Ústavný zákon č. 460/1992 Z. z.

²⁴ Zákonník práce, zákon č. 311/2001 Z. z., § 92-93.

4) udržiavanie zdravia a psychickej pohody.²⁵

V intenciách *de lege ferenda* je možné odporučiť, aby stratégie podporujúce rovnováhu medzi pracovným a súkromným životom boli jasne zakotvené vo vnútorných predpisoch alebo pracovnej zmluve. Zamestnávateľ by mal zároveň aktívne zabezpečovať školenia, workshopy a iné informačné aktivity zamerané na zvyšovanie povedomia zamestnancov o význame odpojenia od práce, riadení pracovného času a prevencii syndrómu vyhorenia. Implementácia týchto opatrení by sa *pro futuro* mala stať súčasťou firemnej politiky reflektujúca moderné potreby zamestnancov, čím by prispievala k efektívnejšiemu fungovaniu pracovného prostredia.

Záver

Udržiavanie rovnováhy medzi pracovnými povinnosťami a osobným životom je základom dlhodobej pohody a zdravia zamestnancov. Právo na odpojenie, ktoré sa formuje ako reakcia na rastúce využívanie digitálnych technológií, ktoré umožňujú zamestnancom neplniť pracovné povinnosti mimo pracovného času, sa postupne začína premietiť do právnych úprav jednotlivých členských štátov EÚ. Každý štát však k jeho regulácii pristupuje rozdielnym spôsobom, pričom na európskej úrovni absentuje jednotná právna úprava. Napriek tomu, že právo na odpojenie v slovenskom práve zakotvené novelizáciou Zákonníka práce, je jeho rozsah pomerne obmedzený, nakoľko sa nevzťahuje na všetkých zamestnancov využívajúcich informačno-technické prostriedky. Z týchto skutočností vyplýva *pro futuro* potreba rozšírenia predmetného ustanovenia. Na jednej strane sa Zákonník práce sústreďuje na obmedzenie používania technických prostriedkov komunikácie, na druhej strane však hranica medzi pracovným a súkromným časom nie je jednoznačne vymedzená. Z tohto dôvodu sa v intenciách *de lege ferenda* javí ako nevyhnutné bližšie upraviť predmetné právo do právneho poriadku Slovenskej republiky a súčasne zaviesť povinnosť zamestnávateľa jasne vymedziť pracovný čas, s cieľom zabezpečiť rešpektovanie odpočinku a dovolení zamestnancov, a tým predchádzať nadmernému pracovnému zaťaženiu.

Z uvedených skutočností vyplýva, že absencia práva na odpojenie by pre zamestnanca znamenala zvýšenú mieru stresu a vyššie riziko vyhorenia, keďže neustála dostupnosť a tlak reagovať na pracovné e-maily či požiadavky aj mimo pracovného času výrazne zvyšujú psychickú záťaž. Súčasne možno poukázať na negatívne dôsledky na zdravotný stav

²⁵ Európsky orgán práce. (2024, apríl 5). *Ako dosiahnuť správnu rovnováhu medzi pracovným a osobným životom*. EURES. Dostupné na: https://eures.europa.eu/striking-right-balance-between-work-and-personal-time-2024-0405_sk [cit. 23. 12. 2025].

zamestnanca, ktoré sa prejavujú najmä v podobe nedostatočného spánku, pretrvávajúceho stresu a obmedzeného času na oddych, čo má za následok aj zníženú pracovnú produktivitu. Súvisiace právo na odpočinok je garantované tak na európskej ako na národnej úrovni, čo prispieva ku kvalitnejším medziľudským vzťahom, vyššej lojalite zamestnancov, s čím súvisí možnosť využívania dostupných stratégií a praktických nástrojov (efektívne plánovanie času, stanovenie priorít, rituály odpojenia od práce a pod.) zo strany zamestnancov i zamestnávateľov. Pre budúcnosť, návrh *de lege ferenda* by mal obsahovať povinnosť zamestnávateľa zaviesť pravidelné školenia pre zamestnancov zamerané na work-life balance. Takéto regulačné zásahy zlepšujú nielen osobnú pohodu zamestnancov, ale zároveň prispievajú k efektívnemu a harmonickému fungovaniu pracovného prostredia a k dlhodobej udržateľnosti pracovného výkonu.

Zoznam bibliografických odkazov

Monografie a skriptá

1. Barancová, H. (2012). *Pracovný čas a judikatúra Súdneho dvora EÚ*. Bratislava: Sprint 2 s.r.o. ISBN 978-80-89393-77-0.
2. Barancová, H. (2019). *Teoretické a praktické súvislosti pracovného práva Európskej únie*. Bratislava: Sprint 2 s.r.o. ISBN 978-80-89393-49-2.
3. Barancová, H., Švec, M., & Bulla, M. (2012). *Ochrana zamestnanca a budúcnosť pracovného práva*. Bratislava: Sprint 2 s.r.o. ISBN 978-80-89393-66-4.
4. Toman, J. (2015). *Individuálne pracovné právo*. Bratislava: Friedrich Ebert Stiftung, zastúpenie v SR. ISBN 978-80-89149-49-0.

Periodiká (časopisy) a zborníky resp. state v nich uverejnené

6. Bonilla, J., & Campos, A. (2025, February-March). *Spain: The right to disconnect Q&A*. Mayer Brown. Dostupné na: <https://www.mayerbrown.com/en/insights/publications/2025/03/spain-the-right-to-disconnect-qa> [cit. 19. 12. 2025].
7. Furbify, P. (2023, August 16). *Digitálna revolúcia a jej vplyv na náš každodenný život*. Dostupné na: <https://www.furbify.com/digitalna-revolucia> [cit. 02. 12. 2025].
8. Mayer Brown. (2025, February-March). *Belgium: The right to disconnect Q&A*. Dostupné na: <https://www.mayerbrown.com/en/insights/publications/2025/03/belgium-the-right-to-disconnect-qa> [cit. 19. 12. 2025].
9. Ženy v Meste. (2016, January 9). *Francúzi zaviedli právo offline. Zamestnanci nemusia odpovedať na emaily a telefonáty po práci. Ženy v Meste*. Dostupné na: https://www.zenyv_meste.sk/francuzi-pravo-offline [cit. 18. 12. 2025].
10. Žulová, J. (2018). *Sociálne práva zamestnancov vykonávajúcich teleprácu*. In *Pracovné právo v digitálnej dobe*. Dostupné na: [Pracovné právo v digitálnej dobe_TISK2.pdf](#) [cit. 10. 12. 2025].

Internetové zdroje

11. Európsky orgán práce. (2024, 5. apríla). *Ako dosiahnuť správnu rovnováhu medzi pracovným a osobným životom*. EURES. Dostupné na: https://eures.europa.eu/striking-right-balance-between-work-and-personal-time-2024-04-05_sk [cit. 23. 12. 2025].
12. Industry4.sk. (n. d.). (November 24, 2025). *Čo je Industry 4.0*. Dostupné na: <https://www.industry4.sk/co-je-industry-4-0> [cit. 02. 12. 2025].
13. Statista. (2025, February). *Global internet user penetration*. Dostupné na: <https://www.statista.com/statistics/273018/number-of-internet-users-worldwide/> [cit. 02.12. 2025].
14. Travail emploi.gouv.fr. (2025, December 4). *Le droit à la déconnexion*. Ministère du Travail, de l'Emploi et des Solidarités. Dostupné na: <https://travail-emploi.gouv.fr/le-droit-la-deconnexion> [cit. 19. 12. 2025].

Právne predpisy

15. Code du travail, art. L2242-8 (as amended 2017).
16. España. (2018, 5 de diciembre). *Ley Orgánica 3/2018, de Protección de Datos Personales y garantía de los derechos digitales, Artículo 88*. Boletín Oficial del Estado.
17. European Parliament. (2021, 21 January). *Resolution on the right to disconnect (2020/2077(INI))* [Resolution]. European Parliament.
18. Ústava Slovenskej republiky. (1992). *Ústavný zákon č. 460/1992 Z. z.*
19. Zákon č. 311/2001 Z. z. *Zákonník práce* (v znení neskorších predpisov).

ZAKÁZANÉ OTÁZKY NA PRACOVNÝCH POHOVOROCH NEPREDSTAVUJÚ ZLYHANIE PRÁVA, ALE ZLYHANIE PRACOVNEJ KULTÚRY

*Prohibited questions in job interviews do not represent a failure of the law, but
a failure of work culture*

DIANA GOGOLOVÁ*

Abstrakt

Zakázané otázky na pracovných pohovoroch sú častým problémom slovenského pracovného prostredia, pričom ich existencia nie je dôsledkom nedostatkov právnej úpravy, ale predovšetkým nedostatočnej pracovnej kultúry. Zákonník práce a antidiskriminačný zákon vymedzujú, aké osobné údaje môže zamestnávateľ od uchádzača požadovať, pričom zakazujú zisťovanie informácií, ktoré nesúvisia s výkonom práce, ako sú zdravotný stav, rodinné pomery alebo politické presvedčenie. Ochrana je ďalej posilnená právom EÚ, najmä zásadou obráteného dôkazného bremena pri podozrení na diskrimináciu. Napriek existencii jasných právnych mantinelov prax ukazuje, že dodržiavanie týchto pravidiel závisí od profesionality HR procesov, etiky zamestnávateľov a kultúrnych návykov vo vedení pohovorov. S nástupom umelej inteligencie do výberových procesov sa objavujú nové riziká diskriminácie a potreba transparentného hodnotenia.

Abstract

Prohibited questions in job interviews are a common problem in the Slovak work environment, and their existence is not a result of shortcomings in legislation, but primarily of an inadequate work culture. The Labour Code and the Anti-Discrimination Act define what personal data an employer may request from an applicant, prohibiting the collection of information unrelated to job performance, such as health status, family circumstances, or political beliefs. Protection is further strengthened by EU law, in particular the principle of reversed burden of proof in cases of suspected discrimination. Despite the existence of clear legal boundaries, practice shows that compliance with these rules depends on the professionalism of HR processes, the ethics of employers, and cultural habits in conducting interviews. With the advent of artificial intelligence in selection processes, new risks of discrimination and the need for transparent evaluation are emerging.

Kľúčové slová: Zakázané otázky, diskriminácia, pracovná kultúra, umelá inteligencia

Key words: Prohibited questions, discrimination, work culture, artificial intelligenc

Úvod

Proces výberu zamestnancov predstavuje komplexnú oblasť, kde sa stretávajú právne normy, etické princípy a praktické aspekty pracovného prostredia. Zakázané otázky na pracovných pohovoroch zasahujú do osobných práv uchádzačov a môžu viesť k diskriminácii. Napriek existencii právneho rámca Slovenskej republiky, ktorý stanovuje jasné pravidlá

* Bc. Diana Gogolová, 1. ročník, 2. stupňa vysokoškolského vzdelávania, dianadobiasova28@gmail.com
Právnická fakulta UMB

rovnakého zaobchádzania a ochrany osobných údajov, sa v praxi stále vyskytujú otázky týkajúce sa rodinného stavu, zdravotného stavu, veku či náboženského presvedčenia. Tento rozpor naznačuje, že problém nespočíva len v právnej úprave, ale aj v pracovnej kultúre a zaužívaných praktikách na pracoviskách.

Efektívnosť právnych noriem preto závisí od ich implementácie a dodržiavania. Hodnoty a pracovná kultúra zamestnávateľov často rozhodujú o tom, či sa pravidlá reálne uplatňujú alebo obchádzajú, najmä v predzmluvnom období. Súčasne nástup automatizovaných systémov a umelej inteligencie prináša nové výzvy, najmä riziko algoritmickej diskriminácie, ktorá môže nevedome reprodukovat' existujúce predsudky a vyvolávať otázky kontroly nad automatizovanými rozhodnutiami.

Cieľom článku je analyzovať pretrvávajúce zakázaných otázok v pracovnom prostredí, identifikovať súvisiace faktory pracovnej kultúry a zhodnotiť vplyv moderných technológií, najmä umelej inteligencie, na proces výberu zamestnancov, pričom sa skúma interakcia medzi právnymi predpismi, etickými štandardmi a reálnou praxou HR procesov.

1 Právny rámec a jeho hranice pri ochrane uchádzačov pred zakázanými otázkami

Ochrana uchádzačov pred zakázanými otázkami na pracovných pohovoroch predstavuje jeden zo základných prejavov moderného pracovného práva postaveného na zásade rovnakého zaobchádzania, nediskriminácie a rešpektovania súkromia jednotlivca.¹ Právne normy stanovujú jasné mantinely, v rámci ktorých sa zamestnávateľ môže pohybovať pri získavaní informácií o budúcom zamestnancovi, a zároveň určujú, ktoré údaje sú pre účely výberového procesu irelevantné alebo neprimerané. Napriek existencii pomerne komplexného právneho rámca však prax ukazuje, že právo samo osebe nedokáže eliminovať nežiaduce otázky – jeho účinnosť je limitovaná kultúrnymi a sociálnymi faktormi, ktoré formujú spôsob, akým sa pracovné pohovory reálne vedú.

Základným predpisom v slovenskom právnom poriadku je Zákonník práce, ktorý výslovne uvádza, že zamestnávateľ môže od uchádzača požadovať len tie osobné údaje, ktoré bezprostredne súvisia s pracovným pomerom.² Informácie týkajúce sa rodinného stavu, plánovaného rodičovstva, tehotenstva, zdravotného stavu bez vzťahu k výkonu práce, sexuálnej orientácie, etnickej príslušnosti, politických či náboženských presvedčení nemajú povahu

¹ Barancová, H., et al. (2015). *Zákonník práce: Komentár* (4th ed.). C. H. Beck.

² Slovenská republika. (2001). *Zákonník práce (zákon č. 311/2001 Z. z.)*.

údajov nevyhnutných pre rozhodnutie o prijatí do zamestnania. Ich zisťovanie je preto neprípustné. Právny poriadok zároveň obsahuje osobitné ustanovenia upravujúce ochranu pred diskrimináciou, najmä prostredníctvom antidiskriminačného zákona, ktorý zakazuje priame aj nepriame formy znevýhodňovania už vo fáze výberového konania.³ Tieto normy vytvárajú jasné hranice, ktoré majú zabrániť tomu, aby zamestnávateľ svoje rozhodnutie zakladal na faktoroch, ktoré sú z hľadiska pracovného výkonu irelevantné, ale z hľadiska osobnej identity uchádzača citlivé.

Ochrana poskytovaná vnútroštátnym právom je ďalej posilnená právom Európskej únie, najmä smernicami o rovnakom zaobchádzaní v zamestnaní a judikatúrou Súdneho dvora Európskej únie, ktorá dopĺňa a vykladá povinnosti členských štátov v oblasti prevencie diskriminácie. Európske právo posúva ochranu uchádzačov na vyššiu úroveň najmä tým, že v sporoch o diskrimináciu uplatňuje princíp obráteného dôkazného bremena – ak existuje indícia, že zamestnávateľ konal diskriminačne, je to on, kto musí preukázať, že jeho konanie bolo objektívne odôvodnené. Tento mechanizmus má odradzovať zamestnávateľov od obchádzania zákonných povinností a motivovať ich k profesionalizácii výberových procesov.⁴

Normy určujú hranice, sankcie a procesné mechanizmy, ale nedokážu samy osebe zmeniť profesionálne návyky, sociálne očakávania či zaužívané praktiky výberových konaní. Ochrana pred zakázanými otázkami je preto vo významnej miere otázkou pracovnej kultúry založenej na rovnosti, rešpekte k uchádzačovi a profesionalite HR procesov. Problém zakázaných otázok tak nemožno chápať primárne ako zlyhanie práva, ide skôr o zlyhanie pracovného prostredia, v ktorom právne normy nenachádzajú dostatočnú oporu na to, aby boli dodržiavané. Právo stanovuje hranice, no ich reálne rešpektovanie závisí od kultúrnej a etickej úrovne tých, ktorí výberové konania vedú.

2 Pracovná kultúra a predzmluvné vzťahy v kontexte pretrvávania zakázaných otázok

Diskusia o zakázaných otázkach na pracovných pohovoroch sa v slovenskom prostredí dlhodobo sústreďuje najmä na právny rámec, teda na vymedzenie toho, ktoré otázky sú prípustné a ktoré právne predpisy zamestnávateľovi ich kladenie zakazujú. Podstatne menšia pozornosť sa však venuje prostrediu, v ktorom sa tieto pravidlá uplatňujú v praxi. Práve pracovná kultúra má zásadný vplyv na to, či sú zákonné hranice v predzmluvných vzťahoch

³ Slovenská republika. (2001). *Zákonník práce (zákon č. 311/2001 Z. z.)*.

⁴ Frťalová, A. (2015). Obrátené dôkazné bremeno pri právnej ochrane pred diskrimináciou a o spôsoboch jej nápravy. *Justičná revue*, 67(1), 17–29.

rešpektované, alebo či zostávajú len formálnym východiskom bez reálneho dosahu. To vysvetľuje, prečo sa v praxi opakovane vyskytujú situácie, ktoré sú z hľadiska právnej úpravy problematické, no v rámci konkrétnych pracovných prostredí sú vnímané ako bežné.

Predzmluvný vzťah medzi uchádzačom a zamestnávateľom je často chápaný ako jednostranný proces, v ktorom má zamestnávateľ dominantné postavenie a uchádzač je odkázaný na jeho rozhodnutie.⁵ Táto asymetria sa premieta aj do priebehu pracovných pohovorov, kde sa zamestnávatelia neraz považujú za oprávnených klásť otázky nad rámec odborných predpokladov uchádzača. Zakázané otázky sú v takýchto prípadoch ospravedlňované snahou získať akýsi komplexnejší obraz o kandidátovi alebo posúdiť jeho vhodnosť pre pracovný kolektív.⁶ V skutočnosti však ide o postupy, ktoré vedú k posudzovaniu uchádzačov na základe kritérií nesúvisiacich s výkonom práce a vytvárajú priestor pre diskriminačné rozhodovanie.

Rozdiel medzi právnou úpravou a realitou praxe spočíva najmä v tom, že právo stanovuje rámec, zatiaľ čo pracovná kultúra rozhoduje o jeho každodennom uplatňovaní. Ak zamestnávateľ nevníma uchádzača ako rovnocenného účastníka predzmluvného vzťahu, prirodzene sa oslabuje rešpekt k jeho súkromiu. Problém preto nespočíva v nejasnosti právnych noriem, ale v absencii vnútorných štandardov, ktoré by v organizáciách podporovali etický a profesionálny prístup k náboru zamestnancov.

Spôsob vedenia pracovných pohovorov sa navyše často prenáša neformálne. Personalisti a vedúci zamestnanci preberajú zaužívané postupy od svojich predchodcov bez toho, aby ich kriticky posudzovali z hľadiska právnej prípustnosti. V dôsledku toho sa v niektorých organizáciách vytvára presvedčenie, že otázky týkajúce sa rodinných či osobných pomerov sú prirodzenou súčasťou pohovoru. Právna úprava sa potom redukuje na formálne minimum, zatiaľ čo samotný proces výberu zamestnancov zostáva nezmenený a nereflektuje súčasné požiadavky na rovnaké zaobchádzanie.

Významným aspektom predzmluvných vzťahov je aj nerovnosť v informovanosti medzi zamestnávateľom a uchádzačom. Mnohí uchádzači si nie sú vedomí toho, že určité otázky sú zakázané, alebo sa obávajú, že odmietnutie odpovede by mohlo negatívne ovplyvniť výsledok výberového konania. Tento tlak vedie k situácii, v ktorej právna ochrana zostáva pre uchádzača

⁵ Szabo, M. (2021, March 19). Diskriminácia a nekorektné zaobchádzanie na pohovore: Čo robiť, ak sa s ním stretnete?

<https://blog.profesia.sk/diskriminacia-na-pohovore-pracovisku/>

⁶ Tamarit, O. (2022, March 2). „Povedzte nám niečo o sebe!“ Ako zvládnuť základné otázky na pracovnom pohovore? <https://www.welcometothejungle.com/sk/articles/povedzte-nam-nieco-o-sebe>

skôr teoretická. Právne normy nadobúdajú praktický význam často až spätne, keď už došlo k porušeniu zásady rovnakého zaobchádzania, zatiaľ čo pracovná kultúra pôsobí priamo v čase rozhodovania.

Pretrvávajúce zakázaných otázok preto nemožno vysvetliť výlučne analýzou právnej úpravy. Právo v predzmluvných vzťahoch naráža na svoje prirodzené limity, keďže jeho účinnosť je do veľkej miery závislá od správania subjektov, ktoré nemôže nepretržite kontrolovať. Naopak, pracovná kultúra pôsobí kontinuálne a formuje očakávania aj správanie účastníkov výberového procesu. Ak sa v nej tolerujú zásahy do súkromia alebo hodnotenie uchádzačov na základe osobných charakteristík, právna regulácia zostáva oslabená.

Z uvedeného vyplýva, že pretrvávajúce zakázaných otázok nie je primárne dôsledkom nedostatočnej právnej úpravy. Ide skôr o prejav pracovnej kultúry, ktorá si ešte v plnej miere neosvojila princípy rovnosti, profesionality a rešpektu k postaveniu uchádzača v predzmluvnom vzťahu. Skutočné obmedzenie týchto praktík si preto vyžaduje nielen existenciu právnych pravidiel, ale aj postupnú zmenu prístupu k vedeniu pracovných pohovorov a k chápaniu úlohy zamestnávateľa v procese výberu zamestnancov.

3 AI v procese výberu zamestnancov a nové riziká algoritmickej diskriminácie

Technológie založené na umelej inteligencii sa čoraz častejšie stávajú súčasťou procesov výberu zamestnancov. Používajú sa najmä na automatizované triedenie životopisov, algoritmicke hodnotenie odpovedí v online testoch alebo analýzu prejavu pri digitálnych pohovoroch. Tieto nástroje sú prezentované najmä ako prostriedok na zvýšenie efektivity, objektivity a rýchlosti náboru, keďže umožňujú spracovať veľké množstvo údajov a automatizovať prvotné fázy výberu.⁷ Z pohľadu pracovného práva však ich využívanie otvára nové otázky, najmä pokiaľ ide o dodržiavanie zásady rovnakého zaobchádzania a ochranu uchádzačov pred diskrimináciou už v predzmluvnej fáze.

Algoritmy sa učia na základe historických dát, ktoré môžu obsahovať skryté predsudky alebo nerovnosti. Ak sú takéto vzorce prítomné vo vstupných dátach, môže systém reprodukovать diskrimináciu, aj keď sa to na prvý pohľad nezdá. Týka sa to napríklad preferencií pre určitý typ uchádzačov, ktoré sa môžu nevedome premietat' do hodnotenia kandidátov na základe veku, pohlavia, zdravotného stavu či rodinného zázemia. Ide o diskrimináciu nepriamu, pretože

⁷ AI pomáha pri náboe zamestnancov: Aké sú jej plusy, mínusy a ako ju vnímajú Slováci? (2025, November13).

algoritmus nemusí priamo pracovať s citlivými údajmi, no výsledky jeho rozhodovania môžu viesť k znevýhodneniu chránených skupín.

Zodpovednosť za dodržiavanie zásad rovnakého zaobchádzania a zákazu diskriminácie zostáva na zamestnávateľovi, aj keď pri výbere používa AI. Zamestnávateľ musí zabezpečiť, aby algoritmus fungoval transparentne, pravidelne kontrolovať jeho výsledky a odstraňovať prípadné skreslenia alebo neželané vzorce správania.⁸ Aby bol nábor s využitím AI právne bezpečný a etický, je potrebné kombinovať technické, organizačné a právne opatrenia, vrátane pravidelného testovania algoritmov, definovania jasných hodnotiacich kritérií, školenia personalistov a zabezpečenia auditov, ktoré preukážu, že výsledky systému neporušujú práva uchádzačov.

Aby sa zistilo, ako ľudia vnímajú využívanie umelej inteligencie pri náboře zamestnancov, uskutočnil El. Lagan Goel prieskum medzi 300 účastníkmi, z toho 150 HR pracovníkmi a 150 uchádzačmi o prácu. Cieľom bolo zistiť, či považujú AI za spravodlivý a dôveryhodný nástroj, ako vnímajú jej prínosy a aké majú obavy, napríklad v oblasti ochrany súkromia alebo transparentnosti rozhodovania. Výsledky pomáhajú ukázať, ako sa líši pohľad ľudí, ktorí AI používajú v praxi, od pohľadu tých, ktorí sú jej objektom pri výberových konaniach.⁹

Možno konštatovať, že AI v procese výberu zamestnancov predstavuje objektívny technologický pokrok s potenciálnymi prínosmi, ale zároveň prináša nové riziká algoritmickej diskriminácie, ovplyvnenia transparentnosti a zníženia možnej právnej kontroly. Pri jeho používaní je preto nevyhnutné kombinovať technologické riešenia s pravidlami ochrany rovnosti, transparentnosťou rozhodovacích procesov a systémami auditu a kontroly, ktoré zabezpečia, aby automatizované nástroje nenarušovali zákonom chránené práva uchádzačov.

Záver

Analýza problematiky zakázaných otázok na pracovných pohovoroch ukazuje, že ich pretrvávanie nemožno vysvetľovať len nedostatkami právnej úpravy. Kľúčovým faktorom sú pracovná kultúra, zaužívané HR praktiky a asymetria predzmluvných vzťahov, ktoré ovplyvňujú reálne uplatňovanie právnych noriem. Právny rámec poskytuje jasné hranice a mechanizmy ochrany, avšak jeho účinnosť závisí od etického prístupu zamestnávateľov a profesionality procesov výberu zamestnancov. Súčasne zavádzanie umelej inteligencie do

⁸ Groß, S. (2025, February 28). *Legal requirements for AI in human resources*. <https://simpliant.eu/insights/legal-requirements-for-ai-in-human-resources>

⁹ Goel, L. (2025). Ethical implications of AI-based hiring tools. *Scientific Journal of Artificial Intelligence and Blockchain Technologies*, 2(3), 71–73

náboru prináša nové príležitosti, ale aj riziká algoritmickej diskriminácie, ktoré si vyžadujú systematickú kontrolu a transparentné mechanizmy hodnotenia. Účinná prevencia zakázaných otázok si preto vyžaduje kombináciu právnych, organizačných a technologických opatrení spolu so zmenou pracovnej kultúry smerom k rovnosti, rešpektu a profesionalite v predzmluvných vzťahoch.

PRÍLOHY

Tabuľka 1 Výsledok prieskumu El. Lagana Goela zameraného na dôveru a spravodlivosť AI pri náboře zamestnancov.

Category	HR Professionals (n=150)	Job Applicants (n=150)	Combined Average
AI improves efficiency	87	72	79.5
AI reduces bias	41	29	35
Concerned about privacy	68	84	76
Lack of transparency	74	89	81.5
Trust AI-based hiring	46	32	39

Zoznam bibliografických odkazov

Knižné publikácie a monografie

1. Barancová, H., et al. (2015). *Zákonník práce: Komentár* (4th ed.). C. H. Beck.
2. Barancová, H., et al. (2019). *Slovenské pracovné právo*. Sprint dva.
3. Švec, M., & Toman, J., et al. (2023). *Zákonník práce. Zákon o kolektívnom vyjednávaní* (2nd ed.). Wolters Kluwer.

Právne predpisy

4. Council of the European Union. (2000). *Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation*.
5. Slovenská republika. (2001). *Zákonník práce (zákon č. 311/2001 Z. z.)*.
6. Slovenská republika. (2004). *Zákon o rovnakom zaobchádzaní (zákon č. 365/2004 Z. z.)*.

Periodiká a zborníky

7. Frťalová, A. (2015). Obrátené dôkazné bremeno pri právnej ochrane pred diskrimináciou a o spôsoboch jej nápravy. *Justičná revue*, 67(1), 17–29.
8. Goel, L. (2025). Ethical implications of AI-based hiring tools. *Scientific Journal of Artificial Intelligence and Blockchain Technologies*, 2(3), 71–73

Internetové zdroje

9. AI pomáha pri náboře zamestnancov: Aké sú jej plusy, mínusy a ako ju vnímajú Slováci? (2025, November13). <https://www.pjservis.sk/blog/AI-pri-nabore-zamestnancov-plusy-minusy-nazor-Slovakov/24>

10. Groß, S. (2025, February 28). *Legal requirements for AI in human resources*.
<https://simpliant.eu/insights/legal-requirements-for-ai-in-human-resources>
11. Szabo, M. (2021, March 19). Diskriminácia a nekorektné zaobchádzanie na pohovore: Čo robiť, ak sa s ním stretnete?
<https://blog.profesia.sk/diskriminacia-na-pohovore-pracovisku/>
12. Tamarit, O. (2022, March 2). „Povedzte nám niečo o sebe!“ Ako zvládnuť zákerné otázky na pracovnom pohovore?
<https://www.welcometothejungle.com/sk/articles/povedzte-nam-nieco-o-sebe>

ROVNOST PRÍLEŽITOSTÍ A ZÁKAZ DISKRIMINÁCIE V PRACOVNOPRÁVNÝCH VZŤAHOCH

Equality of opportunity and the prohibition of discrimination in labor relations

SIMONA SPODNIÁKOVÁ *

Abstrakt

Článok ponúka všeobecný exkurz princípu rovnosti príležitostí a zákazu diskriminácie v pracovnoprávných vzťahoch. Zúžuje danú problematiku na konkrétnu tému, ktorou je odmeňovanie. Osobitnú pozornosť kladie na rovnaké zaobchádzanie medzi mužmi a ženami v kontexte odmeňovania. Vychádza zo Smernice Rady č. 2006/54/ES z 5. júla 2006, v ktorej upriami pozornosť na dôležitú skutočnosť, ktorou je porovnateľnosť situácie pri posudzovaní rovnakého zaobchádzania medzi pohlaviami. Článok sa taktiež zaoberá Smernicou Európskeho parlamentu a Rady (EÚ) 2023/970 z 10. mája 2023, ktorou sa posilňuje uplatňovanie zásady rovnakej odmeny pre mužov a ženy za rovnakú prácu alebo prácu rovnakej hodnoty prostredníctvom transparentnosti odmeňovania. Praktickým prípadom, ktorým sa článok zaoberá je problematika dochádzkového bonusu, ktorý môže viesť k nepriamej diskriminácii najmä osôb so zdravotným postihnutím, žien alebo rodičov.

Abstract

The article offers a general overview of the principle of equal opportunities and prohibition of discrimination in labor relations. It narrows down the issue to a specific topic, which is remuneration. It pays particular attention to equal treatment between men and women in the context of remuneration. It is based on Council Directive 2006/54/EC of July 5, 2006, which draws attention to the important fact that situations must be comparable when assessing equal treatment between the sexes. The article also deals with Directive (EU) 2023/970 of the European Parliament and of the Council of May 10, 2023, which strengthens the application of the principle of equal pay for men and women for equal work or work of equal value through pay transparency. A practical case addressed in the article is the issue of attendance bonuses, which can lead to indirect discrimination, particularly against persons with disabilities, women, or parents.

Kľúčové slová: Rovnosť príležitostí. Zákaz diskriminácie. Zásada rovnosti. Rovnaké zaobchádzanie. Odmeňovanie. Dochádzkový bonus.

Key words: Equal opportunities. Prohibition of discrimination. Principle of equality. Equal treatment. Remuneration. Attendance bonus.

ÚVOD

Princíp rovnosti príležitostí a zásada zákazu diskriminácie predstavujú základné právne zásady, ktoré sú neoddeliteľnou súčasťou demokratickej spoločnosti a pracovného práva. Ich dodržiavanie sa neobmedzuje len na pracovnoprávne vzťahy, ale aj iné oblasti v živote. Povinnosťou subjektov je dodržiavať danú zásadu aj v iných právnych vzťahoch, v sociálnom zabezpečení, v zdravotnej starostlivosti, v poskytovaní tovarov a služieb, a vo vzdelaní. Jednou

* Bc. Simona Spodniaková, 1. ročník, denná forma štúdia, 2. stupeň štúdia, sspodniakova2@student.umb.sk
Právnická fakulta UMB

z nevyhnutností každého z nás je práca, v ktorej trávime podstatnú časť našich životov. Preto je pre spoločnosť dôležité sa danou témou zaoberať.

Slovenský právny poriadok zakotvuje rovnosť príležitostí a zákaz diskriminácie v Ústave Slovenskej republiky, antidiskriminačnom zákone a Zákonníku práce. Zakotvujú ich aj právne záväzné predpisy Európskej únie a medzinárodného práva. Napriek existencii uvedených právnych predpisov v praxi stále dochádza k situáciám, ktoré môžu viesť k priamemu alebo nepriamemu znevýhodňovaniu určitých skupín osôb. Jedným z problémov, ktoré sa v spoločnosti vyskytujú je dochádzkový bonus. Aktuálne bola prijatá nová Smernica EÚ 2023/970, ktorá kladie dôraz na transparentnosť odmeňovania, a vytvorenie mechanizmov, ktoré slúžia na identifikovanie a následné odstránenie priamej alebo nepriamej formy diskriminácie.

Cieľom článku je poskytnúť čitateľovi všeobecný exkurz o právnej úprave rovnosti príležitostí a zákazu diskriminácie, zdôrazniť význam a prepojenie tejto zásady s pracovnoprávnymi vzťahmi. Zároveň článok predstaví konkrétnu problematiku, ktorou je dochádzkový bonus, ktorý sa môže javiť ako nepriama diskriminácia zamestnancov.

Rovnosť a zákaz diskriminácie

V tejto kapitole si najprv definujeme, čo znamená princíp rovnosti príležitostí, a následne sa budeme venovať širšej zásade rovnosti a zákazu diskriminácie. Princíp rovnosti príležitostí spočíva vo vytváraní podmienok, ktoré každému jednotlivcovi umožňujú rovnaký prístup ku všetkým oblastiam spoločenského života. Účelom je zabezpečiť rovnaký prístup alebo rovnakú šancu k zamestnaniu, k vzdelaniu a k zdravotnej starostlivosti. Každý má mať rovnaké možnosti bez ohľadu na svoje pohlavie, vek, sexuálnu orientáciu, rasu či iné odlišnosti. Zároveň slúži ako prevencia diskriminácie ešte pred tým než sa prejaví.¹

Zásada rovnosti je definovaná vo viacerých právnych predpisoch. Netýka sa len pracovnoprávných vzťahov, ale je dôležité ju dodržiavať v každej oblasti života. Z tohto dôvodu je všeobecnou zásadou, ktorú nachádzame definovanú v právnych predpisoch, ktorými sú Ústavný zákon č. 460/1992 Zb. Ústava Slovenskej republiky (ďalej len ako „Ústava SR“), Antidiskriminačný zákon č. 365/2004 Z.z. o rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov (ďalej len ako „antidiskriminačný zákon“), Zákon č. 311/2001 Z. z. Zákonník práce v znení neskorších predpisov (ďalej len ako „Zákonníku práce“), ale taktiež v medzinárodných právnych

¹ Horizontálna priorita rovnosť príležitostí [online]. minedu.sk. Dostupné na internete: <https://www.minedu.sk/1682-sk/horizontalna-priorita-rovnost-prilezitosti/> [cit. 2025-11-28].

predpisoch, ktorými sú Všeobecná deklarácia ľudských práv, Charta základných práv Európskej únie a Európsky dohovor o ľudských právach.

Primárne normatívne zakotvenie má zásada rovnosti a zákaz diskriminácie v hierarchicky najvyššie postavenom právnom predpise Slovenskej republiky, ktorým je Ústava SR. Deklaruje slobodu a rovnosť ľudí v dôstojnosti a v právach.² Ľuďom garantuje dodržiavanie ich základných práv a slobôd bez ohľadu na ich pohlavie, rasu, farbu pleti, jazyk, vieru, náboženstvo, politické alebo iné zmýšľanie, národný alebo sociálny pôvod, príslušnosť k národnosti, príslušnosť k etnickej skupine, majetok, rod alebo iné postavenie. Z týchto ustanovení vyplýva všeobecný ústavný zákaz diskriminácie a povinnosť zabezpečiť rovnosť v prístupe k právam.³ Okrem základného zakotvenia zásady rovnosti a zákazu diskriminácie v ustanovení Ústavy SR, je pre výklad rovnakého zaobchádzania významné aj ďalšie ustanovenie, ktoré stanovuje, že akékoľvek obmedzenie práv musí byť všeobecné, nediskriminačné a rovnako uplatniteľné na každú osobu v rovnakej situácii.⁴

Antidiskriminačný zákon je všeobecný zákon, ktorý sa neorientuje len na oblasť pracovnoprávných vzťahov, ale aj na iné oblasti. Vyplýva to z antidiskriminačného zákona, v ktorom sa uvádza, že je povinnosťou každého dodržiavať zásadu rovnakého zaobchádzania, v oblasti sociálneho zabezpečenia, zdravotnej starostlivosti, poskytovania tovarov a služieb a vo vzdelaní.⁵ Zasadou sa vyjadruje povinnosť rovnakého zaobchádzania so všetkými osobami, bez ohľadu na to, či patria do určitej skupiny ľudí. Osoby sa môžu navzájom od seba odlišovať na základe pohlavia, náboženského vyznania, viery, rasy, príslušnosti k národnosti alebo etnickej skupine, zdravotného postihnutia, veku, sexuálnej orientácie, manželského stavu, farby pleti, jazyka, politického či iného zmýšľania, národného alebo sociálneho pôvodu, majetku, rodu alebo iného postavenia, oznámenia kriminality, inej protispoločenskej činnosti.⁶ Dané odlišenia sa nazývajú aj diskriminačné dôvody.

Rozdiel medzi princípom rovnosti príležitostí a zásadou rovnakého zaobchádzania spočíva v tom, že pri rovnosti príležitostí ide o zabezpečenie rovnakých, porovnateľných podmienok pre všetky osoby od začiatku a pri rovnakom zaobchádzaní ide o zabezpečenie rovnakého zaobchádzania s každým bez ohľadu na individuálne rozdiely. V antidiskriminačnom zákone sú uvedené formy konania, ktorými sa zásada rovnakého

² Pozri čl. 12 ods.1, ústavný zákon č. 460/1992 Zb. Ústava Slovenskej republiky v znení neskorších predpisov.

³ Tamže, čl. 12 ods. 2.

⁴ Pozri čl. 13, ústavný zákon č. 460/1992 Zb. Ústava Slovenskej republiky v znení neskorších predpisov.

⁵ Pozri § 3 ods. 1, zákon č. 365/2004 Z.z. o rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov (antidiskriminačný zákon).

⁶ Tamže § 2 ods. 1.

zaobchádzania porušuje, teda konkrétne formy diskriminácie. K formám diskriminácie patrí priama diskriminácia, nepriama diskriminácia, obťažovanie, sexuálne obťažovanie a neoprávnený postih. Za diskrimináciu sa nepovažuje len samotné diskriminačné konanie, ale aj pokyn na diskrimináciu a nabádanie k takémuto konaniu.⁷ Pri posudzovaní toho, či došlo k porušeniu zásady rovnakého zaobchádzania, je jednou z kľúčových otázok identifikácia komparátora. Komparátor slúži na porovnanie dvoch alebo viacerých osôb, ktoré sa síce nachádzajú v porovnateľnej situácii, avšak je s nimi zaobchádzané odlišne bez relevantného zákonného dôvodu. V takomto prípade, pôjde o diskrimináciu.⁸ Bližšie si takúto situáciu ozrejníme na príklade diskriminácie na základe pohlavia. Ak dve osoby, muž a žena, vykonávajú prácu na rovnakej pozícii, spĺňajú rovnaké kvalifikačné predpoklady, avšak je s nimi zaobchádzané odlišne bez relevantného zákonného dôvodu, pôjde o diskrimináciu. Odlišná situácia by nastala v prípade, ak by muž dosahoval preukázateľne lepší pracovný výkon, dlhoročnú prax a lepšie kvalifikačné predpoklady. V tomto prípade by nešlo o diskrimináciu, pretože by nešlo o dve porovnateľne identické situácie. Z ustanovenia antidiskriminačného zákona vyplýva osobe, ktorej právo bolo dotknuté porušením zásady rovnakého zaobchádzania, právo využiť súdnu ochranu. Dotknutá osoba, môže podať návrh na začatie súdneho konania vo veci porušenia zásady rovnakého zaobchádzania. V návrhu je povinná označiť osobu, ktorá sa dopustila porušenia danej zásady.⁹ V takomto prípade, dôkazné bremeno je na strane žalovaného, ktorého povinnosťou je preukázať, že zásadu neporušil.¹⁰

Rovnako ako v predošlých dvoch právnych predpisoch aj v Zákonníku práce je definovaná zásada rovnosti a zákaz diskriminácie. V predmetnom zákonníku táto zásada už nie je upravená ako všeobecná, ale aplikuje sa výlučne v pracovnoprávných vzťahoch. Zásada je definovaná v základných zásadách Zákonníka práce v čl. 1, v ktorom je uvedené právo fyzických osôb na prácu, na slobodnú vôľu jej zvolenia, na spravodlivé a uspokojivé pracovné podmienky a na ochranu proti nezamestnanosti. Aj v tomto prípade je tu povinnosť zaobchádzať s osobami rovnako bez ohľadu na diskriminačné dôvody. Zákon však pripúšťa výnimku, kedy je možné obmedziť zásadu rovnakého zaobchádzania. Ide o prípady, kedy je rozdielne zaobchádzanie odôvodnené zákonom alebo ak existuje vecný dôvod, ktorý vyplýva

⁷ Tamže § 2a ods. 1.

⁸ KURIL, M.: *Niekoľko filozofickoprávnych úvah k teoretickoprávnym základom bezpečnosti*. [online]. s. 8. Dostupné na internete: <https://www.akademiapz.sk/sites/default/files/2022-08/002%20%20KURIL%20%20Niekoľko%20filozofickopravných%20uváh%20k%20teoretickopravným%20za%20klad.pdf> [cit. 2025-11-28].

⁹ Pozri § 11 ods.1, antidiskriminačného zákona.

¹⁰ Tamže, §11 ods. 2.

z povahy práce a jej požiadaviek.¹¹ Zákonník práce upravuje zákaz diskriminácie vo vzťahu k zamestnancom a obsahovo nadväzuje na základné zásady, ktoré sú zakotvené v danom Zákonníku práce.¹² Ide o totožné znenie aké vyplýva z čl. 1.

Okrem vnútroštátnych právnych predpisov Slovenskej republiky je potrebné zohľadniť aj medzinárodné právne predpisy. Jedným z medzinárodných právnych predpisov, ktorý upravuje zásadu rovnosti a zákaz diskriminácie je Všeobecná deklarácia ľudských práv, ktorá je základným právnym predpisom medzinárodnej ochrany ľudských práv. Uvedený predpis upravuje zásadu v úvodných ustanoveniach v čl. 1 a 2, ktoré sú totožné so slovenským právnym poriadkom, ako sme spomenuli vyššie. Zákaz diskriminácie stanovuje, že všetky osoby sú si rovné a majú právo na rovnakú právnu ochranu bez akejkoľvek formy diskriminácie.¹³ Ďalším medzinárodným právnym predpisom v kontexte európskeho právneho rámca je Charta základných práv Európskej únie, ktorá má právne záväzný charakter. Charta v ustanovení čl. 20 a 21 zakotvuje zásadu rovnosti a zákaz diskriminácie obdobne ako predošlé právne predpisy. V rámci tohto odborného článku je potrebné zmieniť aj Európsky dohovor o ochrane ľudských práv a základných slobôd, ktorý predstavuje základný medzinárodný právny predpis, ktorý je záväzný pre Slovenskú republiku. Dohovor garantuje zákaz diskriminácie v ustanovení čl. 14, a taktiež v Protokole č. 12 v ustanovení čl. 1.

Právna úprava rovnakého odmeňovania

V nasledujúcej kapitole z dôvodu rozsiahlosti a komplexnosti zásady rovnosti a zákazu diskriminácie v pracovnoprávných vzťahoch sa zameriame na túto zásadu v kontexte odmeňovania. Mzda za vykonanú prácu je neoddeliteľnou súčasťou našich životov. Rovnako predstavuje aj jeden z najdiskutovanejších problémov. Mzdové a platové rozdiely medzi mužmi a ženami sú dlhodobým problémom najmä v kontexte odmeňovania.

Samotná Ústava SR v ustanovení čl. 36 priznáva zamestnancom právo na spravodlivé a uspokojivé pracovné podmienky. Zamestnancom priznáva právo na odmenu za vykonanú prácu.¹⁴ Právo na mzdu za vykonanú prácu vyplýva zamestnancom aj zo základných článkov Zákonníka práce. Na druhej strane zamestnávateľom vyplýva povinnosť vyplácať mzdu zamestnancom. Muži a ženy majú právo na rovnaké zaobchádzanie pri prístupe k zamestnaniu a tiež k samotnému odmeňovaniu a pracovným podmienkam a ich úlohe spojenej so

¹¹ Pozri čl. 1, zákon č. 311/2001 Z. z. Zákonník práce.

¹² Tamže § 13 ods. 2.

¹³ Pozri čl. 7, Všeobecná deklarácia ľudských práv.

¹⁴ Pozri čl. 36 písm. a), ústavný zákon č. 460/1992 Zb. Ústava Slovenskej republiky.

starostlivosťou a výchovou detí. Povinnosť zamestnávateľov je zabezpečiť tehotným ženám, matkám do konca deviateho mesiaca po pôrode, dojčiacim ženám také pracovné podmienky, ktoré im umožnia plnohodnotne sa zúčastňovať na práci, pričom musia zohľadniť ich fyziologické predpoklady, spoločenskú úlohu, ktorá súvisí s materstvom a ich rodinnými povinnosťami.¹⁵ Okrem spomenutého ustanovenia, Zákonník práce upravuje zásadu rovnakého odmeňovania v ustanovení § 119a. Mzdové podmienky musia byť dohodnuté spôsobom, ktorý vylučuje akúkoľvek formu rozdielného zaobchádzania na základe pohlavia. Vztahuje sa to na každé plnenie poskytnuté za vykonanú prácu, ako aj na ďalšie plnenia v súvislosti so zamestnaním, či už ide o plnenia súčasné alebo budúce.¹⁶

Do slovenského právneho poriadku konkrétne do antidiskriminačného zákona boli prijaté právne záväzné akty Európskej únie, ktorých transpozícia významne ovplyvnila súčasné chápanie a uplatňovanie zásady rovnakého zaobchádzania a zákazu diskriminácie v slovenskom právnom poriadku. Týmito právne záväznými aktmi EÚ sú:

1. Smernica Rady 2000/43/ES z 29. júna 2000, ktorou sa ustanovuje zásada rovnakého zaobchádzania medzi osobami bez ohľadu na ich rasový alebo etnický pôvod (Mimoriadne vydanie Ú. v. EÚ, kap. 20/zv. 01; Ú. v. ES L 180, 19. 7. 2000).

2. Smernica Rady 2000/78/ES z 27. novembra 2000, ktorou sa ustanovuje všeobecný rámec pre rovnaké zaobchádzanie v zamestnaní a povolani (Mimoriadne vydanie Ú. v. EÚ, kap. 05/zv. 04; Ú. v. ES L 303, 2. 12. 2000).

3. Smernica Rady 2004/113/ES z 13. decembra 2004 o vykonávaní zásady rovnakého zaobchádzania medzi mužmi a ženami v prístupe k tovaru a službám a k ich poskytovaniu (Ú. v. EÚ L 373, 21. 12. 2004).

4. Smernica Európskeho parlamentu a Rady 2006/54/ES z 5. júla 2006 o vykonávaní zásady rovnosti príležitostí a rovnakého zaobchádzania s mužmi a ženami vo veciach zamestnanosti a povolania (prepracované znenie) (Ú. v. EÚ L 204, 26. 7. 2006).

Smernica č. 2006/54/ES definuje priamu diskrimináciu ako situáciu, kedy sa s osobou jedného pohlavia zaobchádza menej priaznivo než s osobou druhého pohlavia v porovnateľnej situácii.¹⁷ V definícii je uvedené, že diskriminácia je medzi odlišnými pohlaviami. V antidiskriminačnom zákone je priama diskriminácia definovaná všeobecne, nie na základe

¹⁵ Pozri čl. 6, zákon č. 311/2001 Z. z. Zákonník práce.

¹⁶ Tamže, § 119a ods.1.

¹⁷ Pozri čl. 2 ods.1 písm. a), smernica Európskeho parlamentu a Rady 2006/54/ES z 5. júla 2006 o vykonávaní zásady rovnosti príležitostí a rovnakého zaobchádzania s mužmi a ženami vo veciach zamestnanosti a povolania (prepracované znenie) (Ú. v. EÚ L 204, 26. 7. 2006).

pohlavia. Diskriminácia môže vzniknúť aj medzi osobami rovnakého pohlavia.¹⁸ Dôležitá skutočnosť, ktorá vyplýva zo Smernice č. 2006/54/ES je *porovnateľná situácia*.¹⁹ Pri posudzovaní, či pracovníci vykonávajú rovnakú prácu alebo prácu rovnakej hodnoty je nevyhnutné určiť, či sa nachádzajú v porovnateľnej situácii. Posúdením sa musia zohľadniť viaceré faktory, ktorými sú povaha práce, úroveň odbornej prípravy a existujúce pracovné podmienky.²⁰ Uvedené vyplýva aj zo Zákonníka práce, kedy muži a ženy majú právo na rovnakú mzdu, avšak musia mať uzavretý pracovný pomer u toho istého zamestnávateľa a musia vykonávať prácu rovnakej alebo porovnateľnej zložitosti, zodpovednosti a namáhavosti.²¹ Ďalším dôležitým kritériom je, že musia vykonávať prácu v rovnakých alebo porovnateľných pracovných podmienkach a dosahovať aj rovnaký alebo porovnateľný výkon v práci. Ak sa zamestnávateľ rozhodne zaviesť systém hodnotenia pracovných miest, jeho posudzovanie musí vychádzať z rovnakých kritérií pre obe pohlavia. Nesmie obsahovať prvky diskriminácie na základe pohlavia. Pri určovaní hodnoty práce je zamestnávateľ oprávnený okrem základných kritérií použiť aj iné, ale len také, ktoré sú objektívne merateľné a je možné ich uplatniť na všetkých zamestnancov bez ohľadu na ich pohlavie.²² Z tohto dôvodu nemôžeme porovnávať osobu A, ktorá síce vykonáva ten istý typ práce ako osoba B, ale osoba A pracuje len na denné zmeny a osoba B vykonáva aj nočnú prácu. Ďalším prípadom je, že nemôžeme porovnávať to, keď osoba B vykonáva prácu nadčas a osoba A nie. Totižto, podľa Zákonníka práce § 120 ods. 2 sa osobám do základnej mzdy nezapočítava mzda za prácu nadčas alebo za prácu počas sviatkov, za nočnú prácu, za prácu v sťaženom a zdraví škodlivom pracovnom prostredí.

¹⁸ Pozri § 2a ods. 2, zákon č. 365/2004 Z.z. o rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov (antidiskriminačný zákon).

¹⁹ Pozri čl. 2 ods. 1 písm. a, smernica Európskeho parlamentu a Rady 2006/54/ES z 5. júla 2006 o vykonávaní zásady rovnosti príležitostí a rovnakého zaobchádzania s mužmi a ženami vo veciach zamestnanosti a povolania (prepracované znenie) (Ú. v. EÚ L 204, 26. 7. 2006).

²⁰ Tamže, čl. (9).

²¹ Pozri §119a ods.2, zákon č. 311/2001 Z. z. Zákonník práce.

²² PERÁČEK, T.: *Employees and their remuneration in the condition of the Slovak Republic / Zamestnanci a ich odmeňovanie v podmienkach Slovenskej republiky* [online]. s. 4. Dostupné na internete: https://www.researchgate.net/profile/Tomas-Peracek-2/publication/359145177_ZAMESTNANCI_A_ICH_ODMENOVANIE_V_PODMIENKACH_SLOVENSKEJ_REPUBLICY_EMPLOYEES_AND_THEIR_REMUNERATION_IN_THE_CONDITION_OF_THE_SLOVAK_REPUBLIC_Tomas_Peracek/links/622a332e97401151d20d5a04/ZAMESTNANCI-A-ICH-ODMENOVANIE-V-PODMIENKACH-SLOVENSKEJ-REPUBLICY-EMPLOYEES-AND-THEIR-REMUNERATION-IN-THE-CONDITION-OF-THE-SLOVAK-REPUBLIC-Tomas-Peracek.pdf

Problematika dochádzkového bonusu

V súvislosti s rovnosťou príležitostí a zákazom diskriminácie bola prijatá Smernica Európskeho parlamentu a Rady (EÚ) 2023/970 z 10. mája 2023, ktorou sa posilňuje uplatňovanie zásady rovnakej odmeny pre mužov a ženy za rovnakú prácu alebo prácu rovnakej hodnoty prostredníctvom transparentnosti odmeňovania a mechanizmov posudzovania. Cieľom smernice je stanoviť základné pravidlá, ktoré posilnia uplatňovanie zásady rovnakého odmeňovania žien a mužov za rovnakú prácu alebo prácu rovnakej hodnoty. Súčasťou cieľov smernice je zvýšenie transparentnosti odmeňovania a zlepšenie mechanizmov prostredníctvom ktorých sa bude zabezpečovať dodržiavanie práva na rovnakú odmenu. Povinnosťou členských štátov je transponovať smernicu do ich vnútroštátnych právnych poriadkov najneskôr do 7. júna 2026 a od tohto dňa uplatňovať všetky súvisiace pravidlá spolu so smernicou.²³

Smernica stanovuje povinnosť členských štátov nastaviť systémy odmeňovania tak, aby umožňovali posúdiť, či sú pracovníci v porovnateľnej situácii. Posudzuje sa to na základe objektívnych a rodovo neutrálnych kritérií, ktoré sa určia po dohode so zástupcami zamestnancov. Medzi tieto kritériá patrí zručnosť, úsilie, zodpovednosť, pracovné podmienky a iné relevantné faktory. Kritériá sa musia uplatňovať bez akejkoľvek priamej alebo nepriamej diskriminácie na základe pohlavia.²⁴ V prípade, ak je potrebné posúdiť porovnateľnosť situácie, už sa to nevzťahuje len na porovnanie žien a mužov, ktorí pracujú u toho istého zamestnávateľa. Posudzovanie sa rozširuje aj na situácie, v ktorých existuje jednotný zdroj určujúci pravidlá odmeňovania.²⁵ K ďalším návrhom, ktoré vyplývajú zo smernice, patrí zavedenie auditu v oblasti odmeňovania. Cieľom je odhaliť prípadné rozdiely v odmeňovaní mužov a žien a preskúmať dôvody ich vzniku. Audity tak umožnia detailne analyzovať štruktúry odmeňovania a zároveň navrhnúť potrebné opatrenia na zníženie identifikovaných rozdielov. V praxi to znamená, že zamestnávateľia budú musieť pravidelne zverejňovať informácie o svojich mzdových štruktúrach. Účelom je podpora transparentnosti a odstránenie prípadných rozdielov medzi pohlaviami.²⁶

²³ *Equal pay for equal work or work of equal value between men and women – rules on pay transparency* [online]. Dostupné na internete: <https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32023L0970&qid=1764886174744> [cit. 2025-12-05].

²⁴ Pozri čl. 4 ods. 4, smernica Európskeho parlamentu a Rady (EÚ) 2023/970 z 10. mája 2023 o posilnení uplatňovania zásady rovnakej odmeny za rovnakú prácu alebo za prácu rovnakej hodnoty medzi mužmi a ženami prostredníctvom transparentnosti odmeňovania a mechanizmov presadzovania.

²⁵ Tamže, čl. 19 ods. 1.

²⁶ SEMANOVÁ, I.: *Posilnenie uplatňovania zásady rovnakej odmeny pre mužov a ženy za rovnakú prácu alebo prácu rovnakej hodnoty*, [online]. s. 522. Dostupné na internete: <https://naos-be.zcu.cz/server/api/core/bitstreams/b014d3db-26ec-4811-9a28-1f380a6d208a/content> [cit. 2025-12-05].

Pre rovnaké odmeňovanie môže byť problémom dochádzkový bonus, ktorý často poskytujú jednotlivé firmy svojim zamestnancom. Dochádzkový bonus slúži ako motivácia pre zamestnancov na zabezpečenie bezproblémovej dochádzky. Podstatou je, že zamestnanec dobrovoľne nevyužije inštitút prekážok v práci. Zamestnávateľ bonusom odmeňuje tých, ktorí v priebehu roka nemajú žiadnu absenciu (neprítomnosť v práci z dôvodu prekážok na strane zamestnanca) alebo prípadne len minimálnu. Takéto nastavenie môže viesť k neobjektívnemu zvýhodňovaniu zamestnancov, ktorí si nenárokujú svoje základné práva, ktoré im vyplývajú zo zákona alebo z kolektívnej zmluvy. V tomto prípade môže ísť o nepriamu diskrimináciu zamestnancov, ktorí majú zdravotné postihnutie, starajú sa o rodinu (napr. jednorodičovské domácnosti), a ktorí využívajú svoje nároky, ktoré im vyplývajú zo zákona alebo z kolektívnej zmluvy. Zamestnanci, ktorí sú práceneschopní z dôvodu choroby a aj napriek chorobe pracujú budú odmenení dochádzkovým bonusom. Je to však v rozpore s právnymi predpismi o nemocenskom poistení a o bezpečnosti a ochrane zdravia pri práci.²⁷ Uplatňovanie takéhoto systému odmeňovania, môže priviesť zamestnancov k riziku poškodenia zdravia. Zamestnanci, ktorí sú často práceneschopní z dôvodu ich zdravotného stavu sú pripravení o odmenu aj napriek tomu, že ich výkon, zodpovednosť a pracovné nasadenie sú porovnateľné s pracovníkmi, ktorí počas roka neboli práceneschopní.²⁸

Výrobný priemyselný podnik Železiarne Podbrezová, a.s. na svojej webovej stránke zverejnila možnosť získania dochádzkového bonusu v hodnote sto eur za splnenia určitých podmienok. Vyselektovanými osobami, ktoré nebudú mať nárok na dochádzkový bonus sú tie, ktoré v danom mesiaci nebudú pracovať z dôvodu prekážky na strane zamestnanca. Týmito osobami sú tie, ktoré navštívia lekára, sprevádzajú rodinného príslušníka k lekárovi, poskytujú ošetrovanie členovi rodiny, darujú krv, požiadajú o pracovné voľno z dôvodu svadby, sťahovania, úmrtia, požiadajú o voľno osamelého rodiča alebo sa zúčastnia preventívnej lekárskej prehliadky.²⁹ Podľa predošlých zistení môže ísť o nepriamu diskrimináciu z dôvodu vyselektovania osôb. Inštitút prekážok v práci je právom každého zamestnanca a títo zamestnanci by, nemali byť oň ukrátení.

Konkludujúc vyššie spomenuté, dochádzkový bonus môže znevýhodňovať osoby, ktoré sa starajú o deti. Tehotné ženy musia počas svojho tehotenstva absolvovať povinnú

²⁷ BARANCOVÁ, H.: *Sociálna politika zamestnávateľa a nové benefity pre zamestnancov* [online]. s. 27. Dostupné na internete: <https://sei.iuridica.truni.sk/archive/2020/04/SEI-2020-04-Studies-Barancova-Helena.pdf> [cit. 2025-12-05].

²⁸ Tamže str. 28.

²⁹ *Robotníci a majstri môžu získať finančnú odmenu 100 eur* [online]. podbrezovan.sk. Dostupné na internete: <https://www.podbrezovan.sk/robotnici-a-majstri-mozu-ziskat-financnu-odmenu-100-eur/> [cit. 2025-12-05].

gynekologickú prehliadku na mesačnej báze.³⁰ Z tohto dôvodu môže ísť o nepriamu diskrimináciu žien, pretože budú vyselektované z dochádzkového bonusu z dôvodu ich rodinného stavu. Z dôvodu doterajšieho systému výpočtu dôchodkov boli znevýhodňovaní rodičia, najmä matky, nakoľko osobný mzdový bod na účely starobného dôchodku sa počas materskej a rodičovskej dovolenky počítal len zo 60 % vymeriavacieho základu, čo viedlo k nižším penziám. Nová právna úprava, ktorá je účinná od 01.01.2026 ruší znevýhodnenie tým, že zohľadňuje skutočný príjem pred a po čase starostlivosti o dieťa. Táto zmena zabezpečí spravodlivosť pre súčasné dôchodkyne a pre ženy, ktoré sa starostlivosti o dieťa ešte len venujú. Na osoby, ktoré boli na materskej, rodičovskej dovolenke sa bude pozeráť akoby pracovali počas tejto dovolenky. Nebudú mať nižší dôchodok z dôvodu, že zarábali menej, vďaka tomu, že boli na materskej a rodičovskej dovolenke.³¹

Záver

Záverom by sme konkludovali, že zásada rovnosti a zákaz diskriminácie sú pevne ukotvené v slovenskom právnom poriadku. Ich zakotvenie vo vnútroštátnej právnej úprave, ktorou je Ústava SR, antidiskriminačný zákon a Zákonník práce je v súlade s medzinárodnou právnou úpravou. Napriek zakotveniu týchto zásad v právnych predpisoch v praxi často vznikajú situácie, v ktorých dochádza k priamej alebo nepriamej diskriminácii. V kontexte odmeňovania sme zistili, že daná problematika je aktuálna. Jej aktuálnosť nám preukazuje Smernica EÚ 2023/970, ktorá sa snaží o posilnenie transparentnosti odmeňovania a o zavedenie mechanizmov posudzovania nerovnosti. Transpozícia smernice do slovenského právneho poriadku bude výrazne vplývať na súčasnú právnu úpravu. Cieľom smernice je vytvoriť mzdové mechanizmy, ktoré umožnia objektívne porovnanie postavenia zamestnancov. Ďalším cieľom je zaviesť pravidelné audity odmeňovania, z čoho vyplýva informačná povinnosť zamestnávateľom o ich mzdových štruktúrach.

Napriek tomu, že slovenský právny poriadok zabezpečuje rovnosť a ochranu pred diskrimináciou, aplikačná prax poukazuje na pretrvávajúcu problematiku dochádzkového bonusu, ktorý môže narúšať zásadu rovnakého zaobchádzania. Za významný posun v oblasti rovnosti a ochrany pred diskrimináciou môžeme považovať prijatie novej právnej úpravy. Uvedená právna úprava prispieva k spravodlivejšiemu dôchodkovému systému, a to hlavne vo

³⁰ *Lekárske preventívne prehliadky* [online]. health.gov.sk. Dostupné na internete: <https://health.gov.sk/?rok-prevencie-lpp> [cit. 2025-12-05].

³¹ *Odstránenie diskriminácie matiek senioriek podporilo 142 poslancov parlamentu* [online]. employment.gov.sk. Dostupné na internete: <https://www.employment.gov.sk/sk/uvodna-stranka/informacie-media/aktuality/odstranenie-diskriminacie-matiek-senioriek-podporilo-142-poslancov-parlamentu.html> [cit. 2025-12-06].

vzťahu k ženám, ktoré v dôsledku starostlivosti o dieťa čelili platobnému znevýhodneniu.

Bibliografické odkazy

Články

1. Barancová, H. (2020). Sociálna politika zamestnávateľa a nové benefity pre zamestnancov. In *Societas et iurisprudencia*, č. (4), s. 21–35. Dostupné na: <https://sei.iuridica.truni.sk/archive/2020/04/SEI-2020-04-Studies-Barancova-Helena.pdf> [cit. 2025-12-05].
2. Kuril, M. (2022). Niekoľko filozofickoprávnych úvah k teoretickoprávnym základom bezpečnosti. In *Policijná teória a prax*, roč. 51, 4/2008. Dostupné na: <https://www.akademiapz.sk/sites/default/files/2022-08/002%20%20KURIL%20%20Niekolko%20filozofickopravných%20uvah%20k%20teoretickopravných%20zaklad.pdf> [cit. 2025-11-28].
3. Semanová Ivana. Posilnenie uplatňovania zásady rovnakej odmeny pre mužov a ženy za rovnakú prácu alebo prácu rovnakej hodnoty. Západočeská univerzita v Plzni, 2025. Dostupné na: <https://naos-be.zcu.cz/server/api/core/bitstreams/b014d3db-26ec-4811-9a28-1f380a6d208a/content> [cit. 2025-12-05].

Právne predpisy

4. Smernica Európskeho parlamentu a Rady 2006/54/ES z 5. júla 2006 o vykonávaní zásady rovnosti príležitostí a rovnakého zaobchádzania s mužmi a ženami vo veciach zamestnanosti a povolania (prepracované znenie) (Ú. v. EÚ L 204, 26. 7. 2006)
5. Smernica Európskeho parlamentu a Rady (EÚ) 2023/970 z 10. mája 2023 o posilnení uplatňovania zásady rovnakej odmeny za rovnakú prácu alebo za prácu rovnakej hodnoty medzi mužmi a ženami prostredníctvom transparentnosti odmeňovania a mechanizmov presadzovania
6. Ústavný zákon č. 460/1992 Zb. Ústava Slovenskej republiky
7. Všeobecná deklarácia ľudských práv
8. Zákon č. 311/2001 Z. z. Zákonník práce v znení neskorších predpisov
9. Zákon č. 365/2004 Z.z. o rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov (antidiskriminačný zákon)

Internet

10. *Equal pay for equal work or work of equal value between men and women – rules on pay transparency* [online]. Dostupné na internete: <https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32023L0970&qid=1764886174744> [cit. 2025-12-05].
11. *Horizontálna priorita rovnosť príležitostí* [online]. minedu.sk. Dostupné na internete: <https://www.minedu.sk/1682-sk/horizontalna-priorita-rovnost-prilezitosti/> [cit. 2025-11-28].
12. *Lekárske preventívne prehliadky* [online]. health.gov.sk. Dostupné na internete: <https://health.gov.sk/?rok-prevenie-lpp> [cit. 2025-12-05].
13. *Odstránenie diskriminácie matiek senioriek podporilo 142 poslancov parlamentu* [online]. employment.gov.sk. Dostupné na internete: <https://www.employment.gov.sk/sk/uvodna-stranka/informacie-media/aktuality/odstranenie-diskriminacie-matiek-senioriek-podporilo-142-poslancov-parlamentu.html> [cit. 2025-12-06].
14. Peráček, Tomáš. (2020). *Employees and their remuneration in the condition of the Slovak Republic / Zamestnanci a ich odmeňovanie v podmienkach Slovenskej republiky*. Dostupné na internete: https://www.researchgate.net/profile/Tomas-Peracek-2/publication/359145177_ZAMESTNANCI_A_ICH_ODMENOVANIE_V_PODMIENKACH_SLOVENSKEJ_REPUBLIKY_EMPLOYEES_AND_THEIR_REMUNERATION_IN_THE_CONDITION_OF_THE_SLOVAK_REPUBLIC_Tomas_Peracek/links/622a332e97401151d20d5a04/ZAMESTNANCI-A-ICH-ODMENOVANIE-V-PODMIENKACH-SLOVENSKEJ-REPUBLIKY-EMPLOYEES-AND-THEIR-REMUNERATION-IN-THE-CONDITION-OF-THE-SLOVAK-REPUBLIC-Tomas-Peracek.pdf
15. *Robotníci a majstri môžu získať finančnú odmenu 100 eur* [online]. podbrezovan.sk. Dostupné na internete: <https://www.podbrezovan.sk/robotnici-a-majstri-mozu-ziskat-financnu-odmenu-100-eur/> [cit. 2025-12-05].

STAROBNÝ DÔCHODKOVÝ SYSTÉM SLOVENSKEJ REPUBLIKY V KONTEXTE PRÁVA NA PRIMERANÉ HMOTNÉ ZABEZPEČENIE V STAROBE

The Old-Age Pension System of the Slovak Republic in the Context of the Right to Adequate Material Security in Old Age

OSKÁR TÓTH*

Abstrakt

Starobný dôchodkový systém, ako subsystém sociálneho zabezpečenia a dôchodkového systému predstavuje integrálnu súčasť sociálnej politiky každého štátu. Odlišnosti možno identifikovať na základe rôzneho právneho, ekonomického a spoločenského vývoja štátu. Kľúčovým prvkom každého starobného dôchodkového systému je miera účasti štátu a prípadne súkromných spoločností v nej a organizovaní sociálneho poistenia. Súčasťou ústavného rámca na Slovensku je právo občanov na primerané hmotné zabezpečenie v starobe. Uvedené ústavné právo sa premieta do praxe osobitným zákonom. Ústava Slovenskej republiky splnomocnila zákonodarcu, aby zákonom, zákonmi upravil podrobnosti realizácie týchto ústavných práv. Zámerom príspevku je poukázať na súčasný kombinovaný starobný dôchodkový systém založený na troch pilieroch ako východisko Koncepcie reformy dôchodkového zabezpečenia v SR schválenej v roku 2003. Hlavným cieľom príspevku je identifikovať a analyzovať systém starobných dôchodkov Slovenskej republiky.

Abstract

The old-age pension system, as a subsystem of social security and the pension system, constitutes an integral part of the social policy of every state. Differences can be identified based on the distinct legal, economic, and social development of each state. A key element of every old-age pension system is the extent of state participation and, where applicable, the involvement of private entities in its operation and in the organization of social insurance. Part of the constitutional framework in Slovakia is the right of citizens to adequate material security in old age. This constitutional right is implemented in practice through specific legislation. The Constitution of the Slovak Republic has authorized the legislature to regulate, by law, the details of the exercise of these constitutional rights. The purpose of this paper is to highlight the current combined old-age pension system based on three pillars, which represents the starting point of the Pension Security Reform Concept in the Slovak Republic approved in 2003. The main objective of the paper is to identify and analyze the old-age pension system of the Slovak Republic.

Kľúčové slová: Starobný dôchodok. Dôchodkový systém. Sociálne poistenie. Slovenská republika. Ústava Slovenskej republiky.

Key words: Old-age pension. Pension system. Social insurance. Slovak republic. The Constitution of the Slovak Republic.

Úvod

Dôchodkové zabezpečenie v každom rozvinutom štáte predstavuje jednu z dôležitých súčastí sociálnej ochrany, ktorý poskytuje ochranu približne tretine obyvateľstva. Systémy starobného dôchodkového zabezpečenia tvoria základnú súčasť sociálneho modelu každého štátu, ktorý dosiahol určitý stupeň spoločenského, právneho a ekonomického rozvoja.

* Mgr. Oskár Tóth, PhD., 1. ročník, externej formy, bakalárskeho stupňa štúdia, ototh@student.umb.sk Právnická fakulta UMB

Finančné zabezpečenie dôchodkového systému je výrazný komponent verejných financií a významne ovplyvňuje ich kvalitu a udržateľnosť. Vzhľadom ku skutočnosti, že dôchodkové systémy majú vplyv na životnú úroveň veľkej časti spoločnosti, a tým aj jej spotrebu, majú významný dopad na fungovanie celého hospodárstva národného štátu. Samotný dôchodkový systém štátu je spätne ovplyvňovaný ekonomickou stabilitou alebo nevyrovnanosťou štátu, mierou zamestnanosti, demografickým vývojom a ďalšími faktormi. Z toho dôvodu sa aj miera účasti štátu v dôchodkovom zabezpečení, samotný model sociálnej politiky štátu sa modifikuje a kryštalizuje v čase a priestore¹. Podliehajú preto neustálym procesom vyrovnávania sa a prispôbovania sa spoločenským, politickým a hospodárskym pomerom v danom štáte. Od každej vlády ako výkonného orgánu štátnej moci sa očakáva, že jej opatrenia smerujúce k občanom a k rôznym sociálnym skupinám budú realizované v duchu spravodlivosti². Práve seniori, ekonomicky už neaktívne obyvateľstvo, predstavuje (aj štatisticky) významnú skupinu obyvateľov štátu, ktorá je mimoriadne zraniteľná, aj v súvislosti so sociálnymi transfermi. Je preto nevyhnutné venovať mimoriadnu pozornosť realizácii a identifikácii sociálnej spravodlivosti v teoretickej reflexii, ale tiež jej aplikácii v praxi. Reprezentuje kľúčový princíp sociálnej politiky štátu, ktorý je vždy ukotvený v čase a priestore. Je predmetom polyparadigmatického skúmania politologickej, sociologickej, právnej či ekonomickej teórie³. Reformy systémov dôchodkového zabezpečenia v Európe sú ústredným prvkom modernizovania sociálnej ochrany so zreteľom na vytvorenie aktívnej spoločnosti blahobytu ako aj pre zabezpečenie vysokej úrovne sociálnej súdržnosti⁴. V sociálnej politike štátu sa blahobytom nerozumie životný nadštandard, ale životný štandard tzv. slušný život, ktorý by mal byť dostupný pre väčšinu jej obyvateľov. Teoretici sa zhodujú v primárnych cieľoch reforiem dôchodkových systémov: majú byť primerané, dostupné, ale aj schopné odolať vážnym otrasom v podobe ekonomických, demografických a politických rizík⁵.

¹ GEFFERT, R. (2014). Sociálna politika a jej axiologické orientácie. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, Filozofická fakulta, 2014. 160 s., ISBN 978-80-8152-099-0

² Horehálová, M. (2010): Spravodlivosť v kontexte princípov sociálnej politiky. Iura Edition, Bratislava. ISBN 978-80-8078-375-4

³ GEFFERT, R., TÓTH, O. (2019). Valorizácia starobných dôchodkov ako nástroj realizácie sociálnej spravodlivosti v Slovenskej republike a Maďarsku 2016 – 2019. Annales Scientia Politica, Vol. 8, No. 1 (2019), pp. 56 – 65. ISSN (online) 1339-0732

⁴ DUDOVÁ, I., STANEK, V., POLONYOVÁ, S. 2018. Sociálna politika. Bratislava: Wolters Kluwer SR s.r.o., 369 s., ISBN 978-80-8168-866-9

⁵ BRDEK, M. a kol. (2002): Trendy v Evropské sociální politice. ASPI Publishing. ISBN 80-86395-25-1

Právo na primerané hmotné zabezpečenie v starobe

Ľudské práva sa delia zvyčajne na tri generácie. Tieto generácie vymedzujú ich podstatu, ale tiež znaky jednotlivých typov ľudských práv a genézu ich vývoja⁶. Druhú generáciu ľudských práv tvoria hospodárske, sociálne a kultúrne práva. Týkajú sa rovnakých podmienok a zaobchádzania zo strany štátu. Súvisia s realizáciou ekonomických, ale aj sociálnych úloh štátu. Na ich dodržiavanie je na rozdiel od prvej generácie ľudských práv nevyhnutná aj činnosť štátu. K ľudským právam druhej generácie patrí aj sociálne právo, a v rámci toho právo na primerané hmotné zabezpečenie v starobe⁷.

Kým základom ľudských práv je samotné právo, spájajú sa s ním aj určité povinnosti. Práve úloha štátu je tu veľmi dôležitá. Jeho úlohou je tieto práva realizovať, rešpektovať a chrániť. Musí sa zdržať zasahovania alebo obmedzovania ich používania. V neposlednom rade tiež musí chrániť jednotlivcov a skupiny. Ich dodržiavanie a ochrana je jedným zo znakov demokratického a právneho štátu.

Na ústavnej úrovni nachádzame základný právny a inštitucionálny rámec úpravy sociálneho zabezpečenia v čl. 39 ods. 1 ústavného zákona č. 460/1992 Zb. Ústava Slovenskej republiky v znení účinnom od 01.11.2025 (ďalej len „Ústava SR“), ustanovujúc že občania majú právo na primerané hmotné zabezpečenie v starobe a pri nespôsobilosti na prácu, ako aj pri strate živiteľa. Vykladať ustanovenie čl. 39 Ústavy SR je potrebné v spojení s ustanovením čl. 52 ods. 1 Ústavy SR tak, že podľa čl. 39 ods. 1 Ústavy majú právo na primerané hmotné zabezpečenie v starobe len občania SR. Na druhej strane, podľa ustanovenia čl. 52 ods. 2 Ústavy SR, cudzinci požívajú v SR základné ľudské práva a slobody zaručené Ústavou SR vtedy, ak nie sú výslovne priznané iba občanom⁸.

Ústava SR v čl. 39 ods. 2 vymedzuje systém hmotného zabezpečenia nasledovne :
*„Primerané hmotné zabezpečenie v starobe sa vykonáva prostredníctvom priebežne financovaného dôchodkového systému a systému starobného dôchodkového sporenia. Štát podporuje dobrovoľné sporenie na dôchodok.“*⁹. Nárok na primerané hmotné zabezpečenie

⁶ NESZMÉRY, Š. (2020) Sociálne práva a ich uplatňovanie v krízových situáciách. Revue spoločenských a humanitných vied. Ročník 8, číslo 3 (2020), pp. ISSN 1339-259X [cit. 2025-02-08]. Dostupné z: https://revue.vsdanubius.sk/rocnik_8_cislo_3_2020

⁷ SVÁK J.(2006) OCHRANA ĽUDSKÝCH PRÁV, .EUROKÓDEX, II. rozšírené vydanie, 1116 s., ISBN 80-88931-51-7-487-0.

⁸ Fraňo, J. D. (2022) PRÁVO NA SOCIÁLNU POMOC AKO ZÁKLADNÉ PRÁVO? / RIGHT TO THE SOCIAL SUPPORT AS A FUNDAMENTAL RIGHT. FRAŇO, Joachim Dušan. 2022. Právo Na Sociálnu Pomoc Ako Základné Právo?. In: GARAYOVÁ, L. (Ed.). Budúcnosť Práva – Právo Budúcnosti II. Zborník Príspevkov z Online Vedeckej Konferencie. Bratislava: Paneurópska Vysoká Škola, Fakulta Práva, s. 550-572. ISBN: 978-80-8275-0000-6.

⁹ Ústavný zákon č. 460/1992 Zb. Ústava Slovenskej republiky

vzniká po dosiahnutí podmienok ustanovených v čl. 39 ods. 3 Ústavy SR¹⁰.

Najvyšší súd Slovenskej republiky tiež potvrdil charakter práva na primerané hmotné zabezpečenie v starobe a pri nespôsobilosti na prácu, ako aj pri strate živiteľa, pri ktorých sa vyžaduje skôr intervencia štátu, než jeho zdržanie sa a to za účelom zabezpečenia predovšetkým materiálnej stránky jednotlivca. V porovnaní s prvou generáciou ľudských práv konkrétna podoba a podmienky uplatnenia práv druhej generácie podliehajú podstatnej širšej miere uváženia zákonodarcu v závislosti od ekonomickej situácie štátu, či aktuálnej hospodárskej, sociálnej alebo kultúrnej politiky. Uvedené sa potom zásadne prejavuje v obsahu a v rozsahu týchto práv. Z čl. 51 ods. 1 Ústavy SR vypláva, že domáhať sa práv uvedených v čl. 38 až 42 sa možno len v medziach zákonov, ktoré tieto ustanovenia vykonávajú. V kontexte s čl. 39 Ústavy SR, podľa ktorého majú občania právo na primerané hmotné zabezpečenie v starobe Ústava SR splnomocnila zákonodarcu, aby zákonom (zákonmi) bližšie upravid samotnú realizáciu týchto ústavných práv. Týmto zákonmi sú najmä zákon č. 461/2003 Z. z. o sociálnom poistení, zákon č. 43/2004 Z. z. o starobnom dôchodkovom sporení, zákon č. 650/2004 Z. z. o doplnkovom dôchodkovom sporení. Vzhľadom na uvedené možno konštatovať, že esenciálny obsah sociálnych práv nie je zaručený ústavou, ale zákonom, t. j. zákonná úprava ustanovuje obsah a rozsah práva jednotlivca na sociálne zabezpečenie a zaručuje aj jeho uplatnenie¹¹.

Starobný dôchodkový systém Slovenskej republiky

Dokument OECD „*Maintaining Prosperity in Ageing Society*“ zaviedol rozlišovanie medzi tromi piliermi dôchodkového systému a bol prvou klasifikáciou svojho druhu. Prvý pilier na základe tejto klasifikácie predstavoval systém verejne spravovaného, dávkami definovaného dôchodkového systému s priebežným financovaním. Druhý pilier bol charakterizovaný ako zamestnanecký spravovaný privátne, finančnými inštitúciami. Tretí pilier bol predstavený anuitne vyplácanými dôchodkami zo súkromných naakumulovaných úspor jednotlivcov¹².

K prvým krokom k zreformovaniu dôchodkového systému Slovenskej republiky bol prechod od sociálneho zabezpečenia k sociálnemu poisteniu. Najdôležitejšou zmenou bolo zavedenie primeranej miery zásluhovosti do sociálneho systému, so zachovaním primeranej miery solidarity. Princíp zásluhovosti znamená podstatnú väčšiu závislosť dávky, ktorú bude

¹⁰ Ústavný zákon č. 460/1992 Zb. Ústava Slovenskej republiky

¹¹ Rozsudok Najvyššieho súdu Slovenskej republiky sp. zn. 7Sžsk/31/2021 z 02. júla 2021

¹² Organisation for economic co-operation and development (1998): *Maintaining Prosperity in an Ageing Society*

jednotlivec v budúcnosti zo systému poberať od výšky zaplateného poistného a od doby poistenia počas aktívneho života. Primeraná solidarita znamená, že dávka je čiastočne redukovaná a zo systému sú „dotované“ dávky tých poistencov, ktorí z objektívnych príčin nemohli platiť poistné v primeranej výške alebo dostatočne dlhé obdobie¹³.

Slovenská republika pristúpila po roku 2003 k rozsiahlej reforme dôchodkového systému, v dôsledku čoho sa jednopilierový systém so stanovenými dávkami PAYG (pay as you go) zmenil na systém postavený na troch samostatných pilieroch. Povinné dôchodkové poistenie – I. pilier je dávkovo definované a priebežne financované poistenie financované Sociálnou poisťovňou. Starobné dôchodkové sporenie – II. pilier je príspevkovo definované poistenie financované prostredníctvom kapitalizácie, ktoré spravujú dôchodkové správčovské spoločnosti. Dobrovoľné doplnkové dôchodkové sporenie – III. pilier je príspevkovo definované poistenie financované prostredníctvom kapitalizácie, ktoré spravujú doplnkové dôchodkové spoločnosti.

Priebežný systém ostáva po reforme zachovaný, jeho veľkosť a podoba sa však podstatne menia. Zákon č. 100/1988 Zb. o sociálnom zabezpečení bol nahradený zákonom č. 461/2003 Z. z. o sociálnom poistení, ktorý upravuje podobu fungovania priebežného systému. Prvý pilier naďalej ostáva verejný, povinný, priebežne financovaný a dávkovo definovaný systém sociálneho poistenia. Starobný dôchodok predstavuje dôchodkovú dávku, ktorá sa za podmienok ustanovených zákonom č. 461/2003 Z. z. v znení neskorších predpisov poskytuje zo starobného poistenia, ktorého účelom je zabezpečiť poistencovi príjem v starobe. Nárok na starobný dôchodok získa poistenec, ktorý získal najmenej 15 rokov obdobia dôchodkového poistenia a dovŕšil dôchodkový vek.

K základným činiteľom dôchodkového poistenia patria obdobie dôchodkového poistenia, dôchodkový vek, osobný mzdový bod, priemerný osobný mzdový bod, všeobecný vymeriavací základ, osobný vymeriavací základ, dôchodková hodnota. Všeobecným vymeriavacím základom je dvanásť násobok priemernej mesačnej mzdy v hospodárstve Slovenskej republiky zistenej Štatistickým úradom Slovenskej republiky za príslušný kalendárny rok. Obdobie dôchodkového poistenia je obdobie povinného dôchodkového poistenia, obdobie dobrovoľného dôchodkového poistenia, ak za tieto obdobia okrem období uvedených v zákone č. 461/2003 Z. z. bolo zaplatené poistné na dôchodkové poistenie. Priemerný osobný mzdový bod nahradil od 1. januára 2004 priemerný mesačný zárobok.

¹³ NĚMEC, M. (2003). Prechod od sociálneho zabezpečenia k sociálnemu poisteniu. Ekonomický časopis. Číslo 3 - Ročník 51/2003, s. 346-350, ISSN 2729-7470.

Prostredníctvom priemerného mzdového bodu sa v dôchodkovom poistení posilňuje princíp zásluhovosti. Dôchodková hodnota je hodnotou jedného priemerného osobného mzdového bodu. Upravuje sa vždy k 1. januáru nasledujúceho kalendárneho roka a to indexom rastu miezd v národnom hospodárstve.

Poistencovi vzniká nárok na starobný dôchodok, ak bol dôchodkovo poistený najmenej 15 rokov a dovŕšil dôchodkový vek. Dôchodkový vek je všeobecný dôchodkový vek pre príslušný ročník znížený o určitý počet mesiacov podľa počtu vychovaných detí. Všeobecný dôchodkový vek pre príslušný ročník je neupravený všeobecný dôchodkový vek príslušný ročník zaokrúhlený na roky a kalendárne mesiace. Kalendárne mesiace sa zaokrúhľujú na celý mesiac nadol. Neupravený všeobecný dôchodkový vek sa pre príslušný ročník určí podľa vzorca uvedeného v prílohe č. 3c zákona č. 461/2003 Z. z. o sociálnom poistení v znení neskorších predpisov. Ministerstvo práce, sociálnych vecí a rodiny Slovenskej republiky (ďalej len „ministerstvo“) vydá všeobecne záväzný právny predpis, ktorým zverejní neupravený všeobecný dôchodkový vek pre príslušný ročník a ustanoví všeobecný dôchodkový vek pre príslušný ročník. Všeobecne záväzným právnym predpisom podľa prvej vety sa v kalendárnom roku zverejňuje neupravený všeobecný dôchodkový vek a ustanovuje všeobecný dôchodkový vek len pre jeden ročník. Vyššie uvedený všeobecne záväzný právny predpis ministerstvo vydáva v kalendárnom roku, ktorý šesť kalendárnych rokov predchádza kalendárnemu roku, v ktorom osoby narodené v príslušnom ročníku dovŕšia dôchodkový vek pre príslušný ročník.

V roku 2025 nastala zmena. Od roku narodenia poistenca 1967 sa zvyšovanie dôchodkového veku opätovne naviazalo na strednú dĺžku života. Právna úprava týkajúca sa zníženia dôchodkového veku o šesť mesiacov za každé vychované dieťa, maximálne však o 18 mesiacov, ostáva zachovaná. Od 1. júla 2025 je známy dôchodkový vek platný pre poistencov narodených v roku 1967 – ich dôchodkový vek je 64 rokov a jeden mesiac. (Tento dôchodkový vek ustanovila vyhláška Ministerstva práce, sociálnych vecí a rodiny Slovenskej republiky č. 148/2025 Z. z., ktorou sa ustanovuje všeobecný dôchodkový vek pre ročník 1967.)

Schválením zákona č. 43/2004 Z. z. o starobnom dôchodkovom sporení bol zavedený druhý, tzv. kapitalizačný pilier základného dôchodkového systému, ktorého podstatou je skutočnosť, že od 1. januára 2005 si poistenci môžu sporiť na svoj dôchodok. Zákon bol schválený Národnou radou Slovenskej republiky 20. januára 2004. Starobné dôchodkové sporenie predstavuje tzv. druhý pilier dôchodkového systému, v ktorom sú finančné prostriedky sporiteľov spravované dôchodkovou správcovskou spoločnosťou. Dôchodková

správcovská spoločnosť je akciová spoločnosť so sídlom na území Slovenskej republiky. Účelom starobného dôchodkového sporenia je zabezpečiť občana pre prípad staroby alebo zabezpečiť príjem pozostalým pre prípad úmrtia poistenca. Sporiteľ uzatvára zmluvu o starobnom dôchodkovom sporení s dôchodkovou správcovskou spoločnosťou oprávnenou vykonávať starobné dôchodkové sporenie. Občanom je v rámci systému umožnený individuálny výber jednej z viacerých dôchodkových správcovských spoločností, ktoré vytvárajú dôchodkové fondy a spravujú dôchodkové aktíva¹⁴.

Po vstupe do II. piliera sa povinné odvody na dôchodkové poistenie v celkovej výške rozdelia na dve časti. Celková výška odvodov na starobné zabezpečenie, to znamená do I. aj II. piliera, je 18% z vymeriavacieho základu. Sadzba príspevkov na starobné dôchodkové sporenie vo výške 5,50 % sa od roku 2024 znížila na 4 %. Vyplýva to zo zákona č. 530/2023 Z. z. ktorým sa menia a dopĺňajú niektoré zákony v súvislosti so zlepšením stavu verejných financií, ktorý bol po schválení v Národnej rade SR a podpise prezidentkou SR publikovaný s účinnosťou od 1. januára 2024 v Zbierke zákonov SR. Zmena v sadzbe príspevkov na starobné dôchodkové sporenie znamená, že od 1. januára 2024 majú zamestnávateľia za zamestnanca odvádzať poistné do II. dôchodkového piliera vo výške 4 % jeho vymeriavacieho základu a sadzba poistného na starobné poistenie (I. pilier) je 14 % z vymeriavacieho základu. Sporitelia majú v II. pilieri možnosť platiť si aj dobrovoľné príspevky na starobné dôchodkové sporenie. Ich výška nie je obmedzená.

Každý fyzickej osobe, ktorej vzniklo prvé dôchodkové poistenie po 1. máji 2023 (napr. prvý raz sa zamestnala) a ktorá zároveň nemá viac ako 40 rokov, vzniká automatická účasť na starobnom dôchodkovom sporení. Takáto osoba môže uzatvoriť prvú zmluvu o starobnom dôchodkovom sporení s ktoroukoľvek DSS do 180 dní odo dňa vzniku jej prvej účasti na starobnom dôchodkovom sporení. Ak tak neurobí, DSS jej určí Sociálna poisťovňa. Účasť v II. pilieri po automatickom vstupe nie je povinná, sporiteľ má možnosť z tohto systému do dvoch rokov od vzniku prvej účasti na starobnom dôchodkovom sporení vystúpiť a zároveň bude mať právo do II. piliera opäť raz dobrovoľne vstúpiť, najneskôr do veku 40 rokov. Každá fyzická osoba, resp. sporiteľ, ktorej sa automatický vstup do II. piliera týka, dostane do 60 dní od vzniku jej prvej účasti na starobnom dôchodkovom sporení zo Sociálnej poisťovne informáciu, obsahom ktorej budú práva a povinnosti súvisiace s účasťou na starobnom dôchodkovom sporení. Automatický vstup sa netýka fyzických osôb, ktorým už vzniklo prvé dôchodkové poistenie pred 1. májom 2023, tie môžu do II. piliera

¹⁴ BEDNÁRIK, R. (2012) Slovenská sociálna politika po vstupe SR do Európskej únie. Slovak Journal of Political Sciences. Volume 12, No. 4. ISSN 1335 – 9096

vstúpiť dobrovoľne, a to najneskôr do dovŕšenia 40 rokov veku, ak uzatvoria zmluvu o starobnom dôchodkovom sporení s ľubovoľnou DSS. Pre túto kategóriu osôb sa po vstupe II. pilier stáva povinný a už z neho nie je možné vystúpiť¹⁵.

V Slovenskej republike sa systém kapitalizačného piliera dôchodkového systému od vzniku po súčasnosť menil zmenami vládnych politických subjektov, vzniknutými koalíciami a ich hodnotovými orientáciami.

Doplňkové dôchodkové sporenie je dobrovoľný, tzv. tretí pilier dôchodkového systému, v ktorom sú finančné prostriedky účastníkov spravované doplnkovými dôchodkovými spoločnosťami. Doplnkové dôchodkové sporenie má umožniť účastníkovi získať: doplnkový dôchodkový príjem v starobe a doplnkový dôchodkový príjem v prípade skončenia výkonu tzv. rizikových prác, do ktorých patria práce zaradené na základe rozhodnutia orgánu štátnej správy na úseku verejného zdravotníctva do 3. alebo 4. kategórie podľa osobitného predpisu a práce zamestnanca, ktorý vykonáva profesiu tanečníka bez ohľadu na štýl a techniku v divadlách a súboroch, alebo zamestnanca, ktorý je hudobný umelec vykonávajúci profesiu hráča na dychový nástroj. Tento pilier bol ukotvený do dôchodkového systému Slovenskej republiky zákonom č. 650/2004 Z. z. o doplnkovom dôchodkovom sporení a o zmene a doplnení niektorých zákonov v znení neskorších predpisov. Vstup do tretieho piliera je pre zamestnanca, ktorý vykonáva tzv. rizikové práce povinný a to do 30 dní od začatia výkonu týchto prác. Znamená to, že zamestnanec je povinný uzatvoriť účastnícku zmluvu a jeho zamestnávateľ je povinný uzatvoriť do 30 dní zamestnávateľskú zmluvu s DDS, ktorú si zamestnanec vyberie. Pre zamestnancov, ktorí nevykonávajú rizikové práce a osoby staršie ako 18 rokov je vstup do III. piliera dobrovoľný. Ak sa zamestnanec, resp. iná osoba staršia ako 18 rokov rozhodne pre sporenie v III. pilieri, musí s vybranou DSS uzatvoriť účastnícku zmluvu. Zamestnávateľ takýchto osôb nie je povinný zamestnávateľskú zmluvu uzatvoriť.

Záver

Každý štát na základe miery účasti v sociálnej politike realizuje určitý model sociálneho štátu. Z dôvodu postavenia štátu ako držiteľa moci, v každom modeli predstavuje základný subjekt sociálnej politiky. Tvorba noriem, ich realizácia, kontrola zostáva vždy v úlohe štátu. Štát je vždy reprezentovaný, v západnom axiologickom priestore, politickými reprezentáciami.

¹⁵ Ministerstvo práce sociálnych vecí a rodiny. 2026. Starobné dôchodkové sporenie [cit. 2026-02-10].

Každý politický subjekt má hodnotové preferencie, ktoré prezentuje vo svojom politickom, volebnom programe a v prípade vytvorenia vládnej koalície sa jeho priority pretavujú do programového vyhlásenia vlády, v závislosti na volebnom zisku daného politického subjektu. Tie sú pretavené do zákonodarnej iniciatívy vlády Slovenskej republiky. Zákony formujúce systém starobných dôchodkov by mali sledovať dlhodobú udržateľnosť systému, všeobecnú spoločenskú zhodu a základné princípy sociálnej politiky, ktorými sú sociálna solidarita a sociálna spravodlivosť. Zákonná úprava práva na primerané hmotné zabezpečenie v starobe určuje skutočný obsah a rozsah jednotlivcov na sociálne zabezpečenie a zaručuje aj jeho uplatnenie. V závislosti týchto skutočností je potrebné aj pristupovať k právu na primerané hmotné zabezpečenie v starobe. V zmysle čl. 39 ods. 2 Ústavy SR sa realizuje prostredníctvom priebežne financovaného dôchodkového piliera a systému starobného dôchodkového sporenia.

Na základe analýzy súčasného systému starobných dôchodkov možno konštatovať, že prijatá a účinná legislatíva vytvára kombinovaný systém založený na troch pilieroch. Štáty sa snažia vytvoriť efektívny, spravodlivý a udržateľný dôchodkový systém, ktorý poskytne dostatočné zabezpečenie pre starnúcu generáciu a nevytvára problémom chudoby seniorov. Budúcnosť zabezpečenia práva na primerané hmotné zabezpečenie v starobe na Slovensku bude závisieť od stratégií v rôznych oblastiach vrátane verejných financií a sociálnej ochrany.

Zoznam bibliografických odkazov

Knižné zdroje a monografie

1. GEFFERT, R. (2014). Sociálna politika a jej axiologické orientácie. Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, Filozofická fakulta, 2014. 160 s., ISBN 978-80-8152-099-0
2. HOREHÁJOVÁ, M. (2010): Spravodlivosť v kontexte princípov sociálnej politiky. Iura Edition, Bratislava. ISBN 978-80-8078-375-4
3. SVÁK J.(2006) OCHRANA ĽUDSKÝCH PRÁV, .EUROKÓDEX, II. rozšírené vydanie, 1116 s., ISBN 80-88931-51-7-487-0.
4. Organisation for economic co-operation and development (1998): Maintaining Prosperity in an Ageing Society. OECD PUBLICATIONS, 2, rue André-Pascal, 75775 PARIS CEDEX 16, ISBN 92-64-16093-0, No. 50101. [cit. 2026-02-10]. Dostupné z: https://books.google.sk/books?id=_YMeCunFcgC&pg=PA18&lpg=PA18&dq=Maintaining+Prosperity+in+an+Ageing+Society&source=bl&ots=IkO-Vebr4L&sig=ACfU3U03yrOLBIpjbmrQbhBmAJMyU_nPiw&hl=sk&sa=X&ved=2ahUKEwi zzZmkypjiAhUDElAKH#v=onepage&q&f=false

Články v časopisoch a zborníkoch

5. BEDNÁRIK, R. (2012) Slovenská sociálna politika po vstupe SR do Európskej únie. *Slovak Journal of Political Sciences*. Volume 12, No. 4. ISSN 1335 – 9096
6. GEFFERT, R., TÓTH, O. (2019). Valorizácia starobných dôchodkov ako nástroj realizácie sociálnej spravodlivosti v Slovenskej republike a Maďarsku 2016 – 2019. *Annales Scientia Politica*, Vol. 8, No. 1 (2019), pp. 56 – 65. ISSN (online) 1339-0732
7. Fraňo, J. D. (2022) PRÁVO NA SOCIÁLNU POMOC AKO ZÁKLADNÉ PRÁVO? / RIGHT TO THE SOCIAL SUPPORT AS A FUNDAMENTAL RIGHT. FRAŇO, Joachim Dušan. 2022. Právo Na Sociálnu Pomoc Ako Základné Právo?. In: GARAYOVÁ, L. (Ed.). *Budúcnosť Práva – Právo Budúcnosti II. Zborník Príspevkov z Online Vedeckej Konferencie*. Bratislava: Paneurópska Vysoká Škola, Fakulta Práva, s. 550-572. ISBN: 978-80-8275-0000-6.
8. NESZMÉRY, Š. (2020) Sociálne práva a ich uplatňovanie v krízových situáciách. *Revue spoločenských a humanitných vied*. Ročník 8, číslo 3 (2020), pp. ISSN 1339-259X [cit. 2025-02-08]. Dostupné z: https://revue.vsdanubius.sk/rocnik_8_cislo_3_2020
9. NĚMEC, M. (2003). Prechod od sociálneho zabezpečenia k sociálnemu poisteniu. *Ekonomický časopis*. Číslo 3 - Ročník 51/2003, s. 346-350, ISSN 2729-7470. [cit. 2026-02-10]. Dostupné z: <https://ekonom.sav.sk/sk/casopis/rocnik/3-2003>

Právne predpisy

10. Ústavný zákon č. 460/1992 Zb. Ústava Slovenskej republiky
11. Zákon č. 461/2003 Z. z. o sociálnom poistení v znení neskorších predpisov
12. Zákon č. 43/2004 Z. z. o starobnom dôchodkovom sporení a o zmene a doplnení niektorých zákonov
13. Zákon č. 650/2004 Z. z. o doplnkovom dôchodkovom sporení a o zmene a doplnení niektorých zákonov

Judikatúra

14. Rozsudok Najvyššieho súdu Slovenskej republiky sp. zn. 7Sžsk/31/2021 z 02. júla 2021

Internetové zdroje

MINISTERSTVO PRÁCE SOCIÁLNYCH VECÍ A RODINY. 2026. Starobné dôchodkové sporenie [cit. 2026-02-10]. Dostupné z: <https://www.employment.gov.sk/sk/socialne-poistenie-dochodkovy-system/dochodkovy-system/ii-pilier-starobne-dochodkove-sporenie/>

URČENIE STATUSU TEHOTNEJ ŽENY V PRACOVNOM PRÁVE SLOVENSKEJ REPUBLIKY A V PRÁVE EURÓPSKEJ ÚNIE

Determination of the Status of a Pregnant Woman in Labour Law of the Slovak Republic and European Union Law

NATÁLIA ŠTUBENDEKOVÁ *

Abstrakt

Autorka týmto článkom analyzuje právnu ochranu tehotných zamestnankýň v Slovenskej republike a jej súlad s právom Európskej únie. Analyzuje tiež definíciu statusu tehotnej zamestnankyne, procesné a materiálne aspekty oznámenia tehotenstva zamestnávateľovi, povinnosti zamestnávateľa a problematiku dokazovania doručenia oznámenia. V článku sa sústreďujeme na analýzu Zákonníka práce č. 311/2001 Z. z., príslušných ustanovení, ako aj medzinárodných záväzkov Slovenskej republiky. Skúmame najmä praktické aspekty uplatňovania práv tehotných zamestnankýň, najmä čas oznámenia, vhodnú formu doručenia a vznik ochrannej doby, ktorá chráni tehotnú zamestnankyňu pred prepustením. Kľúčovou súčasťou článku je analýza judikatúry Súdneho dvora Európskej únie, konkrétne prípadov C-109/00 Tele Danmark a C-63/08 Pontin, ktoré interpretujú materiálny vznik ochrany tehotných žien a požiadavky na efektívnu a reálnu uplatniteľnosť ich práv. Ďalej skúmame slovenskú judikatúru a konkrétne prípady, ktoré potvrdzujú ochranu tehotných žien ako absolútnu a nevzťahujúcu sa na povinnosť predchádzajúceho oznámenia. Cieľom je predchádzať diskriminácii a zabezpečiť rovnaké pracovné a sociálne podmienky. Článkom tak poukazujeme na rozdiel v slovenskej vnútroštátnej právnej úprave v porovnaní s právnou úpravou v Európskej únii.

Abstract

In this article, the author analyses the legal protection of pregnant employees in the Slovak Republic and its compliance with European Union law. The article also examines the definition of the status of a pregnant employee, the procedural and substantive aspects of notifying the employer of pregnancy, the employer's obligations, and issues related to proving the delivery of such notification. The analysis focuses on the Labour Code No. 311/2001 collection of law., relevant statutory provisions, as well as the international obligations of the Slovak Republic. Particular attention is paid to the practical aspects of exercising the rights of pregnant employees, especially the timing of notification, the appropriate form of delivery, and the establishment of the protective period that safeguards pregnant employees against dismissal. A key part of the article is an analysis of the case law of the Court of Justice of the European Union, specifically cases C-109/00 Tele Danmark and C-63/08 Pontin, which interpret the material commencement of protection for pregnant women and the requirements for the effective and practical enforceability of their rights. Furthermore, Slovak case law is examined, including specific cases confirming the absolute nature of the protection of pregnant women, which is not conditional upon prior notification. The aim is to prevent discrimination and to ensure equal working and social conditions. The article thus highlights differences between Slovak national legislation and the legal framework of the European Union.

Kľúčové slová: Zákonník práce, Zamestnávateľ, Zamestnanec, Tehotná zamestnankyňa, Ochranná doba

Keywords: Labour Code, Employer, Employee, Pregnant Employee, Protective Period

* Bc. Natália Štubendeková, 1. ročník, denná forma štúdia, 2. stupeň štúdia, nstubendekova@student.umb.sk
Právnická fakulta UMB

Úvod

V pracovnoprávných vzťahoch patrí ochrana tehotných zamestnankýň medzi kľúčovú oblasť pracovného práva a predstavuje základné princípy rovnosti, bezpečnosti a ochrany zdravia. Slovenská republika ako právny a demokratický štát je viazaná Ústavou Slovenskej republiky 460/1992 Zb. v znení neskorších predpisov, ktorá vo svojich ustanoveniach garantuje osobitnú ochranu tehotným ženám a zároveň rešpektuje medzinárodné záväzky a právne predpisy Európskej únie, ktorými je viazaná. Zákon č. 311/2001 Z. z. Zákonník práce v znení neskorších predpisov, stanovuje konkrétne práva a povinnosti, ktoré upravujú právnu ochranu tehotných zamestnankýň, pričom jednou z kľúčových podmienok pre vznik tejto ochrany je písomné oznámenie tehotenstva zamestnávateľovi spolu s predložením lekárskeho potvrdenia potvrdzujúcim túto skutočnosť.

V praxi však vznikajú otázky týkajúce sa časového určenia oznámenia, formy jeho doručenia a dokazovania prijatia zo strany zamestnávateľa. Tieto aspekty sú kritické, pretože až od tohto momentu oznámenia začína plynúť ochranná doba, ktorá bráni prepusteniu takejto zamestnankyne a poskytuje jej ochranu pred skončením pracovného pomeru. Uvedené je zvlášť významné v prostredí s rizikovými pracovnými podmienkami, fyzickou záťažou, prácou v nočných zmenách alebo v prípadoch, keď takýto zdravotný stav prináša vyššie zdravotné riziká alebo potrebu častej lekárskej starostlivosti.

Slovenská právna úprava je harmonizovaná s právom Európskej únie, predovšetkým so Smernicou Rady 92/85/EHS, ktorá zaviedla opatrenia na ochranu zdravia a bezpečnosti tehotných a dojčiacich pracovníčok, ako aj so Smernicou 76/207/EHS, ktorá zakazuje diskrimináciu na základe pohlavia. Ochrana vyplývajúca z týchto smerníc je materiálna a procesná. Tehotná zamestnankyňa má právo na rovnaké pracovné podmienky, primeranú pracovnú náplň, ochranu pred prepustením. Zakotvuje tiež inštitút preradenia na iné vhodné pracovisko a pracovné uvoľnenie na lekárske prehliadky bez zníženia mzdy.

Judikatúra Súdneho dvora Európskej únie, najmä prípady C-109/00 *Tele Danmark* a C-63/08 *Pontin*, poskytujú interpretáciu týchto ustanovení a potvrdzujú, že ochrana tehotných zamestnankýň musí byť účinná, reálne uplatniteľná a nesmie byť závislá od predchádzajúceho informovania zamestnávateľa. Tieto rozhodnutia zároveň definujú limity vnútroštátnej legislatívy pri stanovení lehôt na podanie žaloby a účinnosti procesných nástrojov. Preto cieľom práce je komplexne analyzovať všetky uvedené skutočnosti a porovnať slovenskú právnu úpravu s právom Európskej únie s poukazom na praktické aspekty oznámenia tehotenstva, formu jeho doručenia, vznik ochrannej doby a možnosti právnej ochrany, ako aj vyhodnotiť význam judikatúry pri interpretácii legislatívnych noriem.

1. Určenie statusu tehotnej ženy v slovenskom pracovnom práve

Slovenská republika je právny, zvrchovaný a demokratický štát. Uznáva a dodržiava pravidlá vyplývajúce z medzinárodných zmlúv, ktoré ratifikovala a je nimi viazaná. Takto to definuje aj najvyšší právny predpis Slovenskej republiky, ktorým je Ústava Slovenskej republiky 460/1992 Zb. v znení neskorších predpisov (ďalej len ako „Ústava SR“) a zaručuje základné práva, slobody a najdôležitejšie princípy. Jedným z nich je aj ochrana, ktorá je garantovaná práve pre tehotné ženy. Článok 41 ods. 2 Ústavy SR vo svojej podstate zaručuje ochranu v pracovných vzťahoch práve tehotným ženám spolu s osobitnou starostlivosťou a primeranými pracovnými podmienkami.¹

Pre pochopenie samotnej problematiky je potrebné si definovať základné pojmy, tak ako ich vyjadruje zákon č. 311/2001 Z. z. Zákonník práce v znení neskorších predpisov (ďalej len ako „Zákonník práce“). Zamestnávateľ je podľa Zákonníka práce, právnická osoba alebo fyzická osoba, ktorá v pracovnoprávnom vzťahu zamestnáva aspoň jednu osobu. Vystupuje vo svojom mene a vyplýva mu zodpovednosť z týchto vzťahov. Takouto osobou môže byť aj organizačná jednotka, nemôžu tak vystupovať súčasne. Takáto osoba je zodpovedná za vykonávanie a plnenie úloh najmä prostredníctvom zamestnancov v pracovnom pomere alebo obchodnom pracovnom vzťahu.² Zamestnanca Zákonník práce definuje ako fyzickú osobu, ktorá so zamestnávateľom vystupuje v pracovnoprávnom vzťahu, v ktorom vykonáva závislú prácu na základe jeho pokynov za mzdu alebo odmenu. Dôležitým pojmom je aj zákaz diskriminácie, ktorý Zákonník práce tiež upravuje a definuje ako zákaz obmedzenia práv vyplývajúcich z pracovnoprávnych vzťahov a to na základe taxatívne vymedzených dôvodov uvedených v tomto zákone.³ Pre tento článok sú pre nás kľúčové pojmy ako zdravotný stav, pohlavie, manželský a rodinný stav.

Zákonník práce definuje tehotnú zamestnankyňu v § 40 ods. 6 ako zamestnankyňu, ktorá písomne informovala zamestnávateľa o svojom stave a doložila o tom lekárske potvrdenie.⁴ Zákonník práce až s takýmto oznámením spája vznik osobitného práva na ochranu. Pokiaľ sa tehotná zamestnankyňa rozhodne neoznámiť takúto skutočnosť zamestnávateľovi, stratí tak nárok na takúto právnu ochranu. Otázkou však stále ostáva, kedy nastáva vhodný moment na oznámenie takejto zmeny zdravotného stavu. Samotný zákon nedefinuje termín oznámenia

¹ Pozri čl. 41 ods. 2 Ústavy Slovenskej republiky 460/1992 Zb.

² Pozri § 7 Zákonníka práce č. 311/2001 Z. z. v znení neskorších predpisov

³ Pozri § 11 Zákonníka práce č. 311/2001 Z. z. v znení neskorších predpisov

⁴ Pozri § 40 ods. 6 Zákonníka práce č. 311/2001 Z. z. v znení neskorších predpisov

zamestnávateľovi, takéto rozhodnutie tak ostáva na samotnej zamestnankyni. Vzhľadom na komplikácie pri skorom tehotenstve, tehotné zamestnankyne obvykle čakajú na ukončenie 12. týždňa tehotenstva, keď riziko zdravotných komplikácií spojených s tehotenstvom klesá. Ak však zamestnankyňa - tehotná žena potrebuje ochranu pred výpoveďou či úpravu pracovných podmienok môže tak urobiť aj skôr. Dôležité je, že takáto ochrana jej vzniká až po písomnom oznámení spolu s predložením lekárskeho potvrdenia. Existujú však aj rizikové situácie, v ktorých by takéto oznámenie malo byť vykonané čo najskôr. Ide napríklad o prípady zamestnankýň pracujúcich v rizikovom prostredí. V tomto prípade môže ísť o pracovisko s výskytom chemikálií, veľkou fyzickou záťažou, s manipuláciou s ťažkými bremenami či nočnými zmenami. Z tohto hľadiska je informovanie zamestnávateľa dôležité z dôvodu povinnosti zo strany zamestnávateľa zabezpečiť adekvátne pracovné podmienky neohrozujúce materské poslanie zamestnankyne, či dokonca zmenu pracovného miesta. Môže ísť aj o pracovné miesto so stresujúcou či náročnou prácou, ktorá môže negatívne ovplyvniť zdravie tehotnej zamestnankyne alebo samotného plodu. Jednou z nich je aj samotné rizikové tehotenstvo, ktoré prináša pracovné komplikácie z dôvodu častej hospitalizácie, väčšiemu množstvu vyšetrení či dokonca výskytu práceneschopnosti.

Z tohto dôvodu je včasné informovanie zamestnávateľa kľúčové nie len z dôvodu lepšej komunikácie, ale aj zabezpečenia pracovnej náplne spolu s ochranou pred samotnou výpoveďou. Na základe uvedeného je včasné oznámenie veľkou výhodou pre zamestnankyňu, keďže od času doručenia oznámenia zamestnávateľa je v ochrannej dobe, kedy zamestnávateľ takúto zamestnankyňu nemôže prepustiť. Vzhľadom na uvedené skutočnosti môže ísť aj o situácie kedy zamestnankyne nemajú stabilné pracovné podmienky v prípadoch ako sú reorganizácie podnikov, či o prípady nepredĺžených pracovných pomerov na dobu určitú, vzťahy na pracovisku, ktoré sa vyvíjajú a môžu nepriaznivo pôsobiť na stabilitu postavenia zamestnankyne. Takýmto spôsobom sa zamestnankyňa môže ochrániť pred nepriaznivou situáciou akou je práve výpoveď.

Právnou formou oznámenia v Zákonníku práce je písomná forma. V prípade existencie dobrých vzťahoch na pracovisku môže dôjsť k ústnemu oznámeniu, čo však z právneho hľadiska nie je dostačujúce. Zákonník práce definuje povinnosť oznámiť takýto stav zamestnávateľovi písomne spolu s lekársym potvrdením.⁵ Z hľadiska ústnej formy oznámenia by tak chýbala náležitosť písomnej formy a tiež absencia lekárskeho potvrdenia. Z tohto dôvodu však existuje možné riziko, že zamestnankyňa nebude náležite evidovaná ako tehotná

⁵ Pozri § 40 ods. 6 Zákonníka práce č. 311/2001 Z. z. v znení neskorších predpisov

zamestnankyňa, čo by mohlo priniesť riziko dôkazného bremena o informovaní zamestnávateľa. Zamestnávateľ by tak mohol datovať toto oznámení odlišne od zamestnankyne, čo by prinášalo riziko absencie právnej ochrany, ktorá jej zo zákona vyplýva. Obdobným prostriedkom doručenia môže byť využitie e-mailu. Aj keď toto oznámenie spĺňa podmienku písomnej náležitosti aj predloženie lekárskeho potvrdenia, v tomto prípade je však sporné samotné doručenie. Preukázať samotné doručenie by mohlo vytvoriť spornú situáciu. Aj napriek tomu, že samotná informácia by bola doručená bolo by komplikované preukázať, kedy a či vôbec sa zamestnávateľ k tejto informácií dostal. Obdobne by tak bolo problematické takúto skutočnosť datovať. Vznikla by tak právna neistota v začatí ochrannej doby.

Zákonník práce tehotnú zamestnankyňu chráni a to v rôznych oblastiach pracovnoprávneho vzťahu. Článok 8 Základných zásad Zákonníka práce uvádza povinnosť zamestnávateľa robiť opatrenia v záujme ochrany života a zdravia, definuje tiež právo zamestnancov na hmotné zabezpečenie pri neschopnosti, ktorá im určitým spôsobom bráni pri výkone práce, z dôvodov a súvislostí spojených napríklad s tehotenstvom, rodičovstvom. Uvedené vyplýva aj v prípade tehotnej zamestnankyne z predpisov o sociálnom zabezpečení. Zamestnávateľ tak má zabezpečiť aby z dôvodu zmeny pracovných schopností vedeli rozvíjať a uplatňovať svoje schopnosti pri práci a to s ohľadom na ich zdravotný stav.⁶ Podľa tohto ustanovenia sú zamestnanci, ktorí nie sú schopní vykonávať svoju prácu, chránení zvýšenou mierou práve zákonom. I keď nie je zakázané doručenie oznámenia o tehotenstve zamestnankyne mailom, z právneho hľadiska je teda najvhodnejšou formou doporučený list s doručenkou, čo je považované za potvrdenie o doručení pri prevzatí. Možnou alternatívou je odovzdanie písomnej informácie v podobe listu osobne. V tomto prípade zamestnávateľ alebo splnomocnená osoba vydá potvrdenie o prijatí takéhoto dokumentu prostredníctvom podpisu. Zákonník práce nedefinuje čo má byť obsahom takéhoto oznámenia, stanovuje iba jeho písomnú formu. V takomto oznámení je teda dostačujúce stručnou vetou informovať o tehotenstve, priložiť písomné lekárske potvrdenie spolu s dátum a podpisom zamestnankyne. V oznámení tak zamestnankyňa nemusí udávať informácie, ktoré Zákonník práce nevyžaduje. Je na vôli a rozhodnutí zamestnankyne či chce uviesť iné informácie ako napríklad odhadovaný dátum pôrodu, nástup na materskú dovolenku. Zamestnankyňa nemusí ani uvádzať odvolávku na konkrétne paragrafy či citovať zákon alebo upozorňovať na práva vyplývajúce zo Zákonníka práce.

⁶ Pozri čl. 8 Zákonníka práce č. 311/2001 Z. z. v znení neskorších predpisov

Chránené sú aj záujmy vyplývajúce z § 41, ktorý upravuje predzmluvne vzťahy. Pri uzatváraní pracovného pomeru, na ktorý je potrebná zdravotná spôsobilosť alebo psychická spôsobilosť môže zamestnávateľ takúto pracovnú zmluvu uzavrieť iba s osobou, ktorá takéto podmienky spĺňa.⁷ Zamestnávateľ však nemôže požadovať zákonom taxatívne vymedzené informácie o zamestnancovi.⁸ Medzi takéto informácie patria napríklad informácie o rodinných pomeroch, politickej príslušnosti, bezúhonnosť ak to priamo nesúvisí s výkonom povolania, pre ktoré sú tieto informácie podmienkou. Pre nás je však dôležité, že pre výkon práce nemôže zamestnávateľ požadovať informácie o tehotenstve. Zákon však uvádza aj dodatok, kedy zamestnávateľ môže takúto informáciu požadovať. Ide teda o prípad keď samotný výkon práce je pre tehotnú ženu zakázaný. Pracovné právo poskytuje tehotnej zamestnankyni ochranu aj v prípade preradenia na inú pozíciu z dôvodu zmeny zdravotného stavu. Ako definuje § 55 Zákonníka práce ide o výnimočnú situáciu,⁹ ktorú zákon umožňuje len z taxatívne vymedzených dôvodov. Ide napríklad o prípad kedy zamestnanec z dôvodu zmeny zdravotného stavu stratil schopnosť vykonávať predchádzajúcu prácu alebo ju nesmie vykonávať z dôvodu choroby z povolania alebo pre ohrozenie touto chorobou.¹⁰ Môže ísť aj o situáciu keď zamestnanec už nemôže vykonávať nočnú prácu na základe lekárskeho posudku. Pre účely tohto článku je dôležité písmeno b) vyššieho citovaného ustanovenia Zákonníka práce, ktoré uvádza, že tehotné ženy alebo matky dieťaťa mladšieho ako deväť mesiacov by inak vykonávali prácu, ktorá podľa lekárskeho posudku alebo z dôvodu, že ide o pozíciu, na ktorú takáto žena nemôže byť prijatá, môže výkon takejto pozície byť ohrozením samotného tehotenstva alebo poslania matky.¹¹ Obdobne to rieši aj pri nočnej práci, keď tieto zamestnankyne požiadajú o zmenu pracovného času, ak vykonávajú prácu v noci.

Ďalšou ochranou tehotnej zamestnankyne je zákaz výpovede podľa § 64 Zákonníka práce. Ide o inštitút zákazu výpovede v čase, kedy sa nachádza v tzv. v ochrannej dobe. Zákonník práce taxatívne vymedzuje dôvody, kedy tak zamestnávateľ nemôže urobiť.¹² Takým dôvodom je práceneschopnosť z dôvodu choroby, úrazu ak je zamestnanec uvoľnený na výkon verejnej funkcie a iné. Pre tehotnú zamestnankyňu je právne významný § 64 ods. 1 písm. c) Zákonníka práce, ktorý stanovuje, že tehotná alebo matka na dovolenke, rodič trvalo starajúci sa o dieťa mladšie ako tri roky požíva ochranu pre výpoveďou z dôvodu ochrannej doby. Odsek

⁷ Pozri § 41 ods. 2 Zákonníka práce č. 311/2001 Z. z. v znení neskorších predpisov

⁸ Pozri § 41 ods. 6 Zákonníka práce č. 311/2001 Z. z. v znení neskorších predpisov

⁹ Pozri § 55 ods. 1 Zákonníka práce č. 311/2001 Z. z. v znení neskorších predpisov

¹⁰ Pozri § 55 ods. 2 Zákonníka práce č. 311/2001 Z. z. v znení neskorších predpisov

¹¹ Pozri § 55 ods. 2. písm. b) Zákonníka práce č. 311/2001 Z. z. v znení neskorších predpisov

¹² Pozri § 64 ods. 1 Zákonníka práce č. 311/2001 Z. z. v znení neskorších predpisov

3. uvádza výnimku zo zákazu výpovede. Písmeno c) zákona tak vytvára výnimku pre prípad porušenia inej pracovnej disciplíny a to z dôvodu uvedeného v § 63 ods. 1 písmena e) (dôvody, pre ktoré je možné okamžité skončenie pracovného pomeru, opakované menej závažné porušenie) a to s výnimkou, ak nejde o tehotnú zamestnankyňu alebo zamestnanca trvale starajúceho sa o dieťa mladšie ako tri roky.

Okamžité skončenie pracovného pomeru je upravené v § 68 Zákonníka práce ako výnimočná možnosť skončenia pracovného pomeru z taxatívne vymedzených dôvodov. Ustanovenie § 68 ods. 3 uvádza nemožnosť skončenia pracovného pomeru okamžitým skončením, z dôvodu ak ide o zamestnankyňu, ktorá je tehotná, ak sa trvale stará o dieťa mladšie troch rokov, zamestnanca trvale starajúceho sa o blízku osobu, ktorá je úplne alebo prevažne nevládna. Môže tak urobiť s výnimkou zamestnankyne na materskej dovolenke alebo rodičovskej dovolenke s ohľadom na dôvody uvedené v § 166 ods. 1 Zákonníka práce, prostredníctvom skončenia pracovného pomeru výpoveďou podľa dôvodov uvedených v § 68 ods. 1.¹³

Slovenská republika ako členský štát Európskej únie je viazaná právom Európskej únie. V súlade s článkom 7 ods. 2 Ústavy Slovenskej republiky¹⁴ a čl. 288 Zmluvy o fungovaní Európskej únie¹⁵ možno dospieť k záveru, že právo Únie má prednosť pred vnútroštátnym právom. Jednou zo základných smerníc upravujúcich práva tehotných zamestnankýň, ktorými je Slovenská republika viazaná je Smernica Rady 92/85/EHS z 19. októbra 1992 o zavedení opatrení na podporu zlepšenia bezpečnosti a ochrany zdravia pri práci tehotných pracovníčok a pracovníčok krátko po pôrode alebo dojčiacich pracovníčok (desiata samostatná smernica v zmysle článku 16 ods. 1 Smernice 89/391/EHS) (ďalej len ako „Smernica Rady 92/85/EHS“). Cieľom tejto smernice je chrániť zdravie a bezpečnosť žien na pracovisku počas tehotenstva, krátko po pôrode či žien, ktoré dojčia. Samotná úprava definuje jednotlivé pojmy. Tehotnú zamestnankyňu definuje ako ženu, ktorá v súlade s vnútroštátnou úpravou a praxou informovala zamestnávateľa. Zamestnankyňu, ktorá nedávno porodila ako ženu, ktorá porodila v zmysle vnútroštátneho práva a informovala o tom zamestnávateľa.¹⁶ Dojčiacu pracovníčku ako ženu, ktorá dojčí podľa definície vnútroštátneho práva a v súlade s týmto právom

¹³ Pozri § 68 ods. 3 Zákonníka práce č. 311/2001 Z. z. v znení neskorších predpisov

¹⁴ Pozri čl. 7 ods. 2 Ústavy Slovenskej republiky 460/1992 Zb.

¹⁵ Pozri čl. 288 Zmluvy o fungovaní Európskej únie, konsolidované znenie

¹⁶ Pozri čl. 2 písm. a) Smernice Rady 92/85/EHS z 19. októbra 1992 o zavedení opatrení na podporu zlepšenia bezpečnosti a ochrany zdravia pri práci tehotných pracovníčok, pracovníčok krátko po pôrode alebo dojčiacich pracovníčok, Ú. v. ES L 348, 28.11.1992

informovala svojho zamestnávateľa.¹⁷ Kľúčové body smernice sú, že zamestnankyňa nemôže pracovať v nočných zmenách, v prípade rizika spojeného s výkonom práce je zamestnávateľ povinný konať tak aby zamestnankyňu ochránil a to aj napríklad preložením na inú pracovnú pozíciu alebo ak takáto pozícia neexistuje poskytnutím dovolenky. Ak je poskytnutá dovolenka, zamestnávateľ ma primerane kompenzovať možnú stratu príjmu. Pre prípad lekárskej prehliadky má zamestnávateľ zamestnankyni poskytnúť možnosť pracovného uvoľnenia aj počas pracovnej doby a to bez straty mzdy. Tak isto smernica definuje zákaz prepustenia z dôvodu tehotenstva alebo materstva.

2. Určenie statusu tehotnej ženy v práve Európskej únie

Ochrana tehotných zamestnankýň je jednou z kľúčových oblastí práva Európskej únie a je explicitne vyjadrená v Smernici Rady 92/85/EHS. Ako smernica uvádza v článku 2, tehotná zamestnankyňa je pracovníčka, ktorá informovala svojho zamestnávateľa o svojom tehotenstve, v súlade s vnútroštátnou právnou úpravou.¹⁸ Táto definícia sa v praxi však považuje za interpretáciu vo formálnom hľadisku, pretože samotné oznámenie nezakladá ochranu ale práve samotný fakt tehotenstva ako materiálna forma. Túto skutočnosť v praxi potvrdzuje práve judikatúra. Smernica v článku 10 stanovuje zákaz prepustenia takejto zamestnankyne v období od začatia jej tehotenstva až do ukončenia materskej dovolenky.¹⁹ Smernica tak poskytuje komplexnú ochranu pred diskrimináciou na základe pohlavia, a tak zabezpečuje bezpečnosť, zdravie zamestnankýň počas samotného tehotenstva. Zamestnávateľ je podľa článkov 4 až 6 povinný, vykonať hodnotenie rizík a na základe toho prijať potrebné opatrenia na odstránenie alebo minimalizovanie nebezpečenstva a tak prispôsobiť pracovné podmienky práve zdravotnému stavu samotnej zamestnankyne. Z judikatúry tak vyplýva, že právo Európskej únie považuje vznik ochrany tehotných zamestnankýň z materiálneho hľadiska. Stanovuje formálne pravidlá, ktoré prekonáva v praxi prostredníctvom judikatúry. Takým príkladom je napríklad Rozsudok Súdneho dvora (piata komora) zo 4. októbra 2001.

¹⁷ Pozri čl. 2 písm. c) Smernice Rady 92/85/EHS z 19. októbra 1992 o zavedení opatrení na podporu zlepšenia bezpečnosti a ochrany zdravia pri práci tehotných pracovníčok, pracovníčok krátko po pôrode alebo dojčiacich pracovníčok, Ú. v. ES L 348, 28.11.1992

¹⁸ Pozri čl. 2 písm. a) Smernice Rady 92/85/EHS z 19. októbra 1992 o zavedení opatrení na podporu zlepšenia bezpečnosti a ochrany zdravia pri práci tehotných pracovníčok, pracovníčok krátko po pôrode alebo dojčiacich pracovníčok, Ú. v. ES L 348, 28.11.1992

¹⁹ Pozri čl. 10 Smernice Rady 92/85/EHS z 19. októbra 1992 o zavedení opatrení na podporu zlepšenia bezpečnosti a ochrany zdravia pri práci tehotných pracovníčok, pracovníčok krátko po pôrode alebo dojčiacich pracovníčok, Ú. v. ES L 348, 28.11.1992

Tele Danmark A/S proti Handels- og Kontorfunktionærernes Forbund v Dánsku (HK) (ďalej len ako „C-109/00 Tele Danmark (2001)“).²⁰

Z uvedeného teda možno dovodiť, že právo Európskej únie poskytuje ochranu tehotným pracovníckam od samotného biologického začiatku tehotenstva. Cieľom je zabezpečiť rovnaké pracovné podmienky, zdravie a sociálne istoty pre ženy. Tento materiálny prístup k ochrane tehotných zamestnankýň je významný pri komparácii s vnútroštátnou právnou úpravou členských štátov. Pre zefektívnenie implementácie smernice, je preto nevyhnutné, aby členské štáty zohľadňovali judikatúru pri transponovaní smerníc do národného práva a zabezpečili tak ochranu zamestnankýň od samotného vzniku tehotenstva.

3. Judikatúra

Vzhľadom na existujúcu právnú úpravu je kľúčová interpretácia prostredníctvom judikatúry. Existuje rozsiahla línia rozhodnutí, ktoré na jednej strane definujú tehotnú zamestnankyňu a ochranu pred prepustením, ale aj ochranu v prípadoch, keď zamestnávateľ nebol o tehotenstve zamestnankyne informovaný. Rozsudok Súdneho dvora Európskej únie C-109/00 Tele Danmark (2001) je jedným z kľúčových rozsudkov v oblasti rovnakého zaobchádzania medzi ženami a mužmi a ochrany tehotných pracovníčok. V danom prípade bola tehotná pracovníčka prijatá na pracovné miesto na dobu určitú (šesť mesiacov). V čase prijatia vedela o svojom tehotenstve a neinformovala zamestnávateľa. Po tom, ako ho o tehotenstve informovala, bola prepustená z dôvodu, že počas podstatnej časti trvania zmluvy nebola práceschopná. Predmetom sporu bolo, či je takéto prepustenie v súlade so smernicami Európskej únie. Konkrétne Smernica Rady z 9. februára 1976 o vykonávaní zásady rovnakého zaobchádzania s mužmi a ženami, pokiaľ ide o prístup k zamestnaniu, odbornej príprave a postupu v zamestnaní a o pracovné podmienky (ďalej len ako „Smernica Rady 76/207/EHS“)²¹ a Smernica Rady 92/85/EHS²². Súdny dvor EU konštatoval, že prepustenie tehotnej zamestnankyne z dôvodu tehotenstva je neprípustné a to aj v prípade, ak bola prijatá na dobu určitú, súčasne nie je ospravedlnením ani fakt, že zatajila tehotenstvo a ani skutočnosť, že nemohla podstatnú časť dohody pracovať. Súd zdôraznil, že takéto prepustenie predstavuje priamu diskrimináciu na základe pohlavia v zmysle článku 5 ods. 1 Smernice Rady

²⁰ Pozri rozsudok Súdneho dvora Európskej únie - Tele Danmark A/S v Handels- og Kontorfunktionærernes Forbund (HK), , 4. októbra 2001, vec C-109/00

²¹ Pozri Smernicu Rady 76/207/EHS z 9. februára 1976 o vykonávaní zásady rovnakého zaobchádzania s mužmi a ženami, pokiaľ ide o prístup k zamestnaniu, odbornej príprave a postupu v zamestnaní a o pracovné podmienky

²² Pozri Smernicu Rady 92/85/EHS z 19. októbra 1992 o zavedení opatrení na podporu zlepšenia bezpečnosti a ochrany zdravia pri práci tehotných pracovníčok, pracovníčok krátko po pôrode alebo dojčiacich pracovníčok, Ú. v. ES L 348, 28.11.1992

76/207/EHS. Skutočnosť, že zamestnávateľ môže utrpieť ekonomickú ujmu, nie je ospravedlniteľný dôvod na prepustenie. Rozhodnutie je významné práve z dôvodu, že zákaz diskriminácie aj zásada rovnakého zaobchádzania sa aplikuje bez ohľadu na typ pracovnej zmluvy. Zároveň stanovuje, že zamestnávateľ nesie riziko ekonomických dôsledkov z dôvodu tehotenstva zamestnankyne.

Rozsudok Súdneho dvora (tretia komora) z 29. októbra 2009. *Virginie Pontin* proti *T-Comalux SA*. Návrh na začatie prejudiciálneho konania: Tribunal du travail d'Esch-sur-Alzette – Luxembursko²³ (ďalej len ako „C-63/08 *Pontin* (2009)“), pojednával o tehotnej zamestnankyni, ktorá bola prepustená počas tehotenstva. Súdny dvor mal rozhodnúť, či vnútroštátna právna úprava je v súlade s právom Európskej únie. V prípade mal štát vo vnútroštátnej úprave stanovenú lehotu 15 dní na podanie žaloby o neplatnosti prepustenia, pričom zamestnankyňa nemala možnosť podať žalobu o náhradu škody, ktorú iní zamestnanci mali. Prejudiciálnou otázkou bolo, či štát môže stanovovať krátke lehoty pre podanie žaloby o neplatnosť prepustenia tehotnej zamestnankyne. V druhom bode pojednávali o situácií, ak štát takúto možnosť má, či pracovníčka mohla efektívne uplatniť svoje práva. V poslednom bode sa obrátili na Smernicu Rady 76/207/EHS s otázkou či táto smernica dovoľuje, aby tehotné pracovníčky nemohli takúto žalobu podať, hoci iní zamestnanci takúto možnosť majú. Súdny dvor Európskej únie sa v prvom a druhom bode vyjadril, že štáty si môžu (podľa článku 10 a 12 Smernice Rady 92/85/EHS) stanoviť aj kratšie lehoty za dodržania zásad. Ide o zásadu ekvivalencie (lehota nemôže byť prísnejšia ako pri porovnateľných vnútroštátnych žalobách), zásadu efektivity (použitie práva nemôže byť nadmerne sťažené alebo znemožnené). V tomto prípade súd poznamenal, že lehota 15 dní sa vzhľadom na zásadu efektivity javí ako neprimerane krátka. V poslednej prejudiciálnej otázke súd vyslovil nesúlad. Článok 2 Smernice Rady 76/207/EHS bráni vnútroštátnej právnej úprave, ktorá by zbavovala takúto pracovníčku možnosti podať žalobu o náhradu škody, ak takúto možnosť majú iní zamestnanci. Takéto rozdielne zaobchádzanie predstavuje diskrimináciu na základe pohlavia. Rozhodnutím tak uznal, že vylúčenie možnosti podať takúto žalobu je diskriminačné. Stanovil, že veľmi krátke lehoty sú v rozpore s právom Európskej únie. Súd rozhodnutím potvrdil, že ochrana tehotných pracovníčok musí byť efektívna a reálne prípustná a nie len formálna. Rozhodnutie Najvyššieho súdu ČSSR, zverejnené pod, sp. zn. 8Co730/66²⁴ judikoval, že zamestnankyňa dostala výpoveď počas tehotenstva, pričom o tejto informácii zamestnávateľ nebol

²³ Pozri rozsudok Súdneho dvora (tretia komora) *Virginie Pontin* proti *T-Comalux SA* z 29. októbra 2009, vec C-63/08

²⁴ Pozri rozhodnutie Najvyššieho súdu ČSSR, sp. zn. 8 Co 730/66, 22. decembra 1966, *Sbírka soudních rozhodnutí a stanovisek Nejvyššího soudu*, 1967

informovaný. Sporné v tomto prípade bolo, či takéto neinformovanie zamestnávateľa bráni ochrane pred prepustením. Súd vo veci rozhodol, že tehotná zamestnankyňa má nárok na ochranu podľa Zákonníka práce a to bez ohľadu od toho či zamestnávateľ poznal jej stav. Súd zdôraznil, že účelom právnej úpravy je chrániť tehotné zamestnankyne pred prepustením a zabezpečiť, aby ich tehotenstvo nebolo dôvodom nepriaznivého zaobchádzania. Rozhodnutie je významné z dôvodu, že výpoveď takejto zamestnankyne je neplatná, ak takéto ukončenie pracovného pomeru je v rozpore so zákonnou ochranou tehotných žien. Súd tak potvrdil absolútnu ochranu tehotných zamestnankýň a nevyžaduje, aby zamestnávateľ mal o takomto stave vedomosť. Toto rozhodnutie patrí k zásadným judikátom v oblasti ochrany tehotných zamestnankýň.

Záver

Ochrana tehotných zamestnankýň predstavuje kombináciu materiálneho a procesného prístupu, ktorý musí byť implementovaný do vnútroštátneho práva a súladu s právom Európskej únie. Analýza právneho postavenia tehotných zamestnankýň v Slovenskej republike s porovnaním s právnou úpravou Európskej únie poukazuje, že slovenská právna úprava poskytuje zamestnankyniam významnú ochranu, najmä prostredníctvom zákazu výpovede a povinnosti na strane zamestnávateľa, prispôbiť pracovné podmienky zdravotnému stavu tehotných žien. Kľúčovým je vznik tejto ochrany, ktorú definuje vnútroštátne právo Slovenskej republiky od preukázania tohto stavu. To však môže viesť k právnej neistote, najmä v situáciách, keď zamestnankyňa očakáva ochranu v skorom štádiu tehotenstva alebo pracuje v rizikovitom prostredí. Existujúca judikatúra, ktorá interpretuje aplikáciu ochrany v praxi je však odlišná od definovania tejto skutočnosti zákonodarcom v Zákonníku práce. Zákonodarcia ju definoval od momentu preukázania takéhoto zdravotného stavu. Judikatúra Súdneho dvora Európskej únie však potvrdzuje, že účinná ochrana sa musí posudzovať materiálne, a teda zamestnankyňa má nárok na ochranu aj v prípade, že zamestnávateľ nebol o tehotenstve predtým informovaný. Tento nesúlad vytvára disproporcie v právnej ochrane a tým právnu neistotu.

Rozhodnutie Najvyššieho súdu ČSSR, uverejnené pod R 74/1966 a rozhodnutie Súdneho dvora Európskej únie C-109/00, C-63/08, ktoré potvrdzujú absolútnu ochranu tehotných zamestnankýň a to aj v prípadoch, keď zamestnávateľ nebol o tehotenstve informovaný. Zároveň tieto rozhodnutia potvrdzujú dôležitosť princípu rovnakého zaobchádzania a zákazu diskriminácie na základe pohlavia. V porovnaní so smernicou 92/85/EHS a súvisiacou judikatúrou je dôležité poznanie, že ochrana tehotných žien

v Európskej únii je nielen formálna, ale aj efektívna a materiálna, pričom vnútroštátne normy nesmú túto ochranu oslabovať. Stanovenie neprimerane krátkych lehôt na podanie žaloby alebo rozdielne zaobchádzanie s tehotnými zamestnankyňami predstavuje porušenie rovnakého zaobchádzania. Z tohto dôvodu je z praktického hľadiska potrebné aby zamestnávateľ vytváral podmienky na bezpečné oznámenie tehotenstva a umožnil efektívnu realizáciu práv zamestnankýň. Pre tehotné zamestnankyne je dôležité, aby si boli vedomé svojich práv a v prípade pochybností ich aj včas písomne uplatnili.

Záverom možno konštatovať, že slovenská právna úprava v kombinácii s právom Európskej únie poskytuje robustný rámec ochrany tehotným zamestnankyniam, pričom judikatúra potvrdzuje jej absolútnu a efektívnu povahu. Z hľadiska praktického uplatnenia je dôležité zabezpečiť, aby tehotné zamestnankyne mali jasnú a reálne dostupnú možnosť oznámenia tehotenstva, primeranú ochranu pred rizikovou prácou a efektívnu ochranu pred prepustením. Je nevyhnutné aby zákonodarca legislatívne alebo administratívne upravil proces oznámenia tehotenstva tak, aby sa minimalizovalo riziko právnej neistoty a zabezpečila sa rovnosť ochrany pre všetky tehotné zamestnankyne. Prostredníctvom implementácie práva Európskej únie do slovenskej legislatívy musí zohľadniť judikatúru Súdneho dvora Európskej únie, aby bola ochrana tehotných zamestnankýň účinná, materiálna a právne bezpečná, čím sa znižuje riziko diskriminácie a zabezpečuje rovnaké pracovné, zdravotné a sociálne podmienky pre ženy počas tehotenstva.

Bibliografia

1. Rozhodnutie Najvyššieho súdu ČSSR, sp. zn. 8 Co 730/66, „Rozviazanie pracovného pomeru“, 22. 12. 1966, Sb. NS 7/1967
2. Rozsudok Súdneho dvora (tretia komora) Virginie Pontin proti T-Comalux SA z 29. októbra 2009, vec C-63/08
3. Rozsudok Súdneho dvora Európskej únie - Tele Danmark A/S v Handelsog Kontorfunktionærernes Forbund (HK), 4. októbra 2001, vec C-109/00
4. Smernica Rady 76/207/EHS z 9. februára 1976, Ú. v. ES L 39, 14.2.1976
5. Smernice Rady 92/85/EHS z 19. októbra 1992 o zavedení opatrení na podporu zlepšenia bezpečnosti a ochrany zdravia pri práci tehotných pracovníčok, pracovníčok krátko po pôrode alebo dojčiacich pracovníčok, Ú. v. ES L 348, 28.11.1992
6. Ústava Slovenskej republiky 460/1992 Zb.
7. Zákonník práce č. 311/2001 Z. z. v znení neskorších predpisov
8. Zmluva o fungovaní Európskej únie, konsolidované znenie

STATUS PROFESIONÁLNEHO FUTBALISTU V KONTEXTE ZÁKONA O ŠPORTE A PREDPISOV MEDZINÁRODNEJ FUTBALOVEJ FEDERÁCIE

The Status of a Professional Footballer in the Context of the Sports Act and the Regulations of the International Federation of Association Football

NINA MORESOVÁ *

Abstrakt

Príspevok sa zaoberá právnym postavením profesionálneho futbalistu v kontexte vnútroštátnej právnej úpravy a autonómnych predpisov športových organizácií. Pozornosť sa sústreďuje najmä na rozdielne vymedzenie amatérskeho a profesionálneho statusu hráča podľa slovenského zákona o športe a regulačného rámca FIFA, ktoré vychádzajú z odlišných kritérií a môžu viesť k kvalifikačným rozporom. Autor analyzuje tento normatívny dualizmus a jeho praktické dôsledky pre právnu istotu v športovom prostredí. Následne poukazuje na materiálnu povahu výkonu profesionálneho futbalu, ktorá napĺňa znaky závislej práce. V tejto súvislosti reflektuje legislatívny vývoj účinný od roku 2026, ktorý smeruje k zosúladeniu právnej formy s obsahom právneho vzťahu. Záverom konštatuje, že profesionálny futbalista v kolektívnom športe vystupuje ako zamestnanec.

Abstract

The contribution examines the legal status of a professional football player in the context of national legislation and the autonomous regulations of sports organizations. Particular attention is paid to the differing definitions of amateur and professional player status under the Slovak Act on Sport and the regulatory framework of FIFA, which are based on distinct criteria and may lead to qualification inconsistencies. The author analyses this normative dualism and its practical implications for legal certainty in the sports environment. Subsequently, the article highlights the material nature of professional football activity, which fulfils the characteristics of dependent work. In this context, it reflects the legislative developments effective from 2026, aimed at aligning the legal form with the actual substance of the legal relationship. The article concludes that a professional football player in team sports should be regarded as an employee.

Kľúčové slová: profesionálny futbalista, športové právo, zákon o športe, FIFA, závislá práca, pracovnoprávny vzťah, právne postavenie športovca, RSTP.

Key words: professional football player, sports law, Act on Sport, FIFA, dependent work, employment relationship, legal status of athlete, RSTP.

Úvod

Profesionálny futbalista predstavuje v modernom futbale osobitný typ pracovnej sily. Jeho právne, ekonomické aj spoločenské postavenie sa v mnohých smeroch odlišuje od postavenia bežného zamestnanca v tradičných pracovnoprávných vzťahoch. Futbal pre neho nepredstavuje voľnočasovú aktivitu, ale hlavné povolanie vykonávané za odmenu v prostredí organizovaných súťaží, klubových štruktúr a prísne regulovaných športových pravidiel. Profesionálny futbalista je preto neoddeliteľnou súčasťou futbalového priemyslu.

* Bc. et Bc. Nina Moresová 2. ročník Mgr., denná forma štúdia, nmoresova@student.umb.sk Právnická fakulta UMB

Futbalové odvetvie je založené na rozsiahlej sieti ekonomických vzťahov. Jeho fungovanie sa opiera o príjmy z vysielacích práv, reklamy, marketingu, sponzoringu, predaja vstupeniek, obchodného využívania štadiónov, či transferov hráčov. Práve hráči pritom predstavujú personálne jadro celého systému, pretože bez ich účasti by nebolo možné naplňať samotný obsah športovej súťaže ani komerčné očakávania, ktoré sa na ňu viažu. Profesionálny futbal sa tak už dávno nevníma iba ako športová činnosť, ale aj ako významné hospodárske odvetvie s globálnym dosahom. Samotná ekonomická dynamika futbalového sektora je pritom mimoriadna. Kým mnohé tradičné odvetvia hospodárstva podliehajú cyklickému vývoju alebo stagnácii, futbal dlhodobo rastie najmä v dôsledku komercializácie súťaží, zvyšovania mediálnej hodnoty zápasov, internacionalizácie trhu s hráčmi a rastúceho ekonomického významu klubov. Tento vývoj sa premieta aj do zvyšujúcej sa hodnoty profesionálnych futbalistov, ktorých postavenie na trhu práce je čoraz silnejšie a menej porovnateľné s tradičnými modelmi zamestnania.

Pracovné právo, ktoré je spravidla postavené na relatívne stabilných a všeobecných modeloch výkonu závislej práce, muselo v športovom prostredí reagovať na viaceré špecifiká. Kariéra profesionálneho futbalistu je spravidla časovo obmedzená, závislá od zdravotného stavu, fyzickej výkonnosti a športovej formy. Zároveň ide o profesiu vykonávanú v prostredí výraznej organizačnej a disciplinárnej regulácie, kde hráč podlieha tréningovému režimu, rozhodnutiam trénera, interným pravidlám klubu a pre futbal záväznej regulácie Medzinárodnej futbalovej federácie (ďalej len ako „FIFA“). Aj preto ide o osobitný druh výkonu práce, ktorý si vyžaduje špecifické právne uchopenie.

Postavenie profesionálneho futbalistu tak nie je determinované iba vnútroštátnym právom. Vo veľkej miere ho ovplyvňujú aj normy športových organizácií, najmä FIFA a na vnútroštátnej úrovni Slovenského futbalového zväzu (ďalej len ako „SFZ“). Tieto normy síce nemajú povahu všeobecne záväzných právnych predpisov, no v rámci futbalového systému majú reálnu normatívnu silu. Ich porušenie môže viesť k významným následkom, napríklad k športovým sankciám, zákazu činnosti, prestupovým obmedzeniam alebo disciplinárnej zodpovednosti. Právne postavenie profesionálneho futbalistu je preto výsledkom prelínania všeobecného práva a autonómnej športovej regulácie.

V slovenskom právnom prostredí bola otázka statusu profesionálneho futbalistu dlhodobo nejednotná. Hoci samotný výkon futbalovej činnosti už svojou povahou naplňal znaky závislej práce, právna úprava po určitý čas umožňovala, aby športovec pôsobil aj mimo pracovnoprávneho režimu. Vznikal tak stav, v ktorom sa právne postavenie profesionálneho športovca pohybovalo na pomedzí pracovného, občianskeho a obchodného práva. Takéto

riešenie vyvolávalo aplikačné problémy najmä pri odmeňovaní, sociálnom zabezpečení, skončení zmluvného vzťahu či posudzovaní disciplinárnej zodpovednosti.

Zásadný obrat priniesla právna úprava účinná od 1. januára 2026, podľa ktorej sa výkon závislej športovej činnosti musí realizovať v pracovnoprávnom vzťahu. Uvedená zmena nepredstavuje úplne nový koncept, ale skôr návrat k pôvodnej koncepcii zákona o športe, ktorý už pri svojom prijatí smeroval k tomu, aby profesionálni športovci v kolektívnych športoch vystupovali v postavení zamestnancov. Neskoršia novela z roku 2020 tento model oslabila tým, že umožnila výkon športovej činnosti aj na základe „inej zmluvy“ v režime samostatnej zárobkovej činnosti. Novelou účinnou od roku 2026 sa však zákonodarca opätovne priklonil k pracovnoprávnemu modelu a posilnil požiadavku materiálneho posudzovania vzťahu medzi klubom a športovcom.

1. Status profesionálneho futbalistu

Zákon o športe rozlišuje športovca profesionálneho, amatérskeho a neorganizovaného. Podľa § 4 ods. 3 zákona o športe profesionálny športovec vykonáva šport spravidla na základe zmluvy o profesionálnom vykonávaní športu, resp. v inom pracovnoprávnom režime ustanovenom zákonom.¹ Podľa § 4 ods. 4 zákona o športe amatérsky športovec môže vykonávať šport za užšie vymedzených podmienok, pričom jedným z rozhodujúcich kritérií podľa § 47 ods. 6 je aj výška odmeny.² Ak odmena športovca nepresahuje zákonom ustanovený limit viazaný na minimálnu mzdu, športovec je považovaný za amatéra. Ak túto hranicu prekročí, amatérsky status mu neprináleží a je *de facto* profesionál. Slovenská právna úprava teda pracuje s relatívne konkrétnym finančným kritériom pri odlíšení amatérskeho a profesionálneho statusu. Zákon o športe síce neobsahuje stručnú legálnu definíciu profesionálneho športovca vo všeobecnej časti, jeho status je však zrejmý z úpravy zmluvy o profesionálnom vykonávaní športu a z pravidiel týkajúcich sa odmeňovania. Zákon o športe zároveň v § 36 ods. 1 výslovne stanovuje, že mzda profesionálneho športovca sa považuje za mzdu podľa Zákonníka práce a nesmie byť nižšia ako minimálna mzda.³

Odlíšny prístup zaujíma FIFA prostredníctvom Nariadenia o prestupe a statuse hráčov (ďalej len ako „RSTP“). Toto nariadenie v čl. 2 rozlišuje iba dve kategórie hráčov a to profesionála a amatéra. Profesionálom je hráč, ktorý má s klubom písomnú zmluvu a za svoju činnosť dostáva odmenu prevyšujúcu náklady, ktoré mu pri výkone športu vznikajú. Všetci

¹ Pozri bližšie § 4 ods. 3 zákona o športe.

² Pozri bližšie § 4 ods. 4 a § 47 ods. 6 zákona o športe.

³ Tamtiež § 36 ods. 1.

ostatní hráči sú považovaní za amatérov.⁴ Kým slovenské právo používa pevnejšie a formálnejšie nastavený limit, FIFA vychádza z materiálneho hodnotenia konkrétnej situácie.

Práve tu vzniká priestor pre rozpor medzi vnútroštátnou právnou úpravou a autonómnou športovou reguláciou. Môže sa totiž stať, že hráč bude podľa slovenského práva stále považovaný za amatéra, pretože jeho odmena neprekračuje zákonný limit, no podľa pravidiel FIFA už bude profesionálom, ak jeho príjem objektívne prevyšuje skutočné náklady spojené s výkonom činnosti. Takýto nesúlad má praktické dôsledky najmä pri prestupoch, registrácii hráčov, tréningových kompenzáciách či disciplinárnych sporoch.

Osobitnú úlohu v tomto kontexte zohráva SFZ, ktorý je povinný rešpektovať pravidlá FIFA, no zároveň nemôže vytvárať vnútorné predpisy odporujúce slovenskému právnemu poriadku. Aj preto sa v predpisoch SFZ objavuje formulačné riešenie, ktoré síce v čl. 4 ods. 4 Registračného a prestupového poriadku preberá definíciu profesionála z RSTP, no zároveň pripúšťa výnimku „ak zákon o športe v § 4 ods. 4 neustanovuje inak“.⁵ Ide o dôležitý prejav uznania nadradenosti vnútroštátneho práva, hoci v praktickom fungovaní futbalu majú normy FIFA často veľmi silný faktický dosah. Uvedené legislatívne premostenie však má skôr deklaratórny než reálne harmonizačný charakter, keďže § 4 ods. 4 zákona o športe sa obsahovo obmedzuje na vymedzenie foriem výkonu športovej činnosti amatéra a nepracuje s finančným kritériom, ktoré je kľúčové pre rozlíšenie amatérskeho a profesionálneho statusu. V dôsledku toho nedochádza k odstráneniu normatívneho napätia medzi vnútroštátnou právnou úpravou a regulačným rámcom FIFA, ale iba k jeho formálnemu preklenutiu bez materiálneho riešenia.

Futbalové kluby sa tak nachádzajú v prostredí normatívneho dualizmu. Na jednej strane musia rešpektovať slovenské pracovné, daňové a sociálne právo, na druhej strane sú viazané autonómnymi pravidlami medzinárodného futbalového systému. Ak sa budú striktne riadiť iba vnútroštátnym právom, môžu sa dostať do konfliktu s predpismi FIFA. Ak zase budú bezvýhradne uprednostňovať neprávne normy FIFA, riskujú rozpor s kogentnými ustanoveniami slovenského právného poriadku.

2. Profesionálny futbalista ako zamestnanec

Z materiálneho hľadiska je postavenie profesionálneho futbalistu veľmi blízke postaveniu zamestnanca. Závislá práca je podľa § 1 ods. 2 Zákonníka práce charakterizovaná vzťahom nadriadenosti a podriadenosti, osobným výkonom práce, výkonom práce podľa pokynov

⁴ Pozri bližšie čl. 2 RSTP

⁵ Pozri bližšie čl. 4 ods. 4 RAP SFZ

zamestnávateľa a v jeho mene. Všetky tieto znaky sú pri profesionálnom futbale spravidla prítomné.⁶

Futbalista vykonáva svoju činnosť osobne a za odmenu, v mene klubu a v rámci jeho organizačnej štruktúry. Klub určuje tréningový plán, miesto a čas výkonu činnosti, podmienky účasti na zápasoch, režim regenerácie, mediálne povinnosti aj pravidlá reprezentácie klubu navonok. Hráč je podriadený rozhodnutiam trénera, športového riaditeľa a ďalších osôb poverených riadením športovej činnosti. V kolektívnom športe je navyše miera organizačnej závislosti hráča na klube ešte intenzívnejšia než v individuálnych športoch, pretože výkon jednotlivca je nevyhnutne podriadený kolektívnej stratégii, taktike a disciplíne tímu. Práve preto sa javí ako neudržateľné, aby bol profesionálny futbalista pri naplnení všetkých znakov závislej práce právne posudzovaný ako samostatne zárobkovo činná osoba. Futbalista totiž spravidla nenesie podnikateľské riziko v pravom zmysle slova. Neorganizuje si činnosť nezávisle, nevystupuje vo vlastnom mene na trhu, ale je pevne začlenený do klubovej štruktúry. Ak právna forma zmluvy nezodpovedá materiálnej realite, vzniká priestor pre obchádzanie pracovnoprávnej ochrany.

Práve tento nesúladsa v slovenskej aplikačnej praxi dlhodobo označoval ako „sivá zóna“ pracovného práva v športe. Formálne sa síce mohlo zdať, že ide o slobodnú voľbu medzi zamestnaneckým a podnikateľským statusom, v skutočnosti však išlo často o oslabenie právnej ochrany športovcov pri zachovaní všetkých podstatných znakov závislej práce. Novela účinná od roku 2026 preto predstavuje významný krok k zosúladieniu právnej formy s reálnym obsahom vzťahu medzi klubom a profesionálnym hráčom.

Prijatím zákona o športe sa slovenský zákonodarca pokúsil vytvoriť osobitný právny rámec, ktorý by reflektoval špecifiká profesionálneho športu. Kľúčovým nástrojom sa stala zmluva o profesionálnom vykonávaní športu, koncipovaná ako osobitný pracovnoprávny vzťah. Jej účelom bolo priblížiť právne postavenie profesionálneho športovca ochranným mechanizmom pracovného práva a zároveň zohľadniť špecifiká športového prostredia. Aplikačná prax však ukázala, že kluby často uprednostňovali model samostatnej zárobkovej činnosti. Novela zákona o športe z roku 2020 tento trend ešte posilnila, keď výslovne umožnila profesionálnemu športovcovi vykonávať šport aj na základe „inej zmluvy“ mimo pracovnoprávneho režimu. Takéto riešenie bolo odôvodňované zmluvnou voľnosťou, v skutočnosti však viedlo k ďalšiemu oslabeniu pracovnoprávnej ochrany v prípadoch, kde bol obsah vzťahu jednoznačne závislý.

⁶ Pozri bližšie § 1 ods. 2 Zákonníka práce

Novela účinná od 1.1.2026 tento model zásadne koriguje. Ak právny vzťah medzi športovým klubom a profesionálnym športovcom napĺňa znaky závislej práce, ide o pracovnoprávny vzťah bez ohľadu na to, ako je zmluva formálne označená.⁷ Kluby boli povinné zosúladiť existujúce zmluvné vzťahy s novou právnou úpravou do konca roka 2025. V praxi to znamená, že profesionálny futbalista už nemá vystupovať ako SZČO tam, kde reálne pôsobí ako člen klubovej organizačnej štruktúry podriadený jej pokynom.

Tento posun možno hodnotiť pozitívne. Zodpovedá materiálnej povahe profesionálneho futbalu, posilňuje právnú istotu a približuje slovenskú právnú úpravu štandardom, ktoré sú zrejmé z európskej praxe aj z logiky pracovného práva. Zároveň však nemožno prehliadať ekonomické dôsledky tejto zmeny, najmä pre menšie kluby s obmedzenými finančnými zdrojmi. Aby bol nový model dlhodobo udržateľný, je vhodné, aby bol sprevádzaný metodickou podporou, stabilným výkladom a primeraným nastavením odvodového zaťaženia.

3. Európsky kontext právneho postavenia futbalistu

Právne postavenie profesionálneho futbalistu nemožno skúmať iba vo vnútroštátnom rámci. Významný vplyv na jeho formovanie malo aj právo Európskej únie, najmä judikatúra Súdneho dvora Európskej únie (ďalej len ako „Súdny dvor EÚ“). Hoci šport dlhodobo nepatril medzi tradičné oblasti intenzívnej európskej regulácie, profesionálny šport bol postupne podriadený pravidlám vnútorného trhu všade tam, kde nadobudol hospodársky charakter.

Súdny dvor EÚ už v skoršej judikatúre zdôraznil, že športová činnosť podlieha právu Únie vtedy, ak má ekonomický rozmer. Kľúčový význam však mal najmä rozsudok (C-415/93) ESD vo veci Bosman z roku 1995. Toto rozhodnutie zásadne zmenilo podobu európskeho futbalového trhu. Súdny dvor konštatoval, že pravidlá, ktoré po skončení zmluvy bránili futbalistovi vo voľnom prestupe do klubu v inom členskom štáte bez zaplatenia prestupovej kompenzácie sú nezlučiteľné so slobodou pohybu pracovníkov.⁸ Rovnako odmietol aj národnostné kvóty pre hráčov z iných členských štátov EÚ. Bosmanov rozsudok mal nielen športový, ale aj pracovnoprávny význam. Potvrdil totiž, že profesionálny futbalista je z pohľadu práva Európskej únie pracovníkom, ktorému musí byť zabezpečená ochrana vyplývajúca zo základných slobôd vnútorného trhu. Autonómia FIFA tak dostala svoje limity a športové

⁷ Pozri bližšie § 46 ods. 1 zákona o športe.

⁸ Úradný vestník Európskej únie. Dostupné na internete: <https://eur-lex.europa.eu/legal-content/SK/TXT/HTML/?uri=CELEX:61993CJ0415&qid=1770745709301> [cit. 2026-03-30].

pravidlá nemožno aplikovať spôsobom, ktorý by zasahoval do základných práv garantovaných právom Únie.

Komparácia vybraných európskych štátov zároveň ukazuje, že pracovnoprávne chápanie profesionálneho futbalistu nie je výnimočné. V Anglicku sa status futbalistu ako zamestnanca formoval predovšetkým prostredníctvom judikatúry, ktorá už začiatkom 20. storočia vychádzala z toho, že hráč podlieha organizačnej autorite klubu. V Taliansku bola otázka profesionálneho športu výslovne riešená osobitnou právnou úpravou, ktorá potvrdila pracovnoprávny základ výkonu tejto činnosti. V Rakúsku je profesionálny futbalista dlhodobo považovaný za zamestnanca nielen v teórii, ale aj v ustálenej súdnej praxi. Naopak, v niektorých postsocialistických krajinách pretrvávali hybridné modely založené na kombinácii pracovných a civilných kontraktov. Tieto modely boli často motivované ekonomicky, najmä snahou znižovať odvodové zaťaženie klubov. Takýto prístup však prinášal vyššiu mieru právnej neistoty a oslabenie ochrany hráčov. Európska skúsenosť preto skôr podporuje záver, že profesionálny futbalista má byť v kolektívnom športe v zásade vnímaný ako osoba vykonávajúca závislú prácu.⁹

Záver

Právna úprava profesionálneho futbalu je dlhodobo sprevádzaná napätím medzi vnútroštátnym právnym poriadkom a autonómnymi normami FIFA, pričom osobitne výrazne sa tento rozpor prejavuje pri vymedzení hranice medzi amatérskym a profesionálnym statusom hráča. Slovenský zákon o športe vychádza pri rozlišovaní týchto dvoch kategórií z pomerne striktného nastaveného finančného kritéria, ktoré je naviazané na výšku minimálnej mzdy. Naopak, regulačný rámec FIFA, konkrétne RSTP, uplatňuje odlišný prístup, keď za profesionála považuje hráča, ktorý má s klubom uzatvorenú písomnú zmluvu a za svoju činnosť dostáva odmenu prevyšujúcu náklady, ktoré mu v súvislosti s výkonom futbalovej činnosti vznikajú. Už z povahy týchto dvoch prístupov je zrejmé, že nejde o zhodné kritériá. Kým vnútroštátna právna úprava pracuje s formálne určenou finančnou hranicou, FIFA vychádza z individuálneho a materiálneho posúdenia konkrétneho prípadu. Praktickým dôsledkom tak môže byť situácia, v ktorej je ten istý hráč podľa slovenského práva stále považovaný za amatéra, pretože neprekročil zákonný finančný limit, no podľa predpisov FIFA už naplňa znaky

⁹ *Právne postavenie profesionálnych futbalistov pôsobiacich vo vybraných krajinách EÚ z hľadiska ich vnútroštátnej legislatívy* [online]. Dostupné na internete: <https://beta.ucps.sk/pravne-postavenie-profesionalnych-futbalistov-posobiacich-vo-vybranych-krajinach-eu-z-hladiska-ich-vnutrostatnej-legislativy> [cit. 2026-03-30].

profesionála, keďže jeho odmena objektívne prevyšuje náklady spojené s výkonom športovej činnosti.

Takto nastavený normatívny dualizmus nemožno považovať za čisto teoretický problém. Jeho dôsledky sa prejavujú v celej rade praktických otázok, akými sú registrácia hráča, prestupový režim, uplatnenie tréningovej kompenzácie, ochrana zmluvnej stability či riešenie sporov v rámci futbalových orgánov. Rozpor medzi vnútroštátnou právnou úpravou a predpismi FIFA zároveň oslabuje právnu istotu klubov aj samotných hráčov, keďže tí sa pohybujú medzi dvoma paralelne pôsobiacimi regulačnými systémami, ktoré nevychádzajú z totožných východísk. Osobitne citlivá je pritom úloha Slovenského futbalového zväzu, ktorý je na jednej strane povinný rešpektovať záväznosť predpisov FIFA, no na druhej strane nemôže vo svojich interných normách ignorovať kogentné ustanovenia slovenského právneho poriadku. Ani formulačné riešenia prijaté v predpisoch SFZ však tento rozpor materiálne neodstraňujú. Ak totiž vnútroštátna norma a autonómny športový predpis vychádzajú z odlišných kvalifikačných kritérií, nejde o problém, ktorý by bolo možné vyriešiť iba odkazom na prednosť jedného alebo druhého systému. V jadre ide o stret dvoch odlišných koncepcií právneho posudzovania postavenia hráča, pričom tento rozpor pretrváva dovtedy, kým nie sú zladené samotné rozhodujúce kritériá. Právna úprava profesionálneho futbalu je preto v tejto časti dodnes charakteristická určitým stupňom nejednotnosti, ktorý znižuje predvídateľnosť právnych dôsledkov a komplikuje aplikačnú prax.

Odlišnou, hoci úzko súvisiacou problematikou, je samotná právna povaha činnosti profesionálneho futbalistu. Z materiálneho hľadiska je totiž jeho postavenie v kolektívnom športe len ťažko zlučiteľné s predstavou samostatne zárobkovo činnnej osoby. Profesionálny futbalista vykonáva svoju činnosť osobne, dlhodobo a za odplatu, v mene klubu a v rámci jeho organizačnej štruktúry. Klub určuje obsah tréningového procesu, miesto a čas výkonu činnosti, rozhoduje o účasti hráča na zápasoch, sústreďeniach, regenerácii, mediálnych aktivitách i ďalších povinnostiach súvisiacich s reprezentáciou klubu. Hráč pritom nevystupuje na trhu nezávisle, nenesie typické podnikateľské riziko a svoju činnosť nevykonáva autonómne podľa vlastného podnikateľského zámeru, ale ako súčasť organizovaného tímového celku podriadeného športovému vedeniu klubu. V prostredí kolektívneho športu navyše vystupujú znaky organizačnej závislosti a podriadenosti ešte intenzívnejšie než v iných oblastiach, pretože výkon jednotlivca je nevyhnutne podriadený spoločnej taktike, disciplíne mužstva, rozhodnutiam trénera a vnútornému režimu klubu. Materiálna povaha tejto činnosti preto jednoznačne nasvedčuje tomu, že profesionálny futbalista vykonáva závislú prácu. Práve z tohto dôvodu treba profesionálneho futbalistu v kolektívnom športe považovať za zamestnanca,

a to bez ohľadu na to, aké formálne označenie bol v minulosti schopný zmluvný vzťah medzi klubom a hráčom nadobudnúť. Skutočnosť, že právna úprava po určitý čas umožňovala aj iné zmluvné modely nemenila nič na tom, že obsah takéhoto vzťahu mal vo svojej podstate pracovnoprávny charakter. Novela účinná od roku 2026 preto nepredstavuje zavedenie úplne nového konceptu, ale skôr normatívne potvrdenie stavu, ktorý bol z materiálneho hľadiska prítomný už skôr. Jej význam spočíva najmä v tom, že zosúladí právnu formu s reálnym obsahom právneho vzťahu a obmedzuje priestor pre obchádzanie pracovnoprávnej ochrany prostredníctvom formálne odlišných kontraktačných modelov. Takéto riešenie posilňuje právnu istotu hráčov aj klubov, zvyšuje transparentnosť zmluvných vzťahov a približuje slovenskú právnu úpravu základnej logike pracovného práva, ako aj európskym trendom v posudzovaní profesionálneho športu. Záver, že profesionálny futbalista je zamestnancom, preto nevyplyva iba zo znenia aktuálnej legislatívy, ale predovšetkým z materiálnej povahy jeho činnosti, ktorá naplňa všetky rozhodujúce znaky závislej práce.

Zoznam bibliografických odkazov

1. Fédération Internationale de Football Association. (2025). *Regulations on the Status and Transfer of Players (RSTP)*.
2. Slovenský futbalový zväz. (2023). *Registračný a prestupový poriadok SFZ*.
3. Zákon č. 440/2015 Z. z. o športe. (2015).
4. Zákon č. 311/2001 Z. z. Zákonník práce. (2001).
5. Križan, L. (2022). *Právne postavenie profesionálnych futbalistov pôsobiacich vo vybraných krajinách EÚ z hľadiska ich vnútroštátnej legislatívy*. UčPS. <https://beta.ucps.sk/pravne-postavenie-profesionalnych-futbalistov-posobiacich-vo-vybranych-krajinach-eu-z-hladiska-ich-vnutrostatnej-legislativy>
6. Court of Justice of the European Union. (1995). *Union royale belge des sociétés de football association ASBL v. Bosman* (C-415/93). <https://eur-lex.europa.eu/legal-content/SK/TXT/HTML/?uri=CELEX:61993CJ0415>

OCHRANA SÚKROMIA VEREJNÝCH OSÔB

Protection of privacy of public figures

SIMONA MAJCHÚTOVÁ*

Abstrakt

Súkromie verejných činiteľov predstavuje v dnešnom digitálnom svete veľmi dôležitú otázku, s ktorou sa stretávame na každodennej báze. Je tomu tak z dôvodu nepretržitého šírenia sa informácií o jednotlivcoch alebo skupinách osôb, ktoré určitým spôsobom zasahuje do verejného diania. V dôsledku tohto prúdenia informácií dochádza k zásahom do súkromnej sféry jednotlivcov a tieto zásahy z hľadiska proporcionality často krát nespĺňajú kritériá, ktoré by liberalizovali dané konanie. Ochrana práva na súkromie predstavuje dôležitý inštitút, vďaka ktorému je umožnené zabezpečiť jednotlivcovi ochranu jeho súkromnej sféry pred neoprávnenými zásahmi zo strany štátu, osôb alebo organizácií. Súkromie jednotlivca zaradujeme pod veľmi široký inštitút, ktorým sú osobnostné práva, ktoré predstavujú veľmi komplexnú úpravu. Preto je našim autorským zámerom poskytnúť analýzu aktuálnej právnej úpravy a relevantnej judikatúry s cieľom rozobrať a vymedziť základné atribúty ochrany práva na súkromie a podmienky za ktorých je súkromie jednotlivca možné obmedziť a následne poskytnúť rozbor hraníc slobody prejavu médií.

Abstract

The privacy of public figures is a very important issue in today's digital world, one that we encounter on a daily basis. This is due to the continuous dissemination of information about individuals or groups of people who in some way interfere with public affairs. As a result of this flow of information, there are intrusions into the private sphere of individuals, and these intrusions often do not meet the criteria of proportionality that would liberalize the conduct in question. The protection of the right to privacy is an important institution that makes it possible to protect individuals from unauthorized interference in their private lives by the state, persons or organizations. We classify an individual's privacy under the very broad institution of personal rights, which represent a very broad and complex regulation, which can often lead to ambiguities in questions of what can be classified as part of an individual's private sphere or what protection individuals can demand. Therefore, our intention is to provide an analysis of the current legal regulation and relevant case law in order to examine and define the basic attributes of the protection of the right to privacy and the conditions under which and individual's privacy may be restricted and an analysis of the limits of freedom of expression in the media.

Kľúčové slová: Verejné osoby. Súkromie. Osobnostné práva. Sloboda prejavu. Verejný záujem.

Key words: Public figures. Privacy. Personality rights. Freedom of expression. Public interest.

ÚVOD

Právo na súkromie predstavuje veľmi dôležitý inštitút, ktorý garantuje jednotlivcovi záruky osobnej slobody, autonómie a tak isto prispieva k ochrane ľudskej dôstojnosti a individuality. V širšom slova zmysle, by sme mohli vymedziť rozsah tohto práva ako všetky aspekty slobody jednotlivca, jeho autonómie, integrity a vzťahov. (súkromných, profesionálnych,..). Súkromie jednotlivca pri tom predstavuje veľmi komplexnú škálu jednotlivých hodnôt, ktoré spoločne vymedzujeme ako súkromná sféra jednotlivca. Medzi najkľúčovejšie hodnoty spadajúce pod

* Bc. Simona Majchútová, 1. ročník, denná forma štúdia, 2. stupeň štúdia, smajchutova@student.umb.sk.
Právnická fakulta UMB

súkromie jednotlivca patrí sloboda, dôstojnosť, identita, autonómia a pod. Prienik ľudskej dôstojnosti a súkromia vnímame najmä v súvislosti s autonómnym rozvojom jednotlivca. Jednou z kľúčových podmienok zabezpečujúcich slobodný a autonómny rozvoj jednotlivca a s tým spojené právo na slobodné sebaurčenie v spoločnosti je najmä zabezpečenie ochrany jeho súkromnej sféry, čomu prispieva aj prienik slobody a súkromia spočívajúci v zabezpečení akejkoľvek nezávislosti jednotlivca od štátnej moci. Aj napriek snahe o priblíženie si tohto komplexného pojmu, je potrebné uviesť, že pojem „súkromie“ nedisponuje všeobecnou legálnou definíciou. Z judikatúry Európskeho súdu pre ľudské práva vyplýva, že súd predpokladá pre prípad poskytnutia jednotnej definície značné reštrikcie v zmysle zúženia okruhu pôsobnosti tohto práva len na vnútorný okruh vymedzujúci súkromie jednotlivca, nakoľko súkromie jednotlivca zahŕňa práve aj jeho vzťah a prepojenie s vonkajším svetom.¹

1. PRÁVO NA SÚKROMIE A JEHO OCHRANA

Právny rámec ochrany práva na súkromie jednotlivca máme zakotvený v Ústave Slovenskej republiky v článku 16, ako jedno z katalógových základných práv a slobôd.² Jeho zakotvenie v základom zákone štátu predstavuje vytvorenie právneho rámca, ktorý zabezpečuje garanciu rešpektovania a ochrany súkromnej sféry každého jednotlivca. Podľa dikcie článku 16, Ústavy Slovenskej republiky je zrejmé, že právo na súkromie je zaručené pre každého jednotlivca a že obmedziť je toto právo v demokratickom a právnom štáte možné len v prípadoch, ktoré ustanoví zákon.³ O ochrane práva na súkromie pojednáva aj Európsky dohovor o ochrane ľudských práv a základných slobôd v článku 8, v ktorom je uvedené, že každý má právo na rešpektovanie svojho súkromného a rodinného života.⁴ Toto zakotvenie predstavuje garanciu ochrany súkromnej sféry jednotlivca prostredníctvom Európskeho súdu pre ľudské práva. Právo na súkromie, ako jedno zo základných práv a slobôd jednotlivca patrí každému jednotlivcovi a je neodňateľné, nescudziteľné, nepremlčateľné, nezrušiteľné a jeho obmedzenie je možné uskutočniť len takým spôsobom, ktorý ustanoví zákon. Generálnu

¹ Z judikatúry : „Súd nepokladá za možné ani nutné pokúsiť sa o vyčerpávajúcu definíciu pojmu súkromný život. Bolo by príliš reštriktívne limitovať tento pojem na „vnútorný okruh“, v ktorom jedinec žije vlastný osobný život podľa svojich predstáv, a úplne z neho vylúčiť svet nezahrnutý do tohto okruhu. Rešpektovanie súkromného života musí do určitej miery rovnako zahŕňať i právo vytvárať a rozvíjať vzťahy s ostatnými ľudskými bytosťami. Zdá sa, že neexistuje dôvod, aby takto chápaný pojem súkromný život vylučoval činnosti profesijnej a obchodnej povahy, pretože práve v priebehu svojej pracovnej aktivity má väčšina ľudí najväčšiu príležitosť rozvíjať vzťahy s vonkajším svetom.“ Rozsudok Európskeho súdu pre ľudské práva, Niemietz proti Nemecku, z 16. decembra 1992, č. 13710/88. Dostupné na internete: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-156054%22%5D%7D>

² Pozri čl. 16, ústavný zákon č. 460/1992 Zb. Ústava Slovenskej republiky v znení neskorších predpisov.

³ Pozri čl. 16 ods. 1, ústavný zákon č. 460/1992 Zb. Ústava Slovenskej republiky v znení neskorších predpisov.

⁴ Pozri čl. 8, Európskeho dohovoru o ochrane ľudských práv a základných slobôd (Rím, 4. november 1950), vyhláška č. 209/1992 Zb.

klauzulu ochrany osobnostných práv, pod ktoré právo na súkromie zaraďujeme, máme stanovenú v § 11, Občianskeho zákonníka, ktorý ustanovuje, že každý jednotlivec má právo na ochranu svojej osobnosti, života a zdravia, občianskej cti a ľudskej dôstojnosti ako aj súkromia, svojho mena a prejavov osobnej povahy.⁵ Ochrana súkromia v sebe zahŕňa široký rámec, ktorý zabezpečuje garancie rešpektovania práva na nerušený osobný život, duševný pokoj a nedotknuteľnosť života jednotlivca v kruhu jeho najbližších.⁶

Pre identifikáciu rozsahu a miery ochrany práva na súkromie je dôležité rozlíšiť status osoby. V teórii a praxi rozlišujeme osoby, pre ktoré táto ochrana platí neobmedzene a osoby, ktoré sú povinné zniesť určitý rozsah zásahov do svojho súkromia. V centre pozornosti stojí základné delenie osôb na osoby verejné (verejne činné/verejne známe) a osoby súkromné. Verejné osoby sú charakterizované ako osoby, ktoré zastávajú verejné funkcie v spoločnosti a určitým spôsobom sa podieľajú na výkone verejnej moci (verejne činné) alebo osoby, ktoré sú pre svoju verejnú aktivitu uskutočňujúcu v spoločnosti verejne známe (verejne známe). Pre tieto osoby platí, že keďže sa na základe svojho vlastného rozhodnutia rozhodli vstúpiť do verejného priestoru, požívajú nižšiu mieru ochrany pred zásahmi do ich súkromného života nakoľko záujem o ich súkromie je daný spoločnosťou a z tohto dôvodu sú povinní strpieť vyššiu mieru zásahov do svojho súkromia. To však neznamená, že nepožívajú žiadnu ochranu a zásah do ich súkromia je bezmedzný.⁷ Súkromné osoby sú charakterizované ako osoby, ktoré nezastávajú verejnú funkciu ani nevykonávajú verejnú činnosť. Môžeme ich charakterizovať aj ako osoby, ktoré nie sú v spoločnosti verejne známe nakoľko nevykonávajú verejnú aktivitu. Tieto osoby požívajú plnú ochranu pred zásahmi do ich súkromia, nakoľko nevystupujú na verejnej scéne ani sa nepodieľajú na výkone verejnej moci a preto je zrejmé, že spoločenský záujem nahliadať a komentovať ich súkromný život neexistuje.⁸ Pojem verejný záujem predstavuje právny inštitút ktorý nedisponuje všeobecnou legálnou definíciou. Verejný záujem, v súvislosti s predmetnou problematikou, predstavuje veľmi dôležitý inštitút nakoľko v dôsledku existencie verejného záujmu a iných predpokladaných podmienok vzťahujúcich sa k okolnostiam prípadu, je možné obmedziť základné práva a slobody legitímnym a právom aprobovaným spôsobom.

⁵ Pozri § 11 zákon č. 40/1964 Zb. Občiansky zákonník v znení neskorších predpisov.

⁶ HARŠANYOVÁ, M.: *Subjekty ochrany osobnosti v mediálnom prostredí* [online]. s. 108 . Dostupné na internete: https://www.flaw.uniba.sk/fileadmin/praf/Veda/Konferencie_a_podujatia/BPF_2019/ZBORNÍK_sekcia_7_Obcianske_pravo.pdf#page=107 [cit. 2025-11-01].

⁷ HARŠANYOVÁ, M.: *Subjekty ochrany osobnosti v mediálnom prostredí* [online]. s. 112-113 . Dostupné na internete: https://www.flaw.uniba.sk/fileadmin/praf/Veda/Konferencie_a_podujatia/BPF_2019/ZBORNÍK_sekcia_7_Obcianske_pravo.pdf#page=107 [cit. 2025-11-01].

⁸ Tamže, s.112-113.

Požiadavkou takéhoto obmedzenia je však jeho existencia a konkrétna identifikácia v právnej norme, na základe ktorej je umožnené orgánu verejnej moci obmedziť súkromný záujem jednotlivca. Aj vzhľadom na to, že sa jedná o právom nedefinovaný pojem, hranice jeho abstraktnosti sú limitované podmienkou jeho obsiahnutia v konkrétnej právnej norme čím je možné rozpoznať jeho prítomnosť vzťahujúcu sa ku konkrétnemu súkromnému právu.⁹

Z vyššie uvedených informácií nám vyplýva, že verejné osoby sú povinné znášať vyššiu mieru kritiky ako aj zásahov do svojho súkromia ako súkromne osoby, a to najmä v dôsledku prítomnosti verejného záujmu. Medzi verejné osoby zaradíme najmä politikov, sudcov, hercov a iné verejne známe osoby. Keďže sa jedná o veľmi širokú problematiku, dovolili by sme si upriamiť pozornosť na problematiku ochrany súkromia sudcov a politikov. Politici predstavujú verejné činné osoby, ktoré sú vyplývajúce z judikatúry Európskeho súdu pre ľudské práva, povinné zniesť vyššiu mieru kritiky a zásahov do ich súkromnej sféry pri výkone svojej funkcie. Jedná sa o osoby, ktoré disponujú skoro najnižšou mierou ochrany. Sudcovia sú pri výkone svojej funkcie tak isto povinný strpieť vyššiu mieru kritiky a zásahov. V tomto prípade je potrebné rozlišovať medzi osobou sudcu, teda medzi jednotlivými osobami a medzi súdmi, teda justíciou. V prípade ak by sa zásah týkal konkrétnej osoby sudcu, ten požíva vyššiu mieru ochrany ako v prípade kritiky fungovania justície. Ešte vyššia miera tolerancie sa predpokladá pri sudcoch Najvyššieho súdu, ktorí rozhodujú o tých najzávažnejších prípadoch.¹⁰ Predmetné tvrdenia môžeme podporiť aj judikatúrou Ústavného súdu slovenskej republiky, z ktorej vyplýva, že v prípade ak kritika smeruje voči fungovaniu justície, je potrebné brať na vedomie, že v daných prípadoch sú hranice slobody prejavu rozšírené a následne, že každý sudca je pri výkone svojej funkcie povinný znášať vyššiu mieru kritiky, nakoľko predstavuje jednu zo základných inštitúcií štátu.¹¹ Novinári a médiá ako „nositelia slobody prejavu“ na druhej strane v predmetných prípadoch disponujú vyššou mierou ochrany, nakoľko sprístupňujú verejnosti informácie na ktorých je daný verejný záujem a preto z hľadiska postavenia subjektov, disponujú

⁹ PÍRY, M.: *Public interest* [online]. s. 82-83. Dostupné na internete: <http://www.michalcerny.net/OPD19-Sbornik-FV.pdf#page=80> [cit. 2025-11-11].

¹⁰ HARŠANYOVÁ, M.: *Subjekty ochrany osobnosti v mediálnom prostredí* [online]. s. 113. Dostupné na internete: https://www.flaw.uniba.sk/fileadmin/praf/Veda/Konferencie_a_podujatia/BPF_2019/ZBORNIK_sekcia_7_Obcianske_pravo.pdf#page=107 [cit. 2025-11-11].

¹¹ Z judikatúry : „Hodnotiace úsudky nesmerovali voči osobe žalobcu ale voči celej skupine sudcov, boli smerované ako kritika fungovania justície, pri ktorej sloboda prejavu požíva širšie hranice ako pri osobnej kritike konkrétneho sudcu. Každý sudca pri výkone svojej funkcie predstavuje jednu zo základných inštitúcií štátu a preto ako verejne činné osoby, sú povinné strpieť vyššiu mieru kritiky.“ Nález Ústavného súdu Slovenskej republiky z 3. júla 2024 sp. zn. I. ÚS 383/2020.

privilegovaným postavením. Ale aj novinári sú povinný svoje tvrdenia podložiť, v prípade ak uvádzajú vlastné hodnotiace úsudky, tie musia mať faktický a relevantný základ.¹²

V mediálnom a v súčasnosti aj v digitálnom prostredí dochádza k prúdeniu informácií na každodennej báze. Tieto informácie svojím obsahom často krát aj nepriamo zasahujú do spoločensky uznávaných hodnôt. V konkrétnych prípadoch ide o zásah do práv verejných osôb, ktoré v daných prípadoch vyúsťujú ku konfliktom, medzi Ústavou garantovanými základnými právami a slobodami, ktorými sú právo na ochranu súkromia a právo na slobodu prejavu. V zmysle uvedeného je nevyhnutné vymedziť si základné kritéria oprávňujúce limitovať základné práva a slobody. Keďže sa jedná o dve rovnocenné práva, v prípade ich kolízie a pri posudzovaní konkrétneho prípadu, bude rozhodujúcim kritériom najmä zistenie okolností, za ktorých došlo k danému konfliktu, nakoľko v každom jednom prípade sa skúma práve proporcionality zásahu do dvoch oproti sebe stojacim rovnocenným právam.¹³ Z toho nám vyplýva skutočnosť, že neexistuje žiadny konkrétny mechanizmus ktorý by bol univerzálnym pri posudzovaní všetkých predmetných sporov. Súd vždy postupuje s prihliadnutím na konkrétne okolnosti prípadu, pretože každý jeden prípad je potrebné posúdiť individuálne, vzhľadom na nevyhnutnosť vykonania testu proporcionality. Z toho nám jasne vyplýva, že k obmedzeniu jedného práva môže dôjsť len v prípade, ak je v kolízii s iným základným právom, pričom v prípade stretu práva na súkromie a verejného záujmu je nevyhnutné sledovať účel daného obmedzenia a jeho prepojenie s použitými prostriedkami. Je nevyhnutné aby v tomto prípade boli naplnené kritéria legality, legitímnosti a proporcionality zásahu, najmä s prihliadnutím na cieľ, ktorý má byť dosiahnutý a na mieru obmedzenia. V prípade ak by nasledujúce kritéria neboli dodržané, jednalo by sa o neoprávnený spôsob obmedzenia základných práv a slobôd v rozpore s Dohovorom.¹⁴

Pre lepšie pochopenie predmetnej analýzy je nevyhnutné, aby sme si okrajovo priblížili právny inštitút slobody prejavu, v zmysle ustanovení základných právnych predpisov. Právo na

¹² Z judikatúry : „Osoba, ktorá tvrdí, že jej sloboda prejavu bola zbytočne obmedzená, ju sama musela uplatniť spôsobom, ktorý je v súlade s demokratickými princípmi, a to v dobrej viere, pokiaľ ide o legitímnosť tvrdení, a spôsobom zlučiteľným s demokratickými cieľmi; okrem toho tvrdenia majú byť podložené faktami. Ak tvrdenie predstavuje hodnotový úsudok, proporcionality zásahu môže závisieť od toho, či pre neho existuje dostatočný faktický základ, pretože aj hodnotiaci úsudok bez akéhokoľvek faktického základu na jeho podporu môže byť neprimeraný.“ Nález Ústavného súdu Slovenskej republiky z 26. júna 2024 sp. zn. IV. ÚS 200/2024.

¹³ HARŠANYOVÁ, M.: *Subjekty ochrany osobnosti v mediálnom prostredí* [online]. s. 112 . Dostupné na internete:

https://www.flaw.uniba.sk/fileadmin/praf/Veda/Konferencie_a_podujatia/BPF_2019/ZBORNÍK_sekcia_7_Obcianske_pravo_.pdf#page=107 [cit. 2025-11-11].

¹⁴ ČENTĚŠ, J.: *Zásahy do práva na súkromie z hľadiska judikatúry európskeho súdu pre ľudské práva* [online]. s. 59-63. Dostupné na internete: <https://www.paneurouni.com/wp-content/uploads/2017/03/zbornik-juridizacia-final-web2.pdf#page=56> [cit. 2025-11-11].

slobodu prejavu máme vymedzené v článku 26, Ústavy Slovenskej republiky.¹⁵ Z tohto článku vyplýva, že každý má právo na slobodu prejavu. Následne právnu úpravu tohto práva nachádzame v Európskom dohovore o ľudských právach a základných slobodách, konkrétne v článku 10.¹⁶ V zmysle ustanovení, právo na slobodu prejavu predstavuje jedno zo základných práv a slobôd, ktoré je garantované každému jednotlivcovi a ktoré v sebe zahŕňa právo slobodne vyjadrovať svoje názory slovom, písmom, tlačou, obrazom alebo iným spôsobom, ako aj slobodne vyhľadávať, prijímať a rozširovať idey a informácie. Ako by sme mohli predpokladať, ani toto právo nie je bezmedzné a z ustanovení predmetnej právnej úpravy nám vyplývajú aj limity uplatňovania tohto práva, ktoré možno charakterizovať ako tzv. „limitujúcu klauzulu“ práva na slobodu prejavu. Právo na slobodu prejavu je možné obmedziť len zákonom, ak je to nevyhnutné v demokratickej spoločnosti a každé obmedzenie musí sledovať dosiahnutie legitímneho cieľa, ktorým je vyplývajúci z Dohovoru, záujem národnej bezpečnosti, územnej celistvosti alebo verejnej bezpečnosti, predchádzanie nepokojom alebo zločinnosti, ochrana zdravia alebo morálky, ochrana povesti alebo práv iných, zabránenie úniku dôverných informácií alebo zachovanie autority a neustrannosti súdnej moci.¹⁷

2. KONFLIKT PRÁVA NA SÚKROMIE A PRÁVA NA SLOBODU PREJAVU

Ako už bolo vyššie spomenuté, v nasledujúcej časti sa budeme zaoberať rozborom relevantnej judikatúry, v rámci ktorej sa pokúsime analyzovať základné podmienky aplikovateľné pre obmedzenie základných práv a slobôd v prípade ich kolízie a tak isto sa zameriame na vymedzenie základných atribútov ochrany súkromia verejných osôb. Rozbor judikatúry vnímame ako veľmi dôležitý prínos, nakoľko judikatúra Európskeho súdu pre ľudského práva predstavuje jeden zo základných prameňov práva pri riešení kolízií základných práv a slobôd a tak isto predstavuje veľmi dôležitý prameň práva pri rozhodovacej činnosti Ústavného súdu Slovenskej republiky.

Prvé rozhodnutie, ktoré vnímame ako dôležité a kľúčové pri analýze predmetnej problematiky je rozhodnutie Európskeho súdu pre ľudské práva Von Hannover proti Nemecku. Publikačnou činnosťou médií a periodickej tlače často krát dochádza k zásahom do súkromnej

¹⁵ Pozri čl. 26, ústavného zákona č. 460/1992 Zb. Ústava Slovenskej republiky v znení neskorších predpisov.

¹⁶ Pozri čl. 10, ods.1 Európskeho dohovoru o ochrane ľudských práv a základných slobôd (Rím, 4. november 1950), vyhláška č. 209/1992 Zb.

¹⁷ Pozri čl. 10, ods.2 Európskeho dohovoru o ochrane ľudských práv a základných slobôd (Rím, 4. november 1950), vyhláška č. 209/1992 Zb.

sféry jednotlivcov, v dôsledku hlavného účelu, ku ktorému ich činnosť smeruje. Týmto účelom je najmä zabezpečenie vysokej sledovanosti a záujem o informácie ktoré poskytujú. Za týmto účelom sa preto mnoho článkov alebo reportáží zameriava najmä na informácie, ktoré dokážu verejnosť určitým spôsobom šokovať a v niektorých prípadoch aj pohoršiť. S publikačnou činnosťou sa v mediálnom priestore stretávame na každodennej báze, je to činnosť, ktorá je často krát veľmi rôznorodá a ktorá sa z pozície priemerného adresáta môže javiť ako príliš ofenzívna nadnesená alebo neprípustná. V predmetnom judikáte Európskeho súdu pre ľudské práva došlo ku konfliktu týkajúceho sa oprávnenia novinára zverejniť informácie zasahujúce do súkromia člena monarchie Monaka, išlo konkrétne o princeznú Caroline von Hannover, ktorej fotografie boli zverejnené niekoľko krát po sebe v nemeckých bulvárnych časopisoch. Caroline Von Hannover v tom čase pôsobila ako prezidentka niekoľkých humanitárnych nadácií a reprezentovala svoju rodinu na významných spoločenských akciách ale iným spôsobom sa na výkone verejnej funkcie nepodieľala. Právnou otázkou tohto prípadu bolo posúdenie, do akej miery je možné aby médiá zverejňovali informácie o verejne známej osobe, týkajúce sa jej súkromného života, ak nie je na ich zverejnení daný konkrétny verejný záujem, nakoľko predmetné fotografie nezaznamenávali výkon verejnej funkcie sťažovateľkou ani činnosti s tým súvisiace. V konkrétnom prípade išlo o sériu fotografií zaznamenajúcich princeznú na dovolenke, v jej súkromí, pri bežných činnostiach nesúvisiacich s výkonom jej verejnej funkcie. Avšak na jednej z fotografií bola v sprievodnom texte zaznamenaná informácia o ťažkom zdravotnom stave kniežat'a Rainiera III a spôsob akým sa k jeho stavu postavila jeho rodina. Európsky súd pre ľudské práva sa pri posudzovaní predmetného sporu zaoberal tvrdením sťažovateľky, ktorá sa domáhala ochrany svojho súkromného a rodinného života, ktoré presadzovala, že bolo rozhodovacou činnosťou nemeckých súdov porušené. Súd dospel k záveru, že rozhodovacou činnosťou nemeckých súdov, ktorou nezamedzili ďalšiemu šíreniu predmetnej fotografie nedošlo k poručeniu článku 8. Dohovoru, nakoľko skúmal prepojenie zverejnených informácií a fotografií a ich následný prínos k diskusií týkajúcej sa verejného záujmu. V tomto prípade zaujal stanovisko, že sťažovateľov je v daných skutkových okolnostiach potrebné považovať za verejné osoby a prepojenie zverejnenej fotografie so zdravotným stavom kniežat'a prispelo k diskusiu o verejnom záujme aj keď len minimálne, ale aj napriek tomu existoval legitímny cieľ.¹⁸

¹⁸ Z judikatúry: „Súd preto uzavrel, že vnútroštátne súdy v rámci svojho rozhodovania obozretné vyvážili slobodu prejavu vydavateľských spoločností proti právu sťažovateľov na rešpektovanie ich súkromného života, podrobne sa zaoberali okolnosťami získania fotografií a zásadný význam priznali skutočnosti, že fotografia vo svetle článku, v rámci ktorého bola publikovaná prispela k debate týkajúcej sa verejného záujmu.“ Rozsudok Európskeho súdu

Pri posudzovaní miery týchto zásahov je veľmi tenká hranica, nakoľko za zverejňovaním súkromných informácií o verejne činných alebo verejne známých osobách môže byť prítomný verejný záujem. Preto je na jednej strane daná voľnosť médiám pri zverejňovaní daných skutočností ale na druhej strane platí, že ani média, aj napriek svojej voľnosti, nemôžu pristúpiť ku zverejňovaniu informácií ktoré by neboli nevyhnutné a v prípade vzniku sporu je pôvodca informácií povinný preukázať nevyhnutnosť zverejnených informácií ako aj ich prepojenie s verejným záujmom.¹⁹ Keďže média svoju činnosť smerujú verejnosti, dalo by sa konštatovať, že jedným z ich hlavných cieľov je dosiahnutie majetkového prospechu. V prípade posúdenia výšky sankcie za neprípustný zásah do súkromnej sféry jednotlivca, je úlohou súdov určiť jej primeranosť, nakoľko náhradu nemajetkovej ujmy v peniazoch, podľa najaktuálnejšieho názoru českého Ústavného súdu, plní viacero funkcií. Náhrada nemajetkovej ujmy v peniazoch pri zásahu do osobnostných práv neplní len preventívno-sankčnú funkciu ale aj funkciu satisfakčnú, nakoľko miera a intenzita zásahu je podmienená úmyslom a zavinením konkrétneho pôvodcu a to by následne malo byť hlavným kritériom pri posudzovaní výšky peňažnej sankcie.²⁰

S používaním expresívnych a urážlivých pomenovaní osôb v mediálnom prostredí sa stretávame pomerne často, na jednej strane by bolo možné sa voči tomu vyhradiť a uzavrieť to ako priamy útok na osobu, na druhej strane je však možné nájsť určitú rovnováhu, ktorá pripúšťa aj takéto označovanie osôb. Predmetom ďalšieho kľúčového rozhodnutia bol spor, ktorý vznikol pred rakúskymi orgánmi. Toto rozhodnutie posudzovalo konflikt práva na slobodu prejavu s rozhodnutím rakúskych súdov. Predmetom sporu bolo zverejnenie hanlivých výrazov zo strany rakúskeho novinára Oberschlicka voči rakúskemu politikovi v časopise *Forum*, ktorého bol pán Oberschlicka vydavateľom. Na základe žaloby podanej rakúskym politikom došlo k odsúdeniu autora článku za urážku politika. Po neúspešnom odvolacom konaní, došlo k podaniu sťažnosti zo strany odsúdeného novinára, na Európsky súd pre ľudské práva, ktorý mal za úlohu posúdiť, či nedošlo zo strany rakúskych orgánov k porušeniu čl. 10 Dohovoru, ktorý garantuje právo na

pre ľudské práva, Von Hannover proti Nemecku (č.2) zo 7. februára 2012, sťažnosť č. 40660/08 a 60641/08. Dostupné na internete: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-169309%22%7D>

¹⁹ *Spoločenské postavenie osoby a verejný záujem*. Príručka ľudských práv. Dostupné na internete: <https://www.humanrightsguide.sk/oblasti/sloboda-prejavu-a-media/sloboda-prejavu/ochrana-sukromia/spolocenske-postavenie-osoby-a-verejny-zaujem> [cit. 2025-11-01].

²⁰ Z judikatúry: „Základnou myšlienkou preventívno-sankčnej funkcie je, že forma a miera zavinenia, pohnútky alebo majetkový prospech pôvodcu majú podstatný vplyv na intenzitu neoprávneného zásahu do osobnostných práv a teda že priamo ovplyvňujú potrebu nižšieho či vyššieho peňažného zadostučinenia. Preventívno-sankčná funkcia sa teda neuplatňuje oddelene od satisfakčnej funkcie ale je jej bezprostrednou súčasťou. Brániť je potrebné najmä ekonomizácii neoprávnených zásahov do práva na ochranu osobnosti, pretože nikto nesmie ťažiť zo svojho protiprávneho konania.“ Nález Ústavného súdu Českej republiky z 23. januára 2025 sp. zn. I. ÚS 428/23. Dostupný na internete: https://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Publikovane_nalezky/2025/I._%C3%9AS_428-23_-_AN.pdf

slobodu prejavu. Ako kľúčové pri rozhodovaní tohto sporu, Európsky súd pre ľudské práva vnímal posúdenie kontextu, v rámci ktorého došlo k použitiu expresívneho výrazu zo strany novinára na osobu rakúskeho politika. Dospel k záveru, že aj napriek tomu, že daný výraz môže byť považovaný za urážlivý, sloboda prejavu rakúskeho novinára bola obmedzená neprimeraným spôsobom nakoľko politici sú povinný pri výkone svojej verejnej funkcie (čo v tomto prípade predstavovalo jeho verejný prejav, za ktorý bol takto expresívne pomenovaný) zniesť vyššiu mieru kritiky.²¹

Naším autorským zámerom bolo upriamiť pozornosť na veľmi dôležitý prínos tohto rozhodnutia, ktorým bolo ustanovenie povinnosti politikom (ako verejne činným osobám), znášať vyššiu mieru kritiky pri výkone svojej verejnej funkcie ale aj skutočnosť, že právo na slobodu prejavu v sebe zahŕňa popri poskytovaní kladných a neútočných informácií spoločnosti aj informácie, ktoré do istej miery šokujú, vzbudzujú rozruch. Jedná sa o veľmi prelomový prípad v danej oblasti, ktorý vymedzil základné princípy vzťahujúce sa na hranice kritiky verejných činiteľov, politického prejavu a postavenie spravodajstva a médií v demokratickej spoločnosti.

Keďže je problematika ochrany práva na súkromie veľmi frekventovanou skutočnosťou, vnímame ako veľmi dôležité zamerať sa na vývoj judikatúry Európskeho súdu pre ľudské práva, s prihliadnutím na tie najaktuálnejšie rozhodnutia v danej právnej otázke. Ako už bolo spomenuté, právo na súkromie predstavuje veľmi komplexný inštitút, pod ktorý sa vzťahuje veľmi veľké množstvo chránených záujmov a práve z toho dôvodu sa problematikou ochrany záujmov spadajúcich pod právo na súkromie zaoberajú súdy veľmi často. V dôsledku neustáleho vývoja spoločnosti a prúdenia myšlienok dochádza k určitým modifikáciám v rozhodovacej činnosti súdov, čo považujeme za prirodzené a tak isto žiadúce. Pomerne najaktuálnejšie rozhodnutie v predmetnej otázke predstavuje rozhodnutie Charki proti Francúzsku, ktorého predmetom bolo posúdenie porušenia práva na rešpektovanie súkromia sťažovateľky v dôsledku uverejnenia doslovných prepisov telefonických hovorov medzi ňou a jej otcom (bývalým ministrom vnútra) v novinách Le Monde, počas súdneho konania vedenému proti jej otcovi.

²¹ Z judikatúry : „Pokiaľ ide o hranice prípustnej kritiky, tieto sú širšie vo vzťahu k politikovi, konajúcemu vo svojej verejnej funkcii, ako vo vzťahu k súkromnej osobe. Politik sám nevyhnutne a vedome otvorene vystavuje podrobnému skúmaniu zo strany novinárov a širokej verejnosti každé svoje slovo a skutok a musí prejaviť väčšiu mieru tolerancie, najmä ak on osobne robí verejné vyhlásenia, ktoré pripúšťajú kritiku. Istotne má právo na ochranu svojej povesti, dokonca i vtedy keď nekoná ako súkromná osoba, ale potreba takejto ochrany musí byť v rovnováhe so záujmami otvorenej diskusie o politických problémoch.“ Rozsudok Európskeho súdu pre ľudské práva, Oberschlick proti Rakúsku (č. 2) z 1. júla 1997, sťažnosť č. 20834/92. Dostupné na internete: [https://hudoc.echr.coe.int/eng#{%22languageisocode%22:\[%22SLO%22\],%22appno%22:\[%2220834/92%22\],%22documentcollectionid%22:\[%22CHAMBER%22\],%22itemid%22:\[%22001-100331%22\]}](https://hudoc.echr.coe.int/eng#{%22languageisocode%22:[%22SLO%22],%22appno%22:[%2220834/92%22],%22documentcollectionid%22:[%22CHAMBER%22],%22itemid%22:[%22001-100331%22]})

Sťažovateľka namietala negatívny dopad týchto informácií na jej osobu a tak isto namietala, že dané zverejnenie neprimerane zasahovalo do jej súkromia nakoľko došlo k zverejneniu jej identity a súkromného telefonátu medzi ňou (ako z jej pohľadu nezainteresovanou osobou) a jej otcom. Súd konštatoval, že keďže sťažovateľka bola v tom čase zverejnenia manželkou obchodného partnera jej otca a zastávala funkciu v holdingovej spoločnosti jej manžela, nebolo možné z jej strany namietat', že by v tomto prípade predstavovala súkromnú osobu a následne dospel k záveru, že zverejnením súkromného telefonátu s doslovným prepisom konverzácie nedošlo k porušeniu jej práva na ochranu súkromia, nakoľko novinári zverejnili informácie v súlade so zásadou zodpovednej žurnalistiky a na zverejnení daných informácií bol prítomný verejný záujem spresniť konkrétne odpovede verejného činiteľa a posilniť ich dôveryhodnosť.²² Ako ďalšie z najaktuálnejších relevantných rozhodnutí je rozhodnutie vo veci Sytnyk proti Ukrajine, ktorého predmetom bolo zverejnenie informácií obsahujúcich popis predmetného trestného činu a uloženej sankcie identifikujúcich sťažovateľa vo verejne dostupnom štátnom „registri korupčných úradníkov“, ktorých skrytým cieľom bolo osobne napadnúť jeho morálnu a profesionálnu integritu. Tejto skutočnosti predchádzalo stíhanie sťažovateľa, ktorý v tom čase pôsobil ako riaditeľ Národného úradu pre boj proti korupcii Ukrajiny, o správnom priestupku za prijímanie darov. Súd konštatoval, že odsudzujúcim rozhodnutím Ukrajinských súdov, došlo k porušeniu jeho práva na ochranu súkromia, nakoľko odsudzujúci rozsudok vychádzal z nenáležité zisteného skutkového stavu a nepodložených spochybniteľných dôkazov, ktoré nepreukázali korupciu zo strany sťažovateľa a preto dospel k záveru, že zverejnením jeho identifikačných údajov v štátnom registri došlo k narušeniu jeho integrity a profesionálnej reputácie nakoľko sa týkali jadra jeho profesie a dané zverejnenie nesledovalo legitímny cieľ, nakoľko rozhodnutie na základe ktorého došlo k vykonaniu opatrenia bolo prijaté v konaní, v ktorom právo sťažovateľa na spravodlivý proces bolo porušené.²³

²² Z judikatúry: „Súd poznamenáva, že vnútroštátne súdy rozhodli, že verný prepis dialógu bol zlučiteľný so zásadami zodpovednej žurnalistiky. Keď rozhodli, že „citácia poznámok žiadateľa má za cieľ lepšie pochopiť odpovede Clauda Guéanta, prominentnej verejnej osobnosti, a spresniť poskytnuté informácie“, usúdili, že rozhodnutie novinárov zverejniť citácie z prepisov odpočúvaní nariadených vyšetrojúcim sudcom s cieľom posilniť dôveryhodnosť ich informácií a podložiť ich analýzu a komentáre bolo v súlade s týmito zásadami.“ Rozsudok Európskeho súdu pre ľudské práva, Charki proti Francúzsku z 11. septembra 2025, sťažnosť. č. 28473/22. Dostupné na internete: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-244732%22%7D>

²³ Z judikatúry: „Súd dospel k záveru, že napadnuté opatrenie poškodilo profesionálnu aj spoločenskú povesť žiadateľa, a preto utrpel vážnu ujmu na uplatňovaní svojho práva na rešpektovanie súkromného života bez ohľadu na následný vývoj jeho kariéry. V tejto súvislosti Súd zohľadnil nasledujúce: povahu informácií o žiadateľovi zverejnených v registri korupčných úradníkov, podľa ktorých bol ľahko identifikovateľný a vzhľadom na jeho profesionálnu funkciu v boji proti korupcii sa týkali jadra jeho profesionálnej reputácie; inherentne stigmatizujúcu nálepku „korupčný“, ktorá vážne ovplyvnila jeho vážnosť okrem iného, najmä vzhľadom na jeho dlhoročnú kariéru v oblasti boja proti korupcii a jeho vysoký post v nej, vrhla tieň na jeho dobré meno, podkopala dôveryhodnosť všetkého jeho profesionálneho úsilia alebo úspechov a spochybnila jeho morálne hodnoty.“

Vzhľadom na posúdenie, či je súd v rámci rozhodovacej činnosti konzistentný, by sme sa priklonili k názoru, že súd vždy prihliada na konkrétne okolnosti prípadu a tak isto vo svojej rozhodovacej činnosti navádza vnútroštátne súdy vyvažovať práva primeraným spôsobom a preto náš záver nie je jednoznačný, nakoľko nie je možné konštatovať či je súd pri rozhodovaní vyložene striktný alebo vyslovene rozširuje hranice ochrany týchto práv, nakoľko od rozhodnutia v danej veci vždy musí brať do úvahy, že sa jedná o rovnocenné práva, ktorých obmedzenie je možné len v súlade so zákonom a ktorých posúdenie vždy závisí od okolností konkrétneho prípadu.

ZÁVER

Právo na súkromie ako jedno z osobnostných práv priznávaných jednotlivcovi, disponuje širokými hranicami svojho uplatňovania, nakoľko súkromie jednotlivca predstavuje veľmi širokú problematiku. Z právnej analýzy dostupných a relevantných publikácií, odborných monografií a právnych predpisov sme dospeli k záveru, že akékoľvek prejavy osobnosti jednotlivca spadajú do jeho súkromnej sféry a v zmysle účinnej právnej úpravy požívajú ochranu, ktorá je v závislosti od statusu jednotlivca ohraničená širšími hranicami pri osobách súkromných a užšími hranicami pri verejných osobách, nakoľko oni sú povinné zniesť vyššiu mieru kritiky. V zmysle predmetnej analýzy vnímame ako veľmi dôležité zaoberať sa touto problematikou a tak isto vnímame narastajúci význam ochrany súkromia pre verejné osoby v dnešnej digitálnej dobe, pretože rozsah týchto zásahov neustále narastá a hranice sa postupne zužujú. Je všeobecne známe, že aj súkromné osoby sa v dôsledku medializácie môžu aj bez vlastnej vôle ocitnúť v centre pozornosti a preto vnímame ako veľmi dôležité zabezpečovať takýmto osobám efektívnu ochranu. Aj napriek tomu, že dnešná doba prináša množstvo spôsobov šírenia sa informácií, vnímame, že sa súdy s týmito situáciami dokážu vysporiadať efektívne s prihliadnutím na dodržiavanie základných princípov demokratického a právneho štátu a princípu legitímnych očakávaní. Spôsobov, akými je v dnešnej dobe možné obmedziť súkromnú sféru jednotlivca je veľké množstvo, ale napriek tomu vnímame, že rozhodovacia činnosť súdov je striktná v prípade kolízie dvoch základných práv a slobôd a zameriava sa výlučne na spôsob a rozsah zásahu do týchto práv a na okolnosti za ktorých k zásahu došlo. Z judikatúry vyplýva jasný záver, ktorým je, že súd je pri posudzovaní kolízie vždy povinný prihliadnuť na okolnosti konkrétneho prípadu a v prípade obmedzenia jedného práva v prospech

druhého musí vždy postupovať primerane a nevyhnutne a za každým obmedzením musí existovať legitímny cieľ a jeho prepojenie na konkrétny a prítomný verejný záujem. Je nevyhnutné aby v každom posudzovanom prípade kolízie boli naplnené kritéria legality, legitímnosti a proporcionálnosti zásahu, najmä s prihliadnutím na cieľ, ktorý má byť dosiahnutý vo vzťahu k rozsahu obmedzenia. Pre prípad, že by sa nasledujúce kritéria nenaplnili, jednalo by sa o neoprávnený zásah.

Zoznam bibliografických odkazov

Články

1. ČENTĚŠ, J.: Zásahy do práva na súkromie z hľadiska judikatúry európskeho súdu pre ľudské práva [online]. Dostupné na internete: <https://www.paneurouni.com/wp-content/uploads/2017/03/zbornik-juridizacia-final-web2.pdf#page=56> [cit. 2025-11-11].
2. HARŠÁNYOVÁ, M.: Subjekty ochrany osobnosti v mediálnom prostredí [online]. Dostupné na internete: https://www.flaw.uniba.sk/fileadmin/praf/Veda/Konferencie_a_podujatia/BPF_2019/ZBORNIK_sekcia_7_Obcianske_pravo_.pdf#page=107 [cit. 2025-11-11].
3. PÍRY, M.: Public interest [online]. Dostupné na internete: <http://www.michalcerny.net/OPD19-Sbornik-FV.pdf#page=80> [cit. 2025-11-11].

Právne prepisy

4. Európskeho dohovoru o ochrane ľudských práv a základných slobôd (Rím, 4. november 1950), vyhláška č. 209/1992 Zb.
5. Ústavný zákon č. 460/1992 Zb. Ústava Slovenskej republiky v znení neskorších predpisov.
6. Zákon č. 40/1964 Zb. Občiansky zákonník v znení neskorších predpisov.

Judikatúra

7. Nález Ústavného súdu Českej republiky z 23. januára 2025 sp. zn. I. ÚS 428/23. Dostupné na internete: https://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Publikovane_nalezky/2025/I._%C3%9AS_428-23_-_AN.pdf [cit. 2025-11-11].
8. Nález Ústavného súdu Slovenskej republiky z 13. júla 2024 sp. zn. I. ÚS 383/2020. Dostupné na internete: <https://merit.slv.cz/I.%C3%9AS383/2020> [cit. 2025-11-09].
9. Nález Ústavného súdu Slovenskej republiky z 26. júna 2024 sp. zn. IV. ÚS 200/2024. Dostupné na internete: <https://www.epi.sk/rozhodnutie-ustavny-sud-sk/ivus2002024ecliskussr20244us20020242.htm> [cit. 2025-11-09].
10. Rozsudok Európskeho súdu pre ľudské práva z 1. júla 1997, sťažnosť č. 20834/92. Dostupné na internete: <https://hudoc.echr.coe.int/eng#%7B%22languageisocode%22%3A%22SLO%22%2C%22appno%22%3A%2220834/92%22%2C%22documentcollectionid%22%3A%22CHAMBER%22%2C%22itemid%22%3A%22001-100331%22%7D> [cit. 2025-11-15].
11. Rozsudok Európskeho súdu pre ľudské práva z 11. septembra 2025, sťažnosť č. 28473/22. Dostupné na internete: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-244732%22%7D> [cit. 2025-12-01].
12. Rozsudok Európskeho súdu pre ľudské práva z 24. júla 2025, sťažnosť č. 16497/20. Dostupné na internete: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-242999%22%7D> [cit. 2025-12-01].

13. Rozsudok Európskeho súdu pre ľudské práva zo 7. februára 2012, sťažnosť č. 40660/08 a 60641/08. Dostupné na internete: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-169309%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-169309%22]}) [cit. 2025-11-11].
14. Rozsudok Európskeho súdu pre ľudské práva zo 16. decembra 1992, sťažnosť č. 13710/88. Dostupné na internete: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-156054%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-156054%22]}) [cit. 2025-11-06].

Internet

15. *Spoločenské postavenie osoby a verejný záujem*. Príručka ľudských práv. Dostupné na internete: <https://www.humanrightsguide.sk/oblasti/sloboda-prejavu-a-media/sloboda-prejavu/ochrana-sukromia/spolocenske-postavenie-osoby-a-verejny-zaujem> [cit. 2025-11-01].

SEKCIA VEREJNÉHO PRÁVA A PRÁVNYCH DEJÍN

UPLATŇUJE SA ZÁSADA ZÁKONNOSTI PRI VYVODZOVANÍ ADMINISTRATÍVNOPRÁVNEJ ZODPOVEDNOSTI?

Is the principle of legality applied when establishing administrative liability?

PETER SYNAK*

Abstrakt

Predkladaný článok sa primárne zameriava na jednu zo základných zásad správneho trestania v podmienkach Slovenskej republiky. Absencia legislatívnej úpravy v oblasti vyvodzovania administratívnoprávnej zodpovednosti sa odráža aj na kvalite rozhodnutí orgánov verejnej správy. Správne orgány sú pri rozhodovaní o správnych deliktoch neraz odkázané len na všeobecný rámec bez konkrétneho zákonného zakotvenia a z tohto dôvodu musia siahať po zásadách, ktoré sú vymedzené inter alia v medzinárodnoprávnej úprave a v rozhodovacej činnosti najvyšších súdnych autorít. Cieľom odborného článku je pomocou komparácie a syntézy analyzovať zásadu nullum crimen sine lege, nulla poena sine lege, ktorá je príznačná aj pre trestné právo, no v rámci správneho trestania sa uplatňuje pomerne špecifickým spôsobom.

Abstract

This article focuses primarily on one of the fundamental principles of administrative punishment in the Slovak Republic. The absence of legislative provisions governing the establishment of administrative liability is also reflected in the quality of decisions made by public administration bodies. When deciding on administrative offenses, administrative authorities are often limited to a general framework without specific statutory provisions and, for this reason, must rely on principles defined, inter alia, in international law and in the case law of the highest judicial authorities. The aim of this academic article is to analyze, through comparison and synthesis, the principle of nullum crimen sine lege, nulla poena sine lege, which is also characteristic of criminal law but is applied in a relatively specific manner within the context of administrative penalties.

Kľúčové slová: Zásada zákonnosti. Správne trestanie. Vyvodzovanie administratívnoprávnej zodpovednosti. Zásady správneho trestania. Správne právo. Zásady trestania.

Key words: The principle of legality. Administrative punishment. Establishing administrative liability. Principles of administrative punishment. Administrative law. Principles of sanctions.

Úvod

Skutočnosť, že v podmienkach slovenského právneho poriadku úplne absentuje unifikovaná právna úprava správneho trestania nepredstavuje žiadnu novinku. Legislatívna roztrieštenosť vyvodzovania administratívnoprávnej zodpovednosti je podčiarknutá viacerými skutočnosťami, ktoré autor uvádza, aby poukázal na fakt, že kodifikačné práce v tomto odvetví sú nielen potrebné, ale priam nevyhnutné. Skutková podstata správnych deliktov je obsiahnutá vo viac ako 200 právnych predpisoch. Správne delikty sa členia na priestupky a iné správne delikty, ktoré sa následne ešte diferencujú na iné správne delikty fyzických osôb, správne delikty právnických osôb a fyzických osôb podnikateľov, správne disciplinárne delikty a

* Bc. Peter Synak, 2. ročník, dennej formy, magisterského stupňa štúdia, peter.synak5@gmail.com

správne poriadkové delikty (Baricová et al., 2018). Istú formu zjednotenia právnej úpravy možno badať pri zákone č. 372/1990 Zb. o priestupkoch v znení neskorších predpisov (ďalej len ako „zákon o priestupkoch“), avšak v tejto súvislosti je potrebné poznamenať, že v zákone o priestupkoch nie sú obsiahnuté všetky skutkové podstaty priestupkov, ale mnohé sa nachádzajú aj v osobitných predpisoch. V rámci procesnoprávnej úpravy správneho trestania je možno badať výraznejšiu snahu zákonodarcu o zjednotenie právnej úpravy, no i napriek tomu je úprava takisto pomerne fragmentovaná. Správne orgány sú pri vyvodzovaní administratívnoprávnej zodpovednosti viazané *in abstracto* zákonom č. 71/1967 Zb. o správnom konaní (správny poriadok) v znení neskorších predpisov (ďalej len ako „správny poriadok“), pokiaľ osobitné predpisy nestanovujú inak. Správny poriadok však obsahuje aj viacero obsolentných ustanovení a nezohľadňuje nároky, ktoré sú na správne trestanie kladené medzinárodnými zmluvami a judikatúrou Európskeho súdu pre ľudské práva (ďalej len ako „ESLP“) (Hamuláková & Jakušová, 2021). Právne normy správneho poriadku nie sú vyprecizované natoľko, aby bol zabezpečený jednotný postup v rámci správneho trestania (Babiaková, 2012), nakoľko ide o príliš špecifickú činnosť správnych orgánov.

Účelom uvedeného výpočtu nebolo priviesť čitateľovi skeptické alebo beznádejné myšlienky, no pre potreby predkladaného článku je predstavenie nepriaznivej legislatívnej situácie nevyhnutné, nakoľko uplatňovanie zásady zákonnosti v rámci správneho trestania súvisí práve s nekonceptnosťou správneho práva trestného ako celku.

Odborná verejnosť zaoberajúca sa touto osobitnou právnou oblasťou dlhodobo upozorňuje na aplikačné a teoreticko-právne problémy a výzvy, ktoré sú s aktuálnym neoptimálnym právnym nastavením správneho trestania spojené (Vačok, 2017; Košičiarová, 2017).

Zásady správneho trestania prenikajú do právneho poriadku Slovenskej republiky najmä skrze medzinárodnoprávnu úpravu a rozhodovaciu činnosť jednak vnútroštátnych súdov, ale aj ESLP a Súdneho dvora Európskej únie. Z tohto dôvodu orgány verejnej správy a správne súdy musia pri rozhodovaní o zodpovednosti za spáchané správne delikty brať do úvahy značne širšiu škálu právnych prameňov a nie je postačujúce aplikovať len právny predpis, v ktorom je daný správny delikt vymedzený (resp. právne predpisy s ním súvisiace). Jednou zo základných pomôcok orgánov verejnej správy pri vyvodzovaní administratívnoprávnej zodpovednosti je aplikácia zásad správneho trestania, *inter alia* aj zásadu zákonnosti. Táto zásada v sebe subsumuje viacero atribútov, avšak snád' najcharakteristickejším z nich je práve zákonné vymedzenie skutkovej podstaty správnych deliktov, pričom adresát práva musí vedieť zo znenia právnej normy zistiť za aké konanie môže byť potrestaný (Najvyšší správny súd Slovenskej

republiky [NSS SR], 2022a). Uvedeným právnym východiskom *zatriasol* rozsudok Najvyššieho správneho súdu Slovenskej republiky (ďalej len ako „najvyšší správny súd“) sp. zn. 1Asan/1/2019 zo dňa 27. októbra 2021, v ktorom najvyšší správny súd pripustil možnosť, aby časť skutkovej podstaty správneho deliktu bola obsiahnutá aj v podzákonnom právnom predpise. Predmetom odborného článku je kritickou analýzou polemizovať a poukázať na výzvy a právne špecifiká, ktoré sa s uvedeným právnym záverom spájajú, nakoľko v istej miere najvyšší správny súd argumentačne vybočil z bežného rámca vnímania zásady zákonnosti.

1. Uplatňovanie trestnoprávných noriem a zásad pri správnom trestaní

Zásada zákonnosti je vyjadrená v čl. 49 Ústavy Slovenskej republiky č. 460/1992 Zb. v znení neskorších predpisov (ďalej len ako „Ústava“) a v čl. 7 ods. 1 Dohovoru o ochrane ľudských práv a základných slobôd (ďalej len ako „Dohovor“). Uvedené ustanovenia sa na prvý pohľad javia akoby ich bolo možné uplatniť výlučne na trestné činy v rámci trestného konania, no opak je pravdou. EŠLP prostredníctvom využitia tzv. doktríny autonómnosti (Košičiarová, 2016) vyložil pojem „trestné obvinenie“ v zmysle čl. 6 ods. 1 Dohovoru omnoho širšie. Pre účely uplatňovania Dohovoru nie je EŠLP viazaný vnútroštátnou kategorizáciou verejných deliktov a skutočnosť, že vnútroštátne právo istý delikt označí ako správny delikt a nie ako trestný čin ešte neznačí, že sa naň nebudú uplatňovať pravidlá Dohovoru. EŠLP v rámci svojej rozhodovacej činnosti nenaznačuje, že by právne poriadky jednotlivých členských štátov Rady Európy nemali rozlišovať medzi určitými kategóriami, resp. druhmi verejných deliktov, avšak toto členenie nie je určujúce pre účely uplatňovania Dohovoru (Európsky súd pre ľudské práva [EŠLP], 1984). Pre posúdenie toho, či konkrétny delikt vykazuje znaky „trestného obvinenia“ v zmysle čl. 6 ods. 1 Dohovoru sa musia skúmať tzv. Engel kritériá, ktoré sú zo strany EŠLP čoraz viac rozpracované. Prvé kritérium spočíva v skúmaní toho, či vnútroštátne právne normy predmetný delikt charakterizujú ako trestný čin alebo ho začleňujú do správneho práva. Pokiaľ je predmetný delikt trestným činom podľa národného práva, tak pre účely Dohovoru bude posudzovaný ako trestný (EŠLP, 1976). Druhým Engelovským kritériom sa skúma povaha deliktu. Tretie Engel kritérium sa týka povahy a stupňa závažnosti trestu, ktorý hrozil dotknutej osobe, so zreteľom na predmet a účel článku 6 Dohovoru (EŠLP, 1988). Ak posudzovaný verejný delikt nie je trestným činom podľa národného právneho poriadku (teda nie je naplnené prvé Engel kritérium), tak sa spravidla alternatívne použijú ďalšie dve kritériá. Ak sa posudzuje druhé a tretie kritérium izolovane a nevedie to k nepochybnému záveru, tak sa tieto kritériá posudzujú kumulatívne (EŠLP, 2009).

Nakoľko administratívnoprávne trestanie podlieha za uvedených okolností rovnakému právnemu režimu ako trestné konanie pri vyvodzovaní zodpovednosti za trestné činy, tak čl. 7 ods. 1 Dohovoru a čl. 49 Ústavy sa vzťahujú aj na správne trestanie. Analogické uplatnenie noriem trestného práva pri správnom trestaní je prípustné kvôli absencii náležitej úpravy v správnom práve, avšak orgán aplikujúci právo musí skúmať, či pre danú oblasť správneho trestania zákonodarca zakotvil osobitný režim. Výlučne v situácii, keď absentuje úprava obsiahnutá v správnom práve je možné siahnuť po využití trestnoprávnej úpravy (*analogia legis*). Pri použití trestného práva je však potrebné posúdiť, či táto úprava je spôsobilá zabezpečiť náležitú ochranu páchateľovi správneho deliktu, či je postihovanie proporcionálne a či je poskytnutá dostatočná ochrana záujmu chránenému správnym právom (NSS SR, 2022b). Avšak nie je prípustné využiť analógiu v neprospech páchateľa správneho deliktu (Ústavný súd Slovenskej republiky [ÚS SR], 2017).

Sumarizujúc uvedené je zrejmé, že správne orgány môžu využiť pri správnom trestaní aj normy zákona č. 300/2005 Z. z. Trestný zákon v znení neskorších predpisov (ďalej len ako „trestný zákon“) a zákona č. 301/2005 Z. z. Trestný poriadok v znení neskorších predpisov (ďalej len ako „trestný poriadok“) (Najvyšší súd Slovenskej republiky [NS SR], 2018), avšak pritom musia rešpektovať osobitosti správneho práva. Odlišný rámec je vymedzený pre správne súdy, ktoré majú v zmysle § 195 písm. c) a d) zákona č. 162/2015 Z. z. Správny súdny poriadok v znení neskorších predpisov (ďalej len ako „Správny súdny poriadok“) zákonnú povinnosť zohľadňovať aj zásady prebraté z trestného práva. No pre správne orgány povinnosť zohľadňovať i normy trestného práva nevyplýva zo zákona a preto sú v tejto otázke viazané najmä judikatúrou ESLP a vnútroštátnych najvyšších súdnych autorít. Práve zákonná absencia tejto povinnosti a nedostatočný prehľad v judikatúre sú neraz dôvodom, prečo orgány verejnej správy analogicky neuplatňujú normy trestného zákon a trestného poriadku.

Hranice uplatnenia trestnoprávnych zásad pri správnom trestaní možno chápať aj obrátene, teda ak je nejaká zásada charakteristická výhradne pre trestné právo, tak ju nemožno uplatniť pri vyvodzovaní administratívnoprávnej zodpovednosti (Košíčiarová, 2016).

2. Zásada zákonnosti a správne trestanie?

Zásada zákonnosti (*nullum crimen sine lege, nulla poena sine lege*) sa skladá z viacerých atribútov: (1) *nullum crimen sine lege scripta* (trestné činy majú byť vymedzené v zákone a nie v podzákonnom právnom predpise), (2) *nullum crimen sine lege certa*

(požiadavka jasnej a zrozumiteľnej formulácie trestnej zodpovednosti), (3) *nullum crimen sine lege stricta* (zákaz analógie v neprospech páchatel'a), (4) *nullum crimen sine lege praevia* (zákaz retroaktivity v neprospech páchatel'a) (Ústavný súd Českej republiky, 2014). K naplneniu zásady zákonnosti dochádza, ak jednotlivec môže z právnej normy zistiť, aké konanie alebo opomenutie konania spôsobuje jeho trestnú, resp. administratívnoprávnu, zodpovednosť (ÚS SR, 2018).

V normách správneho práva nemožno nájsť legislatívne zakotvenie zásady zákonnosti, ktoré by napĺňalo všetky štyri uvedené atribúty. Správny poriadok v § 3 ods. 1 síce obsahuje zásadu legality, avšak v úplne odlišnej obsahovo-právnej rovine. Zásada legality pre účely správneho poriadku vyjadruje najmä viazanosť správnych orgánov postupovať v súlade so zákonmi a inými právnymi predpismi a povinnosť správnych orgánov chrániť záujmy štátu, spoločnosti, práva a záujmy fyzických osôb a právnických osôb a zároveň dôsledne vyžadovať plnenie ich povinností. Zásada zákonnosti je vymedzená i v § 3 ods. 1 zákona č. 563/2009 Z. z. o správe daní (daňový poriadok) a o zmene a doplnení niektorých zákonov v znení neskorších predpisov (ďalej len ako „daňový poriadok“), avšak predstavuje iba špecifickejšie vymedzenie zásady zákonnosti upravenej v správnom poriadku, pričom sa prekrýva s princípom legality vyjadrenom v čl. 2 ods. 2 Ústavy (Kačaljak et al., 2022). Na základe uvedeného je potrebné konštatovať, že zásada zákonnosti v trestnoprávnom zmysle (berúc do úvahy štyri atribúty, z ktorých sa skladá) má v zásade odlišný význam ako zásada zákonnosti vyjadrená v správnom poriadku alebo daňovom poriadku a nemožno ich považovať za obsahovo totožné len z dôvodu zhodného označenia. Norma správneho práva, ktorá sa kvalitatívne najviac blíži k obsahovému naplneniu zásady zákonnosti, je obsiahnutá v § 2 ods. 1 zákona o priestupkoch ktorá vymedzuje, že priestupkom je zavinené konanie, ktoré porušuje alebo ohrozuje záujem spoločnosti a je za priestupok výslovne označené v tomto alebo v inom zákone. Ustanovenie § 2 ods. 1 zákona o priestupkoch sa však vzťahuje výlučne na priestupky a nemožno ho uplatniť *en bloc* pre všetky správne delikty.

Právne zakotvenie zásady zákonnosti vo vzťahu k správnomu trestaniu možno nájsť v Odporúčaní Výboru ministrov Rady Európy č. R (91) 1 o správnych sankciách, avšak v tejto súvislosti je nevyhnutné poznamenať, že odporúčania (resp. rezolúcie) Výboru ministrov Rady Európy majú len odporúčací charakter a sú síce záväzné politicky, no nie právne. Výbor ministrov Rady Európy môže vyzvať vládu členského štátu Rady Európy, aby preukázala akým spôsobom zohľadnila konkrétnu rezolúciu (Vrabko et al., 2018). Tieto odporúčania sú pri správnom trestaní istými výkladovými nástrojmi (NS SR, 2019).

Na základe uvedeného možno vyvodiť záver, že správny poriadok a ani iná norma správneho práva nevymedzuje zásadu zákonnosti v takom materiálnom zmysle, ktorý by napĺňal zásadu *nullum crimen sine lege* a práve z tohto dôvodu je nevyhnutné, aby sa pri vyvodzovaní administratívnoprávnej zodpovednosti uplatňovala zásada zákonnosti v trestnoprávnom ponímaní.

Pri rozhodovaní o správnych deliktoch je potrebné, aby orgán verejnej správy zaručil pre páchatel'a práva upravené Dohovorom. Uvedenému dá správny orgán za dosť, keď správne trestanie podriadi zásadám, na ktorých stojí trestné konanie, vrátane ďalších zásad, na ktorých je postavená trestnoprávna zodpovednosť, pokiaľ absentuje špecifická úprava pre konanie o vyvodení administratívnoprávnej zodpovednosti. Správny orgán je povinný pri dodržaní uvedených zásad dokázať páchatel'ovi, že svojím skutkom naplnil znaky skutkovej podstaty správneho deliktu. Ak teda správny orgán preukáže páchatel'ovi porušenie zákonom ustanovenej povinnosti, tak uniesol dôkazné bremeno pri správnom trestaní (NSS SR, 2025).

Zásada zákonnosti je charakteristická pre hmotnoprávnu úpravu, avšak v trestnom práve procesnom nachádza svoje vyjadrenie v zásade stíhania len zo zákonných dôvodov a zákonným spôsobom (Čentěš et al., 2021) a ich dodržiavanie v trestnom konaní a správnom trestaní predstavuje uplatnenie princípu právneho štátu. Táto zásada sa neprejavuje len vo vzťahu k vymedzeniu znakov deliktu v zákone, ale i v zákonnom vymedzení sankcie za tento delikt. Zásada zákonnosti je osobitným vyjadrením zásady právnej istoty, nakoľko účelom zásady zákonnosti je aj zabezpečenie predvídateľnosti (Súdny dvor Európskej únie, 2025). V konklúzii uvedeného možno konštatovať, že je nepochybné, že skutková podstata správnych deliktov musí byť (rovnako ako pri trestných činoch) vymedzená v zákone (čo vyplýva i zo samotného znenia skúmanej zásady).

3. Aké dopady by spôsobila prípustnosť úpravy časti skutkovej podstaty správneho deliktu v podzákonnom predpise?

Najvyšší správny súd uviedol, že by bolo prípustné, aby časť skutkovej podstaty správneho deliktu bola obsiahnutá v podzákonnom právnom predpise (napr. vo vyhláske ministerstva) pokiaľ by odkaz na daný podzákonný právny predpis bol v zákone, ktorý vymedzuje správny delikt, obsiahnutý v poznámke pod čiarou (NSS SR, 2021). V prípade, ak by takáto situácia vznikla pri akomkoľvek trestnom čine, tak by súdy nepochybne vyslovili nesúlads tohto stavu so zásadou *nullum crimen sine lege (scripta)*. Trestný zákon síce takisto

neobsahuje úpravu každého pojmu, ktorý explicitne používa, avšak je to práve za účelom zabezpečiť prehľadnosť a určitosť jeho právnych noriem. Pokiaľ by bola časť skutkovej podstaty správneho deliktu obsiahnutá v podzákonnom právnom predpise a tento správny delikt by bolo možné subsumovať pod pojem „trestné obvinenie“ pre účely čl. 6 ods. 1 Dohovoru (ESLP, 1976), tak by takýto právny stav bol v rozpore s čl. 7 ods. 1 Dohovoru, ktorý upravuje zásadu zákonnosti a zároveň aj judikatúrou ESLP.

Odhliadnuc od Dohovoru a judikatúry ESLP by stav, keď je časť skutkovej podstaty správneho deliktu obsiahnutá v podzákonnom právnom predpise, bol v rozpore so zásadou zákonnosti, ktorá je príznačná i pre vnútroštátne právo a Ústavný súd Slovenskej republiky obdobne ako najvyšší správny súd a Najvyšší súd Slovenskej republiky judikovali, že na správne trestanie sa vzťahuje zásada zákonnosti v trestnoprávnom rozsahu, pričom však orgány verejnej správy a správne súdy musia zohľadňovať špecifiká správneho práva. Účelom zásady *nullum crimen sine lege* a *nulla poena sine lege* je zabezpečiť ochranu jednotlivca pred neoprávneným stíhaním a potrestaním (MencEROVÁ et al., 2021).

Na druhú stranu je nutné konštatovať, že správne súdy v rámci správneho súdnictva pri skúmaní rozhodnutí správnych orgánov v oblasti správneho trestania vychádzajú z právnej úpravy, ktorá je nadmieru fragmentovaná a ich snahou je preklenúť nežiadúci normotvorný rámec, na ktorý však súdna moc nemá priamy dopad, nakoľko je táto doména príznačná pre politické zložky moci v štáte (pre výkonnú a zákonodarnú moc). Orgány aplikujúce právo musia vždy vychádzať z konkrétneho skutkového a právneho stavu a na tento musia aplikovať zásady trestania.

Záver

Sumarizujúc čiastkové závery predkladaného článku možno dospieť k záveru, že teoretický právny rámec, ktorý najvyšší správny súd vytvoril tým, že pripustil možnosť podzákonného zakotvenia časti skutkovej podstaty správneho deliktu (NSS SR, 2021), nie je úplne súladný so zásadou zákonnosti a najmä s princípom právnej istoty. Najvyšší správny súd v rozsudku sp. zn. IAsan/1/2019 zo dňa 27. októbra 2021 uviedol nasledovné „...*kasačný súd konštatuje, že zakotvenie obsahu právnej normy, ktorej porušenie zakladá zodpovednosť za správny delikt, alebo znaky skutkovej podstaty správneho deliktu sa môžu nachádzať v zákone, alebo čiastočne v zákone a čiastočne vo všeobecne záväznom podzákonnom predpise (napr. vo vyhláške), ak tento predpis súčasne rešpektuje medze zákonného splnomocnenia.*“ Najvyšší správny súd jedným dychom dodáva, že splnenie podmienky jasnosti a jednoznačnosti vo formulácii skutkovej podstaty správneho deliktu je potrebné skúmať v každej veci jednotlivo.

Zároveň je potrebné uviesť, že išlo o tzv. „senátne rozhodnutie“ a nie o rozhodnutie, ktoré by bolo súčasťou napr. zbierky stanovísk a rozhodnutí najvyššieho správneho súdu v zmysle § 8a ods. 4 zákona č. 757/2004 Z. z. o súdoch a o zmene a doplnení niektorých zákonov v znení neskorších predpisov a z tohto dôvodu nie je spôsobilé naštrbiť doterajšie nazeranie na zásadu zákonnosti a jej štyri atribúty.

Takisto pripustenie predmetného záveru by len podporilo stav „právnej neistoty,“ ktorý je v správnom práve prítomný vo forme nekonzistentnej legislatívy a pokiaľ by sa pripustila možnosť podzákonnej úpravy skutkovej podstaty (hoc aj len jej časti) správnych deliktov, tak by došlo ešte k výraznejšiemu normotvornému roztriešteniu právnych noriem správneho trestania. Orgány verejnej správy vykonávajú rozsiahle množstvo činností a vyvodzovanie administratívnoprávnej zodpovednosti je len jednou z nich. Je úplne prirodzené, že správne orgány nemajú materiálne, personálne a formálne podmienky na to, aby poskytl jednotlivcom tak vysokú mieru ochrany základných práv a slobôd akú vedia zabezpečiť súdy. Uvedené je v konečnom dôsledku pretavené práve vo vytvorení správneho súdnictva, kedy môže jednotlivec pred nezávislým súdom v zákonom stanovených prípadoch namietat' nezákonnosť postupu orgánov verejnej správy. Zásada zákonnosti sa pri správnom trestaní uplatňuje, avšak pre zvýšenie právnej istoty nielen adresátov práva, ale aj samotné orgány aplikujúce právo, by bolo vhodné prijať právny predpis, ktorý by upravoval vyvodzovanie administratívnoprávnej zodpovednosti, resp. aspoň vymedzil zásady správneho trestania.

Požiadavka kvalitnej právnej úpravy správnych deliktov je ešte urgentnejšia s prihliadnutím na judikatúru ESLP, ktorá zmažáva rozdiely medzi trestnými činmi a správnymi deliktmi tým, že prostredníctvom využitia Engel kritérií je možné podradiť správne delikty pod pojem „trestné obvinenie“ v súlade s čl. 6 ods. 1 Dohovoru.

In fine možno konštatovať, že správne právo trestné je špecifickým právnym odvetvím a je prirodzené, že trestnoprávne zásady nemožno aplikovať v absolútnom ponímaní a je nevyhnutné v každom osobitnom prípade skúmať, ktoré z týchto zásad môžu byť pri konkrétnom správnom konaní uplatnené, pričom sa musí prihliadať na účel, ktorý tá-ktorá zásada sleduje (NSS SR, 2022b). Predtým ako zákonodarca pristúpi k unifikácii správneho trestania musia správne orgány a správne súdy postupovať najmä v súlade s judikatúrou v tejto oblasti, ktorá je čoraz bohatšia.

Zoznam bibliografických odkazov

Monografie a skriptá

1. Baricová, J., Fečík, M., Števček, M., & Filová, A. (2018). *Správny súdny poriadok: komentár*. C. H. Beck.
2. Čentěš, J. – Kurilovská, L. - Šimovček, I. - Burda, E. et al. (2021) *Trestný poriadok I. § 1 – 195*. C. H. Beck.
3. Kačaljak, M., Kubincová, S., Jamrichová, T., Píry, M., Úradník, M. & Hlinka, T. (2022). *Daňové právo*. 2nd ed. Vydavateľstvo Univerzity Mateja Bela - Belianum.
4. Mencerová, I. et al. (2021) *Trestné právo hmotné. Všeobecná časť*. 3rd ed. Heuréka.
5. Vrabko, M. et al. (2018). *Správne právo hmotné. Všeobecná časť*. 2nd ed. C. H. Beck.

Periodiká (časopisy) a zborníky resp. state v nich uverejnené

6. Babiaková, E. (2012). Analógia v oblasti správneho trestania. In *Justičná revue* (vol. 64, no. 3, pp 343-348).
7. Košičiarová, S. (2017) Potrebuje Slovenská republika zákon o zodpovednosti za správne delikty? In *Správni právo*, (vol. 50, no. 7-8, pp 447-456).
8. Košičiarová, S. (2016) Povinnosť správneho súdu aplikovať trestnoprávne zásady vo veciach správneho trestania. In *Justičná revue*, (vol. 68, no. 8-9, pp 890-899).
9. Vačok, J. (2017). Potreba právnej úpravy správneho trestania na príklade zásady zákazu zmeny k horšiemu. In *Právny obzor* (vol. 100, no. 5, pp 495-502).

Internetové zdroje

10. Hamuláková, Z. & Jakušová, V. (2021). REFORMA PRÁVNEJ ÚPRAVY SPRÁVNÝCH DELIKTOV Z POHLADU NOVEJ PRÁVNEJ ÚPRAVY SPRÁVNÝCH DELIKTOV PRÁVNICKÝCH OSÔB A PODNIKAJÚCICH FYZIKÝCH OSÔB – ÚVAHY DE LEGE FERENDA. [Príspevok na konferencii]. In *Nová právna úprava správneho trestania. Zborník z vedeckej konferencie konanej v dňoch 14. a 15. októbra 2021 v Bratislave* (pp 28-35). https://www.flaw.uniba.sk/fileadmin/praf/Pracoviska/Katedry/KSEP/zborniky_a_cvicebnice/ZB_ORNI_K_APVV_nova_uprava_spravneho_trestania_2021.pdf.

Právne predpisy

11. Dohovor o ochrane ľudských práv a základných slobôd (Oznámenie Federálneho ministerstva zahraničných vecí č. 209/1992 Zb. v znení neskorších predpisov).
12. Odporúčanie Výboru ministrov Rady Európy č. R (91) 1 o správnych sankciách.
13. Ústava Slovenskej republiky č. 460/1992 Zb. v znení neskorších predpisov.
14. Zákon č. 162/2015 Z. z. Správny súdny poriadok v znení neskorších predpisov.
15. Zákon č. 300/2005 Z. z. Trestný zákon v znení neskorších predpisov.
16. Zákon č. 301/2005 Z. z. Trestný poriadok v znení neskorších predpisov.
17. Zákon č. 372/1990 Zb. o priestupkoch v znení neskorších predpisov.
18. Zákon č. 563/2009 Z. z. o správe daní (daňový poriadok) a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.
19. Zákon č. 71/1967 Zb. o správnom konaní (správny poriadok) v znení neskorších predpisov.
20. Zákon č. 757/2004 Z. z. o súdoch a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.

Judikatúra

21. Nález Ústavného súdu Českej republiky sp. zn. II.ÚS 2258/14 zo dňa 16.12.2014.
22. Nález Ústavného súdu Slovenskej republiky sp. zn. II. ÚS 476/2016 zo dňa 17.01.2017.
23. Nález Ústavného súdu Slovenskej republiky, sp. zn. II. ÚS 476/2016 zo dňa 17.01.2018.

24. Rozsudok Európskeho súdu pre ľudské práva zo dňa 08.06.1976 vo veci Engel a iní v. Holandsko, sťažnosť č. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72.
25. Rozsudok Európskeho súdu pre ľudské práva zo dňa 21.02.1984 vo veci Öztürk v. Nemecko, sťažnosť č. 8544/79.
26. Rozsudok Európskeho súdu pre ľudské práva zo dňa 02.09.1988 vo veci Kadubec v. Slovensko, sťažnosť č. 27061/95.
27. Rozsudok Európskeho súdu pre ľudské práva zo dňa 10.02.2009 vo veci Sergey Zolotukhin v. Rusko, sťažnosť č. 14939/03.
28. Rozsudok Najvyššieho správneho súdu Slovenskej republiky sp. zn. 1Asan/1/2019 zo dňa 27.10.2021.
29. Rozsudok Najvyššieho správneho súdu Slovenskej republiky sp. zn. 8Asan/14/2020 zo dňa 27.04.2022a.
30. Rozsudok Najvyššieho správneho súdu Slovenskej republiky sp. zn. 5Asan/12/2020 zo dňa 25.05.2022b.
31. Rozsudok Najvyššieho správneho súdu Slovenskej republiky sp. zn. 4Stk/1/2024 zo dňa 11.03.2025.
32. Rozsudok Najvyššieho súdu Slovenskej republiky sp. zn. 7Sžo/81/2016 zo dňa 18.01.2018.
33. Rozsudok Najvyššieho súdu Slovenskej republiky sp. zn. 2Asan/11/2017 zo dňa 28.11.2019.
34. Rozsudok Súdneho dvora Európskej únie z 26.06.2025 spojené veci C-555/23 a C-556/23.

KEĎ TECHNOLOGIE ODÍDU A REGULÁCIA EŠTE LEN DOBIEHA: POHĽAD NA EFEKTIVITU REGULAČNÝCH SANDBOXOV

When Technologies Move On and Regulation Is Still Catching Up – A View on the Effectiveness of Regulatory Sandboxes

DÁVID KIS*

Abstrakt

Článok sa zaoberá efektivitou regulačných sandboxov ako nástroja právnej reakcie na dynamický technologický vývoj vo finančnom sektore. Analýza ukazuje, že hoci sandboxy predstavujú flexibilnejší prístup k regulácii inovácií, v praxi často reagujú oneskorene, čím nedokážu pokryť najprogresívnejšie technologické riešenia. Autor skúma časový nesúlad medzi tempom inovačných procesov a rýchlosťou regulačného rozhodovania, pričom poukazuje na jeho právne a systémové dôsledky. Článok zároveň hodnotí limity existujúcich modelov sandboxov a diskutuje o potrebe adaptívnejších regulačných mechanizmov, ktoré by umožnili efektívnejšie začleňovanie nových technológií do finančnoprávneho rámca.

Abstract

The article examines the effectiveness of regulatory sandboxes as a legal instrument for responding to dynamic technological developments in the financial sector. The analysis demonstrates that although sandboxes offer a more flexible approach to regulating innovation, they often operate with a delay in practice and therefore fail to address the most advanced technological solutions. The paper explores the temporal mismatch between the pace of innovation and the speed of regulatory decision-making, highlighting its legal and systemic implications. It also evaluates the limitations of existing sandbox models and discusses the need for more adaptive regulatory mechanisms that would enable the more effective integration of emerging technologies into the financial regulatory framework.

Kľúčové slová: regulačný sandbox, finančné inovácie, regulácia, právna istota

Key words: regulatory sandbox, financial innovation, regulation, legal certainty

Úvod

Digitálna transformácia zásadne mení fungovanie finančných trhov a prináša rýchlo sa vyvíjajúce technológie, na ktoré tradičná regulácia nestíha reagovať. Vznik regulačných sandboxov predstavuje praktickú odpoveď na túto dynamiku, keďže umožňujú bezpečné a časovo ohraničené testovanie inovácií pod dohľadom regulátora a zároveň urýchľujú učenie sa na strane trhu aj dohľadu. Nasledujúci text vysvetľuje, prečo sa sandboxy stali kľúčovým nástrojom prediktívnej a flexibilnej regulácie, a ako prispievajú k vyváženiu podpory inovácií s ochranou verejného záujmu.

Metodologický rámec článku vychádza z kombinácie analytických, komparatívnych a syntetizujúcich prístupov, ktoré umožňujú komplexne preskúmať efektívnosť regulačných

* JUDr. Dávid Kis, Interný doktorand, 1.ročník, david.kis@flaw.uniba.sk, Katedra finančného práva, Právnická fakulta Univerzity Komenského v Bratislave

sandboxov v prostredí rýchlo sa rozvíjajúcich finančných technológií. Analytická časť vyhodnocuje existujúcu odbornú literatúru, regulačné dokumenty, konzultačné materiály a skúsenosti jednotlivých jurisdikcií, pričom osobitná pozornosť sa venuje modelom zavedeným v Spojenom kráľovstve, Európskej únii a na Slovensku. Komparatívna metóda umožňuje identifikovať rozdiely v právnom ukotvení, rozsahu pôsobnosti a praktickej implementácii sandboxov, čo slúži ako základ pre vyvodenie širších záverov o ich reálnej funkcii a limite.

Súčasťou metodológie je aj normatívno hodnotiaci prístup, ktorý posudzuje, či sandboxy plnia deklarovaný cieľ podporovať bezpečný rozvoj inovácií bez narušenia regulačnej stability. Na tento účel článok formuluje výskumnú otázku, ktorú postupne zodpovedá: *„Do akej miery dokážu regulačné sandboxy efektívne reagovať na rýchlu transformáciu finančných technológií a či skutočne plnia svoj deklarovaný účel podporovať inovácie bez narušenia regulačnej stability a férovej hospodárskej súťaže?“*.

Zároveň článok overuje hypotézu v znení: *„Hoci regulačné sandboxy predstavujú dôležitý nástroj na prepojenie technologických inovácií s dohľadom, nedokážu v plnej miere zabezpečiť rovnováhu medzi podporou inovácií a ochranou trhu, pričom môžu vytvárať konkurenčné nerovnosti a neprispievajú k právnej istote v rozsahu, v akom sa očakáva.“*

Regulačné sandboxy ako most medzi inováciami a dohľadom

Rýchla transformácia trhov spôsobená nástupom digitálnych technológií priniesla nové typy rizík aj regulačných výziev, na ktoré tradičné dohliadacie mechanizmy nedokázali reagovať dostatočne pružne. Inovácie ako umelá inteligencia, automatizované rozhodovanie či nové formy digitálnych financií sa vyvíjali rýchlejšie než existujúca regulácia, čo si vyžadovalo nástroje umožňujúce efektívne testovanie a priebežné vyhodnocovanie ich dopadov. Práve v tomto kontexte vznikol model regulačných sandboxov, ktorý poskytuje bezpečné a časovo obmedzené prostredie na experimentovanie s novými technológiami pod dohľadom regulátora. Tento mechanizmus umožňuje včas identifikovať riziká, zlepšovať porozumenie technologickým trendom a zároveň znižovať bariéry vstupu pre inovácie. Výsledkom je flexibilnejší a prediktívnejší prístup k regulácii, ktorý vznikol ako reakcia na meniacu sa dynamiku trhov a potrebu nastaviť pravidlá tak, aby podporovali rozvoj technológií bez ohrozenia stability a ochrany verejného záujmu.¹

Regulačný sandbox predstavuje špeciálne vytvorené testovacie prostredie, v ktorom môžu subjekty overovať inovatívne finančné produkty, služby alebo obchodné modely pri

¹ QIU, Y. et al. Regulatory sandbox expansion: Exploring the leap from fintech to medical artificial intelligence. In: *Intelligent Oncology* [online]. 2025, roč. 1, č. 2, s. 121 [cit. 20.03.2026]. DOI: 10.1016/j.intonc.2025.03.001

zachovaní platných právnych predpisov a v súlade s vopred stanoveným plánom testovania schváleným orgánom dohľadu. Hoci dohľad môže v odôvodnených prípadoch dočasne upraviť niektoré požiadavky regulačného rámca, sandbox nie je priestorom bez pravidiel. Účastníci musia dodržiavať všetky relevantné legislatívne povinnosti, pričom niektoré podmienky môžu byť ešte prísnejšie z dôvodu ochrany spotrebiteľa, finančnej stability a bezpečného preverenia nových riešení. Regulačný sandbox zároveň nepredstavuje akcelerátor, keďže jeho účelom nie je poskytovať financovanie, priestor či mentoring na škálovanie podnikania, ani nenahrádza komerčne dostupné odborné poradenstvo v oblasti práva či regulácie. Rovnako nejde o inovačný hub, ktorý slúži najmä na jednorazové konzultácie a otvorený dialóg s orgánom dohľadu. Podstatou regulačného sandboxu je umožniť bezpečné a kontrolované testovanie inovácií v rámci jasne definovaných pravidiel a intenzívnej komunikácie medzi účastníkom a orgánom dohľadu.²

Regulačné sandboxy sa vo všeobecnosti chápu ako nástroje, ktoré umožňujú firmám testovať a overovať nové produkty, služby alebo podnikateľské modely v reálnych podmienkach, avšak pod dohľadom regulátora a počas vopred určeného časového obdobia. Plnia pritom dvojité funkcie. Na jednej strane podporujú proces učenia sa na strane podnikateľov, keďže im umožňujú experimentovať s inováciami v kontrolovanom prostredí. Na druhej strane vytvárajú priestor aj pre samotných regulátorov, ktorí vďaka nim získavajú cenné poznatky o fungovaní nových technológií a môžu formovať vhodné regulačné prístupy. V praxi tak sandboxy predstavujú mechanizmus, ktorý umožňuje realizovať experimentálne inovácie pri súčasnom obmedzení rizík a zvyšovaní porozumenia regulátora pre nové technologické riešenia.³ V tomto širšom regulačnom rámci predstavuje sandbox konkrétnu formu kontrolovaného prostredia, v ktorom môžu firmy testovať inovatívne produkty, služby a obchodné modely priamo v trhových podmienkach, no vždy pod dohľadom regulátora a s vopred určenými ochrannými mechanizmami pre spotrebiteľov. Tento model, prvýkrát zavedený britskou *Financial Conduct Authority* (FCA), má za cieľ urýchliť uvádzanie inovácií na trh, znižovať regulačnú neistotu a zároveň podporovať férovú konkurenciu v prospech spotrebiteľov. Fungovanie sandboxu je spravidla cyklické, pričom účastníci musia splniť presne stanovené podmienky vstupu, spolupracovať s prideleným odborníkom a využívať nástroje, ktoré im umožňujú bezpečne testovať svoje riešenia. Podstatou je intenzívna komunikácia

² *Regulačný sandbox konzultačný materiál* [online], s. 6-7 [cit. 20.03.2026]. Dostupné na internete: https://nbs.sk/_img/documents/_dohlad/fintech/regulacny-sandbox.pdf

³ TAMBIA MA DIEGA, ANNE LOUISE VAN DE POL. *Artificial intelligence act and regulatory sandboxes* [online], s. 2 [cit. 20.03.2026]. Dostupné na internete: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733544/EPRS_BRI\(2022\)733544_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733544/EPRS_BRI(2022)733544_EN.pdf)

medzi firmou a regulátorom, ktorá umožňuje nastaviť primerané bezpečnostné prvky, overiť technológie v praxi a pripraviť ich na širšie nasadenie bez ohrozenia finančnej stability či ochrany spotrebiteľa.⁴

Regulačné sandboxy stoja na existujúcich zákonných právomociach orgánov dohľadu, najmä na ich úlohách chrániť spotrebiteľa, zabezpečovať finančnú stabilitu a posilňovať dôveru vo finančný trh. Keďže sandbox umožňuje regulátorom aj firmám lepšie porozumieť rizikám a prínosom inovácií, výsledky testovania slúžia ako podklad pre úpravu dohľadu či pravidiel, prípadne aj pre zákaz rizikových produktov. Niektoré úrady, ako britská FCA, sa opierajú aj o svoj zákonný cieľ podpory hospodárskej súťaže, iné využívajú všeobecné dohľadacie kompetencie, ktoré považujú za dostatočné. Zriadenie sandboxu si pritom nevyžaduje zmenu zákona, keďže ide len o špecificky usporiadaný rámec intenzívnejšieho dohľadu, v ktorom stále platia všetky regulačné požiadavky a povinnosť mať potrebné povolenia. Každý účastník musí splniť rovnaké základné podmienky ako pri štandardnom dohľade, a ich nedodržanie môže viesť k obmedzeniam alebo sankciám.⁵

Regulačný sandbox na Slovensku sa od modelov v iných krajinách odlišuje najmä svojím právnym ukotvením, rozsahom pôsobnosti a typmi subjektov, ktoré doň môžu vstúpiť. Národná banka Slovenska (NBS) ho zriadila na základe interných, nenormatívnych *Pravidiel fungovania regulačného sandboxu*, ktoré nadväzujú na zákon o dohľade nad finančným trhom, pričom sandbox slúži predovšetkým na nastavenie súladu finančnej inovácie s platnou reguláciou. Slovenský sandbox je sektorovo univerzálny – pokrýva celé spektrum finančného trhu, čo vyplýva z jednotnej integrácie dohľadu v NBS a menšej veľkosti trhu, na rozdiel od väčších štátov, kde sandboxy bývajú sektorovo obmedzené. Špecifikom je aj čiastočné otvorenie pre subjekty, ktoré ešte nie sú dohliadané, vrátane žiadateľov o licenciu, budúcich dohliadaných subjektov či poskytovateľov služieb v outsourcingových vzťahoch. Proces sandboxu je pritom detailne štruktúrovaný – od podania prihlášky cez prípravnú fázu až po samotné testovanie a záverečné hodnotenie – a vstup do neho závisí od kapacitných možností NBS. Vďaka tomu predstavuje slovenský sandbox vysoko regulovaný, konzultačne

⁴ FINANCIAL CONDUCT AUTHORITY. *Regulatory sandbox lessons learned report* [online], s. 1-7 [cit. 20.03.2026]. Dostupné na internete: <https://www.fca.org.uk/publication/research-and-data/regulatory-sandbox-lessons-learned-report.pdf>

⁵ FinTech: Regulatory sandboxes and innovation hubs . In: , s. 19-21 [cit. 20.03.2026]. Dostupné na internete: https://www.esma.europa.eu/sites/default/files/library/jc_2018_74_joint_report_on_regulatory_sandboxes_and_innovation_hubs.pdf

orientovanú platformu, ktorá nadväzuje na inovačný hub NBS ako jeho pokročilejšia, užšia a prísnejšia forma spolupráce s regulátorom.⁶

Z právneho hľadiska predstavuje vzťah NBS a Regulačného sandboxu výkon kompetencie v zmysle § 1 ods. 3 písm. a) prvý bod a tretí bod, § 1 ods. 3 písm. h), § 35, § 37 ods. 1 písm. g) a § 37 ods. 3 písm. e) Zákona č. 747/2004 Z. z. o dohľade nad finančným trhom a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.⁷

Kritický pohľad na regulačné sandboxy upozorňuje, že tento nástroj nie je zďaleka taký univerzálny a efektívny, ako sa často prezentuje.

Viacerí autori⁸ poukazujú na to, že sandboxy nemusia byť ani nevyhnutné, ani postačujúce pre kvalitnú reguláciu FinTechu, keďže mnohé z ich deklarovaných výhod – napríklad individuálne usmernenia či flexibilnejší dohľad – dokážu regulátori poskytovať aj prostredníctvom bežných dohliadacích mechanizmov.⁹ Kritici zároveň varujú, že sandbox môže vytvárať informačnú nerovnosť medzi účastníkmi a ich konkurenciou, podporovať regulačnú arbitráž a dokonca prispievať k skreslenému vnímaniu rizikovosti technológií. S tým súvisia aj širšie problémy týkajúce sa dôvery, zodpovednosti, účasti na regulácii či nerovnakého prístupu k expertíze regulátora. Analýzy zároveň ukazujú, že centrálné banky a regulátori často používajú rétoriku „inováciám naklonenej regulácie“, čím vytvárajú nerealistické očakávania o tom, čo sandbox v skutočnosti dokáže priniesť.¹⁰

Mnohým regulačným sandboxom sa vytýka, že prichádzajú príliš neskoro, keďže viaceré inovácie, ako napríklad robo poradenstvo, sa už stihli etablovať na trhu. Priekopnícke firmy tak sandbox nevyužijú a jeho prínos sa obmedzuje najmä na nových hráčov. Ďalším problémom je absencia kompetencie Európskej únie vytvoriť jednotný sandbox, čo vedie k

⁶ EUBOMÍR ČUNDERLÍK, MAROŠ KATKOVČIN, VILIAM PONIŠT. *Regulačné percepcie FinTechu* [online]. Wolters Kluwer SR s. r. o., 2025, s. 22-24 [cit. 20.03.2026]. Dostupné na internete: www.wolterskluwer.sk

⁷ 747/2004 Z. z. - Zákon o dohľade nad finančným trhom a o zmene a doplnení niektorých zákonov. In: [cit. 20.03.2026]. Dostupné na internete: <https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2004/747/20260301>

⁸ Raudla a kol., pôsobiaci v rámci výskumu publikovaného v *European Journal of Law and Economics* (autori z viacerých akademických inštitúcií v pobaltskom regióne), upozorňujú, že regulačné sandboxy v Litve a Lotyšsku nenaplnili očakávania a nepriniesli výsledky, ktoré im pripisuje existujúca literatúra, čím spochybňujú ich reálny prínos v menších trhoch. Gumbo a Chude-Okonkwo, výskumní pracovníci pôsobiaci na Institute for Intelligent Systems, University of Johannesburg, poukazujú na to, že ani po takmer dekáde od prvých implementácií neexistuje konsenzus o účinnosti sandboxov, pričom ich prínosy sa ukazujú ako podmienené úrovňou rozvinutosti fintech ekosystému. Kálmán, pôsobiaci na Ferenc Deák Faculty of Law and Political Science, István Széchenyi University, zdôrazňuje, že empirická evidencia o pozitívnych účinkoch sandboxov je stále veľmi obmedzená, najmä v rozvíjajúcich sa ekonomikách, a ich skutočný dopad ostáva neistý a ťažko merateľný.

⁹ BUCKLEY, R., P., ARNER, D., W., ZETZSCHE, D., A. *FinTech: Finance, Technology and Regulation*. 2024. s. 305-320.

¹⁰ WANG, Y., ZHOU, Z. Effectiveness of Regulatory Sandboxes in Financial Services: A Systematic Review. In: *Regulation and Governance* [online]. 2026, roč. 0, s. 2 [cit. 20.03.2026]. DOI: 10.1111/rego.70129

fragmentácii regulácie medzi členskými štátmi. Situáciu zhoršuje aj odmietavý postoj niektorých národných dohliadacích orgánov, čo prakticky znemožňuje koordinovaný európsky rámec. Významné riziko predstavuje aj otázka právnej istoty, keďže rozhodnutia regulátora prijaté v sandboxe nie sú záväzné pre súdy. Firma preto môže čeliť odlišnému posúdeniu toho istého riešenia v prípadnom spore, čo vytvára neistotu aj pri postupe schválenom dohľadom. Vzhľadom na tieto faktory je vytvorenie jednotného a spoľahlivého sandboxu na európskej úrovni málo pravdepodobné a trh zostáva odkázaný na existujúci, neraz nejednoznačný regulačný rámec.¹¹

Najčastejšie pozorovaným rizikom sú nenaplnené očakávania, keďže viaceré krajiny po úvodnom nadšení zistili, že záujem o sandbox je nízky alebo neudržateľný, čo viedlo k jeho zrušeniu či prestavbe alebo k situácii, keď v ňom dlhodobo pôsobí len minimum subjektov. Ďalším problémom je nedostatočná pripravenosť účastníkov aj samotného regulátora, ktorá si vyžaduje nielen detailnú znalosť právneho rámca, ale aj schopnosť porozumieť technológiám, ktoré sú často komplexné a rýchlo sa vyvíjajú. Obzvlášť náročným aspektom je riziko súbehu požiadaviek pre licencované subjekty a tie, ktoré testujú v sandboxe. Vzniká tak duálny režim, ktorý môže viesť k rozdielom v posudzovaní zodpovednosti a k potenciálne nejasným dopadom v prípade škody spôsobenej testovaným riešením v porovnaní s rovnakým riešením mimo sandboxu. Problém predstavuje aj zvýšená záťaž na ľudské zdroje regulátora, keďže dohľad nad inovatívnymi riešeniami si vyžaduje špecializované know-how, ktoré nie je vždy ľahké získať. Napokon existuje aj riziko neúmyselného narušenia hospodárskej súťaže, pretože subjekty zapojené do sandboxu môžu získať výhodu pred konkurenciou, ktorá podobné inovácie vyvíja mimo neho. Tieto faktory spolu vytvárajú obraz sandboxu ako nástroja s veľkým potenciálom, ktorý však zároveň prináša významné prevádzkové a regulačné výzvy.¹²

Napriek týmto poznatkom zostáva zrejmé, že regulačný sandbox ako nástroj nie je bez problémov a jeho praktické fungovanie prináša viaceré otvorené otázky. Kritika poukazuje najmä na to, že v niektorých prípadoch môže byť sandbox využívaný spôsobom, ktorý sa míňa so svojím pôvodným cieľom podporovať skutočné technologické inovácie, čo zvyšuje riziko jeho zneužitia zo strany subjektov hľadajúcich skôr regulačné výhody než priestor na experimentovanie. Ďalšou spornou oblasťou je nedostatok dôkazov o tom, že účasť v sandboxe skutočne zlepšuje schopnosť firiem získať kapitál, keďže zvýšená právna istota, ktorá má byť jedným z hlavných benefitov, sa nie vždy premieta do investičnej atraktivity. Tieto výhrady

¹¹ MAUME, P. Reducing Legal Uncertainty and Regulatory Arbitrage for Robo-Advice. In: *European Company and Financial Law Review* [online]. 2019, roč. 16, č. 5, s. 636-638 [cit. 12.03.2026]. DOI: 10.1515/ecfr-2019-0022

¹² Regulačný sandbox konzultačný materiál, s. 8-9.

poukazujú na to, že hoci sandbox predstavuje dôležitý most medzi finančnými inováciami a existujúcim regulačným rámcom, stále ide o relatívne nový mechanizmus, ktorý si vyžaduje ďalší výskum, precizovanie cieľov a zlepšovanie procesov.¹³

Obmedzená možnosť regulátora pružne reagovať na nedostatky v správaní účastníkov sandboxu predstavuje ďalší problém, ktorý ešte viac podčiarkuje napätie medzi rýchlym technologickým vývojom a pomalším tempom regulácie. Ak je regulačný priestor nastavený tak, že regulátor môže reagovať iba veľmi miernymi alebo naopak extrémne prísnymi sankciami, vzniká situácia, v ktorej je jeho schopnosť účinne presadzovať pravidlá oslabená. Regulátor sa môže zdráhať použiť prísnejšie opatrenia z obavy, že bude vnímaný ako prekážka inovácií, čo oslabuje dôveru v samotný dohliadací mechanizmus. Zároveň však môže príliš úzka voľnosť v presadzovaní práva viesť k tomu, že niektoré firmy budú využívať obmedzenú vynútiteľnosť pravidiel a nebudú ochotné transparentne zdieľať informácie o svojom fungovaní. V dôsledku toho vzniká napätie medzi požiadavkou na podporu inovácií a potrebou udržať dôveryhodný a funkčný dohľad. Tento problém ukazuje, že efektívne fungovanie sandboxov si vyžaduje citlivé nastavenie mechanizmov dohľadu a sankcií, ako aj prepracovanejšie zapojenie ďalších aktérov, aby sa zabezpečila rovnováha medzi podporou technologického rozvoja a ochranou verejného záujmu.¹⁴

Regulačné sandboxy napriek deklarovaným výhodám prinášajú riziká vyplývajúce z toho, že technologický vývoj napreduje rýchlejšie než regulácia. V praxi môžu narúšať rovnosť podmienok, keďže poskytujú výrazné výhody len úzkej skupine subjektov, ktoré sa do nich dostanú. Tieto firmy môžu vstúpiť na trh skôr, rýchlejšie budovať dôveru spotrebiteľov a investorov a využívať intenzívnejší kontakt s regulátorom, zatiaľ čo ich konkurenti musia absolvovať plný, časovo náročný proces. Takéto zvýhodnenie môže deformovať hospodársku súťaž a oslabiť postavenie tradičnejších firiem, ktoré nespĺňajú kritériá inovácie potrebné na vstup do sandboxu. Problémom je aj to, že účasť v sandboxe môže pôsobiť ako neformálne potvrdenie dôveryhodnosti zo strany regulátora, čo môže ovplyvniť investičné rozhodnutia a poskytnúť účastníkom reputačnú výhodu. K týmto nerovnostiam môže prispieť aj nerovnomerná dostupnosť neformálnych usmernení regulátora, ktoré subjekty mimo sandboxu nemajú. Tieto faktory naznačujú, že sandboxy síce môžu podporiť dialóg medzi inovátormi a

¹³ ZHENG, Y., WU, X. Fostering fintech innovation: A tripartite evolutionary game analysis of regulatory sandbox experiments. In: *International Review of Economics & Finance* [online]. 2024, roč. 92, s. 1304 [cit. 20.03.2026]. DOI: 10.1016/j.iref.2024.02.060

¹⁴ JOHNSON, W.G. Caught in quicksand? Compliance and legitimacy challenges in using regulatory sandboxes to manage emerging technologies. In: [online]. 2022, s. 718-719 [cit. 20.03.2026]. DOI: 10.1111/rego.12487

regulátorom, no zároveň predstavujú riziko narušenia férovej súťaže, ak nie sú riadené s dostatočnou opatrnosťou.¹⁵

Záver

Cieľom článku bolo odpovedať na výskumnú otázku, ktorá znela: „*Do akej miery dokážu regulačné sandboxy efektívne reagovať na rýchlu transformáciu finančných technológií a či skutočne plnia svoj deklarovaný účel podporovať inovácie bez narušenia regulačnej stability a férovej hospodárskej súťaže?*“. Zároveň článok overoval hypotézu, podľa ktorej regulačné sandboxy síce predstavujú užitočný experimentálny nástroj, avšak nedokážu v plnej miere zabezpečiť rovnováhu medzi podporou inovácií a ochranou trhu, pričom môžu vytvárať konkurenčné nerovnosti a neprinášajú takú právnu istotu, akú deklarujú.

Analýza potvrdila, že sandboxy dokážu zlepšiť interakciu medzi trhom a regulátorom, umožňujú bezpečné testovanie inovatívnych riešení a podporujú rýchlejšiu adaptáciu regulácie na technologické zmeny. Slúžia ako efektívna reakcia na zrýchľujúcu sa dynamiku trhu, ktorá si vyžaduje pružnejšie a prediktívnejšie regulačné nástroje. Z tohto hľadiska sandboxy naplňajú časť očakávaní spojených s ich vznikom.

Zároveň však výsledky jednoznačne ukazujú limity, ktoré potvrdzujú formulovanú hypotézu. Sandboxy môžu v praxi vytvárať nerovnaké konkurenčné podmienky v prospech subjektov, ktoré do nich získajú vstup, čo môže deformovať hospodársku súťaž a oslabiť pozíciu tradičných firiem. Otvorenou zostáva aj otázka právnej istoty, keďže rozhodnutia regulátora prijaté v rámci sandboxu nie sú záväzné pre súdy. Účastníci tak nemajú garantované, že postupy schválené regulátorom obstoja aj v potenciálnych právnych sporoch. Analýza tiež odhalila prekážky na úrovni medzinárodnej harmonizácie, keďže absencia kompetencií Európskej únie pre vytvorenie jednotného sandboxu vedie k fragmentácii regulácie.

Zodpovedanie výskumnej otázky preto ukazuje, že sandboxy predstavujú dôležitý, avšak len čiastočne efektívny nástroj modernej regulácie. Pomáhajú regulátorom lepšie reagovať na technologické zmeny, no zároveň nedokážu plne vyvážiť podporu inovácií a ochranu trhu. Hypotéza sa tak potvrdzuje: sandboxy môžu byť prínosné, no ich účinnosť je podmienená správnym dizajnom, jasným právnym ukotvením a opatrným nastavením, ktoré zabráni narušeniu férovej súťaže a zabezpečí skutočnú právnu istotu.

¹⁵ BRIAN R. KNIGHT, TRACE E. MITCHELL. The Sandbox Paradox Balancing the Need to Facilitate Innovation with the Risk of Regulatory Privilege [online], s. 20-24 [cit. 20.03.2026]. Dostupné na internete: <https://www.mercatus.org/research/working-papers/sandbox-paradox-balancing-need-facilitate-innovation-risk-regulatory>

Tento záver naznačuje potrebu ďalšieho výskumu a reformných krokov smerom k zlepšeniu sandboxových rámcov, aby sa mohli stať stabilným a dôveryhodným nástrojom regulácie v prostredí rýchlo sa meniacej technologickej reality.

Zoznam bibliografických odkazov

1. 747/2004 Z. z. - Zákon o dohľade nad finančným trhom a o zmene a doplnení niektorých zákonov. In: [cit. 20.03.2026]. Dostupné na internete: <https://www.slov-lex.sk/ezbierky/pravne-predpisy/SK/ZZ/2004/747/20260301>
2. BAUDIER, Patricia, ROUBAUD, David, KÁLMÁN, János. The Role of Regulatory Sandboxes in FinTech Innovation: A Comparative Case Study of the UK, Singapore, and Hungary. In: *FinTech 2025*, Vol. 4, Page 26 [online]. 2025, roč. 4, č. 2, s. 26 [cit. 25.03.2026]. ISSN 26741032. DOI: 10.3390/fintech4020026
3. BRIAN R. KNIGHT, TRACE E. MITCHELL. The Sandbox Paradox Balancing the Need to Facilitate Innovation with the Risk of Regulatory Privilege [online] [cit. 20.03.2026]. Mercatus Working Paper. Dostupné na internete: <https://www.mercatus.org/research/working-papers/sandbox-paradox-balancing-need-facilitate-innovation-risk-regulatory>
4. BUCKLEY, R., P., ARNER, D., W., ZETZSCHE, D., A. *FinTech: Finance, Technology and Regulation*. Cambridge: Cambridge University Press, 2024. 342 s. ISBN 978-1-316-51440-5.
5. FINANCIAL CONDUCT AUTHORITY. Regulatory sandbox lessons learned report [online] [cit. 20.03.2026]. Dostupné na internete: <https://www.fca.org.uk/publication/research-and-data/regulatory-sandbox-lessons-learned-report.pdf>
6. FinTech: Regulatory sandboxes and innovation hubs . In: [cit. 20.03.2026]. Dostupné na internete: https://www.esma.europa.eu/sites/default/files/library/jc_2018_74_joint_report_on_regulatory_sandboxes_and_innovation_hubs.pdf
7. GUMBO, Lilian, CHUDE-OKONKWO, Uche A K. Regulatory sandbox as a frontier for innovation and sustainability: a systematic review. In: *Cogent Business & Management* [online]. 2025, roč. 2025, č. 1, s. 2510555 [cit. 25.03.2026]. ISSN 2331-1975. DOI: 10.1080/23311975.2025.2510555
8. JOHNSON, Walter G. Caught in quicksand? Compliance and legitimacy challenges in using regulatory sandboxes to manage emerging technologies. In: [online]. 2022 [cit. 20.03.2026]. DOI: 10.1111/rego.12487
9. ĽUBOMÍR ČUNDERLÍK, MAROŠ KATKOVČIN, VILIAM PONIŠT. Regulačné percepcie FinTechu [online]. 1. vyd. Wolters Kluwer SR s. r. o., 2025 [cit. 20.03.2026]. ISBN 978-80-571-0802-3. Dostupné na internete: www.wolterskluwer.sk
10. MAUME, Philipp. Reducing Legal Uncertainty and Regulatory Arbitrage for Robo-Advice. In: *European Company and Financial Law Review* [online]. 2019, roč. 16, č. 5, s. 622-651 [cit. 12.03.2026]. ISSN 16132556. DOI: 10.1515/ecfr-2019-0022
11. QIU, Yingpeng et al. Regulatory sandbox expansion: Exploring the leap from fintech to medical artificial intelligence. In: *Intelligent Oncology* [online]. 2025, roč. 1, č. 2, s. 120-127 [cit. 20.03.2026]. ISSN 29502616. DOI: 10.1016/j.intonc.2025.03.001
12. RAUDLA, Ringa et al. Regulatory sandboxes and innovation hubs for FinTech: experiences of the Baltic states. In: *European Journal of Law and Economics* 2024 [online]. 2024, s. 1-21 [cit. 25.03.2026]. ISSN 15729990. DOI: 10.1007/s10657-024-09830-y
13. Regulačný sandbox konzultačný materiál [online] [cit. 20.03.2026]. Dostupné na internete: https://nbs.sk/_img/documents/_dohlad/fintech/regulacny-sandbox.pdf
14. TAMBIA MA DIEGA, ANNE LOUISE VAN DE POL. Artificial intelligence act and regulatory sandboxes [online] [cit. 20.03.2026]. Dostupné na internete: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733544/EPRS_BRI\(2022\)733544_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733544/EPRS_BRI(2022)733544_EN.pdf)

15. WANG, Yanqing, ZHOU, Zijian. Effectiveness of Regulatory Sandboxes in Financial Services: A Systematic Review. In: Regulation and Governance [online]. 2026, roč. 0, s. 1-20 [cit. 20.03.2026]. ISSN 17485991. DOI: 10.1111/rego.70129
16. ZHENG, Yulu, WU, Xiaoli. Fostering fintech innovation: A tripartite evolutionary game analysis of regulatory sandbox experiments. In: International Review of Economics & Finance [online]. 2024, roč. 92, s. 1302-1320 [cit. 20.03.2026]. ISSN 10590560. DOI: 10.1016/j.iref.2024.02.060

LIMITY PRÁVA NA INFORMÁCIE MEDZI PROPORCIONALITOU A ZNEUŽITÍM PRÁVA: KRITICKÁ KOMPARÁCIA NÁRODNEJ A MEDZINÁRODNEJ JUDIKATÚRY

Limits of the right to information between proportionality and abuse of rights: a critical comparison of national and international case law

EVA BABINSKÁ *

Abstrakt

Cieľom príspevku je analyzovať normatívny a judikatúrny rámec práva na informácie a kriticky zhodnotiť uplatňovanie princípu proporcionality pri jeho obmedzovaní v slovenskej a medzinárodnej rozhodovacej praxi. Pozornosť sa sústreďuje najmä na úlohu proporcionality ako nástroja vyvažovania medzi ochranou práva na informácie a legitímnymi dôvodmi jeho obmedzenia, ako aj na jej význam pri predchádzaní zneužitiu tohto práva pri zachovaní transparentnosti verejnej správy. Príspevok vychádza z hypotézy, že hoci zneužitie práva na informácie predstavuje potenciálne riziko pre efektívne fungovanie verejnej správy a pre samotný účel tohto práva, aplikácia princípu proporcionality v rozhodovacej praxi Najvyššieho správneho súdu Slovenskej republiky a medzinárodná judikatúra prispieva k jeho účinnému obmedzovaniu bez zásahu do samotnej podstaty práva na informácie. Hlavná výskumná otázka sa preto zameriava na to, do akej miery je princíp proporcionality pri obmedzeniach práva na informácie uplatňovaný v slovenskej a medzinárodnej judikatúre a akým spôsobom tento princíp prispieva k predchádzaniu zneužívaniu práva. Príspevok zároveň reflektuje normatívny základ práva na informácie a jeho medzinárodnoprávny rozmer.

Abstract

The aim of this paper is to analyze the normative and jurisprudential framework of the right to information and to critically evaluate the application of the principle of proportionality in its restriction in Slovak and international case law. Attention is focused in particular on the role of proportionality as a tool for balancing the protection of the right to information and legitimate reasons for its restriction, as well as its importance in preventing abuse of this right while maintaining the transparency of public administration. The article is based on the hypothesis that although the abuse of the right to information poses a potential risk to the effective functioning of public administration and to the very purpose of this right, the application of the principle of proportionality in the decision-making practice of the Supreme Administrative Court of the Slovak Republic and international case law contributes to its effective restriction without interfering with the very essence of the right to information. The main research question therefore focuses on the extent to which the principle of proportionality is applied in Slovak and international case law when restricting the right to information and how this principle contributes to preventing abuse of the right. The paper also reflects on the normative basis of the right to information and its international legal dimension.

Kľúčové slová: právo na informácie, transparentnosť verejnej správy, proporcionality, zneužitie práva

Keywords: right to information, transparency of public administration, proportionality, abuse of rights.

*Bc. Eva Babinská; II. ročník magisterského študijného programu; denná forma štúdia; babinska.evka296@gmail.com Právnická fakulta UMB

Úvod

Transparentnosť výkonu verejnej moci je kľúčovým predpokladom fungovania demokratického právneho štátu. Právo na informácie umožňuje verejnosti kontrolovať činnosť orgánov verejnej správy a posilňuje dôveru občanov v rozhodovacie procesy, hoci jeho výkon nie je absolútny a môže byť v určitých prípadoch obmedzený. Kľúčovým nástrojom posudzovania prípustnosti takýchto obmedzení je princíp proporcionality, ktorý umožňuje vyvažovať ochranu práva na informácie s legitímnymi dôvodmi jeho obmedzenia. V aplikačnej praxi sa zároveň čoraz častejšie objavuje otázka zneužitia práva na informácie, ktorá môže predstavovať riziko pre efektívne fungovanie verejnej správy. Cieľom príspevku je analyzovať normatívny a judikatúrny rámec práva na informácie a kriticky zhodnotiť uplatňovanie princípu proporcionality pri jeho obmedzovaní v slovenskej a medzinárodnej judikatúre. Osobitnú pozornosť venujeme judikatúre Najvyššieho správneho súdu Slovenskej republiky, ktorá rozlišuje medzi objektívnym a subjektívnym prvkom zneužitia práva a posudzuje, ako tieto kritériá bránia šikanóznemu využívaniu práva.

Metodologicky je príspevok založený na normatívno-právnej analýze a komparatívnom skúmaní národnej a medzinárodnej judikatúry. Cieľom je identifikovať, do akej miery aplikácia princípu proporcionality prispieva k vyvažovaniu ochrany práva na informácie a potrebe zabrániť jeho zneužívaniu, pričom zároveň zachováva transparentnosť verejnej správy. Štruktúrou príspevku odrážame kombináciu teoretického rámca a aplikačnej praxe. Prvú kapitolu sa venujeme normatívne a medzinárodnoprávnemu rámcu práva na informácie a analyzujeme proporcionality ako nástroj primeraného obmedzenia práva. V rámci druhej kapitoly skúmame koncept zneužitia práva a jeho posudzovanie v judikatúre, pričom v príspevku uvádzame aj analytické hodnotenie účinnosti týchto právnych mechanizmov pri zachovaní transparentnosti verejnej správy.

Záverom konštatujeme, že hoci súčasná právna úprava a súdna prax poskytujú rámec na ochranu práva na informácie, dôsledné uplatňovanie proporcionality a jasnejšie definovanie pravidiel zneužitia práva sú kľúčové na zachovanie rovnováhy medzi ochranou základného práva a legitímnymi obmedzeniami.

1 Normatívny a medzinárodnoprávny rámec práva na informácie

Ústavná interpretácia uvedeného právneho rámca akcentuje nielen pasívny, ale aj aktívny rozmer uplatňovania slobody prejavu a práva na informácie. Pasívny rozmer zahŕňa právo jednotlivca prijímať informácie, zatiaľ čo aktívny rozmer reflektuje jeho oprávnenie aktívne

vyhľadávať informácie a následne ich slobodne rozširovať.¹ Okrem toho, je však orgánom verejnej správy výslovne uložená povinnosť sprístupňovať informácie o svojej činnosti, čo posilňuje transparentnosť a demokratickú kontrolu výkonu verejnej moci. Vo svojej judikatúre Ústavný súd konštatoval, že právo na informácie nie je možné obmedziť z hľadiska jeho vecného obsahu.² Z ústavy teda vyplýva, že obsah práva na informácie sa vzťahuje na všetky informácie, pokiaľ nejde o informácie podliehajúce ústavne prípustným obmedzeniam. Právo na informácie môže byť obmedzené len v nevyhnutnom rozsahu a to na ochranu práv a slobôd tretích osôb, bezpečnosti štátu, verejného poriadku, zdravia alebo mravnosti v demokratickej spoločnosti.³ Dôvody a spôsob zamietnutia prístupu k informáciám musia byť však špecifikované len prostredníctvom právneho predpisu so zákonnou právnou silou. Aby obmedzenie práva na informácie bolo v súlade s ústavou, musia byť splnené zároveň formálne aj materiálne podmienky.⁴ Formálne aj materiálne podmienky obmedzenia zabezpečujú, že zásah do práva je primeraný a nevyhnutný, čím sa zachováva rovnováha medzi základnými právami.⁵

Európsky dohovor o ochrane ľudských práv a základných slobôd priznáva každému presadzovať si svoj názor, prijímať informácie a myšlienky iných a to bez zásahu zo strany štátu.⁶ Využívanie týchto slobôd je spojené s povinnosťami a zodpovednosťou, a preto môže byť podmienené formálnymi náležitosťami, zákonom stanovenými podmienkami, obmedzeniami alebo sankciami.⁷ Obmedzenia alebo sankcie sú prípustné iba vtedy, keď sú nevyhnutné v demokratickej spoločnosti a ich cieľom je chrániť národnú bezpečnosť, územnú celistvosť štátu, verejný poriadok, zdravie alebo morálku, dobré meno a práva ostatných osôb, predchádzať nepokojom či trestnej činnosti, zabezpečiť dôvernoscť informácií a zachovať autoritu a nestrannosť súdnej moci.

¹ Pozri čl. 26 ods. 2 ústavného zákona č. 460/1992 Zb. o Ústave Slovenskej republiky v znení neskorších predpisov

² Z judikatúry: „Ústava SR neobmedzuje právo na informácie z hľadiska predmetu tohto práva, teda neustanovuje pozitívny výpočet informácií, ktoré oprávnená osoba môže vyhľadávať, prijímať a rozširovať, ani neurčuje negatívny výpočet informácií, ktoré nemožno vyhľadávať, prijímať a rozširovať. Predmetom práva na informácie môžu byť všetky informácie, pokiaľ nejde o informácie podliehajúce obmedzeniu čl. 26 ods. 4 Ústavy SR.“ Nález Ústavného súdu Slovenskej republiky vedený pod sp. zn. II. ÚS 10/1999 zo 16. júna 1999. Dostupné online na internete: <https://merit.slv.cz/II.%C3%9AS10/99> [cit. 2026-01-19].

³ Pozri čl. 26 ods. 4 ústavného zákona č. 460/1992 Zb. o Ústave Slovenskej republiky v znení neskorších predpisov

⁴ VOŽÁR J. a kol.: *Sloboda prejavu v rozhodnutiach súdov*. Bratislava : VEDA, 2015, s. 156.

⁵ SAKTOROVÁ, Ľ. Obmedzenia slobody prejavu vo verejnom internete. In: *Sloboda. Sloboda prejavu a pluralita názorov*. Praha: Wolters Kluwer ČR, 2023, s. 144–154.

⁶ Pozri čl. 10 Európskeho dohovoru o ochrane ľudských práv a základných slobôd

⁷ SAKTOROVÁ, Ľ., DOLÍHALOVÁ, M. Navigating freedom of expression in the digital age: Legal distinctions between factual assertions and evaluative judgments on social media. In: *Pravovi vyklyky súčasnosti: Zachyst prav ľudyny v cyfrovi eru. Materialy V Mižnarodnoji naukovy-praktyčnoji konferenciji*. Černivci: Černiveckij nacional'nyj universytet imeni Jurija Fed'koviča, 2025, s. 54–61.

1.1 Proporcionalita ako nástroj obmedzenia práva na informácie

Ako kľúčové rozhodnutie týkajúceho sa oblasti práva na informácie na medzinárodnej úrovni možno považovať rozsudok Európskeho súdu pre ľudské práva vo veci Magyar Helsinki Bizottság proti Maďarsku pod sp. zn. 18030/11 zo dňa 8. novembra 2016, ktorý predstavuje významný míľnik vo vývoji EŠLP v kontexte výkladu čl. 10 Dohovoru.

Sťažovateľom v predmetnej veci bola maďarská mimovládna organizácia pôsobiaca v oblasti ochrany ľudských práv, ktorej činnosť sa systematicky zameriavala na monitorovanie fungovania verejných inštitúcií a podporu transparentnosti. V rámci svojej analytickej a výskumnej činnosti organizácia realizovala projekt zameraný na systém ustanovovania obhajcov v trestnom konaní, pričom cieľom bolo preskúmať mieru transparentnosti a rovnomernosti prideľovania prípadov ex offio obhajcom.

Výsledky výskumu poukázali na systémové nedostatky, najmä na skutočnosť, že príslušníci policajného zboru mali možnosť vyberať obhajcov zo zoznamov advokátskych komôr bez dostatočne transparentných pravidiel, čo vyvolávalo pochybnosti o nestrannosti a spravodlivosti procesu. Na základe týchto zistení organizácia iniciovala ďalší projekt, ktorého cieľom bolo prispieť k reforme predmetného systému. V tejto súvislosti požiadala orgány verejnej moci o sprístupnenie údajov týkajúcich sa počtu ustanovených obhajcov, pričom svoju žiadosť odôvodnila existenciou verejného záujmu.⁸

Príslušné policajné orgány však žiadosť odmietli s poukazom na ochranu osobných údajov a ich súkromný charakter. Spor sa následne dostal pred Európsky súd pre ľudské práva, ktorý sa zaoberal otázkou, či odmietnutie sprístupnenia požadovaných informácií predstavovalo zásah do práva garantovaného čl. 10 Dohovoru.

Súd vo svojom rozhodnutí zdôraznil, že sloboda prejavu zahŕňa nielen právo informácie šíriť, ale aj právo ich prijímať.⁹ Hoci toto právo nezakladá všeobecný a neobmedzený nárok na prístup ku všetkým informáciám, za určitých okolností môže vzniknúť pozitívny záväzok štátu zabezpečiť prístup k informáciám, najmä ak je takýto prístup nevyhnutný na efektívny výkon slobody prejavu. Odmietnutie sprístupnenia informácií preto môže predstavovať zásah do tohto

⁸ Z judikatúry: „*In the applicant NGO's assessment, its research showed that the system of ex officio appointed defenders did not operate adequately, essentially because the investigative authorities, in particular the police, were free to choose defence counsel from a list compiled by the relevant bar associations.*“ Rozsudok Veľkej komory Európskeho súdu pre ľudské práva vedený pod sp. zn. 18030/11 z 8. novembra 2016. Dostupné online na internete: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-167828%22%5D%7D> [cit. 2026-02-18].

⁹ Z judikatúry: „*According to both Article 10 of the Convention and Article 19 (2) of the International Covenant on Civil and Political Rights, freedom of expression includes freedom to receive and impart information and ideas regardless of frontiers*“ Rozsudok Veľkej komory Európskeho súdu pre ľudské práva vedený pod sp. zn. 18030/11 z 8. novembra 2016. Dostupné online na internete: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-167828%22%5D%7D> [cit. 2026-02-18].

práva, pokiaľ bráni výkonu funkcie verejnej kontroly. V tejto súvislosti Európsky súd pre ľudské práva formuloval kritériá, na základe ktorých je potrebné posudzovať existenciu práva na prístup k informáciám.¹⁰ Kľúčovým faktorom je existencia verejného záujmu, ktorý sa posudzuje v kontexte konkrétnej veci, pričom rozhodujúce je, či sprístupnenie informácií prispieva k diskusii o otázkach verejného významu a k transparentnosti výkonu verejnej moci. Súd zároveň zdôraznil význam subjektu žiadajúceho informácie, pričom mimovládne organizácie a médiá plnia v demokratickej spoločnosti osobitnú úlohu tzv. „verejného dozorného psa“.

Analyticky možno konštatovať, že predmetné rozhodnutie predstavuje zásadný posun v chápaní práva na informácie ako integrálnej súčasti slobody prejavu. Európsky súd pre ľudské práva explicitne rozvinul koncept pozitívnych záväzkov štátu a zdôraznil, že ochrana tohto práva nemá iba negatívny rozmer spočívajúci v zákaze zásahov, ale aj aktívny rozmer vyžadujúci zabezpečenie prístupu k informáciám za splnenia stanovených podmienok.

2 Koncept a vymedzenie zneužitia práva

Zákon č. 211/2000 Z. z. o slobodnom prístupe k informáciám a o zmene a doplnení niektorých zákonov implementuje ústavou garantované právo na informácie a zabezpečuje otvorenosť verejnej správy podľa zásady verejnosti. Predmetný zákon priznáva prístup k informáciám všetkým subjektom, bez ohľadu na to, či ide o fyzické alebo právnické osoby, a to v rozsahu, v akom tieto informácie nie sú zákonom výslovne vylúčené.¹¹ Zákonodarca v ustanoveniach predmetného zákona vymedzil široký okruh informácií prístupných verejnosti, čím významným spôsobom prispel k zabezpečeniu transparentnosti verejnej správy. Zároveň sa v aplikačnej praxi objavujú pokusy o zneužitie práva. Samotné podanie žiadosti o prístup k informáciám pritom ešte nepredstavuje porušenie zákona v pravom slova zmysle.¹² K porušeniu zákona v tomto kontexte dochádza, keď žiadateľ formálne postupuje podľa

¹⁰ Z judikatúry: „Whether and to what extent the denial of access to information constitutes an interference with an applicant's freedom-of-expression rights must be assessed in each individual case and in the light of its particular circumstances. In order to define further the scope of such a right, the Court considers that the recent case-law referred to above (see paragraphs 131-32 above) offers valuable illustrations of the criteria that ought to be relevant.“ Rozsudok Veľkej komory Európskeho súdu pre ľudské práva vedený pod sp. zn. 18030/11 z 8. novembra 2016. Dostupné online na internete: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-167828%22%7D%22%7D> [cit. 2026-02-18].

¹¹ Pozri § 3 zákona č. 211/2000 Z. z. o slobodnom prístupe k informáciám a o zmene a doplnení niektorých zákonov v znení neskorších predpisov

¹² Právo na informácie vs. Zneužitie práva (filibustering). In *REVÚCKE LISTY* [online]. Dostupné online na internete: <https://www.revuckelisty.sk/pravo-na-informacie-vs--zneuzitie-prava--filibustering--oznam/mid/450047/.html> [cit. 2026-01-21].

zákona, no zároveň neguje jeho základný účel, ktorým je zabezpečenie efektívnej a transparentnej informovanosti verejnosti.

V Ústave Slovenskej republiky nie je zákaz zneužitia práva výslovne uvedený. Implicitne však vyplýva z ústavného princípu právneho štátu¹³. Z formálneho hľadiska tento princíp znamená, že právny poriadok platí pre všetkých a musí byť dodržiavaný. Materiálne hľadisko právneho štátu spočíva na jeho hodnotách, ktoré sa premietajú do horizontálnej aj vertikálnej roviny právnych vzťahov. To znamená, že ochrana základných práv a právnych vzťahov sa uplatňuje nielen medzi jednotlivcami navzájom, ale aj vo vzťahu jednotlivca ku štátu.

2.1 Zákaz zneužitia práva v kontexte judikatúry Najvyššieho správneho súdu

V rámci právnej úpravy zákona o slobodnom prístupe k informáciám absentuje vymedzenie pojmu zákazu zneužitia práva. A práve vďaka tomu je nutné oprieť sa o judikatúru, ktorá zneužitie práva vo vzťahu k slobodnému prístupu k informáciám definuje. V rozsudku Najvyššieho správneho súdu Slovenskej republiky pod sp. zn. 4Svk/44/2022 zo dňa 14. decembra 2023 súd posudzoval kasačnú sťažnosť oprávneného subjektu, ktorý sa nestotožnil s rozhodnutím krajského súdu a domáhal sa jeho preskúmania z dôvodu namietaného porušenia zákona o slobodnom prístupe k informáciám. Najvyšší správny súd zdôraznil pritom, že posudzovanie zneužitia práva si vyžaduje uplatnenie objektívnych aj subjektívnych kritérií. Objektívne kritériá sa posudzujú vo vzťahu k zmyslu a účelu právnej úpravy, zatiaľ čo subjektívne kritériá sa viažu na motiváciu žiadateľa o informácie. Zneužitie práva v tomto prípade vymedzil ako konanie, ktoré je síce formálne dovoľené zákonom, avšak svojimi dôsledkami odporuje jeho účelu. Na základe uvedeného, Najvyšší správny súd konštatoval, že samotný úmysel zneužiť predmetné právo musí byť jednoznačný a zo strany orgánov verejnej správy preukázaný bez racionálnych pochybností.¹⁴ Odmietnutie prístupu k informáciám z dôvodu zneužitia práva je nutné považovať ako krajný prostriedok, ktorý predstavuje výnimku zaručeného práva.

Za zneužívanie práva na informácie možno teda považovať šikanózne správanie žiadateľov. Šikanózne žiadosti sa typicky vyznačujú nadmerným objemom informácií bez relevantného

¹³ Pozri čl. 1 ústavného zákona č. 460/1992 Zb. o Ústave Slovenskej republiky v znení neskorších predpisov

¹⁴ Z judikatúry: „*Úmysel zneužiť právo na prístup k informáciám musí byť zjavný a správnymi orgánmi preukázaný nad všetku rozumnú pochybnosť, pretože odmietnutie informácie s poukazom na zneužitie práva je potrebné chápať ako riešenie ultima ratio a ako reštriktívne konštruovaný výnimku z ústavou garantovaného práva na prístup k informáciám.*“ Rozsudok Najvyššieho súdu Slovenskej republiky vedený pod sp. zn. 4Svk/44/2022 z 14. decembra 2023. Dostupné online na internete: <https://www.nssud.sk/wp-content/uploads/4Svk442022.pdf> [cit. 2026-01-21].

odôvodnenia a zámerom zaťažiť orgány verejnej správy.¹⁵ Pri posudzovaní, či ide o šikanózne správanie je nevyhnutné, zohľadniť všetky objektívne okolnosti konkrétnych prípadov. Vzhľadom na nárast šikanózných žiadostí zákonodarca pôvodne zaviedol v zákone o slobodnom prístupe k informáciám systém ich spoplatňovania, umožňujúci požadovať úhradu vynaložených nákladov za nadmerne rozsiahle žiadosti. Táto úprava však bola pozastavená rozhodnutím Ústavného súdu. Poslanci a verejný ochranca práv namietali diskrimináciu, obmedzenie uplatnenia práva a kolíziu s princípom právnej istoty. Ústavný súd v tomto prípade konštatoval, že prijatie spoplatnenia by mohlo viesť k odloženiu žiadosti alebo uhrádzaniu neprimerane vysokých nákladov.¹⁶

Na základe uvedeného možno konštatovať, že Najvyšší správny súd Slovenskej republiky vytvoril pomerne precízny a vnútorne konzistentný rámec pre posudzovanie zneužitia práva na informácie. Jasne rozlíšil medzi objektívnym a subjektívnym prvkom, pričom objektívne kritériá naviazal na zmysel a účel právnej úpravy, a tým ochránil samotnú esenciu práva na informácie. Subjektívny prvok spojil s preukázaním úmyslu žiadateľa, čím zabránil tomu, aby sa zneužitie práva vyvodzovalo iba z formálnych znakov žiadosti, jej rozsahu či administratívnej náročnosti. Takto nastavený prístup eliminuje riziko formalizmu a posilňuje individuálne, kontextuálne hodnotenie každého prípadu.

Osobitne významné je, že súd odmietnutie sprístupnenia informácií z dôvodu zneužitia práva nekoncepčuje ako bežný obranný mechanizmus verejnej správy, ale ako krajný a výnimočný prostriedok, ktorého použitie je podmienené prísnyim dôkazným štandardom. Takýto výklad je v súlade so zásadou proporcionality, keďže zásah do základného práva pripúšťa len v nevyhnutných prípadoch, a zároveň rešpektuje princíp zákazu diskriminácie i požiadavku právnej istoty vyplývajúcu z materiálneho chápania právneho štátu podľa Ústava Slovenskej republiky. Presvedčivosť rozhodnutia spočíva práve v dôslednom vyvážení dvoch legitímnych hodnôt, ktorými sú ochrana základného práva na informácie a potreba zabránenia jeho šikanóznemu výkonu. Súd tým demonštruje metodologickú konzistentnosť a ústavne konformnú argumentáciu, ktorá neuprednostňuje efektivitu verejnej správy na úkor transparentnosti. Zároveň však platí, že stabilita tohto vyváženia bude závisieť od budúcej aplikačnej praxe. Ak by sa dôkazný štandard postupne oslaboval alebo by sa dôraz presúval z

¹⁵ KUČEROVÁ, A.: *Šikanózny výkon práva na informácie*. In: UNIVERZITA PAVLA ŠAFÁRIKA V KOŠICIACH. Teória a prax verejnej správy. Zborník príspevkov. Košice : ŠafárikPress, 2025, s. 44 [cit. 2026-01-21].

¹⁶ Z judikatúry: „Naopak, zavedenie nového právneho inštitútu úhrady nákladov s použitím relatívne neurčitého pojmu „mimoriadne rozsiahle vyhľadávanie informácií“ v hypotéze § 21 ods. 1 tohto zákona za súčasnej absencie limitácie požadovanej výšky úhrady podstatne zasahuje do existujúcej právnej istoty žiadateľov o poskytnutie informácií.“ Nález Ústavného súdu Slovenskej republiky vedený pod sp. zn. PL. ÚS 6/2025 12. marca 2025. Dostupné online na internete: <https://www.autora.sk/zz/2025/58/20250328/> [cit. 2026-01-21].

preukazovania úmyslu na samotnú náročnosť žiadostí, mohlo by dôjsť k nežiaducej expanzii výnimky na úkor pravidiel. Zachovanie reštriktívneho výkladu a dôslednej súdnej kontroly preto predstavuje kľúčový predpoklad toho, aby zákaz zneužitia práva zostal legitímnym korektívom, a nie nástrojom oslabovania transparentnosti verejnej správy.

Na základe uvedeného je možné pristúpiť ku komparatívnemu zhodnoteniu vnútroštátnej a medzinárodnej judikatúry. Judikatúra Európskeho súdu pre ľudské práva, reprezentovaná najmä rozhodnutím Magyar Helsinki Bizottság proti Maďarsku, akcentuje predovšetkým aktívny rozmer práva na informácie a zdôrazňuje existenciu pozitívnych záväzkov štátu zabezpečiť prístup k informáciám v prípade verejného záujmu, najmä ak ide o subjekty plniace funkciu „verejného dozorného psa“.

Naopak, rozhodovacia prax Najvyšší správny súd Slovenskej republiky sa výraznejšie sústreďuje na limity výkonu tohto práva, najmä v kontexte jeho možného zneužitia. Ako bolo analyzované, vnútroštátna judikatúra rozvíja kritériá objektívneho a subjektívneho prvku zneužitia práva a kladie dôraz na ochranu účelu právnej úpravy. Napriek tomuto odlišnému akcentu však medzi oboma prístupmi neexistuje rozpor, ale skôr komplementárny vzťah. Kým medzinárodná judikatúra rozširuje ochranu práva na informácie a posilňuje jeho materiálny obsah, vnútroštátna judikatúra vytvára mechanizmy brániace jeho deformácii prostredníctvom šikanózneho výkonu. Spoločným menovateľom oboch prístupov pritom zostáva princíp proporcionality, ktorý slúži ako základné kritérium posudzovania prípustnosti zásahov do práva na informácie a zabezpečuje zachovanie rovnováhy medzi transparentnosťou verejnej správy a ochranou jej efektívneho fungovania.

Záver

Na základe vykonanej analýzy konštatujeme, že právo na informácie predstavuje dynamické základné právo, ktorého ochrana je nevyhnutne spojená s potrebou jeho racionálneho limitovania. Komparáciou vnútroštátnej a medzinárodnej judikatúry poukazujeme na to, že kým medzinárodný prístup akcentuje expanzívny výklad tohto práva a jeho význam pre verejnú kontrolu, vnútroštátna judikatúra sa sústreďuje na jeho limity v kontexte ochrany funkčnosti verejnej správy. Vďaka uvedenému uvádzame, že hypotéza formulovaná v úvode príspevku sa vo všeobecnosti potvrdila. Princíp proporcionality je v slovenskej aj medzinárodnej judikatúre uplatňovaný ako kľúčový nástroj, ktorý umožňuje obmedziť zneužívanie práva na informácie bez zásahu do jeho podstaty. Zároveň však analýzou naznačujeme, že jeho aplikačná prax nie je úplne bezproblémová a ostáva závislá od konkrétneho výkladu a dôkazného hodnotenia v jednotlivých prípadoch. Tieto prístupy pritom

nie sú protichodné, ale vzájomne sa dopĺňajú. Ich prienikom je princíp proporcionality, ktorý predstavuje metodologický rámec pre vyvažovanie transparentnosti verejnej moci a ochrany pred šikanóznym výkonom práva. Jeho praktická aplikácia však zároveň otvára priestor pre potenciálne riziká, najmä ak by sa dôraz presúval z posudzovania úmyslu žiadateľa na samotnú administratívnu náročnosť žiadostí.

Tvrdíme, že stabilita tohto vyváženia preto nie je samozrejímavá, ale podmienená dôsledným uplatňovaním prísnych kritérií a zachovaním reštriktívneho výkladu zneužitia práva. V opačnom prípade by mohlo dôjsť k postupnej expanzii výnimiek, ktorá by síce formálne rešpektovala princíp proporcionality, no materiálne by oslabovala samotnú podstatu práva na informácie. Práve uvedeným prepojením medzi ochranou práva a prevenciou jeho zneužitia potvrdzujeme kľúčovú úlohu princípu proporcionality, ktorú sme v rámci príspevku identifikovali ako centrálny nástroj vyvažovania kolidujúcich hodnôt. Ako vyplýva z analyzovanej judikatúry, proporcionalita zabezpečuje, že zásah do práva na informácie je prípustný len vtedy, ak je nevyhnutný, primeraný a sleduje legitímny cieľ, pričom zároveň bráni formalistickému alebo automatickému odmietaniu žiadostí.

Príspevkom tak poukazujeme na to, že proporcionalita nepredstavuje len neutrálne technické kritérium, ale aj hodnotovo podmienený nástroj, ktorého aplikácia môže v závislosti od interpretačného prístupu buď posilňovať ochranu základného práva alebo legitimizovať jeho obmedzovanie.

Zoznam bibliografických údajov

Bibliografické odkazy

1. UNIVERZITA PAVLA ŠAFÁRIKA V KOŠICIACH: *Teória a prax verejnej správy*. Zborník príspevkov. Košice : ŠAFÁRIKPRESS, 2025, 360 s. ISBN 978-80-574-0466-8
2. VOZÁR J. a kol.: *Sloboda prejavu v rozhodnutiach súdov*. Bratislava : VEDA, 2015, 224 s. ISBN 978-80-224-1470-8
3. SAKTOROVÁ, E. Obmedzenia slobody prejavu vo verejnom internete. In: *Sloboda. Sloboda prejavu a pluralita názorov*. Praha: Wolters Kluwer ČR, 2023, s. 144–154.
4. SAKTOROVÁ, E., DOLÍHALOVÁ, M. *Navigating freedom of expression in the digital age: Legal distinctions between factual assertions and evaluative judgments on social media*. In: *Právovi vyklyky súčasnosti: Zachyst prav ľudyny v cyfrovu eru. Materialy V Mižnarodnoji naukovo-praktyčnoji konferenciji*. Černivci: Černiveckyj nacional'nyj universytet imeni Jurija Fed'koviča, 2025, s. 54–61. ISBN 978-966-423-929-2. Dostupné na: https://drive.google.com/file/d/1gAqXsnz8b_NfChVfUG49wKmzaoN3m99Y/view

Judikatúra

5. Nález Ústavného súdu Slovenskej republiky vedený pod sp. zn. PL. ÚS 6/2025 12. marca 2025. Dostupné online na internete: <https://www.autora.sk/zz/2025/58/20250328/> [cit. 2026-01-21].

6. Rozsudok Najvyššieho súdu Slovenskej republiky vedený pod sp. zn. 4Svk/44/2022 z 14. decembra 2023. Dostupné online na internete: <https://www.nssud.sk/wp-content/uploads/4Svk442022.pdf> [cit. 2026-01-21].
7. Nález Ústavného súdu Slovenskej republiky vedený pod sp. zn. II. ÚS 10/1999 zo 16. júna 1999. Dostupné online na internete: <https://merit.slv.cz/II.%C3%9AS10/99> [cit. 2026-01-19].
8. Rozsudok Veľkej komory Európskeho súdu pre ľudské práva vedený pod sp. zn. 18030/11 z 8. novembra 2016. Dostupné online na internete: [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-167828%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-167828%22]}) [cit. 2026-02-18]

Právne predpisy

9. Ústavný zákon č. 460/1992 Zb. o Ústave Slovenskej republiky v znení neskorších predpisov
10. Európsky dohovor o ochrane základných ľudských práv a slobôd
11. Zákon č. 211/2000 Z. z. o slobodnom prístupe k informáciám a o zmene a doplnení niektorých zákonov v znení neskorších predpisov

Iné zdroje

12. Právo na informácie vs. Zneužitie práva (filibustering). In *REVÚCKE LISTY* [online]. Dostupné online na internete: <https://www.revuckelisty.sk/pravo-na-informacie-vs--zneuzitie-prava--filibustering--oznam/mid/450047/.html> [cit. 2026-01-21].

UMELÁ INTELIGENCIA AKO NÁSTROJ ENVIRONMENTÁLNEHO DOZORU – PRÁVNE LIMITY A VÝZVY

Artificial Intelligence as a Tool for Environmental Monitoring – Legal Limits and Challenges

DOMINIKA NOSKOVIČOVÁ*

Abstrakt

Rozvoj technológií prináša nové možnosti pre výkon environmentálneho dozoru a kontrolu dodržiavania právnych predpisov v oblasti životného prostredia. Jedným z významných nástrojov, ktorý môže zefektívniť identifikáciu environmentálnych deliktov je využívanie umelej inteligencie pri spracovaní a analýze dát získaných prostredníctvom moderných technológií, ako sú drony alebo fotopasce. Uplatnenie algoritmov umelej inteligencie umožňuje automatizované vyhodnocovanie veľkého množstva dát a rýchlejšiu identifikáciu protiprávnych zásahov do životného prostredia. Cieľom príspevku je analyzovať právne aspekty využívania umelej inteligencie ako nástroja environmentálneho dozoru v kontexte výkonu verejnej správy. Príspevok sa zameriava najmä na otázky zákonnosti získavania a spracúvania údajov, dôkaznej hodnoty takto získaných informácií v správnom konaní, ako aj na problematiku ochrany súkromia a osobných údajov, či zodpovednosti správnych orgánov pri využívaní automatizovaných systémov rozhodovania. Príspevok zároveň reflektuje aktuálny vývoj právnej regulácie umelej inteligencie v Európskej únii a poukazuje na potrebu vytvorenia jasného právneho rámca pre využívanie týchto technológií v oblasti ochrany životného prostredia.

Abstract

Technological advancements are opening up new possibilities for environmental monitoring and enforcement of environmental regulations. One of the key tools that can streamline the identification of environmental violations is the use of artificial intelligence to process and analyze data collected through modern technologies, such as drones or camera traps. The application of artificial intelligence algorithms enables the automated evaluation of large amounts of data and faster identification of illegal environmental violations. The aim of this paper is to analyze the legal aspects of using artificial intelligence as a tool for environmental monitoring in the context of public administration. The paper focuses primarily on issues of the legality of data collection and processing, the evidentiary value of such information in administrative proceedings, as well as privacy and personal data protection, and the liability of administrative authorities when using automated decision-making systems. The paper also reflects on current developments in the legal regulation of artificial intelligence in the European Union and highlights the need to establish a clear legal framework for the use of these technologies in the field of environmental protection.

Kľúčové slová: *Umelá inteligencia. Dôkaz. Dozor. Životné prostredie.*

Key words: *Artificial Intelligence. Evidence. Surveillance. The Environment.*

Úvod

Či si to priznáme alebo nie, umelá inteligencia (AI) už v súčasnosti ovplyvňuje život každého jedného z nás. Bez ohľadu na to, či sa jej pýtame tie najbežnejšie otázky ako napríklad čo dnes variť, ako schudnúť, alebo kto oslavuje meniny, alebo ju využívame pri rôznych

* Mgr. Dominika Noskovičová, 2. ročník, externá forma, tretí stupeň štúdia, noskovicova13@uniba.sk, Katedra správneho a environmentálneho práva, Právnická fakulta, Univerzita Komenského v Bratislave.

odborných činnostiach, ako napríklad vypracúvaní právneho stanoviska, či písaní odborného článku. Bez ohľadu na to, či ju využívame denne, alebo sa k jej použitiu zatiaľ len nesmelo odhodlávame. Práve jej využívanie pri odborných činnostiach sa stáva čoraz frekventovanejším aj napriek tomu, že všetci vieme, že umelá inteligencia v tejto oblasti nie je ešte ani zďaleka dokonalá. AI má však tak, ako v mnohých iných oblastiach nášho života, aj profesijnej sfére pôsobenia obrovský potenciál a to bez ohľadu na zameranie konkrétnej profesie. Pravdepodobne všade sa nájde aspoň minimálny priestor na jej využitie. Výnimkou nie je ani oblasť ochrany životného prostredia. Práve životné prostredie, jeho ochrana, ale aj nachádzanie balansu medzi ňou a ekonomickým rastom sú otázky, ktoré si spoločnosť momentálne kladie veľmi často. Pravdepodobne všetci sa však zhodneme na tom, že ochrana životného prostredia by mala byť prioritou nie len pre každý štát, ale aj pre každého z nás, ako pre jeho občanov. Aj napriek tomu je však niekedy opak pravdou a v praxi často prichádza k porušovaniu environmentálnych predpisov menej závažným ale aj závažnejším konaním. Práve pre takéto prípady je nesmierne dôležité, aby v každej krajine fungoval systém orgánov presadzujúcich ochranu životného prostredia a dozerajúcich na dodržiavanie environmentálnej legislatívy. Ochrana životného prostredia však už nie je len akousi zástupnou témou. Množstvo obyvateľov si už skutočne uvedomuje jej dôležitosť, ako aj ich právo na priaznivé životné prostredie, ktoré priamo garantuje Ústava Slovenskej republiky. S rastúcim povedomím občanov o tejto téme však automaticky prichádzajú aj zvyšujúce sa nároky na efektívne sankcionovanie environmentálnych deliktov a s tým spojenú ochranu životného prostredia. S uvedeným preto často súvisí aj rastúci tlak na orgány na úseku štátnej správy starostlivosti o životné prostredie v súvislosti s efektivitou, rýchlosťou a hospodárnosťou konaní ako aj zvyšujúcim sa počtom skončených konaní a uložených pokút či iných sankcií. Obzvlášť v tomto prípade môže byť veľmi efektívnym riešením využívanie umelej inteligencie, nie len pri výkone štátneho dozoru ale aj v prípadnom následnom správnom konaní. Ako vieme, zavádzanie novín technologickej povahy je však často problematické aj v bežnom živote, nie to ešte v komplikovanom systéme orgánov verejnej správy, ktoré sú často rigidné voči akýmkoľvek zmenám. Aj napriek tomu je však nevyhnutné, aby sa aj tieto orgány postupne prispôbovali procesu digitalizácie verejnej správy a správne a aktívne využívali technologické prostriedky, ktoré majú za cieľ zefektívniť ich činnosť.

Vzhľadom na uvedené je cieľom tohto príspevku analyzovať aktuálnu právnu úpravu výkonu environmentálneho dozoru a posúdiť možnosti využívania umelej inteligencie v rámci tohto procesu, ako aj v rámci dokazovania v správnom konaní. Príspevok má tiež za cieľ

poukázat' na konkrétne limity súčasnej právnej úpravy ako aj problémy súvisiace s využívaním AI v rámci procesov verejnej správy, konkrétne napríklad ochrana osobných údajov, dostatočná miera kybernetickej ochrany takýchto systémov ako aj problém transparentnosti, resp. netransparentnosti takéhoto rozhodovania.

1 K pojmu environmentálny dozor

Každý zo zložkových zákonov, teda tých, ktoré regulujú ochranu konkrétnej zložky životného prostredia,¹ aspoň minimálne pracuje s pojmom správny alebo štátny dozor. V žiadnom právnom predpise však nie je tento pojem legálne definovaný. Z uvedeného môžeme a fortiori usúdiť, že definíciu environmentálneho dozoru v platnej a účinnej právnej úprave taktiež nenachádzame. Čo ale teda skutočne je správny dozor? Z teórie je možné odvodiť záver, že ide o porovnávanie skutočného stavu so stavom požadovaným právnymi predpismi. Legislatíva na pomenovanie tohto procesu často využíva rôzne pojmy, pričom môže ísť o kontrolu, dozor, dohľad, či iné. Dôležitý je tiež fakt, že správny dozor sa uskutočňuje vo vzťahu k nepodriadeným subjektom – fyzickým a právnickým osobám. Rovnako je nevyhnutné poznamenať, že týmto procesom sa zasahuje do práv kontrolovaných osôb, preto je nevyhnutné, aby jednotlivé oprávnenia príslušných správnych orgánov, ktorými disponujú v rámci výkonu tohto dozoru boli náležite definované priamo v zákone.²

Takýmto predpisom je zákon č. 10/1996 Z. z. o kontrole v štátnej správe v znení neskorších predpisov, ktorý obsahuje všeobecné ustanovenia týkajúce sa oprávnení kontrolovaného subjektu ako aj oprávnení orgánu vykonávajúceho kontrolu, postup výkonu kontroly, či proces ukončenia kontroly. Tento zákon predstavuje lex generalis k špeciálnym predpisom, ktoré v tomto prípade predstavujú jednotlivé zložkové zákony upravujúce ochranu konkrétnej zložky životného prostredia, ako napríklad zákon o vodách³, zákon o ochrane ovzdušia⁴, či zákon o odpadoch.⁵ Každý z týchto predpisov obsahuje úpravu výkonu štátneho dozoru, avšak naprieč jednotlivými úpravami sa líši miera podrobnosti, s akou sa rozhodol zákonodarca pristúpiť k daným predpisom.

Veľmi podrobnú úpravu obsahuje zákon č. 543/2002 Z. z. o ochrane prírody a krajiny v znení neskorších predpisov, ktorý v § 71 ods. 1 definuje štátny dozor ako „zisťovanie, či

¹ Cepek, B. a kol. (2015). Environmentálne právo všeobecná a osobitná časť. Aleš Čeněk.

² Vrabko, M. (2025). Správne právo hmotné. Všeobecná časť. C.H. Beck. s. 193.

³ Zákon č. 364/2004 Z. z. o vodách a o zmene zákona Slovenskej národnej rady č. 372/1990 Zb. o priestupkoch v znení neskorších predpisov (vodný zákon) v znení neskorších predpisov.

⁴ Zákon č. 146/2023 Z. z. o ochrane ovzdušia a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.

⁵ Zákon č. 79/2015 Z. z. o odpadoch v znení neskorších predpisov.

*fyzické osoby alebo právnické osoby dodržiavajú tento zákon a všeobecne záväzné právne predpisy vydané na jeho vykonanie, ako aj rozhodnutia orgánov ochrany prírody vydané na ich základe“ a taktiež „objasňovanie spočívajúce v prešetrovaní podozrení alebo podnetov poukazujúcich na porušenie tohto zákona, ktorého účelom je obstaranie podkladov potrebných na zistenie, či sa stal skutok, ktorý môže byť priestupkom alebo iným správnym deliktom podľa tohto zákona, ako aj to, kto takýto skutok spáchal.“*⁶ Zákon ďalej podrobne definuje aj jednotlivé oprávnenia orgánu ochrany prírody pri výkone štátneho dozoru. V žiadnom z uvedených však nemáme definované použitie umelej inteligencie. Zákon oprávňuje orgán ochrany prírody na využívanie technických prostriedkov, avšak len na zhotovovanie fotodokumentácie a videodokumentácie.⁷ V takomto prípade však žiadnym výkladom nie je možné dospieť k záveru, že by sa pod technologickými prostriedkami v tomto prípade mohla ukrývať aj umelá inteligencia.

Obdobné oprávnenia nachádzame napríklad aj v zákone o lesoch⁸ či v zákone o odpadoch. Osobitným prípadom je zákon o ochrane ovzdušia, ktorý je najnovším právnym predpisom z pomedzi uvedených a aj napriek skutočnosti, že bol prijatý len v roku 2023 žiadnym spôsobom nereflektuje na nové technologické prostriedky či inovácie, akými môže byť napríklad aj umelá inteligencia. Prítomnosť obdobnej formulácie oprávnenia, aká sa nachádza aj v predpisoch starších od dve dekády, môže na jednej strane svedčiť o kvalite takejto právnej úpravy, ktorá bola vplyvom času dostatočne preverená a pravdepodobne nespôsobovala aplikačné problémy, ale aj o premárnení príležitosti reflektovať v právnej úprave na nové technológie, ktoré v čase prijatia starších právnych úprav neexistovali avšak v súčasnosti majú potenciál priviesť výkon štátneho dozoru do 21. storočia.

2 Technologický a právny rámec AI

Ako sme uviedli už v úvode, umelá inteligencia má v súčasnosti potenciál v každom aspekte nášho života. Bežne ju často ju vnímame len ako určitý chatovací nástroj, bez toho, aby sme sa zaujímali, akým spôsobom vlastne dostávame odpovede na naše otázky a ako tieto systémy fungujú.

Vo všeobecnosti môžeme hovoriť o dvoch rôznych typoch AI, ktoré sa líšia svojimi schopnosťami a vlastnosťami, ako aj účelom, na ktorý by mali byť používané. Prvým typom je prediktívna umelá inteligencia, ktorá sa využíva najmä v počítačovom videní na detekciu

⁶ § 71 ods. 1 písm. a) a b) zákona č. 543/2002 Z. z.

⁷ § 71 ods. 2 písm. k) zákona č. 543/2002 Z. z.

⁸ Zákon č. 326/2005 Z. z. o lesoch v znení neskorších predpisov.

objektov. Druhým typom, ktorý je pre bežného užívateľa populárnejší, je generatívna AI, ktorá je vhodná na tvorbu kreatívneho obsahu ako napríklad texty, obrázky či zvuk.⁹ Tento typ umelej inteligencie sa využíva aj pri takzvaných veľkých jazykových modeloch (LLM modeloch), ktoré slúžia na tvorbu prirodzeného textu. „*Tieto modely sú trénované na obrovskom množstve údajov, čo im umožňuje generovať text podobný ľudskému a vykonávať zložité úlohy s pozoruhodnou presnosťou.*”¹⁰ Práve táto umelá inteligencia má obrovský potenciál, nie len v rámci výkonu štátneho dozoru na úseku ochrany životného prostredia ale prakticky v rámci celej verejnej správy.

Otázkou však aj naďalej zostáva právny rámec využívania umelej inteligencie, či už v rámci výkonu verejnej správy, ale aj v súkromnom sektore. Ako tomu býva zvykom, aj napriek početnej legislatívnej aktivite, ktorá môže mať pri niektorých predpisoch aj charakter legislatívnej smršte, nie je možné tvrdiť, že právo dostatočne a včas reflektuje na technologický pokrok. Ten je totiž stále niekoľkonásobne rýchlejší. Uvedené sa odzrkadľuje práve aj na téme umelej inteligencie a príslušnej právnej úpravy a to vo forme úplnej absencie vnútroštátnej právnej úpravy využívania AI.

Túto medzeru aspoň čiastočne vyplní legislatíva Európskej únie, konkrétne Nariadenie Európskeho parlamentu a rady (EÚ) 2024/1689, ktorým sa stanovujú harmonizované pravidlá v oblasti umelej inteligencie, teda Akt o umelej inteligencii.¹¹ Toto nariadenie stanovuje základný právny rámec pre používanie AI v Európskej únii, pravidlá uvádzania takýchto systémov na trh, pravidlá na transparentnosť, ale napríklad aj súbor osobitných požiadaviek kladených na vysokorizikové systémy.¹²

Práve pojem vysokorizikový systém je pre verejnú správu a potenciálne využitie umelej inteligencie v rámci jej činnosti nesmierne dôležitý a to práve z toho dôvodu, pretože na tieto systémy sú kladené ďalšie doplnujúce požiadavky, pretože sa predpokladá ich mimoriadna dôležitosť a zložitá povaha úloh, na ktoré budú využívané. Medzi tieto požiadavky patrí napríklad systém riadenia rizík, požiadavky na technickú dokumentáciu, transparentnosť, ale čo je najdôležitejšie, povinnosť ľudského dohľadu nad AI systémom.¹³ Vysokorizikové systémy upravuje čl. 6 Aktu o AI, ktorý definuje pravidlá klasifikácie vysokorizikových systémov. Tento

⁹ Mesarčík, M., Gyurász, Z. a kol. (2024). Právo a umelá inteligencia. Právnická fakulta Univerzity Komenského v Bratislave. s. 17.

¹⁰ Tamže, s. 24.

¹¹ Nariadenie Európskeho parlamentu a rady (EÚ) 2024/1689, ktorým sa stanovujú harmonizované pravidlá v oblasti umelej inteligencie a ktorým sa menia nariadenia (ES) č. 300/2008, (EÚ) č. 167/2013, (EÚ) č. 168/2013, (EÚ) 2018/858, (EÚ) 2018/1139 a (EÚ) 2019/2144 a smernice 2014/90/EÚ, (EÚ) 2016/797 a (EÚ) 2020/1828 (akt o umelej inteligencii).

¹² Čl. 1 Aktu o umelej inteligencii.

¹³ Čl. 8 a nasl. Aktu o umelej inteligencii.

článok nás okrem iného v odseku 2 odkazuje na prílohu č. 3, kde nachádzame zoznam jednotlivých vysokorizikových systémov vymedzených prostredníctvom účelu, na ktorý sa majú tieto systémy využívať. V tejto súvislosti je pre nás dôležitý bod 6 tejto prílohy, ktorý definuje systémy využívané v rámci presadzovania práva. Ako vysokorizikový systém je podľa tejto prílohy možné posúdiť „systém AI, ktoré majú používať orgány presadzovania práva alebo ktoré sa majú používať v ich mene alebo ktoré majú používať inštitúcie, orgány, úrady alebo agentúry Únie na podporu orgánov presadzovania práva na profilovanie fyzických osôb uvedené v článku 3 bode 4 smernice (EÚ) 2016/680 v priebehu odhaľovania, vyšetrovania alebo stíhania trestných činov”. Uvedené nariadenie hovorí len o vyšetrovaní a stíhaní trestných činov, pričom nikde nespomína správne konanie či sankcionovanie správnych deliktov. Na prvý pohľad by sa preto mohlo javiť, že systémy verejnej správy používané v rámci administratívnych procesov ale aj v rámci správneho trestania nebudú vysokorizikovými systémami verejnej správy. Tento záver však nie je možné označiť za úplný. Aj napriek tomu, že sankcia udeľovaná fyzickým či právnickým osobám v rámci správneho konania nie je tak zásadná ako zásahy do práv realizované prostredníctvom trestného práva, ide stále o rozhodovanie o právach, právom chránených záujmoch a povinnostiach občanov. Preto v tejto súvislosti môžeme hovoriť o pochybnostiach týkajúcich sa najmä práva na spravodlivý proces prostredníctvom uplatnenia účinného opravného prostriedku či napríklad prezumpcie nevinu, ktoré by mohli nastať v súvislosti s využívaním systémov AI v rámci takejto rozhodovacej činnosti, ak by takýto systém nebol posudzovaný ako vysokorizikový a neboli by na neho kladené dodatočné požiadavky stanovené nariadením. Takáto činnosť rovnako súvisí aj s využívaním veľkého množstva osobných údajov. Majú byť teda systémy AI, ktoré by boli využívané v rámci správneho konania a v procese rozhodovania posudzované ako vysokorizikové? Aj keď zo samotného textu nariadenia sa nám javí odpoveď na túto otázku negatívne, jasnejšie svetlo do nej vnáša recitál č. 59 nariadenia, ktorý hovorí, že „je vhodné klasifikovať ako vysokorizikové viaceré systémy AI, pokiaľ je ich používanie povolené na základe relevantného práva Únie alebo vnútroštátneho práva, určené na používanie v kontexte presadzovania práva, kde je presnosť, spoľahlivosť a transparentnosť obzvlášť dôležitá, aby sa zabránilo nepriaznivým vplyvom, zachovala dôvera verejnosti a zabezpečila zodpovednosť a účinná náprava.“¹⁴

¹⁴ Recitál č. 59 Aktu o umelej inteligencii.

3 Možnosti a limity využívania AI v environmentálnom dozore a v správnom konaní

Umelá inteligencia má samozrejme v správnom dozore, ako aj následne v správnom konaní veľký potenciál. Pri stálom tlaku na rastúcu mieru efektivity orgánov verejnej správy sa môže javiť ako ideálny pomocník napríklad pri spracúvaní veľkého množstva dát či podkladov, ale aj pri formulovaní výstupov z kontroly alebo samotných rozhodnutí. Obrovskou pomôckou pre zamestnancov správnych orgánov vykonávajúcich štátny dozor, najmä na úseku starostlivosti o životné prostredie, by mohol byť kvalitný systém, presne prispôsobený požiadavkám správneho orgánu, ktorý by fungoval ako veľký jazykový model a pomáhal by zamestnancom, ktorí často nemajú právnické vzdelanie, nie len so samotným vedením správneho konania ale najmä s prípravou výstupov. Uvedené by jednoznačne malo potenciál zvýšiť nie len efektivitu práce v rámci konkrétneho správneho orgánu, ale prispelo by aj k väčšej hospodárnosti a efektívnosti a tým v konečnom dôsledku aj k vyššej miere ochrany životného prostredia. AI by sa rovnako dala využiť aj v rámci dôkazného konania v správnom konaní, kde by mohla pomôcť s analýzou dôkazov či ich spracovaním. Takýto systém by mohol byť riešením napríklad v prípade skúmania niekoľkohodinového video záznamu, kde potrebujeme nájsť jeden konkrétny moment. To čím by zamestnanec správneho orgánu musel stráviť dlhé hodiny, môže mať AI spracované behom niekoľkých sekúnd.

Otázniky však visia nad použiteľnosťou a zákonnosťou takýchto dôkazov, do ktorých akýmkoľvek spôsobom zasiahla umelá inteligencia. V takomto prípade môžeme hovoriť o takzvaných algoritmických dôkazoch. Problém spojený so zásahom AI do dôkazov, či dokonca s vytváraním dôkazov prostredníctvom nej, napríklad vo forme rôznych analýz alebo posudkov, je ešte vypuklejší v zahraničí, kde je AI využívaná napríklad na predikciu recidívy u páchatel'ov trestnej činnosti. V našich podmienkach takéto pokusy zatiaľ nebadáme. Využívanie AI v rámci orgánov verejnej správy je stále skôr v sfére jednotlivých zamestnancov, ktorí skúšajú možnosti bežne dostupných chatbotov, nie v inštitucionálnej rovine vývinu vlastných systémov pre potreby verejnej správy. Otázkou môže taktiež byť, ako by bolo posudzované takéto konanie zamestnanca v prípade, že by bolo uvedené rozhodnutie nezákonné alebo nesprávne, avšak v tomto kontexte nemôžeme hovoriť o probléme vyvodzovania zodpovednosti za nezákonné rozhodnutie vytvorené AI, nakoľko nešlo o automatizované rozhodovanie umelej inteligencie.

Ako sme už uviedli, v jednotlivých zložkových predpisoch upravujúcich oprávnenia orgánov v rámci výkonu štátneho dozoru, ako aj v zákone č. 10/1996 Z. z. o kontrole v štátnej správe absentuje akákoľvek možnosť využitia AI. Práve preto sa takáto činnosť dostáva do

konfliktu s § 34 správneho poriadku, ktorý hovorí, že „na dokazovanie možno použiť všetky prostriedky, ktorými možno zistiť a objasniť skutočný stav veci a ktoré sú v súlade s právnymi predpismi.“¹⁵ Uvedené ustanovenie teda dáva možnosť správnym orgánom využiť aj iné dôkazné prostriedky, ako tie, ktoré sú upravené v druhom odseku, avšak tieto musia objasňovať skutočný stav veci a musia byť získané v súlade s právnymi predpismi. Správny orgán by mal tieto dôkazy vykonať tak, „aby boli dodržané základné ústavnoprávne zásady, práva príslušných osôb v kontexte európskeho, resp. medzinárodného práva, aby sa pri vykonaní dôkazu v neprimeranom rozsahu nezasiahlo do práv a právom chránených záujmov tretích osôb, ďalej má povinnosť vykonať dôkaz rýchlo, hospodárne a účelne.“¹⁶ V tomto prípade je však možné viesť polemiku aj o otázke, či dôkaz získaný s pomocou umelej inteligencie naozaj prispieva k objasneniu skutočného stavu veci, pričom uvedené posúdenie by pravdepodobne záležalo na konkrétnom prípade a konkrétnom dôkaze a spôsobe použitia AI.

Využívanie umelej inteligencie vo verejnej správe sa tiež spája s viacerými rizikami, najmä v súvislosti s ochranou osobných údajov a kybernetickou bezpečnosťou, nakoľko orgány verejnej správy prichádzajú prakticky neustále v rámci svojej činnosti do styku s údajmi fyzických osôb, ktoré môžu mať aj charakter citlivých osobných údajov.¹⁷ Právne v tejto súvislosti je nevyhnutné, aby boli tieto systémy zabezpečené tak, aby boli odolné voči kybernetickým útokom, a teda aby bola zabezpečená bezpečnosť osobných údajov a nedochádzalo k ich úniku či ohrozeniu.

Rovnako dôležitou je aj otázka transparentnosti takýchto rozhodnutí, na ktorú je možné nazerať z viacerých hľadísk. Jedným z nich je najmä skutočnosť, že by adresáti takýchto rozhodnutí mali byť za každých okolností informovaní o zásahu AI. Takýto systém by mal byť tiež predvídateľný vo svojich rozhodnutiach, pričom by malo byť jednoznačne zrejmé ako a na základe čoho rozhodol. Práve tento aspekt je však dlhodobo jedným z najvýraznejších kritických momentov AI, známym pod pojmom black box, ktorého podstata spočíva práve v tom, že nie je možné určiť ako na základe čoho umelá inteligencia robí závery a akým spôsobom rozhoduje.¹⁸

Výhodou, ale aj limitom využívania umelej inteligencie môže byť jej nezaujatosť, resp. zaujatosť. Práve nezaujatosť AI je často uvádzaná ako jedna z jej základných výhod, avšak jej

¹⁵ § 34 zákona č. 71/1967 Zb. o správnom konaní (správny poriadok) v znení neskorších predpisov.

¹⁶ Potasch, P., Hašanová, J., Vallová, J., Milučký, J. (2022). Správny poriadok komentár. C. H. Beck. s. 334 – 344.

¹⁷ K citlivým osobným údajom pozri bližšie: Mesarčík, M. (2020). Ochrana osobných údajov. C.H. Beck. s. 49 – 50.

¹⁸ Akbar, S. A., Mehdi, T., Azam, S. (2025). The Scope of Artificial Intelligence in Evidence Evaluation. Judicial Proceeding, 4(01), s. 3628–3641.

výstupy často závisia od vstupných údajov, ktorými disponuje. Preto je veľmi dôležité, aby pri tvorbe systému bol tento zodpovedne prispôsobený potrebám konkrétneho správneho orgánu a naplnený relevantnými vstupnými údajmi, ktoré skutočne zabezpečia jeho objektivitu.¹⁹

Záver

Umelá inteligencia sa v súčasnosti rozvíja naozaj rýchlo a postupne sa stáva súčasťou nášho každodenného života. Výnimkou nie sú ani orgány verejnej správy, kde by jej využitie malo bezpochyby obrovský potenciál, najmä s prihliadnutím na efektivitu, hospodárnosť a rýchlosť ich činnosti. Na úseku ochrany životného prostredia by takto mohla prispievať aj k zvýšenej miere ochrany životného prostredia práve prostredníctvom urýchlenia celého procesu štátneho dozoru ako aj následného správneho konania. Jej potenciál je možné využiť najmä pri spracovaní veľkého množstva dát či príprave rozhodnutí, protokolov z kontroly či iných písomností.

Benefitov teda v tejto oblasti vieme nájsť nespočetne veľa. Rovnako je tomu však aj s rizikami. Prvým základným problémom je absencia akéhokoľvek oprávnenia využívať moderné technológie vrátane umelej inteligencie v rámci výkonu štátneho dozoru podľa jednotlivých zložkových predpisov v oblasti ochrany životného prostredia. Uvedené teda znamená, že orgány vykonávajúce štátny dozor nie sú oprávnené na využívanie umelej inteligencie v rámci výkonu dozoru. Najväčší potenciál na prijatie takejto právnej úpravy bol pri tvorbe nového zákona o ochrane ovzdušia v roku 2023, avšak aj tento predpis obsahuje len všeobecné konštatovanie o možnosti využívania technických prostriedkov na zhotovovanie fotodokumentácie a videodokumentácie.

Čo sa týka právnej úpravy využívania AI vo všeobecnosti, vnútroštátna úprava tejto otázky doposiaľ prijatá nebola. Na rozmach umelej inteligencie však už reagovala Európska únia v podobe takzvaného Aktu o umelej inteligencii. Tento upravuje kategóriu vysokorizikových systémov, na ktoré kladie náročnejšie požiadavky ako na bežné AI systémy. Takýmto vysokorizikovým systémom by bol aj systém využívaný orgánom verejnej správy v rámci jeho rozhodovacej činnosti, práve kvôli jeho vplyvu na práva a povinnosti občanov. V tejto súvislosti je možné skonštatovať, že používanie umelej inteligencie v rámci výkonu dozoru, ale aj v rámci dokazovania v správnom konaní je zatiaľ viac ako problematické, najmä s poukazom na ustanovenie § 34 ods. 1 správneho poriadku, nakoľko orgánom chýba zákonný

¹⁹ Pintérová, D. (2024). Právna regulácia umelej inteligencie (perspektívy a výzvy). Právny obzor, 107, č. 4. Wolters Kluwer. s.363.

podklad na takéto konanie a rovnako doposiaľ absentuje aj akákoľvek rozhodovacia prax súdov a ich prípadné posúdenie zákonnosti takto získaného, resp. spracovaného dôkazu.

Ako sme už uviedli, AI má nepochybne obrovský potenciál, avšak nesie so sebou aj viaceré riziká. Jedným z najväčších je otázka kybernetickej bezpečnosti a zachovania náležitej ochrany osobných údajov tak, aby sa predišlo k ich zneužitiu. Ďalším problémom je preskúmateľnosť takýchto rozhodnutí, nakoľko doposiaľ nevieme určiť akým spôsobom a na základe akých skutočností prijíma AI závery. V neposlednom rade sa ako problematická javí objektivita takéhoto rozhodovania, ktorá je podmienená charakterom vstupov, ktorým je naplnená. Odpoveď na tieto otázky však môže s istou zabezpečiť len prijatie legislatívy dôsledne upravujúcej jednotlivé aspekty využívania AI najmä v oblasti verejnej správy, ale aj ostatnými orgánmi verejnej moci rozhodujúcimi o právach a povinnostiach fyzických a právnických osôb.

Zoznam bibliografických odkazov

1. AKBAR, S. A., MEHDI, T., AZAM, S.: The Scope of Artificial Intelligence in Evidence Evaluation. *Judicial Proceeding*, 4(01), 2025. s. 3628–3641.
2. CEPEK, B. a kolektív: *Environmentálne právo. Všeobecná a osobitná časť*. Plzeň: Nakladatelství Aleš Čeněk, 2015. ISBN: 978-80-7380-560-9. 442 s.
3. MESARČÍK, M.: *Ochrana osobných údajov*. Bratislava: C.H. Beck. 2020. ISBN: 978-80-89603-92-3. 298 s.
4. MESARČÍK, M., GYURÁSZ, Z.: *Právo a umelá inteligencia*. Bratislava: Právnická fakulta Univerzity Komenského v Bratislave, 2024. ISBN: 978-80-7160-715-1. 244 s.
5. PINTÉROVÁ, D.: *Právna regulácia umelej inteligencie (perspektívy a výzvy)*. In: *Právny obzor*, 107, č. 4, Bratislava: Wolters Kluwer, 2024. s. 361 – 383.
6. POTASCH, P., HAŠANOVÁ, J., VALLOVÁ, J., MILUČKÝ, J., MEDŽOVÁ, D.: *Správny poriadok komentár*. Praha: CH Beck, 2022. ISBN: 978-80-7400-908-2. 688 s.
7. VRABKO, M. a kolektív: *Správne právo hmotné všeobecná časť*. Bratislava: C. H. Beck, 2025. ISBN: 978-80-8232-068-1. 320 s.
8. Nariadenie Európskeho parlamentu a rady (EÚ) 2024/1689, ktorým sa stanovujú harmonizované pravidlá v oblasti umelej inteligencie a ktorým sa menia nariadenia (ES) č. 300/2008, (EÚ) č. 167/2013, (EÚ) č. 168/2013, (EÚ) 2018/858, (EÚ) 2018/1139 a (EÚ) 2019/2144 a smernice 2014/90/EÚ, (EÚ) 2016/797 a (EÚ) 2020/1828 (akt o umelej inteligencii).
9. Zákon č. 10/1996 Z. z. o kontrole v štátnej správe v znení neskorších predpisov.
10. Zákon č. 71/1967 Zb. o správnom konaní (správny poriadok) v znení neskorších predpisov.
11. Zákon č. 543/2002 Z. z. o ochrane prírody a krajiny v znení neskorších predpisov.
12. Zákon č. 326/2005 Z. z. o lesoch v znení neskorších predpisov.
13. Zákon č. 79/2015 Z. z. o odpadoch.
14. Zákon č. 146/2023 o ochrane ovzdušia a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.
15. Zákon č. 364/2004 Z. z. o vodách a o zmene zákona Slovenskej národnej rady č. 372/1990 Zb. o priestupkoch v znení neskorších predpisov (vodný zákon).

NORMOTVNORNÁ ČINNOSŤ SAMOSPRÁV A JEJ PROBLÉMOVÉ OBLASTI

Normative activity of local self-governments and its problematic areas

MARTINA KUBIŠOVÁ*

Abstrakt

Cieľom tohto článku je venovať pozornosť obecnej normotvorbe, konkrétne chceme hovoriť o všeobecne záväzných nariadeniach obcí, so zameraním na ich ústavnosť, zákonnosť, na možnosti kontroly prijímaných VZN ex ante aj ex post. Proces tvorby a prijímania všeobecne záväzných nariadení je stále vysoko aktuálnou, sledovanou, kontrolovanou a diskutovanou problematikou. V článku spomenieme niektorých uznávaných autorov a ich práce, ktoré sa venujú hlavne kvalite normotvorného procesu samospráv, zákonnosti a ústavnosti VZN, spomenieme aj judikatúru súdov v tejto oblasti, či niektoré výsledky previerkovej činnosti prokuratúry. Tieto zdroje dokladujú, že pochybenia samospráv v prípade normotvornej činnosti sú početné, a preto odborné kapacity a znalosti v problematike sú v podmienkach samospráv dôležité a žiaduce pre zabezpečenie úrovne a kvality normotvornej činnosti samospráv.

Abstract

The aim of this article is to focus on municipal law-making, specifically, we want to discuss generally binding municipal regulations, with an emphasis on their constitutionality, legality, and on the possibilities of controlling mechanisms both ex ante and ex post. The process of drafting and adopting generally binding municipal regulations remains a highly relevant, monitored, controlled, and discussed issue. In the article, we mention certain recognized authors and their works, which mainly focus on the quality of the self-governing municipalities' law-making process, the legality and constitutionality of regulations, as well as relevant court case law and some results of prosecutorial inspection activities. These sources demonstrate that mistakes by local governments in the area of legislative activity are numerous, and therefore professional capacities and knowledge in the field are important and desirable within local governments to ensure the level and quality of their legislative activities.

Kľúčové slová: Normotvorba. Obec. Územná samospráva. Všeobecne záväzné nariadenie. Judikatúra ústavného súdu. Nálezy ústavného súdu. Prokuratúra. Zákon o obecnom zriadení.

Key words: Setting of standards. Municipality. Territorial Self-government. Generally binding regulations. Jurisprudence of Constitutional court. Findings of Constitutional court. The Prosecutor's office. Act of municipal establishment

Úvod

Problematike normotvornej činnosti samospráv sú venované početné odborné články, monografie autorov na Slovensku ako Sotolář, Sotolář, Jesenský, Vrabko, Ulaher, Trellová, Tekeli, Vernarský, Švikruha, Hoffmann, Šramel, Hvičš, Alman, Antalová, Sýkora ako aj ďalších. O dôležitosti problematiky svedčia aj protesty prokurátora či judikatúra súdov. Na kompetentné orgány sa obracajú aj samotné dotknuté subjekty, ktoré sa cítia VZN poškodené či nezákonne obmedzované. Je to dôkaz dôležitosti a aktuálnosti problematiky, s dosahom na

* Ing. Martina Kubišová, PhD., L.L.M., I. ročník, externá forma štúdia, 2. stupeň štúdia, Právnická fakulta UMB starostka.kyncelova@gmail.com

mnohé regulované subjekty. Samosprávy prijímajú VZN v rámci výkonu tak originálnej, ako aj prenesenej pôsobnosti. Ústava SR ako základný prameň práva, dáva obciam kompetenciu prijímať všeobecné záväzné nariadenia. Ďalším významným právnym predpisom je práve Zákon č. 369/1990 Zb. o obecnom zriadení v znení neskorších predpisov, ktorý ustanovuje aj samotný proces prijímania nariadení. Od roku 2018 novelizácia zákona o obecnom zriadení priniesla povinnosť pre samosprávy prijať niektoré obligatórne VZN, hoci samotné samosprávy v niektorých prípadoch deklarujú nepotrebnosť týchto nariadení na svojom území, a dokumentuje to aj v texte článku zmieňovaná Správa GP (Mihál, 2023)¹. V prvej a druhej kapitole článku postupne predstavujeme obsahovú aj procesnú stránku všeobecne záväzných nariadení miestnych samospráv, pričom sú tu spomenuté aj ex ante mechanizmy kontroly VZN. V tretej kapitole sa špecificky venujeme nástrojom ex post kontroly VZN a niektorým ich výsledkom. Podrobnejšie sa zamýšľame venovať problematike kontroly VZN v samostatnom článku, ktorý pripravujeme.

1. Legislatívne východiská problematiky obecnej normotvorby – obsahová stránka normotvorby samospráv

Proces tvorby a prijímania VZN upravuje zákon o obecnom zriadení v § 6. V rámci celého procesu sme identifikovali nasledovné etapy: príprava a predloženie návrh VZN (tejto téme sa venujeme v prvej kapitole článku), v nasledujúcej kapitole rozoberáme ďalšie procesy prijímania VZN: zverejnenie návrhu, jeho pripomienkovanie, vyhodnotenie pripomienok, prerokovanie a schvaľovanie v obecnom zastupiteľstve, signácia a vyhlásenie VZN.

Návrh VZN by mal mať určitý obsah a formu. Máme za to, že obce by mali využívať pri tvorbe VZN analógiu legis vzťahujúcu sa na Zákon č. 400/2015 Z. z. o tvorbe právnych predpisov a o Zbierke zákonov Slovenskej republiky a o zmene a doplnení niektorých zákonov v znení neskorších predpisov. Obce pre prípravu VZN využívajú externé právne služby. V tomto prípade, môžeme predpokladať, že predkladaný návrh bude mať určenú formu, obsah a bude v súlade s platnými právnymi predpismi SR. Často sme sa stretli najmä u menších obcí s tým, že vyhládávajú na internete, kopírujú ich a prispôbujú na svoje pomery. Návrh VZN pripravuje spravidla obec, ale môže to byť aj poslanecký návrh. Súčasťou predkladaného VZN

¹ Mihál, P. (2023). *Zhodnotenie stavu zákonnosti všeobecne záväzných nariadení miest a obcí vo veciach územnej samosprávy podľa § 4 ods. 5 písm. a) zákona Slovenskej národnej rady č. 369/1990 Zb. o obecnom zriadení v znení neskorších predpisov* [Materiál na poradu generálneho prokurátora Slovenskej republiky]. Generálna prokuratúra Slovenskej republiky.

by mala byť dôvodová správa spracovaná predkladateľom, ktorá vysvetlí dôvody potreby prijatia predmetného VZN ako aj ďalšie potrebné súvislosti.

Všeobecne záväzné nariadenia je potrebné považovať za právny prostriedok, ktorý má význam predovšetkým celospoločenský, t. j. z hľadiska ochrany základných spoločenských hodnôt, resp. nastavenia základných štandardov v danej komunite (lokalite alebo regióne). V zásade však nemôžu slúžiť ako prostriedok nahradzujúci ochranu práv a právnych záujmov jednotlivca v oblasti súkromnoprávných vzťahov, kde závisí predovšetkým na individuálnej aktivite jednotlivca, aby strážil svoje práva. (Sotolář, J. – Sotolář, M. 2023)²

Transparentný a efektívny proces normotvorby na úrovni obce, môže významne prispieť k rozvoju obce a k zvýšeniu kvality života jej obyvateľov. Zapojenie obyvateľov do procesu prijímania všeobecne záväzných nariadení, nielenže podporuje transparentnosť, ale aj realizáciu samotných demokratických princípov na úrovni územnej samosprávy.

Samosprávnym všeobecne záväzným nariadením môže obec upraviť spoločenské vzťahy, ktorých právna úprava na lokálnej úrovni je nevyhnutná v záujme príslušného miestneho spoločenstva, resp. v záujme riešenia vecí územnej samosprávy, za predpokladu dodržania ústavnosti a zákonnosti normotvornej činnosti obce. Všeobecne záväzné nariadenie aj keď by bolo v súlade s Ústavou SR a zákonmi nemôže ustanoviť to, čím by sa zasahovalo do súkromného a rodinného života.³ 3Jednotlivé etapy normotvorného procesu komunálnej samosprávy nemajú z hľadiska svojho rozsahu úplne rovnakú zákonnú úpravu. Konštatuje Šramel (2015)⁴ niektoré etapy normotvorného procesu sú na jednej strane pomerne detailne upravené (napr. vyhlásenie všeobecne záväzného nariadenia), na strane druhej iné etapy sú upravené len veľmi stroho a vyplývajú prípadne len z internej úpravy či zaužívaných postupov (napr. otázka normotvornej iniciatívy).

Zákon o obecnom zriadení neobsahuje definíciu VZN, ale nachádzajú sa v ňom pojmové znaky, ktoré ho vymedzujú. Vzhľadom na túto skutočnosť, sme identifikovali niekoľko znakov charakteristických pre všeobecne záväzné nariadenia obcí:

- sú formálnym prameňom práva,
- sú prameňom práva, ktorý nevytvoril priamo štát alebo štátne orgány,
- sú právne záväzné,

² J. Sotolář & M. Sotolář (2023). *Všeobecne záväzné nariadenia obcí a miest (normotvorba v samospráve)* (s. 116–134). SOTAC.

³ Hvišč, O. (2015). Tvorba práva na úrovni vyššieho územného celku. In *Územná samospráva a tvorba práva* (s. 74–81). Univerzita Pavla Jozefa Šafárika v Košiciach.

⁴ Šramel, B. (2015). Normotvorný proces v komunálnej samospráve. In *Komunálna samospráva na Slovensku optikou verejnej politiky* (s. 27–37). Univerzita sv. Cyrila a Metoda v Trnave.

- majú obmedzenú územnú pôsobnosť - obsahujú právne normy, ktorými obec reguluje správanie fyzických a právnických osôb na svojom území (výnimku tvoria VZN účinné pre viac obcí),
- vecná pôsobnosť zahŕňa jednotlivé kompetencie, ktoré obec plní - môže ísť o samosprávu alebo prenesenú pôsobnosť,
- pod časovou pôsobnosťou rozumieme vymedzenie časového úseku, počas ktorého VZN záväzne reguluje spoločenské vzťahy, dôležitým pri časovej pôsobnosti je práve vznik a zánik platnosti a účinnosti VZN,
- vzťahujú sa na neurčitý počet prípadov rovnakého druhu,
- prijímané môžu byť len uznesením obecného zastupiteľstva, rovnako menené alebo rušené,
- pravidlá ich tvorby stanovuje osobitný zákon.

Základnou právnou úpravou upravujúcou VZN je zákon č. 369/1990 Zb. o obecnom zriadení v znení neskorších predpisov. Nadobudnutím účinnosti zákona č. 70/2018 Z. z., ktorým sa mení a dopĺňa zákon č. 369/1990 Zb. o obecnom zriadení nastala zmena oproti predošlej právnej úprave, ktorá neustanovovala povinnosť obce prijať konkrétne všeobecne záväzné nariadenia. V rámci predmetnej zmeny došlo k zmene a v zmysle § 4 ods. 5 písm. a zákona o obecnom zriadení obciam vznikla povinnosť nariadením ustanoviť: 1. názvy ulíc a iných verejných priestranstiev, ako aj ich zmeny, 2. pravidlá na udržiavanie čistoty v obci a ochranu verejnej zelene, 3. pravidlá času predaja v obchode a času prevádzky služieb, 4. podrobnosti o organizácii miestneho referenda, 5. činnosti, ktorých vykonávanie je zakázané alebo obmedzené na určitý čas alebo na určitom mieste.⁵ Fakultatívne VZN novela koncipovala formou legislatívnej blankety, o ktorej zrozumiteľnosti Tekeli polemizuje. Tekeli dáva do pozornosti judikatúru Ústavného súdu ČR, v prípade ktorej došlo k obratu vo vzťahu k samosprávnej normotvorbe už v roku 2007, podľa ktorého už Ústavný súd nebude vyžadovať, aby obce mali pri ukladaní povinností samostatnou normotvorbou osobitné zákonné splnomocnenie. Ústavný súd ČR zdôvodnil toto svoje rozhodnutie posunom v právnom povedomí subjektov participujúcich na normotvorbe.

1.2. Testy regulatívnosti všeobecne záväzných nariadení obce

Predpokladá sa, že VZN prejdú každým krokom testu v presne danej postupnosti. Ak by bolo pri vykonávaní testu zistené, že skúmané VZN nespĺňa stanovené podmienky v rámci niektorého kroku, testovanie sa zastaví s konštatovaním, že regulácia konkrétnych skúmaných

⁵ Zákon č. 369/1990 Zb. o obecnom zriadení v znení neskorších predpisov.

spoločenských vzťahov je nemožná. Testy sú vhodným nástrojom, ktorý pomáha odôvodniť potrebnosť VZN. Členenie jednotlivých testov je nasledovné: 1. Primárny test. 2. Test 4 krokov (tiež uvádzaný ako základný test). 3. Prvotný test – zahŕňa test legality, diskriminácie a hospodárskej súťaže. 4. Test proporcionality – zahŕňa test proporcionality (vrátane klasického trojstupňového testu a taktiež na vylúčenie extrémnej disproporcionality) a racionality.⁶

U Furkovej (2013)⁷ sa stretávame s odporúčaním len na vykonanie testu 4 krokov, ktorý využíva Ústavný súd ČR. Využíva sa posúdenie obsahu VZN a kroky sú nasledujúce: 1. skúma sa, či obec mala právomoc vydať VZN, 2. či nekonala mimo vecnej pôsobnosti, ktorú jej ukladajú právne predpisy, 3. či pri vydávaní VZN, obec nezneužila danú právom a pôsobnosť, 4. či obec nejednala absurdne.

2. Legislatívne východiská problematiky obecnej normotvorby – procesná stránka normotvorby samospráv

Obec má obligatórnu povinnosť zverejniť návrh VZN na úradnej tabuli obce a zároveň na webovom sídle obce. V zmysle osobitného predpisu, ktorým je Zákon č. 305/2013 o elektronickej podobe výkonu pôsobnosti orgánov verejnej moci a o zmene a doplnení niektorých zákonov (zákon o e-Governmente) v znení neskorších predpisov⁸ ukladá obci povinnosť zverejňovania aj na Centrálnnej úradnej elektronickej tabuli na portáli slovensko.sk. Z časového hľadiska má obec povinnosť zverejniť návrh najmenej 15 dní pred rokovaním obecného zastupiteľstva. Stáva sa, že obec zverení návrh VZN, ktoré je predpísaných 15 dní vyvesené, avšak termín rokovania obecného zastupiteľstva sa posunie. Máme za to, že predmetný návrh VZN by mal byť zverejnený až do dňa konania obecného zastupiteľstva.

Proces pripomienkovania zvyšuje legitímnosť VZN. Etapa pripomienkovania trvá najmenej v lehote 10 dní od zverejnenia návrhu VZN. Zainteresované strany, ktorými môžu byť fyzické a právnické osoby, vzniesť pripomienky k navrhovanému VZN pred ich schválením. Pripomienky môžu zasielať prostredníctvom mailu, pošty alebo osobne priamo do zápisnice na obecnom úrade. Podstatné je, aby pripomienky boli jasne formulované a odôvodnené. Pripomienka nemôže byť anonymná. Na podnety, ktoré nie sú pripomienkou a nie sú zdôvodnené sa neprihliada.

⁶Sotolář, J., & Sotolář, M. (2023). *Všeobecně závazné nařízení obcí a míst (normotvorba v samosprávě)* (s. 116–134). SOTAC.

⁷Furková, P., Matějková, L., & Rosová, Š. (2013). *Tvorba obecně závazných vyhlášek: Praktický průvodce pro obce* (1. vyd., s. 9–17). C. H. Beck.

⁸Pozri §34 Zákona č. 305/2013 o elektronickej podobe výkonu pôsobnosti orgánov verejnej moci a o zmene a doplnení niektorých zákonov (zákon o e-Governmente) v znení neskorších predpisov.

Všetky zaslané pripomienky sú po uplynutí lehoty na pripomienkovanie vyhodnotené, relevantné pripomienky môže samospráva zohľadniť a zapracovať do návrhu VZN pred jeho schvaľovaním. Vyhodnotenie pripomienok musí byť poskytnuté poslancom obecného zastupiteľstva najneskôr 3 dni pred rokovaním obecného zastupiteľstva.

Obecné zastupiteľstvo je kolektívny orgán, ktorý vždy rokuje v zbore. V zmysle zákona o obecnom zriadení⁹ je podmienkou spôsobilosti rokovať a uznávať sa, ak je prítomná nadpolovičná väčšina všetkých poslancov. Obecné zastupiteľstvo svoj súhlas teda schválenie vyjadruje nadpolovičnou väčšinou alebo trojpäťtinovou väčšinou všetkých prítomných poslancov. V prípade schvaľovania VZN sa požaduje trojpäťtinová väčšina.

Po schválení v obecnom zastupiteľstve je potrebná signácia starostom/primátorom. Zákon mu ukladá lehotu 10 dní od schválenia. Zákon starostovi umožňuje využiť sistačné právo, ktoré je upravené v § 13 ods. 6 zákona o obecnom zriadení *„Starosta môže pozastaviť výkon uznesenia obecného zastupiteľstva, ak sa domnieva, že odporuje zákonu alebo je pre obec zjavne nevýhodné tak, že ho nepodpíše v lehote podľa § 12 ods. 10.“*¹⁰ Štúdiom dostupnej literatúry sme sa stretli s právnou dilemou, či je starosta oprávnený využiť sistačné právo aj na VZN alebo exaktne iba na uznesenie obecného zastupiteľstva. Kukliš (2012)¹¹ takéto uplatnenie práva starostu akceptuje. Naopak Palúš (2020)¹² nesúhlasí s výkladom, že starosta môže využiť sistačné právo na pozastavenie VZN. Rovnako Sotolář (2023)¹³ tvrdí, že využitie sistačného práva starostu sa nevzťahuje na VZN. Situácia je ešte komplikovanejšia v prípadoch, keď obecné zastupiteľstvá prijímajú VZN formou uznesení (t.j. uznesenie o prijatí všeobecne záväzného nariadenia)¹⁴. Máme za to, že riešením by bola úprava zákonodarcu a exaktné vymedzenie, prípadne doplnenie § 13 ods. 7 zákona o obecnom zriadení aj o všeobecne záväzné nariadenie obce.

V prípade uplatnenia sistačného práva majú poslanci možnosť prelomiť toto právo starostu. Musia tak urobiť do 3 mesiacov od schválenia VZN a musia VZN potvrdiť trojpäťtinovou väčšinou všetkých poslancov.

S prijatým VZN je potrebné oboznámiť verejnosť. Na to slúži inštitút vyhlásenia. Rovnako ako sa zverejňuje návrh VZN, obec má obligatórnu povinnosť zverejniť schválené

⁹ Pozri § 12 Zákona č. 369/1990 Zb. o obecnom zriadení v znení neskorších predpisov.

¹⁰ Zákon č. 369/1990 Zb. o obecnom zriadení v znení neskorších predpisov

¹¹ Kukliš, P., & Virová, V. (2012). *Vybrané problémy miestnej samosprávy (v komparácii niektorých štátov Európskej únie)* (s. 73). Eurokódex.

¹² Palúš, I. (2020). Sistačné právo starostu obce – slovenská legislatíva a prax. *Správní právo*, 53(7), 386–387.

¹³ Sotolář, J., & Sotolář, M. (2023). *Průručka starostu obce* (s. 271). SOTAC.

¹⁴ Jesenko, M. (2015). Tvorba práva na úrovni obcí v podmienkach Slovenskej republiky. *Grant Journal*, 4(2). Pozri aj Tekeli, J., & Hoffmann, M. (2014). *Zákon o obecnom zriadení: Komentár* (1. vyd.). Wolters Kluwer.

VZN na úradnej tabuli najmenej na 15 dní. Okrem zverejnenia na úradnej tabuli obce, obec zverejňuje prijaté VZN na webovom sídle obce a taktiež v zmysle zákona o e-governmente na centrálnej úradnej elektronickej tabuli na stránke slovensko.sk. Vyhlásenie VZN má vplyv na platnosť a účinnosť VZN.

2.1 Platnosť všeobecne záväzného nariadenia

Platnosť VZN ovplyvňujú viaceré právne skutočnosti. Aby bolo VZN platné, musí spĺňať nasledovné požiadavky: musí byť prijaté v rámci právomoci obce, ktoré jej ukladá zákon; musí byť v súlade s ústavou, zákonmi, medzinárodnými zmluvami a inými právnymi predpismi vyššej právnej sily; musí prejsť procesom pripomienkovania; musí byť schválené obecným zastupiteľstvom; musí byť riadne zverejnené, aj vo fáze návrhu aj vo fáze vyhlásenia.

Ako bolo uvedené, na platnosť VZN má vplyv jeho vyhlásenie, a to zverejnením na úradnej tabuli obce, webovom sídle obce a na centrálnej úradnej elektronickej tabuli. Zákon obligatórne ustanovuje povinnosť zverejniť VZN na úradnej tabuli obci. Máme za to, že zverejnenie len na úradnej tabuli obce, nezakladá neplatnosť VZN.

Môžeme teda konštatovať, že VZN je platné splnením všetkých podmienok, ktoré ukladajú právne predpisy a jeho vyhlásením, teda prvým dňom zverejnenia na úradnej tabuli. Musíme podotknúť, že platnosťou sa VZN nestáva účinným a teda ani záväzným.

Pokladáme za potrebné spomenúť nulitné VZN, na ktoré sa pozerá tak, ako keby neexistovali a preto nikoho nezaväzujú. Takáto situácia nastane napríklad v prípade, keď obec prijme VZN, na ktoré ju právne predpisy neopravňujú. Pri VZN môže dôjsť aj k strate platnosti, a to rozhodnutím súdu a následným nedodržaním podmienok, ktoré ustanovuje zákon o obecnom zriadení.

V prípade využitia sistačného práva starostu, tým pozastavenia VZN a následnej možnosti poslancov obecného zastupiteľstva prelomiť sistačné právo starostu v lehote 3 mesiacov od schválenia VZN, v prípade nedodržania trojmesačnej lehoty VZN stráca platnosť. Napriek tomu, že v zákone nie je exaktne uvedený pojem nariadenie, ale uznesenie, máme za to, že túto lehotu je možno vzťahovať aj na VZN.

2.2 Účinnosť všeobecne záväzného nariadenia

Nariadenie sa v zmysle zákona o obecnom zriadení musí vyhlásiť. Vyhlásením, je zverejnenie vykonané vyvesením na úradnej tabuli obce a rovnako aj na webovom sídle obce a na centrálnej úradnej elektronickej tabuli. Účinnosť nemôže predchádzať platnosti VZN,

nakoľko podmienkou účinnosti je platnosť. VZN nadobúda účinnosť dodržaním pätnásť dňovej legisvakačnej doby, počas ktorej je VZN riadne zverejnené vyvesením a tým je umožnené, aby sa všetky dotknuté osoby mohli s jeho znením oboznámiť predtým, ako sa pre ne stane záväzným. Je možné ustanoviť aj neskorší dátum účinnosti. Skorší dátum účinnosti zákon pripúšťa v naliehavých prípadoch verejného záujmu avšak najskorším dňom účinnosti je deň vyhlásenia VZN.¹⁵ Na účinnosť VZN môže mať vplyv aj osobitný zákon. Príkladom takéhoto právneho predpisu je Zákon č. 30/2019 Z. z. o hazardných hrách a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.¹⁶

Súd na návrh prokurátora môže pozastaviť účinnosť VZN alebo jeho časti. Kontrolné mechanizmy externého charakteru v článku zmiňujeme iba okrajovo, pretože pripravujeme samostatný článok venovaný predmetnej problematike.

3. Mechanizmy kontroly obecnej normotvorby

Na viacerých miestach v práci spomíname úlohu občana pri správe vecí verejných, osobitne v otázkach normotvorby. Ako sme už uviedli v časti venovanej pripomienkovaniu VZN, občan participuje na normotvorbe jednak v procese prípravy legislatívy, keďže má právo pripomienkovať VZN ešte pred jeho prerokovaním a schvaľovaním v zastupiteľstve samosprávy. Občan má však práva aj v prípade už platných noriem. Konkrétne sa môže obrátiť na verejného ochrancu práv alebo na prokuratúru. Dôvodom, prečo sa na verejného ochrancu práv obracajú fyzické a právnické osoby v oblasti územnej samosprávy, je podľa Antalovej nielen nespokojnosť s prijatým všeobecne záväzným nariadením, ale tiež neporozumenie jeho obsahu či snaha o ich tvorbu, tam kde táto chýba.¹⁷

Známe podnety, ktoré verejný ochranca práv postúpil prokuratúre, sa týkali podľa Antalovej napr. všeobecne záväzných nariadení o spôsobe nakladania s komunálnymi odpadmi a drobnými stavebnými odpadmi, o poskytovaní opatrovateľskej služby, o spôsobe a výške úhrady za opatrovateľskú službu i o udeľovaní trvalého pobytu.

Na verejného ochrancu práv (na rozdiel od Ústavného súdu), sa môže občan obrátiť kedykoľvek, pričom nie je potrebné, aby vyčerpal ostatné právne možnosti a prostriedky (ostatné právne možnosti nevyužil napríklad z dôvodu vlastného nízkeho právneho vedomia). Výhodou verejného ochrancu práv je jeho neformálnosť konania, a tým aj možnosť konať

¹⁵ Pozri § 6 Zákon č. 369/1990 o obecnom zriadení v znení neskorších predpisov.

¹⁶ Pozri § 79 Zákon č. 30/2019 Z. z. o hazardných hrách a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.

¹⁷ Antalová, H. (2015). Tvorba práva územnou samosprávou a verejný ochranca práv. In *Územná samospráva a tvorba práva* (s. 82–97). Univerzita Pavla Jozefa Šafárika v Košiciach.

pružne (oproti súdom). Verejný ochranca práv má možnosť bezprostredne sa stretnúť s orgánmi územnej samosprávy a neformálne komunikovať, presviedčať a argumentovať v prospech zákonnosti i ústavnosti postupu a ochrany práv a slobôd občanov, teda využívať prostriedky jeho tzv. soft law (Antalová, 2015).

Občan má aj ďalšiu možnosť participovať na normotvorbe samospráv: má možnosť podať podnet prokurátorovi na preskúmanie VZN (Ulaher, 2021).¹⁸ Sťažnosti, petície a oznámenia občanov sú aj podľa Vrabka (2019)¹⁹ ďalším prostriedkom kontroly normotvorby obcí popri externých a externých špecializovaných kontrolných mechanizmoch, a teda ďalším dôležitým nástrojom participácie občanov na procese normotvorby. Petície sú pritom oproti zhromaždeniam obyvateľov obce a miestnym referendum aj prostriedkom často využívaným. Regulácia hazardu formou VZN je v podmienkach slovenských samospráv typicky spájaná s petíciou občanov, ako prejavom vôle občanov. O konkrétnych prípadoch angažovania sa občanov v procese normotvorby samospráv formou petície píše Vernarský a tiež Kiča a Michalovič.²⁰

Generálna prokuratúra SR hodnotila stav zákonnosti všeobecne záväzných nariadení (VZN) miest a obcí vo veciach územnej samosprávy, pričom sa zamerala na to, či si obce a mestá plnia zákonom uloženú povinnosť prijímať obligatórne VZN podľa § 4 ods. 5 písm. a) zákona č. 369/1990 Zb. o obecnom zriadení, ako aj na preskúmanie ich zákonnosti v kontexte ostatných právnych predpisov, ktoré upravujú pôsobnosť obcí a miest. Správa bola GP SR vypracovaná v roku 2023²¹. Zistená nezákonnosť, na ktorú prokurátori jednotlivých prokuratúr reagovali protestmi prokurátora, sa týkala najmä nasledovných úprav vo VZN: neurčité a so zákonom rozporné definovanie základných pojmov; neurčitosť, nezrozumiteľnosť textu VZN; úpravy obsahu VZN v rozpore a nad rámec zákonom ustanoveného splnomocňovacieho ustanovenia; prevzatie zákonnej úpravy do textu nariadení vo forme rôznych zákazov, obmedzení a povinností alebo konaní, ktoré sú skutkovými podstatami priestupkov, správnych deliktov a prípadne aj trestných činov; úpravy povinností a obmedzení činnosti v rozpore so

¹⁸ Ulaher, J. (2021). Ako postupovať pri proteste prokurátora proti všeobecne záväznému nariadeniu obce. *Portál Verejná správa SR*.

¹⁹ Vrabko, M. (2019). Normotvorba obcí pri výkone originálnej právomoci a pôsobnosti. In *Dobré všeobecne záväzné nariadenie: Zborník z vedeckej konferencie* (s. 8). Právnická fakulta Univerzity Komenského v Bratislave.

²⁰ Vernarský, M. (2019). Všeobecne záväzné nariadenie obce vo veci regulácie hazardu a petícia ako podmienka na jeho schválenie. In *Dobré všeobecne záväzné nariadenie* (s. 60–65). Právnická fakulta Univerzity Komenského v Bratislave.; Kiča, M., & Michalovič, M. (2019). Proces prijímania všeobecne záväzného nariadenia o obmedzení hazardných hier. In *Dobré všeobecne záväzné nariadenie* (s. 66–74). Právnická fakulta Univerzity Komenského v Bratislave.

²¹ Mihál, P. (2023). *Zhodnotenie stavu zákonnosti všeobecne záväzných nariadení miest a obcí vo veciach územnej samosprávy podľa § 4 ods. 5 písm. a) zákona Slovenskej národnej rady č. 369/1990 Zb. o obecnom zriadení v znení neskorších predpisov* [Materiál na poradu generálneho prokurátora Slovenskej republiky]. Generálna prokuratúra Slovenskej republiky.

zákonom, nad rámec zákona a spravidla bez toho, aby sa obmedzenia týkali určitého času alebo určitého miesta; úpravy sankcií za porušenie jednotlivých ustanovení VZN v rozpore so zákonom; úpravy kontrolných právomocí obcí a miest v rozpore so zákonom; absencia obligatórnych VZN; ukladanie nových povinností resp. obmedzení v rozpore so zákonnou úpravou; prijaté VZN obsahovali odkazy na právne predpisy, ktoré už v čase prijímania VZN boli neplatné; vytváranie vlastných definícií (už zákonom upravených) a pojmov vo VZN; modifikovanie textu zákona prebratého do VZN; zavádzanie nových skutkových podstát priestupkov a správnych deliktov; zverenie kontrolného oprávnenia nad dodržiavaním ustanovení VZN neoprávneným subjektom; nedostatky v procese schvaľovania VZN; problémy obcí zorientovať sa v danej problematike a predovšetkým ich neznalosť, čo konkrétne má byť obsahom uvedených VZN.

Výsledky previerok a závery tejto zmieňovanej správy GP viedli okrem iného k záveru, že zmena súčasnej úpravy v zákone o obecnom zriadení je žiaduca a nevyhnutná v tom smere, aby obce mohli v rámci výkonu samosprávy normatívne upraviť len tie spoločenské vzťahy, ktoré sú odôvodnené z hľadiska ich miestnych pomerov. *„Obligatórne uloženie takejto povinnosti v zmysle súčasnej úpravy je v mnohých prípadoch nelogické a neefektívne“*, píše sa v záveroch správy. Obligatórne uloženie takejto povinnosti v zmysle súčasnej úpravy je však v mnohých prípadoch nelogické a neefektívne.

V Správe GP sa ďalej píše: *„Z hľadiska hodnotenia príčin uvedeného stavu zákonnosti, okrem už vyššie naznačeného okruhu dôvodov právneho charakteru, možno uviesť, že nezanedbateľným aspektom, odrážajúcim nedostatočnú kvalitu hodnotenej normotvornej činnosti obce je aj nedostatok kvalifikovaného personálneho substrátu, osobitne v malých obciach, a v neposlednom rade aj rýchlo sa meniaci právna úprava, v dôsledku čoho obce „nestíhajú“ na tieto zmeny reflektovať. S uvedeným úzko súvisí aj tá skutočnosť, že rovnaká kvantita úloh nielen v rámci samosprávnej pôsobnosti ale aj v rámci preneseného výkonu štátnej správy, je zverená všetkým samosprávam bez ohľadu na ich veľkosť a tým aj na kapacity obecného/mestského úradu. Na tieto skutočnosti už orgány prokuratúry poukazujú dlhodobo, avšak doposiaľ žiadny výraznejší kvalitatívny posun v normotvorbe obcí zaznamenaný nebol.“* V neposlednom rade Správa vyzdvihuje práve opodstatnenie a význam previerkovej činnosti prokuratúry v oblasti VZN.

Záver

Aby boli všeobecne záväzné nariadenia, ktorými miestnej samosprávy na Slovensku regulujú správanie subjektov na svojom území, plané a účinné vyžaduje sa dodržanie

predpísaného postupu ich prijímania. Ale musíme podotknúť, že nielen proces prijímania môže mať vplyv na ich neplatnosť, prípadne neúčinnosť ale aj ich obsah. Máme za to, že práve neznalosť osobitných právnych predpisov, ktoré môžu mať vplyv na účinnosť konkrétnych nariadení, je v samospráve častým javom. Odborné personálne kapacity pre normotvorbu obcí sú hlavne v malých obciach značne limitované, resp. vôbec neexistujú.

Na základe naštudovanej problematiky v článku môžeme konštatovať, že nedostatky normotvornej činnosti miestnych samospráv na Slovensku majú tak procesný, ak aj obsahový charakter, pričom obsahový charakter nedostatkov je prevažujúci, a to často aj z toho dôvodu, že procesné postupy prípravy a prijímania VZN je, častokrát s odstupom času, problematické preskúmať. V prípade VZN, ktoré samosprávy prijímajú s cieľom regulovať správanie fyzických a právnických osôb na určitom území a v určitom čase, dochádza z hľadiska obsahového k porušeniu zákonnosti či ústavnosti VZN, alebo z hľadiska procesného dochádza k nedodržaniu potrebného postupu, aby VZN mohlo nadobudnúť platnosť a účinnosť. Samosprávy, hlavne veľkostne menšie, nemajú pre prípravu VZN potrebné odborné kapacity, a stáva sa, že text VZN kopíruje legislatívne znenie, alebo znenie VZN inej samosprávy namiesto špecifikácie „šitej“ na miestne podmienky. Zostávajú tak nástroje internej a externej kontroly normotvornej činnosti samospráv, význam činnosti ktorých je nesporný a nezastupiteľný.

Ani samotné právne názory na niektoré aspekty normotvorby samospráv a jej kontroly nie sú jednotné. Spomenieme napríklad právne výklady sistačného práva starostu či primátora v prípade prijímania VZN či názory na rozhodovaciu právomoc rôznych typov súdov v prípade súladu VZN s právnymi normami vyššej právnej sily a pod. Celé toto spektrum oblastí problematiky samosprávnej normotvorby je dôkazom dôležitosti potrebného vzdelávania a informovania kompetentných a dôkazom dôležitosti odbornej erudície personálnych kapacít miestnych samospráv v predmetnej oblasti.

V súvislosti s predkladanou problematikou článku a vzhľadom na poznatky zo samosprávnej praxe, vrátane tých osobných, by sme osobne navrhovali niekoľko odporúčaní:

1. Za dôležitú pokladáme neustálu edukáciu obcí, ako správne tvoriť a prijímať VZN. Toto odporúčanie je smerované najmä k menším obciam. Rovnako možno konštatovať, že samosprávam pri príprave a prijímaní všeobecne záväzných nariadení chýba metodická podpora, aká je poskytovaná napríklad v Českej republike. Tu za pozitívum pokladáme vzory VZN, ktoré majú pribudnúť na www.slovlex.sk.

2. Za jednu z významných oblastí pokladáme aj oblasť dozoru a kontroly normotvorby obcí. Občan a jeho právo zúčastňovať sa na normotvorbe samospráv je nesporné, o ochrane jeho práv

súvisiacej s normotvorbou samospráv nehovoriac. Občania sú častokrát tými, ktorí upozorňujú na nezákonnosť VZN a na porušenia či obmedzenia svojich práv týmito vadnými nariadeniami.

3. Hlavný kontrolór má nezastupiteľnú úlohu v samospráve. Ťažko predpokladať, či by legislatívne zakotvenie povinnosti kontrolóra predkladať stanovisko k návrhu VZN obecnému zastupiteľstvu viedla k skvalitneniu prijímaných VZN. Máme za to, že veľmi málo hlavných kontrolórov má právne vzdelanie a vzhľadom na túto skutočnosť by s ťažkosťou posudzovali zákonnosť predkladaného VZN. Čo by však vedeli posúdiť je, je nutnosť takejto regulácie a možné dopady na obyvateľov obce.

4. Ďalšími významným kontrolnými mechanizmami sú dozor prokurátora, správne súdy a Ústavný súd.. Považujeme za nevyhnuté vytvoriť centrálny register upozornení a protestov prokurátorov, ktorý by mal byť verejne prístupný. Faktom podporujúcim naše úvahy je skutočnosť, že pochybenia obcí pri tvorbe a prijímaní VZN sa opakujú, preto považujeme za vhodné, vytvoriť možnosti, ako sa oboznámiť s chybami, ktoré obce robia a tým sa ich vyvarovať. Môžeme konštatovať, že ústavný súd prispieva k rovnováhe medzi autonómiou obce na jednej strane a ochranou práv jednotlivcov na strane druhej. Tento proces preskúmania súladu pokladáme za nevyhnutný na zabezpečenie právnej istoty a ochrany základných práv občanov.

Na zdokumentovanie súčasnej praxe samosprávnej normotvorby prinášame v článku aj konkrétne výsledky z previerkovej činnosti prokuratúry, ale môžeme tu konštatovať aj vlastné poznatky aj skúsenosti z osobného pôsobenia v samosprávnej praxi. Predkladaným článkom chceme prispieť k skvalitneniu normotvornej činnosti samospráv pripomenutím najdôležitejších legislatívnych rámcov pre odbornú verejnosť, ktorá sa v praxi touto problematikou zaoberá, a zároveň chceme poukázať na dôležitosť odborného právneho vzdelania a právnych informácií pre zamestnancov a ďalšie orgány samospráv, ktoré participujú na príprave a schvaľovaní týchto dôležitých samosprávnych noriem.

Bibliografické odkazy

1. Antalová, H. (2015). Tvorba práva územnou samosprávou a verejný ochranca práv. In *Územná samospráva a tvorba práva* (s. 82–97). Univerzita Pavla Jozefa Šafárika v Košiciach.
2. Furková, P., Matějková, L., & Rosová, Š. (2013). *Tvorba obecně závazných vyhlášek: Praktický průvodce pro obce* (1. vyd.). C. H. Beck.
3. Hvišč, O. (2015). Tvorba práva na úrovni vyššieho územného celku. In *Územná samospráva a tvorba práva* (s. 74–81). Univerzita Pavla Jozefa Šafárika v Košiciach.
4. Jesenko, M. (2015). Tvorba práva na úrovni obcí v podmienkach Slovenskej republiky. *Grant Journal*, 4(2), 35–39.
5. Kukliš, P., & Virová, V. (2012). *Vybrané problémy miestnej samosprávy (v komparácii niektorých štátov Európskej únie)*. Eurokódex.
6. Mihál, P. (2023). *Zhodnotenie stavu zákonnosti všeobecne záväzných nariadení miest a obcí vo veciach územnej samosprávy podľa § 4 ods. 5 písm. a) zákona Slovenskej národnej rady č. 369/1990 Zb. o obecnom zriadení v znení neskorších predpisov* [Materiál na poradu generálneho prokurátora Slovenskej republiky]. Generálna prokuratúra Slovenskej republiky.
7. Palúš, I. (2020). Sistačné právo starostu obce – slovenská legislatíva a prax. *Správni právo*, 53(7), 383–392.
8. Sotolář, J., & Sotolář, M. (2023). *Všeobecne záväzné nariadenia obcí a miest (normotvorba v samospráve)*. SOTAC.
9. Šramel, B. (2015). Normotvorný proces v komunálnej samospráve. In *Komunálna samospráva na Slovensku optikou verejnej politiky* (s. 27–37). Univerzita sv. Cyrila a Metoda v Trnave.
10. Ulaher, J. (2021). Ako postupovať pri proteste prokurátora proti všeobecne záväznému nariadeniu obce. *Verejná správa SR*.
11. Vernarský, M. (2019). Všeobecne záväzné nariadenie obce vo veci regulácie hazardu a petícia ako podmienka na jeho schválenie. In *Dobré všeobecne záväzné nariadenie* (s. 60–65). Právnická fakulta Univerzity Komenského v Bratislave.
12. Vrabko, M. (2019). Normotvorba obcí pri výkone originálnej právomoci a pôsobnosti. In *Dobré všeobecne záväzné nariadenie* (s. 6–9). Právnická fakulta Univerzity Komenského v Bratislave.

Právne predpisy

13. Ústava Slovenskej republiky č. 460/1992 Zb. v znení neskorších predpisov
14. Zákon č. 30/2019 Z. z. o hazardných hrách a o zmene a doplnení niektorých zákonov v znení neskorších predpisov
15. Zákon č. 70/2018 Z. z., ktorým sa mení a dopĺňa zákon Slovenskej národnej rady č. 369/1990 Zb. o obecnom zriadení v znení neskorších predpisov
16. Zákon č. 305/2013 o elektronickej podobe výkonu pôsobnosti orgánov verejnej moci a o zmene a doplnení niektorých zákonov (zákon o e-Governmente) v znení neskorších predpisov
17. Zákon č. 369/1990 Zb. o obecnom zriadení v znení neskorších predpisov
18. Zákon č. 400/2015 Z. z. o tvorbe právnych predpisov a o Zbierke zákonov Slovenskej republiky a o zmene a doplnení niektorých zákonov v znení neskorších predpisov

EFEKTIVITA MEDZINÁRODNÉHO TRESTNÉHO SÚDU V KONTEXTE NESPOLUPRÁCE ŠTÁTOV

The effectiveness of the International Criminal Court in the context of non-cooperation of states

NICOLAS LONGAUER*

Abstrakt

Príspevok sa zaoberá problematikou nespolupráce štátov s Medzinárodným trestným súdom a jej dopadmi na efektívnosť medzinárodnej trestnej spravodlivosti. Vychádza z hypotézy, že efektívnosť Medzinárodného trestného súdu je priamo závislá od ochoty štátov spolupracovať, pričom jej nedostatok, či už z politických, mocenských alebo právnych dôvodov, zásadne obmedzuje výkon jurisdikcie a oslabuje legitimitu Súdu. Práca poukazuje na procesné aj systémové dôsledky nespolupráce, vrátane predlžovania konania, obmedzenia rozsahu vyšetrovania či vnímania selektivity Súdu. Zároveň sa rozoberajú skúsenosti so spoluprácou s veľmocami, signatárskymi a nesignatárskymi štátmi, a zdôrazňuje sa význam spolupráce s menšími štátmi, vnútroštátnymi orgánmi a komunitami. V závere sú predstavené navrhované riešenia na posilnenie spolupráce, vrátane budovania dôvery a rozvoja partnerstiev. Cieľom je poskytnúť komplexný pohľad na výzvy a možnosti zabezpečenia efektívnej medzinárodnej trestnej spravodlivosti.

Abstract

The paper addresses the executive issue of non-cooperation of states with the International Criminal Court and its impacts on the effectiveness of international criminal justice. It is based on the hypothesis that the effectiveness of the International Criminal Court is directly dependent on the willingness to work, while its lack, whether for political, power or legal reasons, fundamentally limits the exercise of jurisdiction and weakens the legitimacy of the Court. The paper points to the procedural and systemic consequences of non-cooperation, including prolonging proceedings, limiting the scope of the investigation or the perception of the selectivity of the Court. At the same time, the experience of cooperation with large, signatory and non-signatory states is discussed, and the importance of cooperation with smaller, domestic authorities and communities is emphasized. In conclusion, proposed solutions are presented to strengthen cooperation, including building trust and developing partnerships. The aim is to provide a comprehensive view of the challenges and opportunities for more effective international criminal justice.

Kľúčové slová: medzinárodná spravodlivosť. efektívnosť jurisdikcie. komplementarita. spolupráca štátov

Keywords: international justice. effectiveness of jurisdiction. complementarity. cooperation of states

Úvod

Medzinárodný trestný súd predstavuje kľúčový pilier medzinárodnej spravodlivosti. Jeho úlohou je trestné stíhanie jednotlivcov podozrivých zo spáchania zločinov podľa medzinárodného práva. Obzvlášť v súčasnosti sa jeho rola ukazuje byť viac ako aktuálna, no jeho limity vyvolávajú dôvodné pochybnosti o jeho efektívnosti, vzhľadom na pretvárajúce napätie medzi normatívnymi ambíciami Medzinárodného trestného súdu na jednej strane a

* Bc. Nicolas Longauer; II. ročník magisterského štúdiijného programu; denná forma štúdia Právnická fakulta Univerzity Mateja Bela v Banskej Bystrici; nicolaslongauer14@gmail.com

politickou realitou medzinárodných vzťahov na strane druhej, prejavujúce sa najvýraznejšie v otázkach spolupráce. Práve nespolupráca, motivovaná politickými, mocenskými alebo praktickými dôvodmi, predstavuje jeden z najvýznamnejších faktorov ovplyvňujúcich efektívnosť výkonu jeho jurisdikcie.

Príspevok je metodologicky založený na kvalitatívnej analýze právnych prameňov, doplnenej o syntézu a čiastočnú komparáciu aplikačnej praxe. Cieľom je poskytnúť komplexný pohľad na výzvy a možnosti, ktorými možno zabezpečiť efektivitu Medzinárodného trestného súdu pri výkone jeho jurisdikcie. V prvej kapitole poskytujeme normoprávny rámec spolupráce štátov s Medzinárodným trestným súdom. Obsahom druhej kapitoly je identifikácia politických a právnych dôvodov nespolupráce štátov so Súdom a odmietanie jeho jurisdikcie veľmocami. Treťou kapitolou analyzujeme priame dôsledky, ktoré nespolupráca štátov spôsobuje. Prostredníctvom štvrtej kapitoly ponúkame riešenia, ktorými by mohlo dôjsť k posilneniu efektivity jurisdikcie Súdu. Na záver konštatujeme, že efektivita Medzinárodného trestného súdu je do veľkej miery ovplyvnená spoluprácou štátov, ktorá predstavuje nielen procesnú prekážku, ale aj faktor oslabujúci výkon jeho jurisdikcie.

1 Normatívnoprávny rámec

Medzinárodný trestný súd (ďalej len „MTS“) je stálym medzinárodným súdom, ktorý vykonáva svoju jurisdikciu na základe Rímskeho štatútu. Jeho vecná pôsobnosť je obmedzená na najzávažnejšie zločiny podľa medzinárodného práva, konkrétne na zločin agresie, vojnové zločiny, zločiny proti ľudskosti a zločin genocídy.

1.1 Postavenie a fungovanie MTS

Medzinárodný trestný súd predstavuje špecializovanú medzinárodnú inštitúciu, ktorej jurisdikcia je obmedzená na oblasť medzinárodného trestného práva. Na rozdiel od ad hoc tribunálov, ktoré fungovali na princípe nadradenosti, je jeho činnosť založená na princípe komplementarity. V jeho zmysle Súd koná iba v prípade, ak štát nie je ochotný alebo schopný vykonávať trestné stíhanie sám.¹

Absencia vlastných donucovacích mechanizmov spôsobuje, že Medzinárodný trestný súd je pri výkone svojej jurisdikcie zásadne závislý od spolupráce štátov. Rímsky štatút preto

¹ Pozri článok 17 Vyhlášky ministra zahraničných vecí č.333/2002 Zb. o Rímskom štatúte Medzinárodného trestného súdu

zakotvuje spoluprácu štátov pri vyšetrovaní a trestnom stíhaní ako ich všeobecnú povinnosť.² Súd však môže požiadať o spoluprácu aj štát, ktorý nie je zmluvnou stranou Štatútu, a to na základe ad hoc dojednaní, alebo dohody. Rovnako je oprávnený žiadať o poskytnutie informácií a dokumentov aj medzivládne organizácie.³

V prípade, ak štát nesplní svoju povinnosť spolupracovať, Súd môže nálezom konštatovať nespoluprácu a vec postúpiť Zhromaždeniu štátov alebo Bezpečnostnej rade OSN, ak bola situácia postúpená týmto orgánom.⁴ Rímsky štatút však neobsahuje účinné mechanizmy, prostredníctvom ktorých by bolo možné spoluprácu štátov vynútiť, v dôsledku čoho zostáva jej zabezpečenie do značnej miery závislé od vôle štátov.⁵

2 Nespolupráca štátov ako problém praxe

Nadväzujúc na uvedený normatívnoprávny rámec možno konštatovať, že praktické fungovanie Medzinárodného trestného súdu je vo významnej miere determinované mierou spolupráce štátov. Súd nedisponuje vlastnými donucovacími mechanizmami, prostredníctvom ktorých by mohol svoju jurisdikciu presadzovať. Obzvlášť pri vyšetrovaní a zatýkaní podozrivých osôb vyžaduje spoluprácu štátov. Nakoľko MTS koná v súlade so zásadou komplementarity, v prípade ak štát vedie vlastné vyšetrovanie, v takomto prípade Súd do konania štátu nezasahuje. Súd koná až vtedy, ak štát nie je ochotný alebo schopný viesť skutočné vyšetrovanie alebo trestné stíhanie.⁶ Ako je už vyššie spomenuté, pri výkone svojej jurisdikcie najprv žiada štát o spoluprácu diplomatickým spôsobom, pričom štáty sú povinné poskytnúť spoluprácu a v nevyhnutnom rozsahu zachovávať dôvernosť jeho žiadosti.⁷ Pri výkone svojej jurisdikcie nie je limitovaný len spoluprácou so signatárskym štátom. Na základe ad hoc dohody, alebo dojednaní môže o spoluprácu požiadať aj nesignatársky štát.⁸ V prípade, že štát nevyhoví žiadosti o spoluprácu v rozpore so Štatútom, alebo dokonca marí výkon jurisdikcie MTS, ten vydá nález a vec postúpi zhromaždeniu štátov, alebo Bezpečnostnej rade

² SAKTOROVÁ, E. Výzvy kooperácie medzi Medzinárodným trestným súdom a štátom. In *Štát a právo*, 2022, roč. 9, č. 1, s. 72–83. Dostupné na: <https://www.prf.umb.sk/o-fakulte/pre-verejnost/vedecky-casopis-stat-a-pravo/archive-archiv/2022/1-2022/lubica-saktorova/>

³ Pozri článok 87 Vyhlášky ministra zahraničných vecí č.333/2002 Zb. o Rímskom štatúte Medzinárodného trestného súdu

⁴ Ibid.

⁵ SCHABAS, W.: *An Introduction to the International Criminal Court*. Cambridge: Cambridge University Press, 2004, s. 128.

⁶ Pozri článok 17 Vyhlášky ministra zahraničných vecí č.333/2002 Zb. o Rímskom štatúte Medzinárodného trestného súdu

⁷ Pozri článok 87 Vyhlášky ministra zahraničných vecí č.333/2002 Zb. o Rímskom štatúte Medzinárodného trestného súdu

⁸ Ibid.

OSN, ak podala podnet Bezpečnostná rada.⁹ Ako konštatuje mnoho odborníkov na medzinárodné právo, nález Súdu o prípadnej nespolupráci má skôr deklaratórny účinok.¹⁰ Tento záver vyplýva aj zo skutočnosti, že Rímsky štatút neobsahuje účinné sankčné mechanizmy za porušenie povinností spolupráce, čím sa jeho praktická vymožiteľnosť výrazne oslabuje. Pri zatýkaní podozrivých osôb, najmä tých ktoré požívajú výsady a imunity podľa vnútroštátneho alebo medzinárodného práva sa výkladovo problematickým stal článok 98 odsek 1 Štatútu, ktorý si v prípade Al-Bashir, Jordánske kráľovstvo vyložilo ako potenciálnu prekážku pre zatknutie. Ako ale odvolací senát v tomto prípade skonštatoval, toto ustanovenie imunity nezachováva, ale slúži ako „procesné pravidlo, ktoré určuje, ako má Súd postupovať v prípade existencie imunity, ktorá by mohla brániť žiadosti o spoluprácu.“¹¹ Napriek tomu, že toto rozhodnutie bolo kľúčové pre ďalšie obdobné prípady sa nedá povedať, že by malo pre signatárske štáty význam z hľadiska spolupráce s MTS. Mongolsko ako signatár Rímskeho štatútu, ruského prezidenta počas návštevy začiatkom septembra 2024 nezatklo, hoci bol naňho vydaný medzinárodný zatykač.¹² Rovnaká situácia nastala aj v prípade Maďarska, ktoré napriek vydanému medzinárodnému zatykaču, izraelského premiéra nezatklo.¹³

Medzinárodný trestný súd vďaka podpore vykonáva svoju jurisdikciu efektívne. Nielen zo strany členských štátov Rímskeho štatútu a štátov, ktoré jeho jurisdikciu uznávajú, ale v prvom rade zo strany veľmocí, ktoré sú zhodou okolností stálymi členmi Bezpečnostnej rady OSN. Jediné veľmoci, ktoré plne podporujú jeho činnosť sú Francúzsko a Spojené kráľovstvo, ktoré ho podporujú ako právne, tak aj politicky. Na rozdiel od Spojených štátov amerických (USA), Ruskej federácie a Čínskej ľudovej republiky, ktorých odmietavý postoj voči jurisdikcii MTS vyplýva z politickej, ale aj právnej roviny.

Spojené štáty americké (ďalej len „USA“), hoci váhavo, podporili vznik Medzinárodného trestného súdu. Avšak v dôsledku politických zmien, ako aj zohľadňujúc fakt, že USA sú hlavným garantom bezpečnosti, najmä v OSN, zaujali výrazne odmietavý postoj voči Súdu. Prezident USA po dosiahnutí kompromisov vydal federálny zákon pod názvom American Service-Members' Protection Act. Ide o zákon, ktorý chráni vojenský a administratívny

⁹ Ibid.

¹⁰ CRYER, R.: *An Introduction to International criminal law and procedure*. Cambridge: Cambridge University Press, 2007, s. 412.

¹¹ ICC, Prokurátor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09 OA2, Rozsudok v prípade postúpenia veci Jordánska v prípade odvolania Al-Bashir, 6. máj 2019, ods. 5

¹² ICC, Situácia na Ukrajine, ICC-01/22-90, Nález podľa článku 87(7) Rímskeho štatútu o nevyhovení žiadosti Súdu o spoluprácu Mongolskom pri zatknutí a vydaní Vladimira Vladimiroviča Putina a postúpenie veci Zhromaždeniu štátov, ktoré sú zmluvnými stranami Dohovoru, 24. október 2024, ods. 6

¹³ ICC, Situácia v štáte Palestína, ICC-01/18-462, Nález podľa článku 87(7) Štatútu o nevyhovení žiadosti Súdu o spoluprácu Maďarskom pri predbežnom zatknutí Benjamína Netanjahua a postúpenie veci Zhromaždeniu štátov, ktoré sú zmluvnými stranami Dohovoru, 24. júl 2025, ods. 5

personál ozbrojených síl USA pred jurisdikciou MTS. V rámci tohto zákona teda USA neposkytujú pomoc na území štátov, ktoré sú členmi Rímskeho štatútu a v prípade zadržania ktorejkoľvek dotknutej osoby je prezident oprávnený použiť akékoľvek prostriedky na jej prepustenie. Výnimku zo zákazov ale predstavuje rozhodnutie prezidenta USA o spolupráci, za predpokladu, že je to v národnom záujme USA.¹⁴ Azda najväčší rozruch vyvolala žiadosť prokurátora, ktorou požiadal senát pre prípravné konanie o začatie vyšetrovania zločinov proti ľudskosti a vojnových zločinov spáchaných na území Afgánskej islamskej republiky Talibanom, Afgánskymi ozbrojenými silami, ozbrojenými silami USA a Americkej spravodajskej služby. Napriek zamietnutiu, odvolací senát vyšetrovanie povolil. V dôsledku toho americký prezident uvalil sankcie na MTS, ktoré boli v roku 2021 zrušené. Prokurátor sa tak musel zamerať na zločiny spáchané Talibanom a ISIS. Opätovne boli sankcie na MTS uvalené na základe Executive order 14203¹⁵, ako reakcia na vydanie medzinárodného zatykača na izraelského premiéra a izraelského ministra obrany. Ako poznamenal Shereshevsky, v tomto prípade ako aj v minulých sporoch s MTS, USA stačilo za účelom vyhnúť sa jeho jurisdikcii „*použiť tradičnú moc*.“¹⁶

Ruská federácia bola tiež signatárskym štátom Rímskeho štatútu, ktorý ale neratifikovala. Začiatkom roka 2016 senát pre prípravné konanie povolil prokurátorovi začať vyšetrovanie trestných činov spáchaných počas rusko-gruzínskej vojny v Južnom Osetsku. V reakcii na to, Ruská federácia svoj podpis odvolala na základe prezidentského dekrétu, v ktorom bola činnosť Medzinárodného trestného súdu vyhodnotená ako jednostranná a neefektívna.¹⁷ Čo sa týka Ruskej federácie, jej spolupráca s MTS je vylúčená, čo potvrdil aj prezidentský dekrét z roku 2023, na základe ktorého Ruská federácia neuznáva rozhodnutia a akékoľvek procesné úkony medzinárodných trestných tribunálov vrátane MTS.¹⁸ V prípade Ruskej federácie sa dá povedať, že rovnako ako USA, tiež používa tradičnú moc za účelom vyhnúť sa jurisdikcii.

¹⁴ Ang. American Service-Members' Protection Act (2002)

¹⁵ Imposing Sanctions on the International Criminal Court [online]. Dostupné na inernete: <https://www.federalregister.gov/documents/2025/02/12/2025-02612/imposing-sanctions-on-the-international-criminal-court> [cit. 2026-2-17]

¹⁶ SHERESHEVSKY Y.: Complementarity (Un)Fairness Powerful States and their Ability to Avoid ICC Proceedings by Conducting Domestic Investigations. In *Journal of International Criminal Justice*, 2025, s. 228 [online]. Dostupné na inernete: <https://doi.org/10.1093/jicj/mqaf013> [cit. 2026-2-17]

¹⁷ Russia withdraws signature from ICC statute [online]. Dostupné na inernete: <https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute> [cit. 2026-2-17]

¹⁸ Putin signs bill banning implementation of foreign criminal court rulings in Russia [online]. Dostupné na inernete: <https://novayagazeta.eu/articles/2025/12/29/putin-signs-bill-banning-implementation-of-foreign-criminal-court-rulings-in-russia-en-news> [cit. 2026-2-17]

Čínska ľudová republika, nakoľko nie je signatárom Rímskeho štatútu, jurisdikciu Medzinárodného trestného súdu neuznáva a nejestvujú žiadne oficiálne vyjadrenia, na rozdiel od USA a Ruskej federácie.

Z celkového pohľadu možno konštatovať, že nespolupráca štátov, najmä zo strany veľmocí, nepredstavuje len individuálne zlyhanie pri plnení medzinárodnoprávných záväzkov, ale systémový problém, ktorý zásadným spôsobom limituje efektívny výkon jurisdikcie Medzinárodného trestného súdu.

3 Dôsledky nespolupráce štátov

S nespolupracou štátov je spojených viacero komplikácií, v dôsledku ktorých sa efektivita Medzinárodného trestného súdu môže javiť ako výrazne obmedzená. Tieto komplikácie sa prejavujú predovšetkým v procesnej rovine, kde majú za následok predlžovanie jednotlivých úkonov trestného konania. V prípade, ak štát neposkytne požadovanú súčinnosť, napríklad pri zabezpečovaní dôkazov alebo výsluchu svedkov, je Súd nútený realizovať tieto úkony vlastnými prostriedkami, čo je spravidla časovo aj logisticky náročné. Zároveň platí, že pre vydanie spravodlivého rozhodnutia je nevyhnutné úplné a presné zistenie skutkového stavu, čo pri absencii spolupráce zo strany štátov predstavuje významnú prekážku.

Nespolupráca štátov sa negatívne premieta aj do samotného výkonu jurisdikcie Súdu. V situáciách, keď štát odmietne vykonať žiadosť o zatknutie alebo odovzdanie podozrivej osoby, je Súd odkázaný na spoluprácu iných štátov alebo na hľadanie alternatívnych riešení, ktoré však často nemajú požadovanú efektivitu. Tento problém je obzvlášť výrazný v prípadoch, keď sa obvinené osoby nachádzajú na území štátov, ktoré nie sú zmluvnými stranami Rímskeho štatútu alebo ktoré vedome odmietajú plniť svoje záväzky. V takýchto situáciách dochádza k faktickému paralyzovaniu trestného stíhania, keďže bez fyzickej prítomnosti obvineného nie je možné viesť hlavné pojednávanie.¹⁹

Ďalším významným dôsledkom nespolupráce štátov je obmedzovanie rozsahu vyšetrovania, ktoré môže navonok pôsobiť ako selektívne alebo jednostranné. V skutočnosti však ide často o dôsledok politických a praktických limitov, v ktorých sa Súd pohybuje. Ako príklad možno uviesť vyšetrovanie zločinov spáchaných na území Afganistanu, ktoré sa týkalo aj príslušníkov ozbrojených síl Spojené štáty americké a ich spravodajských služieb. Reakciou Spojených štátov bolo prijatie sankcií voči predstaviteľom Súdu, čo viedlo k tomu, že Úrad

¹⁹ Pozri článok 63 Vyhlášky ministra zahraničných vecí č.333/2002 Zb. o Rímskom štatúte Medzinárodného trestného súdu

prokurátora následne zúžil rozsah vyšetrovania najmä na činnosť Talibanu a tzv. Islamského štátu.²⁰ Uvedený príklad poukazuje na skutočnosť, že politický tlak zo strany štátov môže mať reálny dopad na smerovanie a rozsah činnosti Súdu.

V neposlednom rade vedie nespolupráca štátov k vnímaniu selektivity medzinárodnej trestnej spravodlivosti, čo je často kritizované najmä zo strany afrických štátov.²¹ Hoci táto selektivita nie je nevyhnutne výsledkom úmyselného postupu Súdu, ale skôr dôsledkom objektívnych obmedzení, významne ovplyvňuje jeho legitimitu a dôveryhodnosť. Ak sú niektoré situácie vyšetrované intenzívnejšie než iné, môže to vyvolávať dojem nerovného uplatňovania práva, čo oslabuje autoritu Súdu ako nestranného orgánu medzinárodnej spravodlivosti.

Možno teda konštatovať, že nespolupráca štátov nepredstavuje len procesnú prekážku, ale má aj širšie systémové dôsledky, ktoré sa prejavujú v obmedzení efektivity, oslabovaní legitimacy a v konečnom dôsledku aj v spochybňovaní samotného významu Medzinárodného trestného súdu.

4 Navrhované riešenia

Hľadanie riešení nespolupráce štátov s Medzinárodným trestným súdom si vyžaduje viac než len normatívny prístup; nevyhnutne zahŕňa aj reflexiu politických a praktických limitov, v ktorých sa medzinárodná trestná spravodlivosť realizuje. Práve na priesečníku práva a politiky sa totiž rozhoduje o skutočnej efektívite navrhovaných opatrení.

Jedným z navrhovaných riešení posilnenia spolupráce štátov je upevnenie partnerstiev ako so štátmi, tak aj s vnútroštátnymi orgánmi, multilaterálnymi organizáciami a občianskou spoločnosťou.²² Prostredníctvom vytvárania štrukturovaných dialógov a spoločných programov je možné zabezpečiť účinné vyšetrovanie, získavanie a zhromažďovanie dôkazov, ochranu obetí a efektívnosť trestného stíhania voči podozrivým osobám.²³ Toto je súčasná prax Medzinárodného trestného súdu, ktorá sa ukazuje byť efektívna. Posilniť spoluprácu je možné aj budovaním dôvery u štátov, ktoré nie sú členmi Rímskeho štatútu. Ako príklad môžeme

²⁰ Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan [online]. Dostupné na inernete: <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application> [cit. 2026-2-28]

²¹ Instrument of neo-colonial repression'-Mali, Burkina Faso and Niger withdraw from International Criminal Court [online]. Dostupné na inernete: <https://www.wionews.com/world/mali-burkina-faso-niger-exit-icc-neo-colonial-repression-1758623632435> [cit. 2026-2-28]

²² SAKTOROVÁ, E. *Globálna občianska spoločnosť v kontexte medzinárodných vzťahov a medzinárodného práva*. Praha: Leges, 2020. 112 s. ISBN 978-80-7502-472-5.

²³ International Criminal Court. *Strategic plan 2026-2029*. The Hague: International Criminal Court, 2025, s. 41.

uviesť nedávne vyhlásenie o prijatí jurisdikcie Súdu líbyjskou vládou vo vzťahu k údajným zločinom spáchaným na jej území od roku 2011 do konca roka 2027.²⁴ Tento krok potvrdzuje, že aj bez formálneho členstva môže dôjsť k významnému prehĺbeniu vzťahu medzi štátom a MTS, čo môže do budúcnosti vytvoriť predpoklady pre prípadnú ratifikáciu Rímskeho štatútu. Spolupráca Súdu s veľmocami akými sú Spojené štáty americké, Ruská federácia a Čínska ľudová republika je však vzhľadom na súčasnú geopolitickú situáciu otázna. Posilnenie spolupráce s menšími a stredne veľkými štátmi však môže významne prispieť k efektívnemu výkonu jurisdikcie MTS a k vytvoreniu stabilnej medzinárodnej justičnej siete.

Pre posilnenie spolupráce je tiež potrebné presadiť zmeny v Rímskom štatúte, najmä rekodifikáciou 9. časti Rímskeho štatútu. Vzhľadom na súčasnú právnu úpravu, ako aj nemožnosť prinútiť štát k spolupráci *by de lege ferenda* stálo za zváženie zavedenie mechanizmov vyvodzovania zodpovednosti za porušenie povinnosti spolupracovať, nakoľko verejné odsúdenie v konečnom dôsledku nemusí mať pre dotknutý štát vážny význam. Išlo by o mechanizmy, ktoré by mohlo uplatniť Zhromaždenie štátov za účelom prinútiť štát spolupracovať s Medzinárodným trestným súdom. Aké konkrétne mechanizmy by členské štáty mohli v budúcnosti prijať na zabezpečenie účinnej spolupráce, je otázkou, ktorú by si mali klásť štáty, vďaka ktorým Medzinárodný trestný súd vznikol. Faktom však zostáva, že spolupráca štátov s MTS by nemala byť len o plnení záväzkov vyplývajúcich z členstva, ale aj o presadzovaní medzinárodnej spravodlivosti ako záujmu.

Záver

Na základe vykonanej analýzy sme dospeli k záveru, že nespolupráca štátov, ako aj odmietanie jurisdikcie zo strany veľmocí závažným spôsobom zasahuje do efektívneho výkonu jurisdikcie Medzinárodného trestného súdu. Samotná nespolupráca vyplýva z mocenských, právnych, aj politických dôvodov, čím sa naša hypotéza potvrdila. Rovnako sa naša hypotéza potvrdila aj v tom, že v dôsledku nespolupráce štátov s Medzinárodným trestným súdom vznikajú viaceré procesné komplikácie, ktoré zároveň znemožňujú riadny výkon jeho jurisdikcie. To sa prejavuje v selektívnom uplatňovaní medzinárodnej spravodlivosti. Rovnako sa nám podarilo zistiť, že útoky zo strany veľmocí, najmä prostredníctvom sankcií, zasahujú do nezávislosti Medzinárodného trestného súdu, čo núti Súd k obmedzovaniu vyšetrovania.

²⁴ Libya accepts ICC jurisdiction over alleged crimes from 2011 to the end of 2027 [online]. Dostupné na inernete: <https://www.icc-cpi.int/news/libya-accepts-icc-jurisdiction-over-alleged-crimes-2011-end-2027> [cit. 2026-2-27]

Poukazujeme aj na potrebu posilnenia spolupráce medzi Súdom a štátmi, a to najmä prostredníctvom budovania partnerstiev, prehlbovania dôvery a rozvoja spolupráce s vnútroštátnymi orgánmi a medzinárodnými aktérmi. Zároveň sa ukazuje ako potrebné otvoriť odbornú diskusiu o možných zmenách právnej úpravy, ktoré by prispeli k efektívnejšiemu zabezpečeniu plnenia záväzkov štátov. Konkrétna podoba týchto mechanizmov však zostáva otázkou ďalšieho vývoja a rozhodnutia samotných členských štátov.

Skutočná sila medzinárodného práva sa neprejavuje v jeho formulácii, ale v jeho uplatňovaní. Bez aktívnej spolupráce štátov tak aj najprecíznejší právny rámec Medzinárodného trestného súdu naráža na hranice svojej vykonateľnosti. V konečnom dôsledku tak budúcnosť Medzinárodného trestného súdu nezávisí len od kvality jeho normatívneho rámca, ale predovšetkým od toho, do akej miery budú štáty ochotné podriaďiť svoje politické záujmy požiadavkám medzinárodnej spravodlivosti. Len v takom prípade možno očakávať, že jeho činnosť bude viesť k reálnemu posilneniu medzinárodného právneho poriadku a k trvalému presadzovaniu spravodlivosti.

Týmto príspevkom tak prispievame k širšiemu pochopeniu limitov aj potenciálu Medzinárodného trestného súdu v súčasnom medzinárodnom prostredí, v ktorom sa efektívne uplatňovanie práva nevyhnutne stretáva s politickými záujmami štátov.

Zoznam bibliografických odkazov

Bibliografické odkazy

1. CRYER, R.: *An Introduction to International criminal law and procedure*. Cambridge: Cambridge University Press, 2007, 477 s. ISBN-13 978-0-511-28918-7
2. SCHABAS, W.: *An Introduction to the International Criminal Court*. New York: Cambridge University Press, 2004, 495 s. ISBN-13 978-0-511-18676-9
3. SAKTOROVÁ, Ľ. *Globálna občianska spoločnosť v kontexte medzinárodných vzťahov a medzinárodného práva*. Praha: Leges, 2020. 112 s. ISBN 978-80-7502-472-5.
4. SAKTOROVÁ, Ľ. *Výzvy kooperácie medzi Medzinárodným trestným súdom a štátom*. In Štát a právo, 2022, roč. 9, č. 1, s. 72–83.. Dostupné na: <https://www.prf.umb.sk/o-fakulte/pre-verejnost/vedecky-casopis-stat-a-pravo/archive-archiv/2022/1-2022/lubica-saktorova/> ISSN 1339-7753

Judikatura

5. *Al-Bashir*, ICC-02/05-01/09 OA2, Rozsudok v prípade postúpenia veci Jordánska v prípade odvolania Al-Bashir, 6. máj 2019
6. *Situácia na Ukrajine*, ICC-01/22-90, Nález podľa článku 87(7) Rímskeho štatútu o nevyhovení žiadosti Súdu o spoluprácu Mongolskom pri zatknutí a vydaní Vladimira Vladimiroviča Putina a postúpenie veci Zhromaždeniu štátov, ktoré sú zmluvnými stranami Dohovoru, 24. október 2024
7. *Situácia v štáte Palestína*, ICC-01/18-462, Nález podľa článku 87(7) Štatútu o nevyhovení žiadosti Súdu o spoluprácu Maďarskom pri predbežnom zatknutí Benjamina Netanjahua a postúpenie veci Zhromaždeniu štátov, ktoré sú zmluvnými stranami Dohovoru, 24. júl 2025

Právne predpisy

8. Vyhláška ministra zahraničných vecí č.333/2002 Zb. o Rímskom štatúte Medzinárodného trestného súdu
9. Ang. American Service-Members' Protection Act (2002)
10. Imposing Sanctions on the International Criminal Court [online]. Dostupné na inernete: <https://www.federalregister.gov/documents/2025/02/12/2025-02612/imposing-sanctions-on-the-international-criminal-court> [cit. 2026-2-17]

Iné medzinárodné dokumenty

11. International Criminal Court. *Strategic plan 2026-2029*. The Hague: International Criminal Court, 2025

Iné zdroje

12. Instrument of neo-colonial repression'-Mali, Burkina Faso and Niger withdraw from International Criminal Court [online]. Dostupné na inernete: <https://www.wionews.com/world/mali-burkina-faso-niger-exit-icc-neo-colonial-repression-1758623632435> [cit. 2026-2-28]
13. Libya accepts ICC jurisdiction over alleged crimes from 2011 to the end of 2027 [online]. icc-cpi.int, Dostupné na inernete: <https://www.icc-cpi.int/news/libya-accepts-icc-jurisdiction-over-alleged-crimes-2011-end-2027> [cit. 2026-2-19]
14. Putin signs bill banning implementation of foreign criminal court rulings in Russia [online]. novayagazeta.eu, Dostupné na inernete: <https://novayagazeta.eu/articles/2025/12/29/putin-signs-bill-banning-implementation-of-foreign-criminal-court-rulings-in-russia-en-news> [cit. 2026-2-17]
15. Russia withdraws signature from ICC statute [online]. theguardian.com, Dostupné na inernete: <https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute> [cit. 2026-2-17]
16. Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan [online]. icc-cpi.int, Dostupné na inernete: <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application> [cit. 2026-2-28]
17. SHERESHEVSKY, Y.: Complementarity (Un)Fairness Powerful States and their Ability to Avoid ICC Proceedings by Conducting Domestic Investigations. In *Journal of International Criminal Justice*, 2025, s. 227–248. [online]. Dostupné na inernete: <https://doi.org/10.1093/jicj/mqaf013> [cit. 2026-2-17]

OBNOVA KULTÚRNEJ IDENTITY AKO DÔKAZ SPÁCHANIA KULTÚRNEJ GENOCÍDY

The Restoration of Cultural Identity as Evidence of Cultural Genocide

SOLOMIIA STETS*

Abstrakt

Článok sa zameriava na komparatívnu analýzu jazykovej politiky ZSSR a vybraných vnútroštátnych právnych predpisov upravujúcich postavenie štátneho jazyka v Slovenskej republike, na Ukrajine a v Litve. Východiskom skúmania je predpoklad, že legislatívna úprava štátneho jazyka môže reflektovať reakciu na predchádzajúce obdobia systematického potláčania kultúrnych prvkov. Cieľom článku je analyzovať účel týchto právnych predpisov a posúdiť, či ich prijatie bolo motivované snahu o obnovu kultúrnej identity po období jej útlaku, ktorý možno kvalifikovať ako kultúrnu genocídu. Výsledky analýzy majú ambíciu prispieť k úvahám o normatívnom uchopení kultúrnej genocídy na medzinárodnej úrovni.

Abstract

The article focuses on a comparative analysis of the language policy of the USSR and selected domestic legal regulations governing the status of the state language in the Slovak Republic, Ukraine, and Lithuania. The study is based on the premise that legislation on the state language may reflect a response to previous periods of systematic suppression of cultural elements. The aim of the article is to analyze the purpose of these legal regulations and assess whether their adoption was motivated by an effort to restore cultural identity following a period of its suppression, which can be characterized as cultural genocide. The results of the analysis seek to contribute to discussions on the normative conceptualization of cultural genocide at the international level.

Kľúčové slová: Jazyková legislatíva. Kultúrna identita. Kultúrna genocída. Post-sovietske štáty.

Keywords: Language legislation. Cultural identity. Cultural genocide. Post-soviet states.

Úvod

Kultúrna genocída nadobúda čoraz väčší význam najmä v kontexte súčasného rusko-ukrajinského vojnového konfliktu. Napriek tomu, že ide o problematiku rozsiahlo spracovanú predovšetkým v zahraničnej literatúre, viaceré otázky zostávajú naďalej nezodpovedané a viacero aspektov kultúrnej genocídy je dodnes nepreskúmaných. Jedným z takých aspektov je snaha o obnovu kultúrnej identity, teda prekonanie následkov kultúrnej genocídy zo strany jednotlivých štátov.

Za najjednoduchšie pozorovateľný prvok považujem jazyk, preto som sa v článku zamerala na legislatívu upravujúcu postavenie štátneho jazyka, a to v zámerne vybraných štátoch, ktoré

* Bc. Solomiia Stets, 1. ročník, denná forma, II. stupeň štúdia Právnická fakulta Univerzity Mateja Bela v Banskej Bystrici, ssolomiasstets@gmail.com

sú determinované spoločnou historickou skúsenosťou so sovietskym režimom, konkrétne v Slovenskej republike, na Ukrajine a v Litve.

Práca vychádza z predpokladu, že z legislatívnej úpravy štátneho jazyka možno vyvodit' príčinnú súvislosť s predchádzajúcim spáchaním kultúrnej genocídy, a tým preukázať, že kultúrna genocída v určitých prípadoch predstavovala materiálny prameň práva. To zároveň naznačuje existenciu takého stupňa ohrozenia, ktorý si vyžadoval zvýšenú mieru ochrany, pričom obdobný ochranný mechanizmus by mohol byť zavedený aj na medzinárodnej úrovni s cieľom predchádzať páchaniu kultúrnej genocídy.

V práci analyzujem jazykovú politiku ZSSR v porovnaní s jazykovou právnou úpravou vo vyššie uvedených súčasných štátoch s cieľom odlíšiť ich účel. Následne komparujem samotné vybrané zákony Slovenska, Ukrajiny a Litvy upravujúce postavenie jednotlivých jazykov, a to s cieľom zistiť dôvody existencie takejto právnej úpravy.

Predpokladaným prínosom štúdie je možnosť využitia získaných poznatkov ako východiska pre formuláciu paragrafového znenia potenciálnej medzinárodnej zmluvy zameranej na predchádzanie kultúrnej genocídy, ako aj pre vymedzenie skutkovej podstaty kultúrnej genocídy ako medzinárodného trestného činu s cieľom jej zaradenia do Rímskeho štatútu, a tým aj do pôsobnosti Medzinárodného trestného súdu. Zároveň môžu tieto poznatky slúžiť ako zdroj skúseností štátov pri obnove kultúrnej identity, čím prispievajú k lepšiemu pochopeniu spôsobov prekonávania následkov kultúrnej genocídy.

1 Teoretické východiská skúmania kultúrnej genocídy

1.1 Kultúrna genocída

Základným právne záväzným prameňom upravujúcim zločin genocídy je Dohovor o zabránení a trestaní zločinu genocídy z roku 1948. Nepokrýva však celú problematiku systémového útlaku a ničenia základných pilierov existencie najmä národných a etnických skupín, preto je dôležité skúmať nielen daný dokument ako výsledok normotvorných prác, ale aj na historické pozadie a spôsob, akým bol prijatý. Najväčší prínos v procese prijatia Dohovoru mal poľský právnik Raphael Lemkin, keďže práve on je autorom samotného pomenovania a prvotného komplexného výskumu fenoménu genocídy, ktorý obsiahol vo svojom diele *Vláda síl Osy v okupovanej Európe* (ang. *The Axis Rule in Occupied Europe*) z roku 1944.

Keďže súčasné znenie Dohovoru predstavuje výsledok politických kompromisov a snáh vyhnúť sa zodpovednosti, ktorú by Dohovor za iných okolností založil¹ nemôžeme vnímať jeho úpravu ako objektívne postačujúcu a musíme sa zamerať na pôvodný koncept genocídy Raphaela Lemkina (obsiahnutý v spomenutom jeho diele), t. j. úmyselný proces smerujúci k zničeniu národa alebo etnickej skupiny ako takej nerozlišujúc použité nástroje. Genocída podľa neho nepredstavuje výlučne fyzické vyhubenie členov skupiny prostredníctvom masového vraždenia, ale môže sa uskutočňovať aj bez použitia násilia, a to napr. rozkladom politických a sociálnych inštitúcií, potláčaním alebo likvidáciou kultúry, jazyka, národného povedomia a náboženstva, nie len ohrozovanie života, zdravia, osobnej slobody a ľudskej dôstojnosti príslušníkov skupiny.²

1.2 Kultúrna identita

Jednotná legálna definícia kultúrnej identity absentuje, avšak jej vymedzenie je kľúčovým v kontexte skúmania kultúrnej genocídy. Z teoretického hľadiska ide o súhrn nehmotných prvkov, prostredníctvom ktorých sa určitá skupina osôb konštituuje ako osobitný nositeľ historickej, jazykovej a kultúrnej kontinuity. Medzi tieto prvky patria predovšetkým jazyk, kolektívna historická pamäť, kultúrne tradície, symboly a inštitucionálne mechanizmy ich reprodukcie a ich útlak môže spôsobiť štrukturálne dôsledky pre existenciu určitej skupiny.³

Medzinárodné právo priznáva kultúrnej identite ochranu predovšetkým nepriamo, prostredníctvom systému ochrany ľudských práv, práv menšín a práva národov na sebaurčenie.

2 Jazyk ako nástroj útlaku a ako chránený záujem

2.1 Jazyková politika v ZSSR

Sovietsky zväz, ako mnohonárodnostný štátny útvar existujúci v rokoch 1917 – 1991, predstavuje jeden z najpozoruhodnejších príkladov cieľavedomého využívania jazykovej politiky na dosiahnutie politických a ideologických cieľov.⁴ Jazyk v tomto kontexte nebol vnímaný len ako neutrálny prostriedok komunikácie, ale ako primárny pilier etnickej identity a národného vedomia.⁵

¹ Irvin-Erickson, D. (2017). *Raphael Lemkin and the concept of genocide*. University of Pennsylvania Press, 161.

² Lemkin, R. (1944). *Axis rule in occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*. Carnegie Endowment for International Peace, 79.

³ Sharma, L. R. (2025). Culture as a Reflection of Heritage and Identity: A Thematic Analysis. *Journal of Foreign Languages, Cultures & Civilizations*, 13, 127.

⁴ Grenoble, L. A. (2003). *Language policy in the Soviet Union*. Dordrecht: Springer Netherlands, 1.

⁵ Tamže.

V počiatočných fázach sa jazyková politika javila byť v zásade demokratická, keďže plne podporovala rozvoj lokálnych kultúr, i keď za účelom propagácie komunizmu.⁶ Tento prístup sa však ukázal ako prechodný a v pomerne krátkom čase začal štát dôsledne presadzovať privilegované postavenie ruského jazyka, a to najmä vo verejnej správe, školstve aj v ďalších oblastiach spoločenského života.⁷

V Ústave ZSSR bola formálne zakotvená rovnosť jazykov a právo vzdelávať sa v materinskom jazyku. Pre bližšie znázornenie uvediem úryvok z čl. 121 Ústavy ZSSR z roku 1936, ktorá je podstatná z toho dôvodu, že bola prijatá v období, keď sa už jazyková politika zmenila svoje zameranie: „*Občania Zväzu sovietskych socialistických republík majú právo na vzdelanie. Toto právo sa zabezpečuje [...] vyučovaním v školách v materinskom jazyku [...]*“.⁸

Taktiež uvádzam úryvok z čl. 36 Ústavy ZSSR z roku 1977: „*Občania Zväzu sovietskych socialistických republík rôznych rás a národností majú rovnaké práva. Uplatňovanie týchto práv sa zabezpečuje politikou všestranného rozvoja a zbližovania všetkých národov a národností ZSSR, výchovou občanov v duchu sovietskeho patriotizmu a socialistického internacionalizmu, ako aj možnosťou používať materinský jazyk a jazyky ostatných národov ZSSR. Akékoľvek priame alebo nepriame obmedzovanie práv, [...] akákoľvek propaganda rasovej alebo národnej výlučnosti [...] sa trestá podľa zákona*“.⁹

Neskoršia úprava pôsobí dvojako. Na jednej strane deklaruje rovnosť práv nezávisle od rasy či národnosti, ale na druhej strane uvádza bližšie nešpecifikovaný pojem „politiky zbližovania“, čo sa dá interpretovať ako homogenizáciu jazykovo-kultúrnych prvkov jednotlivých národov. Význam daného spojenia vieme komplexne vysvetliť až analýzou praktických krokov a mechanizmov, ktoré vykonávala sovietska vláda.

Jedným z takých krokov bola cyrilizácia, t. j. prevedenie jazykov na azbuku pre „uľahčenie osvojenia ruštiny“, čo predstavovalo prvotnú modifikáciu zakladajúcu rozkol s väzbami na historické tradície používania latinky či arabského písma.¹⁰ Okrem vonkajších zmien nasledovali aj obsahové, ktoré priamo zasahovali do slovných zásob prostredníctvom umelého obohacovania a približovania pôvodných slov, označovaných ako „buržoázno-nacionalistické“, „dialektové“ alebo „archaické“, k ruským.¹¹ Napríklad, olonetské slovo

⁶ Bondarchuk, P., Danylenko, V. *Ukrainizatsii polityka*. http://www.history.org.ua/?termin=Ukrainizatsii_polityka.

⁷ Tamže.

⁸ Ústava ZSSR, prijatá 5. decembra 1936. <https://www.hist.msu.ru/ER/Etext/cnst1936.htm> (vlastný preklad).

⁹ Ústava ZSSR, prijatá 7. októbra 1977. <https://www.hist.msu.ru/ER/Etext/cnst1977.htm#3> (vlastný preklad).

¹⁰ Grenoble, L. A. (2003). *Language policy in the Soviet Union*. Dordrecht: Springer Netherlands, 54.

¹¹ Ornstein, J. (1959). Soviet language policy: Theory and practice. *The Slavic and East European Journal*, 3 (1), 2.

„siätoi“ (zlé počasie) je tvarované podľa ruského „bespogodica“, votické „selle takaz“ (predtým) podľa ruského „tomu nazad“, ludické „panna strok“ (stanoviť termín) podľa ruského „položiti' srok“ a podobne.¹² Novozavedené tzv. „všeobecné pravidlo“ nútilo národné jazyky písať ruské prebraté slová v ich pôvodnej ruskej podobe, čo rozbíjalo fonetický systém miestnych rečí.¹³ Modifikáciám v období Sovietskeho zväzu podľahol aj litovský jazyk, aj ukrajinský. Do litovskej slovnej zásoby sa pridalo množstvo komunistických termínov, umelo sa zavádzali neprirodzené predpony kopírujúce ruské ekvivalenty, napr. virš-, iki-, sovietske administratívne akronymy a zložené skratiky (partorgas, kolūkis), ktoré litovčina dovtedy nevyužívala, a taktiež sa preberali kalkovaním (doslovným prekladom) ruské slová.¹⁴ Ukrajinské slová boli rovnakým spôsobom deformované a zamieňané rusifikovanými, viac podobajúcimi sa ruským slovám.¹⁵

Vzdelávanie predstavuje kľúčovú oblasť systematického útlaku, keďže slúži ako strategický mechanizmus formovania novej generácie. V roku 1958 bol prijatý zákon „o upevnení spojenia školy so životom a o ďalšom rozvoji systému národného vzdelávania“, ktorý predstavoval zásadnú školskú reformu v úmysle modernizovať vzdelávací systém počas obdobia Chruščovovho „oteplenia“. ¹⁶ Jedným z jej najspornejších bodov bolo ustanovenie, ktoré dávalo rodičom právo slobodne si vybrať vyučovací jazyk pre svoje deti, čo výrazne oslabovalo vzdelávanie v materinskom jazyku.¹⁷ Ukrajinská inteligencia (napríklad, M. Ryl'skyj, M. Bazhan) proti tomuto ustanoveniu ostro protestovala, považujúc ho za ohrozenie národnej identity.¹⁸ Výsledkom bolo prudké zvýšenie počtu ruských škôl v mestách (napríklad, v Kyjeve sa v tom čase len 30 % detí učilo v ukrajinčine, zatiaľ čo 70 % v ruštine, v Odese to bol pomer 10 % - v ukrajinčine, 90 % - v ruštine a v Luhansku 7 % - v ukrajinčine, 93 % - v ruštine).¹⁹ Poznačené tým boli aj iné štáty, najmä Pobaltské štáty, ktoré v dôsledku rozsiahlych migračných procesov počas obdobia Sovietskeho zväzu prijímajú Pobaltské štáty dodnes legislatívne a politické opatrenia zamerané na ochranu štátneho jazyka a zabezpečenie vzdelávania v národnom jazyku, čo sa odzrkadlilo aj v judikatúre Európskeho súdu pre ľudské

¹² Tamže, 6.

¹³ Grenoble, L. A. (2003). *Language policy in the Soviet Union*. Dordrecht: Springer Netherlands, 53.

¹⁴ Salys, A. (1967). The Russianization of the Lithuanian Vocabulary under the Soviets. *Lituanus*, 13 (2). http://www.old.lituanus.org/1967/67_2_03Salys.html.

¹⁵ Novorodovska, N. (2018) Influence of the Soviet Policy of Russification on Socio-cultural and the Linguistic Space of the Ukrainian SSR in 1964-1985. *Young Scientist*, 63 (11), 32-33.

¹⁶ Marchuk, O. A. (2016). *Zakon pro shkolu (1959 r.): obstavyny joho pryjniattia*, 113.

¹⁷ Tamže, 117.

¹⁸ Marchuk, O. A. (2016). *Zakon pro shkolu (1959 r.): obstavyny joho pryjniattia*, 118.

¹⁹ Tamže.

práva.²⁰ Napríklad, súčasná legislatíva Lotyšska z roku 2018 výrazne zvyšuje podiel lotyštiny ako vyučovacieho jazyka, čím redukuje používanie ruštiny v školstve a Európsky súd pre ľudské práva uznal, že tieto opatrenia sú legitímne, pretože ich cieľom je posilnenie národného jazyka a prekonávanie následkov segregovaného vzdelávacieho systému zdedeného po rusifikačnej politike ZSSR.²¹

Ďalšou významnou udalosťou pre pochopenie vtedajšej politiky bola Všeľvazová vedecko-teoretická konferencia v Taškente (1979) s názvom „Ruský jazyk – jazyk priateľstva a spolupráce národov ZSSR“.²² Bilinsky veľmi kriticky hodnotí tvrdenie sovietskeho vedenia z danej konferencie, že ruština je jediným prostriedkom, cez ktorý sa môžu neruské národy uplatňovať v svetovej kultúre.²³ Zatiaľ čo pri malých národoch Sibíri (napr. Nenci) môže mať ruština civilizačný účel, pri národoch s antickou kultúrou (Gruzínci, Arméni) alebo islamskou tradíciou (Uzbeki) pôsobí toto tvrdenie do značnej miery skreslene.²⁴

Ironická je tá skutočnosť, že poprvýkrát za celú históriu ZSSR bol prijatý zákon „o jazykoch ZSSR“ upravujúci postavenie ruského jazyka ako oficiálneho jazyka ZSSR až v roku 1990. Sám o sebe predstavoval legalizáciu výrazného potlačenia národných jazykov (i keď formálne obsahoval ustanovenie o zákaze ich útlaku) odôvodňujúc to prirodzeným historickým vývojom, ktorý viedol k šíreniu ruského jazyka medzi neruských príslušníkov ZSSR, čo vytvára dojem prirodzenosti priebehu tohto procesu.²⁵ Pre znázornenie uvádzam citáciu čl. 4 daného zákona: „*Zväzové a autonómne republiky sú oprávnené určovať právne postavenie jazykov republik, vrátane ich ustanovenia za štátne jazyky. So zreteľom na historicky vzniknuté podmienky a s cieľom zabezpečenia celozväzových úloh sa ruský jazyk uznáva na území ZSSR za oficiálny jazyk ZSSR a používa sa ako prostriedok medzinárodnej komunikácie*“.²⁶

Pri analýze predchádzajúcich skutočných „historických podmienok“ vieme usúdiť, že ruština sa neustále nepriamo používala ako nástroj pre vytlačanie lokálnych národných prvkov a centralistické upevnenie moci a neexistovala transparentná úprava ochrany národných jazykov a akékoľvek snahy vzoprieť sa priamym modifikačným a nepriamym normatívnym jazykovým zásahom z dôvodu dobovej politickej situácie bolo takmer nemožné, keďže také

²⁰ *Valiullina and Others v. Latvia*, Application no. 56928/19, ECtHR, Judgment of 14 December 2023, 21–22. [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-226485%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-226485%22]}).

²¹ Tamže.

²² Bilinsky, Y. (1981). Expanding the Use of Russian or Russification? Some Critical Thoughts on Russian As a Lingua Franca and the "Language of Friendship and Cooperation of the Peoples of the USSR". *The Russian Review*, 40(3), 317.

²³ Tamže, 318.

²⁴ Tamže, 319.

²⁵ *Zakon o jazykach narodov SSSR*. https://www.libussr.ru/doc_ussr/ussr_16479.htm.

²⁶ Tamže, (vlastný preklad).

konanie mohlo byť označené za „protisovietske“ a „buržoázno-nacionalistické“ ako v prípade ukrajinskej inteligencie v 20-30. rokoch 20. storočia.²⁷

2.2 Súčasná jazyková politika na Slovensku, Ukrajine a Litve.

Súčasná úprava jazykovej politiky v postsovietskych štátoch predstavuje priamy protiklad k historickej sovietskej politike, ktorá bola plánovaným nástrojom štátnej moci na umelé formovanie etnickej identity a asimiláciu neruských etník a národov.²⁸ Zatiaľ čo Sovietsky zväz systematicky presadzoval ruštinu ako dominantný komunikačný prostriedok, ktorý bol zneužívaný na vytvorenie „sovietskeho ľudu“, viaceré súčasné štáty vnímajú svoje národné jazyky ako prvok hodný osobitnej ochrany na legislatívnej úrovni, čo má viac protektívny, než útočný voči iným jazykom charakter.²⁹ Neplatí to však v prípade každého štátu a nie vždy prítomnosť právnej úpravy štátneho jazyka automaticky znamená, že v určitom historickom období ten bol utláčaný, preto je podstatné skúmať účel konkrétnych ochranných právnych predpisov, t. j. dôvod zákonnej ochrany jazyka.

Preambula slovenského zákona č. 270/1995 Z. z. o štátnom jazyku uvádza, že slovenský jazyk je, okrem iného, označovaný najvzácnejšou hodnotou a prejavom štátnej suverenity, čo by sa mohlo interpretovať ako nepriamy odkaz na historický vývoj na slovenskom území, keďže z logického hľadiska niet potreby vyzdvihovať hodnotu jazyka v spoločnosti, kde jeho existencia, prirodzený vývoj a dominantné postavenie neboli v minulosti spochybňované či existenčne ohrozované.³⁰ V slovenských dejinách výrazný útlak slovenčiny možno identifikovať po rakúsko-uhorskom vyrovnaní v roku 1867 označovanom obdobím „maďarizácie“, ktorý sa realizoval prostredníctvom násilného vytlačania slovenského jazyka z verejného života, administratívy, súdnictva a školstva, perzekúciou národne uvedomelej inteligencie a cirkvi a maďarčením osobných mien.³¹ Uvedené skutočnosti vykazujú znaky

²⁷ Werth, N. (2010). *The NKVD Mass Secret Operation n°00447 (August 1937 - November 1938)*. <https://www.sciencespo.fr/mass-violence-war-massacre-resistance/en/document/nkvd-mass-secret-operation-n-00447-august-1937-november-1938.html>.

²⁸ Silver, B. (1974). Social mobilization and the Russification of Soviet nationalities. *American Political Science Review*, 68(1), 45.

²⁹ Bilinsky, Y. (1981). Expanding the Use of Russian or Russification? Some Critical Thoughts on Russian As a Lingua Franca and the Language of Friendship and Cooperation of the Peoples of the USSR". *The Russian Review*, 40(3), 317.

³⁰ Najočividnejším príkladom takého štátu je Spojené kráľovstvo, kde úprava anglického jazyka ako úradného nie je obsiahnutá v súčasnej legislatíve, ale v zvykovom práve. Vplyv na anglický jazyk bol minimálny a úradným jazykom sa stal postupne po prijatí tzv. zákona o žalobe v angličtine z roku 1362 z toho dôvodu, že v právnej oblasti, najmä na súdoch, sa používal francúzsky jazyk, ktorému väčšina obyvateľov nerozumelo (viď. <http://www.languageandlaw.org/TEXTS/STATS/PLEADING.HTM>). Analogický historický vývoj prebiehal aj vo Francúzsku, kde sa francúzsky jazyk stal úradným najmä z dôvodu nízkej vzdelanosti v latinskom jazyku (viď. <https://www.larousse.fr/encyclopedie/oeuvre/Villers-Cotter%C3%AAs/149015>).

³¹ Kálal, K.: *Maďarizácia Slovákov*. <http://www.trencan.6f.sk/knihovnicka/1908-Madarizacia-Kalal-32A4.pdf>.

spáchania kultúrnej genocídy a tvoria bohatý základ pre jej výskum. Avšak samotná existencia určitých historických udalostí a preambula skúmaného zákona nie sú postačujúca na vyvodenie príčinnej súvislosti.

§ 2 zákona priamo vo svojom názve („Štátny jazyk a jeho ochrana“) nesie odkaz, že pre slovenský jazyk sa vyžaduje zákonná ochrana pred vonkajšími zásahmi. Dané ustanovenie špecifikuje mechanizmy zachovania slovenčiny, a to spôsobom vytvorenia priaznivých podmienok pre osvojenie a používanie štátneho jazyka, podpory jeho vývoja najmä vo vedeckej oblasti a udržiavania jeho jednotnej kodifikovanej podoby. Je zaujímavým najmä z toho hľadiska, že odzrkadľuje mieru spomínanej ochrany, ktorú zákonodarca priznáva slovenskému jazyku. Inými slovami ide o výpočet spôsobov ochrany, ktoré podrobnejšie upravujú nasledujúce paragrafy zákona v určitých oblastiach. Pre komparačné účely uvádzam, že konkrétnych oblastí, ktoré zákon upravuje je 6: úradný styk (§ 3), geografické názvy (§ 3a), školstvo (§ 4), verejný styk (§ 5, 8), ozbrojené sily, ozbrojené zbory a hasičské jednotky (§ 6), súdne, správne konanie a konanie pred orgánmi činnými v trestnom konaní (§ 7). Dané číslo tiež považujem za signifikantné pre uchopenie prepracovanosti právnej úpravy.

Hlavný cieľ slovenského zákona č. 270/1995 Z. z. o štátnom jazyku nachádzame v stanovisku Ústavného súdu Slovenskej republiky k zákonu o štátnom jazyku, a to „zabezpečiť, aby bolo na Slovensku možné komunikovať vo verejnej sfére v štátnom jazyku, a zabezpečiť, aby niekto, kto neovláda menšinový jazyk, nebol diskriminovaný“.³² Podľa iných zdrojov zákon mal slúžiť ako nástroj budovania štátu po rozpade Československa a tiež posilniť dominantné postavenie jazyka štátotvorného národa najmä vo vzťahu k jazykom historicky spájaným s predchádzajúcimi politickými a kultúrnymi vplyvmi (najmä maďarčine a češtine).³³ Musím však konštatovať, že dané tvrdenia sa navzájom nevylučujú.

Ukrajinský zákon č. 2704-VIII o zabezpečení fungovania ukrajinského jazyka ako štátneho jazyka z roku 2019 má omnoho rozsiahlejšiu úpravu (9 hláv a 57 článkov), než slovenský zákon o štátnom jazyku (13 paragrafov). Zakotvuje prioritné postavenie ukrajinčiny vo viac ako 30 sférach verejného života.³⁴ V porovnaní so slovenským zákonom je prítomná napr. aj úprava oblasti knižného trhu a vydavateľských kvót (čl. 26), digitálneho priestoru (čl. 27), komunikácie v službách (čl. 30).

³² Stanovisko Ústavného súdu Slovenskej republiky k zákonu o štátnom jazyku Slovenskej republiky. ustavnysud.sk/documents/20121/71741/2010-01-stanovisko_k_zakonu.pdf/4b62d323-35b8-9c0f-54f7-639b8946ef7a.

³³ Gál, K., & Daftary, F. (2000). *The new Slovak Language Law: Internal or External Politics?* <https://edoc.vifapol.de/opus/volltexte/2009/1888/>.

³⁴ Chekalenko, L. D. (2025). Rusyfikatsiia ukrajintiv: mynule jak dzerkalo siohodennia. Vcheni zapysky TNU imeni V. I. Vernadskoho. Sarii: *Istorychni nauky*, 36 (75), 180.

Preambula zákona priamo hovorí, že zákon bol prijatý na základe toho, že „ukrajinský jazyk je určujúcim faktorom a hlavným znakom identity ukrajinského národa, ktorý sa historicky sformoval a počas mnohých storočí nepretržite žije na vlastnom etnickom území, tvorí prevažnú väčšinu obyvateľstva krajiny a dal štátu jeho oficiálny názov, a zároveň je základnou systémotvornou zložkou ukrajinského občianskeho národa“.³⁵ Rovnako z preambuly vieme vyčítať, že zákon je prejavom snahy „posilniť funkciu ukrajinského jazyka v zabezpečení územnej celistvosti a národnej bezpečnosti Ukrajiny“.³⁶ V danom prípade je jazyková politika priamo prezentovaná ako nástroj ochrany štátu.

V čl. 3 zákona sa uvádzajú spôsoby ochrany ukrajinského jazyka obdobne ako v § 2 slovenského zákona o štátnom jazyku. Okrem všeobecných ustanovení o zabezpečení používania štátneho jazyka v súlade s pravopisom, jeho výučby a rozvoja, s ktorými sme sa mohli oboznámiť aj v slovenskom jazykovom zákone zdôrazňuje sa dokonca podpora používania ukrajinských ekvivalentov cudzích slov, zamedzenie vulgarizácie ukrajinčiny, zamedzenie miešania s inými jazykmi a taktiež popularizácia a zachovanie dialektov.³⁷ jedine Rozdiel spočíva aj v tom, že ukrajinský jazykový zákon v čl. 3 explicitne zakotvuje účel takej ochrany, a to posilnenie národnej identity, zachovanie národnej kultúry, tradícií, zvykov a historickej pamäte.³⁸

Špecifikum ukrajinského zákona predstavuje aj ustanovenie čl. 6 ods. 1, ktoré zakotvuje povinnosť každého ukrajinského občana ovládať ukrajinský jazyk.³⁹ Okrem toho zákon v čl. 9 ukladá rovnakú povinnosť taxatívne výpočtu verejných funkcionárov.⁴⁰

Z uvedeného vyplýva silná snaha o zachovanie štátnej suverenity a kultúry, ktorá bola v historickom kontexte výrazne ohrozovaná, a to hlavne v období socialistického režimu zo strany Ruska, čo negatívne ovplyvnilo jazykovú politiku na území Ukrajiny.

Pre bližšie pochopenie vzniknutých predpokladov pre prijatie zákona (v kontexte hybridnej vojny s Ruskom) je účelné spomenúť krátky prehľad udalostí po vzniku nezávislej Ukrajiny.

V čl. 10 ukrajinskej ústavy prijatej v roku 1996 sa poprvýkrát zmieňa o tom, že ukrajinčina je jediným štátnym jazykom, a hoci išlo o dôležitý akt pre suverenitu krajiny, samotná ústava nepostačovala na reguláciu noriem zavádzania jazyka do praxe a určenie kontrolných orgánov,

³⁵ Law of Ukraine On Supporting the Functioning of the Ukrainian Language as the State Language. <https://zakon.rada.gov.ua/laws/show/en/2704-19#Text>.

³⁶ Tamže.

³⁷ Law of Ukraine On Supporting the Functioning of the Ukrainian Language as the State Language. <https://zakon.rada.gov.ua/laws/show/en/2704-19#Text>.

³⁸ Tamže.

³⁹ Tamže.

⁴⁰ Tamže.

čo si vyžadovalo osobitný zákon.⁴¹ Implementácia štátneho statusu ukrajinčiny však narážala na silný odpor pro-ruských politických strán podporovaných Kreml'om, ktoré sa dlhodobo snažili presadiť ruštinu ako druhý štátny jazyk, na čo však v parlamente nikdy nezískali potrebných počet hlasov na zmenu ústavy.⁴² Napriek tomu pro-ruská Strana regiónov v júni 2012 presadila zákon „O zásadách štátnej jazykovej politiky“, ktorý sa opieral o argumentáciu Európskou chartou regionálnych alebo menšinových jazykov a zaviedol kritérium podielu obyvateľstva ako základ na priznanie osobitného statusu menšinovým jazykom. Ak v určitom územnom celku podiel nositeľov menšinového jazyka dosiahol najmenej 10 %, mohol tento jazyk získať postavenie regionálneho jazyka s právami porovnateľnými so štátnym jazykom.⁴³ Vyvolalo to vlnu protestov známu ako „Jazykový majdan“, ktorý mnohí politológovia považujú za počiatočnú fázu neskoršieho Euromajdanu (2013 – 2014), až nakoniec vo februári 2018 Ústavný súd Ukrajiny vyhlásil zákon z roku 2012 za neústavný.⁴⁴

Z uvedeného je pozorovateľná nespochybniteľná príčinná súvislosť medzi rusifikačnými praktikami v ZSSR a prijatím súčasného jazykového zákona z roku 2019 ako jedného z prostriedkov obnovy bývalej národnej identity a povedomia a zabránenia lingvocídy.⁴⁵

Zároveň v súvislosti s dôvodne vyvolaným dojmom prísnosti úpravy ukrajinského zákona o štátnom jazyku je na mieste uviesť, že takáto ochrana ukrajinského jazyka nie je jednostrannou a boli rovnako prijaté ďalšie zákony, ktoré poskytujú ochranu aj jazykom národnostných menšín, dokonca si dovoľím tvrdiť, že ich úprava je obsahovo viac prepracovanejšia, než v slovenskom zákone č. 184/1999 Z. z. o používaní jazykov národnostných menšín. Napr. zákon č. 2827-IX o národnostných menšinách z roku 2022 explicitne obsahuje zákaz asimilačnej politiky a asimilačných praktik (čl. 3 ods. 2).⁴⁶ Rovnako ho obsahuje aj zákon č. 1616-IX o pôvodných národoch Ukrajiny z roku 2021 (čl. 4 ods. 3).⁴⁷ Pôvodným národom navyše poskytuje dodatočnú ochranu tým, že zakotvuje právo na vlastné zastupiteľské orgány (napr. Medžlis).⁴⁸

⁴¹ Masenko, L. (2019). Zakon pro derzhavnu movu: peredistoriia, uhvalennia, osnovni normy. *Ukrainska mova i literatura v shkolah* 7(8), 26.

⁴² Tamže.

⁴³ Tamže, 26-27.

⁴⁴ Tamže, 27.

⁴⁵ Chekalenko, L. D. (2025). Rusyfikatsiia ukrajintsiv: mynule jak dzerkalo siohodennia. Vcheni zapysky TNU imeni V. I. Vernadskoho. Sariiia: *Istorychni nauky*, 36 (75), 180.

⁴⁶ Zakon Ukrajiny pro natsionalni menshyny (spilnoty) Ukrajiny vid 13.12.2022 № 2827-IX. <https://zakon.rada.gov.ua/laws/show/2827-20#Text>.

⁴⁷ Zakon Ukrajiny pro korinni narody Ukrajiny vid 01.07.2021 № 1616-IX. <https://zakon.rada.gov.ua/laws/show/1616-20#Text>.

⁴⁸ Zakon Ukrajiny pro korinni narody Ukrajiny vid 01.07.2021 № 1616-IX. <https://zakon.rada.gov.ua/laws/show/1616-20#Text>.

V zdrojoch sa uvádza, že krajiny ako Litva, Lotyšsko a Estónsko prijali svoje jazykové zákony už v 90. rokoch, a preto dokázali oveľa úspešnejšie uskutočniť derusifikáciu v porovnaní s Ukrajinou.⁴⁹

Litovský zákon o štátnom jazyku č. I-779 z roku 1995 preambulu neobsahuje, preto oficiálne postavenie k štátnemu jazyku sa možno dozvedieť z nálezu Ústavného súdu Litovskej republiky č. 14/98 z 21. októbra 1999, a to konkrétne v časti V bode 4: „*Ústavná konsolidácia postavenia štátneho jazyka znamená, že litovský jazyk je ústavnou hodnotou. Štátny jazyk chráni identitu národa, integruje občiansky národ, zabezpečuje vyjadrenie suverenity národa, integritu štátu a jeho nedeliteľnosť, ako aj normálne fungovanie štátnych a mestských inštitúcií. Štátny jazyk je dôležitou zárukou rovnosti občanov, pretože umožňuje všetkým občanom komunikovať so štátnymi a mestskými inštitúciami za rovnakých podmienok, uplatňovať svoje práva a oprávnené záujmy. [...] zákonodarca musí zákonom stanoviť, ako je používanie tohto jazyka zabezpečené vo verejnom živote, a navyše musí zabezpečiť opatrenia na ochranu štátneho jazyka*“.⁵⁰ Zaujímavým postrehom je, že rovnako ako litovský Ústavný súd preambula ukrajinského zákona o štátnom jazyku taktiež spomína národnú identitu na rozdiel od slovenského zákona o štátnom jazyku ani slovenský Ústavný súd tento pojem nespomína. Napriek tomu zdroje uvádzajú, že Litovci sa cítili bezpečne vo svojej etnickej homogenite a nemali obavy, že by sa stali politickou alebo kultúrnou menšinou, na rozdiel od Estónska a Lotyšska, kde bol strach z kultúrneho zániku prítomný neustále od druhej svetovej vojny.⁵¹

Svoj predmet úpravy litovský zákon zakotvuje v čl. 1, a to „*používanie štátneho jazyka vo verejnom živote Litvy, ochranu štátneho jazyka, jeho kontrolu a zodpovednosť za porušenie zákona*“.⁵² Upravené oblasti používania litovčiny sa zhruba prekrývajú s oblasťami slovenského zákona o štátnom jazyku. Má však aj ten svoj dištinkatívny prvok, čo je regulácia osobných mien a toponým.

Litovská legislatíva v danej oblasti v porovnaní s ukrajinskou i slovenskou úpravou je najmenej flexibilná pri preberaní cudzích mien, keďže trvá na ich litvanizácii, čo zakotvuje čl. 15 „*V Litovskej republike sa používajú zákonom stanovené formy osobných mien občanov*

⁴⁹ Masenko, L. (2019). Zakon pro derzhavnu movu: peredistoriia, uhvalennia, osnovni normy. *Ukrainska mova i literatura v shkolah* 7(8), 26.

⁵⁰ Uznesenie Ústavného súdu Litovskej republiky č. 14/98 o súlade rezolúcie Najvyššej rady Litovskej republiky z 31. januára 1991 "O zápise mien a priezvisk do pasu občana Litovskej republiky" s ústavou Litovskej republiky z 21.10.1999. <https://lrkt.lt/lt/teismo-aktai/paieska/135/ta363/content>.

⁵¹ Yadav, H. S. (2017). The Soviet Russification Policy & The Baltic Resistance. *Assonance*, 170.

⁵² Lietuvos Respublikos valstybinės kalbos įstatymas. <https://www.e-tar.lt/portal/lt/legalAct/TAR.0B0253BB424C>, (vlastný preklad).

Litovskej republiky“.⁵³ Do roku 2022 právnu reguláciu danej otázky bližšie upravovala vyhláška Najvyššej rady Litovskej republiky č. I-1031 z 31. januára 1991 o písaní mien a priezvisk v pasoch príslušníkov Litovskej republiky, v ktorej sa uvádzalo, že priezviská a mená v pasoch občanov Litovskej republiky sa zapisujú písmenami litovskej abecedy a v prípade osôb nelitovského pôvodu sa zapisujú tiež litovskou abecedou, pričom na ich žiadosť môžu byť prepísané foneticky buď bez uplatnenia litovských gramatických koncoviek, alebo s ich použitím.⁵⁴ Z toho dôvodu vznikalo množstvo sporov zo strany litovských občanov nelitovského pôvodu, ktorí žiadali zapisovanie svojich mien v pôvodnej podobe (napr. Rozsudok Súdneho dvora vo veci C-391/09 z 12. mája 2011).⁵⁵ Obdobný nesúhlas prejavovali aj občania Lotyšska, kde sa k napísaniu osobných mien a priezvisk postavil lotyšský zákonodarca rovnako ako litovský a v danej veci sa vyjadril Európsky súd pre ľudské práva, že sa nejedná o zásah do základných práv občanov zo strany štátu.⁵⁶

V roku 2022 vyhláška č. I-1031 bola zrušená zákonom o zápise osobného mena a priezviska v dokumentoch č. XIV-903 (publikované pod č. 1142). V čl. 3 ods. 3 zákona sa uvádza, že občania nelitovskej národnosti môžu požiadať o zápis mien a priezvisk v dokladoch totožnosti písmenami latinskej abecedy bez diakritických znamienok, inak sa zapisujú litovskými písmenami.⁵⁷

Záver

Analýza historického kontextu preukázala, že sovietska jazyková politika, hoci formálne deklarovala rovnoprávnosť, v praxi slúžila ako nástroj centralistického upevnenia moci a asimilácie neruských národov a etník. Tento proces sa realizoval najmä prostredníctvom modifikácie slovnej zásoby, cyrilizácie a strategického vytlačania národných jazykov zo vzdelávacieho systému a iných oblastí verejného života, čo spôsobovalo pokles počtu škôl s vyučovacím jazykom jednotlivých štátov, ktoré tvorili súčasť ZSSR. Možno konštatovať, že

⁵³ Lietuvos Respublikos valstybinės kalbos įstatymas. <https://www.e-tar.lt/portal/lt/legalAct/TAR.0B0253BB424C>, (vlastný preklad).

⁵⁴ Nutarimas dėl vardų ir pavardžių rašymo Lietuvos Respublikos piliečio pase 1991 m. sausio 31 d. Nr. I-1031, <https://www.e-tar.lt/portal/en/legalAct/TAR.A0DD1190CAE9>, (vlastný preklad).

⁵⁵ Rozsudok Súdneho dvora vo veci C-391/09 z 12. mája 2011, <https://eur-lex.europa.eu/legal-content/SK/TXT/?uri=CELEX:62009CJ0391>.

⁵⁶ Mentzen v. Latvia, Applicable no. 71074/01, ECtHR, Judgement of 7 December 2004, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-70407%22%7D>.

⁵⁷ Lietuvos Respublikos asmens vardo ir pavardės rašymo dokumentuose įstatymas, 2022 m. sausio 18 d., Nr. XIV-903, <https://www.e-tar.lt/portal/en/legalAct/c8890cd07e6e11ec993ff5ca6e8ba60c>, (vlastný preklad).

účelom takej politiky bolo dosiahnutie politických a ideologických cieľov. Naproti tomu právna úprava jazykov v Slovenskej republike, na Ukrajine a v Litve sledovala naopak ochranný účel.

Komparácia vybraných právnych predpisov preukázala, že najvýraznejšiu legislatívnu snahu o ochranu jazyka možno sledovať v ukrajinskom zákone č. 2704-VIII o zabezpečení fungovania ukrajinského jazyka ako štátneho jazyka a v litovskom zákone č. I-779 o štátnom jazyku. Vzhľadom na vysokú mieru prepracovanosti ich úpravy možno dôvodne predpokladať, že úmysel zákonodarcu pri ich prijímaní priamo vychádzal z negatívnej historickej skúsenosti súvisiacej s útlakom kultúrnej identity. Jednotlivé ustanovenia tak tvoria ochranný mechanizmus, ktorý v obdobiach systematického útlatu ukrajinského i litovského jazyka absentoval, hoci bol existenčne nevyhnutný.

V prípade Slovenskej republiky sa takúto bezprostrednú príčinnú súvislosť preukázať nepodarilo. Zákon č. 270/1995 Z. z. o štátnom jazyku je formulovaný vo všeobecnejšej rovine a má skôr regulatívny, než protektívny charakter, a to aj napriek historickému faktu, že slovenský národ bol v období maďarizácie vystavený praktikám vykazujúcim prvky kultúrnej genocídy.

Pre budúci výskum a jeho uplatnenie v praxi možno za najprínosnejšiu považovať ukrajinskú jazykovú legislatívu. Nejde pritom len o samotný zákon o štátnom jazyku, ale aj o nadväzujúce normy, a to zákon č. 2827-IX o národnostných menšinách a zákon č. 1616-IX o pôvodných národoch Ukrajiny, keďže explicitne upravujú zákaz asimilácie, ktorá predstavuje kľúčový nástroj kultúrnej genocídy.

Výskum potvrdil hypotézu, že prostredníctvom komparatívnej analýzy a teleologického výkladu určitých právnych predpisov možno preukázať, že snaha o prekonávanie následkov kultúrnej genocídy sa odzrkadľuje v súčasnej legislatíve a možno z toho vyvodit' priamu príčinnú súvislosť s historickou skúsenosťou s kultúrnou genocídou ako materiálnym prameňom práva. Zároveň sa však ukázalo, že intenzita ochrany utláčaného prvku nie je v štátoch s takou historickou skúsenosťou jednotná. Identifikácia a analýza faktorov, ktoré spôsobujú tieto odlišnosti otvára priestor pre ďalší osobitný vedecký výskum.

Zoznam bibliografických odkazov

1. Bilinsky, Y. (1981). Expanding the Use of Russian or Russification? Some Critical Thoughts on Russian As a Lingua Franca and the "Language of Friendship and Cooperation of the Peoples of the USSR". *The Russian Review*, 40(3), 317-332.
2. Bondarchuk, P., Danylenko, V. *Ukrainizatsii polityka*. http://www.history.org.ua/?termin=Ukrainizatsii_polityka.
3. Gál, K., & Daftary, F. (2000). *The new Slovak Language Law: Internal or External Politics?*. <https://edoc.vifapol.de/opus/volltexte/2009/1888/>.
4. Grenoble, L. A. (2003). *Language policy in the Soviet Union*. Dordrecht: Springer Netherlands.
5. Chekalenko, L. D. (2025). Rusyfikatsiia ukrajintiv: mynule jak dzerkalo siohodennia. Vcheni zapysky TNU imeni V. I. Vernadskoho. *Sariia: Istorychni nauky*, 36(75), 174-182.
6. Irvin-Erickson, D. (2016). *Raphael Lemkin and the concept of genocide*. University of Pennsylvania Press.
7. Kálal, K.: *Maďarizácia Slovákov*. <http://www.trencan.6f.sk/knihovnicka/1908-Madarizacia-Kalal-32A4.pdf>.
8. *Law of Ukraine On Supporting the Functioning of the Ukrainian Language as the State Language*. <https://zakon.rada.gov.ua/laws/show/en/2704-19#Text>.
9. Lemkin, R. (1944). *Axis rule in occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*. Carnegie Endowment for International Peace.
10. *Lietuvos Respublikos asmens vardo ir pavardės rašymo dokumentuose įstatymas, 2022 m. sausio 18 d., Nr. XIV-903*, <https://www.e-tar.lt/portal/en/legalAct/c8890cd07e6e11ec993ff5ca6e8ba60c>.
11. *Lietuvos Respublikos valstybinės kalbos įstatymas*. <https://www.e-tar.lt/portal/lt/legalAct/TAR.0B0253BB424C>.
12. Marchuk, O. A. (2016). *Zakon pro shkolu (1959 r.): obstavyny joho pryjniattia*.
13. Masenko, L. (2019). *Zakon pro derzhavnu movu: peredistoriia, uhvalennia, osnovni normy. Ukrainska mova i literatura v shkolah*, 7(8), 26-28.
14. *Mentzen v. Latvia*, Application no. 71074/01, ECtHR, Judgement of 7 December 2004, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-70407%22%7D>.
15. Novorodovska, N. (2018) Influence of the Soviet Policy of Russification on Socio-cultural and the Linguistic Space of the Ukrainian SSR in 1964-1985. *Young Scientist*, 63 (11).
16. *Nutarimas dėl vardų ir pavardžių rašymo Lietuvos Respublikos piliečio pase 1991 m. sausio 31 d. Nr. I-1031*, <https://www.e-tar.lt/portal/en/legalAct/TAR.A0DD1190CAE9>.
17. Ornstein, J. (1959). Soviet language policy: Theory and practice. *The Slavic and East European Journal*, 3(1), 1-24.
18. Rozsudok Súdneho dvora vo veci C-391/09 z 12. mája 2011, <https://eur-lex.europa.eu/legal-content/SK/TXT/?uri=CELEX:62009CJ0391>.
19. Salys, A. (1967). The Russianization of the Lithuanian Vocabulary under the Soviets. *Lituanus*, 13 (2). http://www.old.lituanus.org/1967/67_2_03Salys.html.
20. Sharma, L. R. (2025). Culture as a Reflection of Heritage and Identity: A Thematic Analysis. *Journal of Foreign Languages, Cultures & Civilizations*, 13, 124-132.
21. Silver, B. (1974). Social mobilization and the Russification of Soviet nationalities. *American Political Science Review*, 68(1), 45-66.
22. *Stanovisko Ústavného súdu Slovenskej republiky k zákonu o štátnom jazyku Slovenskej republiky*. https://www.ustavnysud.sk/documents/20121/71741/2010-01-stanovisko_k_zakonu.pdf/4b62d323-35b8-9c0f-54f7-639b8946ef7a.
23. *Ústava ZSSR, prijatá 5. decembra 1936*. <https://www.hist.msu.ru/ER/Etext/cnst1936.htm>.
24. *Ústava ZSSR, prijatá 7. októbra 1977*. <https://www.hist.msu.ru/ER/Etext/cnst1977.htm#3>.
25. *Valiullina and Others v. Latvia*, Application no. 56928/19, ECtHR, Judgment of 14 December 2023. <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-226485%22%7D>.
26. Werth, N. (2010). *The NKVD Mass Secret Operation n°00447 (August 1937 - November 1938)*. <https://www.sciencespo.fr/mass-violence-war-massacre-resistance/en/document/nkvd-mass-secret-operation-n-00447-august-1937-november-1938.html>.
27. Yadav, H. S. (2017). The Soviet Russification Policy & The Baltic Resistance. *Assonance*, 168-172.

28. *Zakon o jazykach narodov SSSR.* https://www.libussr.ru/doc_ussr/usr_16479.htm.
29. *Zakon Ukrainy pro korinni narody Ukrainy vid 01.07.2021 № 1616-IX.* <https://zakon.rada.gov.ua/laws/show/1616-20#Text>.
30. *Zakon Ukrainy pro natsionalni menshyny (spilnoty) Ukrainy vid 13.12.2022 № 2827-IX.* <https://zakon.rada.gov.ua/laws/show/2827-20#Text>.

ZMENY ZMLÚV VO VEREJNOM OBSTARÁVANÍ

Changes of contracts in public procurement

ADRIÁN LÍŠKA*

Abstrakt

V oblasti verejného obstarávania v zásade platí, že zmluva, rámcová dohoda alebo koncesná zmluva ako výsledok verejného obstarávania sa nemá meniť. Zmena zmluvy je možná len v prípadoch výslovne ustanovených v zákone č. 343/2015 Z. z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov v znení neskorších predpisov (ďalej len ako „zákon o verejnom obstarávaní“). Podmienky uzatvorenej zmluvy, ktorá je výsledkom verejného obstarávania by mali odrážať záväzky prijaté v ponuke úspešného uchádzača. Príspevok sa venuje vybraným ustanoveniam zákona o verejnom obstarávaní, ktoré umožňujú zmeny zmlúv počas ich trvania. Príspevok obsahuje analýzu vybraných metodických usmernení a rozhodnutí Úradu pre verejné obstarávanie, ktoré rozoberajú konkrétne príklady z praxe pri aplikácii inštitútu zmeny zmlúv vo verejnom obstarávaní so zameraním na hranice oprávnenosti uzatvárania dodatkov k existujúcim zmluvám, ktoré boli výsledkom verejného obstarávania.

Abstract

In the field of public procurement, it is generally true that a contract, framework agreement or concession contract as a result of a public procurement should not be amended. Amendment of a contract is possible only in cases expressly provided for in Act No. 343/2015 Coll. on Public Procurement and on Amendments to Certain Acts, as amended (hereinafter referred to as the "Public Procurement Act"). The terms and conditions of a concluded contract resulting from a public procurement should reflect the commitments made in the successful tenderer's bid. The article contains an analysis of selected methodological guidelines and decisions of the Public Procurement Office, which discuss specific examples from practice in the application of the institute of contract amendment in public procurement, focusing on the limits of eligibility for concluding amendments to existing contracts that were the result of public procurement.

Kľúčové slová: Verejné obstarávanie. Zmluva. Zmeny zmlúv. Dodatok. Neoprávnená zmena zmluvy, Strata príležitosti pre hospodárske subjekty. Princíp transparentnosti a rovnakého zaobchádzania.

Key words: Public procurement. Contract. Changes to contracts. Contract amendment. Unlawful contract modification. Loss of opportunity for economic operators. Principle of transparency and equal treatment.

Úvod

Všeobecne platí, že zmluva, rámcová dohoda alebo koncesná zmluva, ktorá vznikla ako výsledok verejného obstarávania, by sa nemala dodatočne meniť. K úpravám môže dôjsť iba v prípadoch, ktoré výslovne pripúšťa zákon o verejnom obstarávaní. Obsah zmluvy by pritom mal zodpovedať záväzkom, ktoré na seba prevzal úspešný uchádzač vo svojej ponuke.

Pri akejkol'vek zmene zmluvy je nevyhnutné posúdiť, či nejde o takú podstatnú zmenu zmluvy, ktorá by si vyžadovala vyhlásenie nového verejného obstarávania. Neoprávnené zmeny, ktoré by zároveň odňali hospodárskym subjektom možnosť uchádzať sa o novú

* Mgr. Bc. Adrián Líška 1. ročník, externá forma štúdia, 2. stupeň štúdia, aliska@student.umb.sk Právnická fakulta Univerzity Mateja Bela v Banskej Bystrici

zákazku, predstavujú porušenie základných princípov verejného obstarávania, najmä princípu transparentnosti a rovnakého zaobchádzania.

Zákon o verejnom obstarávaní zároveň vymedzuje situácie, v ktorých je možné zmluvu počas jej trvania meniť bez potreby vyhlásiť nové verejné obstarávanie. Cieľom príspevku je analýza situácií v ktorých je možné zmluvu počas jej trvania meniť resp. nemeniť a identifikovať hranice oprávnenosti uzatvárania dodatkov k existujúcim zmluvám, ktoré boli výsledkom verejného obstarávania.

Determinanty zmien zmlúv, ktoré sú výsledkom verejného obstarávania

Právna úprava zmien zmlúv vo verejnom obstarávaní vychádza z dvoch protichodných záujmov. Na jednej strane je potreba flexibility zmluvných strán, ktoré musia vedieť reagovať na zmeny okolností, najmä pri dlhodobých projektoch, bez nutnosti ukončenia zmluvy či nového obstarávania. Na druhej strane stojí verejný záujem na zachovaní hospodárskej súťaže, transparentnosti a rovnakého zaobchádzania. Zmeny zmlúv bez súťaže totiž oslabujú konkurenčný tlak, môžu viesť k nevýhodným podmienkam a riziku neprimeraných platieb. Úplný zákaz zmien však nie je realistický, preto je cieľom nájsť rovnováhu medzi flexibilitou a ochranou súťaže tak, aby úpravy zmlúv boli primerané a nenarúšali princípy verejného obstarávania.¹

Účel zákona o verejnom obstarávaní pri zmenách zmlúv

Rozsudok Súdneho dvora EÚ z 19. júna 2008 vo veci C-454/06 Pressetext Nachrichtenagentur GmbH v. Republik Österreich, predstavuje základný východiskový bod pre posudzovanie zmien zmlúv vo verejnom obstarávaní. Súdny dvor v ňom formuloval zásadu, podľa ktorej každá zmena zmluvy počas jej trvania musí byť posudzovaná z hľadiska jej podstatnosti. Za podstatnú zmenu sa považuje najmä taká, ktorá by mohla ovplyvniť výsledok pôvodného verejného obstarávania, meniť ekonomickú rovnováhu v prospech dodávateľa alebo rozširovať predmet zmluvy. V takom prípade ide o nové zadanie zákazky, ktoré si vyžaduje uskutočnenie nového postupu verejného obstarávania. Naopak, zmeny, ktoré nemenia základné charakteristiky zmluvy a nemajú vplyv na hospodársku súťaž, sú prípustné. Rozsudok tak vytvoril tzv. test podstatnej zmeny, ktorý sa stal kľúčovým nástrojom ochrany princípov

¹ Azud, J., Plaváková, L., Bartoš, P. *Zákon o verejnom obstarávaní. Komentár*. Bratislava: C. H. Beck, 2019, s.501-502.

transparentnosti, rovnakého zaobchádzania a hospodárskej súťaže a neskôr bol premietnutý aj do právnej úpravy Európskej únie.²

V slovenskej praxi sa hodnotenie zmien zmlúv opiera predovšetkým o metodické usmernenie ÚVO č. 10/2019. Tento dokument stanovuje základné pravidlá pre vykonávanie zmien zmlúv tak, aby bolo zrejmé, kedy ide ešte o prípustnú úpravu a kedy už o obchádzanie pravidiel verejného obstarávania. Jeho zásadným prínosom je zavedenie tzv. testu narušenia hospodárskej súťaže, ktorý predstavuje kľúčové kritérium pri posudzovaní zmien. Podľa tohto testu je zmena neprípustná v prípade, ak by mohla ovplyvniť priebeh pôvodného verejného obstarávania – napríklad tým, že by prilákala iných uchádzačov alebo zmenila poradie ponúk. Usmernenie tak plní funkciu ochranného mechanizmu, ktorý má zabrániť účelovým úpravám zmluvných podmienok po ukončení súťaže a zároveň podporuje zachovanie transparentnosti a rovnosti počas celého trvania zmluvného vzťahu.³

Zmena zmluvy na základe pravidiel (podmienok) v nej stanovených

Zmluvu, rámcovú dohodu alebo koncesnú zmluvu je možné počas jej trvania meniť bez potreby vyhlásenia nového verejného obstarávania, pokiaľ už pôvodný zmluvný dokument obsahuje jasne, presne a jednoznačne formulované podmienky takejto zmeny. Tieto podmienky musia zahŕňať aj úpravu ceny alebo opcí, ako aj vymedzenie rozsahu, povahy možných zmien a pravidiel ich uplatnenia. Zároveň však nesmú byť nastavené tak, aby viedli k zmene charakteru pôvodnej zmluvy, rámcovej dohody alebo koncesnej zmluvy.⁴

Je žiaduce, aby už pri príprave návrhu zmluvy pre verejné obstarávanie bolo počítané s možnosťou, že v budúcnosti môžu vzniknúť okolnosti odôvodňujúce jej zmenu. Tieto situácie je potrebné vopred jasne, presne a jednoznačne upraviť v zmluvných podmienkach, pričom treba konkrétne vymedziť rozsah a charakter možných úprav, ako aj pravidlá ich uplatnenia. Takto formulované podmienky nepredstavujú neoprávnený zásah do zmluvy, ale ide o zmeny vykonané na základe vopred dohodnutého rámca. Zmluva preto musí obsahovať jednoznačné a zrozumiteľné ustanovenia, ktoré umožňujú jej úpravu. Tieto podmienky by mali byť zahrnuté už v návrhu zmluvy ako súčasť súťažných podkladov, prípadne priamo v súťažných

² Rozsudok Súdneho dvora EÚ z 19. júna 2008 vo veci C-454/06 Pressetext Nachrichtenagentur GmbH v. Republik Österreich.

³ Vývoj rozhodovacej praxe pri zmene zmlúv [online]. Bratislava: Verejné obstarávanie - právo a prax. 2026. [cit. 2026-25-03]. Dostupné na: https://www.vovpraxi.sk/sk/casopis/verejne-obstaravanie-pravo-a-prax/vyvoj-rozhodovacej-praxe-pri-zmene-zmluv-m-835.html?utm_source=chatgpt.com

⁴ § 18 ods. 1 písm. a) zákona č. 343/2015 Z. z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.

podkladoch, a následne premietnuté do samotného zmluvného textu.⁵ V aplikačnej praxi nastal aj prípad, že pôvodná zmluva síce obsahovala jasne, presne a jednoznačne upravené podmienky zmeny zmluvy, avšak na podklade neprípustného nadlimitného postupu na základe ktorého bola uzatvorená pôvodná zmluva, nebolo možné pristúpiť k uzatvoreniu dodatku k pôvodnej zmluve.

V rozhodnutí predsedu úradu č. 15831-9000/2025 zo dňa 09. 03. 2026 sa posudzovalo, či Dodatok č. 2, ktorým bola zmluva predĺžená o 12 mesiacov (8,8 mil. € s DPH), predstavuje prípustnú zmenu podľa § 18 ods. 1 písm. a) zákona o verejnom obstarávaní, alebo nové zadanie zákazky. Rozhodujúce bolo, že pôvodná zmluva bola uzavretá nezákonne prostredníctvom priameho rokovacieho konania. Účastník konania argumentoval legitímnym využitím opcie a potrebou zabezpečiť kontinuitu dopravy, ako aj procesnými námietkami. Predseda úradu tieto argumenty odmietol s tým, že výnimky podľa § 18 je potrebné vykladať reštriktívne a nemožno ich použiť na sanovanie nezákonného stavu, v súlade so zásadou *ex iniuria ius non oritur*. Dospel preto k záveru, že dodatok nepredstavoval prípustnú zmenu zmluvy, ale nové plnenie, ktoré malo byť predmetom riadneho verejného obstarávania.⁶

Z aplikačnej praxe vyplýva, že ani existencia takto formulovaných ustanovení nepostačuje, ak bola pôvodná zmluva uzatvorená na základe nezákonného postupu. Výnimky podľa § 18 zákona o verejnom obstarávaní je potrebné vykladať reštriktívne a nemožno ich použiť na legitimizáciu nezákonného stavu ani na pokračovanie plnenia z takejto zmluvy. Uvedené potvrdzuje aj rozhodovacia prax, podľa ktorej dodatok k zmluve v takom prípade nepredstavuje prípustnú zmenu, ale nové zadanie zákazky, ktoré musí byť zabezpečené riadnym postupom verejného obstarávania. Zásada *ex iniuria ius non oritur* zároveň zdôrazňuje, že z nezákonného základu nemôžu vzniknúť ďalšie oprávnenia.

Doplňujúce tovary, stavebné práce alebo služby

Počas trvania zmluvy, rámcovej dohody alebo koncesnej zmluvy je možné vykonať zmenu bez potreby nového verejného obstarávania aj v prípade, ak ide o dodatočné tovary, stavebné práce alebo služby, ktoré neboli súčasťou pôvodného zmluvného vzťahu, no sú nevyhnutné. Takéto plnenia musí zabezpečovať pôvodný dodávateľ alebo koncesionár, pričom zmena dodávateľa nie je možná z ekonomických alebo technických dôvodov, najmä z dôvodu potreby zabezpečiť kompatibilitu alebo vzájomnú nadväznosť na existujúce zariadenia, služby

⁵ Všeobecné metodické usmernenie z 24.10.2019 k zmenám zmluvy, rámcovej dohody a koncesnej zmluvy počas ich trvania.

⁶ Rozhodnutie predsedu úradu č. 15831-9000/2025 zo dňa 09. 03. 2026

či inštalácie. Zároveň musí platiť, že prípadná zmena dodávateľa by spôsobila verejnému obstarávateľovi alebo obstarávateľovi značné komplikácie alebo by viedla k výraznému zdvojeniu nákladov.⁷

V prípade verejného obstarávateľa a zmien podľa § 18 ods. 1 písm. b) zákona o verejnom obstarávaní platí, že celková hodnota všetkých takýchto úprav nesmie presiahnuť 50 % hodnoty pôvodnej zmluvy, rámcovej dohody alebo koncesnej zmluvy. Zároveň nie je prípustné prostredníctvom opakovaných zmien obchádzať povinnosť uplatniť postupy a pravidlá stanovené týmto zákonom.

Pri úpravách zmluvy z dôvodu potreby doplňujúcich tovarov, stavebných prác alebo služieb platí, že celková hodnota všetkých takýchto zmien nesmie prekročiť 50 % hodnoty pôvodnej zmluvy. Z toho vyplýva, že tieto zmeny je možné realizovať aj opakovane, avšak ich súhrnná hodnota musí zostať v rámci stanoveného limitu. Zároveň nie je prípustné využívať opakované zmeny na obchádzanie zákonom určených postupov a pravidiel.⁸

Predseda úradu zároveň skúmal, či kontrolovaný splnil zákonné podmienky na zmenu zmluvy podľa § 18 ods. 1 písm. b), ako aj podmienky na použitie priameho rokovacieho konania podľa § 98 ods. 1 písm. b) a c) zákona. Dospel však k záveru, že tieto podmienky preukázané neboli. Vo svojom rozhodnutí zdôraznil, že stav tzv. vendor lock-in si kontrolovaný spôsobil vlastným postupom pri obstaraní informačného systému a následne ho dlhodobo udržiaval. Napriek opakovanému uzatváraniu zmlúv s tým istým dodávateľom si totiž nezabezpečil práva k systému ani potrebnú dokumentáciu, čo by mu umožnilo vymaniť sa zo závislosti od jedného dodávateľa. V dôsledku toho nejde o objektívnu výlučnosť, ale o situáciu vytvorenú samotným kontrolovaným. Absencia hospodárskej súťaže tak bola výsledkom umelého zúženia podmienok obstarávania, a preto sa kontrolovaný nemohol oprávnene odvolávať na splnenie podmienok pre priame rokovacie konanie.

Predseda úradu tiež poukázal na to, že kontrolovaný mal dostatok času na riešenie vzniknutej situácie aj na zabezpečenie podporných služieb súťažným spôsobom ešte pred skončením pôvodnej zmluvy. Neuznal preto argument, že dodatok bol uzatvorený z dôvodu časovej tiesne.

Pri posudzovaní možnosti zmeny zmluvy podľa § 18 ods. 1 písm. b) zdôraznil, že musí ísť o skutočne nevyhnutné doplňujúce plnenia, bez ktorých by nebolo možné dosiahnuť účel pôvodnej zmluvy alebo by bola ohrozená jej funkčnosť. V prípade Dodatku č. 1 však nešlo o

⁷ § 18 ods. 1 písm. b) zákona č. 343/2015 Z. z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.

⁸ Všeobecné metodické usmernenie z 24.10.2019 k zmenám zmluvy, rámcovej dohody a koncesnej zmluvy počas ich trvania.

takéto plnenia, keďže jeho účelom bolo najmä preklenutie obdobia do nového obstarávania a príprava vlastných kapacít, nie zabezpečenie nevyhnutnej funkčnosti služieb. Rovnako konštatoval, že nenadobudnutie zdrojových kódov nemalo vplyv na samotné poskytovanie služieb podľa Zmluvy SLA.

Zmenu zmluvy bez nového verejného obstarávania možno pripustiť aj pri doplňujúcich plneniach, ktoré sú nevyhnutné a musia byť zabezpečené pôvodným dodávateľom z technických alebo ekonomických dôvodov, pričom celková hodnota týchto zmien nesmie presiahnuť 50 % hodnoty pôvodnej zmluvy. Takéto zmeny zároveň nesmú slúžiť na obchádzanie zákona.

Rozhodovacia prax však zdôrazňuje reštriktívny výklad týchto podmienok. Ak si verejný obstarávateľ vytvorí závislosť od dodávateľa vlastným konaním alebo nepreukáže skutočnú nevyhnutnosť plnenia, nemožno takúto zmenu považovať za prípustnú. V takom prípade ide o nové plnenie, ktoré musí byť predmetom riadneho verejného obstarávania.

Zmena zmluvy v dôsledku nepredvídaných okolností

Zmluvu, rámcovú dohodu alebo koncesnú zmluvu je možné počas jej trvania upraviť bez potreby vyhlásenia nového verejného obstarávania v prípade, ak potreba takejto zmeny vznikla v dôsledku okolností, ktoré verejný obstarávateľ alebo obstarávateľ nemohol ani pri vynaložení primeranej starostlivosti predvídať, pričom samotná zmena nesmie viesť k zmene charakteru pôvodného zmluvného vzťahu.⁹

V prípade verejného obstarávateľa zároveň platí, že celková hodnota všetkých takýchto zmien nesmie presiahnuť 50 % hodnoty pôvodnej zmluvy, rámcovej dohody alebo koncesnej zmluvy. Zároveň nie je prípustné prostredníctvom opakovaných zmien obchádzať zákonom stanovené postupy a pravidlá verejného obstarávania.¹⁰

Verejný obstarávateľ uzatvoril kúpnu zmluvu na dodanie vybavenia učební v rámci projektu modernizácie vzdelávania. Zmluva, ktorá vznikla z podlimitnej zákazky, stanovila lehotu dodania do 3 mesiacov od jej účinnosti. Následne bol uzatvorený Dodatok č. 1, ktorým sa lehota dodania predĺžila na 6 mesiacov.

Ako dôvod tejto zmeny bolo uvedené predĺženie dodávok komponentov potrebných na kompletné plnenie. Verejný obstarávateľ však nepreukázal oprávnenosť tejto zmeny v súlade s § 18 ods. 1 písm. c) zákona o verejnom obstarávaní. Predložená dokumentácia neobsahovala

⁹ § 18 ods. 1 písm. c) zákona č. 343/2015 Z. z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.

¹⁰ Všeobecné metodické usmernenie z 24.10.2019 k zmenám zmluvy, rámcovej dohody a koncesnej zmluvy počas ich trvania.

dostatočné a preskúmateľné odôvodnenie, ktoré by potvrdzovalo splnenie zákonných podmienok, najmä existenciu nepredvídateľných okolností a príčinnú súvislosť medzi dôvodom a vykonanou zmenou.

Na výzvu na doplnenie dokumentácie verejný obstarávateľ predložil vyjadrenia dodávateľa a jeho subdodávateľa, ktoré poukazovali na výrobné a kapacitné problémy. Tieto tvrdenia však neboli podložené ďalšími dôkazmi ani dokumentáciou preukazujúcou postup s náležitou odbornou starostlivosťou.

Z predložených dokladov zároveň vyplynulo, že v pôvodne dohodnutej lehote nebol dodaný žiadny tovar. Hoci verejný obstarávateľ deklaroval opak, kontrola faktúr, dodacích listov a protokolov preukázala, že dodávky boli realizované až po uplynutí pôvodnej lehoty. Úrad konštatoval, že verejný obstarávateľ nepreukázal nepredvídateľnosť okolností ani ich vplyv na plnenie zmluvy, pričom samotné všeobecné tvrdenia o omeškaní dodávok nemožno považovať za dostatočné. Z tohto dôvodu neboli splnené podmienky na zmenu zmluvy podľa § 18 ods. 1 písm. c) zákona o verejnom obstarávaní.

Zároveň bolo zistené, že predĺženie lehoty dodania o ďalšie 3 mesiace predstavuje významnú zmenu zmluvy, keďže ide o zdvojnásobenie pôvodnej lehoty. Takáto úprava mohla ovplyvniť priebeh súťaže a výsledok verejného obstarávania, keďže informácia o dlhšej lehote mohla mať vplyv na účasť uchádzačov a tvorbu ponúk.

Verejný obstarávateľ navyše uzavretím dodatku rezignoval na uplatnenie zmluvných sankcií za omeškanie, čím zvýhodnil úspešného uchádzača. Tým porušil vlastné pravidlá nastavené v zmluve a princípy verejného obstarávania.¹¹

Aplikačná prax však potvrdzuje, že splnenie uvedených podmienok musí byť riadne preukázané. V prípade, ak verejný obstarávateľ nepreukáže existenciu nepredvídateľných okolností, ich príčinnú súvislosť so zmenou zmluvy alebo postup s náležitou odbornou starostlivosťou, nie je možné takúto zmenu považovať za prípustnú. Významné zmeny, ako napríklad podstatné predĺženie lehoty plnenia či upustenie od sankcií, môžu zároveň narušiť hospodársku súťaž a zvýhodniť dodávateľa. V takom prípade ide o neprípustnú zmenu zmluvy, ktorá mala byť riešená novým postupom verejného obstarávania.

Nahradenie dodávateľa (koncesionára)

Počas trvania zmluvy, rámcovej dohody alebo koncesnej zmluvy je možné vykonať zmenu bez potreby nového verejného obstarávania aj v prípade, ak dochádza k nahradeniu

¹¹ Rozhodnutie predsedu úradu č. 13501-9000/2025 zo dňa 19. 02. 2026

pôvodného dodávateľa alebo koncesionára novým subjektom. Takáto zmena je prípustná najmä vtedy, ak vyplýva z uplatnenia vopred dohodnutých podmienok, alebo ak nový subjekt predstavuje právneho nástupcu pôvodného dodávateľa v dôsledku jeho reorganizácie (napr. zlúčenie, splynutie či úpadok), pričom zároveň nedochádza k podstatnej zmene pôvodnej zmluvy a cieľom nie je obchádzanie zákona o verejnom obstarávaní. Rovnako je takáto zmena možná aj v situácii, keď verejný obstarávateľ alebo obstarávateľ preberá plnenie povinností hlavného dodávateľa alebo koncesionára vo vzťahu k jeho subdodávateľom podľa príslušných ustanovení zákona.¹²

V zásade platí, že nahradenie zmluvného partnera predstavuje podstatnú zmenu zmluvy. V súlade s princípmi rovnakého zaobchádzania a transparentnosti by iný hospodársky subjekt nemal nahradiť úspešného uchádzača bez toho, aby sa zákazka opätovne otvorila hospodárskej súťaži.¹³

Nahradenie pôvodného dodávateľa novým je možné len vo výnimočných prípadoch, najmä ak je takáto možnosť vopred jasne upravená v zmluve, napríklad prostredníctvom „step-in“ práva, alebo ak ide o právneho nástupcu pôvodného dodávateľa v dôsledku reorganizácie. Podmienkou pritom je, aby nedošlo k podstatnej zmene zmluvy ani k obchádzaniu zákona o verejnom obstarávaní. Zmena dodávateľa je zároveň prípustná aj v situácii, keď verejný obstarávateľ preberá plnenie voči subdodávateľom. Vo všeobecnosti však platí, že ide o výnimočný inštitút, ktorý je potrebné vykladať reštriktívne.¹⁴

Nepodstatné zmeny zmluvy

Zmluvu, rámcovú dohodu alebo koncesnú zmluvu je možné počas jej trvania upraviť bez potreby nového verejného obstarávania za predpokladu, že takáto zmena nemá podstatný charakter, a to bez ohľadu na jej finančný rozsah. Za podstatnú zmenu sa považuje najmä taká úprava, ktorá vedie k zmene povahy zmluvy alebo k rozšíreniu jej rozsahu, prípadne zásadne mení podmienky, ktoré by v pôvodnom obstarávaní umožnili účasť ďalších hospodárskych subjektov alebo prijatie inej ponuky. Rovnako ide o podstatnú zmenu vtedy, ak dochádza k narušeniu ekonomickej rovnováhy v prospech dodávateľa spôsobom, ktorý pôvodná zmluva

¹² § 18 ods. 1 písm. c) zákona č. 343/2015 Z. z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.

¹³ Rozsudok Súdneho dvora EÚ z 13. marca 2008 vo veci C-454/06 Nachrichtenagentur GmbH proti Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH, APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung.

¹⁴ Všeobecné metodické usmernenie z 24.10.2019 k zmenám zmluvy, rámcovej dohody a koncesnej zmluvy počas ich trvania.

nepredpokladala, alebo ak dochádza k zmene dodávateľa či koncesionára inak, než pripúšťajú zákonné výnimky.¹⁵

Zákonom č. 278/2024 Z. z. z 3. októbra 2024, ktorým sa novelizovali viaceré právne predpisy v súvislosti so zlepšovaním stavu verejných financií, došlo aj k zmene § 27 ods. 1 zákona č. 222/2004 Z. z. o dani z pridanej hodnoty. S účinnosťou od 1. januára 2025 sa základná sadzba DPH zvyšuje z 20 % na 23 % zo základu dane. Podľa § 27 ods. 5 tohto zákona sa pri zmene sadzby dane uplatní vždy tá sadzba, ktorá je platná v deň vzniku daňovej povinnosti.

Vo všeobecnosti možno uviesť, že legislatívna zmena spočívajúca vo zvýšení sadzby DPH predstavuje vo vzťahu k už existujúcim zmluvám z verejného obstarávania (s plnením presahujúcim do roku 2025), ak neobsahujú výslovné ustanovenia o zmene ceny podľa § 18 ods. 1 písm. a) zákona o verejnom obstarávaní, nepodstatnú zmenu zmluvy podľa § 18 ods. 1 písm. e) tohto zákona. Ide totiž o zmenu vyplývajúcu z legislatívy, ktorá rovnako dopadá na všetky hospodárske subjekty registrované pre DPH, a preto nespĺňa znaky podstatnej zmeny podľa § 18 ods. 2 zákona o verejnom obstarávaní.¹⁶

Legislatívne zmeny, ako napríklad zvýšenie sadzby DPH, spravidla predstavujú nepodstatnú zmenu, keďže pôsobia rovnako voči všetkým subjektom, a preto nevyžadujú nový postup verejného obstarávania.

Zmena zmluvy malého rozsahu (deminimis)

Zmluvu, rámcovú dohodu alebo koncesnú zmluvu je možné počas jej trvania upraviť bez potreby nového verejného obstarávania aj v prípade, ak celková hodnota všetkých zmien nedosahuje finančné limity stanovené v § 5 podľa druhu zákazky alebo koncesie a súčasne neprekračuje stanovené percentuálne hranice. Konkrétne ide o najviac 15 % hodnoty pôvodnej zmluvy alebo rámcovej dohody pri zákazkách na stavebné práce a 10 % pri zákazkách na dodanie tovaru alebo poskytnutie služieb, pričom rovnaký 10 % limit sa uplatňuje aj pri koncesných zmluvách.¹⁷

Zmenu zmluvy možno vykonať aj bez splnenia vyššie uvedených podmienok, ak verejný obstarávateľ neprekročí zákonom stanovené finančné limity. V takom prípade je možné zmluvu upraviť z akéhokoľvek relevantného dôvodu, pričom rozhodujúci je súhrn všetkých

¹⁵ § 18 ods. 1 písm. e) zákona č. 343/2015 Z. z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.

¹⁶ Metodické usmernenie č. 14733-5000/2024. Dostupné na: <https://www.uvo.gov.sk/metodika-vzdelavanie/metodicke-usmernenia-a-vykladove-stanoviska/metodicke-usmernenia-k-zakonu-c-343-2015-zz/usmernenie-detail/1078826?cHash=3e7a32e30274894ffb8edc148dfff9d2>

¹⁷ § 18 ods. 3 zákona č. 343/2015 Z. z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.

zmien, ktorý nesmie presiahnuť limity podľa § 5 zákona ani stanovené percentuálne hranice. Zmeny menšieho rozsahu podľa § 18 ods. 3 sa nemusia týkať len ceny, ale aj iných aspektov s finančným dopadom, napríklad lehoty plnenia. Predĺženie lehoty pritom ovplyvňuje náklady oboch strán – dodávateľa aj verejného obstarávateľa.¹⁸

Zmluvu, rámcovú dohodu alebo koncesnú zmluvu možno počas jej trvania meniť bez nového verejného obstarávania, ak celková hodnota všetkých zmien neprekročí finančné limity podľa § 5 zákona a zároveň nepresiahne 15 % pri stavebných prácach a 10 % pri dodávkach, službách a koncesiách. Rozhodujúci je pritom súhrn všetkých zmien, nie ich jednotlivé časti.

Tieto zmeny sa nemusia týkať len ceny, ale aj iných aspektov s finančným dopadom, napríklad lehoty plnenia. Takáto úprava poskytuje verejnemu obstarávateľovi primeranú flexibilitu, pri zachovaní základných princípov verejného obstarávania.

Záver

Zmeny zmlúv vo verejnom obstarávaní predstavujú citlivú oblasť vo verejnom obstarávaní, v ktorej je nevyhnutné hľadať rovnováhu medzi potrebnou flexibilitou a ochranou hospodárskej súťaže. Základným pravidlom zostáva, že zmluva uzatvorená na základe verejného obstarávania by sa nemala meniť, pričom výnimky sú prípustné len v zákonom presne vymedzených prípadoch. Predmetné výnimky však nemožno vykladať extenzívne, ale reštriktívne, keďže predstavujú výnimky. Analýza jednotlivých dôvodov zmien podľa § 18 zákona o verejnom obstarávaní ukazuje, že zákon poskytuje verejným obstarávateľom určitý priestor na reagovanie na dynamiku realizácie projektov, najmä pri nepredvídateľných okolnostiach, potrebe doplňujúcich plnení či pri zmenách malého rozsahu. Tento priestor je však striktno ohraničený tak, aby nedochádzalo k obchádzaniu zákona, narušeniu hospodárskej súťaže ani k zvýhodňovaniu konkrétnych dodávateľov.

Rozhodovacia prax Úradu pre verejné obstarávanie zároveň potvrdzuje, že dôkazné bremeno oprávnenosti zmeny zmluvy nesie vždy verejný obstarávateľ. Ten musí vedieť preukázať nielen existenciu zákonného dôvodu zmeny, ale aj jeho riadne zdokumentovanie a súlad so základnými princípmi verejného obstarávania, najmä princípom transparentnosti, rovnakého zaobchádzania a nediskriminácie.

Osobitne významným kritériom pri posudzovaní zmien zmlúv je tzv. test narušenia hospodárskej súťaže, podľa ktorého je potrebné skúmať, či by navrhovaná zmena mohla

¹⁸ Všeobecné metodické usmernenie z 24.10.2019 k zmenám zmluvy, rámcovej dohody a koncesnej zmluvy počas ich trvania.

ovplyvniť výsledok pôvodného verejného obstarávania. Ak by zmena mala potenciál osloviť iných uchádzačov alebo zmeniť poradie ponúk, ide spravidla o neprípustnú, podstatnú zmenu.

Z aplikačnej praxe vyplýva, že najčastejšie pochybenia verejných obstarávateľov spočívajú v nedostatočnom odôvodnení zmien, nesprávnom posúdení nevyhnutnosti doplňujúcich plnení, zneužívaní výnimiek, či v snahe riešiť vlastné pochybenia prostredníctvom dodatkov k zmluvám. Takéto postupy však vedú k porušeniu zákona o verejnom obstarávaní a môžu mať významné právne aj finančné dôsledky.

V konečnom dôsledku, možno konštatovať, že právna úprava zmien zmlúv vo verejnom obstarávaní je nastavená ako kompromis medzi rigiditou a flexibilitou. Jej správna aplikácia si vyžaduje nielen dôsledné právne posúdenie, ale aj odborný a zodpovedný prístup verejných obstarávateľov už pri príprave zmluvných podmienok. Práve kvalitná príprava zmluvy a predvídanie možných zmien predstavujú kľúčový nástroj na minimalizáciu rizík a zabezpečenie zákonného, transparentného a efektívneho nakladania s verejnými prostriedkami.

Zoznam bibliografických odkazov

1. Azud, J., Plaváková, L., Bartoš, P. *Zákon o verejnom obstarávaní. Komentár*. Bratislava: C. H. Beck, 2019, s. 1816. ISBN 978-80-89603-75-6.
2. Rozsudok Súdneho dvora EÚ z 13. marca 2008 vo veci C-454/06 Nachrichtenagentur GmbH proti Republik Österreich (Bund), APA-OTS Originaltext-Service GmbH, APA Austria Presse Agentur registrierte Genossenschaft mit beschränkter Haftung.
3. Rozsudok Súdneho dvora EÚ z 19. júna 2008 vo veci C-454/06 Presstext Nachrichtenagentur GmbH v. Republik Österreich.
4. Úrad pre verejné obstarávanie. 2019. *Všeobecné metodické usmernenie z 24.10.2019 k zmenám zmluvy, rámcovej dohody a koncesnej zmluvy počas ich trvania*. [cit. 2026-20-03]. Dostupné na: <https://www.uvo.gov.sk/metodika-vzdelavanie/metodicke-usbmerenia-a-vykladove-stanoviska/vseobecne-metodicke-usbmerenia-k-zakonu-c-343-2015-zz/detail/104?cislo=&datum=&ext=0&limit=20&page=2&poznanka=&problematika=&sort=&sort-dir=ASC&text=&ustanovenie=&year=0&cHash=1d31697544c4ac2ef74be8453b809add>
5. Úrad pre verejné obstarávanie. 2024. *Metodické usmernenie č. 14733-5000/2024*. [cit. 2026-25-03]. Dostupné na: <https://www.uvo.gov.sk/metodika-vzdelavanie/metodicke-usbmerenia-a-vykladove-stanoviska/metodicke-usbmerenia-k-zakonu-c-343-2015-zz/usbmerenie-detail/1078826?cHash=3e7a32e30274894ffb8edc148dfff9d2>
6. Úrad pre verejné obstarávanie. 2026. *Rozhodnutie predsedu úradu č. 13501-9000/2025 zo dňa 19. 02. 2026*. [cit. 2026-22-03]. Dostupné na: <https://www.uvo.gov.sk/dohlad/spravne-delikty/prehľad-rozhodnuti-o-ulozeni-pokuty-pre-verejneho-obstaravateľa-a-obstaravateľa/detail/1938?delikt=&ext=0&limit=20&page=1&predmet=&sort=rok&sort-dir=DESC&text=slovensk%C3%A1%20po%C5%A1ta&ucastnik=&year=0&cHash=6c078021aae6c0999f7006fbadc3c87c>
7. Úrad pre verejné obstarávanie. 2026. *Rozhodnutie predsedu úradu č. 15831-9000/2025 zo dňa 09. 03. 2026*. [cit. 2026-22-03]. Dostupné na: <https://www.uvo.gov.sk/dohlad/spravne-delikty/prehľad-rozhodnuti-o-ulozeni-pokuty-pre-verejneho-obstaravateľa-a-obstaravateľa/detail/1944?delikt=&ext=0&limit=20&page=1&predmet=&sort=rok&sort-dir=DESC&text=%C5%BEilinsk%C3%BD%20samospr%C3%A1vny&ucastnik=&year=0&cHash=cdddb8c7435cffd5863bbe09091996bb>

8. *Vývoj rozhodovacej praxe pri zmene zmlúv* [online]. Bratislava: Verejné obstarávanie - právo a prax, 2026. [cit. 2026-25-03]. Dostupné na: https://www.vovpraxi.sk/sk/casopis/verejne-obstaravanie-pravo-a-prax/vyvoj-rozhodovacej-praxe-pri-zmene-zmluv.m-835.html?utm_source=chatgpt.com
9. *Zákon č. 343/2015 Z. z. o verejnom obstarávaní a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.*

HODNOSŤ PALATÍNA V DEJÍNACH UHORSKEJ MONARCHIE

The Office of the Palatine in the History of the Hungarian Monarchy

OLIEINICHENKO NIKITA*

Abstrakt

Hodnosť palatína v priebehu dejín uhorskej monarchie predstavovala fakticky druhú hodnosť v krajine popri kráľovi a mala veľký vplyv na fungovanie štátu a jeho právneho systému. Predovšetkým palatín v uhorskom kráľovstve bol sudcom, hlavným sudcom krajiny popri monarchovi, samozrejme. V rukách palatína sa v priebehu storočí sústreďovala obrovská moc, okrem súdnictva v rámci svojich právomocí palatín mohol aj zastupovať kráľa, viesť diplomatické rokovania, riešiť veľa rôznych úloh na úseku štátnej správy. Preto analýza hodnosti palatína a jeho postavenia v systéme štátnych orgánov Uhorska, ktorej je venovaný môj príspevok, pomôže objasniť a vysvetliť, ako vôbec fungovalo súdnictvo a štátny mechanizmus v stredovekom a novovekom štáte. Môj príspevok má za cieľ na príklade jednej hodnosti poukázať, ako vyzeralo právo v minulosti a ako sa transformovalo. Podľa týchto kritérií hodnosť palatína bude fungovať ako ideálny príklad, lebo ona existovala fakticky celé obdobie existencie uhorského kráľovstva a bola založená ešte prvým uhorským kráľom Štefanom I. a pokračovala vo svojej existencii až do roku 1867, do vzniku Rakúsko-uhorského štátu. V takých chronologických medziach bude aj môj príspevok, v ktorom sa ja pokúsím rýchlo vysvetliť podmienky vzniku hodnosti a jej transformácie v priebehu času a samozrejme zániku, spolu s tým aj transformácie v krajine, ktoré na to vplývali. Okrem teoretických vedomostí tak isto v príspevku uvediem aj niekoľko prípadov zo stredoveku a novoveku, ktoré boli riešené palatínmi v medziach ich kompetencií.

Abstract

The office of the palatine throughout the history of the Hungarian monarchy represented in fact the second highest office in the country, next to the king, and had a great influence on the functioning of the state and its legal system. Above all, the palatine in the Kingdom of Hungary was a judge, the chief judge of the country alongside the monarch, of course. Over the centuries, enormous power was concentrated in the hands of the palatine; besides judicial authority within the framework of his competences, the palatine could also represent the king, conduct diplomatic negotiations, and deal with many different tasks in the sphere of state administration. Therefore, the analysis of the office of the palatine and his position in the system of state authorities of Hungary, to which my paper is devoted, will help to clarify and explain how the judiciary and the state mechanism functioned in the medieval and early modern state. My paper aims, using the example of one office, to demonstrate how law looked in the past and how it transformed. According to these criteria, the office of the palatine will serve as an ideal example, because it existed in fact throughout the entire period of the existence of the Kingdom of Hungary and was established by the first Hungarian king, Stephen I, and continued to exist until 1867, until the creation of the Austro-Hungarian state. These chronological boundaries will also frame my paper, in which I will attempt to briefly explain the conditions of the creation of the office and its transformations over time, and of course its disappearance, together with the transformations in the country that influenced it. In addition to theoretical knowledge, the paper will also present several cases from the medieval and early modern periods that were resolved by palatines within the limits of their competences.

Kľúčové slová: *Hodnosť palatína, štátoprávne dejiny Uhorska a Slovenska, dejiny súdnictva, dejiny verejnej správy, postupný vývoj štátu a práva*

Key words: *Office of the palatine, state-legal history of Hungary and Slovakia, history of judiciary, history of public administration, gradual development of the state and law*

* študent 3 roku štúdia, Študijný program: Právo /Denné/ Študijný odbor: Právo na Právnickej fakulte Univerzity Mateja Bela v Banskej Bystrici, Komenského 20, 974 01 Banská Bystrica; Kontaktný e-mail: nikita.oleyni@gmail.com, nolieinichenko@student.umb.sk

Úvod

Predkladaný príspevok sa zameriava na výskum hodnosti palatína v priebehu storočí. Zaujímavý je aj moment, že pri rozbere úradu palatína môžeme sledovať vývoj celej krajiny, aj spoločnosti, ktorá v nej bývala, od najstarších čias prvých Arpádovcov až po Rakúsko-uhorské vyrovnanie.

Už od vlády prvého kráľa z dynastie Arpádovcov, Štefana I, úrad palatína zohrával v kráľovstve významnú rolu. Palatín, hodnostár vyberaný spomedzi vysokej šľachty a menovaný kráľom, bol v kráľovstve druhým svetským úradníkom po panovníkovi. Zúčastňoval sa vojenských vyprav, viedol mierové rokovania, vykonával súd nad obyvateľmi krajiny, bol fakticky nadradený nad kráľovskými sudcami v jednotlivých komitátoch (bielotmi) a výrazne ovplyvňoval politický život štátu. Zúčastňoval sa na rozličných podujatiach a ceremóniách, ale aj na povstaniach a občianskych vojnách. V niektorých prípadoch sa mohol v dôsledku určitej udalosti dostať aj na kráľovský trón, ak to bolo napríklad v prípade Šamuela Abu, ktorý vládol niekoľko rokov po Petrovi Orseolovi. Samotná hodnosť palatína neexistovala iba v Uhorsku, ale aj v iných krajinách Európy. Tam síce mohli mať títo hodnostári iné označenie, no vykonávali totožné alebo podobné funkcie, napríklad Hofpfalzgraf v Nemecku. To vytvára vhodný priestor na komparáciu, ktorej sa budem vo svojej práci tiež venovať.

Je potrebné zdôrazniť, že časom sa úrad palatína menil a prispôboval spoločenským tendenciám jednotlivých období. Od roku 1222, keď Ondrej II. vydal Zlatú bulu, sa Uhorské kráľovstvo začalo meniť z klasického európskeho modelu centralizovaného ranofeudálneho štátu na model feudálnej rozdrobenosti. Charakteristickými znakmi tohto modelu boli rast vplyvu vysokej šľachty a naopak pokles kráľovskej moci. V tomto období sa palatíni menili z kráľovských úradníkov, reprezentujúcich vôľu kráľa, na predstaviteľov vôle šľachty na kráľovskom dvore. Inými slovami, mohli zohrávať úlohu sprostredkovateľa a udržiavať určitú rovnováhu medzi kráľom a šľachtou.

Po bitke pri Moháči, keď sa v dôsledku osmanskej invázie a bojov medzi Jánom Zápoľským a Ferdinandom I. Habsburským dostala významná časť územia Uhorska pod moc Habsburgovcov, sa úrad palatína a jeho dvor na určitý čas stali nielen reprezentantom vôle panovníka, ale aj čiastočnou náhradou za stratený kráľovský dvor. Palatínsky dvor sa stal nielen politickým, ale aj kultúrnym centrom krajiny. Palatíni sa podieľali aj na výstavbe rozličných kultúrnych pamiatok; príkladom môže byť palatín Mikuláš Esterházy, ktorý sa stal donátorom výstavby Katedrály sv. Jána Krstiteľa v Trnave. Neskôr však habsburský absolutizmus zvyšoval tlak na spoločnosť. Ako reakcia na Veľkú francúzsku revolúciu a napoleonské vojny narastal spoločenský odpor, ktorého jedným z prejavov boli aj udalosti revolučného roku 1848.

Po porážke revolúcie došlo k obnove absolutizmu. V tomto období hodnosť palatína ešte existovala, ale už len ako určitý relikť a pripomienka slávnej minulosti, pričom palatíni vykonávali prevažne reprezentatívne funkcie. Hodnosť definitívne zanikla po rakúsko-uhorskom vyrovnaní.

Týmto stručným prehľadom dejín som chcel vysvetliť svoj záujem o túto tému, pretože hodnosť palatína v uhorských dejinách možno považovať za jedinečný jav. Ťažko možno nájsť inú hodnosť, samozrejme s výnimkou panovníka, ktorá by v jednej krajine existovala tak dlho, približne tisíc rokov, a zároveň prešla takým množstvom premien, transformácií a obnov. Menili sa králi, celé dynastie, zásadne sa menila politická mapa krajiny aj celej Európy, no táto hodnosť pretrvávala, hoci sa sama vnútorne transformovala. Z toho vyplýva, že palatína možno považovať za akési zrkadlo spoločenských, sociálnych a štátoprávných premien krajiny. Výskum tejto témy môže byť podľa môjho názoru zaujímavý nielen pre historikov, ale aj pre právnikov ako zdroj poznania dejín štátu a práva.

Hodnosť palatína v priebehu dejín

Predtým ako prejsť ku samotnej problematike vzniku a vývoja hodnosti palatína bude dôležitým ukázať stručnú definíciu pojmu *palatín*. Podľa F. Uličneho: palatína väčšina historikov stredovekarov vníma ako jedného z najvýznamnejších šľachtických hodnostárov v Uhorskom kráľovstve, po panovníkovi. Obvykle palatína menoval na obdobie jedného roka kráľ, ale za výnimočných okolností mohli posobiť aj dvaja palatíni v jednom čase.¹ Ale musím poukázať že, hoci uvedená definícia aj poskytuje základnú predstavu o hodnosti palatína, ona aktuálna pre obdobie stredoveku. Ďalej mení sa proces menovania palatínova jeho funkčne obdobie, ale podstata hodnosti ako druhej v krajine po kralovi pozostáva nemenná až do roku 1848.

1.1 Etimológia slova palatín

Otazku etimológii pojmu palatín je možné rozdeliť do dvoch rovín. V prvej rovine sme môžeme rozobrať vznik samotného pojmu palatín. Samotne slovo palatín má výrazne latinský pôvod a je odvodené od slova *palatium*, ktoré označovalo panovnícky dvor, alebo palác, v zmysle sídla panovníka, a pochádzalo z označenia jedného z vrchov, na ktorých bol postavený antický *Rim-Mons palatinum*.²

¹ ULIČNÝ, F.: Dejiny Slovenska v 11 až 13 storočí. Bratislava: VEDA, 2013, s 418

² HERUCOVA, A.: Palatini Arpadovských kralov. Bratislava: VEDA, vydavateľstvo SAV, 2020, s.12

Po zániku Rímskej ríše v roku 476 n. l. však rímska kultúra a systém rímskeho práva nezanikli spolu so samotnou ríšou, ale boli prevzaté Gótmami, Frankmi a inými barbarskými kmeňmi, ktoré obsadili územie bývalej ríše, a boli implementované, alebo presnejšie povedané, spojené s pôvodným barbarským obyčajovým právom. A tak, ako sa pôvodné obyvateľstvo Rímskej ríše stalo súčasťou spoločnosti v novovzniknutých barbarských štátnych útvaroch, tak sa aj rímske právo, výdobytky rímskej štátovedy a latinčina stali neoddeliteľnou súčasťou verejnoprávneho poriadku týchto štátnych útvarov a v spojení s pôvodnými barbarskými tradíciami a obyčajmi zohrali výraznú rolu vo formovaní prvých ranofeudálnych štátov.

Tu ide o určitú recepciu, v rámci ktorej bol prebratý aj samotný pojem *Palatium*, ktorý podľa Herucovej, bol aj označením putovného dvora Karola Veľkeho.³

Ďalej bude dôležité ukázať, že nielen Franská ríša pod vládou Karola Veľkého preberala latinské slová a termíny na účely formovania a usporiadania štátnej správy. Napríklad slovo *palatium* na pomenovanie sídla panovníka mohli využívať aj iné ranofeudálne kráľovstvá súčasné Frankom. Obdobne mohli mať aj podobný systém usporiadania dvora panovníka a aj obdobný systém hodností na tomto dvore. Franská ríša však bola v čase panovania Karola Veľkého najmocnejším kráľovstvom západnej Európy, až natoľko, že v roku 800 n. l. pápež korunoval Karola za rímskeho cisára. Preto bola v predstavách súčasníkov aj budúcich generácií Franská ríša vnímaná ako najvyspelejší a najsilnejší štát, a preto sa jej právny systém, usporiadanie dvora panovníka a vnútroštátna organizácia stali vzorom pre iných panovníkov, ako si môžu usporiadať svoje kráľovstvo.

Pôvod samotnej hodnosti palatína musíme tiež hľadať na franskom kráľovskom dvore. Z prameňov, ktoré sa k nám dostali z konca 9. storočia, vieme, že v priebehu času a vývoja štátu kráľ už nemohol riešiť všetky záležitosti dvora samostatne, a preto zriadil na svojom dvore dve stále hodnosti, a to apokrisiara pre cirkevné záležitosti a palatína pre svetské záležitosti. Palatín okrem toho mal aj súdnu právomoc riešiť spory, ktoré sa dostali na dvor.⁴

Druhá rovina spočíva v tom, že okrem latinského slova palatín, alebo *comes palatii*, existoval aj uhorský ekvivalent názvu tejto hodnosti, a to *nádorispán* (dvorský župan). Podľa Bidovského má maďarské slovo *nádorispán* výrazne slovanský pôvod a pochádza zo slovanského výrazu *na dvore župan*.⁵

³ HERUCOVA, A.: *Palatini Arpadovských kralov*. Bratislava: VEDA, vydavateľstvo SAV, 2020, s.12

⁴ HERUCOVA, A.: *Palatini Arpadovských kralov*. Bratislava: VEDA, vydavateľstvo SAV, 2020, s.30

⁵ BIDOVSKEÝ, E.: *Orhany stredovekeho sudnictva v Uhorsku 1000- 1526*. In *Slovenska archivistika*, 1973, roč. 7, č.2, s.102

1.2 Prvý uhorský palatín

V súčasnej historiografii je za prvého uhorského palatína označovaný uhorský šľachtic Šamuel Aba, ktorý mal svoje panstvo na severovýchode dnešného Uhorska; za jeho sídlo sa považuje mesto Jäger. Vychádzajúc z prameňov, bol to významný a bohatý šľachtic a tiež manžel sestry prvého uhorského kráľa Štefana, pričom mal výraznú úlohu na kráľovskom dvore. V neskoršom období bol kráľom vymenovaný za palatína, ale zároveň zostával aj komesom na svojom rodnom území na východe krajiny.⁶ Po smrti kráľa Štefana nastúpil na uhorský trón Peter Orseolo, ale jeho vnútorná politika pobúrila maďarskú šľachtu a v septembri roku 1041 v krajine vypuklo povstanie. Povstali šľachtici zvolili za kráľa palatína Šamuela Abu. Jeho panovanie však bolo krátke, trvalo len od roku 1041 do roku 1044, a následne bol porazený nemeckým kráľom Henrichom III. v bitke pri Menfő a neskôr aj popravený. Po ňom moc v kráľovstve opäťovne získal Peter Orseolo.⁷

1.3 Postavenie palatína v zakonníku kráľa Ladislava I a vznik hodnosti

V tejto podkapitole začneme analýzou postavenia palatína na kráľovskom dvore za obdobia prvých Arpádovcov. Ale predtým, ako prejdeme k charakteristike úradu palatína, musíme v stručnosti povedať o tom, v akom právnom prostredí sa formoval. Podľa názoru historikov stredoveku bolo ranofeudálne Uhorsko, ako aj Veľká Morava, patrimoniálnym štátom. Patrimoniálny znamená, že štát je považovaný za výlučné a neobmedzené vlastníctvo panovníka; neexistuje rozdiel medzi súkromnými záujmami panovníka a verejnými záujmami obyvateľstva, lebo aj jedno, aj druhé je záujmom panovníka, a štát ako celok nemá svoju právnu subjektivitu, tú môže mať len panovník, v prípade Uhorska kráľ, ktorého subjektivita a mocenské postavenie boli odvodené od vôle Boha⁸.

Tú musím poukazať že o tom ako hodnosť palatína vznikla a vyvíjala v období vlády prvých kráľov z dinastie Arpádovcov nevieme fakticky nič, lebo zachovalo malo roznych listin, textov a ďalších zdrojov informácie. Nam pozostava len domievať

Napríklad Bidovský opisuje okolnosti vzniku úradu palatína a jeho pôvodnú úlohu na kráľovskom dvore takto: *“Prislušníci kralovskeho dvora prvých Arpádovcov, najmä tamojši zamestnanci, pochádzajúci z roznych vrstiev obyvateľstva, mali rôzne postaveni, a to vyššie, nižšie a najnižšie. Pretože išlo o nemalý počet ľudí, ich hospodarske, disciplinarne záležitosti*

⁶ SEGEŠ, V.: Kniha kralov panovníci v dejinach slovenska a slovakov. Bratislava: Slovenske pedagogicke nakladatelstvo- Mlade leta s.r.o., 2010, s. 51

⁷ SEGEŠ, V.: Kniha kralov panovníci v dejinach slovenska a slovakov. Bratislava: Slovenske pedagogicke nakladatelstvo- Mlade leta s.r.o., 2010, s. 51-52

⁸ ŠEVCOVA, A. GABRIŠ, T.: Dejiny štátu, spravy a sudnictva na Slovensku. Plzeň: Aleš Čeněk, s.r.o., 2009, s. 25

vyžadovali iste vrchnostenske usmernovanie. Toto usmernovanie vykonaval dvorský župan(, župan dvora(comes palatii). ”⁹

Ďalej prejdeme od roviny teórií k analýze samotných prameňov práva, a konkrétne k zákonníku kráľa Ladislava I. Tu nás bude zaujímať článok 3 tretej knihy, ktorý sa nazýva O palatínovi. Z analýzy tohto článku vyplýva, že palatín bol správcom kráľovskej pečate, ale nemohol ňou voľne disponovať. Ak palatín odchádzal z kráľovského dvora, musel kráľovskú pečať ponechať hodnostárovi, ktorý ho zastupoval. Neskôr sa vyvinula aj funkcia dvorského sudcu, ktorý mal na starosti obdobné funkcie ako palatín a de facto ho čiastočne nahrádzal počas jeho neprítomnosti na kráľovskej kúrii.

Ďalej z analýzy článku vyplýva, že ak palatín odíde z kráľovského dvora, nemôže posilať svoju pečať nikomu okrem tých, ktorí sú dvorníci, a len v prípade, že ho títo dvorníci o to požiadajú, môže rozhodnúť ich spor. Ak palatín urobí inak, zákon preňho stanovuje určitý peňažný trest, pričom rovnaký trest postihne aj kniežacieho župana.¹⁰

1.4 Hodnosť palatína a Zlatá bula

Výsledkom celoštátneho nepokoja a nedôvery medzi kráľom a šľachtou sa stala Zlatá bula kráľa Ondreja II., vydaná v roku 1222. Bula predstavovala kráľovský dekrét opatrený zlatou pečaťou, ktorý sa obsahovo skladal z 31 článkov, pričom väčšina z nich bola venovaná postaveniu kráľovských servientov a zároveň ustanovovala dominantné postavenie veľmožov a cirkvi. Kráľ však bulu nevydal dobrovoľne, ale pod obrovským nátlakom šľachty. Najdôležitejším ustanovením obsiahnutým v Zlatej bule bolo právo šľachty na odpor voči kráľovi, *ius resistendi*.¹¹

Palatín je spomínaný už v prvom článku buly, ktorý hovorí o tom, že všetci šľachtici môžu prísť do Stoličného Belehradu na deň svätého kráľa Štefana a predložiť svoje správy kráľovi. Ak je kráľ z vážnych okolností neprítomný na stretnutí, zastupuje ho palatín.¹²

Ešte palatín je spomínaný v ôsmom článku Buly, v ktorom ide o to, že palatín má právo súdiť každého slobodného obyvateľa krajiny bez rozdielu na to, aké má tento obyvateľ postavenie. Ak však ide o prirodzeného šľachtica a v dôsledku posúdenia veci mu hrozí strata života alebo

⁹ BIDOVSKEÝ, E.: Orhany stredovekeho sudnictva v Uhorsku 1000-1526. In *Slovenska archivistika*, 1973, roč. 7, č. 2, s. 102

¹⁰ LACLAVÍKOVA, M. ŠVECOVA, A.: Práve na uzemi Slovenska 1 Odnajstarších čias do roku 1790. vydavateľstvo Typi Universitatis turnaviensis, spoločne pracovisko Trnavskej university, a VEDY. s. 74

¹¹ SEGEŠ, V.: Kniha kralov panovníci v dejinách slovenska a slovakov. Bratislava: Slovenske pedagogicke nakladateľstvo- Mladé leta s.r.o., 2010, s. 114

¹² SEGEŠ, V. ŠEDOVA, B.: *Práve k vojenským dejinám Slovenska*. Bratislava: Vojenský historický ústav, 2011, s. 67

prepadnutie majetku, palatín môže vyniesť rozsudok len so súhlasom kráľa. Palatín môže mať len jedného zastupujúceho sudcu na svojom dvore.¹³

Tu bude dôležité pripomenúť slova Bidovského: *«Pravda, platilo to viac-menej na prvé desaťročie XIII storočia, lebo neskôr príslušníci niektorých tried, niektorých vrstiev obyvateľstva, ďalej privilegované obyvateľstvo výsadných území, obyvateľstvo miest a poddní nespádali pod palatínovu súdnu právomoc.»*¹⁴

1.5 Analýza postavenia palatína na konkrétnom príklade

Začneme analýzou palatína Rolanda, pochádzajúceho zo šľachtického rodu Ratoldovcov. Jeho osobnosť je zaujímavá tým, že jeho palatinát trval od roku 1248 do roku 1260, teda celých dvanásť rokov, čo možno považovať za jeden z najdlhších palatinátov svojej doby, a takisto sa z jeho palatinátu zachovalo viacero listín, preto je ideálnym príkladom na vysvetlenie úlohy palatína v 13. storočí. Rolandov život pred palatinátom nás veľmi nezaujíma, ale musíme povedať, že svoju kariéru začal v rôznych hodnostiach na kráľovskom dvore. Bol kráľovským pohárnikom, ďalej stolníkom a popri tom ešte aj komesom v Nitre a Šoprone v rokoch 1242 – 1245. Vrchol jeho kariéry však nastal počas vojen s rakúskym vojvodom Fridrichom II. Babenbergom. V roku 1246 stál Roland na čele kráľovského vojska vo víťaznej bitke pri Litave. V roku 1248 ho kráľ vymenoval za palatína a spolu s tým aj za bratislavského župana.¹⁵

Teraz však bude dôležité venovať pozornosť súdnej činnosti Rolanda. V roku 1252 riešil otázku chotárných hraníc majetku Nevegy v Zalianskej župe, patriaceho banovi Jolatovi, ale samotnú otázku kontroly a zistenia skutkového stavu veci zveril prištaldovi. Ďalej v roku 1252 Roland svojou listinou potvrdil splatenie dlhu Konradom, synom komesa Štefana. Na konci roku 1253 bol však tento komes Konrad pred palatínom obvinený z toho, že odsúdil istého Bytka na stratu ruky, a tento Bytko podal na Konrada sťažnosť palatínovi. Konrad na obvinenie odpovedal tým, že postupoval zákonne a uložil Bytkovi takýto trest preto, že Bytko zabil Konradovho poddaného a aj sám bol Konradovým poddaným. Po vyšetrení skutkového stavu veci palatín

¹³ ŠEGEŠ, V. ŠEDOVA, B.: *Pramene k vojenským dejinám Slovenska*. Bratislava: Vojenský historický ústav, 2011, s. 67

¹⁴ BIDOVSÝ, E.: Orhany stredovekeho sudnictva v Uhorsku 1000-1526. In *Slovenska archivistika*, 1973, roč. 7, č. 2, s. 103

¹⁵ TIHÁNYIOVÁ, M.: Palatin a bratislavský župan Roland z rodu Ratoldovcov. In *Verbum historiae: internetový časopis Katedry historie PdF UK v Bratislave*, roč. 3, č. 1 st 11-12

rozhodol, že obe strany majú riešiť spor prostredníctvom Božieho súdu, a to prisahou v jeho kaplnke.¹⁶

Ďalší spor, ktorému tu bude venovaný priestor, sa z roku 1253 týkal bratislavských hradných jobagiónov z dediny Kračany, medzi ktorými boli Etre a jeho syn Serafín. Tí pred palatínom obvinili hradčanov Bratislavského hradu z dediny Kráľovičove Kračany spolu aj s klerikom z neoprávneného užívania ornej pôdy a lúk, ktoré mali hradčania odovzdať jobagiónom do dedičnej držby. Hradčania však všetky obvinenia odmietli a tvrdili, že pôda patrí im už od dávnych čias a že s jobagiónmi neuzatvárali žiadne dohody o držbe. Po vypočutí oboch strán rozhodol palatín o vyšetrowaní skutkového stavu veci prostredníctvom výpovedí svedkov, ale jeden zo svedkov odmietol zložiť prisahu. Za týchto okolností Roland nariadil riešiť spor vzájomným súbojom; v priebehu súboja zvíťazil Etre a jeho strana. Ďalej palatín odoslal svojho prištalda spolu so zástupcom Bratislavskej kapituly a ďalšími poverenými ľuďmi dohliadať na vykonanie jeho rozsudku a skontrolovať prevod pôdy k jobagiónom.¹⁷

1.6 Palatín ako sudca

Začneme tým, že najprv palatín súdil na Súde kráľovskej prítomnosti praesentia regia, v mene kráľa. Od čias kráľa Ladislava I. bol palatín faktickým zástupcom kráľa aj ochrancom kráľovskej pečate, čo už bolo spomínané vyššie. Od čias vlády kráľa Štefana II. však palatín už nesúdil na Súde kráľovskej prítomnosti, ale jeho funkcia tu prešla na dvorského sudcu.¹⁸ Značné posilnenie súdnych právomocí palatína priniesla Zlatá bula kráľa Ondreja II. a už vyššie spomínaný ôsmy článok dokumentu, podľa ktorého palatín fakticky mohol súdiť ktoréhokoľvek obyvateľa kráľovstva. Od tohto obdobia palatín súdil nezávisle, ale v rámci kráľovskej kúrie. Palatín mohol súdiť osobne alebo s dvoma svojimi zástupcami, ktorých vymenúval z radov svojej familiares, vo vlastnom sídle. S príchodom Anjouovcov k moci smerovala politika panovníkov k centralizácii kráľovstva a palatín mohol súdiť už len na kráľovskom dvore. V období do roku 1526 sa však vyvinuli dva druhy palatínskeho súdnictva: po prvé *palatínska kongregácia*, ktorá sa konala na vidieku a bola venovaná záležitostiam komitátov, a po druhé *súd palatína v kráľovskej kúrii*.¹⁹

¹⁶ TIHÁNYIOVÁ, M. Palatín a bratislavský župan Roland z rodu Ratoldovcov. In Verbum historiae: internetový časopis Katedry histórie Pdf UK v Bratislave, roč. 3, č.1 s 20

¹⁷ TIHÁNYIOVÁ, M. Palatín a bratislavský župan Roland z rodu Ratoldovcov. In Verbum historiae: internetový časopis Katedry histórie Pdf UK v Bratislave, roč. 3, č.1 st. 21-22

¹⁸ ŠTIPKA, I. Dejiny sudnej moci v Uhorsku do roku 1918. Košice: nica, 2004, s 20

¹⁹ ŠTIPKA, I. : Dejiny sudnej moci v Uhorsku do roku 1918. Košice: nica, 2004, s 68

Ale teraz bude vhodné analyzovať samotnú palatínsku kongregáciu a povedať, ako prebiehala. Zhromaždenia zvolávané palatínom sa konali pod holým nebom a, samozrejme, vyžadovali teplé počasie. Predstavovali určitú formu snemu, ale aj verejného súdneho konania, ktorého hlavným cieľom bolo potrestanie zločineckej činnosti v rôznych jej formách. Z uvedených vyššie príčin sa takéto zhromaždenie mohlo konať len zriedkavo, raz za dva až tri roky, a aj pre samotného palatína bolo ťažké zvolávať takéto zhromaždenie osobitne pre každý komitát. To však nevylučuje, že kongregácia mohla byť niekedy venovaná aj jednému komitátu, ale obyčajne na začiatku rozvoja vidieckeho súdnictva palatína kongregácie konali pre päť až sedem žúp, a neskôr, už v časoch vlády Ľudovíta Veľkého, v rámci jeho snáh o centralizáciu krajiny, kongregácie konali už len pre dva až tri komitáty.

Šľachticovi, ktorý sa nezúčastnil na zhromaždení, hrozila sankcia finančnej pokuty.²⁰ Právo účasti na zhromaždeniach však mohli mať okrem šľachty aj osoby nešľachtického pôvodu, takisto ako podžupani a slúžni žúp. Na zhromaždení sa volilo dvanásť sudcov, teda funkcionárov. Samozrejme, neboli to sudcovia v klasickom zmysle slova, pretože rozsudok vynášal sám palatín; oni boli skôr jeho poradcami a reprezentantmi miestnej šľachty. Týchto dvanásť osôb bolo volených z predstaviteľov župnej šľachty a skladali prisahu. Predsedom kongregácie bol najčastejšie sám palatín. Pomáhal mu jeho notár, ale za hodnovernosť listín tu vydaných niesol zodpovednosť človek kráľa a vyslanec kapituly Stoličného Belehradu.²¹ E. Bidovský vôbec menuje týchto 12 šľachticov nie sudcami, ale prisáznymi a samotnú kongregáciu popisuje tak to: *«Palatin po zostaveni svojej sudnej stolice z funkcionarov, zo zvolenych prisaznych a po ich prisahе opytal , ktorí su zname verejni zločinci, lupiči, zlodeji, ukryvači, falšovatelja penazi, listin a podpaľači. Neskôr mu funkcionari žup a prisazni odovzdali už písomný zoznam týchto zločincov. Palatin dal tento menoslov prečítať a po ustalení že nie su prítomní na zhromaždení, vyobcoval ich akoby na základe rozsudku verejnosti.»*²² Fakticky tento rozsudok predstavoval určitú formu starorímskej proskripcie. Inštitút palatínskych kongregácií bol definitívne zrušený kráľom Matejom Korvínom v roku 1486.

Súd palatína, ktorý už bol sformovaný v prvej polovici 13. storočia, bol až do druhej polovice 14. storočia, ak možno tak povedať, autonómnou súčasťou dvorského kuriálneho súdu, ale palatín mohol súdiť aj vo vlastnej kúrii, ktorá sa nachádzala mimo kráľovského dvora. Podľa

²⁰ BIDOVSÝ, E. Orhany stredovekeho sudnictva v Uhorsku 1000-1526. In Slovenska archivistika, 1973, roč. 7, č. 2, st 103-104

²¹ ŠTIPKA, I. Dejiny sudnej moci v Uhorsku do roku 1918. Košice: nica, 2004, s 69

²² BIDOVSÝ, E. Orhany stredovekeho sudnictva v Uhorsku 1000-1526. In Slovenska archivistika, 1973, roč. 7, č. 2, s. 104

ôsmeho článku Zlatej buly mohol mať na takomto súde jedného zastupujúceho sudcu. Od vlády kráľa Ľudovíta Veľkého však bol súd palatína včlenený do kráľovskej kúrie a palatín už vlastnú kúriu na vidieku nemal. Od roku 1342 mohol v rámci svojho súdu súdiť už len na kráľovskom dvore, čím sa fakticky stal len jedným zo sudcov kráľovského dvora (*praesentia palatinalis in curia regia*), hoci mal osobitnú právomoc. Najmä do jeho právomoci spadali spory, ktoré sa týkali nehnuteľností, odvolania a spory, v ktorých na jednej strane vystupoval kráľ, ale z úradnej povinnosti palatín rozhodoval aj sporné veci, ktoré vznikali medzi kráľom a obyvateľmi krajiny. Aj palatínske kongregácie bolo od toho času možné zvolávať len na základe kráľovského poverenia.²³ Takisto palatín v rámci svojho súdu na kráľovskom dvore mohol rozhodovať aj spory, ktoré mu prideliť kráľ, prípady, ktoré sa dostali na kráľovskú kúriu od palatínskej kongregácie, a takisto sa určité skupiny mohli obrátiť na súd palatína v rámci výsady alebo privilégia, ktoré dostali od panovníka. Takisto mohol palatín rozhodovať vo veciach, ktorých predmetom bolo regálne právo, tridsiatky a vrchnostenské práva. Palatín bol tiež riadnym sudcom Kumánov a Jazygov a vystupoval aj ako odvolací orgán pre územie Dalmácie. Podľa palatínskych článkov z roku 1485 mal palatín právomoc ako sudca zastupovať panovníka v čase jeho neprítomnosti.²⁴

1.7 Zmeny v úrade palatína, ktoré priniesol pozdný stredovek

Palatín sa významne podieľal na rozvoji župnej správy prostredníctvom palatínskych kongregácií, ale ako už tiež bolo spomenuté, kompetencie palatína na palatínskych kongregáciách výrazne poklesli v období vlády Ondreja III. a ďalej sa za vlády Ľudovíta Veľkého a Žigmunda Luxemburského len znižovali v prospech moci kráľa a miestnej župnej šľachty, až napokon bol inštitút palatínskych kongregácií zrušený Matejom Korvínom.

Tieto zmeny však neznamenal úplný úpadok hodnosti, ale len proces jej evolúcie, ktorá išla tým istým smerom ako vývoj samotného kráľovstva. Teraz venujme pozornosť palatínskym zákonným článkom, ktoré boli prijaté uhorským snemom v roku 1485 a už boli spomenuté v predchádzajúcej podkapitole. Podľa týchto článkov bol palatínov hlas prvým pri voľbe panovníka, palatín bol regentom v čase neplnoletosti panovníka, zodpovedal za zvolávanie a priebeh snemu v prípade dlhodobej neprítomnosti panovníka alebo jeho neplnoletosti, stával sa krajinským kapitánom insurekčného vojska, mal právomoc rozhodovať spory medzi príslušníkmi jednotlivých šľachtických rodov a klanov, bol sprostredkovateľom pri spore medzi

²³ BIDOVSÝ, E.: Orhany stredovekeho sudnictva v Uhorsku 1000-1526. In Slovenska archivistika, 1973, roč. 7, č. 2, s. 103

²⁴ ŠTIPKA, I.: Dejiny sudnej moci v Uhorsku do roku 1918. Košice: nica, 2004, s. 70

panovníkom a krajinou, teda obyvateľstvom, a pri nečinnosti kráľa mohol rozhodnúť o sťažnostiach prednesených kráľovi, o čom ho však musel informovať. Poskytoval panovníkovi aj sťažnosti, ktoré sa týkali donácií, bol druhým sudcom v krajine po panovníkovi a jeho zástupcom, bol hlavným kapitánom Kumánov (*comes Cumanorum*) a ich riadnym sudcom, za čo dostával 3000 zlatých ročne. Okrem iného bol palatín aj sudcom pre územie Dalmácie, za čo dostával úžitky z určitých dalmátskych ostrovov.

Okrem iného palatínske články priniesli aj určité zmeny do samotnej podstaty hodnosti palatína. Hodnosť sa stala doživotnou, ale v prípade jej uvoľnenia musel kráľ v priebehu jedného roka od tejto udalosti zvolať snem na účel voľby nového palatína. Ak by to kráľ neurobil, povinnosť zvolať snem postupne prechádzala na krajinského sudcu a ďalej na taverníka; ak by si ani oni svoju povinnosť neplnili, mohli prísť o svoje hodnosti. Mieru odmeny palatína za výkon jeho funkcie určoval panovník. Takéto určenie úloh a povinností palatína prežilo nielen vládu Mateja Korvína, ale aj bitku pri Moháči v roku 1526 a pád Budína v roku 1541 a bolo zachované aj pri nástupe panovníkov z dynastie Habsburgovcov na uhorský trón.²⁵

1.8 Hodnosť palatína v období po Mochačskej bitke a jeho sudcovské kompetencie

Úplne rozdeliť dejiny súdnictva v Uhorsku na obdobie pred Moháčom a po Moháči však nie je možné, lebo spoločenské zmeny a reformy nenastávajú naraz. Nie je možné povedať, že po nástupe Habsburgovcov na uhorský trón už vznikol úplne nový súdny systém. Všetko bolo presne naopak. Habsburgovcov otázkou súdnictva v Uhorsku zaujímala menej než obranyschopnosť krajiny a jej ekonomický stav. Fakticky v Uhorsku zostalo zachované stavovské súdnictvo, ktoré sa vyvinulo ešte v období stredoveku. Podstata takéhoto systému spočívala v tom, že boli rozšírené kompetencie stavovského snemu, zachované skoršie kompetencie najvyšších sudcov krajiny a súdne kompetencie žúp.

To, čo som teraz povedal, je však len jedna strana mince. Na druhej strane Habsburgovci chápali neurčitú povahu svojej vlády v Uhorsku, takisto aj to, že ak ide o uhorskú korunu, mali konkurentov, napríklad sedmohradských vojvodov. Preto sa viedenský panovníci pokúšali upevniť svoju moc v krajine aj prostredníctvom zasahovania do kompetencií vnútorných uhorských súdov a, ak by sa to podarilo, vylúčiť uhorské súdnictvo z vplyvu uhorskej stavovskej elity.

Jedným z takýchto pokusov bolo zavedenie miestodržiteľského súdnictva a úradu miestodržiteľa. Habsburgovci fakticky zrušili súdnu stolicu palatína a jej úlohy a kompetencie

²⁵ KOČIŠ, J. KURUSÁROVÁ, J. Palatín: Životné osudy Juraja Thurzu. Žilina: GEORG, 2012, st 47-48

rozdělili medzi kráľovského miestodržiteľa, vrchného kapitána a palatínskeho miestodržiteľa. O úrade kráľovského miestodržiteľa je možné povedať, že bol do určitej miery náhradou za úrad palatína. Na miestodržiteľa panovníci často prenášali svoje súdne kompetencie, pokiaľ neboli prítomní v krajine, ale tieto skutočnosti neodporovali uhorským právnym obyčajom, pokiaľ sa pravidelne konali voľby palatínov.²⁶ Ústredným súdom krajiny bola v tom čase Kráľovská kúria, ktorej právomoc sa v priebehu 17. storočia výrazne menila a tieto zmeny pokračovali aj v neskoršom období. Kráľovskú kúriu tvorili dva sudy: Kráľovská tabuľa, na čele ktorej stál tretí sudca v krajine, teda sudca-personalist, a Sedmopanská tabuľa, na čele ktorej stál kráľovský miestodržiteľ. Sedmopanská tabuľa však bola výlučne odvolacím súdom a činnosť týchto súdov nebola stála, najmä kvôli vojenským hrozbám a iným mimoriadnym situáciám. Napríklad v rokoch 1650 – 1700 sa klasické súdne zasadnutia buď nekonali vôbec, alebo sa konali len niekedy, preto sa stalo zvykom zvolávanie krátkych oktáv, ktoré mohli byť zvolané za súhlasu kráľa palatínom alebo kráľovským miestodržiteľom.²⁷

Zákony z roku 1723 priniesli určité zmeny v súde Kráľovskej kúrie. Sedmopanská tabuľa sa teraz skladala z 15 členov, Kráľovská tabuľa zasadala permanentne a do jej kompetencie začali patriť veci, ktoré skôr spadali pod právomoc palatína a krajinského sudcu.²⁸

Zákonný článok 30/1729 priniesol dvom vrchným súdom krajiny, teda Sedmopanskej tabuli a Kráľovskej tabuli, podobnú štruktúru, a najmä to, že na oboch uvedených súdoch predsedali palatín alebo na jeho mieste kráľovský miestodržiteľ, krajinský sudca a sudca-personalist. Palatinálny súd, teda Sedmopanskú tabuľu, či súd miestodržiteľa, riadil palatín alebo miestodržiteľ. Na týchto súdoch súdil spolu s tromi vysokými šľachticmi a tromi najvyššími predstaviteľmi kléru. Pojem Sedmopanská tabuľa vznikol už v roku 1715 a v roku 1723 bol počet jej členov stanovený na 15.

Na Kráľovskej tabuli predsedal sudca-personalist, ktorý vykonával svoju činnosť spolu s ďalšími úradníkmi, medzi ktorými bol aj zástupca palatína.²⁹

Významné zmeny súdnej organizácie prebehli za reforiem Jozefa II. Novus Ordo Judiciarius, vydaný 12. decembra 1785, výrazne menil súdnictvo. Jeho hlavná idea spočívala v centralizácii súdnictva a oddelení súdnictva od správy. V praxi nás tu zaujíma najmä premena Sedmopanskej tabule na ústredný riadiaci orgán na úseku súdnej správy a definitívne zrušenie palatinálneho súdnictva.³⁰

²⁶ ŠTIPKA, I. Dejiny sudnej moci v Uhorsku do roku 1918. Košice: nica, 2004, st 26-27

²⁷ ŠTIPKA, I. Dejiny sudnej moci v Uhorsku do roku 1918. Košice: nica, 2004, st 31

²⁸ ŠTIPKA, I. Dejiny sudnej moci v Uhorsku do roku 1918. Košice: nica, 2004, st 33-35

²⁹ ŠTIPKA, I. Dejiny sudnej moci v Uhorsku do roku 1918. Košice: nica, 2004, st 86

³⁰ ŠTIPKA, I. Dejiny sudnej moci v Uhorsku do roku 1918. Košice: nica, 2004, st 36

1.9 Miestodržiteľská rada

Začiatok 18. storočia v Európe bol poznačený rôznymi významnými zmenami, a to tak v politickom, ako aj v sociálno-ekonomickom živote. Najprv v roku 1699 skončila rakúsko-turecká vojna a išlo o úplné víťazstvo Rakúšanov a ich spojencov. Už v roku 1686 bol vojenskými jednotkami Svätej ligy oslobodený Budín a spolu s ním aj väčšia časť bývalého Uhorského kráľovstva. Zároveň sa však na začiatku 18. storočia Habsburská monarchia ocitla v stave nových vojenských konfliktov. Na jednej strane to bola vojna o španielske dedičstvo, na druhej strane v Uhorsku vypuklo obrovské stavovské povstanie vedené Františkom Rákóczim.

Rákócziho povstanie malo veľký rozsah, povstalcom sa podarilo obsadiť prakticky celé územie Uhorska a bolo ukončené v roku 1711 Satmárskym mierom, ktorým sa skončila aj celá epocha stavovských povstaní. Mier priniesol určitý konsenzus: uhorská šľachta si zachovala svoje práva a privilégia, ktoré mala v rámci stavovskej ústavy, a takisto dostala aj garancie pre protestantov, ale musela sa vzdať práva na odpor panovníkovi, potvrdiť dedičnosť uhorskej koruny v rámci rodu Habsburgovcov a zrušiť voľby kráľov. Takýto stav vecí bol potvrdený aj v Pragmatickej sankcii z roku 1713, ktorá bola uhorským snemom prijatá až v roku 1723.

V tom istom roku bola rozhodnutím snemu v Uhorsku vytvorená miestodržiteľská rada, vrcholný orgán v krajine, ktorý zastupoval panovníka v čase jeho neprítomnosti v krajine. Na začiatku stál na čele miestodržiteľskej rady palatín ako kompromisná figúra medzi záujmami šľachty a panovníka, ale už v období vlády Márie Terézie a Jozefa II. stál na čele rady kráľovský miestodržiteľ. V roku 1784 sa sídlo rady presťahovalo z Bratislavy do Budína.³¹

1.10 Zánik hodnosti

Ako si už pozorný čitateľ mohol všimnúť z materiálu uvedeného vyššie, hodnosť palatína začala postupom času strácať svoj význam. Tak či onak, pre Habsburgovcov bola hodnosť palatína cudzím uhorským prvkom, akýmsi reliktom už minulej feudálnej a stredovekej epochy. Táto hodnosť, existujúca od samého začiatku uhorského kráľovstva, už do seba stihla vstrebať toľko rôznych tradícií a zvykov, že podľa môjho názoru pre uhorskú šľachtu raného novoveku predstavovala neoddeliteľnú súčasť uhorského štátu.

³¹ SKALOŠ, M. MIČKOVA, Z. Praktikum k dejinám štátu a práva na uzemí dnešného Slovenska do roku 1918. Banská Bystrica: BELIANUM, 2023 st 153-154

V časoch viedenskej vlády bol palatín pre väčšinu uhorskej šľachty fakticky kráľom popri kráľovi, čo potvrdzujú aj sťažnosti uhorských šľachticov adresované palatínovi, ktoré boli spomínané aj v prípade Juraja Thurza. Mnohí zo sťažovateľov vnímali palatína ako svojho zástupcu a ochrancu proti cudziemu panovníkovi. Pre viedenskú administratívu však palatín predstavoval niečo cudzie a nie vždy kontrolovateľné. Ako už bolo povedané, boli palatíni, ktorí verne slúžili Viedni, ako Juraj Thurzo a Mikuláš Esterházy, ale boli aj ľudia ako František Vešelény, ktorí využívali svoju palatínsku moc proti Habsburgovcom, čo len posilňovalo nedôveru. Výsledkom uvedeného boli logické pokusy nahradiť hodnosť palatína úradníkmi, ktorí by zachovávali lojalitu výlučne Habsburgovcom a na ktorých by uhorské stavy už nemali vplyv.

Ale aj napriek tomu úrad palatína pokračoval vo svojej existencii. Áno, po reformách Jozefa II. a po časoch stavovských povstaní hodnosť palatína veľa stratila, ale palatín stále zostával druhým hodnosťárom v Uhorsku po kráľovi, fakticky jeho námestníkom, čo už samo osebe znamenalo veľký význam. Od roku 1795 bol uhorským palatínom Jozef Anton von Habsburg, ktorý bol synom cisára Leopolda. Tento úrad držal vo svojich rukách fakticky 50 rokov, až do svojej smrti v roku 1847. Ako uhorský palatín Jozef Anton Habsburg aktívne podporoval rozvoj vedy a vzdelania v krajine, bol jedným z iniciátorov založenia prvej železničnej trate v Uhorsku v roku 1827, podporoval založenie Uhorského národného múzea, akadémie vied a vojenskej akadémie. Inicioval aj založenie Pester Ungarische Commerzbank v roku 1831. V rámci svojej vnútornej politiky sa snažil hľadať konsenzus medzi záujmami cisárskej administratívy vo Viedni a požiadavkami miestnej uhorskej elity, ale ako už bolo v tejto práci poukázané, obdobná politická pozícia bola využívaná mnohými palatínmi tej doby.³² Takto hodnosť pokračovala vo svojej existencii aj v 19. storočí, až do obdobia pádu režimu Klemensa Metternicha a uhorskej revolúcie v rokoch 1848 – 1849. Hodnosť palatína je spomínaná aj v uhorskej Marcovej ústave z roku 1848, v ktorej bol palatín uvedený ako zástupca kráľa v čase jeho neprítomnosti v krajine.³³

Ale ďalej, po porážke uhorskej revolúcie rokov 1848 – 1849 a v časoch Bachovho absolutizmu, mala hodnosť už len reprezentačný význam a bola definitívne zrušená v roku 1867 po rakúsko-uhorskom vyrovnaní.

³² The King's Deputy: Archduke Josef, 'József nádor', online, / <https://www.habsburger.net/en/chapter/kings-deputy-archduke-josef-jozsef-nador>, cit. 13-03-2026

³³ SKALOŠ, M. MIČKOVA, Z. Praktikum k dejinám štátu a práva na území dnešného Slovenska do roku 1918. Banská Bystrica: BELIANUM, 2023 s.236

Záver

To, čo je pri analýze úradu palatína najviac viditeľné, je miera, v akej právo a právny systém závisia od politického stavu v krajine. Žiaden úrad a žiadna hodnosť nemôžu existovať oddelene od spoločnosti; vznikajú ako odraz konkrétnych potrieb a požiadaviek sociá a transformujú sa tak, ako sa transformuje samo socium. Zaujímavé je pritom aj to, že právomoci jednotlivých hodnostárov sa menili neustále od obdobia k obdobiu. Ak si zhromaždíme rôznych palatínov, z ktorých každý pochádza z iného storočia, zistíme, že každý z nich mal rozdielne právomoci, úlohy a predstavy o spoločnosti a práve vôbec. Dokonca by si možno ani navzájom nerozumeli, lebo každý z nich bol absolútne organickým výtvorom svojej epochy. Napriek tomu však existovalo niečo, čo bolo spoločné pre všetkých palatínov rôznych období, a to podstata ich funkcie: každý palatín bol zástupcom kráľa a druhým hodnostárom v krajine po kráľovi. Takéto postavenie palatína vyplýva tak zo zákonníka kráľa Ladislava, ako aj z uhorskej marcovej ústavy.

To navodzuje myšlienku o skutkovej povahe práva. Právo ako umelo vytvorený konštrukt musí slúžiť aktuálnym potrebám obyvateľstva, pričom jeho existenciu ovplyvňujú tak objektívne, ako aj subjektívne skutočnosti. Jeden inštitút môže existovať na riešenie konkrétnych problémov a výziev, ale môže byť aj stelesnením rôznych tradícií a zvykov, a práve preto sa môže stať neoddeliteľnou súčasťou krajiny. Pritom boli palatíni v priebehu dejín neoddeliteľnou súčasťou uhorského štátu, jeho politického, ekonomického a právneho života. Na jednej strane boli sami produktom svojej spoločnosti, ale na druhej strane, vzhľadom na svoje obrovské právomoci a postavenie, mohli byť aj sami tým faktorom, ktorý „tvorí históriu“.

Zoznam bibliografických odkazov

1. BIDOVSÝ, E.: Orhany stredovekeho sudnictva v Uhorsku 1000-1526. In *Slovenska archivistika*, 1973, roč. 7, č. 2, s. 92-116 ISSN 0231-6722
2. HERUCOVA, A.: *Palatini Arpadovskych kralov*. Bratislava: VEDA, vydavateľstvo SAV, 2020, 285 s ISBN 978-80 224-1780-8
3. KOČIŠ, J. KURUSÁROVÁ, J.: *Palatín: životné osudy Juraja Thurzu*. Žilina: GEORG, 2012, 151 s ISBN 978-80-89401-76-5
4. SEGEŠ, V.: *Kniha kralov panovníci v dejinách slovenska a slovakov*. Bratislava: Slovenske pedagogicke nakladatelstvo- Mlade leta s.r.o., 2010, 299 s ISBN 978-80-10-02026-3
5. ŠEVCOVÁ, A. GABRIŠ, T.: *Dejiny štátu, spravy a sudnictva na Slovensku*. Plzeň: Aleš Čenek, s.r.o., 2009, 267 s ISBN 978-80-7380-161-8
6. SKALOŠ, M. MIČKOVA, Z.: *Praktikum k dejinám štátu a práva na území dnešného Slovenska do roku 1918*. Banská Bystrica: BELIANUM, 2023 339 s. ISBN 978-80-557-2057-4
7. ŠTIPKA, I.: *Dejiny sudnej moci v Uhorsku do roku 1918*. Košice: nica, 2004, 270 s ISBN 80-969246-0-5

8. TIHÁNYIOVÁ, M.: Palatin a bratislavský župan Roland z rodu Ratoldovcov. In *Verbum historiae: internetový časopis Katedry historie PdF UK v Bratislave*, roč. 3, č.1 st. 21-22
9. UILIČNÝ, F.: *Dejiny Slovenska v 11 až 13 storočí*. Bratislava: VEDA, 2013, 567s ISBN 978-80-224-1292-6
10. LACLAVÍKOVA, M. ŠVECOVA, A.: *Pranene prava na uzemi Slovenska 1. Od najstarších čias do roku 1790*. vydavateľstvo Typi Universitatis turnaviensis, spoločne pracovisko Trnavskej university, a VEDY, 2007, 415 s ISBN 978-80-8082-153-1
11. ŠEGEŠ, V. ŠEDOVA, B.: *Pramene k vojnovým dejinám Slovenska*. Bratislava: Vojenský historický ústav, 2011, 288 s ISBN 978-80-89523-14-6
12. The King's Deputy: Archduke Josef, 'József nádor', online, / <https://www.habsburger.net/en/>
Dostupné na internete pod <https://www.habsburger.net/en/chapter/kings-deputy-archduke-josef-jozsef-nador>, cit. 13-03-2026

HISTORICKÁ A KOMPARATÍVNA ANALÝZA POSTAVENIA POŠKODENÉHO NA SLOVENSKU A V MAĎARSKU

Historical and Comparative Analysis of the Legal Status of the Injured Party in Slovakia and Hungary

KOVÁCSNÉ MOLNÁR ANNA*

Abstrakt

Počas svojej vedeckej práce som analyzovala postavenie poškodeného v trestnom konaní, pričom som aplikovala historickú a komparatívnu metódu s osobitným zreteľom na vývoj maďarského a slovenského práva a jeho medzinárodný kontext. Cieľom výskumu je poukázať na to, ako sa právne postavenie poškodeného v priebehu storočí menilo a aký vplyv na tento vývoj mal socializmus, ako aj harmonizačná činnosť Európskej únie. Od prvého maďarského trestného poriadku až po súčasnú právnu úpravu analyzujem vývoj práv poškodeného v komparácii s vývojom slovenského právneho systému. Využitím historickej a komparatívnej právnej metodológie poukazujem na vzájomné pôsobenie právnych noriem a spoločenských hodnôt, ako aj na kontinuálnu transformáciu postavenia poškodeného v maďarskom, slovenskom a medzinárodnom právnom poriadku.

Abstract

In the course of my research, I examined the role and legal position of the injured party in criminal proceedings by applying historical and comparative methods, with particular regard to the development of Hungarian and Slovak law and its international context. The aim of the research is to demonstrate how the legal status of the injured party has evolved over the centuries and how this development has been influenced by socialism as well as by the harmonisation activities of the European Union. From the first Hungarian Code of Criminal Procedure to contemporary procedural legislation, I analyse the evolution of the injured party's rights in comparison with the development of the Slovak legal system. By employing historical and comparative legal methodology, the study highlights the interaction between legal norms and social values, as well as the continuous transformation of the injured party's position within the Hungarian, Slovak and international legal orders.

Kľúčové slová: Poškodený. Trestné konanie. Právo. Historický vývoj. Komparatívna analýza.

Key words: Injured party. Criminal procedure. Law. Historical development. Comparative analysis.

Úvod

Postavenie poškodeného v trestnom konaní má mimoriadny význam, keďže ako obeť trestného činu nie je iba pasívnym pozorovateľom výkonu spravodlivosti, ale aj jeho aktívnym účastníkom. Vývoj jeho právneho postavenia v jednotlivých historických obdobiach sa formoval v dôsledku vonkajších politických, spoločenských a hospodárskych zmien. Osobitnú pozornosť si zasluhuje vývoj maďarského a slovenského právneho systému, ktoré boli v priebehu dejín na viacerých miestach navzájom prepojené. Cieľom štúdie je historická a komparatívna analýza postavenia poškodeného v maďarskom a slovenskom trestnom konaní od zákonného článku XXXIII z roku 1896 (Bűnvádi perrendtartás), až po súčasnosť, so

* Kovácsné Molnár Anna, doktorandka dennej formy štúdia, III. stupeň štúdia (PhD.), Doktorandská škola, Štátna a právnická fakulta, Reformovaná univerzita Károliho Gáspára v Budapešti, e-mail: annamo3274@gmail.com

zdôraznením rozhodujúcich momentov právneho vývoja, ako aj legislatívnej a aplikačnej praxe.

Skúmanie vývoja práv poškodeného v historickom kontexte poukazuje na to, ako sa jeho právne postavenie formovalo v jednotlivých právnych poriadkoch a aký vplyv naň mali politické a právne reformy. Jedným z najvýznamnejších medzníkov maďarského právneho vývoja bol zákonný článok XXXIII z roku 1896, ktorý ako prvý trestný poriadok položil základy moderného maďarského trestného konania a podrobne upravil postavenie poškodeného. V nasledujúcom období zohrával kľúčovú úlohu socialistický režim, počas ktorého sa postavenie poškodeného postupne oslabovalo, zatiaľ čo dominantné postavenie v trestnom konaní prevzal štát.

Analýza právneho vývoja Slovenska je rovnako významná, keďže bol úzko prepojený s maďarským právom, najmä v období Rakúsko-uhorskej monarchie¹, keď dnešné územie Slovenska tvorilo súčasť historického Uhorska a podliehalo rovnakému právnemu systému, čo sa odrážalo aj v jednotnej aplikačnej praxi. V období Československej republiky sa na území Slovenska naďalej uplatňovalo právo zodpovedajúce územným osobitostiam až do postupnej unifikácie českého a slovenského práva, ku ktorej došlo až v období socializmu. Po druhej svetovej vojne sa v socialistickom systéme právotvorba v oboch krajinách vyvíjala na základe podobných princípov. Po pristúpení k Európskej únii Maďarsko aj Slovensko zohľadnili požiadavky práva Európskej únie pri zabezpečovaní práv poškodených. Smernice Európskej únie týkajúce sa obetí trestných činov, najmä smernica 2012/29/EÚ, mali významný vplyv na posilnenie práv poškodených, ktoré oba právne poriadky implementovali.

Štúdia venuje osobitnú pozornosť komparácii postavenia poškodeného v maďarskom a slovenskom právnom poriadku, pričom skúma vývoj právnych noriem, faktory ovplyvňujúce práva poškodeného, ako aj modernú aplikačnú prax. V analýze uplatňujem metódy historickej a komparatívnej právnej vedy a poukazujem na vývoj postavenia a práv poškodeného so zohľadnením externých vplyvov právneho vývoja.

¹ Rakúsko-uhorská monarchia vznikla na základe rakúsko-uhorského vyrovnania z roku 1867, pričom jej štátoprávnu konštrukciu zakotvila decembrová ústava z roku 1867. Zákonný článok XII z roku 1867 upravoval spoločné záujmové vzťahy medzi krajinami uhorskej koruny a ostatnými krajinami pod vládou Jeho Veličenstva, ako aj spôsob ich riešenia. https://net.jogtar.hu/ezer-ev-torveny?docid=86700012.TV&searchUrl=

Vo výskume sa opieram o názory právnych mysliteľov, ako sú Henry Maine², Montesquieu³ a Friedrich Carl von Savigny⁴, ako aj o odbornú literatúru využívajúcu moderné metódy komparatívneho práva. Cieľom práce je identifikovať faktory, ktoré ovplyvnili vývoj postavenia poškodeného, a vyvodiť závery smerujúce k ďalšiemu rozvoju súčasnej právnej úpravy.

Hypotézou štúdie je, že popri paralelnom vývoji maďarského a slovenského práva nadobúdali vývoj postavenia poškodeného aj odlišné smerovanie v dôsledku historických a politických zmien. V období socializmu sa v oboch krajinách dostali do popredia štátne záujmy, zatiaľ čo práva poškodených boli oslabené. Po vstupe do Európskej únie však došlo k opätovnému posilneniu ich postavenia a normy Európskej únie mali zásadný vplyv na právnu reguláciu. Cieľom výskumu je preskúmať, ako tieto zmeny ovplyvnili procesné postavenie poškodeného v trestnom konaní a do akej miery sa podarilo zosúladiť individuálne práva so štátnymi záujmami.

Právotvorba v období Rakúsko-uhorskej monarchie

V roku 1867, po rakúsko-uhorskom vyrovnaní medzi Rakúskym cisárstvom a Uhorským kráľovstvom, vznikla Rakúsko-uhorská monarchia, ktorej ustanovenia o spoločných záležitostiach boli zakotvené v tzv. decembrovej ústave. Uhorsko a Rakúsko disponovali vnútropolitickou autonómiou, vlastným zákonodarným orgánom a vládou, avšak z hľadiska medzinárodného práva fungovala Rakúsko-uhorská monarchia ako jeden štát (Fónagy & Nagy, n.d.).

Územie dnešného Slovenska tvorilo súčasť historického Uhorska, pričom na území Horného Uhorska žilo početné slovenské obyvateľstvo. Z toho dôvodu sa maďarská právotvorba vzťahovala aj na územia obývané Slovákmi. Keďže Uhorsko nepovažovalo cisársku legislatívu za vlastnú, bol prijatý zákonný článok z roku 1878, tzv. Csemegiho kódex, ktorý predstavoval základnú normu v oblasti hmotného trestného práva a obsahoval aj niektoré procesnoprávne ustanovenia. Samostatná kodifikácia trestného procesného práva sa však oneskorila, keďže

² Podľa Henryho Mainea sa ľudská prirodzenosť a spoločnosť riadia určitými zákonitostami, a preto aj právny vývoj vykazuje určité pravidelnosti. Jeho metodologický prístup napomáha pochopeniu právnych zmien prostredníctvom analýzy konkrétnych historických príkladov a empirických údajov, čo je nevyhnutné pre porozumenie historického vývoja právnych predpisov.

³ Montesquieu považoval systematické štúdium právnych systémov za nevyhnutné.

⁴ Friedrich Carl von Savigny zastával názor, že vývoj práva je úzko spätý s historickými a spoločenskými faktormi, a preto je porozumenie právnym systémom nemožné bez zohľadnenia ich historických súvislostí.

prvý návrh zákona bol predložený už v roku 1872⁵, avšak po zdĺhavom legislatívnom procese bol zákon prijatý až v roku 1896 a nadobudol účinnosť 1. januára 1900.

Podľa Veroniky Markovej bol zákonný článok XXXIII z roku 1896 liberálnejší a modernejší než rakúsky zákon č. 117/1852 (Marková, 2018). Podľa názoru Szilvie Dobrocsi sa rehabilitácia poškodených začala zavedením trestného poriadku z roku 1896, avšak po následnom ústupe sa ich procesné postavenie stalo opätovne výraznejším až koncom 20. storočia (Dobrocsi, 2023). Po rozpade Rakúsko-uhorskej monarchie a na základe versaillského mierového systému sa územia obývané Slovákmi stali súčasťou Československa (Halmosy, 1983).

Na základe uvedeného možno konštatovať, že vzhľadom na identickú právnu úpravu trestného konania na území Uhorska je možné až do konca prvej svetovej vojny jednoznačne poukázať na paralely medzi procesným postavením poškodeného v slovenskom a maďarskom kontexte.

Právotvorba na Slovensku v rokoch 1918 – 1993

V období medzi dvoma svetovými vojnami bol charakteristický právny dualizmus. Po komunistickom prevrate v roku 1948 bola táto dualita odstránená (Februárový prevrat, n.d.). Dlhoo očakávaná unifikácia práva sa uskutočnila v rámci tzv. dvojročného legislatívneho plánu, v ktorom došlo ku kodifikácii viacerých právnych odvetví.

V období socializmu sa marxisticko-leninské idey prejavili nielen v politike, ale aj v právotvorbe. To isté možno konštatovať aj vo vzťahu k Maďarsku, keďže maďarský aj slovenský národ sa ocitli pod vládou socialistického režimu.

Socialistickému obdobiu sa podarilo prekonať dualistický právny systém Československa, v dôsledku čoho Ministerstvo spravodlivosti v roku 1950 prijalo pre oba národy spoločný trestný zákon, zákon č. 86/1950 Sb. (trestní zákon), ako aj spoločný trestný poriadok, zákon č. 87/1950 Sb. o trestnom konaní súdnom, pričom obe právne úpravy vychádzali zo sovietskeho modelu. Cieľom nového trestného poriadku bolo zjednodušenie konania a zabezpečenie aktívnej účasti ľudových sudcov (Vojáček & Schelle, 2007). Zaviedol sa princíp verejnej obžaloby, čím došlo k obmedzeniu práv poškodeného. Poškodený stratil možnosť podať obžalobu, prevziať konanie či ovplyvňovať trest, mohol iba podať oznámenie a vystupovať ako svedok. Pojem poškodeného bol zúžený – nárok si mohli uplatniť iba priamo poškodené osoby, pričom nemajetková ujma bola vylúčená. Medzi jeho práva patrilo nahliadanie do spisu, oznámenie o pojednávaní, právo na tlmočníka a právneho zástupcu, avšak orgány činné v trestnom

⁵ Návrh zákona o dočasnom trestnom konaní sa v roku 1872 stal známym pod názvom „Žltá kniha“ podľa farby svojej obálky. Minister spravodlivosti István Bittó zaslal dňa 1. mája 1872 nariadenie Ministerstva spravodlivosti č. 4765/1872 súdom na dočasnú aplikáciu, v dôsledku čoho sa tento návrh uplatňoval v praxi počas 28 rokov.

konaní ho často riadne nepoučili. Adhézne konanie sa ešte viac prepojilo s trestným konaním, keďže ak bol obžalovaný uznaný vinným, súd rozhodol aj o základe nároku na náhradu škody. Poškodený sa nemohol obrátiť na civilný súd, ak už bolo o jeho nároku rozhodnuté v trestnom konaní (Kaščák, 2009). Zákon nadobudol účinnosť 1. augusta 1950 a platil do 5. júla 1961, pričom bol trikrát novelizovaný.

Zákon č. 64/1956 Sb. o trestnom konaní súdnom (trestný poriadok) bol prijatý pod vplyvom politických zmien a záverov konferencie Komunistickej strany Československa (KSČ), keďže predchádzajúcej úprave sa vyčítal nedostatok socialistických princípov. Nový trestný poriadok podrobnejšie upravil práva a povinnosti, ako aj ochranu osoby, proti ktorej sa konanie viedlo, a podľa sovietskeho vzoru formuloval základné zásady konania (Marková, 2018).

Ustanovenie § 7 ods. 10 zúžilo pojem poškodeného: na náhradu škody mal nárok iba vtedy, ak by si ho mohol uplatniť aj v civilnom konaní a ak nebol spoluobžalovaným. Súkromná obžaloba ani subsidiárna obžaloba neboli prípustné a poškodený mohol byť odkázaný na civilné konanie, ak bol jeho nárok neistý alebo by zdržoval konanie. Novinkou bolo, že poškodený mohol uplatniť aj nároky vyplývajúce zo škody na zdraví, ako napríklad náklady na liečenie, ušlý zisk a rentu (Jurišová, 2017). Podľa § 60 ods. 1 musel nárok na náhradu škody uplatniť najneskôr do začatia hlavného pojednávania, aby o ňom súd mohol spravodlivo rozhodnúť. Orgány boli povinné poškodeného poučiť o jeho právach, avšak nemal právo podať odvolanie, keďže svoj nárok si mohol vždy uplatniť v civilnom konaní (Růžicka et al., 2007). Ostatné oprávnenia podľa § 44 ods. 1 – najmä právo na náhradu škody a návrh na zabezpečenie majetku – zostali zachované a o nárokoch sa rozhodovalo v rozsudku.

Politickým cieľom Československa bolo vybudovanie socialistickej spoločnosti, čo si vyžadovalo odstránenie triednych rozdielov a transformáciu právneho systému (Vojáček & Schelle, 2007). Ústavný zákon č. 100/1960 Zb. deklaroval socialistický charakter štátu, na čo nadviazal Trestný zákon č. 140/1961 Zb. a Trestný poriadok č. 141/1961 Zb., ktoré čiastočne vychádzali z právnej úpravy z roku 1950, no odstránili prvky odkazujúce na diktatúru proletariátu a zaviedli novú socialistickú terminológiu (Národná rada SR, 1961).

Postavenie poškodeného bolo chápané ako nástroj zapojenia občanov do boja proti kriminalite (Růžicka et al., 2007). Ustanovenia § 43 a § 65 umožňovali poškodenému nahliadať do spisu, podávať dôkazné návrhy a uplatniť nárok na náhradu škody. Orgány boli povinné poučiť ho o jeho právach. Podanie obžaloby však naďalej patrilo výlučne do právomoci prokurátora, ktorý mohol navrhnúť rozhodnutie o nároku poškodeného v adhéznom konaní.

Do roku 1993 možno vyzdvihnúť tri významné novelizácie. Novela zákona č. 57/1965 Zb. umožnila poškodenému podať sťažnosť proti zastaveniu trestného stíhania. Novela zákona č.

48/1973 Zb., konkrétne § 314f ods. 1 písm. e), zaviedla inštitút trestného rozkazu, ktorý vylučoval rozhodovanie o nároku na náhradu škody v trestnom konaní. Novela zákona č. 178/1990 Zb., § 11 ods. 1 písm. h), zrušila oprávnenie prokurátora iniciovať adhézne konanie v mene poškodeného a zaviedla trestné činy viazané na súhlas poškodeného.

Po politických zmenách v roku 1989 došlo k demokratizácii Československa a v roku 1993 k jeho rozdeleniu na Českú republiku a Slovenskú republiku. Slovensko sa prihlásilo k princípom demokratického právneho štátu a ochrane ľudských práv (Bajcsi, 2023).

Právotvorba v Maďarsku po Trianone

Na začiatku 20. storočia viedli právne zmeny k oslabeniu práv poškodených, zatiaľ čo postavenie štátu sa posilnilo. Napriek tomu zostali ustanovenia zákonného článku XXXIII z roku 1896 v Maďarsku v platnosti až do prijatia zákona č. III z roku 1951, zákonné nariadenie č. 8 z roku 1962 a zákon č. I z roku 1973 uprednostňovali štátne záujmy, čím obmedzili aktívnu účasť poškodených v trestnom konaní. Popri monopole prokurátora na podanie obžaloby sa sťažila aj možnosť poškodených efektívne uplatňovať svoje práva.

Po roku 1949 určovali právotvorbu marxisticko-leninské idey (Atzél, 1900). Podľa dôvodovej správy k zákonu č. III z roku 1951 bolo jeho prijatie ovplyvnené socialistickou ideológiou, okrem iného aj zabezpečením používania materinského jazyka.

Podľa dôvodovej správy k zákonnému nariadeniu č. 8 z roku 1962 bolo cieľom urýchlenie trestného konania a zabezpečenie socialistickej zákonnosti, pričom právne postavenie poškodených sa zásadne nezmenilo. Okruh vecí stíhaných na súkromnú žalobu sa zúžil, výsluch sa stal povinným a do popredia sa dostala zmierovacia prax (Kratochwill, 1990).

Od šesťdesiatych rokov nadobúdalo čoraz väčší význam západoeurópske komparatívne právo, ktoré v Maďarsku reprezentovali autori ako Imre Szabó a Gyula Eörsi (Fekete, 2010). V sedemdesiatych rokoch bol tento proces legitimizovaný aj uvoľnením medzinárodnopolitickej situácie (Szabó, 1967).

Zákon č. I z roku 1973 zohľadnil požiadavky smerujúce k posilneniu postavenia poškodených, avšak v dôsledku ďalšieho posilnenia úlohy prokuratúry sa možnosti poškodených vystupovať ako žalobcovia zúžili (Kratochwill, 1990). Ustanovenia § 53 ods. 2 písm. a) – d) im však zabezpečovali právo nahliadať do spisu, podávať dôkazné návrhy a vystupovať na hlavnom pojednávaní.

V prípade zákona č. XIX z roku 1998 sa už prejavili aj medzinárodnoprávne požiadavky, keďže jeho obsah bol formovaný aj Európskym dohovorom o ochrane ľudských práv a základných

slobôd a judikatúrou Európskeho súdu pre ľudské práva v Štrasburgu. Uznesenie vlády č. 2002/1994 (I. 17.) potvrdilo významné posilnenie práv poškodených.

Aplikácia práva Európskej únie

Právna úprava postavenia poškodených v Európskej únii bola formovaná rámcovým rozhodnutím Rady 2001/220/SVV a smernicou Európskeho parlamentu a Rady 2012/29/EÚ, pričom posledne uvedená nahradila predchádzajúcu úpravu. Smernica stanovuje minimálne normy v oblasti práv, podpory a ochrany obetí trestných činov a bola zároveň východiskom pri tvorbe novej právnej úpravy trestného konania. Kľúčovú úlohu vo vývoji regulácie zohral Budapeštiansky plán (Budapešťský plán), vypracovaný počas maďarského predsedníctva v Rade Európskej únie, ktorý zdôraznil potrebu posilnenia práv obetí, najmä ochranu dôstojnosti, integrity a súkromia. V dôsledku aplikačných nedostatkov rámcového rozhodnutia bolo nevyhnutné jeho prehodnotenie a ďalší rozvoj, čo viedlo k prijatiu smernice 2012/29/EÚ. Cieľom smernice je zabezpečiť aktívnu účasť poškodených v trestnom konaní, ich úplné informovanie a vyššiu úroveň ochrany ich záujmov. Osobitná pozornosť sa venuje zdravotnej starostlivosti o obeť násilných trestných činov, zabezpečeniu tlmočnických a právnych služieb, ako aj ochrane osobných údajov. Zároveň umožňuje ukončenie trestného konania prostredníctvom mediácie a uplatnenie preventívnych podporných opatrení. Smernica zdôrazňuje zásadu ohľaduplného zaobchádzania, zákaz diskriminácie a požiadavku spravodlivého konania.

Slovenská republika aj Maďarsko pristúpili k Európskej únii v roku 2004. Rovnako ako ostatné členské štáty boli povinné zosúladiť svoju legislatívu s právom Európskej únie. V záujme zabezpečenia súladu s právom Únie obe krajiny postupne implementovali európske právne akty do svojho vnútroštátneho právneho poriadku.

Na účely transpozície smernice do vnútroštátneho práva prijalo maďarské Národné zhromaždenie 6. októbra 2015 zákon č. CLI z roku 2015, ktorým boli novelizované ustanovenia predchádzajúceho trestného poriadku týkajúce sa poškodených a doplnené ustanovenia § 62/B a § 62/C. Zásady novej právnej úpravy trestného konania schválila vláda už vo februári 2015, pričom zohľadnila spoločenské, hospodárske a trestnopolitické zmeny. Zákon č. XC z roku 2017 o trestnom konaní pristupuje k úprave práv poškodených ako k reformnému prvku a zabezpečuje im možnosť osobitného zaobchádzania. Dôvodová správa k návrhu zákona T/13972 vymedzuje hlavné smery reformy trestného konania, medzi ktoré patrí aj to, že poškodený môže v priebehu konania vyjadriť ujmu, spracovať následky trestného činu a uplatniť nárok na náhradu škody podľa vlastného rozhodnutia.

V záujme zabezpečenia súladu s právom Európskej únie prijala Národná rada Slovenskej republiky 24. mája 2005 zákon č. 301/2005 Z. z. Trestný poriadok, ktorý podrobne upravuje práva a možnosti poškodených počas celého trestného konania. Tento zákon implementoval rámcové rozhodnutie Rady 2001/220/SVV o postavení obetí v trestnom konaní, ako aj rámcové rozhodnutie Rady 2002/465/SVV o spoločných vyšetrovacích tímoch. Zákon bol následne viackrát novelizovaný. Z hľadiska predmetu výskumu má osobitný význam zákon č. 274/2017 Z. z. o obetiach trestných činov a o zmene a doplnení niektorých zákonov. Tento zákon implementoval smernicu Rady 2004/80/ES o odškodňovaní obetí trestných činov, ktorá zabezpečuje, aby obeť trestných činov mali prístup k náhrade škody bez ohľadu na to, v ktorom členskom štáte Európskej únie bol trestný čin spáchaný. Zároveň prevzal aj ustanovenia smernice 2012/29/EÚ, ktorá poskytuje podrobnejšiu úpravu práv obetí a poškodených.

Komparatívna analýza

Balázs Fekete vo svojej štúdii pripisuje komparatívnej metóde v modernej právnej vede zásadný význam, pokiaľ chceme dospieť k vedecky podloženým odpovediam (Fekete, 2010). Pri skúmaní postavenia poškodeného umožňuje analýza paralel medzi slovenským a maďarským trestným konaním odhaliť podobnosti a rozdiely medzi právnymi normami a procesnými mechanizmami, ako aj ich vplyv na práva a možnosti poškodených. V prípade Slovenska vykazoval právny status poškodených podobnú vývojovú trajektóriu ako v Maďarsku a tento paralelizmus pretrváva až do súčasnosti.

Z historického hľadiska je potrebné zdôrazniť, že v období Rakúsko-uhorskej monarchie mali oba štáty spoločný právny systém, keďže územie dnešného Slovenska tvorilo severnú časť historického Uhorska. Ako som uviedla vo svojej štúdii, na území vtedajšieho Horného Uhorska sa uplatňoval tzv. Csemegiho kódex (zákonný článok z roku 1878), ako aj zákonný článok XXXIII z roku 1896, ktoré upravovali pravidlá trestného konania vrátane postavenia poškodeného.

Po prvej svetovej vojne došlo k rozdeleniu územia Uhorska a územia obývané Slovákmi boli pričlenené k Česku. Spojením českého a slovenského národa vzniklo nové štátne zriadenie – Československo – s centrom v Prahe. Paralely s maďarským právnym vývojom možno v právnom vývoji Československa identifikovať najmä v období socializmu, keď marxisticko-leninská ideológia formovala právny systém aj politické usporiadanie podobne ako v Maďarsku. Po komunistickom prevrate zostala Praha centrom štátnej moci, čo vyvolávalo národnostné napätie medzi Čechmi a Slovákmi. V druhej polovici osemdesiatych rokov, pod vplyvom zmien v Sovietskom zväze, sa v Československu presadili demokratizačné tendencie,

ktoré vyústili do tzv. zamatovej revolúcie v roku 1989. Po voľbách v roku 1990 sa posilnili slovenské národné ambície a napokon 1. januára 1993 došlo k pokojnému rozdeleniu spoločného štátu. Vznikla Slovenská republika, ktorá deklarovala zámer pristúpiť k Rade Európy a prihlásila sa k princípom demokratického viacstraníckeho systému a ochrany ľudských práv (Paksa & Nagy, n.d.).

Podľa nálezu Ústavného súdu Slovenskej republiky č. k. I. ÚS 465/2020 vytvoril vstup Slovenska do Európskej únie v roku 2004 ďalšie paralely medzi maďarskou a slovenskou právotvorbou, keďže obe krajiny implementovali smernice Európskej únie do svojich právnych poriadkov. Slovenský zákonodarca pritom kládol osobitný dôraz na aktívnu úlohu poškodených v trestnom konaní, čo sa prejavilo aj v aplikačnej praxi.

Je potrebné zdôrazniť, že zatiaľ čo Európska únia v roku 2001 používala pojem „poškodený“, smernica z roku 2012 už pracuje s pojmom „obeta“. Slovensko, podobne ako Maďarsko, rozlišuje medzi postavením poškodeného a obete. Práva poškodených upravuje zákon č. 301/2005 Z. z. Trestný poriadok, zatiaľ čo práva obetí upravuje zákon č. 274/2017 Z. z. o obetiach trestných činov. V Maďarsku je postavenie poškodeného upravené v trestnom poriadku a práva obetí sú zakotvené v zákone CXXXV z roku 2005 o pomoci obetiam trestných činov a o štátnej kompenzácii.

Slovensko v procese svojho právneho vývoja, rovnako ako Maďarsko, zohľadňovalo medzinárodné normy a usilovalo sa zosúladiť svoju legislatívu s požiadavkami Deklarácie Valného zhromaždenia OSN A/RES/40/34 o základných princípoch spravodlivosti pre obete trestných činov a zneužitia moci, ako aj s usmerneniami vydanými Úradom OSN pre drogy a kriminalitu a Medzinárodným centrom pre prevenciu kriminality týkajúcimi sa spravodlivosti pre obete.

Komparácia právneho systému s právnou úpravou iných štátov umožňuje identifikovať spoločenské a právne faktory ovplyvňujúce vývoj práv poškodených. Komparatívna právna veda prispieva k identifikácii najlepších praktík, ktoré môžu podporiť efektívnejšiu ochranu poškodených v trestnom konaní. Pri právnoteoretických analýzach je potrebné zohľadňovať nielen legislatívne procesy, ale aj skúsenosti z aplikačnej praxe, aby sa zabezpečilo skutočné uplatňovanie práv poškodených.

V rámci medzinárodnej komparácie je nevyhnutné prihliadať na kultúrne a historické osobitosti, ktoré zásadne ovplyvňujú vývoj právnych noriem. Rozdielne právne rámce a aplikačné prístupy jednotlivých štátov poskytujú príležitosť, aby Slovensko aj Maďarsko využívali najlepšie medzinárodné skúsenosti pri ochrane práv poškodených. Harmonizácia právnych noriem a smerníc Európskej únie zároveň zohráva kľúčovú úlohu v legislatívnom

processe, keďže prispieva k jednotnejšiemu a efektívnejšiemu uplatňovaniu práv poškodených v európskom právnom priestore.

Záver

Cieľom právnych reforiem je posilnenie práv poškodených a rozšírenie možností ich uplatňovania. Skúsenosti z minulosti a budúce smerovanie legislatívneho vývoja môžu spoločne prispieť k ďalšiemu rozvoju práv poškodených, pričom v trestnom konaní sa čoraz výraznejšie zohľadňujú aj záujmy obetí.

Moja štúdia poukazuje na to, že ochrana práv poškodených nie je iba otázkou legislatívy, ale úzko súvisí so spoločenským hodnotovým rámcom a vývojom právneho prostredia. Uplatnenie historickej a komparatívnej analýzy je osobitne významné pre pochopenie vývoja právnych systémov, keďže umožňuje identifikovať faktory, ktoré v jednotlivých obdobiach viedli k posilneniu alebo oslabeniu postavenia poškodeného.

Keďže právo sa neustále prispôsobuje spoločenským a politickým zmenám, vývoj práv poškodených odráža túto dynamiku: v niektorých obdobiach dominovali štátne záujmy, zatiaľ čo inokedy sa do popredia dostávali práva jednotlivca. V súčasnosti venujú trestnoprávne systémy zvýšenú pozornosť ochrane poškodených, avšak aj budúca právotvorba musí nevyhnutne zohľadňovať medzinárodné skúsenosti a integrovať osvedčené právne riešenia s cieľom ďalšieho posilnenia ochrany poškodených. Komparatívna právna analýza tak môže prispieť nielen k určeniu smerovania slovenských a maďarských právnych reforiem, ale aj k neustálemu rozvoju právnych noriem a efektívnejšiemu uplatňovaniu práv poškodených.

Zoznam bibliografických odkazov

1. Atzél, B. (1900). *A bünvádi perrendtartás (1896. évi XXXIII. t.-cz.)*. Stampfel Károly.
2. Bajcsi, I. (2023, October 14). *Csehszlovákia felbomlása és a magyar kisebbség a rendszerváltást követően*. <https://tte.hu/wp-content/uploads/2023/10/Csehszlovakia-felbomlása-es-a-magyar-kisebbség-a-rendszerváltást-követően.pdf>
3. Dobrocsi, S. (2023). A sértett jogérvényesítési lehetőségeinek változása a büntetőeljárásban. *Glossa Iuridica*, 10(5–6), 195–212. https://ajk.kre.hu/images/doc2023/glossa/2023X56/GI_2023_5-6_195-212.pdf
4. Februárový prevrat (tzv. Víťazný február – z pohľadu komunistov). (n.d.). *Február 1948*. <https://www.februar1948.sk/sk/februar-1948-na-slovensku/>
5. Fekete, B. (2010). *A modern jogösszehasonlítás paradigmái: Kísérlet a jogösszehasonlítás tudománytörténetének új értelmezésére* (Doctoral dissertation). Pázmány Péter Katolikus Egyetem.
6. Fónagy, Z., & Nagy, B. (n.d.). 1867–1918. *Oszták–Magyar Monarchia*. Bölcsészettudományi Kutatóközpont. <https://tti.abtk.hu/terkepek/terkepek/1867-1918-osztrak-magyar-monarchia-2>

7. Halmosy, D. (1983). *Nemzetközi szerződések 1918–1945: A két világháború közötti korszak és a második világháború legfontosabb külpolitikai szerződésai* (2nd ed.). Közgazdasági és Jogi Könyvkiadó & Gondolat Könyvkiadó.
8. Jurišová, K. (2017). *Poškodený v predsúdnom konaní*. Leges.
9. Kaščák, J. (2009). *Postavení poškozeného a oběti v systému českého trestního práva procesního a viktimologie* (Diplomová práce). Masarykova univerzita, Právnická fakulta. https://is.muni.cz/th/kuyb6/Juraj_Kascak_-_diplomova_praca.pdf
10. Kratochwill, F. (1990). *A sértett jogi helyzete a magyar büntető eljárási jogban*. ELTE Állam- és Jogtudományi Kar.
11. Marková, V. (2018). *Zmeny v koncepcii trestných kódexov od roku 1918 až po súčasnosť*. <https://proflib.akademiapz.sk/webisnt/fulltext/clanky/NIA2018-2/MARKOV%C3%81%20VERONIKA%20%20Zmeny%20v%20koncepcii%20trestn%C3%BDch%20k%C3%B3dexov%20od%20roku%201918%20a%C5%BE%20po%20s%C3%BA%C4%8Dasnos%C5%A5.pdf>
12. Národná rada Slovenskej republiky. (1961). *Dôvodová správa k návrhu zákona č. 140/1961 Zb.* <https://www.nrsr.sk/dl/Browser/Document?documentId=54626>
13. Paksa, R., & Nagy, B. (n.d.). *1918–1924. Az Osztrák–Magyar Monarchia felosztása*. Bölcsészettudományi Kutatóközpont. <https://tti.abtk.hu/terkepek/terkepek/1918-1924-az-osztrak-magyar-monarchia-felosztasa>
14. Růžička, M., Púry, F., & Zezulová, J. (2007). *Poškozený a adhezní řízení v České republice*. C. H. Beck.
15. Szabó, I. (1967). Jogtudomány és békés együttélés. In I. Szabó (Ed.), *Szocialista jogelmélet – népi demokratikus jog*. Közgazdasági és Jogi Könyvkiadó.
16. Vojáček, L., & Schelle, K. (2007). *Právní dějiny na území Slovenska*. Masarykova univerzita.

**SEKCIA OBCHODNÉHO PRÁVA, OBČIANSKEHO PRÁVA
A MEDZINÁRODNÉHO PRÁVA SÚKROMNÉHO**

POSTAVENIE LIKVIDÁTORA V KONTEXTE REKODIFIKÁCIE SÚKROMNÉHO PRÁVA: OD ORGÁNU SUI GENERIS K ŠTATUTÁRNEMU ORGÁNU?

The Role of the Liquidator in the Context of the Recodification of Private Law: From a Sui Generis Body to a Statutory Body?

PETER KIŠŠ*

Abstrakt

Príspevok sa zaoberá postavením likvidátora právnickej osoby v optike navrhovanej rekodifikácie súkromného práva. Rekodifikačný návrh likvidátora výslovne koncipuje ako štatutárny orgán právnickej osoby v likvidácii, čím dochádza k posunu oproti súčasnemu právnemu stavu kedy bol likvidátor chápaný ako osobitný orgán sui generis. Takto formulovaná koncepcia otvára priestor na posúdenie či ide o výraznejší zásah do chápania štruktúry právnickej osoby v procese jej zániku. Príspevok vychádza z porovnania navrhovanej úpravy s platným právnym stavom, v ktorom sa postavenie likvidátora formovalo predovšetkým prostredníctvom jeho zákonom vymedzenej pôsobnosti, nie však prostredníctvom výslovného normatívneho zaradenia medzi orgány právnickej osoby. V tejto súvislosti tvorí predmet skúmania otázka, aký význam má rekodifikačné uchopenie likvidátora z hľadiska systematiky právnej úpravy a vnútorného usporiadania právnickej osoby po vstupe do likvidácie.

Abstract

This article examines the status of the liquidator of a legal entity in light of the proposed recodification of private law. The recodification proposal explicitly defines the liquidator as a statutory body of a legal entity in liquidation, marking a shift from the current legal framework, under which the liquidator was regarded as a special body sui generis. This formulation opens the door to assessing whether it constitutes a significant intervention in the understanding of a legal entity's structure during the process of its dissolution. This article is based on a comparison of the proposed amendment with the current legal framework, in which the status of the liquidator was primarily shaped by its scope of authority as defined by law, rather than through explicit normative classification among the bodies of a legal entity. In this context, the subject of examination is the significance of the recodification of the liquidator's role from the perspective of the legal framework and the internal organization of a legal entity after entering liquidation.

Kľúčové slová: likvidátor, rekodifikácia súkromného práva, likvidácia právnickej osoby

Key words: liquidator, recodification of private law, liquidation of a legal entity

Úvod

Likvidácia predstavuje terminálnu fázu „života“ právnickej osoby, ktorá nastupuje po jej zrušení a smeruje k uspokojeniu nárokov veriteľov a iných osôb, ktorým prislúcha právo na likvidačný zostatok. V tomto štádiu právnická osoba síce naďalej existuje ale jej činnosť už nesmeruje k napĺňaniu účelu, na ktorý bola založená, ale k ukončeniu jej činnosti a vyporiadaniu právnych vzťahov pred jej definitívnym zánikom. S tým úzko súvisí aj otázka, akým spôsobom je v tomto štádiu usporiadaná vnútorná štruktúra právnickej osoby a kto je

* Mgr. Peter Kišš, Katedra obchodného práva a hospodárskeho práva, Právnická fakulta Univerzity Mateja Bela v Banskej Bystrici, externý doktorand

nositeľom oprávnenia konať v jej mene. Práve v tomto kontexte nadobúda osobitný význam postavenie likvidátora. V platnom právnom stave sa jeho postavenie formuje predovšetkým prostredníctvom zákonom vymedzeného prechodu pôsobnosti štatutárneho orgánu, pričom likvidátor môže robiť len úkony smerujúce k likvidácii spoločnosti. Rekodifikačný návrh Občianskeho zákonníka k tejto otázke pristupuje odlišne, keď likvidátora výslovne koncipuje ako štatutárny orgán právnickej osoby v likvidácii. Takto formulované riešenie vyvoláva otázku, či ide len o legislatívne spresnenie doterajšieho materiálneho stavu, alebo o koncepčnú zmenu zasahujúcu do chápania orgánovej štruktúry právnickej osoby v procese jej zániku.

Na materiálne orgánové črty postavenia likvidátora poukazuje aj právna doktrína. V odbornej literatúre sa zdôrazňuje, že právna úprava vymedzuje postavenie likvidátora predovšetkým prostredníctvom rozsahu jeho pôsobnosti a osobitných povinností viazaných na priebeh likvidácie. Východiskom je pritom generálna klauzula, podľa ktorej likvidátor robí v mene spoločnosti len úkony smerujúce k likvidácii spoločnosti. Práve spojenie oprávnenia konať v mene spoločnosti a súčasného účelového obmedzenia tejto pôsobnosti vedie časť doktríny k záveru, že likvidátor vykazuje znaky orgánu spoločnosti, prípadne že ide o osobitný monokratický orgán spoločnosti. V tejto súvislosti sa v odbornej literatúre objavujú aj úvahy o tom, že vnútorný vzťah medzi spoločnosťou a likvidátorom sa spravuje režimom obdobným vzťahu medzi spoločnosťou a členom jej orgánu, a to buď prostredníctvom aplikácie ustanovení o mandátnej zmluve, alebo uzatvorením osobitnej zmluvy o výkone funkcie ako nepomenovanej zmluvy.¹ Aj tento pohľad tak vytvára priestor pre úvahu, že likvidátora nemožno chápať výlučne ako osobu stojacu mimo organizačnej štruktúry spoločnosti. Možno sa preto pýtať, či navrhované výslovné zaradenie likvidátora medzi štatutárne orgány právnickej osoby predstavuje skutočne novú koncepciu, alebo skôr systematické a normatívne vyjadrenie tendencií, ktoré boli v doterajšom právnom stave prítomné už na úrovni jeho pôsobnosti a doktrinálneho výkladu.

Predmetom príspevku je preto posúdenie postavenia likvidátora v optike navrhovanej rekodifikácie súkromného práva, a to najmä vo vzťahu k otázke, či jeho výslovné normatívne konštituovanie ako štatutárneho orgánu právnickej osoby v likvidácii predstavuje iba terminologické vyjasnenie doterajšieho stavu, alebo aj zásah do vnútorného usporiadania právnickej osoby po vstupe do likvidácie.

1. Postavenie likvidátora v platnom právnom stave

¹ LUKÁČKA, P., HUČKOVÁ, R., KUBINEC, M. a kol. *Obchodný zákonník. Komentár*. s. 429 - 430

Likvidáciu obchodnej spoločnosti, resp. právnickej osoby možno charakterizovať aj ako osobitné štádium jej právnej existencie, ktoré nastupuje po jej zrušení a smeruje k usporiadaniu jej majetkových a záväzkových vzťahov pred definitívnym zánikom. Hoci spoločnosť v tomto období naďalej existuje jej činnosť už nie je *de facto* orientovaná na napĺňanie účelu, pre ktorý bola založená, ale na realizáciu úkonov vedúcich k ukončeniu jej existencie. Špecifická povaha likvidácie sa premieňa aj do personálneho a organizačného zabezpečenia likvidačného procesu, ktorý má zásadný vplyv na štruktúru právnickej osoby. Vstup spoločnosti do likvidácie je spojený s kreovaním funkcie likvidátora, ktorý sa stáva nositeľom právomocí a povinností nevyhnutných na riadne vykonanie likvidácie. Funkcia likvidátora je nevyhnutná pre riadny priebeh likvidácie. Z tohto dôvodu musí právna úprava zabezpečiť, aby bola táto funkcia počas celého procesu likvidácie nepretržite obsadená.

Navrhovaná rekodifikácia súkromného práva v Slovenskej republike prináša nové koncepčné uchopenie postavenia likvidátora v rámci likvidácie právnickej osoby. Navrhované znenie Občianskeho zákonníka opúšťa doterajšie chápanie likvidátora ako orgánu *sui generis* a namiesto toho výslovne ustanovuje, že likvidátor má postavenie štatutárneho orgánu právnickej osoby v likvidácii.² Zákonodarca k tomu pristupuje s cieľom vyjasniť pozíciu „likvidátora, ktorý je štatutárnym orgánom, čím na neho zároveň platia pravidlá o orgánoch právnických osôb a nie je osobitne potrebné zdôrazňovať jeho povinnosti z toho vyplývajúce.“³ Otázkou však zostáva, či ide len o legislatívne vyjadrenie materiálne už existujúceho stavu, alebo o koncepčnú zmenu, ktorá mení chápanie vnútorného usporiadania právnickej osoby po vstupe do likvidácie.

Teória fikcie vychádza z premisy, ktorá charakterizuje obchodnú spoločnosť ako entitu bez duše a tela, ktorá nadobúda „život“ až prostredníctvom právnej úpravy štátu. Z uvedeného dôvodu je utváranie a prejavovanie jej vôle sprostredkované fyzickými osobami pôsobiacimi v rámci jej organizačnej štruktúry. Jej základné štrukturálne jednotky tvoria orgány právnickej osoby, ktoré sa v závislosti od spôsobu ich kreovania a personálneho zloženia členia na individuálne a kolektívne orgány.⁴ Orgány právnickej osoby môžeme charakterizovať „ako organizačné útvary právnickej osoby, ktoré vznikajú na základe zákona *ex lege* alebo na základe právneho úkonu (napr. sú kreované zakladateľmi v spoločenskej zmluve a vzniknú

² § 275 ods. 1 návrhu rekodifikačného znenia Občianskeho zákonníka. Dostupné na internete: <https://www.justice.gov.sk/dokumenty/2025/09/Navrh-Obcianskeho-zakonnika.pdf>

³ Dôvodová správa k návrhu rekodifikačného znenia Občianskeho zákonníka. Dostupné na internete: https://www.justice.gov.sk/dokumenty/2025/09/Dovodova-sprava-osobitna-cast_WTM.pdf

⁴ PATAKYOVÁ, M. a kol. Aplikované právo obchodných spoločností a družstva – ťažiskové inštitúty. s. 815

*zápisom do obchodného registra pri prvozápise) a ktoré vytvárajú vôľu právnickej osoby.*⁵ Práve z tohto pohľadu nadobúda význam otázka, či má byť likvidátor považovaný za orgán právnickej osoby aj v období jej likvidácie, keďže nejde len o terminologické zaradenie, ale o otázku miesta tejto osoby v organizačnej štruktúre právnickej osoby.

Likvidáciu právnickej osoby vykonáva likvidátor. Platná právna úprava vychádza z toho, že vstupom obchodnej spoločnosti do likvidácie prechádza na likvidátora pôsobnosť štatutárneho orgánu konať v mene spoločnosti, s výnimkou oprávnenia zvoliť zasadnutie najvyššieho orgánu spoločnosti. *„Doktrína v tejto súvislosti používa terminus, že právomoc štatutárneho orgánu „spočíva“ s výnimkou oprávnenia zvoliť valné zhromaždenie.*“⁶ Súčasne dochádza k zániku vybraných jednostranných právnych úkonov spoločnosti, najmä príkazov, poverení, splnomocnení a prokúr, čo potvrdzuje, že vstup do likvidácie zásadným spôsobom mení vnútorné usporiadanie aj spôsob vonkajšieho konania právnickej osoby. Hoci likvidátor podľa platného práva nie je výslovne normatívne označený za štatutárny orgán, rozsah jeho zákonnej pôsobnosti nasvedčuje tomu, že materiálne preberá podstatnú časť jeho funkcií. Táto pôsobnosť je však účelovo limitovaná, keďže likvidátor môže vykonávať iba také úkony, ktoré smerujú k realizácii likvidácie a k usporiadaniu majetkových pomerov spoločnosti pred jej zánikom.

Účinkom vstupu spoločnosti do likvidácie je prechod pôsobnosti štatutárneho orgánu konať v mene spoločnosti na likvidátora, a to s výnimkou oprávnenia zvoliť zasadnutie najvyššieho orgánu spoločnosti. Ak je ustanovených viacero likvidátorov a z ich ustanovenia nevyplýva niečo iné, túto pôsobnosť vykonáva každý z nich. Zo znenia § 75b ods. 3 Obchodného zákonníka, vyplýva, že likvidátor robí v mene spoločnosti len úkony smerujúce k likvidácii spoločnosti, čím sa *ex lege* vymedzuje vzťah medzi jeho pôsobnosťou a pôsobnosťou štatutárneho orgánu. Likvidátor pri výkone tejto pôsobnosti najmä plní záväzky spoločnosti, uplatňuje pohľadávky a prijíma plnenia, koná za spoločnosť pred súdmi a inými orgánmi, uzatvára zmiery a dohody o zmene a zániku práv a záväzkov, pričom nové zmluvy môže uzatvárať len v súvislosti s ukončením doterajších právnych vzťahov. Z uvedeného možno vyvodit', že na likvidátora prechádza pôsobnosť konať v mene spoločnosti v rozsahu viazanom na účel likvidácie, zatiaľ čo oprávnenie zvoliť zasadnutie najvyššieho orgánu spoločnosti zostáva zachované štatutárnemu orgánu. Zákonodarca tak v podmienkach likvidácie ustanovuje hranice pôsobnosti oboch orgánov. Z predmetnej úpravy zároveň vyplýva, že ani v procese

⁵ STREMY, J. Likvidátor. In Bratislavské právnické fórum 2019: nezávislosť a etický rozmer výkonu súdnej moci v obchodnom práve. 2019, s. 62

⁶ LUKÁČKA, P., HUČKOVÁ, R., KUBINEC, M. a kol. *Obchodný zákonník. Komentár.* s. 429

likvidácie nedochádza k zániku pôvodnej organizačnej štruktúry spoločnosti. Aj keď likvidátor nadobúda časť pôsobnosti štatutárneho orgánu, nedochádza tým k jeho substitúcii, keďže štatutárny orgán zostáva zachovaný aj počas likvidácie, hoci s podstatne redukovaným rozsahom pôsobnosti.⁷

2. Rekodifikačné uchopenie likvidátora ako štatutárneho orgánu

Zverejnený rekodifikačný návrh však k tejto otázke pristupuje odlišne. Podľa § 275 ods. 1 navrhovaného rekodifikačného znenia je štatutárnym orgánom právnickej osoby v likvidácii jej likvidátor. Rekodifikácia tak opúšťa doterajšie uchopenie postavenia likvidátora založeného predovšetkým na rozsahu jeho zákonom ustanovenej pôsobnosti a nahrádza ho jeho výslovným normatívnym zaradením medzi štatutárne orgány právnickej osoby. Práve tu sa najvýraznejšie prejavuje rozdiel oproti platnému právnemu stavu, keďže likvidátor už nie je len subjektom, na ktorý prechádza časť pôsobnosti štatutárneho orgánu, ale osobou, ktorej navrhovaná právna úprava priamo priznáva postavenie štatutárneho orgánu. Uvedené riešenie však nemožno chápať len ako terminologickú úpravu. Výslovné označenie likvidátora za štatutárny orgán má význam z hľadiska systematiky právnej úpravy, keďže „odstraňuje“ potrebu vyvodzovať jeho orgánové postavenie v rámci štruktúry právnickej osoby z hľadiska rozsahu jeho pôsobnosti.

Zároveň však treba zdôrazniť, že rekodifikačný návrh nemení samotný účelový rámec konania likvidátora za právnickú osobu, resp. obchodnú spoločnosť v likvidácii. Kým podľa § 75b ods. 3 Obchodného zákonníka likvidátor robí v mene spoločnosti len úkony smerujúce k likvidácii spoločnosti, podľa § 275 ods. 2 navrhovaného znenia možno v mene právnickej osoby v likvidácii robiť len právne úkony v súlade s účelom likvidácie, najmä tie, ktoré smerujú k ukončeniu činnosti vrátane ukončenia právnych vzťahov. Rekodifikačný návrh tak nemení účelové obmedzenie konania v likvidácii, ale predovšetkým normatívne postavenie subjektu, ktorý toto konanie uskutočňuje.

Nóvum rekodifikačného návrhu preto nespočíva v samotnom vymedzení účelu likvidácie, ale v tom, že likvidátor už nie je chápaný len ako orgán *sui generis*, ale ako štatutárny orgán právnickej osoby v likvidácii. Tým sa mení nielen spôsob právneho vyjadrenia jeho postavenia, ale aj jeho miesto v štruktúre právnickej osoby. Kým doterajšia úprava umožňovala uvažovať o likvidátorovi ako o orgáne *sui generis* stojacom popri pôvodnom štatutárnom orgáne, navrhovaná úprava smeruje k tomu, aby bol likvidátor priamo štatutárnym orgánom.

⁷ STRÉMY, J. Sanačné a deštrukčné metódy riešenia krízy v podniku. In. Bratislavské právnické fórum 2021: Legislatívna a aplikačná invencia v obchodnom práve počas pandémie COVID-19. 2021, s. 77

Práve v tejto súvislosti vystupuje do popredia otázka, aký vplyv má rekodifikačné riešenie na postavenie pôvodného štatutárneho orgánu počas likvidácie. Ak je totiž likvidátor po novom výslovne koncipovaný ako štatutárny orgán právnickej osoby v likvidácii, treba sa zamyslieť aj nad tým, či pôvodný štatutárny orgán stráca len svoju pôsobnosť konať v mene právnickej osoby, alebo či dochádza aj k takému oslabeniu jeho postavenia, že jeho ďalšia existencia má už len formálny význam.

Rekodifikačný návrh vypúšťa likvidátorove obmedzenie zvoliť zasadnutie najvyššieho orgánu spoločnosti, ktorý doteraz prislúchal pôvodnému štatutárnemu orgánu. Práve vypustenie tejto výnimky naznačuje, že rekodifikačný návrh už nevychádza len z modelu „čiastočného“ prechodu pôsobnosti zo štatutárneho orgánu na likvidátora, ale skôr z predstavy, že v období likvidácie sa likvidátor stáva primárnym, a navonok rozhodujúcim nositeľom štatutárneho postavenia právnickej osoby. Z tohto pohľadu sa javí presvedčivejší záver, že pôvodný štatutárny orgán síce nemusí v rámci orgánovej štruktúry právnickej osoby formálne zaniknúť, avšak jeho funkčné postavenie sa redukuje natoľko, že jadro štatutárnej pôsobnosti prechádza na likvidátora. Rekodifikačné riešenie tak smeruje skôr k modelu dominantného postavenia likvidátora než k modelu paralelného výkonu dvoch rovnocenných orgánových postavení.

Rekodifikačný návrh teda nepracuje už len s konštrukciou prechodu pôsobnosti, ale s priamym normatívnym určením likvidátora ako štatutárneho orgánu právnickej osoby v likvidácii. Takéto riešenie oslabuje význam úvahy o paralelnom zachovaní pôsobnosti pôvodného štatutárneho orgánu a skôr smeruje k záveru, že v období likvidácie sa právnická osoba organizačne preusporiadáva tak, že likvidátor disponuje vonkajšou a vnútornou právomocou. Tomu zodpovedajú aj ďalšie ustanovenia rekodifikačného návrhu, keďže ustanovenie likvidátora je viazané na orgán oprávnený ustanoviť štatutárny orgán⁸ a odmeňovanie likvidátora ustanoveného právnickou osobou sa spravuje zmluvou o výkone funkcie uzavretou s právnickou osobou.⁹

Význam rekodifikačného uchopenia postavenia likvidátora sa zvyrazňuje aj pri posudzovaní následkov zániku jeho funkcie. Platný právny stav kladie dôraz na to, aby bola funkcia likvidátora personálne obsadená počas celej likvidácie. *„Ak likvidátor nie je ustanovený alebo ak sa skončila jeho funkcia a nie je ustanovený nový likvidátor, musí vykonávať likvidáciu*

⁸ § 277 ods. 1 návrhu rekodifikačného znenia Občianskeho zákonníka. *„Orgán právnickej osoby, ktorý je oprávnený ustanoviť štatutárny orgán, ustanoví jedného alebo viacerých likvidátorov súčasne s rozhodnutím o zrušení právnickej osoby, najneskôr však do 60 dní od zrušenia právnickej osoby tak, aby právnická.“* Dostupné na internete: <https://www.justice.gov.sk/dokumenty/2025/09/Navrh-Obcianskeho-zakonnika.pdf>

⁹ § 281 ods. 2 návrhu rekodifikačného znenia Občianskeho zákonníka. *„Odmeňovanie likvidátora ustanoveného právnickou osobou sa spravuje zmluvou o výkone funkcie uzavretou s právnickou osobou.“* Dostupné na internete: <https://www.justice.gov.sk/dokumenty/2025/09/Navrh-Obcianskeho-zakonnika.pdf>

*spoločnosti až do ustanovenia likvidátora jej štatutárny orgán (§ 68 ods. 5 zákona č. 513/1991 Zb. Obchodného zákonníka v znení neskorších predpisov „ďalej len Obchodný zákonník“).*¹⁰ Takéto riešenie podľa platného práva evokuje to, že štatutárny orgán ani v likvidácii nestráca úplne svoj význam, ale môže dočasne prevziať výkon úkonov smerujúcich k likvidácii.

Aj pri rekodifikačnom návrhu však môže vzniknúť otázka, kto zabezpečí výkon nevyhnutných úkonov v prípade, ak funkcia likvidátora zanikne a nový likvidátor ešte nebol ustanovený. Navrhovaná úprava síce vyžaduje, aby bol po zániku funkcie likvidátora bez zbytočného odkladu ustanovený nový likvidátor, výslovne však nerieši, kto vykonáva úkony smerujúce k účelu likvidácie v období do jeho ustanovenia.

Práve táto situácia ukazuje limity výlučného chápania likvidátora ako jediného nositeľa štatutárneho postavenia v likvidácii. Ak by sa totiž úplne vylúčila akákoľvek reziduálna funkcia pôvodného štatutárneho orgánu, vznikalo by prechodné obdobie, v ktorom by právnická osoba fakticky nemala orgán schopný vykonať nevyhnutné úkony smerujúce k zachovaniu a zabezpečeniu kontinuity likvidácie. Práve z tohto dôvodu sa javí obhájitelným záver, že aj pri rekodifikačnom modeli môže pôvodný štatutárny orgán v takomto medziobdobí pretrvávať aspoň ako reziduálny orgán oprávnený vykonať nevyhnutné úkony do ustanovenia nového likvidátora. Nešlo by pritom o popretie dominantného postavenia likvidátora, ale o funkčne nevyhnutné korektívne riešenie mimoriadnej situácie. Naopak, vylúčenie takejto možnosti by posilňovalo chápanie likvidátora ako výlučného nositeľa štatutárneho postavenia právnickej osoby v likvidácii, pričom proces likvidácie právnickej osoby by mohol byť „ochromený“ až do ustanovenia nového likvidátora. Takáto úvaha by však predpokladala, že pôvodný štatutárny orgán ani po vstupe do likvidácie celkom nezaniká, a v obmedzenej podobe naďalej pretrváva v orgánovej štruktúre právnickej osoby.

Rekodifikačný návrh preto možno interpretovať tak, že nemení materiálny účel likvidácie, ale mení koncepčný model orgánového usporiadania právnickej osoby v tomto štádiu jej existencie. Likvidátor už nie je iba subjektom, na ktorý prechádza výkon určitej pôsobnosti, ale subjektom, ktorému navrhovaná právna úprava priznáva samotné postavenie štatutárneho orgánu. V tomto smere ide o viac než o terminologické spresnenie. Ide o normatívne posilnenie likvidátora, ktoré mení interpretačné východiská pre posúdenie jeho vzťahu k právnickej osobe aj k pôvodnému štatutárnemu orgánu.

¹⁰ Uznesenie Najvyššieho súdu Slovenskej republiky, sp. zn. 5Cdo/284/2010, zo dňa 15.05.2010

Záver

V platnom právnom stave sa postavenie likvidátora odvodzuje predovšetkým z rozsahu jeho zákonom ustanovenej pôsobnosti, ktorá vzniká vstupom právnickej osoby do likvidácie. Hoci aktuálna práva úprava umožňuje vnímať likvidátora ako orgán *sui generis*, jeho orgánové postavenie bolo potrebné vyvodzovať interpretačne, najmä z rozsahu oprávnenia konať v mene právnickej osoby a z účelového vymedzenia jeho pôsobnosti. Rekodifikačný návrh tento model opúšťa a likvidátora výslovne konštituuje ako štatutárny orgán právnickej osoby v likvidácii.

Takéto riešenie podľa nášho názoru nemožno považovať len za terminologické alebo systematické spresnenie doterajšieho stavu. Jeho význam spočíva v tom, že likvidátorovi už nepriznáva len faktický výkon časti štatutárnej pôsobnosti, ale priamo normatívne zakotvuje jeho postavenie ako nositeľa štatutárnej funkcie v období likvidácie. Rekodifikačný návrh tak mení nielen jazyk právnej úpravy, ale aj samotné interpretačné východiská pre posúdenie vnútorného usporiadania právnickej osoby po jej vstupe do likvidácie. V tomto smere ide o koncepčný posun, ktorý zasahuje do chápania orgánovej štruktúry právnickej osoby v štádiu jej zániku.

Za osobitne významné pritom treba považovať, že výslovné zaradenie likvidátora medzi štatutárne orgány posilňuje aj záver o aplikácii všeobecných pravidiel vzťahujúcich sa na orgány právnických osôb. Práve v tom sa prejavuje praktický dosah rekodifikačného riešenia. Nejde teda len o legislatívne pomenovanie materiálne známeho stavu, ale o normatívne spresnenie, ktoré má potenciál ovplyvniť samotný právny režim výkonu funkcie likvidátora.

Rekodifikačné uchopenie likvidátora zároveň mení aj optiku pohľadu na pôvodný štatutárny orgán. Ak je totiž likvidátor výslovne štatutárnym orgánom právnickej osoby v likvidácii, javí sa presvedčivejším záver, že pôvodný štatutárny orgán už v tomto období nepredstavuje orgán s paralelným alebo rovnocenným postavením, ale jeho funkčné postavenie sa oslabuje natoľko, že jadro štatutárnej pôsobnosti prechádza na likvidátora. Likvidátor sa tak stáva primárnym a rozhodujúcim nositeľom oprávnenia konať v mene právnickej osoby sledujúc cieľ naplnenia účelu likvidácie.

To však nevylučuje, aby pôvodný štatutárny orgán pretrvával aj po vstupe právnickej osoby do likvidácie v reziduálnej podobe, a to výlučne pre mimoriadne situácie vyžadujúce zachovanie kontinuity likvidačného procesu. Práve mimoriadne situácie, najmä zánik funkcie likvidátora pred ustanovením nového likvidátora, ukazujú, že úplné vylúčenie akejkoľvek reziduálnej funkcie pôvodného štatutárneho orgánu by mohlo viesť k nežiaducej diskontinuite likvidácie. Preto sa javí ako obhájitelné, aby pôvodný štatutárny orgán v takomto medziobdobí pretrvával aspoň v obmedzenej, reziduálnej podobe, a to výlučne na účel vykonania

nevyhnutných úkonov smerujúcich k zachovaniu účelu likvidácie do ustanovenia nového likvidátora.

Rekodifikačný návrh teda podľa nášho názoru zavádza model, v ktorom je likvidátor primárnym štatutárnym orgánom právnickej osoby v likvidácii, zatiaľ čo pôvodný štatutárny orgán môže mať nanajvýš zvyškové, výnimočne uplatniteľné postavenie odôvodnené potrebou zabezpečenia kontinuity likvidačného procesu. Práve v tomto spočíva skutočný význam navrhovanej úpravy. Nejde iba o jazykové vyjasnenie doterajšieho stavu, ale o koncepčné preusporiadanie orgánovej štruktúry právnickej osoby v štádiu jej zániku.

Zoznam bibliografických odkazov

1. ĎURICA, M. a kol. Obchodné právo I. Všeobecné ustanovenia. Obchodné spoločnosti a družstvo. Banská Bystrica : Belianum Vydavateľstvo Univerzity Mateja Bela. 2024. ISBN 978-80-557-2138-5. s. 540
2. KUBÍČEK, Pavol a kol.: *Obchodné právo*, 3. vydanie. Plzeň: Aleš Čeněk, 2021. ISBN 978-7380-847-1. s. 418
3. PATAKYOVÁ, M. a kol.: . Aplikované právo obchodných spoločností a družstva – ťažiskové inštitúty. Bratislava : Wolters Kluwer SR s.r.o., 2021, 864 s. ISBN 978-571-0363-9
4. PATAKYOVÁ, M. a kol.: Obchodný zákonník. Komentár. 1. vydanie. Bratislava: C. H. Beck, 2022. ISBN: 978-80-8232-018-6. s. 1792
5. STREMY, J. Likvidátor. In Bratislavské právnické fórum 2019: nezávislosť a etický rozmer výkonu súdnej moci v obchodnom práve. Bratislava : Právnická fakulta UK, 2019, ISBN 978-80-7160-526-3. s. 61 – 72
6. STRÉMY, J. Sanačné a deštrukčné metódy riešenia krízy v podniku. In. Bratislavské právnické fórum 2021: Legislatívna a aplikačná invencia v obchodnom práve počas pandémie COVID-19. Bratislava : Právnická fakulta UK, 2021, ISBN 978-80-7160-607-9. s. 70 – 79
7. STREMY, J. Niekoľko poznámok k inštitútu likvidácie v pripravovanej novele Obchodného zákonníka, In. Míľniky práva v stredoeurópskom priestore 2019, Bratislava: Právnická fakulta UK, 2019, ISBN 978-80-7160-517-1. s. 567-576
8. OVEČKOVÁ, O. a kol.: *Obchodný zákonník. Veľký komentár. Zväzok I. (§ 1 až 260)*. Bratislava: Wolters Kluwer, 2022, ISBN 978-80-571-0436-0. s. 2100
9. Uznesenie Najvyššieho súdu Slovenskej republiky, sp. zn. 5Cdo/284/2010, zo dňa 15.05.2010
10. Zákon č. 513/1991 Zb. Obchodný zákonník v znení neskorších predpisov

INŠTITÚT ŠPECIÁLNEHO SPRÁVCU V INSOLVENČNOM KONANÍ

The Institution of the Special Trustee in Insolvency Proceedings

DOMINIKA FICIKOVÁ*

Abstrakt

Príspevok sa zaoberá inštitútom špeciálneho správcu v insolvenčnom konaní v právnom poriadku Slovenskej republiky. Cieľom príspevku je analyzovať dôvody zavedenia tohto inštitútu, jeho právnu úpravu a postavenie v systéme správcov v konkurznom a reštrukturalizačnom konaní. Príspevok vychádza z normatívnej analýzy právnej úpravy, odbornej literatúry a zhodnotenia aplikačnej praxe, pričom osobitnú pozornosť venuje podmienkam zápisu do oddielu špeciálnych správcov, priebehu špeciálnej správcovskej skúšky a ustanovovaniu špeciálneho správcu v konaniach vedených voči špeciálnym subjektom. Hypotéza príspevku predpokladá, že existencia špeciálneho správcu prispieva k efektívnejšiemu riešeniu ekonomicky a organizačne náročných insolvenčných konaní. Výsledky analýzy naznačujú, že tento inštitút má významnú úlohu pri správe zložitých konaní, pričom poukazujú aj na potrebu jasnej legislatívnej úpravy a vysokej odbornej úrovne osôb vykonávajúcich túto funkciu.

Abstract

The paper deals with the institution of the special trustee in insolvency proceedings within the legal system of the Slovak Republic. The aim of the paper is to analyse the reasons for the introduction of this institution, its legal regulation, and its position within the system of trustees in bankruptcy and restructuring proceedings. The paper is based on a normative analysis of the legal framework, relevant academic literature, and an evaluation of application practice, with particular attention given to the conditions for registration in the register of special trustees, the course of the special trustee examination, and the appointment of a special trustee in proceedings conducted against so-called special entities. The hypothesis of the paper assumes that the existence of a special trustee contributes to a more efficient resolution of economically and organisationally demanding insolvency proceedings. The results of the analysis indicate that this institution plays an important role in the administration of complex proceedings, while also highlighting the need for clear legislative regulation and a high level of professional expertise of individuals performing this function.

Kľúčové slová: insolvenčné konanie, správca konkurznej podstaty, špeciálny správca, konkurz, reštrukturalizácia, špeciálna správcovska skúška

Key words: insolvency proceedings, trustee, special trustee, bankruptcy, restructuring

Úvod

Insolvenčné právo je odvetvie právneho poriadku, ktorého cieľom je riešenie úpadku dlžníka spôsobom zabezpečujúcim čo najvyššie uspokojenie veriteľov pri zachovaní zákonných pravidiel a transparentnosti konania. Dôležitú úlohu v rámci týchto konaní zohráva správca, ktorý ako osobitný procesný subjekt vykonáva správu majetku dlžníka a zabezpečuje priebeh konkurzného alebo reštrukturalizačného konania.

* Mgr. Dominika Ficiková 1. ročník, externá forma, 3. stupeň, dficikova@student.umb.sk, Katedra obchodného práva a hospodárskeho práva Právnická fakulta UMB

S narastajúcou komplexnosťou niektorých insolvenčných konaní sa v aplikačnej praxi začala prejavovať potreba vyššej špecializácie správcov. Najmä v prípade veľkých konkurzov alebo konaní vedených voči subjektom s osobitným postavením sa ukázalo, že výkon správcovskej činnosti vyžaduje vyššiu mieru odborných znalostí a skúseností. Na tieto potreby reagovala právna úprava účinná od 17. júla 2022, ktorá zaviedla do slovenského právneho poriadku inštitút špeciálneho správcu.

Cieľom príspevku je analyzovať právnu úpravu špeciálneho správcu v insolvenčnom konaní, poukázať na dôvody jeho zavedenia a priblížiť podmienky výkonu tejto funkcie. Príspevok sa zameriava najmä na podmienky zápisu do oddielu špeciálnych správcov, špeciálnu správčovskú skúšku a ustanovovanie špeciálneho správcu v konaniach vedených voči tzv. špeciálnym subjektom. Pri spracovaní príspevku boli použité metódy právnej analýzy, syntézy a interpretácie právnych predpisov, ako aj analýza vybraných rozhodnutí súdnej praxe.

1. Správca konkurznej podstaty

Zákon o správcoch definuje ako správcu fyzickú alebo právnickú osobu, ktorá je zapísaná do zoznamu správcov.¹ Dôležité je podotknúť, že správčovskú činnosť môže vykonávať len správca. Činnosti zverené správcovi môže vykonávať len osoba zapísaná do zoznamu správcov.²

Správcovia vykonávajú činnosť v konkurznom konaní, reštrukturalizačnom konaní o oddlžení alebo konaní o verejnej preventívnej reštrukturalizácii podľa osobitných predpisov.³ Správca predstavuje špecifický procesný subjekt konkurzného konania, ktorý v sebe kombinuje prvky verejnoprávneho orgánu a podnikateľského subjektu.

1.1 Právne postavenie správcu konkurznej podstaty

Ako sme uviedli, správca je špecifickým subjektom konkurzného konania, ktorý v zmysle ustanovenia § 24 zákona o konkurze a reštrukturalizácii (ďalej len „ZKR“) nemá postavenie účastníka konania. Uvedené potvrdzuje aj judikatúra, ktorá definuje postavenie správcu ako *„osobitný procesný subjekt, ktorý má samostatné postavenie ako voči úpadcovi, tak voči konkurzným veriteľom a nie je ho možné považovať za zástupcu konkurzných veriteľov a ani za zástupcu úpadcu.“*⁴ Dôležité je však dodať, že uvedené neplatí absolútne, a to vzhľadom na § 24 ods. 3 ZKR, ktorý ustanovuje že *„Účastníkmi konkurzného konania sú aj*

¹ § 2 ods. 1 zákona č. 8/2005 Z. z. o správcoch

² § 2 ods. 2 zákona č. 8/2005 Z. z. o správcoch

³ § 1 zákona č. 8/2005 Z. z. o správcoch

⁴ R (ČR) 52/1998

*d'alšie osoby, o ktorých právach alebo povinnostiach sa má v konkurznom konaní konať; tieto osoby sú účastníkmi konkurzného konania pre tú časť konkurzného konania, v ktorom sa koná a rozhoduje o ich právach alebo povinnostiach.*⁵ V súlade s citovaným ustanovením teda správca má postavenie účastníka konania napríklad v prípade ak sa rozhoduje o jeho odmene.⁶ Rovnako by mal postavenie účastníka konania aj v prípade ak by sa rozhodovalo o zbavení jeho funkcie, pričom by mu prináležalo právo podať opravný prostriedok.⁷

Zaujímavou otázkou súvisiacou s postavením správcu z teoretického hľadiska je posúdenie jeho statusu ako podnikateľa v zmysle legálnej definície podnikania podľa Obchodného zákonníka. Legálna definícia podnikania pre účely Obchodného zákonníka zahŕňa 5 pojmových znakov, ktoré v prípade ak sú kumulatívne naplnené, možno uzavrieť že ide o podnikanie v intenciách Obchodného zákonníka. Ustanovenie § 2 ods. 2 Obchodného zákonníka upravuje že *„Podnikaním sa rozumie sústavná činnosť vykonávaná samostatne podnikateľom vo vlastnom mene a na vlastnú zodpovednosť za účelom dosiahnutia zisku.*“⁸ Podmienka sústavnosti vo všeobecnosti predstavuje požiadavku na kontinuitu činnosti, ktorá tkvie v racionálnom predvídaní opakovania tejto činnosti podnikateľom. Jej protipólom by bola príležitostná alebo náhodná činnosť.⁹ V súlade s uvedeným možno považovať túto podmienku pri správcovi za splnenú, keďže hoci môže dôjsť k situácii, keď v konkrétnom čase nie je správca ustanovený do žiadneho konania, požiadavka vôle správcu byť do konaní ustanovovaný je aj v takomto prípade daná. Podmienky účelu dosiahnutia zisku ako aj vlastnej zodpovednosti tiež možno považovať za splnené, a to vzhľadom na odmenu správcu a § 12 zákona o správcoch, ktorý ustanovuje zodpovednosť správcu za škodu.¹⁰ Podmienky ktoré však možno relativizovať sú samostatnosť ako aj výkon činnosti vo vlastnom mene. Samostatnosť je oslabená najmä z dôvodu systému prideľovania konaní náhodným výberom, ktorý prirodzene nevie správca ovplyvniť.¹¹ Tým sa oslabuje úplná autonómia rozhodovania o podnikateľskej činnosti. Konanie vo vlastnom mene tiež možno považovať za problematické vzhľadom na fakt, že v súlade s ustanovením § 44 ods. 1 *in fine* ZKR *„správca pritom koná v mene a na účet*

⁵ § 24 ods. 3 zákona č. 7/2005 Z. z. o konkurze a reštrukturalizácii

⁶ Dolný, J. – Machatová, L. – Maliar, M. (2024). Zákon o správcoch. Komentár. I. vydanie. Praha : Wolters Kluwer ČR, a.s., str. 13

⁷ ZSR 90/2001

⁸ § 2 ods. 2 zákona č. 513/1991 Zb. Obchodný zákonník

⁹ Patakyová, M. a kol. Obchodný zákonník. Komentár. 1. vydanie. (2022). Bratislava : C. H. Beck, str. 14

¹⁰ Dolný, J. – Machatová, L. – Maliar, M. (2024). Zákon o správcoch. Komentár. I. vydanie. Praha : Wolters Kluwer ČR, a.s., str. 13

¹¹ Dolný, J. – Machatová, L. – Maliar, M. (2024). Zákon o správcoch. Komentár. I. vydanie. Praha : Wolters Kluwer ČR, a.s., str. 14

úpadcu.“¹² Aj napriek uvedeným skutočnostiam však možno považovať správcu za podnikateľa, hoci na niektoré z pojmových znakov podnikania sa vzťahujú určité modifikácie.

Ďalším významným znakom definujúcim postavenie správcu je, ako sme už vyššie naznačili, že v sebe inkorporuje určité znaky verejnoprávneho orgánu. Teda napriek tomu, že zákon správcovi postavenie orgánu verejnej moci nepriznáva, podobne ako je tomu napríklad pri exekútoroch, pri výkone správcovskej činnosti možno identifikovať situácie kedy autoritatívne rozhodovanie, nerovné postavenie subjektov a vynútiteľnosť rozhodnutí štátom sú príznačné práve aj pre správcovsčú činnosť.¹³

Pokiaľ ide o vplyv správcu na konkurzné konanie, vo všeobecnosti možno konštatovať, že v rámci konkurzného konania preberá výkon dispozičných oprávnení k majetku dlžníka a vykonáva správu jeho majetku s cieľom zabezpečiť čo najvyššie uspokojenie veriteľov. Pri výkone svojej funkcie je povinný postupovať nestranne a nezávisle, pričom zároveň úzko spolupracuje so súdom a veriteľským výborom.¹⁴ Správca koná v mene a na účet úpadcu, pričom *de facto* vstupuje do postavenia štatutárneho orgánu, hoci *de iure* sa štatutárom nestáva.¹⁵

1.2 Zoznam správco

Zoznam správco je verejný zoznam zákonom ustanovených údajov o správcoch. Zoznam správco vedie ministerstvo spravodlivosti. V tomto zozname sa zverejňujú všetky zapísané údaje o správcovi okrem údajov o trvalom pobyte.¹⁶

Zoznam správco sa člení na oddiely:

- a) správco pre fyzické osoby,
- b) správco pre právnické osoby a
- c) špeciálnych správco.¹⁷

Oddiel špeciálnych správco bol do zákona pridaný až novelou 111/2022 Z. z. s účinnosťou od 17. júla 2022. Dôvody, ktoré viedli k zavedeniu inštitútu špeciálneho správcu si rozoberieme v ďalšej kapitole.

¹² Dolný, J. – Machatová, L. – Maliar, M. (2024). Zákon o správcoch. Komentár. I. vydanie. Praha : Wolters Kluwer ČR, a.s., str. 13

¹³ Dolný, J. – Machatová, L. – Maliar, M. (2024). Zákon o správcoch. Komentár. I. vydanie. Praha : Wolters Kluwer ČR, a.s., str. 14

¹⁴ Dolný, J. – Machatová, L. – Maliar, M. (2024). Zákon o správcoch. Komentár. I. vydanie. Praha : Wolters Kluwer ČR, a.s., str. 15

¹⁵ Dolný, J. – Machatová, L. – Maliar, M. (2024). Zákon o správcoch. Komentár. I. vydanie. Praha : Wolters Kluwer ČR, a.s., str. 14

¹⁶ § 20 zákona č. 8/2005 Z. z. o správcoch

¹⁷ § 20 ods. 2 zákona č. 8/2005 Z. z. o správcoch

2. Špeciálny správca

Otázka zavedenia inštitútu špeciálneho správcu úzko súvisí s vývojom aplikačnej praxe a požiadavkami práva Európskej únie. Doterajší model univerzálneho správcu sa v prípade ekonomicky rozsiahlych alebo organizačne náročných konaní ukazoval ako nedostatočný, keďže neumožňoval dostatočne reflektovať špecifiká jednotlivých prípadov.

Z dôvodovej správy vyplýva, že problém spočíval najmä v absencii mechanizmu, ktorý by umožnil selekciu správcov podľa ich odbornosti a skúseností. V praxi tak dochádzalo k situáciám, keď bol do komplexných konaní ustanovený správca bez adekvátnej špecializácie. Zavedenie špeciálneho správcu preto predstavuje snahu o diferencovaný prístup k správe insolvenčných konaní.

Významným impulzom bola aj transpozícia smernice (EÚ) 2019/1023, ktorá zdôrazňuje potrebu zohľadňovať odborné predpoklady správcu vzhľadom na povahu konkrétneho prípadu. Národná právna úprava tak reagovala nielen na vnútroštátne aplikačné problémy, ale aj na európske štandardy.¹⁸

Členenie zoznamu správcov je nastavené tak, aby odrážalo potrebu vertikálneho aj horizontálneho rozdelenia správcov. Vertikálne členenie vychádza z typu dlžníka a zahŕňa oddiel správcov pre fyzické osoby, oddiel správcov pre právnické osoby a oddiel špeciálnych správcov. Horizontálne členenie zase zohľadňuje požadované odborné znalosti správcov pri vykonávaní špecifických a náročnejších konaní, pričom zahŕňa oddiel správcov zabezpečujúcich oddĺženie fyzických osôb, oddiel správcov vykonávajúcich konkurzy právnických osôb a oddiel špeciálnych správcov zameraných na konkurzy špecifických subjektov.¹⁹

Prepojením uvedeného vertikálneho a horizontálneho členenia vzniklo rozdelenie na oddiely správcov pre fyzické osoby, správcov pre právnické osoby a špeciálnych správcov. Takéto členenie umožňuje lepšie priradiť správcu k typu konania, avšak zároveň vyvoláva otázku, či je nastavenie kritérií dostatočne flexibilné. Najmä automatické viazanie niektorých konaní (napr. reštrukturalizácie) na špeciálnych správcov môže byť v praxi diskutabilné, keďže nie každé takéto konanie je nevyhnutne mimoriadne zložitú. Zavedenie špeciálnej správcovskej skúšky predstavuje kľúčový prvok tejto diferenciácie. Jej prínos možno vidieť v dôraze na ekonomické a manažérske aspekty, ktoré boli v tradičnom modeli správcovskej činnosti menej

¹⁸ Dôvodová správa k zákonu č. 111/2022 Z. z.

¹⁹ Dôvodová správa k zákonu č. 111/2022 Z. z.

akcentované. Na druhej strane však prísne kvalifikačné požiadavky prirodzene zužujú okruh oprávnených osôb, čo môže mať vplyv na dostupnosť správcov v praxi.²⁰

Možno teda konštatovať, že právna úprava sleduje legitímny cieľ zvýšenia odbornosti a efektívnosti konaní, avšak jej praktická aplikácia bude závisieť najmä od rovnováhy medzi kvalifikačnými požiadavkami a reálnou dostupnosťou kvalifikovaných správcov.

2.1. Predpoklady zápisu do oddielu špeciálnych správcov

Vznikom samostatného oddielu špeciálnych správcov vznikla potreba stanoviť aj prísnejšie kritériá, ktoré musí uchádzač o zápis do tohto oddielu splniť. Predmetné podmienky sú upravené v § 23a zákona o správcoch, pričom reflektujú skutočnosť, že činnosť špeciálnych správcov je vysoko odbornou činnosťou, najmä vzhľadom na povahu a osobitosti špeciálnych subjektov. Jednou z podmienok zápisu do oddielu špeciálnych správcov je preto úspešné absolvovanie špeciálnej správcovskej skúšky.

Správca, ktorý sa chce zapísať do oddielu špeciálnych správcov musí spĺňať jednak všeobecné predpoklady na zápis správcu do zoznamu správcov, či už ako fyzická alebo právnická osoba a musí vykonať špeciálnu správcovskú skúšku.²¹

Možno konštatovať, že úspešné vykonanie špeciálnej správcovskej skúšky predstavuje základný predpoklad pre zápis správcu do oddielu špeciálnych správcov. Táto požiadavka má zabezpečiť, aby sa na výkone správcovskej činnosti v osobitne náročných insolvenčných konaniach podieľali iba osoby disponujúce primeranou odbornou kvalifikáciou a praktickými skúsenosťami. Po splnení predpokladov na zápis musí správca o zápis do oddielu pre špeciálnych správcov požiadať ministerstvo spravodlivosti. Náležitosti žiadosti, ako aj doklady, ktoré je potrebné k žiadosti priložiť upravuje zákon o správcoch v § 24 zvlášť pre fyzickú a zvlášť pre právnickú osobu. Ministerstvo preverí splnenie podmienok na zápis do zoznamu správcov.²²

2.2. Špeciálna správcovská skúška

Zákon o správcoch ustanovuje základný účel a rámcové vymedzenie špeciálnej správcovskej skúšky, teda okruh vedomostí a skúseností, ktoré musí uchádzač o výkon funkcie

²⁰ Dôvodová správa k zákonu č. 111/2022 Z. z.

²¹ Dolný, J. – Machatová, L. – Maliar, M. (2024). Zákon o správcoch. Komentár. I. vydanie. Praha : Wolters Kluwer ČR, a.s., str. 77

²² Dolný, J. – Machatová, L. – Maliar, M. (2024). Zákon o správcoch. Komentár. I. vydanie. Praha : Wolters Kluwer ČR, a.s., str. 77

špeciálneho správcu preukázať. Cieľom špeciálnej správcovskej skúšky je overiť skúsenosti uchádzača a preveriť jeho odborné právne a ekonomické vedomosti nevyhnutné na riadny výkon správcovskej činnosti správcu zapísaného v oddiele špeciálnych správcov, pričom sa zároveň posudzujú aj jeho znalosti z oblasti finančnej analýzy a riadenia podnikov.²³

Z takto vymedzeného základného rámca zároveň vyplýva, že rozsah požadovaných vedomostí je podstatne širší než pri klasickej skúške správcu, pričom sa kladie výraznejší dôraz aj na ekonomické aspekty výkonu správcovskej činnosti, najmä na problematiku riadenia podnikov a finančnej analýzy podnikov nachádzajúcich sa v úpadku alebo v stave hroziaceho úpadku.²⁴

K vykonaniu špeciálnej správcovskej skúšky môže byť správca pripustený vtedy, ak aktívne vykonával správcovskú činnosť najmenej päť rokov a uhradí správny poplatok za vykonanie tejto skúšky vo výške 7 000 eur.²⁵ Špeciálna správcovská skúška sa organizuje podľa potreby, avšak najmenej raz za päť rokov.²⁶

Samotný priebeh špeciálnej skúšky, spôsob bodovania a ďalšie náležitosti upravuje vyhláška o vzdelávacom poriadku správcov v oblasti konkurzu a reštrukturalizácie č. 291/2005 Z. z. v § 8a a 8c. Overovanie špecifických odborných znalostí uchádzačov zabezpečuje špeciálna komisia zložená z odborníkov, ktorých výber a menovanie má garantovať nezávislé, objektívne a spravodlivé posúdenie kandidátov. Transparentnosť tohto procesu sa posilňuje aj tým, že zvukový záznam z výberu uchádzačov sa zverejňuje na webovom sídle Ministerstva spravodlivosti Slovenskej republiky najmenej na dobu 180 dní.²⁷ Podrobnosti týkajúce sa zloženia a rokovania komisie, spôsobu hodnotenia uchádzačov, rozhodovania komisie a účasti na jej zasadnutiach upravuje vyhláška č. 291/2005 Z. z.

Špeciálna správcovská skúška predstavuje kľúčový kvalifikačný prvok, ktorého cieľom je overiť odborné právne a ekonomické vedomosti uchádzača, ako aj jeho praktické skúsenosti. Na rozdiel od základnej skúšky sa kladie väčší dôraz na ekonomické aspekty správy podnikov, najmä finančnú analýzu a riadenie podnikov v úpadku. Podmienkou jej vykonania je predchádzajúca prax správcu, čo posilňuje požiadavku odbornej skúsenosti. Možno konštatovať, že skúška predstavuje nástroj selekcie odborne spôsobilých správcov, avšak zároveň prispieva k zúženiu ich počtu v praxi.

²³ § 16a zákona č. 8/2005 Z. z. o správcoch

²⁴ Dolný, J. – Machatová, L. – Maliar, M. (2024). Zákon o správcoch. Komentár. I. vydanie. Praha : Wolters Kluwer ČR, a.s., str. 54

²⁵ § 16a ods. 5 zákona č. 8/2005 Z. z. o správcoch

²⁶ § 16a ods. 6 zákona č. 8/2005 Z. z. o správcoch

²⁷ Dôvodová správa k zákonu č. 111/2022 Z. z.

2.3. Ustanovenie špeciálneho správcu

Špeciálneho správcu, ustanoví súd na základe náhodného výberu pomocou technických a programových prostriedkov schválených ministerstvom, pre náhodný výber ak osobitný predpis neustanovuje inak v nižšie uvedených prípadoch.²⁸

Náhodný výber sa uskutoční iba zo správcov, ktorí sú zapísaní v oddiele špeciálnych správcov, ak ide o konanie voči právnickej osobe:

1. ktorá je finančnou inštitúciou podľa § 4 ods. 4,
2. ktorej obrat v poslednom kalendárnom roku pred vyhlásením konkurzu prekročil 10 000 000 eur,
3. ktorej majetok podľa poslednej účtovnej závierky presiahol 10 000 000 eur,
4. ktorej úpadok sa rieši reštrukturalizáciou alebo
5. ktorej hroziaci úpadok sa rieši verejnou preventívnou reštrukturalizáciou.²⁹

Z uvedeného vyplýva, že ide o insolvenčné konania vedené voči tzv. špeciálnym subjektom, ktoré sa vyznačujú osobitnou náročnosťou, či už vzhľadom na charakter činnosti dotknutých subjektov (napríklad finančné inštitúcie s veľkým počtom klientov), ich rozsah alebo veľkosť (napr. vysoký počet zamestnancov, veriteľov alebo značný objem majetku), prípadne iné špecifické znaky. Takéto konania zasahujú do práv a povinností veľkého počtu osôb, čo zvyšuje význam verejného záujmu na riadnom a odbornom vedení konkurzných, reštrukturalizačných alebo preventívnych konaní.³⁰

V nadväznosti na prípady, kedy je obligatórne ustanovený špeciálny správca možno vyššie uvedené teoretické východiská zavedenia inštitútu špeciálneho správcu, ktoré potvrdzuje aj dôvodová správa relativizovať vo vzťahu k vyhradeniu reštrukturalizačných konaní a verejnej preventívnej reštrukturalizácie špeciálnym správcom. Vo všeobecnosti možno konštatovať, že uvedené konania nemusia nevyhnutne odôvodňovať potrebu ustanovenia osobitne kvalifikovaného subjektu, keďže nevyhnutne nemusia byť zvlášť komplikované.³¹

Ako uvádza Ďurica, právnu úpravu špeciálneho správcu možno vo svojej podstate hodnotiť pozitívne, nakoľko potreba diferenciácie a určovania správcov podľa zložitosti insolvenčného konania bola dlhodobo pertraktovanou témou. Dodáva však tiež, že okrem aktuálneho legislatívou zvoleného spôsobu by prichádzali do úvahy aj iné metódy zabezpečovania výberu kvalifikovaného správcu. Ako príklad uvádza výber správcu

²⁸ § 20a zákona č. 8/2005 Z. z. o správcoch

²⁹ § 20a písm. c) zákona č. 8/2005 Z. z. o správcoch

³⁰ Dôvodová správa k zákonu č. 111/2022 Z. z.

³¹ Ďurica, M.: Špeciálny insolvenčný správca v obmedzenom režime; Justičná revue, 77, 2025, č. 1, s. 3

konkurzným sudcom, a to na základe predchádzajúcich skúseností s postupom správcu v konkurzných konaniach.³²

2.4. Pôsobnosť špeciálneho správcu

Oddiel správcov pre fyzické osoby a oddiel správcov pre právnické osoby sa aj naďalej vedú podľa obvodov krajských súdov, v ktorých má sídlo príslušný konkurzný súd. Na rozdiel od toho sa oddiel špeciálnych správcov vedie s pôsobnosťou pre celé územie Slovenskej republiky.³³

Z toho vyplýva, že špeciálny správca môže mať kanceláriu zriadenú v obvode ktoréhokoľvek konkurzného súdu na území Slovenskej republiky a pri jeho ustanovovaní sa vyberá zo zoznamu špeciálnych správcov bez väzby na konkrétny konkurzný súd.

Dôvodom takejto celoslovenskej pôsobnosti je najmä skutočnosť, že počet konkurzných alebo reštrukturalizačných konaní vedených voči špeciálnym subjektom nie je vysoký a v priemere dosahuje približne 20 konaní ročne. Zároveň je obmedzený aj počet správcov zapísaných v tomto oddiele. Z tohto dôvodu sa nepovažuje za potrebné tento oddiel ďalej vnútorne členiť podľa sídla kancelárie správcu ani určovať špeciálneho správcu podľa obvodov súdov, ako je to v prípade oddielu správcov pre fyzické osoby a oddielu správcov pre právnické osoby.³⁴

3. Z aplikačnej praxe

Aj napriek tomu, že inštitút špeciálneho správcu je zavedený právnou úpravou od 17. júla 2022, tak právna úprava už prešla novelou, a to konkrétne zákonom č. 240/2025 Z. z., ktorý bol vyhlásený 25. septembra 2025. Táto novela bola potrebná, nakoľko zákonodarca mal za to, že aplikačná prax v niektorých prípadoch nesprávne aplikovala pravidlá pri výmene správcu na schôdzi veriteľov a to s ohľadom na inštitút špeciálneho správcu.³⁵

Zavedením inštitútu špeciálneho správcu sa upravil spôsob náhodného výberu správcov v konaniach vedených voči tzv. špeciálnym alebo osobitným subjektom, teda dlžníkom, ktorých osobitný predmet činnosti, rozsah alebo spôsob riešenia úpadku si vyžaduje osobitný spôsob správy. Ide o konania, pri ktorých je potrebná vyššia úroveň odborných znalostí a praxe, pričom tieto predpoklady musia spĺňať správcovia zapísaní v oddiele špeciálnych správcov. V takýchto

³² Ďurica, M.: Špeciálny insolvenčný správca v obmedzenom režime; Justičná revue, 77, 2025, č. 1, s. 2

³³ § 20 ods. 4 zákona č. 8/2005 Z. z. o správcoch

³⁴ Dôvodová správa k zákonu č. 111/2022 Z. z.

³⁵ Dôvodová správa k zákonu č. 240/2025 Z. z.

prípadoch sa preto správca ustanovuje náhodným výberom zo zoznamu správcov vedeného v oddiele špeciálnych správcov.³⁶

V konkurznom konaní je možné na schôdzi veriteľov hlasovať o výmene správcu. Aplikačná prax však v niektorých prípadoch nesprávne vykladala pravidlá týkajúce sa výmeny správcu na prvej schôdzi veriteľov v týchto špecifických konaniach. V súlade so zmyslom a cieľom právnej úpravy, ktorá zaviedla inštitút špeciálnych správcov, sa preto potvrdzuje, že aj pri výmene správcu na prvej schôdzi veriteľov musia byť zachované pravidlá vzťahujúce sa na ustanovovanie špeciálnych správcov.³⁷

Z tohto dôvodu sa výslovne ustanovuje, že dôvodom na odmietnutie návrhu schôdze veriteľov na výmenu správcu je aj situácia, keď v konaní, v ktorom bol pôvodne ustanovený správca z oddielu špeciálnych správcov, má byť novým správcom osoba, ktorá nie je zapísaná v tomto oddiele.³⁸

Ako príklad „nesprávnej“ interpretácie môžeme použiť nález Ústavného súdu SR II. ÚS 451/2023 zo dňa 03.09.2024. V tomto prípade Ústavný súd posudzoval sťažnosť správcu konkurznej podstaty, ktorý bol odvolaný z funkcie na základe rozhodnutia veriteľov, ktoré následne potvrdil okresný súd. Sťažovateľ sa domnieval, že týmto postupom boli porušené jeho práva. Podstata sporu bol inštitút špeciálneho správcu. Jadrom sporu bola otázka, či veritelia pri výmene správcu musia povinne zvoliť nového správcu, ktorý je zapísaný v zozname špeciálnych správcov. Sťažovateľ argumentoval, že okresný súd pochybil, keď akceptoval jeho odvolanie a nahradenie správcom, ktorý nebol špeciálny. Tvrdil, že takýto výklad je v rozpore s účelom zákona, ktorým bolo zvýšenie odbornosti a kvality pri správe veľkých konkurzov práve prostredníctvom špeciálne kvalifikovaných správcov.³⁹

Ústavný súd potvrdil, že výklad okresného súdu bol v súlade so zákonom. Rozlíšil medzi dvoma situáciami:

1. Ustanovenie prvého správcu: Zákon o konkurze a reštrukturalizácii ukladá súdu povinnosť, aby do funkcie v určitých prípadoch ustanovil špeciálneho správcu.
2. Výmena správcu veriteľmi: Zákon však veriteľom takúto explicitnú povinnosť pri výmene správcu neukladá. Ich právo zvoliť si nového správcu je autonómne a nie je viazané na podmienku, že musí ísť o špeciálneho správcu. Podľa Ústavného súdu teda okresný súd postupoval správne, keď rešpektoval vôľu veriteľov.⁴⁰

³⁶ Dôvodová správa k zákonu č. 111/2022 Z. z.

³⁷ Dôvodová správa k zákonu č. 240/2025 Z. z.

³⁸ Dôvodová správa k zákonu č. 111/2022 Z. z.

³⁹ Nález Ústavného súdu SR II. ÚS 451/2023 zo dňa 03.09.2024

⁴⁰ Nález Ústavného súdu SR II. ÚS 451/2023 zo dňa 03.09.2024

Uvedený nález poukázal na interpretačnú medzeru právnej úpravy, ktorú zákonodarca následne reagoval odstrániť prijatím legislatívnej novely. Zákonodarca predmetnou novelou teda jednoznačne stanovil, že v špeciálnych konkurzoch musia pôsobiť výlučne špeciálni správcovia, a to aj v prípade ich výmeny na schôdzi veriteľov, aby už nedochádzalo k nesprávnej interpretácii inštitútu špeciálneho správcu.

4. Hodnotenie právnej úpravy špeciálneho správcu

Zavedenie inštitútu špeciálneho správcu možno považovať za významný krok smerujúci k zvýšeniu profesionalizácie správcovskej činnosti v rámci slovenského insolvenčného práva. Osobitné konkurzné a reštrukturalizačné konania, najmä voči veľkým podnikateľským subjektom alebo finančným inštitúciám, sú často charakteristické vysokou ekonomickou a organizačnou náročnosťou, čo kladie zvýšené nároky na odborné znalosti správcu.

Pozitívom právnej úpravy je najmä zavedenie špeciálnej správcovskej skúšky, ktorá preveruje nielen právne, ale aj ekonomické vedomosti uchádzačov. Takéto komplexné preverenie odbornosti môže prispieť k efektívnejšiemu vedeniu insolvenčných konaní, najmä v prípadoch, keď je potrebné riešiť komplikované ekonomické a finančné otázky súvisiace so správou majetku dlžníka.

Na druhej strane je možné poukázať aj na niektoré otvorené otázky aplikačnej praxe. Jednou z nich je napríklad relatívne úzky okruh správcov zapísaných v oddiele špeciálnych správcov, ktorý môže v určitých prípadoch obmedziť flexibilitu pri ustanovovaní správcu do funkcie. Rovnako sa v aplikačnej praxi objavili výkladové problémy týkajúce sa výmeny správcu na schôdzi veriteľov, ktoré bolo potrebné riešiť následnou legislatívnou úpravou.

Z uvedeného vyplýva, že inštitút špeciálneho správcu predstavuje významný nástroj profesionalizácie správcovskej činnosti, pričom jeho ďalší vývoj bude závisieť najmä od aplikačnej praxe.

Záver

Cieľom príspevku bolo preskúmať postavenie a význam inštitútu špeciálneho správcu v insolvenčnom konaní v právnom poriadku Slovenskej republiky. Analýza právnej úpravy a aplikačnej praxe ukázala, že zavedenie tohto inštitútu reagovalo na potreby praxe spojené so zvýšenou náročnosťou niektorých konkurzných a reštrukturalizačných konaní, najmä v prípadoch veľkých podnikov alebo subjektov s osobitným postavením na trhu.

Osobitné podmienky zápisu do oddielu špeciálnych správcov a zavedenie špeciálnej správcovskej skúšky prispievajú k zabezpečeniu vyššej odbornej úrovne osôb vykonávajúcich túto funkciu. Aplikačná prax zároveň poukázala na určité interpretačné problémy, najmä v súvislosti s výmenou správcu na schôdzi veriteľ'ov, na ktoré zákonodarca reagoval legislatívnou úpravou.

Možno konštatovať, že inštitút špeciálneho správcu prispieva k profesionalizácii správcovskej činnosti a k efektívnejšiemu riešeniu zložitých insolvenčných konaní.

Bibliografia

Odborná literatúra

1. Dolný, J. – Machatová, L. – Maliar, M. (2024). Zákon o správcoch. Komentár. I. vydanie. Praha: Wolters Kluwer ČR, a.s.
2. Ďurica, M. Zákon o konkurze a reštrukturalizácii. Komentár. 4. vydanie. (2021). Praha : C. H. Beck
3. Patakyová, M. a kol. Obchodný zákonník. Komentár. 1. vydanie. (2022). Bratislava : C. H. Beck

Právne predpisy

4. Zákon č. 7/2005 Z. z. o konkurze a reštrukturalizácii a o zmene a doplnení niektorých zákonov
5. Zákon č. 8/2005 Z. z. o správcoch a o zmene a doplnení niektorých zákonov
6. Vyhláška č. 291/2005 Z. z. o vzdelávacom poriadku správcov v oblasti konkurzu a reštrukturalizácie
7. Zákon č. 513/1991 Zb. Obchodný zákonník

Dôvodové správy

8. Dôvodová správa k zákonu č. 240/2025 Z. z.
9. Dôvodová správa k zákonu č. 111/2022 Z. z.

Súdne rozhodnutia

10. Nález Ústavného súdu SR II. ÚS 451/2023 zo dňa 03.09.2024
11. R (ČR) 52/1998
12. ZSR 90/2001

Odborné články

13. Ďurica, M.: Špeciálny insolvenčný správca v obmedzenom režime; Justičná revue, 77, 2025, č. 1

PREUKAZOVANIE HMOTNOPRÁVNÝCH PODMIENOK PRI ODPOROVACEJ ŽALOBE V KONKURZE

Proof of Substantive Legal Conditions in Avoidance Action in Bankruptcy Proceedings

VOJTECH AGNER *

Abstrakt

Príspevok sa zaoberá hmotnoprávnymi podmienkami odporovateľnosti právnych úkonov v konkurznom práve, pričom osobitná pozornosť je venovaná problémom ich preukazovania v aplikačnej praxi. Cieľom príspevku je analyzovať právnu úpravu odporovateľnosti podľa zákona o konkurze a reštrukturalizácii a poukázať na praktické problémy spojené najmä s dokazovaním ukrátenia uspokojenia pohľadávok veriteľov, existencie úpadku a úmyslu dlžníka ukrátiť veriteľov. Príspevok vychádza z normatívnej analýzy právnej úpravy, odbornej literatúry a relevantnej súdnej praxe, pričom osobitná pozornosť je venovaná dôkaznému bremenu v konaniach o odporovacej žalobe a špecifikám dokazovania jednotlivých podmienok odporovateľnosti. Hypotéza príspevku predpokladá, že napriek významu inštitútu odporovateľnosti ako nástroja ochrany veriteľov jeho praktická využiteľnosť je v aplikačnej praxi limitovaná najmä náročnosťou unesenia dôkazného bremena. Výsledky analýzy naznačujú, že práve preukazovanie ukrátenia veriteľov, existencie úpadku a úmyslu dlžníka predstavuje jednu z hlavných príčin nízkej úspešnosti odporovacích žalôb a zároveň poukazujú na potrebu presnejšej legislatívnej úpravy niektorých aspektov.

Abstract

The paper deals with the substantive legal conditions of the avoidance of legal acts in bankruptcy law, with particular attention given to the problems related to their proof in practice. The aim of the paper is to analyse the legal regulation of avoidance under the Act on Bankruptcy and Restructuring and to highlight practical issues related in particular to proving the detriment to creditors' claims, the existence of insolvency, and the debtor's intent to prejudice creditors. The paper is based on a normative analysis of the legal framework, relevant academic literature, and case law, with particular attention paid to the burden of proof in avoidance actions and the specifics of proving the individual conditions of avoidance. The hypothesis of the paper assumes that, despite the importance of the institution of avoidance as a tool for the protection of creditors, its practical applicability is limited in practice mainly due to the difficulty of meeting the burden of proof. The results of the analysis indicate that proving the detriment to creditors, the existence of insolvency, and the debtor's intent represents one of the main reasons for the low success rate of avoidance actions, while also pointing to the need for a more precise legislative regulation of certain aspects.

Kľúčové slová: odporovateľnosť právnych úkonov; konkurzné právo; ukrátenie veriteľov; úpadok dlžníka; dôkazné bremeno; odporovacia žaloba

Key words: avoidance of legal acts; bankruptcy law; prejudice to creditors; debtor insolvency; burden of proof; avoidance action

* JUDr. Vojtech Agner 1. ročník, externá forma, 3. stupeň, vagner@student.umb.sk, Katedra obchodného práva a hospodárskeho práva

Úvod

Inštitút odporovateľnosti právnych úkonov predstavuje významný nástroj ochrany veriteľov v konkurznom práve. Jeho základným účelom je zabrániť zmenšovaniu majetku dlžníka prostredníctvom právnych úkonov, ktoré by mohli viesť k ukráteniu uspokojenia pohľadávok veriteľov, a tým zabezpečiť naplnenie základného cieľa konkurzného konania, ktorým je čo najvyššie a spravodlivé uspokojenie veriteľov. Odporovateľnosť právnych úkonov je v slovenskom právnom poriadku upravená nielen v zákone o konkurze a reštrukturalizácii, ale aj v Občianskom zákonníku, pričom obe právne úpravy sa vzájomne dopĺňajú.

Hoci právna úprava odporovateľnosti právnych úkonov predstavuje dôležitý prostriedok ochrany veriteľov, aplikačná prax poukazuje na viaceré problémy spojené najmä s preukazovaním jednotlivých hmotnoprávnych podmienok odporovateľnosti.

Cieľom príspevku je analyzovať vybrané hmotnoprávne podmienky odporovateľnosti právnych úkonov v konkurznom práve a poukázať na praktické problémy súvisiace s ich preukazovaním v aplikačnej praxi. Osobitná pozornosť je venovaná najmä dokazovaniu ukrátenia uspokojenia pohľadávok veriteľov, preukazovaniu úpadku a skúmaniu úmyslu dlžníka ukrátiť veriteľov, ako aj otázke dôkazného bremena v konaniach o odporovacej žalobe. Pri spracovaní príspevku boli použité najmä metódy právnej analýzy, syntézy a interpretácie právnych predpisov, ako aj analýza vybranej odbornej literatúry a relevantnej súdnej praxe.

1. Všeobecne k odporovateľnosti v konkurznom práve

Odporovateľnosť právnych úkonov je jedným z ťažiskových inštitútov konkurzného práva sledujúci naplnenie účelu konkurzu ako čo najvyššie uspokojenie pohľadávok veriteľov a zachovanie princípu *pari passu* pri ich uspokojovaní.¹ Inými slovami ide o inštitút slúžiaci na ochranu veriteľov pred zmenšovaním majetku dlžníka, ktoré by eventuálne vyústilo do nižšieho uspokojenia ich pohľadávok. Účelom odporovateľnosti je teda zabrániť situácii, kedy by neodôvodnene dochádzalo k zmenšovaniu majetku dlžníka a tým zabezpečiť vyššiu mieru uspokojenia pohľadávok veriteľov.

Myšlienkový základ existencie inštitútu odporovateľnosti tkvie v tom, že má ponúkať efektívny a dynamický nástroj na ochranu veriteľov, ktorým je možné dosiahnuť neúčinnosť ukracujúceho úkonu. Ide teda o inštitút umožňujúci domáhať sa neúčinnosti právneho úkonu a nie jeho neplatnosti. Diferenciácia medzi neplatnosťou a odporovateľnosťou právneho úkonu

¹ Dolný, J. Odporovateľnosť právnych úkonov v konkurznom práve. (2021). Bratislava : C. H. Beck, s. 3

má v tomto ohľade relevanciu vo viacerých rovinách a považujeme za vhodné hneď v úvode adresovať aj túto otázku. Ako príklad možno uviesť, že absolútna neplatnosť pôsobí *ex tunc*, súd na ňu prihliada *ex offio*, jej domáhanie sa nie je časovo obmedzené a domáhať sa jej môže každý.² Uvedené neplatí pri odporovateľnosti keďže zákon výslovne ustanovuje osoby, ktorým prináleží právo domáhať sa jej, súd ju *ex offio* neskúma a taktiež ustanovuje lehoty v rámci ktorých sa jej možno dovolávať. V porovnaní s relatívnou neplatnosťou teda obdobne platí, že na vyvolanie právnych následkov odporovateľnosti ako aj relatívnej neplatnosti sa vyžaduje určitá aktivita, a teda neprihliada sa na ne *ex offio*.³ Samozrejme odporovateľnosť sa od relatívnej neplatnosti líši v samotných právnych následkoch.

Ďalej je dôležitou skutočnosťou, že odporovateľnosť nemožno vnímať ako určitú sankciu za vady právneho úkonu, ako tomu je pri neplatnosti. V porovnaní s neplatnosťou sa nesankcionuje vadnosť právneho úkonu, ale jeho dôsledky vo vzťahu k veriteľom.⁴ Predmetné dôsledky vo vzťahu k veriteľom možno následne chápať ako ukrátenie uspokojenia ich pohľadávok. V rámci právnej teórie sa možno stretnúť aj s názorom, že sankciou nie je samotná odporovateľnosť právneho úkonu, ale až následok tejto odporovateľnosti.⁵

Na tomto mieste je dôležité zdôrazniť aj skutočnosť, že právny úkon nemôže byť súčasne neplatný aj odporovateľný.⁶ Jednou z podmienok odporovateľnosti je aj platnosť právneho úkonu, pričom ak by boli dané dôvody zakladajúce aj neplatnosť a aj odporovateľnosť súčasne, platí pravidlo, že neplatnosť právneho úkonu má prednosť. Uvedené vyplýva jednoducho zo skutočnosti, že právny úkon, ktorý je neplatný je aj neúčinný, a teda nemožno sa domáhať jeho neúčinnosti, keď jeho účinnosť nikdy ani nenastala. *A contrario* platí tiež, že v prípade, ak bola vyslovená neúčinnosť právneho úkonu po úspechu odporovacej žaloby, tento právny úkon nemôže byť súčasne neplatný. Vzťah medzi neplatnosťou a odporovateľnosťou je však v aplikačnej praxi pomerne problematickou otázkou nakoľko hranica medzi naplnením podmienok odporovateľnosti a naplnením podmienok § 39 Občianskeho zákonníka s právnym následkom absolútnej neplatnosti je často veľmi tenká.⁷

Hoci samozrejme existencia inštitútu odporovateľnosti nepochybne má svoje rácie, sme toho názoru, že právnu úpravu *de lege lata* možno vystaviť oprávnenej kritike. Uvedené je

² Ďurica, M. Zákon o konkurze a reštrukturalizácii. Komentár. 4. vydanie. (2021). Praha : C. H. Beck, s. 510

³ Fekete, I.: Relatívna neúčinnosť odporovateľného právneho úkonu dlžníka. (2013). EPI Odborné články

⁴ Ďurica, M. Zákon o konkurze a reštrukturalizácii. Komentár. 4. vydanie. (2021). Praha : C. H. Beck, s. 511

⁵ Dolný, J. Odporovateľnosť právnych úkonov v konkurznom práve. (2021). Bratislava : C. H. Beck, s. 4

⁶ Dolný, J. Odporovateľnosť právnych úkonov v konkurznom práve. (2021). Bratislava : C. H. Beck, s. 66

⁷ § 39 zákona č. 40/1964 Zb. Občiansky zákonník v znení neskorších predpisov

dané skutočnosťou, že z praktického hľadiska sa odporovateľnosť často javí ako mimoriadne ťažko uplatniteľný inštitút. Toto je spôsobené najmä náročnosťou unesenia dôkazného bremena žalobcom, teda najmä správcom konkurznej podstaty, ktoré je zapríčinené okolnosťami rozoberanými nižšie v texte.

2. Hmotnoprávne podmienky odporovateľnosti

Ešte pred tým ako pristúpime k analýze hmotnoprávnych podmienok odporovateľnosti, považujeme za dôležité poznamenať skutočnosť, že právna úprava odporovateľnosti nie je obsiahnutá len v zákone o konkurze a reštrukturalizácii (ďalej len „ZKR“). Okrem právnej úpravy v ZKR sa možno s odporovateľnosťou stretnúť aj v Občianskom zákonníku,⁸ pričom možno konštatovať, že občianskoprávna úprava je, hoci v užšej miere, tiež relevantná pre účely konkurzného práva. ZKR výslovne odkazuje na ustanovenia Občianskeho zákonníka o odporovateľnosti právnych úkonov v prípade konkurzov vyhlásených podľa 4. časti ZKR a taktiež v prípade malého konkurzu.⁹

Pokiaľ ide o hmotnoprávne podmienky odporovateľnosti, možno z hľadiska právnej teórie rozlišovať medzi všeobecnými podmienkami vzťahujúcimi sa všeobecne na odporovateľnosť vrátane občianskoprávnej úpravy, podmienkami osobitnými, ktoré sú špecifické pre konkurzné konanie¹⁰ a následne ešte podmienkami ustanovenými tou-ktorou skutkovou podstatou odporovateľnosti v ZKR, ktoré musia byť naplnené nad rámec tých všeobecných a osobitných.

Medzi všeobecné podmienky možno zaradiť skutočnosť, že ide o právny úkon dlžníka. Je irelevantné či pôjde o viacstranný právny úkon v rámci ktorého dlžník vystupuje ako jedna zo strán, alebo či pôjde o jednostranný právny úkon, nemôže však ísť o právny úkon tretích osôb bez ingerencie dlžníka, a to hoci by spôsobil ukrátenie uspokojenia pohľadávok veriteľov.¹¹ Ďalšou podmienkou je účinnosť právneho úkonu. Ako sme už aj vyššie v texte uvádzali odporovať možno len právnomu úkonu, ktorý je platný, keďže neplatný právny úkon z povahy veci nespôsobuje žiadne právne následky t. j. absentuje jeho účinnosť. K tomuto pristupuje aj samotná požiadavka účinnosti aj pri platnom právnom úkone, keďže sa nemožno domáhať neúčinnosti u právneho úkonu, ktorý touto vlastnosťou ani nedisponuje. Poslednou

⁸ § 42a a nasl. zákona č. 40/1964 Zb. Občiansky zákonník v znení neskorších predpisov

⁹ Dolný, J. Odporovateľnosť právnych úkonov v konkurznom práve. (2021). Bratislava : C. H. Beck, s. 15

¹⁰ Ďurica, M. Zákon o konkurze a reštrukturalizácii. Komentár. 4. vydanie. (2021). Praha : C. H. Beck, s. 511

¹¹ Ďurica, M. Zákon o konkurze a reštrukturalizácii. Komentár. 4. vydanie. (2021). Praha : C. H. Beck, s. 511

všeobecnou podmienkou je ukrátenie uspokojenia veriteľa,¹² pričom tou sa vzhľadom na jej povahu a význam pri preukazovaní podrobnejšie zaoberáme v osobitnej časti príspevku.

Medzi osobitné podmienky vzťahujúce sa špecificky na odporovanie v konkurznom práve možno zaradiť vyhlásenie konkurzu, právny úkon dlžníka týkajúci sa jeho majetku a napokon ukrátenie pohľadávky veriteľa, ktorý si prihlásil pohľadávku.¹³ Prvú zo spomínaných podmienok možno vyvodiť z aktívnej vecnej legitimácie na podanie odporovacej žaloby, keďže primárne podávanie odporovacej žaloby prináleží správcovi resp. pri naplnení zákonom ustanovených podmienok aj veriteľovi s prihlásenou pohľadávkou. Pred vyhlásením konkurzu uvedené nie je možné, keďže správca ešte ustanovený nebol a veritelia ešte nemali možnosť svoje pohľadávky prihlásiť. Formuláciu podmienky, že právny úkon sa týka majetku dlžníka možno označiť za nepresnú, keďže zákon by správne mal operovať s pojmom majetok dlžníka podliehajúci konkurzu.¹⁴ V rámci poslednej podmienky sa kladie dôraz nie len na existenciu pohľadávky veriteľa, ktorá bola odporovateľným právnym úkonom ukrátená, ale takáto pohľadávka musí byť prihlásená v konkurze.

Medzi zvyšné podmienky ustanovené osobitnými skutkovými podstatami odporovateľnosti možno zaradiť nad rámec spomenutých aj podmienku vykonania odporovateľného právneho úkonu počas úpadku resp. spôsobenie úpadku ako aj podmienku úmyslu dlžníka ukrátiť veriteľov.

Ďalej v texte sa zameriavame na preukazovanie tých najproblematickejších podmienok odporovateľnosti.

3. Preukazovanie ukrátenia uspokojenia pohľadávok veriteľov

Preukázanie ukrátenia uspokojenia prihlásených pohľadávok veriteľov predstavuje jednu z najproblematickejších podmienok pokiaľ ide o unesenie dôkazného bremena žalobcom pri odporovacích žalobách. Zákon v ustanovení § 57 ods. 4 ZKR ustanovuje, že „*Odporovať podľa tohto zákona možno len tomu právnemu úkonu dlžníka, ktorý ukracuje uspokojenie prihlásenej pohľadávky niektorého z veriteľov dlžníka.*“¹⁵ Ide teda najmä o situácie kedy dochádza k zmenšeniu majetku dlžníka s tým dôsledkom, že veriteľ v dôsledku tohto zmenšenia majetku nemôže dosiahnuť také uspokojenie svojej pohľadávky, aké by dosiahol nebyť tohto zmenšenia. Naopak, ak by išlo o situáciu v rámci ktorej by síce došlo k zmenšeniu

¹² Ďurica, M. Zákon o konkurze a reštrukturalizácii. Komentár. 4. vydanie. (2021). Praha : C. H. Beck, s. 511

¹³ Ďurica, M. Zákon o konkurze a reštrukturalizácii. Komentár. 4. vydanie. (2021). Praha : C. H. Beck, s. 511

¹⁴ Ďurica, M. Zákon o konkurze a reštrukturalizácii. Komentár. 4. vydanie. (2021). Praha : C. H. Beck, s. 513

¹⁵ § 57 ods. 4 zákona č. 7/2005 Z. z. o konkurze a reštrukturalizácii a o zmene a doplnení niektorých zákonov

majetku dlžníka, ale jeho zostávajúci majetok by stále postačoval na uspokojenie pohľadávok veriteľov, v tomto prípade by predmetná podmienka naplnená nebola.¹⁶ V právnej teórii sa možno stretnúť aj s názorom, že o ukrátenie nepôjde v prípade, ak sa hodnota majetku dlžníka v dôsledku vykonania právneho úkonu zmenší, avšak v prípade ak by tento právny úkon vykonaný nebol, hodnota majetku by sa zmenšila viac.¹⁷

Hoci normatívny text neustanovuje nad rámec uvedeného vymedzenia podrobne aké konkrétne úkony možno považovať za ukracujúce, z aplikačnej praxe a rozhodovacej praxe súdov možno vyvodit', že jedným z najvýznamnejších aspektov, ktoré v tomto ohľade je potrebné skúmať, je protiplnenie úkonu. Išlo by teda o ekvivalentné úkony, za ktoré dlžník nadobudol zodpovedajúcu protihodnotu, a teda vo svojej podstate ani nejde o zmenšenie majetku dlžníka. Uvedený názor uvádza napríklad Najvyšší súd Českej republiky, keď v rozhodnutí konštatuje, že ak bola jedna vec v majetku dlžníka nahradená inou (vrátane peňazí), hodnota dlžníkovho majetku sa nezmenšila, a preto veriteľ nemohol byť ukrátený.¹⁸

O problematike ekvivalentných právnych úkonov možno v rámci právnej teórie identifikovať viacero názorov, a teda neexistuje všeobecný konsenzus o otázke či možno odporovať len neekvivalentné právne úkony. Možno sa stretnúť s názormi, že je nesprávne obmedzovať ukrátenie veriteľov len na zmenšenie majetku, nakoľko ukrátenie prichádza do úvahy aj v prípade, ak majetok dlžníka zmení svoju skladbu spôsobom neznižujúcim jeho hodnotu, avšak v konečnom dôsledku fakticky ukracujúcim svojimi dôsledkami.¹⁹ Na druhej strane Dolný zastáva názor, že ochranu veriteľov dlžníka vo forme označenia takéhoto úkonu za ukracujúci nemožno povýšiť nad ochranu záujmov nového nadobúdateľa majetku, ktorý tento majetok nadobudol za primeranú hodnotu. Predmetnú situáciu však odlišuje od zmeny skladby majetku započítaním pohľadávok, pri ktorej sa prikláňa k názoru, že uvedené spôsobuje ukrátenie veriteľa keďže protiplnenie sa v tomto prípade nenadobúda.²⁰ V nastolenej problematike zastávame právno-pozitivistický názor, a teda v prípade ak právny úkon vykazuje znaky ukrátenia veriteľa, hoci by išlo o ekvivalentný úkon, bude možné takémuto úkonu odporovať. Dikcia zákona nelimituje možnosť odporovania len na neekvivalentné právne úkony a preto zastávame názor, že k naplneniu hypotézy príslušnej právnej normy dôjde aj

¹⁶ Dolný, J.: Podmienky odporovateľnosti právnych úkonov v konkurze (1. časť); Justičná revue, 71, 2019, č. 4

¹⁷ Pospíšil, B.: Zákon o konkurze a reštrukturalizácii. (2012). Bratislava: Iura Edition, s. 236

¹⁸ Dolný, J. Odporovateľnosť právnych úkonov v konkurznom práve. (2021). Bratislava : C. H. Beck, s. 20

¹⁹ Dolný, J. Odporovateľnosť právnych úkonov v konkurznom práve. (2021). Bratislava : C. H. Beck, s. 20

²⁰ Dolný, J. Odporovateľnosť právnych úkonov v konkurznom práve. (2021). Bratislava : C. H. Beck, s. 20

v prípade ak ekvivalentný právny úkon svojimi dôsledkami spôsobí ukrátenie iným spôsobom ako priamym zmenšením majetku.

Z praktického hľadiska je práve preukazovanie ukrátenia veriteľa jednou z najväčších prekážok spôsobujúcich neúspech veľkej časti odporovacích žalôb. Správca konkurznej podstaty ako žalobca musí uniesť dôkazné bremeno (okrem iného) o tom, že napádaný právny úkon spôsobil ukrátenie prihlásenej pohľadávky veriteľa. V praxi sa toto ukazuje často ako problematické, keďže nezriedka dlžníci buď nedisponujú dostatočnou alebo úplnou účtovnou dokumentáciou, poprípade ak ňou aj disponujú, nie je správcovi vydaná, alebo mu nie je vydaná v rozsahu, v ktorom by informácie v nich obsiahnuté umožňovali unesenie dôkazného bremena o ukrátení veriteľov. Uvedené je následne dôvodom nízkej úspešnosti odporovacích žalôb a spôsobuje praktickú neefektívnosť inštitútu.

4. Preukazovanie podmienky úpadku

Pojem „úpadok“ je jedným z ústredných pojmov konkurzného práva. Z hľadiska ideového základu možno konštatovať, že úpadok reflektuje nepriaznivú hospodársku situáciu subjektu neraz vedúcu k takým finančným ťažkostiam, ktoré vedú aj k zániku podnikateľskej činnosti a vyžadujú intervenciu pre zabezpečenie ochrany veriteľov.

Úpadok možno charakterizovať ako zákonom vymedzený stav majetkových pomerov dlžníka, s ktorým ZKR spája určité následky. V zmysle § 3 ods. 1 ZKR je dlžník v úpadku, ak je platobne neschopný alebo predĺžený.²¹ Zároveň platí právna domnienka, že ak návrh na vyhlásenie konkurzu podá sám dlžník, predpokladá sa, že je v úpadku. Zákon ďalej definuje aj dve formy úpadku. Pri platobnej neschopnosti rozlišuje medzi právnickými a fyzickými osobami, a to tak, že za platobne neschopnú právnickú osobu považuje osobu, ktorá nie je schopná plniť 90 dní po lehote splatnosti aspoň dva peňažné záväzky viac ako jednému veriteľovi, pričom pri fyzickej osobe za platobne neschopnú považuje osobu, ktorá nie je schopná plniť 180 dní po lehote splatnosti aspoň jeden peňažný záväzok.²² Druhou formou úpadku je predĺženie, kde zákon nediferencuje medzi právnickými a fyzickými osobami a v súhrne ustanovuje, že ide o osobu povinnú viesť účtovníctvo podľa osobitného predpisu, ak má viac ako jedného veriteľa a hodnota jej záväzkov presahuje hodnotu jej majetku.²³

²¹ § 3 ods. 1 zákona č. 7/2005 Z. z. o konkurze a reštrukturalizácii a o zmene a doplnení niektorých zákonov

²² § 3 ods. 2 zákona č. 7/2005 Z. z. o konkurze a reštrukturalizácii a o zmene a doplnení niektorých zákonov

²³ § 3 ods. 3 zákona č. 7/2005 Z. z. o konkurze a reštrukturalizácii a o zmene a doplnení niektorých zákonov

Zákon v rámci právnej úpravy odporovania právneho úkonu bez primeraného protiplnenia formuláciou „*Právneho úkonu bez primeraného protiplnenia možno odporovať, ak spôsobil úpadok dlžníka alebo bol urobený počas úpadku dlžníka*“,²⁴ ako aj v rámci úpravy odporovania zvýhodňujúcemu právneho úkonu obdobnou formuláciou „*Zvýhodňujúcemu právneho úkonu možno odporovať, ak spôsobil úpadok dlžníka alebo bol urobený počas úpadku dlžníka*“²⁵ zakotvuje hmotnoprávnu podmienku existencie úpadku resp. spôsobenia úpadku napádaným právnym úkonom. Uvedená podmienka nachádza svoje legislatívne zakotvenie iba pri uvedených dvoch skutkových podstatách odporovateľnosti, a teda nie je podmienkou pri odporovaní ukracujúcemu právneho úkonu. Odporovanie ukracujúcemu právneho úkonu je použiteľné aj v mimoúpadkových situáciách, čo výslovne potvrdzuje aj dôvodová správa k ZKR.²⁶

Pokiaľ ide o preukazovanie predmetného aspektu, možno konštatovať, že pokiaľ ide o realizáciu právneho úkonu počas úpadku, ide o pomerne jednoducho preukázateľnú situáciu, nakoľko úpadok možno objektívne posúdiť a následne vyhodnotiť, či právny úkon nadobudol účinky už počas tohto úpadku, alebo nie. Pri druhej alternatíve sa však jedná o komplikovanejšiu situáciu. Táto si vyžaduje preukázanie príčinnej súvislosti medzi právnym úkonom a úpadkom, čo vzhľadom na absenciu explicitnej zákonnej úpravy tohto aspektu je ponechané interpretačne na právnu teóriu. Taktiež je dôležité sa v tejto súvislosti vysporiadať s otázkou, či je nevyhnutné aby úpadok bol spôsobený jedným úkonom, alebo či môže ísť o sled viacerých, ktoré v konečnom dôsledku vyústia do úpadku.²⁷

Na skúmanie príčinnej súvislosti sú podľa Vrby aplikovateľné Princípy európskeho deliktneho práva, a teda príčinná súvislosť medzi právnym úkonom a spôsobeným úpadkom by bola daná v prípade ak je právny úkon jednou z konkurenčných príčin, ktorá by sama osebe spôsobila úpadok v ten istý okamih.²⁸ V prípade ak by išlo o situáciu, v ktorej by bolo isté, že žiadna zo súbežne pôsobiacich príčin by sama osebe k úpadku neviedla, možno konštatovať, že rozhodovacia prax českých a slovenských súdov sa prikláňa k záveru, že ak je príčin viac, tak nemusí byť právne relevantná príčina jedinou príčinou určitého následku, ale postačuje, že ide o jednu z príčin, ktorá však musí byť dôležitá, podstatná a značná.²⁹

²⁴ § 58 ods. 2 zákona č. 7/2005 Z. z. o konkurze a reštrukturalizácii a o zmene a doplnení niektorých zákonov

²⁵ § 59 ods. 3 zákona č. 7/2005 Z. z. o konkurze a reštrukturalizácii a o zmene a doplnení niektorých zákonov

²⁶ Dôvodová správa k zákonu č. 7/2005 Z. z. o konkurze a reštrukturalizácii

²⁷ Dolný, J. Odporovateľnosť právnych úkonov v konkurznom práve. Bratislava : C. H. Beck, 2021, s. 26

²⁸ Dolný, J. Odporovateľnosť právnych úkonov v konkurznom práve. Bratislava : C. H. Beck, 2021, s. 27

²⁹ Dolný, J. Odporovateľnosť právnych úkonov v konkurznom práve. Bratislava : C. H. Beck, 2021, s. 27

Koncentrujúc uvedené, možno konštatovať, že preukazovanie úpadku, a to najmä príčinnej súvislosti medzi odporovateľným právnym úkonom a spôsobeným úpadkom môže v aplikačnej praxi vzhľadom na absenciu podrobnej zákonnej úpravy aspektu príčinnej súvislosti vyvolať nejasnosti a právnu neistotu, a teda zastávame názor, že by bolo vhodné aby zákonodarca reflektoval požiadavky aplikačnej praxe a v záujme zvýšenia právnej istoty zahrnul priamo do dikcie zákona aj úpravu uvedenej otázky.

5. Preukazovanie úmyslu ukrátiť veriteľov

V rámci ďalšej špecifickej podmienky odporovania, a to konkrétne pri úprave odporovania ukracujúcemu právnemu úkonu zákon ustanovuje, že *„Odporovať možno tiež každému právnemu úkonu, ktorým dlžník ukrátiť svojich veriteľov (ďalej len „ukracujúci právny úkon“), ak bol urobený s úmyslom dlžníka ukrátiť svojich veriteľov a tento úmysel bol alebo musel byť druhej strane známy.“*³⁰ Uvedenú podmienku zákon predpisuje len pri ukracujúcich právnych úkonoch. Ako poznámku si dovoľujeme poznamenať skutočnosť, že predmetná skutková podstata je pomenovaná nesprávne resp. zavádzajúco nakoľko jej názov implikuje, že pri iných skutkových podstatách sa ukrátenie veriteľov nevyžaduje.³¹ Ide o mylnú predstavu, keďže ukrátenie veriteľov predstavuje podmienku ustanovenú § 57 ZKR a teda vzťahujúcu sa na všetky osobitné skutkové podstaty odporovateľnosti.

Z hľadiska teoretického možno pri predmetnej skutkovej podstate hovoriť o potrebe skúmať subjektívny, t. j. vnútorný, psychický vzťah dlžníka a druhej strany právneho úkonu k realizovanému úkonu. Z kvalitatívneho hľadiska sa u dlžníka vyžaduje úmysel ukrátiť pohľadávku veriteľa, pričom je irelevantné či ide o priamy alebo nepriamy úmysel. Pre naplnenie hypotézy právnej normy teda bude postačovať ak dlžník vedel, že predmetným úkonom môže ukrátiť svojho veriteľa, a pre prípad že sa tak stane, s tým bol uzrozumený. Naopak pri druhej strane právneho úkonu sa vyžaduje, aby jej tento úmysel dlžníka bol známy. Úmysel dlžníka ako aj vedomosť druhej strany musia byť splnené súčasne.

Preukazovanie predmetnej podmienky je značne problematické, nakoľko psychický vzťah konajúceho subjektu je abstraktnou veličinou, ktorá nemôže byť priamo preukázanou. Jej preukázanie je potrebné odvodiť z objektívnych skutočností vonkajšieho sveta, ktoré odrážajú vnútorné zámery konajúcich subjektov.³² Z praktického hľadiska sa najčastejšie uvedené skutočnosti vyvodzujú z okolností za akých boli právne úkony realizované, ktoré už

³⁰ § 60 ods. 1 zákona č. 7/2005 Z. z. o konkurze a reštrukturalizácii a o zmene a doplnení niektorých zákonov

³¹ Ďurica, M. Zákon o konkurze a reštrukturalizácii. Komentár. 4. vydanie. (2021). Praha : C. H. Beck, s. 539

³² Dolný, J.: Podmienky odporovateľnosti právnych úkonov v konkurze (1. časť); Justičná revue, 71, 2019, č. 4

môžu byť objektívne preukázané, ako aj vzťahu konajúcich subjektov. Z judikatúry ďalej vyplýva, že pre unesenie dôkazného bremena nie je nevyhnutné preukázať, že úmysel ukrátiť veriteľov smeroval voči konkrétnym osobám a vo vzťahu k vedomosti druhej strany stačí preukázať, že táto druhá strana musela vedieť o tom, že dlžník má akýkoľvek dlh, ktorý nie je schopný splniť.³³ Pre unesenie dôkazného bremena nie je teda potrebné identifikovať konkrétnu pohľadávku konkrétného veriteľa, postačí preukázanie úmyslu ukrátiť veriteľov v konkurze a vedomosť druhej strany o tom, že takýto veritelia existujú.

Dôležitou okolnosťou súvisiacou s úmyslom dlžníka a vedomosti druhej strany je rozlišovanie a vzťah medzi neplatnosťou právneho úkonu a jeho odporovateľnosťou. V úvode príspevku sme sa už k uvedenému vzťahu vo všeobecnosti vyjadrili a uviedli sme, že hranica medzi odporovateľnosťou a neplatnosťou je často v aplikačnej praxi tenká. Tento problém vyvstáva z právnej úpravy neplatnosti podľa § 39 Občianskeho zákonníka, ktorý ustanovuje, že „*Neplatný je právny úkon, ktorý svojím obsahom alebo účelom odporuje zákonu alebo ho obchádza alebo sa prieči dobrým mravom.*“³⁴ Východiskovou otázkou, ktorú je nevyhnutné v každom prípade posudzovať teda je, či konanie dlžníka a druhej strany možno označiť za priečiace sa dobrým mravom so sankciou absolútnej neplatnosti, alebo či pôjde „len“ o naplnenie kategórie odporovateľného právneho úkonu s následkom neúčinnosti. Uvedené má nie len teoretickú relevanciu, ale ako sme vyššie uvádzali, pokiaľ je právny úkon neplatný, nemožno uvažovať o jeho odporovateľnosti a *vice versa*. Správna identifikácia neplatnosti či odporovateľnosti je teda nevyhnutnou podmienkou pre úspech pri žalobe. Deliacim kritériom medzi neplatnosťou a odporovateľnosťou v zmysle judikatúry Najvyššieho súdu Českej republiky je určenie, či úmysel ukrátiť veriteľa bol daný výlučne na strane dlžníka, alebo bol daný jednak na strane dlžníka a aj na strane druhej strany.³⁵ V prípade ak by bolo preukázané, že obe strany konali v úmysle ukrátiť veriteľa, pôjde o rozpor s § 39 Občianskeho zákonníka a teda o neplatný právny úkon.³⁶

Z hľadiska preukazovania predmetnej podmienky na tomto mieste považujeme za vhodné poukázať aj na skutočnosť, že v praxi sa často možno stretnúť so situáciou, kedy odporovateľný právny úkon realizuje dlžník s inou osobou s totožným štatutárnym orgánom. Zastávame názor, že v tomto prípade, keďže ide vo svojej podstate o totožnosť osoby na oboch stranách právneho úkonu, je správne kvalifikovať vnútorný vzťah tejto druhej osoby ako

³³ Dolný, J.: Podmienky odporovateľnosti právnych úkonov v konkurze (1. časť); Justičná revue, 71, 2019, č. 4

³⁴ § 39 zákona č. 40/1964 Zb. Občiansky zákonník v znení neskorších predpisov

³⁵ Rozsudok Najvyššieho súdu Českej republiky zo dňa 25.04.2007, sp. zn.: 20 Cdo 2886/2006

³⁶ § 39 zákona č. 40/1964 Zb. Občiansky zákonník v znení neskorších predpisov

úmysel, v prípade ak je preukázané, že dlžník úmysel ukrátiť veriteľov mal. To následne vo svetle už vyššie uvedeného bude mať relevanciu pre posúdenie daného právneho úkonu ako neplatného, teda nie ako odporovateľného.

6. Kategória spriaznených osôb a obrátenie dôkazného bremena

Vo vzťahu k dôkaznému bremenu pri preukazovaní úpadku je potrebné vychádzať zo všeobecného pravidla, že dôkazné bremeno zaťažuje žalobcu t. j. v tomto prípade primárne správcu konkurznej podstaty. Predmetné pravidlo sa však neuplatňuje bezvýnimočne, a to aj vzhľadom na existenciu inštitútu spriaznených osôb a osobitného režimu zahŕňajúceho obrátenie dôkazného bremena pri odporovateľnosti, ktoré je vo vzťahu k nim upravené.

Pri kategórii spriaznených osôb teda zákon ustanovuje vyvrátiteľnú právnu domnienku, že podmienka úpadku je daná a týmto presúva dôkazné bremeno na tieto spriaznené osoby. Predmetná právna úprava je odôvodnená myšlienkovým základom existencie inštitútu spriaznených osôb, ktorým je vyššia pravdepodobnosť o znalosti pomerov úpadcu resp. spolupráce s úpadcom. Hoci uvedené riešenie má svoje rácie a možno ho vo všeobecnosti považovať za legitímne, v praxi sa vynárajú viaceré praktické otázky vyvstávajúce z problémov napríklad s dokazovaním, ktoré vznikajú aplikáciou tohto inštitútu. Ako príklad možno spomenúť problém v preukazovaní, že úpadca nebol v čase uskutočňovania právneho úkonu v úpadku, ktorý je daný tým, že v konkurznom konaní sa už účtovná dokumentácia nachádza u správcu konkurznej podstaty. Uvedené spôsobuje pre spriaznenú osoby značné ťažkosti v preukazovaní neexistencie úpadku.³⁷

Okrem preukazovania podmienky úpadku má kategória spriaznených osôb relevanciu aj pri preukazovaní úmyslu dlžníka ukrátiť svojich veriteľov ako aj vedomosti druhej strany. Zákon v rámci právnej úpravy ukracujúcich právnych úkonov obracia dôkazné bremeno v prípade ak ide o právny úkon urobený v prospech osoby spriaznenej s dlžníkom, pričom tým ustanovuje vyvrátiteľnú právnu domnienku, že úmysel dlžníka ako aj vedomosť druhej strany sú dané.

Záver

Ťažiskom príspevku bola analýza hmotnoprávnych podmienok odporovateľnosti právnych úkonov a ich praktického uplatňovania v konkurznom konaní. Analýza ukázala, že hoci inštitút odporovateľnosti predstavuje významný nástroj ochrany veriteľov a prispieva k

³⁷ Dolný, J. Odporovateľnosť právnych úkonov v konkurznom práve. Bratislava : C. H. Beck, 2021, s. 28

naplnení základného účelu konkurzného konania, jeho praktická efektívnosť je do značnej miery ovplyvnená náročnosťou dokazovania.

Osobitne problematickým sa v aplikačnej praxi javí najmä preukazovanie ukrátenia uspokojenia pohľadávok veriteľov, existencie úpadku, ako aj úmyslu dlžníka ukrátiť veriteľov. Tieto skutočnosti často predstavujú významnú prekážku pri unesení dôkazného bremena žalobcom, ktorým je spravidla správca konkurznej podstaty, čo sa následne odráža aj na nižšej úspešnosti odporovacích žalôb.

Na základe uvedeného možno konštatovať, že hypotéza príspevku sa potvrdila. Napriek významu inštitútu odporovateľnosti ako prostriedku ochrany veriteľov jeho praktická využiteľnosť naráža na viaceré aplikačné problémy, ktoré súvisia najmä s dokazovaním jednotlivých zákonných podmienok.

Bibliografia

Odborná literatúra

1. Dolný, J. Odporovateľnosť právnych úkonov v konkurznom práve. (2021). Bratislava : C. H. Beck
2. Ďurica, M. Zákon o konkurze a reštrukturalizácii. Komentár. 4. vydanie. (2021). Praha : C. H. Beck
3. Pospíšil, B.: Zákon o konkurze a reštrukturalizácii. (2012). Bratislava: Iura Edition

Právne predpisy

4. Zákon č. 7/2005 Z. z. o konkurze a reštrukturalizácii a o zmene a doplnení niektorých zákonov
5. Zákon č. 40/1964 Zb. Občiansky zákonník v znení neskorších predpisov

Dôvodové správy

6. Dôvodová správa k zákonu č. 7/2005 Z. z. o konkurze a reštrukturalizácii

Súdne rozhodnutia

7. Rozsudok Najvyššieho súdu Českej republiky zo dňa 25.04.2007, sp. zn.: 20 Cdo 2886/2006

Odborné články

8. Fekete, I.: Relatívna neúčinnosť odporovateľného právneho úkonu dlžníka. (2013). EPI Odborné články
9. Dolný, J.: Podmienky odporovateľnosti právnych úkonov v konkurze (1. časť); Justičná revue, 71, 2019, č. 4

KODIFIKÁCIA OBČIANSKEHO ZÁKONNÍKA: SPOLOČNÉ IMANIE MANŽELOV AKO NÓVUM V MAJETKOVOPRÁVNÝCH VZŤAHOCH MANŽELOV

Codification of the Civil Code: Joint property of spouses as a novelty in property relations between spouses

ZDENKO FUČEK*

Abstrakt

Bezpodielové spoluvlastníctvo manželov patrí k tradičným inštitútom slovenského občianskeho práva, pričom je súčasťou Občianskeho zákonníka už od obdobia socializmu. Vzhľadom na zastaranosť právnej úpravy sa v nej vyskytujú rôzne problémy, ktoré súčasná právna úprava nerieši. Cieľom článku je identifikovať a analyzovať aplikačné problémy súčasnej právnej úpravy bezpodielového spoluvlastníctva manželov a reagovať na novú kodifikáciu majetkového režimu manželov, tzv. „spoločné imanie manželov“. Následne sa článok zameriava na komparáciu inštitútu spoločného imania manželov v Slovenskej republike a „společného jmění manželů“ v Českej republike, ako aj na identifikáciu potenciálnych výziev pripravovaného zmluvného režimu spoločného imania manželov v optike judikatúry českých súdov.

Abstract

Joint ownership of spouses is one of the traditional institutions of Slovak civil law and has been part of the Civil Code since the socialist era. Due to the outdated nature of the legal regulation, there are various problems that are not addressed by the current legal regulation. The aim of this article is to identify and analyze the problems in applying the current legal regulation of joint ownership of spouses and to respond to the new codification of the property regime of spouses, known as "joint property of spouses." The article then focuses on comparing the institution of joint property of spouses in the Slovak Republic and "joint property of spouses" in the Czech Republic, as well as identifying potential challenges of the planned contractual regime of joint property of spouses from the perspective of Czech court case law.

Kľúčové slová: *Bezpodielové spoluvlastníctvo manželov. Aplikačné problémy bezpodielového spoluvlastníctva manželov. Kodifikácia Občianskeho zákonníka. Spoločné imanie manželov.*

Keywords: *Joint ownership of spouses. Application problems of joint ownership of spouses. Codification of the Civil Code. Joint property of spouses.*

Úvod

Bezpodielové spoluvlastníctvo manželov (ďalej aj ako „BSM“) patrí k tradičným inštitútom slovenského občianskeho práva. Právna úprava je obsiahnutá v zákone č. 40/1964 Zb. Občiansky zákonník v znení neskorších predpisov (ďalej aj ako „Občiansky zákonník“), pričom základná štruktúra BSM má svoj pôvod v období socializmu. Inštitút BSM si počas svojej existencie prešiel viacerými zmenami, no napriek viacerým novelizáciám je jeho základná štruktúra vo veľkej miere zachovaná až dodnes (Takáč, 2023). V súvislosti s tým sa v súčasnej právnej úprave vyskytujú viaceré problémy, ktoré súvisia najmä s nedostatočnou

* Bc. Zdenko Fuček, 1.ročník dennej formy magisterského štúdia, Právnická fakulta Univerzity Mateja Bela v Banskej Bystrici, zdenkofucek@gmail.com

podrobnosťou (strohosťou) právnej úpravy, absenciou právnej úpravy alebo obmedzenou zmluvnou autonómiou manželov.

Základným nedostatkom je predovšetkým samotná strohosť právnej úpravy. Strohosť vedie k potrebe rozsiahlej interpretácie zo strany súdnej praxe, pričom takáto interpretačná prax, ktorá je ovplyvnená rozmanitosťou jednotlivých prípadov, často spôsobuje vznik nejednotných názorov a sťažujú predvídateľnosť súdnych rozhodnutí (Benčíková, 2016). Pre porovnanie, právna úprava BSM obsiahnutá v slovenskom Občianskom zákonníku v časti „*Bezpodielové spoluvlastníctvo manželov*“ zahŕňa 12 paragrafov, zatiaľ čo česká právna úprava spoločného jmění manželů (ďalej aj ako „SJM“) je v zákone č. 89/2012 Sb., občanský zákoník (ďalej aj ako „Občiansky zákoník ČR“) v oddiele „*Manželské majetkové právo*“ upravená v rozsahu § 708 až § 742, teda v 35 paragrafoch. Ďalším výrazným nedostatkom je obmedzená zmluvná autonómia manželov, ktorá neumožňuje zánik a vyporiadanie majetku pred zánikom manželstva, čím sa zvyšuje riziko zdĺhavých sporov, ako aj absencia možnosti uzavretia tzv. *predmanželskej zmluvy*. Tieto, ako aj iné nedostatky, vyvolali potrebu komplexnejšej právnej úpravy a v súvislosti s tým sa na Slovensku pripravuje kodifikácia Občianskeho zákonníka. Súčasťou kodifikácie je aj prepracovanejšia právna úprava majetkových vzťahov medzi manželmi, ktorá sa premenovala na spoločné imanie manželov (ďalej aj ako „SIM“).

Cieľom článku je identifikácia a analýza aplikačných problémov súčasného BSM a potenciálnych dopadov pripravovanej kodifikácie BSM na majetkovoprávne vzťahy manželov, ako aj posúdenie jej schopnosti riešiť pretrvávajúce problémy súčasného BSM. Pozornosť bude venovaná aj predikcii možných aplikačných rizík v súvislosti s pripravovaným zmluvným režimom nového SIM, a to najmä prostredníctvom komparácie s právnou úpravou SJM v Českej republike, ktorá má v tejto oblasti z pohľadu kodifikácie bohatšie skúsenosti a rozsiahlejšiu judikatúru.

1. Aplikačné problémy súčasného bezpodielového spoluvlastníctva manželov

Prvý aplikačný problém, ako už bolo naznačené v úvode, spočíva v samotnej strohosti právnej úpravy inštitútu BSM. Strohosť je možné vidieť už pri vymedzení majetku, ktorý patrí do BSM. Podľa § 143 Občianskeho zákonníka do bezpodielového spoluvlastníctva manželov patrí všetko, čo môže byť predmetom vlastníctva, a čo nadobudol manžel počas trvania manželstva, okrem:

- a) vecí získaných dedičstvom,

- b) vecí získaných darom¹,
- c) vecí slúžiacich podľa svojej podstaty výlučne osobnej potrebe alebo výkonu povolania jedného z manželov,
- d) vecí vydaných v súlade s predpismi o reštitúcii majetku tomu manželovi, ktorý danú vec vlastnil pred uzavretím manželstva alebo ju dostal ako právny nástupca pôvodného vlastníka.

Podľa tohto ustanovenia do BSM zaradujeme všetko, čo môže byť predmetom vlastníctva, t.j. hnutelné, nehnuteľné veci, ale aj príjmy, úspory z pracovného alebo iného obdobného pomeru, z podnikateľskej činnosti a pod. Zároveň je možné si všimnúť, že tu nie sú zahrnuté ani pohľadávky ani dlhy. Tento nedostatok sa preklenul súdnou praxou, ktorá stanovila, že pri vyporiadaní sa musí prihliadať aj na dlhy (Krajský súd v Prešove, 2022, sp. zn. 3Co/41/2021). Občiansky zákonník taktiež ustanovuje aj rôzne výnimky, ktoré budú vo výlučnom vlastníctve jedného z manželov. Pri výpočte týchto výnimiek je však možné si všimnúť určitý nedostatok, a to najmä v prípade darovania a dedenia. Občiansky zákonník neupravuje možnosť výberu pre darcu alebo poručiteľa, či chce, aby majetok patrilo do výlučného vlastníctva jedného z manželov, alebo do BSM. V bežnom živote sa stáva, že manželia nadobudnú určitý majetok, buď vo forme daru napr. svadobné dary alebo vo forme závetu, pričom úmyslom darcu alebo poručiteľa môže byť to, aby predmetný majetok nadobudli obaja manželia spoločne do BSM. Táto možnosť v súčasnej právnej úprave absentuje, a je možné len to, aby manželia nadobudli vec do podielového spoluvlastníctva, pričom ak nie je určené inak, tak budú mať obaja manželia rovnakú veľkosť podielu.

Ďalšia situácia, ktorú zákon neupravuje, vzniká najmä pri akvizícii majetku z výlučných prostriedkov jedného z manželov. Príkladom môže byť situácia, kedy manžel kúpi vec za peniaze, ktoré nadobudol výlučne ešte pred uzavretím manželstva, alebo aj počas trvania manželstva darovaním alebo dedením. V dôsledku absencie komplexnejšej právnej úpravy si je možné položiť otázku:

Stáva sa predmetná vec súčasťou BSM alebo zostáva výlučne vo vlastníctve jedného z manželov?

Zákon odpoveď na túto otázku neposkytuje, ale je ju možné nájsť v súdnej praxi. Významným rozhodnutím, ktoré poskytuje odpoveď na predmetnú otázku je rozsudok Najvyššieho súdu ČR, ktorý uvádza, že veci, ktoré boli kúpené výlučne zo svojich vlastných peňazí (napr. z úspor

¹ Pri posúdení komu je dar určený, je rozhodujúci úmysel darcu a prejav vôle darcu či chcel darovať vec len jednému z manželov alebo obom manželom, pričom rozhodujúce pre určenie sú okolnosti, za ktorých k darovaniu došlo : bližšie pozri: Cirák et al., 2021, s. 30

spred sobáša alebo z daru, ktorý dostal iba jeden z manželov) nepatria do bezpodielového spoluvlastníctva, ale patria len tomu manželovi, ktorý ich za tieto peniaze nadobudol (Najvyšší súd ČR, 2008, sp. zn. 22 Cdo 3596/2006). Odlišná situácia nastáva však vtedy, keď kupujúcimi sú obaja manželia a jasne prejavia vôľu nadobudnúť vec do spoločného vlastníctva. V takomto prípade zaplataenie ceny z výlučných prostriedkov jedného z manželov nevedie k „transformácii“ veci na výlučný majetok, ale stáva sa súčasťou bezpodielového spoluvlastníctva manželov (Najvyšší súd ČR, 2000, sp. zn. 22 Cdo 1658/98). Nakoľko do BSM patria nielen aktíva, ale aj pasíva, je možné sa stretnúť aj s nedostatočnou právnou úpravou v prípade dlhov, resp. v prípade, ak len jeden z manželov bude vo vzťahu dlžníka voči veriteľovi. Problematika dlhov len jedného z manželov je výslovne upravená v § 147 ods. 1 Občianskeho zákonníka, v zmysle ktorého môže byť pohľadávka uspokojená aj z majetku patriaceho do bezpodielového spoluvlastníctva manželov za podmienky, že pohľadávka vznikla za trvania manželstva. V tomto prípade chýba určitý hmotnoprávny prostriedok ochrany nedlžníckeho manžela, ktorý by znížil riziko sporov v tejto oblasti. Občiansky zákonník však upravuje dva spôsoby, ako sa dá určitým spôsobom predísť tejto situácii, a to prostredníctvom:

- a) zúženia bezpodielového spoluvlastníctva manželov alebo
- b) zrušenia bezpodielového spoluvlastníctva manželov.

Súčasná právna úprava BSM síce obsahuje možnosť, ktorá umožňuje manželom modifikovať už existujúce BSM, ktorá sa premietne do tzv. *Dohody o zúžení alebo rozšírení BSM* s požiadavkou na formu notárskej zápisnice, alebo dohodou si vyhradiť vznik BSM ku dňu zániku manželstva. (Círák et al., 2021, s. 32) alebo správy spoločného majetku (Zákon č. 40/1964 Zb., § 143a), ale stále chýba možnosť, ktorá by umožnila zánik a vyporiadanie BSM ešte pred zánikom manželstva. Rigidná viazanosť bezpodielového spoluvlastníctva na manželský vzťah, ktorá vylučuje možnosť dohody manželov o jeho vzniku alebo zániku počas trvania manželstva, je vnímaná ako neopodstatnená a narúšajúca všeobecné princípy súkromného práva (Takáč, 2023). Taktiež chýba inštitút, ktorý by umožnil snúbencom, ešte pred uzavretím manželstva dohodnúť odlišný majetkový režim ako zákonné bezpodielové spoluvlastníctvo manželov. „*Manželia majú iba možnosť, v zákonom presne stanovených medziach, odchyliť sa od zákonnej úpravy. Akákoľvek dohoda medzi manželmi (prípadne snúbencami) o vylúčení BSM by bola absolútne neplatná.*“ (Dolíhalová & Dzimko, 2024, s. 121). To znamená, že aj páry, ktoré si želajú oddeliť svoj majetok a dlhy od začiatku manželstva, sú nútené vstúpiť do režimu BSM, ktorý sa následne musí formou notárskej zápisnice modifikovať.

2. Kodifikácia BSM a jej potenciálne dopady na majetkový režim manželov

V nadväznosti na predchádzajúcu kapitolu je nevyhnutné preskúmať navrhovanú kodifikáciu Občianskeho zákonníka (ďalej aj ako „návrh Občianskeho zákonníka“) a jej potenciálne dopady na majetkové vzťahy medzi manželmi. Návrh Občianskeho zákonníka si kladie za cieľ najmä odstrániť relikty socialistického prístupu k súkromnému právu, modernizovať právnu úpravu zavedením chýbajúcich inštitútov a pozdvihnúť význam autonómie vôle jednotlivca (Ministerstvo spravodlivosti Slovenskej republiky, 2025a). Základným posunom, ktorý nová právna úprava prináša, je transformácia inštitútu BSM na spoločné imanie manželov (návrh Občianskeho zákonníka, § 320 - § 341), pričom prechodné ustanovenia zabezpečujú kontinuitu právnych vzťahov prevodom existujúcich majetkových hodnôt a dlhov do nového režimu (návrh Občianskeho zákonníka, § 2131 ods. 1-2). V tomto kroku je možné si všimnúť snahu zákonodarcu prispôbiť sa aktuálnym spoločenským podmienkam a potrebám.

Jedným z hlavných problémov, ako bolo spomenuté už v predchádzajúcej časti tohto článku, je samotná strohosť právnej úpravy BSM. Na prvý pohľad je možné si všimnúť značné rozšírenie rozsahu právnej úpravy, ktorý sa zväčšil z 12 paragrafov na 22 paragrafov. Okrem toho je možné si všimnúť aj väčšiu komplexnosť jednotlivých ustanovení. Návrh Občianskeho zákonníka explicitne stanovuje, že *„uzavretím manželstva vzniká spoločné imanie manželov“* a v pochybnostiach sa predpokladá, že majetok nadobudnutý počas trvania manželstva patrí do zákonného spoločného imania. Táto domnienka sa vzťahuje aj na dlhy, ktoré vznikli za trvania manželstva (návrh Občianskeho zákonníka, § 320 ods. 1 a 4). Na základe tohto ustanovenia sa dá predpokladať určité posilnenie spoločného majetkového režimu manželov. Nakoľko sa po uzavretí manželstva bude predpokladať, že všetok majetok aj dlhy nadobudnuté počas manželstva patria do zákonného spoločného imania, tak pri spore bude musieť ten, kto tvrdí opak, preukázať, že nejde o majetok, ktorý patrí do SIM. V praxi to môže riešiť problém, ktorý súvisí s dokazovaním, že majetok patrí do spoločného majetku, najmä pri manželstvách, ktoré trvajú aj niekoľko desiatok rokov. Následne boli do novej právnej úpravy zaradené aj položky, ktoré patria do výlučného vlastníctva jedného z manželov, ku ktorým patrí napr. *„majetok alebo náhrada, ktorú manžel nadobudol za majetok patriaci do jeho výlučného majetku a z majetku patriaceho do spoločného imania manželov, ak hodnota použitého spoločného majetku je nepatrná,“* (návrh Občianskeho zákonníka § 322 písm. e) alebo *„dlh, ktorý sa týka výlučného majetku manžela“*. (návrh Občianskeho zákonníka § 322 písm. g). Zaradením dlhov do právnej úpravy vyriešil zákonodarca problém, ktorý doposiaľ riešila len súdna prax. Veľmi podstatné je aj doplnenie možnosti pre darcu alebo porúčiteľa, ktorý v zmysle § 322 písm. a) návrhu

Občianskeho zákonníka môže výslovne určiť, že majetok nadobudnutý darom, dedičstvom alebo odkazom bude patriť do zákonného spoločného imania manželov. V súčasnej právnej úprave je takýto majetok zo zákona vylúčený z BSM, a jeho zahrnutie do spoločného režimu nebolo možné dosiahnuť priamo vôľou darcu alebo poručiteľa, ako bolo uvedené v predchádzajúcej kapitole. Zväčšením precíznosti týchto ustanovení sa taktiež znižuje riziko nejednotnej interpretácie zo strany súdov. Okrem toho, právna úprava výslovne dopĺňa do rozsahu SIM položky, ktoré v pôvodnej úprave neboli priamo uvedené, ako sú „výnosy z výlučného majetku“ alebo „hodnota podielu“ manžela v obchodnej spoločnosti či družstve (návrh Občianskeho zákonníka, § 321 ods. 2-3). Účelom zákonodarcu bolo najmä odstrániť nedostatky, ktoré doteraz riešila len súdna prax (Ministerstvo spravodlivosti Slovenskej republiky, 2025b). Ďalším významným problémom, ktorý bol identifikovaný v prvej kapitole, je problém, ktorý sa týka dlhov len jedného z manželov a s ním spojená absencia určitej hmotnoprávnej ochrany nedlžníckeho manžela. Nová kodifikácia v tejto oblasti prináša zásadné zmeny. Zavádza určitý dvojstupňový mechanizmus uspokojovania pohľadávok, ktorý spočíva v prioritnom uspokojení z výlučného majetku dlžníka, a až v prípade, ak tento majetok nepostačuje, je možné siahnuť na majetok, ktorý patrí do SIM, avšak len do výšky podielu, ktorý by dlžníkovi pripadol, ak by spoločné imanie zaniklo, alebo bolo zrušené (návrh Občianskeho zákonníka, § 333). Hoci počas trvania spoločného imania nie je miera účasti manželov vyjadrená podielmi (návrh Občianskeho zákonníka, § 321 ods. 5), toto ustanovenie vyžaduje prepočítanie podielu podľa zásad vyporiadania (návrh Občianskeho zákonníka, § 340). Tento mechanizmus výrazne posilňuje ochranu nedlžníckeho manžela a tým sa znižuje priestor pre spory v tejto oblasti. Následne bola v predchádzajúcej kapitole identifikovaná obmedzená možnosť modifikácie majetkového režimu manželov. Nová kodifikácia na túto požiadavku reaguje výrazným rozšírením možností zmluvnej úpravy, a tým odstraňuje medzery v pôvodnej právnej úprave. Už v § 320 ods. 2 návrhu Občianskeho zákonníka je uvedené, že snúbenci alebo manželvia môžu usporiadať práva a povinnosti, ktoré sa týkajú spoločného imania zmluvou tzv. *zmluvné imanie manželov*. Tretí oddiel návrhu Občianskeho zákonníka v rozsahu od § 326 do § 332, detailne rozpracúva typy zmluvného režimu. Popri rozšírení a zúžení SIM (návrh Občianskeho zákonníka, § 328 - § 329) je zavedený úplne nový režim, a tým je tzv. „*oddelený režim imania manželov*“ (návrh Občianskeho zákonníka, § 330). V rámci tohto režimu SIM vôbec nevznikne, ak sa na tom snúbenci dohodnú, alebo zanikne a je potrebné ho vyporiadať, ak sa na tom manželvia dohodnú počas trvania manželstva. V takom prípade všetok majetok nadobudnutý počas manželstva, vrátane dlhov, zostáva výlučným majetkom toho manžela, ktorý ho nadobudol (návrh Občianskeho zákonníka, § 330 ods. 1-2). Okrem toho

nová úprava umožňuje uzatváranie zmlúv o správe spoločného imania (návrh Občianskeho zákonníka, § 331) a stanovuje, že zmluvy môžu mať formu nielen notárskej zápisnice, ale aj autorizácie advokátom (návrh Občianskeho zákonníka, § 327 ods. 1).

3. Komparácia režimu SIM a režimu SJM v optike ich aplikácie

V Českej republike sa inštitút zmluvného režimu vyskytuje podstatne dlhšie. Občiansky zákonník ČR nadobudol účinnosť 1. januára 2014 a od tej doby sa v súdnej praxi podarilo identifikovať viacero problémov, ktoré môžu mať vplyv, vzhľadom na podobnosť právnej úpravy aj na pripravovaný zmluvný režim SIM. Zmluvný režim v oboch systémoch umožňuje manželom alebo snúbencom upraviť majetkové vzťahy odlišne od zákonného režimu, pričom kladie dôraz na autonómiu vôle.

V Slovenskej právnej úprave v návrhu Občianskeho zákonníka podľa § 326 – § 331 si manželia alebo snúbenci môžu uzavrieť zmluvu o spoločnom imaní, ktorou si upravujú majetkové práva a povinnosti odlišne od zákonného SIM, pričom zmluva snúbencov nadobudne účinnosť uzavretím manželstva (návrh Občianskeho zákonníka, § 326 ods. 1 a 4). Podľa návrhu Občianskeho zákonníka zmluvné imanie môže mať formu:

- a) **rozšírenia rozsahu SIM**, ktorá umožňuje zahrnutie majetku, ktorý by inak do imania nepatrilo, majetok musí byť určený druhovo alebo individuálne (návrh Občianskeho zákonníka, § 328 ods. 1-2),
- b) **zúženia rozsahu SIM**, čo predstavuje vylúčenie majetku, ktorý by inak patril do zákonného spoločného imania, taktiež určeného druhovo alebo individuálne (návrh Občianskeho zákonníka, § 329 ods. 1-2), alebo
- c) **oddeleného režimu, kde SIM budú:**
 - a. nevznikne, prostredníctvom dohody snúbencov (návrh Občianskeho zákonníka, § 330 ods. 1), alebo
 - b. zanikne s povinnosťou vyporiadania prostredníctvom dohody manželov (návrh Občianskeho zákonníka, § 330 ods. 2).

V českej právnej úprave SJM, ktorá je obsiahnutá v Českom občianskom zákonníku od § 716 – § 723 si snúbenci a manželia taktiež môžu dohodnúť tzv. „*Smluvený režim*“ odlišný od zákonného SJM, a ako aj v slovenskej právnej úprave, smluvený režim umožňuje:

- a) rozšírenia,
- b) zúženia rozsahu SJM,
- c) režim oddelených jmění,

- d) režim vyhradenia vzniku SJM ku dňu zániku manželstva (Občiansky zákonník ČR, § 716 ods. 1 a § 717 ods. 1). Inštitút vyhradenia vzniku SIM ku dňu zániku manželstva v slovenskej právnej úprave SIM absentuje, zatiaľ čo v súčasnej právnej úprave BSM je obsiahnutá.

Zmluva môže obsahovať akékoľvek ujednania o rozsahu, obsahu, dobe vzniku zákonného alebo iného režimu spoločného imania, jednotlivých veciach či súboroch, vrátane zmeny zaradenia existujúceho alebo budúceho majetku (Občiansky zákonník ČR, § 718 ods. 1). Na prvý pohľad je možné si všimnúť podobnosť v šírke obsahu, oba režimy umožňujú rozšírenie, zúženie a oddelený režim, no slovenský návrh explicitne špecifikuje jednotlivé druhy a to v § 327 ods. 2 návrhu Občianskeho zákonníka, zatiaľ čo český zmluvný režim je otvorenejší a obsahuje, že môže obsahovať akékoľvek ujednania, ak to zákon nezakazuje (Občiansky zákonník ČR, § 718 ods. 1).

Nakoľko právna úprava SIM prináša možnosť uzavrieť zmluvu aj pre snúbencov, je možné hovoriť o tzv. *predmanželskej zmluve*. Inštitút predmanželskej zmluvy je v českej právnej úprave už značne dlhší čas a počas tohto času si bolo možné všimnúť určité problémy, ktoré v súvislosti s týmto inštitútom vznikli. Tieto problémy sa následne z dôvodu podobnosti právnej úpravy môžu vyskytnúť aj v slovenskej právnej úprave SIM.

Jedným z problémov, v súvislosti s predmanželskou zmluvou, ktorý rieši súdna prax v Českej republike, sa týka rozhodovania o exekúcii na majetok manželov pri dlhoch vzniknutých pred uzavretím manželstva. Pre pochopenie dôležitosti nasledujúceho judikátu je potrebné sa oboznámiť s nasledujúcimi ustanoveniami:

„Pohľadávka veriteľa len jedného z manželov sa pri výkone rozhodnutia uspokojí z jeho výlučného majetku. Ak výlučný majetok nestačí na uspokojenie pohľadávky, môže byť uspokojená pri výkone rozhodnutia i z majetku patriaceho do spoločného imania manželov, a to len do výšky podielu, ktorý by manželovi pripadol, ak by spoločné imanie zaniklo alebo bolo zrušené.“ (návrh Občianskeho zákonníka, § 333)

„Manželia sa môžu voči inej osobe na zmluvu o spoločnom imaní odvolať len vtedy, ak jej je táto zmluva známa alebo musela byť známa.“ (návrh Občianskeho zákonníka, § 327 ods. 4)

Z kombinácie týchto ustanovení vyplýva prakticky podstatná situácia:

- a) ak dlžník nemá dostatok výlučného majetku, veriteľ sa môže uspokojiť z majetku v SIM (návrh Občianskeho zákonníka, § 333)
- b) avšak, ak manželia tvrdia, že SIM bolo zmluvne vylúčené (oddelený režim SIM), musia zároveň v exekučnom konaní riešiť aj otázku účinkov tejto zmluvy voči veriteľovi.

Inými slovami povedané, exekútor resp. veriteľ sa môže brániť tým, že zmluva mu nebola známa a vzhľadom na okolnosti ani nemusela byť známa, a preto pri výkone rozhodnutia vychádzal zo zákonného predpokladu existencie SIM, z ktorého sa môže uspokojovať v rozsahu § 333 návrhu Občianskeho zákonníka.

Predmetnou situáciou sa zaoberá uznesenie Najvyššieho súdu ČR, sp. zn. 20 Cdo 1846/2020. Súd sa v predmetnom judikáte zaoberá situáciou, kedy snúbenci ešte pred svadbou uzavreli zmluvu o režime oddelených imaní. Hlavným právnym argumentom tohto rozhodnutia je, že účelom manželstva nemôže byť platenie dlhov druhého manžela, ktoré vznikli ešte pred jeho uzavretím, pretože opačný výklad by bol v extrémnom rozpore s princípmi spravodlivosti. Súd v tomto smere nadviazal na nález Ústavného súdu (Najvyšší súd ČR, 2021, 20 Cdo 1846/2020). Ústavný súd sa v predmetnom náleze vyjadril nasledovne:

- a) nie je možné dovodiť žiadny racionálny argument, prečo by uzavretie manželstva malo viesť k možnosti tretej osoby viesť exekúciu na majetok manžela nadobudnutý pred uzavretím manželstva;
- b) dôvodová správa ani žiadne ustanovenie Občianskeho zákonníka nehovorí o posilnení práva veriteľa na úkor manžela dlžníka;
- c) ochrana poskytovaná manželstvu by nemala byť menšia než ochrana poskytovaná neformálnym rodinám. (Ústavný súd ČR, 2019, I. ÚS 1587/17)

Ak veriteľ v čase uzavretia predmanželskej zmluvy nemal voči snúbenici dlžníka žiadne subjektívne právo, nemôže spätne namietat, že táto zmluva jeho práva negatívne zasiahla (Najvyšší súd ČR, 2021, 20 Cdo 1846/2020). Z procesného hľadiska je podstatné, že exekúcia prikázaním pohľadávky z účtu manžela povinného musí byť zastavená, ak sa preukáže, že na ňom nie sú uložené prostriedky, ktoré by inak patrili do SJM. V predmetnom prípade bývalá manželka dlžníka úspešne preukázala, že financie na jej účtoch boli jej výlučným majetkom, a teda že išlo o prostriedky z predaja jej bytu, finančné dary od rodiny či príjmy z jej podnikania. Keďže vďaka predmanželskej zmluve SJM vôbec nevzniklo, nebolo možné na účte manželky identifikovať majetok, ktorý by mohol byť zákonne postihnutý exekúciou pre dlh jej manžela. Súd tak uzavrel, že postihnutie účtu manželky by bolo v rozpore s dobrými mravmi, najmä ak sa ona sama na vzniku dlhu nepodieľala a dlžník sa opakovane dopúšťal nečestného konania (Najvyšší súd ČR, 2021, 20 Cdo 1846/2020). Pre slovenskú prax to vyjadruje potrebu jasne definovať hranice zmluvnej voľnosti snúbencov tak, aby na jednej strane chránila nedlžníka a na druhej strane neumožňovala obchádzanie veriteľov. Inými slovami povedané, právna úprava a jej výklad musia súčasne:

a) umožniť nedlžnému manželovi účinne brániť sa proti exekučnému postihu jeho majetku pri predmanželských dlhoch druhého manžela, no zároveň

b) počítať s tým, že v praxi sa veriteľ/exekútor môže dovolávať toho, že zmluva o majetkovom režime mu nebola známa alebo ani nemusela byť známa (návrh Občianskeho zákonníka, § 327 ods. 4), a preto bude potrebné jasne nastaviť aj procesné a dôkazné pravidlá, ako sa tieto námietky budú v konkrétnych prípadoch posudzovať.

Ďalším problémom, ktorý sa môže v aplikačnej praxi objaviť, sa týka časovej pôsobnosti právnej úpravy a z nej vyplývajúci odlišný režim postihovania majetku v SJM podľa toho, kedy výlučný dlh jedného z manželov vznikol. Nasledovný prípad sa týkal situácie, v ktorej notárka oneskorene zapísala predmanželskú listinu do zoznamu listín. Najvyšší súd ČR v uznesení, sp. zn. 30 Cdo 509/2024 zdôraznil, že pri posudzovaní ochrany majetku nedlžného manžela je nevyhnutné striktne rozlišovať medzi dlhmi vzniknutými do 31. 12. 2013 a dlhmi vzniknutými po 1. 1. 2014. Pri výlučných dlhoch dlžníka vzniknutých pred uzavretím manželstva a zároveň do 31. 12. 2013 je podľa ustálenej judikatúry objektívne vylúčené, aby boli uspokojené zo SJM (ani z majetku, ktorý sa pre účely exekúcie za SJM považuje), hoci by exekučné konanie začalo až po 1. 1. 2014. V tomto režime je preto z hľadiska postihnuteľnosti majetku irelevantné, či snúbenci uzavreli predmanželskú zmluvu, alebo či bola zapísaná do zbierky listín, keďže exekúcia na SJM je pri tomto type dlhu vylúčená priamo z princípov časovej pôsobnosti práva. Naopak, pri výlučných dlhoch vzniknutých po 1. 1. 2014, hoci ešte pred uzavretím manželstva, česká právna úprava (Občiansky zákonník ČR, § 732) pripúšťa, aby bolo postihnuté aj SJM, avšak len do výšky podielu, ktorý by dlžníkovi pripadol pri vyporiadaní (Najvyšší súd ČR, 2024, sp. zn. 30 Cdo 509/2024).

V tejto situácii nadobúda zásadný význam publicita predmanželskej zmluvy, t.j. ak zmluva nie je včas zapísaná do príslušného zoznamu listín, nedlžný manžel sa jej voči veriteľovi nemusí vedieť účinne dovoliť a exekútor môže vychádzať zo zákonného režimu a zákonných domnienok, vrátane vyvrátiteľnej domnienky pri účtoch, že prostriedky, ktoré sú na nich uložené, patria do SJM. Z procesného hľadiska rozhodnutie zároveň zdôrazňuje tzv. *zakročovací povinnosť*, t.j. ak exekúcia postihne účet, na ktorom sú iba výlučné prostriedky nedlžného manžela, dotknutý manžel musí aktívne využiť dostupný procesný prostriedok (návrh na čiastočné zastavenie), pretože ak bez zakročenia dlh uhradí len za účelom odblokovania účtu, súdy môžu považovať vznik škody za dôsledok jeho vlastnej nečinnosti (Najvyšší súd ČR, 2024, sp. zn. 30 Cdo 509/2024). Pre slovenskú aplikačnú prax z toho vyplýva, že pri zavádzaní predmanželských zmlúv je nevyhnutné precízne vyriešiť prechodné

ustanovenia (časovú pôsobnosť), nastaviť mechanizmus publicity zmluvy voči tretím osobám a zároveň je potrebné jasne definovať procesné prostriedky ochrany.

Záver

Súčasná úprava bezpodielového spoluvlastníctva manželov je do veľkej miery poznačená svojim historickým kontextom, čo sa prejavuje najmä v potrebe rozsiahlej interpretácie zo strany súdov, v obmedzenej zmluvnej autonómii manželov a v nevyjasnených otázkach pri dlhoch, nadobúdaní majetku z výlučných prostriedkov, či pri ochrane nedlžnickeho manžela.

Navrhovaná kodifikácia, ktorá transformuje bezpodielové spoluvlastníctvo manželov na spoločné imanie manželov, predstavuje významnú zmenu, ktorou zákonodarca prispôsobuje právnu úpravu modernej spoločnosti. Návrh Občianskeho zákonníka prináša najmä precíznejšie vymedzenie aktív aj pasív, explicitné zaradenie dlhov do rozsahu spoločného režimu, rozšírenie výnimiek, vrátane možnosti, aby darca alebo poručiteľ výslovne určil, že plnenie má patriť do spoločného imania manželov a zavedenie mechanizmu, ktorý pri uspokojovaní veriteľa uprednostňuje výlučný majetok dlžníka a zásah do spoločného imania pripúšťa len v obmedzenej miere. Zásadným posunom je aj zavedenie zmluvného režimu vrátane predmanželských zmlúv a oddeleného režimu, ktoré umožnia lepšie zohľadniť individuálne potreby manželov.

Zároveň však komparácia s českou právnou úpravou SJM a judikatúra naznačuje, že úspech novej koncepcie bude závisieť najmä od vyriešenia problémov, ktoré návrh Občianskeho zákonníka obsahuje. Príkladom je riešenie hraníc zmluvnej voľnosti snúbencov, publicity zmlúv voči tretím osobám, jasné vymedzenie prechodných ustanovení v súvislosti s časovou pôsobnosťou a zrozumiteľných procesných prostriedkov ochrany v exekučných situáciách.

Zoznam bibliografických odkazov

Monografia

1. Takáč, J. (2023). *Modifikácia bezpodielového spoluvlastníctva manželov a jeho zánik za trvania manželstva* (2. prepracované a rozšírené vyd.). Belianum (Vydavateľstvo Univerzity Mateja Bela v Banskej Bystrici). <https://doi.org/10.24040/2023.9788055720395>
2. Cirák, J., Dolíhalová, M., Kubošiová, D., & Takáč, J. (2021) *Bezpodielové spoluvlastníctvo manželov*. Banská Bystrica, UMB Belianum.

Právne predpisy

3. *Občiansky zákonník* (zákon č. 40/1964 Zb.). (1964). *Zbierka zákonov Slovenskej republiky*.
4. *Občianský zákonník* (zákon č. 89/2012 Sb.). (2012). *Sbírka zákonů České republiky*.

5. Národná rada Slovenskej republiky. (2025). *Občiansky zákonník (Návrh zákona)*.
6. Ministerstvo spravodlivosti Slovenskej republiky. (2025a). *Dôvodová správa: A. Všeobecná časť (k návrhu zákona Občiansky zákonník)*.
7. Ministerstvo spravodlivosti Slovenskej republiky. (2025b). *Dôvodová správa: B. Osobitná časť (k návrhu zákona Občiansky zákonník)*.

Judikatúra

8. Krajský súd v Prešove. (2022, 28. septembra). Uznesenie (sp. zn. 3Co/41/2021).
9. Nejvyšší soud České republiky. (2000, 19. dubna). Rozsudek (sp. zn. 22 Cdo 1658/98).
10. Nejvyšší soud České republiky. (2008, 7. ledna). Rozsudek (sp. zn. 22 Cdo 3596/2006).
11. Nejvyšší soud České republiky. (2021, 24. února). Usnesení (sp. zn. 20 Cdo 1846/2020).
12. Ústavní soud České republiky. (2019, 24. dubna). Nález (sp. zn. I. ÚS 1587/17).
13. Nejvyšší soud České republiky. (2024, 18. března). Usnesení (sp. zn. 30 Cdo 509/2024).

Odborné články

14. Benčíková, Z. (2016). *Všeobecné aspekty vypořádania bezpodielového spoluvlastníctva manželov, aplikačné problémy*. Legalis.
15. Dolíhalová, M., & Dzimko, J. (2024). K zmluvnej úprave majetkových vzťahov medzi manželmi v podmienkach Slovenskej republiky. In V. Knoll & J. Hablovič (Eds.), *Naděje právní vědy 2024: Právní věda v praxi* (s. 118-130). Západočeská univerzita v Plzni. <https://naos-be.zcu.cz/server/api/core/bitstreams/3410c99f-662f-4d38-85c1-779a9d0fac8b/content>

DOVOLENKOVÉ DELIKTY: NÁHRADA ŠKODY UTRPENEJ V ZAHRANIČÍ Z POHLADU MEDZINÁRODNÉHO PRÁVA SÚKROMNÉHO

Holiday Torts: Compensation of Damage Sustained Abroad in Private International Law

TIMON MILAN SOLÁR*

Abstrakt

Príspevok sa venuje problematike tzv. dovolenkových deliktov (angl. „holiday torts“), teda nárokom na náhradu škody vyplývajúcim zo škodovej udalosti, ku ktorej došlo v zahraničí počas dovolenky. Akým právom sa takýto vzťah spravuje a ktorý súd bude mať právomoc rozhodnúť daný spor? Príspevok analyzuje úpravu podľa práva Európskej únie a následne ju porovnáva s judikatúrou anglických súdov, ktoré sa po vystúpení Spojeného kráľovstva z Európskej únie rozhodli odkloniť od európskych pravidiel. Cieľom je preskúmať, akým problémom môžu čeliť ako turisti, tak aj osoby, ktoré sa ocitnú na druhej strane nárokov týchto turistov. Pozornosť je venovaná aj špecifickému postaveniu cestovných kancelárií a balikom cestovných služieb.

Abstract

The paper addresses the issue of so-called ‘holiday torts’, i.e., claims for damages arising from a harmful event that occurred abroad during a holiday. Which law governs such a relationship, and which court will have the jurisdiction to decide the dispute? The paper examines the regulation under European Union law and subsequently compares it with the case law of English courts, which decided to diverge from the European rules following the United Kingdom’s withdrawal from the European Union. The aim is to explore the challenges faced by both tourists and those on the receiving end of these tourists’ claims. Attention will also be given to the specific position of tour operators and package travel services.

Kľúčové slová: dovolenkové delikty; medzinárodné právo súkromné; medzinárodná právomoc; rozhodné právo

Keywords: holiday torts; private international law; international jurisdiction; applicable law

Úvod

Predstavte si dovolenku, ktorá sa skončí absolútnou katastrofou. V roku 2010 sa svetovo rešpektovaný medzinárodný právnik Sir Ian Brownlie, jeho manželka Lady Brownlie, dcéra Rebecca a jej dve deti vybrali na dovolenku do Egypta. Ešte pred odchodom na dovolenku si prostredníctvom hotela, v ktorom boli ubytovaní, rezervovali exkurziu. Počas tejto exkurzie ich vodič zišiel z cesty a v tragickej autonehode Sir Ian a Rebecca zomreli. Lady Brownlie a Rebeccine deti utrpeli zranenia. Lady Brownlie následne strávila viac ako dekádu

* Timon Milan Solár, LL.M., Katedra občianskeho a obchodného práva, Právnická fakulta Trnavskej univerzity v Trnave, 1. ročník denného doktorandského štúdia, timonmilan.solar@tvu.sk. Publikované v rámci riešenia grantu VEGA 1/0403/24 Právne postavenie cestovnej kancelárie a cestovnej agentúry s osobitným zreteľom na zmluvné a zodpovednostné vzťahy (právoekonomická analýza).

v komplexnom právnom spore, ktorého cieľom bolo dostať jej nárok na náhradu škody pred anglický a nie egyptský súd.¹

V každom nároku na náhradu škody s cudzím prvkom je dôležité zodpovedať dve základné otázky: (1) Akým právom sa bude riadiť náhrada škody? (2) Súd ktorej krajiny o nej rozhodne? Práve prípady ako tragédia Lady Brownlie ilustrujú, že odpoveď na tieto otázky nemusí byť vždy jednoznačná. Doktríny medzinárodného práva súkromného a procesného sú tradične založené na myšlienke, že právne kontroverzie by mali byť lokalizované a riešené podľa miesta, s ktorým majú najužšiu väzbu, čo je pri civilných deliktach spravidla miesto vzniku škody. Kým v otázkach rozhodného práva existuje istá miera flexibility, pravidlá medzinárodnej právomoci súdov často pošlú poškodeného späť na miesto škody. Poškodení sa ale málokedy chcú vracať na miesto, kde sa im stala škodová udalosť. Ich jediná väzba s touto krajinou je krátky, dovolenkový kontakt. V tomto článku postupne porovnáme rigidnú úpravu podľa práva Európskej únie s judikatúrou anglických súdov, ktoré sa po vystúpení Spojeného kráľovstva z Európskej únie rozhodli odkloniť od európskych pravidiel a ponúknuť poškodeným dovolenkárom o čosi flexibilnejšie pravidlá. Na záver naznačíme, že situácia pre európskych cestujúcich sa mení, pokiaľ dokážu preklasifikovať svoj nárok ako vyplývajúci zo zmluvnej zodpovednosti voči cestovnej kancelárii a využiť tak pravidlá týkajúce sa ochrany spotrebiteľa.

1. Rozhodné právo

Naprieč krajinami Európskej únie (s výnimkou Dánska) sa otázky rozhodného práva v prípade mimozmluvných záväzkov spravujú nariadením Rím II.² Tento režim si ponechalo aj Spojené kráľovstvo po odchode z EÚ.³ Nariadenie Rím II sa uplatní v každom prípade škody utrpenej v zahraničí, bez ohľadu na to, či krajina, v ktorej sa stala škoda, je členským štátom EÚ alebo nie. Toto nariadenie určuje v prípadoch škody utrpenej v zahraničí ako rozhodné právo *lex loci damni*: mimozmluvný záväzok vyplývajúci z civilného deliktu sa spravuje „*právnym poriadkom krajiny, na území ktorej vznikla škoda, bez ohľadu na to, na území ktorej krajiny došlo ku skutočnosti, ktorá spôsobila škodu, a bez ohľadu na to, na území ktorej krajiny alebo krajín nastali nepriame následky takejto skutočnosti.*“⁴ To znamená, že pre škody spôsobené civilnými deliktmi počas dovolenky bude rozhodné právo dovolenkovej destinácie, kde sa stala priama škoda. Nariadenie odôvodňuje toto pravidlo tým, že práve „[v]äzba s

¹ *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] AC 995.

² Nariadenie Európskeho parlamentu a Rady (ES) č. 864/2007 z 11. júla 2007 o rozhodnom práve pre mimozmluvné záväzky (OJ L 199, 31.7.2007, s. 40 – 49) (ďalej aj „nariadenie Rím II“).

³ *Pozri* Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019, SI 2019 No 834.

⁴ Čl. 4 ods. 1 nariadenia Rím II.

krajinou, na území ktorej vznikla priama škoda (...), vytvára spravodlivú rovnováhu medzi záujmami osoby, o ktorej sa tvrdí, že je zodpovedná, a poškodenej osoby a tiež zohľadňuje moderný prístup k občianskoprávnej zodpovednosti a vývoj systémov objektívnej zodpovednosti.“⁵ Dôležitosť špecifikácie, že ide o priamu škodu, vysvetľuje Adrian Briggs na príklade tragickej dopravnej nehody v zahraničí, akou bola napríklad nehoda Lady Brownlie. Ak príbuzní obete utrpia vo svojej domovskej krajine psychickú traumú zo straty blízkeho, ich poloha nehrá pri určovaní rozhodného práva žiadnu rolu. Nariadenie Rím II podriaďuje všetky nároky, aj týchto sekundárnych obetí, výlučne právu štátu, kde došlo k nehode. A to bez ohľadu na to, že príbuzní môžu svoju ujmu oprávnene vnímať ako dostatočne priamu a vzniknutú doma, a nie v mieste, kde vozidlo reálne zišlo z cesty.⁶

Nariadenie Rím II prináša okrem tohto všeobecného pravidla dve výnimky. Prvá výnimka sa uplatní v prípade, že poškodený aj žalovaná strana majú svoj obvyklý pobyt v tej istej krajine v čase vzniku škody. V takom prípade sa na škodu uplatní právo tej krajiny.⁷ Cieľom tohto ustanovenia je zohľadniť oprávnené očakávanie strán – uplatní sa napríklad v prípade, ak počas zájazdu spôsobí účastník škodu svojmu susedovi, s ktorým išiel na zájazd spolu.⁸ Druhá výnimka predstavuje tzv. „únikovú klauzulu“,⁹ podľa ktorej sa v prípadoch, v ktorých má civilný delikt zjavne užšiu väzbu s inou krajinou, než určujú predchádzajúce dve pravidlá, uplatní právo tejto inej krajiny.¹⁰ Práve vďaka tomuto ustanoveniu sa zabezpečuje flexibilita systému pre špecifické prípady. V praxi by sa malo toto ustanovenie aplikovať len výnimočne, napríklad v prípadoch, že je daný delikt úzko spojený s už predchádzajúcim vzťahom medzi stranami, ako napríklad zmluvou.¹¹

V prípade, že sa vďaka aplikácii týchto výnimiek použije na delikt iné rozhodné právo, než *lex loci damni*, nariadenie Rím II uvádza, že pri hodnotení správania sa osoby, ktorá by mala byť zodpovedná, treba zohľadniť aj „...pravidlá bezpečnosti, ktoré boli účinné v mieste a v čase, keď nastala skutočnosť, ktorá spôsobila vznik zodpovednosti.“¹² Samotné nariadenie uvádza, že tieto pravidlá bezpečnosti zahŕňajú „všetky pravidlá súvisiace s bezpečnosťou a správaním sa vrátane napríklad pravidiel bezpečnosti cestnej premávky v prípade dopravnej nehody.“¹³

⁵ Bod 16 odôvodnenia nariadenia Rím II.

⁶ Briggs, A. (2019). *The Conflict of Laws* (4th ed.). Oxford University Press.

⁷ Čl. 4 ods. 2 nariadenia Rím II.

⁸ Csach, K., Gregová Širicová, E., & Júdová, E. (2018). *Úvod do štúdia medzinárodného práva súkromného a procesného* (2nd ed.). Wolters Kluwer, s. 175.

⁹ Bod 18 odôvodnenia nariadenia Rím II.

¹⁰ Čl. 4 ods. 3 nariadenia Rím II.

¹¹ Tamže.

¹² Čl. 17 nariadenia Rím II.

¹³ Bod 34 odôvodnenia nariadenia Rím II.

Ako príklad si vieme predstaviť prípady, v ktorých má *lex loci damni* inú maximálnu hranicu alkoholu v krvi za volantom, než právo, ktoré sa určilo ako rozhodné aplikáciou čl. 4 ods. 2 alebo čl. 4 ods. 3 nariadenia Rím II. Ide o rozumné usporiadanie, ktoré reflektuje nevyhnutnosť dodržiavať miestne pravidlá.

V neposlednom rade je dôležité poznamenať, že nariadenie Rím II sa neuplatní, pokiaľ existuje medzinárodná zmluva, ktorá má v zmysle čl. 28 ods. 1 nariadenia Rím II prednosť pred jeho ustanoveniami. Je preto nevyhnutné vždy zvážiť, či neexistuje multilaterálna alebo bilaterálna medzinárodná zmluva, ktorá upravuje kolízne normy v danom prípade. V slovenskom prostredí to najčastejšie bude Dohovor o práve použiteľnom na dopravné nehody z roku 1971.¹⁴ Pokiaľ sa dovolenková škoda týka dopravnej nehody, slovenský súd použije tento dohovor na určenie rozhodného práva, a to aj keď rozhodným právom je právo štátu, ktorý nie je zmluvnou stranou dohovoru.¹⁵ Tento dohovor ustanovuje ako rozhodné právo pre dopravné nehody právo štátu, na území ktorého došlo k nehode.¹⁶ Z tohto pravidla existujú výnimky, pri ktorých sa uplatní právo štátu registrácie motorového vozidla. Ide o prípady, ak sa na nehode zúčastňuje iba jedno vozidlo, ktoré je registrované v inom štáte, než v ktorom došlo k nehode, alebo ak sa na nehode zúčastňuje viac vozidiel, ak sú všetky tieto vozidlá registrované v tom istom štáte.¹⁷ V takom prípade dohovor stanovuje, že „sú rozhodné vnútorné predpisy štátu registrácie na určenie zodpovednosti

- vo vzťahu k vodičovi, vlastníkovi alebo inej osobe majúcej právo k vozidlu bez ohľadu na ich bydlisko,

- vo vzťahu k postihnutej osobe, ktorou je cestujúci, ktorého bydlisko je v inom štáte, než v ktorom došlo k nehode,

- vo vzťahu k postihnutej osobe nachádzajúcej sa mimo vozidla v mieste nehody, ak má bydlisko v štáte registrácie.

V prípade, že sú postihnuté dve osoby alebo viac osôb, určí sa rozhodné právo pre každú z nich oddelene.“¹⁸

Tieto výnimky predstavujú dôležitý koncepčný rozdiel voči nariadeniu Rím II, ktoré ako hraničný určovateľ nevyužíva miesto registrácie vozidla, ale obvyklý pobyt účastníkov nehody, pričom sa obmedzuje výlučne na prípady spoločného obvyklého pobytu oboch strán sporu.

¹⁴ Publikovaný ako Vyhláška ministra zahraničných vecí z 23. augusta 1976 o Dohovore o práve použiteľnom na dopravné nehody. Dohovor nemohol byť použitý v už spomínanom prípade Lady Brownlie, pretože Spojené kráľovstvo nie je jeho zmluvnou stranou.

¹⁵ Čl. 11 Dohovoru o práve použiteľnom na dopravné nehody.

¹⁶ Čl. 3 Dohovoru o práve použiteľnom na dopravné nehody.

¹⁷ Čl. 3 Dohovoru o práve použiteľnom na dopravné nehody.

¹⁸ Čl. 4 písm. a) Dohovoru o práve použiteľnom na dopravné nehody.

Dohovor tiež na rozdiel od nariadenia neobsahuje tzv. únikovú klauzulu pre prípady zjavne užšej väzby s iným právnym poriadkom, v dôsledku čoho sú jeho pravidlá o čosi rigidnejšie. Aj v prípadoch aplikácie týchto výnimiek však dohovor, rovnako ako nariadenie Rím II, ustanovuje nevyhnutnosť vždy prihliadať na predpisy o konaní a bezpečnosti dopravy platné v mieste a čase nehody.¹⁹

2. Príslušný súd

Medzinárodná právomoc súdov v otázkach škody spôsobenej deliktom počas dovolenky je o čosi komplikovanejšia, než otázka rozhodného práva. Naprieč členskými štátmi EÚ sa na určovanie právomoci v nárokoch vyplývajúcich z civilného deliktu použije nariadenie Brusel Ia.²⁰ Toto nariadenie sa však v zásade uplatní len v prípade, ak žalovaná strana má bydlisko (domicil) v jednom z členských štátov EÚ. Ak nie, právomoc sa určí podľa národných prameňov medzinárodného práva procesného. Aj v týchto prípadoch sú ale tieto pravidlá často podobné nariadeniu Brusel Ia.²¹

Nariadenie Brusel Ia ponúka dva hlavné spôsoby, podľa ktorých si súd môže založiť právomoc. Prvý spôsob je tzv. všeobecná právomoc, podľa ktorej *„osoby s bydliskom na území členského štátu sa bez ohľadu na ich štátne občianstvo žalujú na súdoch tohto členského štátu.“*²² To znamená, že v prípade škody vzniknutej na dovolenke budú podľa tohto pravidla príslušné súdy bydliska žalovaného, bez ohľadu na to, kde sa stala škoda alebo kde má bydlisko žalobca.

Druhý spôsob je tzv. špeciálna právomoc. Ide o alternatívu k pravidlu, že právomoc sa všeobecne zakladá podľa miesta bydliska žalovaného, odôvodnená existenciou úzkej väzby medzi súdom a žalobou a nevyhnutnosťou uľahčenia efektívneho a riadneho výkonu súdnictva.²³ Podľa tohto pravidla, *„[o]sobu s bydliskom na území členského štátu možno žalovať v inom členskom štáte ... vo veciach nárokov z mimozmluvnej zodpovednosti na súdoch podľa miesta, kde došlo alebo by mohlo dôjsť ku skutočnosti, ktorá zakladá takýto nárok“*.²⁴

Ako však určiť, kde presne došlo k skutočnosti zakladajúcej nárok, ak ide o škodu spôsobenú počas dovolenky? V tejto súvislosti Súdny dvor EÚ opakovane judikuje, že *„miesto,*

¹⁹ Čl. 7 Dohovoru o práve použiteľnom na dopravné nehody.

²⁰ Nariadenie Európskeho parlamentu a Rady (EÚ) č. 1215/2012 z 12. decembra 2012 o právomoci a o uznávaní a výkone rozsudkov v občianskych a obchodných veciach (prepracované znenie) (OJ L 351, 20. 12. 2012, s. 1–32) (ďalej aj „nariadenie Brusel Ia“).

²¹ Napríklad slovenská vnútroštátna úprava, obsiahnutá v zákone č. 97/1963 Zb. o medzinárodnom práve súkromnom a procesnom (ďalej aj „ZMPSaP“) v oblasti mimozmluvných záväzkov v princípe kopíruje nariadenie Brusel Ia.

²² Čl. 4 ods. 1 nariadenia Brusel Ia.

²³ Bod 16 odôvodnenia nariadenia Brusel Ia.

²⁴ Čl. 7 ods. 2 nariadenia Brusel Ia.

kde došlo k skutočnosti, ktorá zakladá takýto nárok“ zahŕňa ako miesto, kde vznikla škoda, tak aj miesto, kde došlo k udalosti, ktorá viedla k tejto škode.²⁵ To ale neznamená, že miesto, kde vznikla škoda, zahŕňa „každé miesto, kde sa dajú pocítiť škodlivé následky skutočnosti, ktorá už spôsobila škodu vzniknutú v skutočnosti na inom mieste.“ Práve naopak, pojem škoda zahŕňa len prvotnú, priamu škodu, nie nepriamu.²⁶ Podľa pravidiel špeciálnej právomoci si teda môžu založiť právomoc len súdy toho miesta, kde sa samotná dovolenková škoda stala, a nie miesta, kde bola škoda následne cítená. V tomto prípade sa tak nariadenie Brusel Ia približuje úprave rozhodného práva podľa nariadenia Rím II, avšak bez možnosti „únikových klauzúl“ v prípade bližšej väzby s iným miestom.

Z tohto pohľadu je teda úprava nariadenia Brusel Ia pomerne rigidná. Kým na papieri dáva poškodenému nariadenie tri možnosti – bydlisko žalovaného, miesto, kde vznikla priama škoda, a miesto, kde došlo k udalosti, ktorá viedla k tejto škode – v prípade škody vzniknutej na dovolenke obvykle povedie aplikácia týchto pravidiel k právomoci súdov dovolenkovej destinácie.²⁷ V prípade, že žalovaný bol rovnako dovolenkár, jeho príslušným súdom podľa pravidiel všeobecnej právomoci bude úplne iný, pre poškodeného často neočakávaný štát. Nariadenie Brusel Ia tak v podstate očakáva, že dovolenkár, ktorý utrpel škodu, bude následne cestovať za spravodlivosťou.

3. Anglická úprava

Práve táto spomínaná nepružnosť pravidiel právomoci podľa nariadenia Brusel Ia vyvolávala pred vystúpením Spojeného kráľovstva z EÚ nesúhlas anglických súdov.²⁸ Anglická úprava medzinárodnej právomoci totiž síce tiež operuje s konceptmi všeobecnej a špeciálnej právomoci, tieto sú ale založené na iných predpokladoch, než európske nariadenia. Ako zhrnul rozdiel medzi týmito úpravami jeden z najznámejších anglických sudcov v oblasti medzinárodného práva súkromného, Lord Goff: kým európsky režim podľa nariadenia Brusel

²⁵ Vec C-189/08 *Zuid-Chemie BV proti Filippo's Mineralenfabriek NV/SA* EU:C:2009:475, bod 23.

²⁶ Vec C-343/19 *Verein für Konsumenteninformation proti Volkswagen AG* EU:C:2020:534, bod 26. Pozri aj Vec C-364/93 *Antonio Marinari proti Lloyds Bank plc a Zubaidi Trading Company* EU:C:1995:289, body 14–15.

²⁷ V prípade autohavárie, akú utrpela Lady Brownlie, vznikla priama škoda na mieste, kde vozidlo zišlo z cesty, pričom samotné zidenie z cesty predstavuje aj udalosť, ktorá k tejto škode viedla. Nakoľko mal žalovaný bydlisko v Egypte, právomoc by podľa týchto pravidiel mohli mať len egyptské súdy.

²⁸ Napríklad v prípade všeobecnej právomoci voči žalovaným s bydliskom mimo členských štátov EÚ zastávali anglické súdy názor, že majú právo odmietnuť vykonanie právomoci, pokiaľ sú súdy iného štátu objektívne vhodnejšie na konanie v danej veci. Tento názor bol však Súdny dvorom EÚ dôrazne odmietnutý vo veci *Owusu proti Jackson*. Pre účely tohto článku je zaujímavý skutkový stav daného sporu. Žaloba sa týkala ujmy na zdraví utrpenej na dovolenke v Jamajke, pričom len jeden zo žalovaných mal bydlisko v Anglicku, zvyšných päť v Jamajke. Kým anglický súd zastával názor, že v takomto prípade by sa mal spor rozsúdiť na Jamajke, Súdny dvor jasne zdôraznil, že všeobecná právomoc založená na bydlisku žalovaného v členskom štáte nemôže byť odmietnutá. Pozri Briggs, A. (2019). *The Conflict of Laws* (4th ed.). Oxford University Press, s. 95; Vec C-281/02 *Andrew Owusu proti N. B. Jackson* EU:C:2005:120.

Ia má za cieľ zabrániť konfliktom medzi súdmi členských štátov vďaka precízne definovaným pravidlám, robí tak za cenu rigidity, ktorá môže viesť k občasným nespravodlivým výsledkom. Naopak, anglický režim operuje na princípe, že pravidlá právomoci by mali byť praktické a flexibilné, a tak umožňovať súdom dosiahnuť „praktickú spravodlivosť“ v individuálnych prípadoch.²⁹

Po vystúpení Spojeného kráľovstva z EÚ sa medzinárodná právomoc anglických súdov opätovne spravuje týmito vnútroštátnymi procesnými pravidlami obsiahnutými v Civil Procedure Rules (ďalej aj „CPR“).³⁰ Podľa týchto pravidiel je medzinárodná právomoc otázkou procesného práva – právomoc anglických súdov je daná, ak žalobca doručí žalobu žalovanému.³¹ Podobne ako v prípade nariadenia Brusel Ia, aj v anglickej úprave vieme rozlíšiť medzi všeobecnou a špeciálnou právomocou. V prípade všeobecnej právomoci môže byť žalovanému doručená žaloba, ak je *prítomný* na anglickom území. To predstavuje rozdiel medzi anglickou a európskou úpravou, ktorá pre účely všeobecnej právomoci vyžaduje bydlisko.³² Špeciálna právomoc sa využije v prípade, že sa žalovaný nenachádza na anglickom území. Podľa týchto pravidiel môže žalobca založiť právomoc voči zahraničnému žalovanému len prostredníctvom inštitútu tzv. doručenia žaloby mimo jurisdikciu („*service out of jurisdiction*“).

Na to, aby anglický súd povolil takéto doručenie, musí žalobca kumulatívne splniť tri podmienky: (1) nárok musí mať rozumné vyhliadky na úspech;³³ (2) musia existovať dostatočne presvedčivé argumenty, že nárok spadá pod jednu z tzv. „*gateways*“ uvedených v bode 3.1 Practice Direction 6B;³⁴ a (3) Anglicko musí byť najvhodnejším miestom na podanie žaloby (*forum conveniens*).³⁵ Práve uvedené *gateways* predstavujú v praxi konkrétne pravidlá špeciálnej právomoci. V prípade škody utrpenej na dovolenke je kľúčové pravidlo zakotvené v

²⁹ *Airbus Industrie GIE v Patel* [1999] 1 AC 119, s. 132.

³⁰ Tieto pravidlá sa počas členstva Spojeného kráľovstva v EÚ aplikovali v obmedzenej podobe, v prípadoch mimo pôsobnosti nariadenia Brusel Ia, napríklad ak mal žalovaný bydlisko mimo členského štátu EÚ.

³¹ Collins and Harris (Eds.). (2022). *Dicey, Morris and Collins on the Conflict of Laws* (16th ed.). Sweet & Maxwell, bod 11R-001.

³² Prípadné nežiaduce situácie, v ktorých sa doručí žaloba strane, ktorá s Anglickom nemá nič spoločné (napríklad je jej väzba na Anglicko len prestup na letisku) anglická právna úprava rieši už spomínaným mechanizmom *forum (non) conveniens*, podľa ktorého môže anglický súd odmietnuť právomoc, ak existuje objektívne vhodnejší súd, ktorý môže vo veci konať a takéto konanie by bolo v záujme všetkých strán a v záujme spravodlivosti: *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL).

³³ CPR 6.37(1)(b).

³⁴ CPR 6.37(1)(a).

³⁵ CPR 6.37(3). Kým v prípade všeobecnej právomoci musí žalovaný dokázať, že existuje iné fórum, ktoré je vhodnejšie na konanie v danej veci, než anglické súdy, v prípade špeciálnej právomoci musí žalobca dokázať, že práve anglické súdy sú najvhodnejšie fórum, ktoré môže konať: *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL).

CPR PD 6B, bode 3.1(9)(a), podľa ktorého možno právomoc založiť vtedy, ak „škoda bola utrpená, alebo bude utrpená, v rámci jurisdikcie“.³⁶

Napriek tomu, že toto pravidlo pripomína úpravu podľa nariadenia Brusel Ia, anglická judikatúra dospela k diametrálne odlišnému výkladu toho, čo znamená „utrpieť škodu“. Vráťme sa preto k prípadu Lady Brownlie. Ako sme už vysvetlili, Lady Brownlie strávila vyše dekády v komplexnom súdnom spore, v ktorom sa snažila dostať svoj nárok voči hotelu pred anglické súdy, napriek tomu, že incident sa stal v Egypte a rozhodným právom bolo egyptské právo. Jej argument v prospech právomoci anglických súdov spočíval v tom, že slovo „škoda“ podľa tejto *gateway* nezahŕňa len priamu škodu v zmysle nariadenia Brusel Ia. Naopak, ide o širší pojem, ktorý pokrýva aj ďalšie následky (napríklad pretrvávajúce bolesti a finančné straty), ktoré cítila a znášala po návrate do Anglicka.

Spor sa prvýkrát dostal pred Najvyšší súd Spojeného kráľovstva v roku 2017 (tzv. vec *Brownlie I*).³⁷ Práve tu sa však zistilo, že Lady Brownlie súdila nesprávneho odporcu, čiže jej spor nemal žiadne vyhliadky na úspech.³⁸ Nakoľko ale súd uznal, že k tomuto omylu došlo aj z dôvodu nejasnej vlastníckej štruktúry hotela, povolil Lady Brownlie nahradiť pôvodného odporcu novým a vrátil vec na konanie prvostupňového súdu. Napriek tomu ale sudcovia ponúkli cenné *obiter dicta* postrehy k interpretácii pojmu „škoda utrpená v rámci jurisdikcie“. Kým dvaja zo sudcov preferovali reštriktívny výklad pojmu „škoda“ limitovaný len na priamu škodu,³⁹ zvyšní traja zastávali názor, že tento pojem treba vykladať v jeho prirodzenom význame a zahŕňa akúkoľvek žalovateľnú ujmu vrátane všetkých fyzických, finančných a sociálnych následkov, ktoré poškodený utrpel.⁴⁰ Aj vzhľadom na rozdielnosť názorov na najvyššej inštancii sa spor v roku 2021 opätovne vrátil na Najvyšší súd vo veci *Brownlie II*.⁴¹ Väčšina sudcov tu definitívne potvrdila, že pojem „škoda“ sa vzťahuje na akúkoľvek žalovateľnú ujmu spôsobenú deliktným konaním, vrátane všetkých telesných a následných

³⁶ CPR PD 6B, para 3.1(9)(a): „The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where ... [a] claim is made in tort where ... damage was sustained, or will be sustained, within the jurisdiction.“ Pojem jurisdikcia v tomto kontexte odkazuje na územie Anglicka.

³⁷ *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80 [2018], 1 WLR 19.

³⁸ Tamže, bod 15.

³⁹ Tamže, bod 28 (Lord Sumption, s ktorým Lord Hughes súhlasí), podľa ktorého by širší výklad pojmu škoda umožnil anglickým súdom uzurpovať si takmer neobmedzenú, exorbitantnú právomoc: „...a principle which located damage in the place where the pecuniary consequences of the accident were felt or where any continuing pain, suffering or loss of amenity were experienced would in the great majority of cases confer jurisdiction on the country of the claimant's residence. It would confer on the English courts what amounts to a universal jurisdiction to entertain claims by English residents for the more serious personal injuries suffered anywhere in the world.“

⁴⁰ Tamže, bod 53 (Lady Hale, s ktorou Lord Wilson a Lord Clarke súhlasia): „If I am seriously injured in a road accident, the pain, suffering and loss of amenity that I suffer are all part of the same injury and in cases of permanent disability will be with me wherever I am.“

⁴¹ *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] AC 995.

finančných dopadov, ktoré poškodený utrpí.⁴² Z tohto pohľadu nepriama škoda, ktorú Lady Brownlie utrpela v Anglicku, postačovala na založenie právomoci anglických súdov.⁴³

Tento extenzívny výklad sa markantne odkláňa od európskej právnej úpravy právomoci a umožňuje anglickým dovolenkárom súdiť svoje nároky na svojom domacom fóre. Ako však vysvetľoval Lord Wilson vo svojom *obiter dictum* vo veci *Brownlie I*, európsky prístup treba chápať v kontexte, v ktorom bol vytvorený. Nakoľko je úlohou nariadenia Brusel Ia alokovať právomoc medzi súdmi členských štátov EÚ v sporoch voči žalovaným s bydliskom v členských štátoch, môže si nariadenie dovoliť takúto mieru preskriptívnosti. Tento prístup je pochopiteľný, nakoľko stojí na predpoklade, že medzi členskými štátmi EÚ existuje vzájomná dôvera vo výkon spravodlivosti a každý z nich je viazaný európskou ľudskoprávnou úpravou garantovať stranám právo na spravodlivé súdne konanie v primeranej lehote.⁴⁴ Takýto striktný režim by ale bez tejto dôvery vo výkon spravodlivosti nedokázal existovať. Je rozumné, že v rámci ekonomickej únie založenej na jednotnom trhu a voľnom pohybe osôb (vrátane dovolenkárov) budú poškodení dovolenkári cestovať za žalovaným alebo na miesto nehody. Neprípustnosť výnimky vie byť do veľkej miery vysvetlená nevyhnutnosťou zabrániť konfliktom medzi súdmi členských štátov EÚ, čo by obmedzilo funkčnosť a efektivitu nariadenia Brusel Ia.

Čo ale v prípade, kde by podľa pravidiel nariadenia Brusel Ia mali právomoc len sudy krajiny, v ktorej by kvôli systematickým nedostatkom v justícii trvalo konanie dvadsať rokov?⁴⁵ Kým anglická úprava poskytuje takýmto žalobcom možnosť dostať svoje nároky pred anglický súd, model podľa nariadenia Brusel Ia neposkytuje súdom žiaden priestor na zohľadnenie týchto mimoriadnych okolností.⁴⁶ Z tohto pohľadu sa domnievame, že v prípadoch, keď hrozí faktické odopretie spravodlivosti, európskemu systému chýba nevyhnutná ochranná úloha.

Samozrejme, bolo by drakonické, ak by boli miestni žalovaní nútení prichádzať pred zahraničné sudy len preto, že sa ich údajné deliktne konanie týkalo turistu, ktorý môže byť

⁴² Tamže, bod 76: „*The damage of which Lady Brownlie complains has, in a very real sense, been sustained by her in this jurisdiction. She has largely endured the pain, suffering and loss of amenity consequent on her own personal injury in this jurisdiction and the financial consequences of her husband's death have also largely been sustained in this jurisdiction.*“

⁴³ Podmienka, že Anglicko musí byť najvhodnejším miestom na podanie žaloby v zmysle CPR 6.37(3) bola považovaná prvostupňovým súdom za naplnenú, čo nebolo predmetom odvolania.

⁴⁴ *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80 [2018], 1 WLR 19, bod 59 (Lord Wilson).

⁴⁵ *Pozri Pike v Indian Hotels Co Ltd* [2013] EWHC 4096 (QB). Poškodený utrpel vážne zranenia počas návštevy Indie a práve predpokladaná dĺžka konania v Indii, odhadovaná na 15 až 20 rokov, presvedčila anglický súd, aby založil svoju právomoc.

⁴⁶ To platí nielen pri priamej aplikácii nariadenia Brusel Ia, ale aj v prípadoch, keď sa medzinárodná právomoc určuje podľa vnútroštátneho práva, ktoré je koncepčne modelované podľa európskej úpravy (ako je to napríklad v prípade slovenského ZMPSaP).

odkiaľkoľvek zo sveta.⁴⁷ Žalovaní musia mať možnosť rozumne predvídať, pred súdy akého štátu budú predvolaní. Avšak zatiaľ čo úprava podľa nariadenia Brusel Ia dáva zmysel v prípadoch týkajúcich sa bežných fyzických osôb, pre ktoré by vtiahnutie do konania v cudzom štáte nebolo spravodlivé a predstavovalo by neprimeranú záťaž, táto rovnováha záujmov sa mení, pokiaľ na strane škodcu stojí veľká nadnárodná sieť, ako napríklad globálna hotelová sieť v prípade Lady Brownlie. Anglický systém je dostatočne flexibilný, aby umožnil tieto faktory zohľadniť pri rozhodovaní, či súd prijme vec na konanie.⁴⁸

4. Cestovná kancelária

Ako vyplýva z predchádzajúcej analýzy, európsky poškodený v prípade škody utrpenej na dovolenke čelí prísnejším procesným pravidlám a je v zásade nútený uplatňovať svoje nároky v zahraničí. Najdôležitejšou výnimkou v tomto prípade je, ak poškodený dokáže klasifikovať svoj nárok ako nárok zo zmluvnej zodpovednosti voči cestovnej kancelárii, napríklad v prípade existujúcej zmluvy o balíku cestovných služieb.⁴⁹

Z hľadiska medzinárodnej právomoci európskych súdov podľa nariadenia Brusel Ia sa v tomto prípade ponúka ako možnosť špeciálna úprava spotrebiteľských zmlúv. Za predpokladu, že zmluva bola uzavretá so „spotrebiteľom na účely, ktoré nie je možné považovať za súčasť jeho podnikania alebo povolania“⁵⁰ pričom druhá strana „obchoduje alebo podniká v členskom štáte bydliska spotrebiteľa alebo akýmkoľvek spôsobom smeruje takéto činnosti do tohto členského štátu alebo do viacerých štátov vrátane tohto členského štátu, a zmluva spadá o rozsahu týchto činností“,⁵¹ môže spotrebiteľ podať žalobu proti organizátorovi zájazdu na súdoch podľa miesta bydliska spotrebiteľa.⁵²

V tejto súvislosti Súdny dvor EÚ judikoval, že nariadenie Brusel Ia sa uplatňuje na všetky zmluvy o balíku cestovných služieb týkajúce sa výletov do zahraničia, a to aj v prípade, ak obe

⁴⁷ Argument predostretý najmä v disente Lorda Leggatta vo veci *Brownlie II*. Pozri *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] AC 995, body 203 – 208.

⁴⁸ Pozri najmä *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL). O schopnosti doktríny *forum (non) conveniens* reálne zabrániť uplatňovaniu exorbitantnej právomoci anglických súdov sa, samozrejme, vedie dlhodobá diskusia, čo dokazujú aj rozdielne postoje sudcov Najvyššieho súdu vo veciach *Brownlie I* a *Brownlie II*. Vzhľadom na obmedzený rozsah tohto príspevku postačuje uviesť, že sa stotožňujeme s argumentáciou väčšiny, podľa ktorej tento test predstavuje dostatočne efektívny mechanizmus. Dokáže podľa nás úspešne zabrániť založeniu právomoci v situáciách, kde je väzba sporu na Anglicko len okrajová, veľmi slabá alebo dokonca umelo vykonštruovaná.

⁴⁹ Pozri čl. 13 ods. 1 smernice Európskeho parlamentu a Rady (EÚ) 2015/2302 z 25. novembra 2015 o balíkoch cestovných služieb a spojených cestovných službách (OJ L 326, 11. 12. 2015, s. 1 – 33), podľa ktorého „[č]lenské štáty zabezpečia, aby zodpovednosť za poskytnutie cestovných služieb uvedených v zmluve o balíku cestovných služieb niesol organizátor, a to bez ohľadu na to, či tieto služby poskytne on sám alebo iní poskytovatelia cestovných služieb.“ Samotná náhrada škody je upravená v čl. 14 smernice.

⁵⁰ Čl. 17 ods. 1 nariadenia Brusel Ia.

⁵¹ Čl. 17 ods. 1 písm. c) nariadenia Brusel Ia.

⁵² Čl. 18 ods. 1 nariadenia Brusel Ia.

strany majú bydlisko v tom istom členskom štáte. Vo veci *JX proti FTI Touristik GmbH* podal spotrebiteľ s bydliskom v nemeckom Norimbergu žalobu proti organizátorovi cestovných zájazdov so sídlom v Mníchove. Žalobu podal spotrebiteľ v zmysle nariadenia Brusel Ia podľa miesta svojho bydliska. Organizátor zájazdov namietal, že miestna príslušnosť by mala byť určená podľa nemeckého práva, nakoľko ide o spor, v ktorom chýba cudzí prvok. Súdny dvor ale rozhodol, že pokiaľ sa cieľ cesty nachádza v zahraničí, spory týkajúce sa zmlúv o cestovných službách budú spadať do pôsobnosti nariadenia Brusel Ia.⁵³ Nakoľko v tomto prípade upravuje nariadenie Brusel Ia ako medzinárodnú, tak aj miestnu právomoc, spotrebiteľia môžu žalovať cestovné kancelárie aj v mieste svojho bydliska.⁵⁴ Ako uvádza Salih Okur, ide o prekvapivé rozhodnutie. Primárnym cieľom nariadenia Brusel Ia je riešiť konflikty medzinárodnej právomoci medzi členskými štátmi EÚ. V tomto spore by ale žiadny iný súd členského štátu nemohol mať právomoc a spor teda nevytváral žiaden potenciálny konflikt právomocí.⁵⁵ Je preto otázne, či Súdny dvor dospel k správnej interpretácii nariadenia. V každom prípade ale rozhodnutie nepochybne predstavuje benefit pre európskych spotrebiteľov a poskytuje im možnosť súdiť svoje nároky vyplývajúce zo zmlúv o zájazde v zahraničí na svojom domácom fóre.⁵⁶ Rozhodnutie tak predstavuje istú mitigáciu rigidity deliktých pravidiel nariadenia Brusel Ia, aj keď len v užšom okruhu prípadov týkajúcich sa spotrebiteľských zmlúv.

Záver

Nároky na náhradu škody utrpenej v zahraničí počas dovolenky predstavujú komplexnú problematiku medzinárodného práva súkromného a procesného. Ako sme v tomto príspevku naznačili, rigidná úprava, ktorá poškodeného automaticky pošle na miesto, kde škodu utrpel, nemusí byť vždy najlepším riešením. Kým v otázkach rozhodného práva ponúkajú aj európsky, aj anglický systém totožné pravidlá, ktoré kombinujú právo miesta škody s výnimkami, v oblasti medzinárodnej právomoci súdov sa tieto systémy diametrálne odlišujú. V tomto článku sme argumentovali, že kým v prípade vnútroúniyných sporov predstavuje rigidný európsky režim možno rozumné usporiadanie, to nemusí byť pravda v situáciách, kde je alternatívnym fórom nečlenský štát EÚ. Článok však končíme s varovaním, že anglická flexibilná úprava môže viesť k situáciám, v ktorých si anglické súdy založia právomoc zo sympatie voči

⁵³ Vec C-774/22 *JX proti FTI Touristik GmbH* EU:C:2024:646, bod 40.

⁵⁴ Tamže, bod 47.

⁵⁵ Okur, S. (2024, 29. júla). Travel destination in another (Member) State's territory in an otherwise purely domestic case triggers application of Art. 18(1) Brussels Ia. *Conflict of Laws.net*. <https://conflictoflaws.net/2024/travel-destination-in-another-member-states-territory-in-an-otherwise-purely-domestic-case-triggers-application-of-art-181-brussels-ia/>.

⁵⁶ Tamže.

poškodenému.⁵⁷ Z tohto dôvodu je nevyhnutné, aby súdy naozaj dôkladne zvážili rozumné očakávania a prístup k spravodlivosti všetkých strán sporu.

Bibliografia

Knižné a internetové zdroje

1. Briggs, A. (2019). *The Conflict of Laws* (4. vyd.). Oxford University Press.
2. Collins, L., & Harris, J. (Eds.). (2022). *Dicey, Morris and Collins on the Conflict of Laws* (16. vyd.). Sweet & Maxwell.
3. Csach, K., Gregová Širicová, Ľ., & Júdová, E. (2018). *Úvod do štúdia medzinárodného práva súkromného a procesného* (2. vyd.). Wolters Kluwer.
4. Okur, S. (2024, 29. júla). Travel destination in another (Member) State's territory in an otherwise purely domestic case triggers application of Art. 18(1) Brussels Ia. *Conflict of Laws.net*. <https://conflictoflaws.net/2024/travel-destination-in-another-member-states-territory-in-an-otherwise-purely-domestic-case-triggers-application-of-art-181-brussels-ia/>

Právne predpisy a medzinárodné zmluvy

5. Civil Procedure Rules (Spojené kráľovstvo).
6. Dohovor o práve použiteľnom na dopravné nehody zo 4. mája 1971 (vyhláška ministra zahraničných vecí č. 130/1976 Zb.).
7. Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019, SI 2019 No 834 (Spojené kráľovstvo).
8. Nariadenie Európskeho parlamentu a Rady (ES) č. 864/2007 z 11. júla 2007 o rozhodnom práve pre mimozmluvné záväzky (Rím II).
9. Nariadenie Európskeho parlamentu a Rady (EÚ) č. 1215/2012 z 12. decembra 2012 o právomoci a o uznávaní a výkone rozsudkov v občianskych a obchodných veciach (Brusel Ia).
10. Smernica Európskeho parlamentu a Rady (EÚ) 2015/2302 z 25. novembra 2015 o balíkoch cestovných služieb a spojených cestovných službách.
11. Zákon č. 97/1963 Zb. o medzinárodnom práve súkromnom a procesnom.

Judikatúra Súdneho dvora EÚ

12. Vec C-281/02 *Andrew Owusu proti N. B. Jackson* (EU:C:2005:120).
13. Vec C-364/93 *Antonio Marinari proti Lloyds Bank plc a Zubaidi Trading Company* (EU:C:1995:289).
14. Vec C-774/22 *JX proti FTI Touristik GmbH* (EU:C:2024:646).
15. Vec C-343/19 *Verein für Konsumenteninformation proti Volkswagen AG* (EU:C:2020:534).
16. Vec C-189/08 *Zuid-Chemie BV proti Philippo 's Mineralenfabriek NV/SA* (EU:C:2009:475).

Judikatúra súdov Spojeného kráľovstva

17. *Airbus Industrie GIE v Patel* [1999] 1 AC 119.
18. *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 WLR 19.
19. *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] AC 995.
20. *Pike v Indian Hotels Co Ltd* [2013] EWHC 4096 (QB).
21. *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL).

⁵⁷ Pozri najmä dissent Lorda Leggatta vo veci *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] AC 995, body 203 – 208.

LIMITY OCHRANY TRETÍCH OSÔB PRI MODIFIKÁCII BEZPODIELOVÉHO SPOLUVLASTNÍCTVA MANŽELOV

Limits on the protection of third parties in the modification of joint ownership of spouses

FILIP HALUŠKA*

Abstrakt

Príspevok analyzuje problematiku zákonných limitov ochrany tretích osôb pri modifikácii bezpodielového spoluvlastníctva manželov. Autor zároveň rozoberá podstatu inštitútu bezpodielového spoluvlastníctva manželov a možnosti jeho modifikácie. Cieľom článku je rozobrať fungovanie ochrany tretích osôb pri úpravách BSM a načrtnúť možné nedostatky v tejto oblasti. V obsahu príspevku autor popisuje rozdelenie zákonnej ochrany tretích osôb. Vysvetľuje problematiku vnútorných vzťahov medzi manželmi pri výkone práv a povinností vyplývajúcich z bezpodielového spoluvlastníctva manželov. Ďalej je v článku rozoberaná problematika ochrany tretích osôb smerom navonok, a to od podmienok platnosti dohody manželov o modifikácii bezpodielového spoluvlastníctva voči tretím osobám, ako aj skutočnosti, kedy tieto osoby budú môcť namietať neplatnosť takýchto dohôd vykonanými manželmi.

Abstract

The article analyzes the issue of legal limits on the protection of third parties in the modification of joint marital property. The author also examines the nature of the institution of joint marital property and the possibilities for its modification. The aim of the article is to examine the functioning of third-party protection in the context of modifications to joint marital property and to outline potential shortcomings in this area. In the article, the author describes the scope of statutory third-party protection. He explains the issues surrounding internal relations between spouses in the exercise of rights and obligations arising from joint marital property. The article further examines the issue of the protection of third parties vis-à-vis external parties, ranging from the conditions for the validity of a spouses' agreement to modify joint property ownership vis-à-vis third parties, to the circumstances under which such third parties may challenge the validity of such agreements entered into by the spouses.

Kľúčové slová: Bezpodielové spoluvlastníctvo manželov. Ochrana tretích osôb. Modifikácia bezpodielového spoluvlastníctva manželov. Občianske právo. Rodinné právo.

Key words: Joint ownership of spouses. Protection of third parties. Modification of joint ownership of spouses. Civil law. Family law.

Úvod

Význam bezpodielového spoluvlastníctva manželov v Slovenskej republike je nezanedbateľný, nakoľko sa s ním manželia stretávajú v každodennom živote. Je všeobecne známe, že *Občiansky zákonník* umožňuje určité možnosti modifikácie tohto inštitútu upravujúceho majetkové vzťahy manželov, avšak prináša to viaceré otázky v oblasti ochrany tretích osôb stojacich mimo manželstva.

* Mgr. Filip Haluška, 1. ročník, denný doktorand, 3. stupeň vysokoškolského štúdia, filip.haluska@umb.sk, Katedra občianskeho a pracovného práva Právnickej fakulty Univerzity Mateja Bela v Banskej Bystrici

Manželia ako osoby v manželskom zväzku disponujú určitými právami a povinnosťami navzájom, avšak týmito právnymi vzťahmi disponujú aj voči tretím osobám, ktoré vystupujú naproti nim. Ako teda občianske právo chráni tieto osoby pred možným ukrátením zo strany manželov prostredníctvom modifikácie bezpodielového spoluvlastníctva?

Cieľom príspevku je analyzovať limity ochrany tretích osôb pri modifikácii bezpodielového spoluvlastníctva manželov, vysvetliť fungovanie ochrany tretích osôb pri úpravách BSM a načrtnúť možné nedostatky v tejto oblasti.

V príspevku bola využitá metóda analýzy, a to najmä pri skúmaní inštitútu bezpodielového spoluvlastníctva manželov, ako aj pri analýze ochrany iných osôb. Ďalej sa v texte využívala metóda komparácie pri porovnávaní právnej ochrany v Občianskom zákonníku. Rovnako bola použitá aj metóda čiastočnej indukcie pri analyzovaní judikatúry súdov.

1 Bezpodielové spoluvlastníctvo manželov a jeho modifikácia

Bezpodielové spoluvlastníctvo manželov (ďalej aj ako „BSM“) je upravené v ustanoveniach *Občianskeho zákonníka*, zákon č. 40/1964 Zb. (ďalej aj ako „OZ“), konkrétne medzi § 143 – 151. Uvedený inštitút sa vyznačuje najmä dvomi charakteristickými znakmi a to *bezpodielovosťou* a *viazanosťou na manželstvo*. Prvý pojmový znak, ktorým je bezpodielovosť vyplýva zo skutočnosti, že po vzniku bezpodielového spoluvlastníctva manželov nie je možné vyjadrovať mieru účasti manželov na výkone vlastníckych práv a povinností k tu patriacim veciam prostredníctvom podielov, pričom obe osoby v manželskom zväzku požívajú rovnaké vlastnícke práva k týmto veciam. Viazanosť existencie BSM na manželstvo reflektuje skutočnosť, že bez trvania manželského zväzku by nemohol existovať ani rozoberaný inštitút vlastníckeho práva. Najdôležitejšia funkcia BSM spočíva v zabezpečovaní majetkových potrieb manželov a ich rodiny počas trvania manželstva.¹

Predmet bezpodielového spoluvlastníctva tvoria všetky veci, ktoré môžu byť podľa OZ predmetom vlastníckeho práva, avšak ani tu nie je možné zaradiť všetky veci nadobudnuté manželmi počas trvania manželského zväzku.² Výnimky, ktoré nemožno zaradiť ako veci patriace do bezpodielového spoluvlastníctva manželov charakterizuje priamo Občiansky zákonník; sú to nasledovné veci: veci získané dedičstvom alebo darom, veci osobnej potreby niektorého manžela, veci slúžiace na výkon povolania manžela a veci nadobudnuté na základe

¹ CIRÁK, J., DOLÍHALOVÁ, M., KUBOŠIOVÁ, D., TAKÁČ, J.: *Bezpodielové spoluvlastníctvo manželov*. Banská Bystrica : UMB Belanium, 2021, s. 11

² VOJČÍK, P. a kolektív: *Občianske právo hmotné I*. Plzeň : Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., 2021, s. 325

právnych predpisov o reštitúcii.³ Obsah BSM tvoria práva a povinnosti, ktoré je možné vyvodit' z obsahu vlastníckeho práva k veci. Jednak ho tvoria práva a povinnosti manželov k veciam a majetkovým hodnotám v BSM, a zároveň ho tvoria práva a povinnosti, ktorými manželia spoločne disponujú voči tretím, respektíve ostatným osobám nachádzajúcim sa mimo manželstva.⁴ Samotné bezpodielové manželstvo vystupuje v našom právnom poriadku ako akýsi zákonom „predvolený,“ alebo teda predpokladaný právny režim upravujúci majetkové práva manželov. Cieľom tohto inštitútu je upevniť spoločné rodinné a majetkové záujmy manželov a prispievať k solidarite a rovnoprávnosti medzi manželmi.⁵

Priamo zo zákona vyplýva možnosť manželov upraviť si rozsah bezpodielového spoluvlastníctva. Manželia si môžu dohodou rozšíriť alebo zúžiť rozsah bezpodielového spoluvlastníctva, okrem toho je možné, aby sa dohodli na skutočnosti, že BSM vznikne ku dňu zániku manželstva alebo si môžu modifikovať pravidlá správy spoločného majetku. V uvedených prípadoch umožňuje základný právny predpis súkromného práva osobám v manželskom zväzku odchyliť sa od zákonnej úpravy len v zákonom vymedzených hraniciach.⁶ Takáto forma modifikácie musí spĺňať zákonom predpísanú podobu, taktiež sa vyžaduje aby bola uzavretá vo forme notárskej zápisnice. Všetky uvedené spôsoby úpravy bezpodielového spoluvlastníctva sú platné len do budúcnosti a záväzné len medzi manželmi.⁷

2 Ochrana tretích osôb pri úprave bezpodielového spoluvlastníctva manželov medzi manželmi

Osoby stojace mimo manželského zväzku sa zvyknú označovať ako tretie osoby, nakoľko sa jedná o osoby, ktoré nijakým spôsobom nezasahujú do vnútorných záležitostí manželov. Na základe skôr uvedených informácií ohľadom obsahu bezpodielového spoluvlastníctva je jednoznačné, že manželia vystupujú spoločne a nerozdielne voči týmto osobám, rovnako aj tieto osoby disponujú určitými oprávneniami a povinnosťami voči osobám v manželskom zväzku.

³ Pozri Občiansky zákonník, zákon č. 40/1964 Zb.

⁴ VOJČÍK, P. a kolektív: *Občianske právo hmotné I.* Plzeň : Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., 2021, s. 330

⁵ ŠTEVČEK, M., DULAK, A., BAJÁNKOVÁ, J., FEČÍK, M., SEDLAČKO, F., TOMAŠOVIČ, M. A KOL.: *Občiansky zákonník I. §1 – 450. Komentár.* Praha : C. H. Beck, 2015, s. 1008

⁶ TAKÁČ, J.: *Modifikácia bezpodielového spoluvlastníctva manželov a jeho zánik za trvania manželstva. Druhé, prepracované a rozšírenie vydanie* [online]. Banská Bystrica : Vydavateľstvo Univerzity Mateja Bela v Banskej Bystrici – Belianum, 2023 .s. 27, [cit. 2026-01-08]

⁷ Tamže, s. 28

Pri všetkých vyššie v texte uvedených druhoch modifikácie BSM sa rozlišuje účinnosť týchto dohôd na účinnosť dohody medzi manželmi a účinnosť dohody voči tretím stranám.⁸ Pri otázke účinnosti dohôd o modifikácii bezpodielového spoluvlastníctva sa názory právnych odborníkov odlišujú v tom, či do tohto typu dohôd patrí majetok nadobudnutý len do budúcnosti, alebo aj majetok, ktorý buď nadobudli osoby v manželskom zväzku pred uzavretím tejto dohody, ako aj majetok, ktorý nadobudol niektorý z manželov pred uzavretím samotného manželstva.⁹

Prvý spôsob ochrany tretích osôb sa nachádza už pri ustanoveniach o obsahu bezpodielového spoluvlastníctva, nakoľko sa pri výkone vzájomných práv a povinností manželov ich úkony rozdeľujú na „bežné“ a „ostatné veci“. Rozdiel je v skutočnosti, že pri výkone bežných vecí nie je nutné, aby niektorý z manželov disponoval predchádzajúcim súhlasom druhej osoby v tomto zväzku. Ako príklad možno uviesť nákup potravín do domácnosti.¹⁰ Jedná sa predovšetkým o „...obstarávanie bežných potrieb rodiny a domácnosti, v rozsahu primeranom pomerom v akých rodina žije, obstarávanie bežných opráv v domácnosti a plnenie obvyklých a platobných povinností, ...“¹¹

Naproti tomu, za bežné veci sa nepovažujú úkony na základe ktorých sa prevádza vlastnícke právo k veciam patriacim do bezpodielového spoluvlastníctva alebo obmedzovanie takýchto práv k týmto predmetom. Rovnako, nie je možné bez súhlasu druhého manžela veci v BSM dať do zálohy alebo zaťažiť takúto vec právom tretej osoby.¹² V tomto prípade je možné konštatovať, že sa jedná o ostatné veci, respektíve o „nebežné veci“, kde je nutné pri nakladaní s nimi disponovať súhlasom druhého manžela. Rovnako aj pri iných úkonoch v rámci hospodárenia s majetkom patriacim do masy bezpodielového spoluvlastníctva manželov bude nutný súhlas oboch osôb v manželskom zväzku na ich vykonaní. Typický príklad „nebežných vecí“ sú nákupy väčšieho investičného charakteru ako kúpa nehnuteľnosti, automobilu a podobne. V rámci vzťahu manželov ako osôb vystupujúcich v BSM, vystupujú tieto osoby spoločne a nerozdielne, teda ako solidárni dlžníci, a zároveň aj solidárni veritelia.¹³

⁸ HOLEČKA, M., ŠÚRYOVÁ, M.: *Bezpodielové spoluvlastníctvo manželov a podnikanie – Odborný poradca pri riešení situácií pri bezpodielovom spoluvlastníctve manželov*. Bratislava : Verlag Dashöfer, 2009, s. 40

⁹ HOLEČKA, M., ŠÚRYOVÁ, M.: *Bezpodielové spoluvlastníctvo manželov a podnikanie – Odborný poradca pri riešení situácií pri bezpodielovom spoluvlastníctve manželov*. Bratislava : Verlag Dashöfer, 2009, s. 41

¹⁰ VOJČÍK, P. a kolektív: *Občianske právo hmotné 1*. Plzeň : Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., 2021, s. 331

¹¹ VOJČÍK, P. a kolektív: *Občianske právo hmotné 1*. Plzeň : Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., 2021, s. 331

¹² Tamže, s. 331

¹³ VOJČÍK, P. a kolektív: *Občianske právo hmotné 1*. Plzeň : Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., 2021, s. 332

Prvý spôsob ochrany tretích osôb pri výkone vnútorných práv a povinností manželov voči osobám nachádzajúcim sa mimo manželstva sa snaží o to, aby v prípade významných právnych skutočností bola zhoda oboch manželov na výkone takýchto právnych úkonov. Na základe uvedeného možno konštatovať, že v prípade, ak niektorý manžel vykoná takto relatívne neplatný právny úkon, tak tretia osoba, ktorá by bola ukrátená sa môže domáhať neplatnosti právneho úkonu. Je dôležité aby manželia aj v tomto smere konali spoločne a nerozdielne.

3 Limity ochrany tretích osôb navonok pri modifikácii BSM

Všetky dohody prostredníctvom ktorých sa modifikuje bezpodielové spoluvlastníctvo sa vyznačujú skutočnosťou, že manželia sa môžu voči inej osobe odvolávať na text týchto dohôd len v prípade, ak týmto osobám je obsah uvedenej dohody známy.¹⁴ Inými slovami povedané, zákon chráni osoby stojace mimo manželstva pred nepriaznivými účinkami, ktoré môžu vyplývať z úpravy podoby BSM podľa § 143a Občianskeho zákonníka. Takéto nepriaznivé dohody by pre tretie osoby mohli mať za následok sťaženie ich uspokojenia alebo by mohla nastať situácia, kedy by manželia mohli získať prospech na ich úkor.¹⁵ Samotné účinky modifikácie bezpodielového spoluvlastníctva manželov môžeme rozlíšiť podľa spôsobu ktorým sa modifikoval tento inštitút vlastníckeho práva. Pri zúžení rozsahu BSM sa považuje za tretiu osobu, ten subjekt ktorého sa uvedená dohoda dotýka spôsobom, že ho môže ukrátiť na svojich právach voči manželom.¹⁶ Zmyslom rozoberaného ustanovenia OZ je snaha o ochranu majetkových práv osôb stojacich mimo manželstva, no zároveň sa tu prejavuje snaha zákonodarcu o obmedzenie, respektíve zamedzenie účelových dohôd manželov za cieľom znemožnenia uspokojovania pohľadávky veriteľa z majetku nachádzajúceho sa v BSM.¹⁷ Podľa rozhodnutia Najvyššieho súdu Českej republiky (ďalej aj ako „NS ČR“), nie je z právneho hľadiska významná skutočnosť, či osoba, ktorej sa zúženie BSM dotýka uzavrela dohodu na základe ktorej vznikol právny vzťah pred modifikáciou BSM, podstatná je akákoľvek vedomosť inej osoby o tom, že ovplyvnila jej postavenie.¹⁸

Pri otázke času sa môže manžel odvolať na dohodu o modifikácii bezpodielového spoluvlastníctva len v tom prípade, ak bola naplnená podmienka, že oprávnená tretia osoba bola

¹⁴ ŠTEVČEK, M., DULAK, A., BAJÁNKOVÁ, J., FEČÍK, M., SEDLAČKO, F., TOMAŠOVIČ, M. A KOL.: Občiansky zákonník I. §1 – 450. Komentár. Praha : C. H. Beck, 2015, s. 1047

¹⁵ ZMEKOVÁ, I.: *Bezpodielové spoluvlastníctvo manželov – Vybrané otázky aplikačnej praxe*. Bratislava : IURIS LUBRI, spol. s.r.o., 2018, s. 131

¹⁶ ZMEKOVÁ, I.: *Bezpodielové spoluvlastníctvo manželov – Vybrané otázky aplikačnej praxe*. Bratislava : IURIS LUBRI, spol. s.r.o., 2018, s. 131

¹⁷ Tamže, s. 132

¹⁸ Rozhodnutie Najvyššieho súdu Českej republiky sp. zn. 22 Cdo 1593/2004

o obsahu takejto dohody informovaná najneskôr ku dňu vzniku pohľadávky. Avšak oprávnenej osobe z pohľadávky manželov (alebo niektorého z nich) môže byť obsah dohody o modifikácii bezpodielového spoluvlastníctva manželov známy len za predpokladu, že takáto dohoda už existovala v čase vzniku vymáhanej pohľadávky.¹⁹ Ak by nastala situácia, podľa ktorej pohľadávka vznikla pred úpravou BSM, tak v prípade exekúcie, by sa jej vykonanie vzťahovalo aj na majetok, ktorý bol predmetom tejto dohody. V tomto prípade nebude právne dôležité, či oprávnená osoba bola informovaná o obsahu dohody o modifikácii bezpodielového spoluvlastníctva ku dňu začatia exekučného konania.²⁰

Judikatúra hovorí o tom, že nie je právne zásadné, či dohoda o modifikácii bola uzatvorená pred vznikom právneho vzťahu niektorého z manželov alebo aj oboch manželov k inej osobe, alebo neskôr. Najdôležitejšou a rozhodujúcou skutočnosťou je akákoľvek vedomosť tretej osoby o dohode, ktorou sa upravovala podoba BSM, pričom táto modifikácia by mohla mať za následok ovplyvnenie jej práv.²¹ V tejto súvislosti sa zvykne uvádzať zápis dohody tohto druhu na liste vlastníctva evidovanom katastrom nehnuteľností. V uvedenom prípade, nie je naplnená informačná povinnosť manželov, nakoľko je potrebné inú osobu oboznámiť s obsahom dohody po právnej, ale aj faktickej stránke.²²

Jedným z pretrvávajúcich problémov pri ochrane iných osôb voči dohodám o úprave bezpodielového spoluvlastníctva manželov je skutočnosť, že na území Slovenskej republiky neexistuje žiadny register, kde by sa dohody tohto druhu ukladali a následne zverejňovali. V susednej Českej republike bol zavedený tzv. „Zoznam listín o manželskom majetkovom režime vedený Notárskou komorou Českej republiky“. Zavedenie takéhoto zoznamu spôsobilo to, že v prípade ak takáto dohoda o modifikácii spoločného jmění manželů bola zaregistrovaná do tohto registru, tak povinnosť zistiť a vyhľadať skutočnosti o existencii takejto zmluvy medzi manželmi prechádza na tretie osoby, resp. veriteľov. Na druhej strane, veritelia majú k dispozícii informácie o tom, či ich záväzok zaväzuje oboch alebo iba jedného z manželov.²³

Taktiež na zvýšenie ochrany tretích osôb občianske právo pozná zásadu princípu dobrej viery v súkromnom práve postihujúcou osoby, ktoré zneužili práva alebo nekonali v dobrej

¹⁹ FEKETE, I.: *Občiansky zákonník. 2. zväzok (Vecné práva, Zodpovednosť za škodu a za bezdôvodné obohatenie). Veľký komentár, 2. aktualizované a rozšírené vydanie*. Bratislava : Eurokódex, 2015, s. 335

²⁰ Rozhodnutie Najvyššieho súdu Českej republiky sp. zn. 20. Cdo 279/2003

²¹ ŠTEVČEK, M., DULAK, A., BAJÁNKOVÁ, J., FEČÍK, M., SEDLAČKO, F., TOMAŠOVIČ, M. A KOL.: *Občiansky zákonník I. §1 – 450. Komentár*. Praha : C. H. Beck, 2015, s. 1047

²² ZMEKOVÁ, I.: *Bezpodielové spoluvlastníctvo manželov – Vybrané otázky aplikačnej praxe*. Bratislava : IURIS LUBRI, spol. s.r.o., 2018, s. 132

²³ *Seznam listin o manželském majetkovém režimu*. [online]. <https://www.nkcr.cz/>. Dostupné na internete <https://www.nkcr.cz/sluzby/rodina-majetek-a-ochrana-prav/seznam-listin-o-manzelskem-majetkovem-rezimu> [cit. 2026-02-07]

viere.²⁴ Naproti tomu sa v súkromnom práve vyskytuje zásada zmluvnej voľnosti, ktorá vyjadruje úplnú zmluvnú autonómiu osôb vôle, podľa ktorej osoby môžu slobodne rozhodovať o tom akú zmluvu uzatvoria, avšak takáto dohoda musí byť v súlade so zákonom.²⁵

Záver

Bezpodielové spoluvlastníctvo manželov sa vyznačuje najmä dvomi charakteristickými znakmi, a to *bezpodielovosťou* a *viazanosťou na manželstvo*. Napriek skutočnosti, že jeho predmetom sú všetky veci, ktoré môžu byť predmetom vlastníckeho práva, existujú aj určité výnimky, ktoré do bezpodielového spoluvlastníctva manželov nepatria. Obsah bezpodielového spoluvlastníctva manželov tvoria práva a povinnosti, ktoré je možné vyvodiť z obsahu vlastníckeho práva k veci. Jednak ho tvoria práva a povinnosti manželov k veciam a majetkovým hodnotám v BSM, a po druhé ich tvoria práva a povinnosti, ktorými manželia disponujú voči iným osobám nachádzajúcim sa mimo manželstva. Zákon umožňuje manželom upraviť si rozsah bezpodielového spoluvlastníctva, pričom takáto modifikácia musí spĺňať zákonom predpísanú podobu a musí byť uzavretá vo forme notárskej zápisnice. V tomto smere sa javí ako dôležitá skutočnosť, že pre všetky dohody, ktorými je možné modifikovať BSM, platí, že manželia sa môžu voči inej osobe, respektíve tretej osobe, odvolávať na takúto dohodu len v tom prípade, ak je týmto osobám obsah dohody známy. Pri všetkých druhoch modifikácie BSM je potrebné rozlišovať medzi účinnosťou dohody medzi manželmi a účinnosť dohody voči tretím osobám. V tejto oblasti stále nie je jednoznačná zhoda právnych teoretikov, najmä pokiaľ ide o otázku rozsahu majetku zahrnutého do takýchto dohôd. Bolo by vhodné, keby zákonodarca vyriešil uvedené jednoznačnou právnou úpravou, nakoľko aj v tomto smere uniká ochrana osôb nachádzajúcich sa mimo manželstva.

Prvým druhom ochrany tretích osôb je rozdelenie úkonov manželov na „bežné“ a „ostatné veci“. Manželia vystupujú voči iným osobám spoločne a nerozdielne, teda ako solidárni dlžníci, a zároveň aj solidárni veritelia. Tento spôsob ochrany sa snaží o to, aby v prípade významných právnych skutočností bola zhoda oboch manželov na výkone takýchto právnych úkonov. Zákon prípadné konanie niektorého manžela nad rámec jeho oprávnení sankcionuje relatívnou neplatnosťou právneho úkonu.

Pri ochrane osôb stojacich mimo manželstva sa manželia sa môžu voči tretej osobe odvolávať na text dohody len v prípade, ak je týmto osobám obsah uvedenej dohody známy.

²⁴ VOJČÍK, P. a kolektív: *Občianske právo hmotné 1*. Plzeň : Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., 2021, s. 21

²⁵ Tamže, s. 21

Uvedená skutočnosť je vzhľadom na význam ochrany manželov najdôležitejšou informáciou pri rozoberanej problematike. V otázke času existencie pohľadávky, môže byť oprávnenému obsah dohody o úprave bezpodielového spoluvlastníctva známy len za predpokladu, že takáto dohoda už existovala v čase vzniku vymáhanej pohľadávky. Nie je tu právne dôležité, či oprávnená osoba bola informovaná o obsahu dohody o modifikácii BSM ku dňu začatia výkonu plnenia tejto pohľadávky.

Jedným z pretrvávajúcich problémov pri ochrane iných osôb voči dohodám o úprave bezpodielového spoluvlastníctva manželov je, že na území Slovenskej republiky neexistuje žiadny register, kde by sa dohody tohto druhu ukladali a následne zverejňovali. Na zvýšenie ochrany tretích osôb pozná občianske právo aj všeobecné zásady, ktoré tiež môžu dopomôcť ukráteným osobám k oprávnenej náprave. V súčasnosti je ochrana tretích osôb pri modifikácii bezpodielového spoluvlastníctva manželov na dosť vysokej úrovni. Samozrejme, sú tu isté problémy, podobná situácia môže nastať, aj v prípade informatívnosti osôb. Otázka teda znie, či je aktuálna právna úprava o stanovení limitu ochrany týchto osôb dostatočná?

Zoznam použitej literatúry

Knižné publikácie a monografie

1. CIRÁK, J., DOLÍHALOVÁ, M., KUBOŠIOVÁ, D., TAKÁČ, J.: *Bezpodielové spoluvlastníctvo manželov*. Banská Bystrica : UMB Belanium, 2021, 74 s., ISBN 978-80-557-1839-2
2. FEKETE, I.: *Občiansky zákonník. 2. zväzok (Vecné práva, Zodpovednosť za škodu a za bezdôvodné obohatenie). Veľký komentár, 2. aktualizované a rozšírené vydanie*. Bratislava : Eurokódex, 2015, 901 s. ISBN 978-80-8155-040-9
3. HOLEČKA, M., ŠURYOVÁ, M.: *Bezpodielové spoluvlastníctvo manželov a podnikanie – Odborný poradca pri riešení situácií pri bezpodielovom spoluvlastníctve manželov*. Bratislava : Verlag Dashöfer, 2009, 72 s.
4. ŠTEVČEK, M., DULAK, A., BAJÁNKOVÁ, J., FEČÍK, M., SEDLAČKO, F., TOMAŠOVIČ, M. A KOL.: *Občiansky zákonník I. §1 – 450. Komentár*. Praha : C. H. Beck, 2015, 1616 s. ISBN 978-80-7400-597-8
5. TAKÁČ, J.: *Modifikácia bezpodielového spoluvlastníctva manželov a jeho zánik za trvania manželstva. Druhé, prepracované a rozšírenie vydanie* [online]. Banská Bystrica : Vydavateľstvo Univerzity Mateja Bela v Banskej Bystrici – Belianum, 2023. 144 s. ISBN 978-80-557-2039-5. Dostupné na: <https://doi.org/10.24040/2023.9788055720395>
6. VOJČÍK, P. a kolektív: *Občianske právo hmotné I*. Plzeň : Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., 2021, 395 s. ISBN 978-80-7380-845-7
7. ZMEKOVÁ, I.: *Bezpodielové spoluvlastníctvo manželov – Výbrané otázky aplikačnej praxe*. Bratislava : IURIS LUBRI, spol. s.r.o., 2018, 315 s., ISBN 978-80-89635-37-5

Právne predpisy

8. Občiansky zákonník, 40/1964 Zb.

Judikatura

9. Rozhodnutie Najvyššieho súdu Českej republiky sp. zn. 20. Cdo 279/2003
10. Rozhodnutie Najvyššieho súdu Českej republiky sp. zn. 22 Cdo 1593/2004

Internet

11. *Seznam listin o manželském majetkovém režimu*. [online]. <https://www.nkcr.cz/>. Dostupné na internete <https://www.nkcr.cz/sluzby/rodina-majetek-a-ochrana-prav/seznam-listin-o-manželskem-majetkovem-rezimu> [cit. 2026-02-07]

NIČOTNOSŤ UZNESENIA VALNÉHO ZHROMAŽDENIA AKO FANTÓM OBCHODNÉHO PRÁVA

The nullity of a general meeting resolution as a phantom of commercial law

MARIA GOLUBIEVA*

Abstrakt

Ničotnosť uznesenia valného zhromaždenia predstavuje najzávažnejšiu formu jeho právnej vady uznesenia, pri ktorej rozhodnutie nie je schopné vyvolať žiadne právne účinky a hľadá sa naň, akoby vôbec nebolo prijaté. Práca analyzuje súčasnú právnu úpravu, ktorá ničotnosť výslovne neupravuje, a preto jej kontúry vyplývajú najmä z judikatúry a doktrínálneho výkladu. Pozornosť sa venuje aj rekodifikačným tendenciám v oblasti súkromného práva, ktoré smerujú k zjednoteniu režimu neplatnosti rozhodnutí orgánov právnických osôb, avšak ničotnosť ponechávajú mimo explicitnej regulácie. Na tomto základe sa identifikujú aplikačné problémy, najmä nejasná hranica medzi neplatnosťou a ničotnosťou, ich odlišné právne následky a dopad na právnu istotu účastníkov korporáčnych vzťahov. Cieľom je poukázať na praktické dôsledky ničotnosti pre spoločnosť, spoločníkov a tretie osoby a zároveň prispieť k presnejšiemu vymedzeniu tohto inštitútu v slovenskom obchodnom práve.

Abstract

The nullity of a general meeting resolution constitutes the most serious form of legal defect in a resolution, whereby the decision has no legal effect and is treated as if it had never been adopted. This paper analyzes the current legal framework, which does not expressly regulate nullity; consequently, its contours are derived primarily from case law and doctrinal interpretation. Attention is also given to recodification trends in private law, which aim to unify the rules governing the invalidity of decisions made by the governing bodies of legal entities, while leaving nullity outside the scope of explicit regulation. On this basis, practical issues are identified, particularly the unclear distinction between invalidity and nullity, their differing legal consequences, and their impact on the legal certainty of parties to corporate relationships. The aim is to highlight the practical consequences of nullity for the company, shareholders, and third parties, while also contributing to a more precise definition of this concept in Slovak commercial law.

Kľúčové slová: *Ničotnosť. Neplatnosť. Zrušiteľnosť. Uznesenie valného zhromaždenia. Právny úkon. Rekodifikácia.*

Key words: *Nullity. Invalidity. Revocability. Resolution of the general meeting. Legal act. Recodification.*

Úvod

Ničotnosť uznesenia valného zhromaždenia predstavuje jeden z najzáhadnejších javov korporáčného práva, jav, ktorý akoby sa pohyboval medzi bytím a ničotou. Uznesenie je prijaté, no nie je schopné vyvolať právne účinky. Ničotné uznesenie sa tak stáva akýmsi fantómom obchodného práva. Formálne sa objaví v zápisnici, môže vyvolať reakcie spoločníkov či tretích osôb, no z hľadiska právneho účinku je prázdne a v istom zmysle neexistujúce. Práve táto ambivalentná povaha robí z ničotnosti mimoriadne citlivý inštitút, ktorý si vyžaduje presné

* Bc. Maria Golubieva, 1. ročník, dennej formy, magisterského stupňa štúdia, maria.golubieva@gmail.com

vymedzenie, aby nedochádzalo k erózii právnej istoty, ani k neprimeranému rozširovaniu možností spochybňovať rozhodnutia orgánov spoločnosti.

1. Nie je prejav vôle ako prejav vôle

Otázka, či možno uznesenie valného zhromaždenia obchodnej spoločnosti (ďalej aj ako „uznesenie“) považovať za právny úkon, predstavuje akúsi „shakespearovskú dilemu“ obchodného práva, tému, ktorá už desaťročia vyvoláva diskusie naprieč právnickou obcou a napriek rozsiahlej odbornej debate stále nemá jednoznačné riešenie.

Prvý myšlienkový prúd odmieta priznať uzneseniu povahu právneho úkonu. Vychádza z premisy, že v danom prípade chýba subjekt práva, ktorý by prejavil svoju vôľu. Valné zhromaždenie nedisponuje kompetenciou uskutočňovať právne úkony v mene spoločnosti (Štenglová, Dedič, 1999), danú funkciu plní štatutárny orgán. Aj v jeho prípade však nejde o prejav vôle samotného štatutára, ale o prejav vôle spoločnosti ako právnickej osoby. V neprospech kvalifikácie uznesenia ako právneho úkonu sa uvádza aj to, že valné zhromaždenie nemá právnu subjektivitu, a teda ani spôsobilosť na právne úkony (Števček et al., 2008). Na túto argumentáciu reaguje Hlušák, ktorý upozorňuje, že nepriamy prejav vôle nie je v právnom poriadku žiadnou anomáliou, stačí sa pozrieť na inštitút zastúpenia (Hlušák, 2022).

Môžeme sa stretnúť aj s menej kategorickým nazeraním na danú problematiku, kde uznesenie nie je len aktom kreovania vôle, ale ide o prejav vôle s právnymi účinkami. Nakoľko sa rozhodnutie pričíta spoločnosti, ide aj o rozhodnutie spoločnosti ako takej (Ovečková et al., 2020). Podľa Eliáša uznesenie valného zhromaždenia spĺňa všetky náležitosti právneho úkonu a zdôrazňuje, že Obchodný zákonník priznáva valnému zhromaždeniu pôsobnosť nielen vôľu formovať, ale aj ju prejaviť (Eliáš, 1999).

Dôležité pri posudzovaní či uznesenie možno považovať za právny úkon je aj rozlíšiť, kedy je rozhodnutie spôsobilé samo osebe zakladať práva a povinnosti a vyvolávať právne následky. Je totiž zásadný rozdiel, medzi uznesením, ktorým sa len vyjadruje vďaka odchádzajúcemu konateľovi (Hlušák, 2022) a uznesením, ktorým sa rozhodne o jeho odvolaní.

Hoci sa môže zdať, že ide o čisto teoretickú otázku, jej praktický význam je neprehliadnuteľný. Odpoveď na to, či uznesenie valného zhromaždenia možno považovať za právny úkon, totiž priamo určuje, aký právny režim sa pri jeho preskúvaní použije. Ak by bola uzneseniu priznaná povaha právneho úkonu, bolo by nevyhnutné následne preskúmať, do akej miery sa naň premietajú pravidlá zákona č. 40/1964 Občiansky zákonník v znení

neskorších predpisov (ďalej len ako Občiansky zákonník) o právnych úkonoch a ich neplatnosti.

Obava, že priznanie povahy právneho úkonu uzneseniam valného zhromaždenia by otvorilo priestor na neobmedzené uplatňovanie všeobecnej neplatnosti podľa Občianskeho zákonníka, je naozaj legitímna. Takýto scenár by mohol narušiť predvídateľnosť a stabilitu nevyhnutnú pre fungovanie obchodných spoločností a preto je pre korporáčné právo nežiadúci.

Zároveň však platí, že takémuto riziku možno účinne predísť dôsledným uplatnením princípu *lex specialis derogat legi generali*, ktorý by zabezpečil, že osobitná úprava zákona č. 513/1991 Obchodný zákonník v znení neskorších predpisov (ďalej len ako Obchodný zákonník) by mala prednosť pred všeobecnými pravidlami občianskeho práva (Hlušák, 2023).

V odborných diskusiách je pluralita názorov prirodzená a neraz aj žiadúca, no judikatúra sa v záujme zachovania právnej istoty musela prikloniť k jednotnému riešeniu. V tejto otázke je dlhodobo konzistentná a stabilne zastáva názor, že uznesenie valného zhromaždenia nemožno považovať za právny úkon (napríklad rozhodnutie Najvyššieho súdu Slovenskej republiky, sp. zn. 4 Obdo 22/98)

2. Kde končí neplatnosť a začína ničotnosť?

Počas fungovania obchodnej spoločnosti možno očakávať, že niektoré uznesenia valného zhromaždenia budú trpieť vadami. Zákonodarca s touto možnosťou počítal a osobitne upravil možnosť domáhať sa neplatnosti uznesenia.

Podmienky, za ktorých možno dosiahnuť určenie neplatnosti uznesenia valného zhromaždenia, upravuje § 131 Obchodného zákonníka (v prípade akciových spoločností sa uplatní § 183 Obchodného zákonníka). Z tohto ustanovenia vyplýva, že aktívne legitimované subjekty sa môžu domáhať súdnej ochrany vtedy, ak je uznesenie v rozpore so zákonom, spoločenskou zmluvou alebo stanovami spoločnosti. Táto úprava však nepokrýva všetky možné dôvody neplatnosti.

Zákon zároveň stanovuje trojmesačnú lehotu na podanie návrhu na určenie neplatnosti uznesenia. Ak oprávnená osoba v tejto lehote svoje právo neuplatní, jej oprávnenie zaniká a uznesenie sa považuje za nezvratne platné. Práve existencia tejto prekluzívnej lehoty a potreba iniciatívy zo strany oprávneného subjektu spôsobujú, že neplatnosť uznesenia má povahu relatívnej neplatnosti (Števček et al., 2019), hoci judikatúra Najvyššieho súdu Slovenskej republiky (ďalej aj ako Najvyššieho súdu SR) opakovane zdôrazňuje, že uznesenie nie je právnym úkonom v pravom slova zmysle.

Pre uchopenie pojmu ničotnosti je potrebné ju najskôr odlíšiť od absolútnej neplatnosti, keďže tieto dva inštitúty môžu na prvý pohľad splývať a spôsobovať zmätočnosť. Absolútna neplatnosť nastupuje automaticky *ex lege*, pričom od počiatku a bez ohľadu na to, či sa jej niekto dovoľá. Právny úkon síce formálne vznikne, no pre svoju závažnú vadu nie je spôsobilý vyvolať žiadne právne účinky. Pri ničotnosti samotný právny úkon ani nevznikne. Pôjde napríklad o situáciu, keď chýba základný predpoklad právne relevantného konania, napríklad keď „rozhodnutie“ prijme subjekt, ktorý vôbec nie je orgánom spoločnosti. V takom prípade nedáva zmysel uvažovať o platnosti či neplatnosti, pretože právne konanie sa jednoducho neuskutočnilo (Eliáš, 2023). Takto chápaná ničotnosť predstavuje kvalitatívne odlišnú kategóriu od neplatnosti. Kým neplatnosť koriguje vadný prejav vôle, ničotnosť konštatuje, že žiadna vôľa vôbec prejavená nebola.

3. Stav *de lege lata*

Dôsledkom záveru, že uznesenie valného zhromaždenia nemožno považovať za právny úkon, bolo vylúčenie použitia všeobecnej úpravy neplatnosti podľa Občianskeho zákonníka. Týmto prístupom si však súdna prax zúžila manévrovací priestor, vytvorila si rámec, ktorý nedokáže pokryť všetky situácie, na ktoré osobitná úprava neplatnosti v Obchodnom zákonníku nepamätá. Vznikla tak potreba hľadať alternatívny mechanizmus, ktorý by umožnil reagovať na prípady, v ktorých je vada uznesenia natoľko závažná, že ju nemožno podriadiť len režimu relatívnej neplatnosti. Práve tu sa objavuje konštrukt ničotnosti ako korektív, ktorý má vyplňať medzery tam, kde „špeciálna neplatnosť“ podľa Obchodného zákonníka nedokáže poskytnúť adekvátne riešenie.

Kým dôvody neplatnosti uznesenia valného zhromaždenia sú v právnej úprave pomerne jasne vymedzené - môžu vyplývať z vád zvolania, vád hlasovania alebo vád obsahu prijatého uznesenia, z rozporu obsahu uznesenia s kogentným zákonným ustanovením alebo ustanovením spoločenskej zmluvy (Ďurica et al., 2024) - dôvody ničotnosti musíme hľadať v judikatúre.

Pomyselným „oknom“ do sveta ničotnosti sa stal rozsudok Najvyššieho súdu Českej republiky sp. zn. 32Cdo 500/200 z 1. júna. 2000. Práve v tomto rozhodnutí súd po prvýkrát jasne identifikoval situáciu, ktorá môže viesť k ničotnosti uznesenia a to keď valné zhromaždenie rozhoduje mimo svoju pôsobnosť. Kľúčovým je v tomto smere § 125 Obchodného zákonníka, ktorý rámcuje rozsah pôsobnosti valného zhromaždenia. Nakoľko ide o umelo vytvorený konštrukt práva, pozná len to, čo mu umožňuje zákon (Valentinovič, 2024).

V praxi však hranica medzi tým, čo ešte patrí do pôsobnosti valného zhromaždenia a čo už nie, nemusí byť vždy jednoznačná.

Druhým dôvodom ničotnosti, ktorý sa postupne vykryštalizoval z judikatúry, je situácia, keď uznesenie prijme iný orgán, než je valné zhromaždenie. Vhodný na ilustráciu je prípad, keď dozorná rada rozhodne o vymenovaní konateľa napriek tomu, že to patrí do výlučnej pôsobnosti valného zhromaždenia (Valentinovič, 2024).

Do tretej skupiny patria ďalšie mimoriadne závažné nedostatky, ktoré znemožňujú považovať výsledok za právne relevantný prejav vôle, typicky úplná nezrozumiteľnosť prijatého aktu alebo hrubé porušenie kogentnej právnej normy (Eliáš, 2023).

4. *Quo vadis?*

Rekodifikačný návrh mení pravidlá hry a prelamuje doteraz ustálený názor, podľa ktorého uznesenie valného zhromaždenia nemá povahu právneho úkonu (Ministerstvo spravodlivosti, 2022). Zároveň sa však, napriek tomuto koncepčnému obratu, nepoužije všeobecná úprava neplatnosti právneho úkonu ako by sa mohlo na prvý pohľad zdať. Návrh osobitne upravuje neplatnosť a zrušiteľnosť rozhodnutia orgánu právnickej osoby (Ministerstvo spravodlivosti, 2025). Daná duplicita bola v rámci pripomienkových vyjadrení kritizovaná, keďže jedným z hlavných cieľov rekodifikácie bolo práve odstránenie dvojkoľajnosti medzi občianskoprávnou a obchodnoprávnou úpravou.

V rámci navrhovaného riešenia nedostatkov rozhodnutí, navrhovaná úprava výrazne favorizuje zrušiteľnosť, nakoľko ide o najmenej invazívny zásah do obchodnoprávných vzťahov. Zrušiteľnosť sa viaže najmä na vady spočívajúce v porušení zákona či vnútorného predpisu, pričom ide o nedostatky, ktoré sú konvalidovateľné, ak by s nimi dotknutá osoba súhlasila.

Neplatnosť postihuje len najzávažnejšie, nekonvalidovateľné nedostatky, ako je napríklad porušenie kogentných ustanovení zákona, teda ide o také porušenia, pri ktorých nepostačuje možnosť zrušiteľnosti (Ministerstvo spravodlivosti, 2025). Na rozdiel od súčasnej úpravy neplatnosti v Obchodnom zákonníku nastáva neplatnosť *ex lege*, nie sú vymedzené aktívne legitimované subjekty a dokonca nie je ani obmedzená lehota, čím sa svojou povahou približuje k absolútnej neplatnosti. Na jednej strane to umožňuje širšie uplatnenie neplatnosti a to aj na prípady, na ktoré sa doteraz využíval inštitút ničotnosti, na druhej strane však neexistencia časového limitu predstavuje zásah do stability fungovania spoločnosti. Rovnako absentuje zákonná úprava, ktorá by explicitne zabezpečovala ochranu práv nadobudnutých

v dobrej viere tretími osobami, ako to poznáme z § 131 Obchodného zákonníka, čo môže v praxi vyvolať neistotu.

Zaujímavým momentom návrhu je zaradenie prekročenia pôsobnosti medzi dôvody neplatnosti, hoci logicky by to mohlo smerovať až k ničotnosti. Dôvodom je praktická potreba, aby súd posúdil obsah vnútorných predpisov spoločnosti, ktoré môžu pôsobnosť jednotlivých orgánov upravovať.

Pokiaľ ide o samotnú ničotnosť, návrh zvolil priam šalamúnske riešenie, keď uviedol, že „nemožno upraviť všetko, čo rozhodnutím nie je“ (Ministerstvo spravodlivosti, 2022). Daným spôsobom elegantne obchádza potrebu explicitnej kodifikácie ničotnosti a zároveň ponecháva priestor pre judikátorne dotváranie daného pojmu.

Záver

Súčasná právna úprava zreteľne uprednostňuje osobitný režim neplatnosti podľa § 131 OBZ (Ústavný súd Slovenskej republiky, 2014), čo je do istej miery pochopiteľné, nakoľko primárnou funkciou obchodného práva je chrániť stabilitu podnikateľského prostredia. Aj preto je odborná diskusia sprevádzaná značnou opatrnosťou pri úvahách o aplikovaní všeobecných účinkov neplatnosti, či prípadnej kodifikácii ničotnosti. Príliš široké uplatnenie týchto inštitútov by mohlo narušiť vnútornú stabilitu spoločnosti a oslabiť predvídateľnosť právnych vzťahov, ktorá je pre podnikateľské prostredie kľúčová.

Na druhej strane však existujú vady natoľko závažné, že ich nemožno tolerovať prostredníctvom konvalidácie uplynutím prekluzívnej lehoty. Práve v týchto výnimočných situáciách je potrebná korekcia v podobe ničotnosti, ktorá zabraňuje tomu, aby právne defektné „rozhodnutie“ nadobudlo účinky len preto, že nebolo včas napadnuté.

Aj keď zákonná úprava ničotnosti sa zatiaľ nepredpokladá, jej doktrínálne a judikátorne precizovanie je nevyhnutné pre posilnenie právnej istoty a predvídateľnosti korporčných vzťahov. Rekodifikačný návrh sa pritom prikláňa k modernej koncepcii, podľa ktorej by neplatnosť mala predstavovať výnimočnú situáciu, zatiaľ čo zrušiteľnosť je štandardným následkom väd rozhodnutia, pričom ochrana právnej istoty a stability vnútorných pomerov právnickej osoby má prednosť pred automatickým rušením prijatých rozhodnutí. Tento prístup reflektuje potrebu chrániť právne vzťahy založené na rozhodnutiach orgánov, ktoré často pôsobia navonok a vyvolávajú významné právne následky a zároveň zdôrazňuje, že zásahy do ich účinnosti musia byť primerané, uvážené a rešpektujúce autonómiu korporčného rozhodovania.

Zoznam bibliografických odkazov

Monografie a zborníky resp. state v nich uverejnené

1. Csach, K., Havel, B., & Žitňanská, L. (2023). *Korporační spory*. Wolters Kluwer.
2. Ďurica, M. a kol. (2024). *Obchodné právo I. Všeobecné ustanovenia. Obchodné spoločnosti a družstvo*. Vysokoškolská učebnica. Belianum.
3. Eliáš, K. (1999). K právni povaze usnesení valné hromady. In *Právní rozhledy*, (vol. 12).
4. Ovečková, O., Csach, K., Žitňanská, L. (2020). *Obchodné právo 2. Obchodné spoločnosti a družstvo*. Wolters Kluwer
5. Patakyová, M. a kol. (2022). *Obchodný zákonník*. Komentár. C. H. Beck.
6. Pokorná, J. (1999). Několik úvah k právni povaze usnesení valné hromady. In *Právní rozhledy*, (vol. 12).
7. Števček, M., Dulak, A., Bajánková, J., Fečík, M., Sedlačko, F., & Tomašovič, M. (2019). *Občiansky zákonník I.: § 1-450: Komentár (2nd ed.)*. C.H. Beck.

Články v e-časopise

8. Hlušák, M. (2022). Právna povaha uznesenia valného zhromaždenia obchodných spoločností. *Súkromné právo*, 5. <https://www.legalis.sk/clanky/3045/pravna-povaha-uznesenia-valneho-zhromazdenia-obchodnych-spolocnosti>
9. Valentinovič, J. (2024). Česká judikatura ničotnosti uznesenia valného zhromaždenia. *Súkromné právo*, 2. <https://www.legalis.sk/clanky/4181/ceska-judikatura-nicotnosti-uznesenia-valneho-zhromazdenia>
10. Šuleková, Ž. (2016). Ničotnosť uznesení valného zhromaždenia obchodnej spoločnosti – posun v slovenskej judikatúre?. *Súkromné právo*, 1. <https://www.legalis.sk/clanky/132/nicotnost-uzneseni-valneho-zhromazdenia-obchodnej-spolocnosti-posun-v-slovenskej-judikature>

Internetové zdroje

11. Ministerstvo spravodlivosti. (2025). Návrh občianskeho zákonníka. <https://www.justice.gov.sk/dokumenty/2025/09/Navrh-Obcianskeho-zakonnika.pdf>
12. Ministerstvo spravodlivosti. (2022). Prvá diskusia o návrhu právnej úpravy právnických osôb súkromného práva: „Rozhodnutia orgánov právnických osôb“ <https://www.justice.gov.sk/dokumenty/2022/08/Diskusia-Pravnicke-osoby-2022-01-Rozhodnutia-organov-1.pdf>
13. Ministerstvo spravodlivosti. (2022). Odôvodnenie k návrhu občianskeho zákonníka. <https://www.justice.gov.sk/dokumenty/2022/08/1.1.2.3-Pravnicke-osoby-20220209-odovodnenie.pdf>

Právne predpisy

14. Zákon č. 40/1964 Občiansky zákonník v znení neskorších predpisov.
15. Zákon č. 513/1991 Obchodný zákonník v znení neskorších predpisov.

Judikatúra

16. Uznesenie Najvyššieho súdu Slovenskej republiky sp. zn. 3 Obdo 2/2022 zo dňa 24.02.2022.
17. Rozsudok Najvyššieho súdu Slovenskej republiky sp. zn. 4 Obdo 22/98 zo dňa 01.01.1998.
18. Rozsudok Najvyššieho súdu Českej republiky sp.zn. 32 Cdo 500/200 zo dňa 01.06.2000.
19. Uznesenie Najvyššieho súdu Českej republiky sp. zn. 29 Cdo 986/2007 zo dňa 24.09.2008.

DEDENIE INVESTIČNÝCH NEHNUTEĽNOSTÍ S CUDZÍM PRVKOM

Succession Of Investment Real Estate With A Foreign Element

MICHAELA FEDÁKOVÁ*

Abstrakt

Príspevok sa zaoberá právnou úpravou dedenia investičných nehnuteľností s cudzím prvkom v kontexte slovenského a európskeho medzinárodného práva súkromného. Pozornosť sústreďuje na osobitosti investičných nehnuteľností ako majetkového objektu, ktorého dedenie v cezhraničných situáciách vyvoláva zvýšené nároky na určenie rozhodného práva a právomoci príslušných orgánov. Cieľom príspevku je poukázať na rozdiely medzi právnou úpravou platnou pred prijatím nariadenia (EÚ) č. 650/2012 a právnym stavom po jeho nadobudnutí aplikovateľnosti, a to osobitne vo vzťahu k investičným nehnuteľnostiam. Príspevok vychádza zo systematického rozboru normatívnej úpravy obsiahnutej v nariadení (EÚ) č. 650/2012 a v zákone č. 97/1963 Zb. o medzinárodnom práve súkromnom a procesnom.

Abstract

The article examines the legal framework governing the succession of investment real estate involving a foreign element in the context of Slovak and European private international law. It focuses on the specific nature of investment real estate as a category of property whose succession in cross-border situations raises increased demands regarding the determination of applicable law and jurisdiction. The aim of the article is to identify the differences between the legal framework applicable before the adoption of Regulation (EU) No 650/2012 and the legal framework applicable after it became operative, with particular regard to investment real estate. The article is based on a systematic analysis of the normative framework laid down in Regulation (EU) No 650/2012 and Act No. 97/1963 Coll. on Private International Law and Procedure.

Kľúčové slová: Dedenie s cudzím prvkom. Investičná nehnuteľnosť. Rozhodné právo. Právomoc. Nariadenie (EÚ) č. 650/2012.

Key words: Succession with a foreign element. Investment real estate. Applicable law. Jurisdiction. Regulation (EU) No. 650/2012.

Úvod

Migrácia obyvateľstva naprieč Európou je javom, ktorý má dlhodobé historické korene. V období socialistického zriadenia však bol voľný pohyb osôb výrazne obmedzený, pričom popri potláčaní súkromného vlastníctva dochádzalo aj k zásahom do možnosti slobodne sa usadzovať a nadobúdať majetok v zahraničí. Hoci nebolo úplne vylúčené, aby jednotlivci vycestovali za prácou a v cudzine sa natrvalo usadili, išlo skôr o výnimočné situácie než o bežný spoločenský jav. Zlomovým momentom sa stal rok 1989, ktorý priniesol zásadné uvoľnenie pohybu osôb, a následne vstup Slovenskej republiky do Európskej únie, v dôsledku ktorého došlo k výraznému zjednodušeniu mobility občanov. S rozšírením možností cestovania a usádzania sa v zahraničí začali jednotlivci vo zvýšenej miere presúvať centrum svojich životných a ekonomických záujmov mimo územia Slovenskej republiky, pričom si súčasne

* Bc. Michaela Fedáková. 1. ročník, externá forma, II. stupeň štúdia. michaela.fedakova@student.umb.sk, Právnická fakulta, Univerzita Mateja Bela v Banskej Bystrici

zachovávali majetkové väzby k domovskému štátu. Sloboda pohybu tak neovplyvnila len osobné a pracovné pomery, ale významným spôsobom sa premietla aj do majetkových vzťahov.

V súčasnosti už nie je výnimočné, že osoba s trvalým alebo obvyklým pobytom na Slovensku vlastní nehnuteľný majetok nielen na jeho území, ale aj v zahraničí. Práve v tomto kontexte nadobúdajú význam tzv. investičné nehnuteľnosti, ktoré predstavujú stabilný investičný nástroj s dlhodobým výnosovým potenciálom. Ich popularitu posilnil najmä vývoj finančného trhu, dostupnosť hypotekárnych úverov a relatívna stabilita realitného sektora. V praxi sa však pozornosť investorov sústreďuje predovšetkým na ekonomické aspekty investície, najmä na očakávaný výnos a časový horizont zhodnotenia vložených prostriedkov, pričom právne dôsledky nadobúdania a držby tohto majetku zostávajú často v úzadí.

Otázka právneho osudu takéhoto majetku v prípade smrti vlastníka však zostáva často na okraji záujmu, a to najmä v situáciách, keď poručiteľ vlastní nehnuteľnosti nachádzajúce sa v rôznych štátoch. Osobitné zameranie príspevku na investičné nehnuteľnosti vyplýva zo skutočnosti, že práve pri tomto type majetku sa typicky rozchádza miesto umiestnenia nehnuteľnosti s obvyklým pobytom poručiteľa. Na rozdiel od nehnuteľností určených na vlastné bývanie, pri ktorých sa spravidla predpokladá zhoda medzi miestom bývania poručiteľa a štátom, v ktorom sa nehnuteľnosť nachádza, investičné nehnuteľnosti prirodzene vytvárajú cezhraničný prvok a otvárajú otázky rozhodného práva a právomoci v dedičských veciach. Práve dedenie investičných nehnuteľností s cudzím prvkom predstavuje právne komplexnú oblasť, v ktorej sa prelínajú otázky rozhodného práva, právomoci a procesnej efektívnosti dedičského konania.¹

Tento príspevok vychádza z predpokladu, že investičná nehnuteľnosť predstavuje v dedičských vzťahoch osobitne citlivý majetkový objekt, a to nielen vzhľadom na svoju ekonomickú hodnotu, ale najmä pre praktické dôsledky jej nadobudnutia a následnej správy. V cezhraničných situáciách sa tieto dôsledky zosilňujú existenciou cudzieho prvku, ktorý zásadným spôsobom ovplyvňuje určenie právomoci a rozhodného práva, a tým aj predvídateľnosť a efektívnosť dedičského konania.²

¹ European Commission, *Improving internal labour mobility in Slovakia*, Brussels, (2014)

² European Commission, Directorate-General for Economic and Financial Affairs, *Housing in the European Union: Market Developments, Underlying Drivers, and Policies*, European Economy Discussion Paper 228, Luxembourg: Publications Office of the European Union, (2025)

1. Investičná nehnuteľnosť ako objekt dedičských vzťahov s cudzím prvkom

1.1 Vymedzenie pojmu investičná nehnuteľnosť

Bývanie možno vnímať ako špecifický druh statku, ktorý funguje v trhovom prostredí a ktorého cenu formuje vzájomná interakcia dopytu a ponuky. Pri prevažujúcom dopyte nad ponukou dochádza k rastu cien nehnuteľností, zatiaľ čo pri prebytku ponuky ceny klesajú. V súčasných podmienkach má bývanie charakter súkromného statku, keďže vlastníctvo alebo užívanie nehnuteľnosti je spojené s právom na súkromie. Nehnuteľnosti zároveň patria medzi najkomplexnejšie investičné produkty na trhu, keďže sa vyznačujú výraznou rôznorodosťou a prakticky neobmedzeným množstvom rozdielnych vlastností. Jednotlivé nehnuteľnosti sa odlišujú nielen dispozičnými a technickými parametrami, ako sú veľkosť úžitkovej plochy, počet a rozloha miestností, architektonické riešenie, vek stavby či kvalita použitých materiálov, ale aj stavebno-technickým stavom. Rozdielnosť nehnuteľností je ďalej ovplyvnená ich vybavením, vnútorným, ako aj vonkajším, napríklad existenciou balkóna, garáže, záhrady, dielne alebo bazéna. Významnú úlohu zohráva aj lokalita, najmä kvalita okolitého prostredia, sociálna štruktúra obyvateľstva, dopravná dostupnosť, vzdialenosť od centra obce a dostupnosť občianskej vybavenosti, vrátane sociálnych, kultúrnych a zdravotníckych zariadení. V súčasných ekonomických podmienkach disponuje značná časť obyvateľstva finančnými prostriedkami, ktoré nie sú bezprostredne určené na spotrebu, a preto sa vlastníci týchto prostriedkov zaoberajú otázkou ich efektívneho zhodnotenia. Tradičné formy uloženia kapitálu, ponúkané najmä bankovými a nebankovými inštitúciami, síce poskytujú určitú mieru bezpečnosti, avšak spravidla neprinášajú výraznejšie výnosy. Voľba konkrétneho investičného nástroja pritom vždy súvisí s mierou rizika, keďže vyšší potenciálny výnos je spravidla spojený s vyššou mierou neistoty. Jednou z najrozšírenejších foriem investovania sú investície do nehnuteľností, predovšetkým do rezidenčných nehnuteľností určených na bývanie, ako sú bytové jednotky a rodinné domy. Tieto typy nehnuteľností spĺňajú základnú ľudskú potrebu bývania a zároveň predstavujú relatívne stabilnú investičnú príležitosť. Na účely tohto príspevku sa za investičnú nehnuteľnosť považuje taká nehnuteľnosť, ktorú vlastník nenadobúda primárne za účelom uspokojovania vlastnej bytovej potreby, ale najmä za účelom dlhodobého zhodnotenia kapitálu, dosahovania výnosu z nájmu alebo uchovania majetkovej hodnoty.³

³ Lux, M., & Sunega, P. (2006). *Jak dobře investovat do bydlení*. s. 134-137

1.2 Nehnuteľnosť ako špecifický predmet dedenia

Smrťou fyzickej osoby dochádza k zániku jej spôsobilosti mať práva a povinnosti, a tým aj k zániku jej právnej subjektivity. Práva a povinnosti, ktoré boli viazané na osobu poručiteľa počas jeho života, však nemajú po jeho smrti jednotný osud. Ich ďalšia existencia, zánik alebo prechod na iné osoby závisí od ich povahy, ako aj od dôvodov a spôsobu, akým boli na poručiteľa viazané. Niektoré práva a povinnosti zanikajú smrťou, iné sa stávajú predmetom dedenia a môžu prejsť na dedičov. Právna úprava dedenia rieši okrem samotného prechodu majetkových práv a povinností aj širší okruh otázok súvisiacich so smrťou fyzickej osoby, najmä určenie predmetu dedičstva, okruhu dedičov, možnosti vylúčenia potomkov z dedenia, ako aj procesný postup v dedičskom konaní. Tieto otázky tvoria základný rámec dedičského práva a predstavujú východisko pre ďalšie právne posudzovanie majetkových vzťahov vznikajúcich v dôsledku úmrtia osoby.⁴

Investičná nehnuteľnosť má z pohľadu medzinárodného práva súkromného osobitné postavenie preto, že pri nej spravidla nevystupuje iba obytná funkcia, ale výraznejšie sa prejavuje aj jej ekonomický a výnosový rozmer. Práve tento aspekt spôsobuje, že vlastník takejto nehnuteľnosti často nemá k miestu jej polohy rovnakú osobnú väzbu, akú má pri nehnuteľnosti slúžiacej na vlastné bývanie. V cezhraničných pomeroch sa preto pri investičných nehnuteľnostiach častejšie otvára otázka, či je rozhodujúca väzba na osobu poručiteľa alebo na štát, v ktorom sa majetok nachádza.⁵

Osobitosť nehnuteľností sa v medzinárodnom práve súkromnom tradične spájala s ich silnou väzbou na územie konkrétneho štátu. Aj preto sa v starších kolíznych modeloch pri dedení nehnuteľností presadzovalo odlišné riešenie než pri ostatnom majetku a vznikal priestor na rozštiepenie dedičského štatútu. Nehnuteľnosť teda nebola vnímaná len ako jedna zo zložiek dedičstva, ale ako majetok, pri ktorom štát dlhodobo trval na silnejšej väzbe k vlastnému právnemu poriadku.⁶

Tento osobitný prístup sa prejavil aj vo vnútroštátnej úprave právomoci. Zákon č. 97/1963 Zb. priznával slovenským orgánom právomoc prejednať dedičstvo po cudzincovi, ak išlo o nehnuteľnosti nachádzajúce sa na území Slovenskej republiky, čím výslovne potvrdzoval osobitný význam miesta polohy nehnuteľnosti aj z hľadiska právomoci, čo zvýrazňovalo ich špecifické postavenie v dedičských veciach s cudzím prvkom.⁷

⁴ Gandžalová, D. (2024). *Predpoklady dedenia*. s. 3

⁵ Lysina, P. a kol. (2023). *Medzinárodné právo súkromné*. s.339-340

⁶ Lysina, P. a kol. (2023). *Medzinárodné právo súkromné*. s.339-344

⁷ zákon č. 97/1963 Zb., § 45 ods. 1 písm. c)

Nariadenie (EÚ) č. 650/2012 nadviazalo na potrebu posudzovať dedenie ako celok a výrazne obmedzilo predchádzajúce rozlišovanie medzi jednotlivými zložkami majetku. Jeho cieľom však nie je upraviť všetky otázky späté s nehnuteľnosťami v najširšom zmysle, ale určiť, podľa akého práva sa má dedenie ako celok spravovať. Pri investičných nehnuteľnostiach je preto potrebné odlišovať dedičskoprávny prechod majetku od ďalších otázok, ktoré už nespádajú do jadra kolíznej úpravy dedenia. Ide najmä o otázky evidencie práv k nehnuteľnostiam, registračných postupov alebo ďalšie vecnoprávne účinky. Tieto otázky sa totiž principiálne nespravujú režimom rozhodným pre dedenie podľa nariadenia (EÚ) č. 650/2012, ale podliehajú osobitnému právnomu režimu, keďže sú z jeho vecného rozsahu vylúčené. Aj pri investičných nehnuteľnostiach preto treba odlišovať samotné dedičskoprávne nadobudnutie majetku od následných otázok jeho evidencie a vecnoprávných účinkov.⁸

1.3 Vznik cudzieho prvku v dedičských vzťahoch

Pokiaľ dedičská vec neobsahuje cudzí prvok, nevzniká potreba aplikovať normy medzinárodného práva súkromného. Ak má poručiteľ obvyklý pobyt v Slovenskej republike, majetok sa nachádza na jej území a dedičská vec nevykazuje väzbu na iný právny poriadok, dedenie sa spravuje výlučne vnútroštátnym právom. Cudzí prvok je preto podmienkou, aby vôbec vznikla otázka rozhodného práva a právomoci v medzinárodnom zmysle.⁹

Pri investičnej nehnuteľnosti je potrebné výslovne uviesť, že jej investičný charakter sám o sebe ešte nepredstavuje cudzí prvok. Cudzí prvok vzniká až vtedy, keď sa predmet dedenia, poručiteľ alebo iný relevantný prvok dedičskej veci viaže na iný štát. Práve pri investičných nehnuteľnostiach však takáto situácia nastáva častejšie, pretože vlastník spravidla nebýva v štáte, v ktorom sa nehnuteľnosť nachádza, ale drží ju ako majetok určený na zhodnotenie alebo výnos. Z tohto dôvodu investičná nehnuteľnosť typicky vytvára priestor pre vznik dedičskej veci s medzinárodným prvkom.¹⁰

Z pohľadu súčasnej unijnej úpravy má následne zásadný význam obvyklý pobyt poručiteľa v čase smrti, keďže práve tento určovací moment tvorí základ všeobecného pravidla pre určenie rozhodného práva. V modelovej situácii, na ktorú je tento článok zameraný, teda pri poručiteľovi s obvyklým pobytom v Slovenskej republike a investičnou nehnuteľnosťou v zahraničí, vzniká cudzí prvok práve z dôvodu umiestnenia nehnuteľnosti mimo štátu obvyklého pobytu poručiteľa, nie z dôvodu samotnej investičnej povahy majetku.¹¹

⁸ Nariadenie (EÚ) č. 650/2012, čl. 1 ods. 2 písm. k) a l), odôvodnenia 18 a 19

⁹ Lysina, P. a kol. (2023). *Medzinárodné právo súkromné*. s.13-16

¹⁰ Hačková, T. (2015). *Justičná revue*.

¹¹ Nariadenie (EÚ) č. 650/2012, čl. 21 ods. 1.

Osobitný význam tejto situácie spočíva v tom, že nehnuteľnosti boli tradične vnímané ako majetok s výraznou väzbou na štát ich umiestnenia, čo sa v starších kolíznych modeloch prejavovalo aj v odlišnom riešení dedenia nehnuteľností oproti ostatnému majetku. Práve preto bolo v dedičských veciach potrebné odlišovať rozštiepenie dedičského štatútu od paralelných konaní: prvé predstavovalo hmotnoprávny problém rôznych rozhodných práv, druhé procesný dôsledok rozdielnej právomoci orgánov viacerých štátov.¹²

Treba zároveň prihliadať na to, že ani po prijatí nariadenia nemožno cezhraničný rozmer dedičských vecí redukovať len na vzťahy medzi všetkými členskými štátmi Európskej únie. Samotné nariadenie výslovne uvádza, že sa na jeho prijatí nezúčastnili Dánsko a Írsko, a preto má význam rozlišovať medzi členským štátom viazaným nariadením, neviazaným členským štátom a tretím štátom. Aj z tohto dôvodu musí byť existencia cudzieho prvku v dedičskej veci v texte vyjadrená presne a nie len všeobecným odkazom na „zahraničnú nehnuteľnosť“.¹³

2. Právna úprava dedenia nehnuteľností s cudzím prvkom v období pred prijatím nariadenia (EÚ) č. 650/2012

2.1 Východiská právnej úpravy

Pred prijatím nariadenia (EÚ) č. 650/2012 sa dedičské vzťahy s cudzím prvkom v slovenskom právnom prostredí spravovali predovšetkým zákonom č. 97/1963 Zb. o medzinárodnom práve súkromnom a procesnom, ak sa neuplatnila medzinárodná zmluva, ktorou bola Slovenská republika viazaná. Dedičské právne pomery sa pritom podľa § 17 tohto zákona spravovali právnym poriadkom štátu, ktorého bol poručiteľ príslušníkom v čase smrti, takže základným kolíznym kritériom bola štátna príslušnosť poručiteľa.¹⁴

2.2 Osobitné postavenie nehnuteľností a význam pre investičnú nehnuteľnosť

V predchádzajúcej právnej úprave mala osobitný význam aj právomoc slovenských orgánov pri dedení nehnuteľností. V odbornej literatúre k dedeniu s medzinárodným prvkom sa uvádza, že slovenský súd prejedná dedičstvo po cudzincovi vždy, ak ide o nehnuteľnosti ležiace na území Slovenskej republiky, a zároveň že právomoc slovenského súdu je daná vždy, ak bol poručiteľ v čase smrti slovenským občanom. Pri cezhraničnom dedení sa tak pri nehnuteľnostiach zvyčajne zdôrazňoval význam štátneho občianstva poručiteľa aj miesta, kde sa

¹² CSACH, K. – KRÁLIK, O. (2018). Úvod do štúdia medzinárodného práva súkromného a procesného. s. 16-20.

¹³ Nariadenie (EÚ) č. 650/2012, odôvodnenia 82 a 83)

¹⁴ Pozri § 17, Zákon č. 97/1963 Zb. o medzinárodnom práve súkromnom a procesnom

nehnuteľnosť nachádza. Pre dedenie investičných nehnuteľností mal tento stav osobitný význam. Práve pri tomto type majetku totiž často dochádza k rozchodu medzi osobnou väzbou poručiteľa k jednému štátu a majetkovou väzbou k štátu, v ktorom sa nehnuteľnosť nachádza. Ak sa dedičské právne pomery viazali na štátnu príslušnosť poručiteľa a zároveň sa pri nehnuteľnostiach zvýrazňoval význam ich polohy, zvyšovalo to nároky na procesné usporiadanie dedičskej veci a na určenie právomoci príslušných orgánov. Pri investičných nehnuteľnostiach sa preto ešte výraznejšie prejavovala praktická citlivosť dedenia s cudzím prvkom.¹⁵

Procesný rozmer predchádzajúcej právnej úpravy potvrdzovali aj ustanovenia upravujúce právomoc slovenských orgánov v dedičských veciach s cudzím prvkom. Staršiu právnu úpravu preto nemožno redukovať len na otázku rozhodného práva, keďže popri kolíznej úprave bolo potrebné samostatne posudzovať aj to, ktorý štát má právomoc dedičskú vec prejednať. V cezhraničných prípadoch tak vznikalo prepojenie medzi osobným štatútom poručiteľa, miestom polohy nehnuteľnosti a právomocou príslušných orgánov, čo zvyšovalo právnu aj procesnú zložitosť dedenia nehnuteľností s cudzím prvkom.¹⁶

3. Právna úprava dedenia nehnuteľností s cudzím prvkom podľa nariadenia (EÚ) č. 650/2012

3.1 Konceptná zmena kolízneho prístupu k dedeniu s cudzím prvkom

Nariadenie (EÚ) č. 650/2012 predstavuje zásadnú konceptnú zmenu v úprave dedenia s cudzím prvkom, keď posilňuje princíp jednoty dedičstva a koncentráciu dedičskej veci do jedného právneho režimu. Jeho význam sa pri investičných nehnuteľnostiach prejavuje najmä v rovine právomoci, keďže orgány jedného členského štátu môžu rozhodovať o dedičstve ako celku aj vo vzťahu k majetku nachádzajúcemu sa v inom členskom štáte viazanom nariadením. Tým sa odstraňuje potreba viesť samostatné dedičské konania v každom štáte, v ktorom sa nehnuteľnosť nachádza, čo bolo pre predchádzajúcu aplikačnú prax typické.¹⁷

3.2 Rozhodné právo a voľba práva ako nástroj právnej istoty investičného dedičstva

¹⁵ GANDŽALOVÁ, D. (2024) *Predpoklady dedenia*. s. 12

¹⁶ Pozri § 44-45, Zákon č. 97/1963 Zb. o medzinárodnom práve súkromnom a procesnom

¹⁷ HAČKOVÁ, T.: Dedenie s medzinárodným prvkom v EÚ – nové nariadenie EÚ. *Justičná revue*, 2015, roč. 67, č. 6–7, s. 857–868.

Základným pravidlom určenia rozhodného práva podľa nariadenia (EÚ) č. 650/2012 je aplikácia práva štátu, v ktorom mal poručiteľ v čase smrti svoj obvyklý pobyt. Toto riešenie umožňuje zohľadniť skutočné centrum životných záujmov poručiteľa a zabezpečiť, aby sa celé dedičstvo, vrátane nehnuteľností nachádzajúcich sa v zahraničí, spravovalo jednotným právnym poriadkom. V kontexte investičných nehnuteľností to prispieva k vyššej miere predvídateľnosti dedičských vzťahov a znižuje riziko kolízií medzi viacerými právnymi poriadkami. Nariadenie zároveň umožňuje poručiteľovi vykonať voľbu práva, a to v prospech právneho poriadku štátu, ktorého je štátnym príslušníkom. Táto možnosť posilňuje autonómiu vôle poručiteľa a vytvára priestor pre vedomé právne plánovanie dedičstva, najmä v prípadoch, keď má poručiteľ investičné nehnuteľnosti umiestnené v rôznych štátoch alebo keď sa jeho obvyklý pobyt v priebehu života menil. Uplatnenie jednotného rozhodného práva má priamy dopad na rozsah dedičstva, určenie dedičov, ako aj na prechod práv a povinností k investičným nehnuteľnostiam. Právny poriadok určený podľa nariadenia sa použije na dedičstvo ako celok, čím sa zabezpečuje konzistentné posúdenie právnych vzťahov súvisiacich s investičným majetkom poručiteľa bez ohľadu na jeho geografické rozmiestnenie, v rozsahu pôsobnosti nariadenia a s prihliadnutím na postavenie štátov, ktoré ním nie sú viazané.¹⁸

3.3 Jednotná právomoc a obmedzenia uplatnenia rozhodného práva vo vzťahu k nehnuteľnostiam

Nariadenie (EÚ) č. 650/2012 zavádza princíp jednotnej právomoci, podľa ktorého sú na prejednanie dedičstva príslušné súdy štátu obvyklého pobytu poručiteľa v čase smrti. Koncentrácia dedičského konania do jedného štátu prispieva k procesnej efektívnosti a znižuje riziko paralelných konaní, ktoré boli typické pre právnu úpravu pred rokom 2015, najmä pri dedení nehnuteľností nachádzajúcich sa v zahraničí. Nariadenie neupravuje hmotnoprávne postavenie poručiteľa, dedičov a ďalších osôb majúcich práva k pozostalosti, ale rieši najmä to, orgány ktorého štátu budú oprávnené konať v dedičskej veci s cezhraničným prvkom a podľa práva ktorého štátu budú pri prejednaní dedičstva postupovať. Práve v tomto rámci sa pri dedení investičných nehnuteľností osobitne prejavuje význam úpravy právomoci, keďže majetok poručiteľa sa môže nachádzať vo viacerých členských štátoch. Tento efekt sa však prejavuje predovšetkým v rámci štátov viazaných nariadením (EÚ) č. 650/2012, a preto ho nemožno bez

¹⁸ Pozri článok 21-23 Nariadenia (EÚ) č. 650/2012

d'alšieho prenášať na nečlenské štáty ani na členské štáty, ktoré sa na prijatí nariadenia nezúčastnili.¹⁹

Praktickým nástrojom uľahčujúcim preukazovanie dedičských práv v cezhraničných situáciách je európske dedičské osvedčenie, ktoré umožňuje dedičom, odkazovníkom alebo správcom dedičstva preukazovať ich postavenie v inom členskom štáte bez potreby osobitných vnútroštátnych konaní. Jeho využitie má význam aj pri dedení nehnuteľností, avšak účinky osvedčenia sú obmedzené a nenahrádzajú vnútroštátne postupy evidencie práv k nehnuteľnostiam.²⁰

Osobitnú pozornosť si v kontexte dedenia nehnuteľností vyžaduje ustanovenie článku 30 nariadenia, ktoré umožňuje uplatnenie osobitných pravidiel právneho poriadku štátu, v ktorom sa nehnuteľnosť nachádza, ak tieto pravidlá z dôvodov hospodárskych, rodinných alebo sociálnych obmedzujú alebo ovplyvňujú dedenie určitých druhov majetku. Ide o významnú korekciu princípu jednotného rozhodného práva, ktorá zachováva priestor pre uplatnenie vnútroštátnych kogentných ustanovení viazaných na nehnuteľnosti, a to aj v prípadoch, keď sa dedičstvo inak spravuje cudzím právnym poriadkom.²¹

Princíp jednotnej právomoci znamená, že po 17. auguste 2015 existencia nehnuteľnosti na území Slovenskej republiky ešte neodôvodňuje vedenie samostatného dedičského konania pred slovenskými orgánmi. Potvrdzuje to aj uznesenie Ústavného súdu Slovenskej republiky sp. zn. II. ÚS 537/2021, z ktorého vyplýva, že ak mal poručiteľ v čase smrti obvyklý pobyt v Českej republike, všeobecnú právomoc prejednať celé dedičstvo mali české orgány, a to aj vo vzťahu k nehnuteľnému majetku nachádzajúcemu sa na území Slovenskej republiky. Význam nariadenia (EÚ) č. 650/2012 sa tak pri investičných nehnuteľnostiach prejavuje najmä v tom, že orgány jedného členského štátu môžu rozhodovať o dedičstve ako celku aj vtedy, ak sa jednotlivé zložky majetku nachádzajú v iných členských štátoch. Článok 21 ods. 1 pritom podporuje jednotu dedičského štatútu tým, že zavádza jednotné rozhodné právo pre celé dedičstvo, zatiaľ čo článok 4 koncentruje právomoc do jedného štátu a znižuje riziko paralelných konaní.²²

¹⁹ JÚDOVÁ.E. (2025) *Cezhraničné dedičské konanie a možnosť voľby súdu a voľby práva*. s.1

²⁰ Pozri článok 62,69 Nariadenia EÚ 650/2012

²¹ Pozri článok 30 Nariadenia EÚ 650/2012

²² Uznesenie Ústavného súdu Slovenskej republiky z 11. novembra 2021, sp. zn. II. ÚS 537/2021

4. Komparácia právnej úpravy dedenia nehnuteľností s cudzím prvkom pred a po prijatí nariadenia (EÚ) č. 650/2012

Rozdiel medzi právnym stavom pred prijatím nariadenia (EÚ) č. 650/2012 a po jeho nadobudnutí aplikovateľnosti možno názorne ukázať na modelovej situácii poručiteľa Jána, ktorý bol štátnym občanom Slovenskej republiky, avšak dlhodobo žil, pracoval a podnikal v Českej republike. Na území Slovenskej republiky vlastnil rodinný dom, ktorý nevyužíval na vlastné bývanie, ale prenajímal ho, a zároveň vlastnil dva byty v Českej republike, ktoré rovnako slúžili na investičné účely. Takto postavený príklad umožňuje porovnať režim dedenia investičných nehnuteľností v situácii, ak by poručiteľ zomrel v roku 2014, a v situácii, ak by zomrel v roku 2016.²³

Ak by Ján zomrel v roku 2014, dedičské právne pomery by sa v slovenskom právnom prostredí posudzovali podľa zákona č. 97/1963 Zb. o medzinárodnom práve súkromnom a procesnom. Podľa tejto úpravy sa dedičské právne pomery spravovali právnym poriadkom štátu, ktorého bol poručiteľ príslušníkom v čase smrti, takže z pohľadu slovenských orgánov by rozhodným právom bolo slovenské právo. Praktická zložitosť však pri investičných nehnuteľnostiach rozmiestnených vo viacerých štátoch nespočívala primárne v určení rozhodného práva, ale v potrebe viesť dedičské konania aj v štátoch, v ktorých sa jednotlivé nehnuteľnosti nachádzali. Práve pri investičných nehnuteľnostiach, ktoré sú typicky umiestnené mimo štátu osobného zázemia poručiteľa, sa tento problém prejavoval výraznejšie, keďže majetok nebol sústredený len v jednom štáte.²⁴

Ak by ten istý poručiteľ zomrel v roku 2016, už by sa použilo nariadenie (EÚ) č. 650/2012, keďže sa vzťahuje na dedenie po osobách, ktoré zomreli 17. augusta 2015 alebo neskôr. Keďže Ján dlhodobo žil, pracoval a podnikal v Českej republike, práve české orgány by mali všeobecnú právomoc prejednať celé dedičstvo na základe obvyklého pobytu, ak vychádzame z predpokladu, že poručiteľ si nezvolil rozhodné právo inak. Význam tejto zmeny sa pri investičných nehnuteľnostiach prejavuje najmä tým, že orgány jedného členského štátu môžu rozhodovať o dedičstve ako celku aj vtedy, ak sa jednotlivé nehnuteľnosti nachádzajú v iných členských štátoch viazaných nariadením. V porovnaní s predchádzajúcim stavom tak odpadá potreba viesť samostatné dedičské konania v každom členskom štáte, v ktorom sa investičná nehnuteľnosť nachádza.²⁵

²³ Pozri články 4,21,22,83 Nariadenia EÚ 650/2012

²⁴ Pozri § 17 zákona č. 97/1963 Zb. o medzinárodnom práve súkromnom a procesnom

²⁵ Pozri články 4, 21, 22, 83 Nariadenia EÚ 650/2012

Takýto záver zodpovedá aj uzneseniu Ústavného súdu Slovenskej republiky sp. zn. II. ÚS 537/2021, ktoré potvrdilo, že pri poručiteľovi s obvyklým pobytom v Českej republike mali české orgány právomoc prejednať celé dedičstvo aj vo vzťahu k nehnuteľnosti nachádzajúcej sa na území Slovenskej republiky.²⁶

Určenie obvyklého pobytu poručiteľa pritom nemožno chápať len formálne. Súdny dvor Európskej únie vo veci C-80/19, E.E. zdôraznil, že pri posudzovaní obvyklého pobytu je potrebné vychádzať z celkového posúdenia životných okolností poručiteľa. Aj v modelovej situácii by preto nebolo rozhodujúce len jeho slovenské štátne občianstvo, ale predovšetkým to, kde sa v čase smrti nachádzalo skutočné centrum jeho osobného a ekonomického života.²⁷

Záver

Analýza ukázala, že pri dedení investičných nehnuteľností s cudzím prvkom spočíval hlavný rozdiel medzi predchádzajúcou slovenskou právnou úpravou a režimom podľa nariadenia (EÚ) č. 650/2012 predovšetkým v rovine právomoci. Pred prijatím nariadenia sa z pohľadu slovenských orgánov dedičské právne pomery spravovali podľa štátnej príslušnosti poručiteľa, avšak pri investičných nehnuteľnostiach nachádzajúcich sa v zahraničí vznikala praktická zložitosť najmä preto, že o nehnuteľnostiach bolo potrebné viesť dedičské konania aj v štátoch, na ktorých území sa nachádzali. Práve pri investičných nehnuteľnostiach sa tento problém prejavoval výraznejšie, keďže ide o majetok, ktorý býva typicky umiestnený mimo štátu osobného zázemia poručiteľa a často je rozložený vo viacerých štátoch.

Nariadenie (EÚ) č. 650/2012 prinieslo zásadný praktický posun tým, že posilnilo koncentráciu právomoci do jedného členského štátu. Ak majú orgány členského štátu právomoc podľa nariadenia, môžu rozhodovať o dedičstve ako celku aj vo vzťahu k investičným nehnuteľnostiam nachádzajúcim sa v iných členských štátoch viazaných týmto nariadením. Práve v tom spočíva hlavný rozdiel oproti predchádzajúcemu režimu. Pri investičných nehnuteľnostiach tak súčasná úprava znižuje potrebu viesť samostatné dedičské konania v každom štáte, v ktorom sa majetok nachádza, a tým zvyšuje praktickú prehľadnosť aj efektívnosť prejednaní dedičstva. Zároveň však platí, že tento efekt sa prejavuje predovšetkým vo vzťahu medzi členskými štátmi viazanými nariadením a nemožno ho bez ďalšieho prenášať na nečlenské štáty ani na členské štáty, ktoré sa na prijatí nariadenia nezúčastnili.

²⁶ Uznesenie Ústavného súdu Slovenskej republiky z 11. novembra 2021, sp. zn. II. ÚS 537/2021

²⁷ Rozsudok Súdneho dvora Európskej únie zo 16. júla 2020 vo veci C-80/19, E.E.

Zoznam bibliografických odkazov:

Knižné publikácie a monografie:

1. LUX, M.-SUNEGA, P.: *Jak dobře investovat do bydlení*. Praha: Sociologické nakladatelství, 2006, s. 134-137.
2. LYSINA, P. a kol.: *Medzinárodné právo súkromné*. Praha: C. H. Beck, 2023, s. 339-344.
3. GANDŽALOVÁ, D.: *Predpoklady dedenia*. Banská Bystrica: Belianum, 2024, s. 3-12.

Odborné články a štúdie:

4. LYSINA, P.: Priestor pre aplikáciu zákona o medzinárodnom práve súkromnom a procesnom pri voľbe práva. Dopad koexistencie unijných a vnútroštátnych prameňov slovenského medzinárodného práva súkromného na úpravu voľby práva. *Acta Facultatis Iuridicae Universitatis Comenianae*, 2021, roč. 40, č. 1, s. 112-119.
5. HAČKOVÁ, T.: Dedenie s medzinárodným prvkom v EÚ-nové nariadenie EÚ. *Justičná revue*. 2015. roč. 67, č. 6-7, s. 857-868. Dostupné na internete: EPI.
6. JÚDOVÁ, E.: Cezhraničné dedičské konanie a možnosť voľby súdu a voľby práva. 2025. s.1. Dostupné na internete: EPI
7. CSACH, K.-KRÁLIK, O.: Úvod do štúdia medzinárodného práva súkromného a procesného. Trnava: Trnavská univerzita v Trnave, Právnická fakulta, 2018, s. 16-20. Dostupné na internete: <https://www.truni.sk/sites/default/files/uk/f000314.pdf> (truni.sk)

Právne predpisy:

8. Zákon č. 97/1963 Zb. o medzinárodnom práve súkromnom a procesnom.
9. Nariadenie Európskeho parlamentu a Rady (EÚ) č. 650/2012 z 4. júla 2012 o právomoci, rozhodnom práve, uznávaní a výkone rozhodnutí a o prijímaní a výkone verejných listín v dedičských veciach a o vytvorení európskeho dedičského osvedčenia.

Internetové zdroje:

10. European Commission, *Improving internal labour mobility in Slovakia*, Brussels, 2014, dostupné na internete: <https://ec.europa.eu/social/BlobServlet?docId=12068&langId=en> (cit. 12.2. 2026).
11. European Commission, Directorate-General for Economic and Financial Affairs, *Housing in the European Union: Market Developments, Underlying Drivers, and Policies*, European Economy Discussion Paper 228, Luxembourg: Publications Office of the European Union, 2025, dostupné na internete: https://economy-finance.ec.europa.eu/document/download/11912749-99e7-4ade-be0c-890a6d6d55ee_en?filename=dp228_en.pdf (cit. 12.2. 2026).

**Zborník príspevkov z medzinárodnej študentskej vedeckej konferencie
PRO-LEGAL Deň študentov práva a doktorandov 2026**

Recenzovaný zborník vedeckých príspevkov

Recenzenti (Reviewers) : doc. JUDr. Ivana Šošková, PhD., MBA
 Mgr. Miroslava Dolíhalová, PhD.
 JUDr. Peter Trajlínek, PhD.

Zostavovateľ (Editor) : JUDr. Ľubica Saktorová, PhD., LL.M., MA.

Vydavateľ: Belianum. Vydavateľstvo Univerzity Mateja Bela
 v Banskej Bystrici

Edícia: Právnická fakulta UMB

Rok vydania: 2026

Počet strán: 699

ISBN 978-80-557-2337-2

EAN 9788055723372

<https://doi.org/10.24040/2026.9788055723372>



ISBN 978-80-557-2337-2

