

SCHOLARLY ARTICLE

# Business and Human Rights in Central and Eastern Europe: Constitutional Law as a Driver for the International Human Rights Law

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## Abstract

This paper analyses five constitutional developments in Central and Eastern Europe that can impact the domestic implementation of the UN Guiding Principles on Business and Human Rights (UNGPs). Using Czechia, Poland and Slovenia as examples, the paper highlights four potential drivers, namely: (1) the process of constitutionalizing human rights; (2) the proliferation of the doctrine of horizontal effect of constitutional rights; (3) the constitutional legitimacy of state intervention in the free market economy; and (4) the mechanism of judicial review. Furthermore, the author underlines the most significant challenge, which is increasing resistance to international norms in some countries, e.g., Poland. The paper concludes that the jurisprudence of the constitutional courts can facilitate the domestic implementation of the UNGPs, particularly Pillars I (State duty to protect human rights) and III (access to remedy).

**Keywords:** Business and human rights; Central and Eastern Europe; constitutional law; horizontal effect; UN Guiding Principles on Business and Human Rights

## I. Introduction

The field of business and human rights has been studied primarily from two legal perspectives: international law (including, among others, international human rights law,<sup>1</sup> investment law,<sup>2</sup> and, more recently, EU law<sup>3</sup>) and the domestic legislation of selected countries, which are particularly advanced in the adoption of human rights due

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<sup>1</sup> Surya Deva and David Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (New York: Cambridge University Press, 2013). See also Oliver De Schutter, 'Towards a New Treaty on Business and Human Rights' (2016) 1:1 *Business and Human Rights Journal* 41.

<sup>2</sup> Anil Yilmaz Vastardis and Rachel Chambers, 'Overcoming the Corporate Veil Challenge: Could Investment Law Inspire the Proposed Business and Human Rights Treaty?' (2018) 67:2 *International & Comparative Law Quarterly* 389.

<sup>3</sup> Daniel Augenstein, Mark Dawson and Pierre Thielbörger, 'The UNGPs in the European Union: The Open Coordination of Business and Human Rights?' (2018) 3:1 *Business and Human Rights Journal* 1; Daniel Augenstein, 'Negotiating the Hard/Soft Law Divide in Business and Human Rights: The Implementation of the UNGPs in the European Union' (2018) 9:2 *Global Policy* 254.

diligence frameworks (e.g., France,<sup>4</sup> the Netherlands,<sup>5</sup> Switzerland,<sup>6</sup> more recently Germany and Norway<sup>7</sup>). Such a choice is understandable and desirable as the researchers can study the content of the legal acts and their subsequent implementation.

Nevertheless, the concepts that have emerged within other legal domains can serve as drivers or, through the synergy effect, facilitate the uptake of the legal instruments developed by international organizations, particularly the UN Guiding Principles on Business and Human Rights (UNGPs).<sup>8</sup> One of these under-represented perspectives is offered by constitutional law.<sup>9</sup> This article highlights how constitutional law can become a driver for better conceptualizing and enforcing human rights obligations for business actors.<sup>10</sup> There are at least four potential synergies that will be introduced in the following sections of the paper: (1) the process of constitutionalizing human rights; (2) the emergence of the doctrine of horizontal effect of constitutional rights, i.e., its application between private entities; (3) the dual legitimacy (juridical and social) of state intervention in the free market economy; and (4) the mechanism of judicial review which can facilitate access to remedy and, through the removal of unconstitutional provisions from the legal framework, to prevent future infringements. The last part of the paper will address the significant challenge in utilizing constitutional courts as drivers for the UNGPs, namely the courts' increasing resistance against international norms (so-called 'third wave of judicial review').<sup>11</sup>

In each section, I will analyse these synergies in the selected Central and Eastern European (CEE) countries, namely Czechia, Poland and Slovenia. Their selection is due to three reasons. Firstly, the above-mentioned countries adopted National Action Plans (NAPs) on business and human rights, which indicates that this issue remains on the political agenda and creates momentum for the introduction of regulations into domestic law. Secondly, their constitutions share many textual<sup>12</sup> and contextual similarities, which can arguably facilitate the reception of constitutional arguments emerging in one jurisdiction into another. Their constitutional courts<sup>13</sup> also apply a comparative perspective in their

<sup>4</sup> Almut Schilling-Vacaflor, 'Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?' (2021) 22:1 *Human Rights Review* 109.

<sup>5</sup> Liesbeth Enneking and Jeroen Veldman, 'Towards Responsible Business Conduct in Global Value Chains. Relevant Legal Developments in the Netherlands' (2019) 4 *Erasmus Law Review* 1.

<sup>6</sup> Nicolas Bueno, 'Human Rights Due Diligence Legislation in Switzerland: The State-of-Play after the Swiss Responsible Business Initiative', *Nova Centre on Business, Human Rights and the Environment Blog* (1 February 2021), <https://novabhre.novalaw.unl.pt/human-rights-due-diligence-switzerland/> (accessed 12 April 2023).

<sup>7</sup> Markus Krajewski, Kristel Tonstad and Franziska Wohltmann, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' (2021) 6:3 *Business and Human Rights Journal* 550.

<sup>8</sup> Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011).

<sup>9</sup> Nevertheless, there are some studies that investigate potential added value of constitutional law for the conceptualization of BHR framework at the international level. See David Bilchitz, 'Corporate Obligations and a Business and Human Rights Treaty: a Constitutional Law Model?' in Surya Deva and David Bilchitz (eds.), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge: Cambridge University Press, 2017) 185.

<sup>10</sup> In the paper, the terms 'business actors' and 'non-state actors' are used interchangeably for a better reading experience.

<sup>11</sup> Doreen Lustig and J H H Weiler, 'Judicial Review in the Contemporary World – Retrospective and Prospective' (2018) 16:2 *International Journal of Constitutional Law* 315.

<sup>12</sup> If not explicitly stated otherwise, the references to the constitutional provisions are based on the author's own analysis on the data extracted from the Constitute Project. For the dataset, see Zachary Elkins, Tom Ginsburg and James Melton, 'Constitute: The World's Constitutions to Read, Search, and Compare', <https://www.constituteproject.org> (accessed 17 November 2022).

<sup>13</sup> For better readability, the paper refers to all constitutional courts in the same manner, e.g., 'the constitutional court of Poland' without using the official names such as Constitutional Tribunal (in the case of Poland).

legal reasoning and refer to regulations adopted in neighbouring countries, often with a similar legal tradition or level of economic development.<sup>14</sup> Moreover, the constitutional courts of these countries have been active in adjudicating social rights, which are of particular importance for business and human rights (BHR). For instance, the most advanced framework for determining the infringement of social rights emerged in Czechia (Section V); Poland tailored the doctrine of the social market economy to the circumstances of a post-socialist country (Section IV), while Slovenia is one of the most progressive countries within Central and Eastern Europe to apply human rights obligations in horizontal relationships (Section III). At the same time, all three countries codified extensive catalogues of social rights in their constitutions (Section II).

Thirdly, the role of constitutional courts across CEE countries is modelled on the German Federal Constitutional Court (with some exceptions, such as Hungary or Romania). Having the final word in any constitutional argument, these courts are often confronted with challenging questions about the scope of human rights and the obligations arising thereof. Hence, the competencies of constitutional courts are far-reaching and typically include derogation of legal norms and even entire legal acts from the legal system. This unique power of constitutional courts makes them potential vehicles for the reception of human rights due diligence in CEE countries, even in the absence of statutory acts.

This paper contends that constitutional legitimacy can provide a parallel opportunity for implementing the UNGPs and contribute to better protection of human rights in the context of business activities. It postulates the need for policymakers of the remaining CEE countries to analyse constitutional arrangements and developments in their countries. This would allow them to make an informed choice about whether and to what extent to take constitutional norms and jurisprudence into account when working on the subsequent NAPs (Czechia, Lithuania, Poland, Slovenia) or during the development of the first NAPs (Latvia, Ukraine).

## II. The Constitutionalization of Human Rights

Since the end of World War II, we have been witnessing an intense process of constitutionalizing human rights.<sup>15</sup> The median number of rights included in constitution has increased from 19 to 40 since 1946.<sup>16</sup> The increasing importance of rights is also reflected in the position of the human rights chapter in the constitutions (moving towards the front) and the share of words in the constitutions about rights (increasing from 9.7 per cent to nearly 15 per cent since 1946).<sup>17</sup> Among the rights with the most significant increase rates were: the right to a healthy environment (an increase from 0 per cent to 63 per cent), trade union rights (increase from 25 per cent to 72 per cent), and the right to work (an increase from 55 per cent to 82 per cent).<sup>18</sup> Also, other constitutional provisions important from the perspective of BHR observed an increase; in particular, the state obligation to ensure that everyone benefits from natural resources (increase from 8 per cent to 29 per cent) and protection of vulnerable groups such as women (enshrined in only 35 per cent of

<sup>14</sup> For instance, when adjudicating on the payments for medical services, the Czech constitutional court referred to the regulations in the neighbouring countries. See Czech Constitutional Court, Pl. ÚS 36/11, paras 18–23.

<sup>15</sup> David S Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99:5 *California Law Review* 1163, 1195.

<sup>16</sup> Zachary Elkins and Tom Ginsburg, 'How Many Rights is Enough?', *Constitute Project* (16 February 2021), <https://www.constituteproject.org/data-stories/how-many-rights-is-enough?lang=es> (accessed 15 July 2022).

<sup>17</sup> *Ibid.*

<sup>18</sup> Law and Versteeg, note 15, 1201.

constitutions in 1946, but 91 per cent in 2006), children (increase from 25 per cent to 65 per cent), and minorities (increase from 16 per cent to 51 per cent).<sup>19</sup>

The embodiment of rights in a constitutional text grants them the status of supreme norms and, thus, a promise of efficacy. Nevertheless, numerous empirical studies have shown that constitutional guarantees do not necessarily translate into practice.<sup>20</sup> Globally aggregated statistics should be taken with a grain of salt as many constitutions fail to reflect reality (so-called facade or sham constitutions).<sup>21</sup> Central and Eastern Europe, next to Latin America, observes the largest share of strong constitutions characterized by promising much in the supreme law and, at the same time, delivering much in practice.<sup>22</sup> Some CEE countries (namely Czechia, Slovenia and Slovakia) observe the highest constitutional compliance rates for socioeconomic rights worldwide.<sup>23</sup>

The scope of the constitutional catalogue of fundamental rights is essential in determining the substantive scope for constitutional complaints, which is one of the most far-reaching and effective remedies in the domestic jurisdiction.<sup>24</sup> These can be lodged by individuals (either natural persons or legal entities) whose constitutional rights have been violated. The framework for constitutional complaints varies from country to country;<sup>25</sup> however, many CEE countries adopted the so-called ‘narrow complaint’ (including Poland, Slovenia, Slovakia, Ukraine, and recently introduced in Lithuania<sup>26</sup>). According to this, an individual can challenge only the legal provision based on which a public authority has finally ruled on one’s rights or freedoms. The effect of the ruling may be the removal of such a provision from the legal order, which usually constitutes, among other things, grounds for the resumption of proceedings in a given case. Thus, a constitutional complaint is a remedy in individual cases (addressing Pillar III of the UNGPs) and affects the general protection of human rights in the domestic jurisdiction (as a preventive measure). In countries that have adopted a narrow model of constitutional complaint, one of the necessary conditions is to demonstrate a violation of a right enshrined in the constitution. For this reason, the composition of the constitutional catalogue of fundamental rights is crucial for an individual to trigger a constitutional complaint.

An extensive catalogue of human rights is typical of most new democracies worldwide, as they aim to provide credible commitments to join the international community.<sup>27</sup> Central and Eastern Europe remains one of the regions where constitutional commitments have been largely respected. In some countries of the region (Poland and Hungary), we have recently witnessed constitutional backsliding, particularly in the area of judicial

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Giovanni Sartori, ‘Constitutionalism: A Preliminary Discussion’ (1962) 56:4 *The American Political Science Review* 853, 861; David S Law and Mila Versteeg, ‘Sham Constitutions’ (2013) 101:4 *California Law Review* 863.

<sup>22</sup> Law and Versteeg, *note 21*.

<sup>23</sup> Ibid.

<sup>24</sup> Existing evidence indicates that countries which adopted the constitutional complaint tend to have lower number of applications to the European Court of Human Rights. The introduction of a constitutional complaint is also recommended by the Venice Commission. See Mykhailo Hultai, ‘Normative Constitutional Complaint in Ukraine as a National Legal Remedy’, CDL-JU(2018)015 (29 October 2018).

<sup>25</sup> M Lutfi Chakim, ‘A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions’ (2019) 5:1 *Constitutional Review* 96.

<sup>26</sup> Agne Limantė, ‘Lithuania Introduces Individual Constitutional Complaint’, *VerfBlog* (26 March 2019), <https://verfassungsblog.de/lithuania-introduces-individual-constitutional-complaint/> (accessed 23 August 2022).

<sup>27</sup> Tom Ginsburg, Svitlana Chernykh and Zachary Elkins, ‘Commitment and Diffusion: How and Why National Constitutions Incorporate International Law’ (2008) 201 *University of Illinois Law Review* 232–236. For the comparative analysis of CEE constitutions, see also James P McGregor, ‘Constitutional Factors in Politics in Post-Communist Central and Eastern Europe’ (1996) 29:2 *Communist and Post-Communist Studies* 147.

independence.<sup>28</sup> This can have a profound long-term impact on human rights protection and has already resulted in the deterioration of, *inter alia*, women's rights (Poland) and freedom of opinion and expression (Hungary). Nevertheless, this phenomenon primarily concerns relationships between the individual and the state and, to a lesser extent, relationships between private entities.<sup>29</sup>

### III. The Horizontal Effect of Constitutional Rights

Constitutions have traditionally regulated relations between the state and the citizen. However, in recent years, we have witnessed an intensive development of the doctrine of the horizontal effect of constitutions (Ger. *Drittwirkung*). This means that the constitutional arrangements remain binding not only in relations between public authorities and individuals but also between private parties, such as businesses and individuals. The doctrine's origins can be traced back to 1958 and the *Lüth* judgment of the German Federal Constitutional Court (*Bundesverfassungsgericht*).<sup>30</sup> The case involved Erich Lüth, a local politician and official from Hamburg, who publicly called for a boycott of the film 'Immortal Lover.' Lüth claimed that the film would harm the German cinema industry because of the anti-Semitic views and filmography of its director, Veit Harlan. A Hamburg court ruled to prohibit Lüth from calling for a boycott under threat of a fine or imprisonment. In the constitutional complaint, Lüth claimed a violation of his constitutional right to freedom of expression. In its decision, the constitutional court indicated *inter alia* that such fundamental rights constitute an expression of a constitutional order that governs all areas of law, including civil law. Drawing on the general clauses contained in the laws, it was decided that the judges should give effect to the content of the constitutional provisions.

In the subsequent decades, the German constitutional court issued several decisions that grounded and widened the *Drittwirkung* doctrine.<sup>31</sup> According to the reasoning in the *Sozialplan* case (1986), collective agreements between the mining company and the workers should not exceed the 'permissible constitutional limits'.<sup>32</sup> In another case from 2011, the court expressly stated that 'enterprises owned both by private shareholders and the State over which the State has a controlling influence and which are organized in the forms of private law are directly bound by the fundamental rights' [emphasis added by the

<sup>28</sup> Tímea Drinóczi and Agnieszka Biń-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland' (2019) 20:8 *German Law Journal* 1140. For the systemic dysfunction in judicial appointments procedure in Poland see, for instance, the following judgments of the European Court of Human Rights: *Advance Pharma sp. z o.o. v Poland* (1469/20), *Reczkowicz v Poland* (43447/19), *Dolińska-Ficek and Ozimek v Poland* (49868/19, 57511/19).

<sup>29</sup> Nevertheless, the subordination of the judiciary to the public authorities can result in judgments that favour the views presented by the ruling party, including in cases between private entities. For example, in Poland, in a case involving a printer's refusal to produce posters for an LGBT foundation, an unlawfully composed constitutional court ruled in accordance with the Attorney General's motion. It thus ruled out that a statutory provision providing for the punishment of a person who, while engaged in the professional provision of services, refuses a service and without just cause violates the constitution. See Polish Constitutional Court, Judgment of 26 June 2019, K 16/17.

<sup>30</sup> German Federal Constitutional Court's Judgment of 15 January 1958, 1 BvR 400/51, BVerfGE 7, 198–230, *Lüth*. Sarah Katharina Stein also indicates the relevance of the *Elfes* case, which was decided one year earlier. See Sarah Katharina Stein, 'Lüth and Elfes – A German Approach to a Horizontal Effect of Fundamental Rights', *IACL-AIDC Blog* (14 June 2022), <https://blog-iacl-aidc.org/new-blog-3/2022/6/14/lth-and-elfes-a-german-approach-to-a-horizontal-effect-of-fundamental-rights> (accessed 12 April 2023). Two decades later, the Supreme Court of California ruled out that the freedom of expression is protected also on the privately owned areas. See Supreme Court of California, *Robbins v Pruneyard Shopping Center* (1979) 23 Cal. 3rd 899.

<sup>31</sup> See, for instance, Claus Dieter Classen, 'Die Drittwirkung der Grundrechte in der Rechtsprechung des Bundesverfassungsgerichts' (1997) 122:1 *Archiv des öffentlichen Rechts*, 65.

<sup>32</sup> German Federal Constitutional Court's Judgment of 23 April 1986, 2 BvR 487/80, BVerfGE 73, 261, *Sozialplan*.

author].<sup>33</sup> The most progressive position was taken by the Federal Labor Court, which derived, in the absence of statutory provisions, certain obligations addressed towards non-State actors directly from the constitutional provision guaranteeing the freedom of association of workers.<sup>34</sup>

The doctrine of horizontal effect has also been applied by the courts in other countries, most notably in Ireland.<sup>35</sup> It has also been raised during discussions on the drafting of contemporary constitutions, for instance, in India,<sup>36</sup> and was introduced to the constitutions of South Africa and Kenya.<sup>37</sup> The concept has many variations, but in the context of BHR, the most important aspect is the division between indirect and direct application of constitutional rights. According to the former, the constitution regulates business only indirectly by imposing obligations on public authorities (e.g., to prohibit certain market behaviours). According to the latter, selected constitutional norms directly bind business actors. Indirect and direct application of human rights thus corresponds to Pillar I (State duty to protect human rights) and Pillar II (the corporate responsibility to respect human rights) of the UNGPs, respectively.<sup>38</sup> There is increasing consensus among constitutional courts and scholars that fundamental rights apply to the relations between subjects of private law, either indirectly or directly. The relevant jurisprudence builds on the cases in which parties have an unequal position, or even a power relationship may be identified between them. This is perfectly illustrated in the context of employment<sup>39</sup> or consumer relationships, which bear similarity to the State–individual relationship. Interestingly, many CEE countries enshrined in the constitution the obligation of the state to interfere in private relationships and to protect a weaker party, namely a worker or a consumer (i.e., constitutions of Bulgaria, Hungary, Lithuania, Montenegro, Poland, Serbia and Ukraine).<sup>40</sup> The proliferation of such clauses was a response to the ‘reduction of the state’, resulting from the transition to a market economy in the 1990s and the increasing power of businesses.<sup>41</sup>

<sup>33</sup> German Federal Constitutional Court’s Judgment of 22 February 2011, 1 BvR 699/06. For the analysis of the remaining jurisprudence see, e.g., Bartosz Skwara, ‘W obronie bezpośredniego horyzontalnego obowiązywania praw człowieka’ [In the defense of the direct horizontal application of human rights] (2017) 1:138 *Przegląd Sejmowy* 79.

<sup>34</sup> Judgment of the Federal Labor Court of 3 December 1954, ref. no. 1 AZR 150/54, BAGE 1, 185 – *Kündigung eines Betriebsratsmitglieds*; Judgment of the Federal Labor Court of 10 May 1957, ref. no. 1 AZR 249/57, BAGE 4, 274 – *Zölibatsklausel*. For the analysis, see Monika Florczak-Wątor, *Applying the Constitution of the Republic of Poland in Horizontal Relations* (Krakow: Jagiellonian University Press, 2015) 81–85.

<sup>35</sup> Colm O’Cinneide, ‘Irish constitutional law and direct horizontal effect – a successful experiment?’ in Oliver Dawn and Jörg Fedtke (eds.), *Human Rights and the Private Sphere. A Comparative Study* (New York: Routledge Cavendish, 2007).

<sup>36</sup> Mahendra Pal Singh, ‘Fundamental Rights, State Action and Cricket in India’ (2006) 13 *Asia Pacific Law Review* 203.

<sup>37</sup> Bilchitz, note 9, 197.

<sup>38</sup> Andras Sajó and Renata Uitz (eds.), *The Constitution in Private Relation: Expanding Constitutionalism* (Utrecht: Eleven, 2005). See also Florczak-Wątor, note 34.

<sup>39</sup> Anna Musiała, ‘O stosunku pracy raz jeszcze. Horyzontalne oddziaływanie praw konstytucyjnych a stosunek pracy’ [Employment relationship revisited: horizontal impact of constitutional rights vs. employment relationship] (2019) 26:3 *Studia z Zakresu Prawa Pracy i Polityki Społecznej* 183, 184.

<sup>40</sup> For instance, article 76 of the Constitution of the Republic of Poland states as follows: ‘Public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. [...]’ Article 42 of the Ukrainian constitution states that: ‘The State protects the rights of consumers [...]’

<sup>41</sup> Iwona Wróblewska, ‘The Publicisation of Private Relations by Horizontal Application of Constitutional Rights’ (2019) 25 *Comparative Law Review* 299, 303. For the justification of the protection of a weaker party in the jurisprudence of the German constitutional court, see German Constitutional Court, Judgment of 13 October 1993, 1 BvR 567, 1044/89, BVerfGE 89, 214 – *Bürgerschaftsverträge*.

CEE countries undergoing a transformation in the 1990s often modelled themselves on German constitutional solutions, which also facilitated the reception of concepts developed in the jurisprudence of the German constitutional court. In the context of *Drittwirkung*, three countries stand out, namely Czechia, Poland and Slovenia, where the doctrine of the horizontal impact of constitutional rights enjoys solid legal grounds and has been accentuated in the jurisprudence of constitutional courts.<sup>42</sup> In the remaining CEE countries, the application of the doctrine remains on theoretical ground, without a reception in jurisprudence (e.g., Albania,<sup>43</sup> Lithuania,<sup>44</sup> Ukraine<sup>45</sup>).

In Czechia, the constitutional framework highlights that ownership entails obligations and shall not be misused to the detriment of the rights of others or the public interest (e.g., human health, the environment).<sup>46</sup> In its jurisprudence, the constitutional court highlighted on numerous occasions that fundamental rights remain valid in horizontal relationships, and the courts should ensure that the constitutional provisions radiate through the norms of statutory laws.<sup>47</sup>

In Poland, the most relevant cases were related to employment and consumer relationships.<sup>48</sup> The Polish constitution provides grounds on these matters, as it expressly formulates the obligation of States to protect weaker parties in these contexts (article 24 and article 76, respectively). In recent years, the constitutional court highlighted the horizontal dimension of property rights (cases that involved copyright<sup>49</sup>) and also stated that the horizontal application of the right to participate in cultural life ‘cannot be ruled out’.<sup>50</sup> Surprisingly, in 2021, the court stated that the legislative branch should assess the ‘horizontal consequences’ of the enacted laws and that the constitutional court ‘does not have jurisdiction in this matter’.<sup>51</sup> However, this statement has not been substantiated in the justification of the decision and remains isolated from the previous jurisprudence.

In Slovenia, the grounds for the horizontal application of fundamental rights are provided by article 74 of the constitution, which stipulates that ‘commercial activities may not be pursued in a manner contrary to the public interest’. The public interests

<sup>42</sup> Some authors indicate that to determine the scope of the application of the *Drittwirkung*, one should analyse the jurisprudence of civil courts. See Skwara, note 33.

<sup>43</sup> Migena Leskoviku, ‘Constitutionalisation of the Relations between Private Parties in the View of the Principle of Equality and Non-Discrimination: Albanian Legislation and Case-Law Practice in Compliance with International and European Standards’ in Monika Florczak-Wątor (ed.), *Oddziaływanie współczesnych konstytucji na stosunki między podmiotami prywatnymi* (Krakow: Księgarnia Akademicka, 2015).

<sup>44</sup> Solveiga Cirtautienė, ‘Impact of Human Rights on Private Law in Lithuania and other European Countries: Problematic Aspects’ (2013) 20:1 *Jurisprudence* 77.

<sup>45</sup> Mykhailo Savchyn, ‘Doctrinal Issues of Introduction of the Constitutional Complaint in Ukraine’ (2018) 12 *Legal Journal ‘Law of Ukraine’* (Ukrainian version).

<sup>46</sup> Article 11(3) of the Charter of Fundamental Rights and Basic Freedoms provides that the ‘[o]wnership entails obligations. It may not be misused to the detriment of the rights of others or in conflict with legally protected public interests. It may not be exercised so as to harm human health, nature, or the environment beyond the limits laid down by law’. A similar norm is laid down in article 20(3) of the Slovak constitution. This is reminiscent of the concept of *Sozialbindung des Eigentums* which is anchored in article 14(2) of the German Basic Law (*Grundgesetz*). For discussion, see e.g., E Niebler, ‘Die Sozialbindung des Eigentums nach der Rechtsprechung des Bundesverfassungsgerichts’ (1982) 101 *Fortwissenschaftliches Centralblatt* 229.

<sup>47</sup> Czech Constitutional Court, Judgement of 18 December 2020, II. ÚS 1916/20. See also the judgements Pl. ÚS 34/09 of 7 September 2010 (N 187/58 SbNU 647); IV. ÚS 1735/07 of 21 October 2008 (N 177/51 SbNU 195), and II. ÚS 222/18 of 14 August 2019.

<sup>48</sup> Florczak-Wątor, note 34, 132–136.

<sup>49</sup> Polish Constitutional Court, Judgment of 5 November 2019, P 14/19; Judgment of 23 June 2015, SK 32/14.

<sup>50</sup> Polish Constitutional Court, Judgment of 19 June 2018, K 47/14.

<sup>51</sup> Polish Constitutional Court, Judgment of 11 March 2021, SK 9/18.

which enjoy constitutional protection include the life and health of people,<sup>52</sup> the protection of consumers,<sup>53</sup> employees,<sup>54</sup> children and family life, and the weekly rest of workers<sup>55</sup> as well as nature.<sup>56</sup> The court has also underlined that public authorities enjoy broad discretion in designing economic and social policies towards achieving the general welfare of society.<sup>57</sup> Article 74 served as a justification for imposing limitations on business activities, e.g., in cases on book-entry securities,<sup>58</sup> consumer credit services,<sup>59</sup> and preventive COVID-19 measures.<sup>60</sup> The court has also underlined that the state is obliged to ensure that economic activities are exercised in line with the right to a healthy living environment as stipulated in article 72 of the constitution.<sup>61</sup> Similarly, the constitutional court highlighted that by signing ILO Conventions 151 and 154, the state recognized the right to collective bargaining in the private sector.<sup>62</sup> In his concurring opinion to one of the decisions, Judge Jan Zobec stressed that due to the excessive power of businesses, particularly transnational corporations, ‘inclusion of these subjects – at least corporations in majority state ownership – into the notion of the public sphere should be considered. I also think that a new balance in the state–corporation relation should be sought, as well as a different methodological approach for resolving conflicts between them, especially when the aim of state interference with their rights is the protection of individuals’ human rights (for instance, those of workers, consumers, a certain category of the population, etc.).’<sup>63</sup>

In all three countries, the doctrine of horizontal application of constitutional rights has been gradually evolving, with constitutional courts systematically invoking earlier decisions. The continuity indicates that the concept is well-established within the judiciary (although, primarily, indirect applicability). Moreover, the scope of its application is slowly but systematically increasing in terms of the rights covered (i.e., the right to take part in cultural life in Poland) and duty bearers (i.e., classification of selected public–private businesses as public entities in Poland and Slovenia<sup>64</sup>). So far, none of the courts has expressly stated that the constitutional provisions bind businesses. Instead, the decisions take the perspective of a State, highlighting its obligation to regulate the private sector and ensure the protection of workers or consumers as weaker parties. The claims on the direct applicability of selected constitutional rights in horizontal relations have been, however, raised by scholars, e.g., the prohibition of corporal punishment or the prohibition of subjecting

<sup>52</sup> Slovenian Constitutional Court, Order of the Constitutional Court of 9 June 2005, U-I-36/03, para 12.

<sup>53</sup> Slovenian Constitutional Court, Judgment of 18 February 2021, U-I-27/17, Official Gazette RS, 29/2021.

<sup>54</sup> Slovenian Constitutional Court, Judgment of 25 April 2013, U-I-311/11, Official Gazette RS, 100/2011, 44/2013 and OdlUS XX, 6.

<sup>55</sup> Slovenian Constitutional Court, Judgment of 15 April 2021, U-I-446/20, U-I-448/20, U-I-455/20, U-I-467/20, Official Gazette RS, 72/2021.

<sup>56</sup> In this context, the constitutional court highlighted the ‘social function of property’ which enjoys protection under article 67 of the constitution. See Slovenian Constitutional Court, Judgment of 25 April 2013, U-I-311/11, Official Gazette RS, 100/2011, 44/2013 and OdlUS XX, 6.

<sup>57</sup> *Ibid.*

<sup>58</sup> Slovenian Constitutional Court, Judgment of 7 February 2018, U-I-192/16, Official Gazette RS, 15/2018 and OdlUS XXIII, 2.

<sup>59</sup> Slovenian Constitutional Court, Judgment of 18 February 2021, U-I-27/17, Official Gazette RS, 29/2021.

<sup>60</sup> Slovenian Constitutional Court, Judgment of 7 October 2021, U-I-155/20, unpublished.

<sup>61</sup> Slovenian Constitutional Court, Judgment of 11 April 2013, U-I-40/12, Official Gazette RS, 39/2013 and OdlUS XX, 5.

<sup>62</sup> Slovenian Constitutional Court, Judgment of 15 March 2012, U-I-249/10, Official Gazette RS, 27/2012 and OdlUS XIX, 34.

<sup>63</sup> Slovenian Constitutional Court, Judgment of 11 April 2013, U-I-40/12, Official Gazette RS, 39/2013 and OdlUS XX, 5.

<sup>64</sup> For Poland, see Polish Constitutional Court, Resolution of 6 April 2011, SK 21/07. For Slovenia, see Slovenian Constitutional Court, Judgment of 11 April 2013, U-I-40/12, Official Gazette RS, 39/2013 and OdlUS XX, 5.



citizens to scientific experimentation without one's voluntary consent.<sup>65</sup> Other potential areas include workers' rights as recognized by the German courts. The doctrine of the horizontal application of human rights remains perhaps the greatest ally of the UNGPs, which has so far been ignored in the jurisprudence of the CEE constitutional courts.<sup>66</sup> Unfortunately, given the moment we are currently in – with rising populism across CEE countries and mistrust towards external actors, including international human rights law (IHRL)<sup>67</sup> – it is hard to count on this change anytime soon.

#### IV. The Dual Legitimacy of State Intervention in the Free Market Economy

According to Ruggie, human rights due diligence as established under the UNGPs 'is rooted in a transnational social norm, not an international legal norm'<sup>68</sup> and, therefore, applies irrespective of the actions of a State (or lack thereof). Similarly, the legitimacy of constitutions is derived primarily from their present social acceptance (unlike the ordinary laws, which derive their legitimacy from other legal norms).<sup>69</sup> One of the distinctive features of the constitutions is the density of the general reference clauses, which open the legal framework to extra-legal values, e.g., references to equity, democracy, social welfare, or public interest.<sup>70</sup> In contemporary democracies, they are typically applied to construct socially justified legal norms, thus overcoming the ambiguity of the legal text or adjusting the interpretation to the evolving social, economic and cultural standards.<sup>71</sup>

The general clauses are dominant in the introductory chapters of the constitution, reflecting their fundamental significance for the legal framework of a given country. The codified values are meant to influence the interpretation of the remaining constitutional provisions, including the normative content of constitutional rights. Suppose a constitutional text allows for more than one interpretation of a legal norm, which is common in adjudicating social rights and determining their minimum core content. In that case, the judge is obliged to choose the meaning which fulfils the constitutional values to the highest possible extent. In the situation of conflicting values, the judge is obliged to choose the meaning of the legal norm that allows for achieving maximum levels of fulfilment for all conflicting values (optimization requirement).<sup>72</sup>

<sup>65</sup> Florczak-Wątor, note 34, 86–88.

<sup>66</sup> The UNGPs have been, however, referenced by the Dutch court in the landmark judgment in case *Milieudefensie v Royal Dutch Shell*, ECLI:NL:RBDHA:2021:5339, para 4.4.11 *et seq.*

<sup>67</sup> Jacques Rupnik, 'The Crisis of Liberalism' (2018) 29:3 *Journal of Democracy* 24, 25.

<sup>68</sup> John G Ruggie and John Sherman III, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 28 *European Journal of International Law* 921, 923–924. See also Human Rights Council, 'Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework', A/HRC/11/13 (22 April 2009), para 46 which reads as follows: 'Companies know they must comply with all applicable laws to obtain and sustain their legal license to operate. However, over time companies have found that legal compliance alone may not ensure their social license to operate, particularly where the law is weak. The social license to operate is based in prevailing social norms that can be as important to a business' success as legal norms. Of course, social norms may vary by region and industry. But one has acquired near-universal recognition by all stakeholders: the corporate responsibility to respect human rights – or, put simply, to not infringe on the rights of others.'

<sup>69</sup> Richard H Fallon Jr, 'Legitimacy and the Constitution' (2005) 118:6 *Harvard Law Review* 1787, 1792.

<sup>70</sup> In the authoritarian regimes, on the other hand, they can serve to justify the prevailing interest of a state reflected in political and ideological documents. See Leszek Leszczyński, 'Extra-Legal Values in Judicial Interpretation of Law: A Model Reasoning and Few Examples' (2020) 33 *International Journal for the Semiotics of Law* 1073, 1077.

<sup>71</sup> *Ibid.*

<sup>72</sup> Robert Alexy, 'On the Structure of Legal Principles' (2000) 13:3 *Ratio Juris* 294, 295.

The catalogues of codified values reflect the ‘social contract’ at the moment of drafting the constitution. For this reason, non-discrimination (equal protection) clauses were omitted from the US constitution and the Bill of Rights, when they were adopted in the nineteenth century. In the aftermath of the World War II, the German constitution codified the protection of democracy to ensure that anti-democratic movements were not allowed to participate in the public sphere.<sup>73</sup> The phenomena of globalization and the increasing power of business actors in the 1990s paved the way for constitutional clauses aimed at addressing the unintended consequences of a free market economy in former socialist countries.<sup>74</sup>

The Czech and Slovenian constitutions incorporated them into the chapters on constitutional rights, which means that they are primarily activated in cases of balancing rights, for instance, when striking a balance between free enterprise and the right to just and favourable conditions of work. Poland, however, adopted a different approach and enshrined the principle of a ‘social market economy’ in the introductory chapter of the constitution.<sup>75</sup> Therefore, the application of this provision stretches beyond cases of competing rights claims and obliges the state to pursue the policy towards achieving specific goals, namely sustainable development, high levels of employment, the dignity of labour, an adequate system of social security, protection of the environment, and ensuring access to energy and transportation.<sup>76</sup> Although not expressly stated by the Polish constitutional court, public authorities should ensure this principle is duly considered when negotiating investment or free trade agreements. In this context, public authorities could be found in violation of the constitution if they would sign an agreement that favours business actor(s) at the expense of the welfare of society, e.g., signing a TRIPS+ agreement.<sup>77</sup>

Article 20 of the Polish constitution declares the ‘social market economy’ as the basis of the economic system, which is interpreted as a third way between the extremes of a *laissez-faire* and a centrally planned economy.<sup>78</sup> The normative content of this provision

<sup>73</sup> The principle of the defensible democracy (Ger. *wehrhafte (streitbare) Demokratie*) was enshrined in articles 9(2), 18 and 21(2) of the German Basic Law. In addition, article 20(4) lays down as a last resort the right to resistance against anyone wishing to abolish the German constitutional order.

<sup>74</sup> The majority of CEE countries declared free market economy but, at the same time, allowed for the state intervention. See McGregor, note 27, 147. Nevertheless, the role of the state remained limited in the transformation period as the majority of post-Soviet countries were too weak and lacked ‘expertise to design and implement ambitious, activist and discretionary policies which may, theoretically, help to mitigate the panoply of market imperfections in the transformation period’. See Holger Schmieding, ‘Property Rights, Institutions, and Market Reform’ in Hendrikus J Blommestein and Bernard Steunenberg (eds.), *Government and Markets: Establishing a Democratic Constitutional Order and a Market Economy in Former Socialist Countries* (Dordrecht: Springer, 1994), 159, 164.

<sup>75</sup> Around the same time, the social market economy was established as the basis of the economic system also in the constitutions of Peru (1993) and Armenia (1995).

<sup>76</sup> Polish Constitutional Court, Judgment of 7 May 2014, K 43/12.

<sup>77</sup> TRIPS+ agreements provide broader protection of intellectual property rights than the minimum level required by the Agreement on Trade-Related Aspects of Intellectual Property Rights. Such agreements are typically signed between the EFTA, EU member states or the US with developing states and favour their businesses. See Jean-Frédéric Morin and Jenny Surbeck, ‘Mapping the New Frontier of International IP Law: Introducing a TRIPS-plus Dataset’ (2020) 19:1 *World Trade Review* 1, 6.

<sup>78</sup> According to this principle, the state is obliged to ensure *inter alia* sustainable development, high employment rate, adequate social security, healthy environment, access to energy and transportation, and the dignity of labour. See Polish Constitutional Court, Judgment of 7 May 2014, K 43/12. The term ‘social market economy’ was coined by Alfred Müller-Armack in his book *Wirtschaftslenkung und Marktwirtschaft* published in 1947. It was based on three pillars, namely free trade, private enterprise and market competition. The success of the German post-War model of social market economy diffused across Europe and, therefore, has also been adopted by emerging democracies in the 1990s.

should be adjusted according to the evolving socioeconomic context.<sup>79</sup> In addition, article 24 obliges public authorities to protect work, while article 76 protects weaker parties in private relationships, namely consumers, customers, hirers or lessees. In the context of Pillar I of the UNGPs, public authorities should ensure a minimum core level of the right to work, the right to just and favourable conditions of work (e.g., minimum wage, working time limits), and the right to a healthy environment.<sup>80</sup> The constitutional court has also stated expressly that article 20 is addressed not only to public authorities but also to trade unions, associations of manufacturers and retailers, and employers' associations, which are obliged to engage in dialogue and cooperation with other socioeconomic stakeholders. This means that all stakeholders, to the extent appropriate to their capabilities, are obliged to pursue the common good even if it contravenes their individual interests.<sup>81</sup> It affects, among other things, the interpretation of the principle of freedom of contract, according to which it is impermissible to impose unfavourable conditions on the weaker party,<sup>82</sup> e.g., offering civil law instead of employment contracts to a specific group of workers, e.g., platform workers.<sup>83</sup> In one of its decisions, the Polish constitutional court indicated that 'there are restrictions that aim not to limit the autonomy of will of the parties but, on the contrary, are motivated by the intention to ensure equality in contractual relations.'<sup>84</sup>

Although there was not a judicial decision determining the specific business obligations arising from the constitution, the above-mentioned interpretation indicates that they are obliged, at least, to respect the minimum core content of the relevant rights, which correspond to Pillar II of the UNGPs. At the same time, considering the benefit of the doubt (*in dubio pro libertate*),<sup>85</sup> this obligation would be more feasible to enforce in the context of negative rights, e.g., prohibition of employment of children under 16 years of age (article 65(3) of the constitution), the complete exclusion of the right to bargain or the right to strike by the employee (article 59).<sup>86</sup> The constitutional court has emphasized that principles of dialogue and cooperation between socioeconomic stakeholders apply to horizontal relations, including in the workplace. The specific mechanisms can vary between the specific sectors as well the size of the companies.<sup>87</sup> Among the CEE countries, the Polish and Lithuanian constitutions arguably provide the most robust legitimacy for state intervention in the free market. Other states limit themselves to listing mechanisms and/or criteria for regulating the free market in the provision which establishes property rights (e.g., prohibiting monopoly and ensuring free competition).

<sup>79</sup> Polish Constitutional Court, Judgment of 7 May 2014, K 43/12.

<sup>80</sup> In one of the cases, the constitutional court stated that '[t]he protection of social rights should be established through statutory solutions that will allow for the optimal realization of a constitutional right. There is also no doubt that regardless of the intensity of the impact of factors that may inhibit the pursuit of legitimate social needs, the statutory realization of a constitutional social right can never rank below the minimum determined by the essence of the right in question.' See Polish Constitutional Court, Judgment of 8 May 2000, SK 22/99.

<sup>81</sup> Polish Constitutional Court, Judgment of 30 January 2001, K 17/00.

<sup>82</sup> Polish Constitutional Court, Judgment of 27 November 2006, K 47/04.

<sup>83</sup> Izabela Jędrzejowska-Schiffauer and Łukasz Szoszkiewicz, 'Digital Platforms and the Right to Just and Favourable Conditions of Work: A Business and Human Rights Perspective' (2022) 17 *Journal of Law and Ethics of Human Rights* (forthcoming).

<sup>84</sup> Polish Constitutional Court, Judgment of 13 September 2005, K 38/04.

<sup>85</sup> Polish Supreme Court, Resolution of 10 January 1990, III CZP 97/89.

<sup>86</sup> The Polish Constitutional Court has also suggested the direct applicability of negative obligations derived from the cultural rights. See Polish Constitutional Court, Judgment of 19 June 2018, K 47/14.

<sup>87</sup> Polish Constitutional Court, Judgment of 7 April 2003, P 7/02; Judgment of 28 September 2006, K 45/04.

Nevertheless, their constitutional courts also highlight the ‘social function’ of property rights, e.g., in Slovenia.<sup>88</sup>

## V. Judicial Review

Although the concept of a judicial review emerged as early as the nineteenth century,<sup>89</sup> its incorporation into domestic law was a slow process. For a long time, the idea of nullifying actions taken by the legislative or executive branches by the judiciary was contested as ‘invading the field of public policy’.<sup>90</sup> Nevertheless, judicial review proliferated in the second half of the twentieth century and remains one of the essential elements of modern constitutional democracies. Judgments of constitutional courts on controversial issues such as abortion, freedom of speech or national security are widely debated and sometimes criticized for judicial activism. However, a certain level of involvement of the judiciary in standard-setting for various areas of everyday life is widely accepted.<sup>91</sup>

The proliferation of constitutional courts is sometimes framed as the more significant phenomenon, namely the judicialization of politics. It describes ‘the process by which courts and judges come to make or increasingly to dominate the making of public policies that had previously been made (or, it is widely believed, ought to be made) by other governmental agencies, especially legislatures and executives’.<sup>92</sup> The constitutional courts remain the most vivid manifestation of this process, as they have the last word in any dispute concerning constitutional matters.

Most constitutions, including those in CEE countries, do not determine whether the constitution binds business entities (indirectly or directly) or affects relations between private entities. Theoretically, one can imagine a situation in which the legislature amends the constitution and prescribes a particular solution. However, this is an unlikely situation due to the difficulty of carrying out the procedure for amending the constitution. In this context, constitutional court judges appear as allies of the UNGPs, who have the legitimacy and instruments for implementing Ruggie’s Principles in domestic jurisdictions. In many CEE jurisdictions, they can adjudicate within the framework of concrete review (connected to a particular case, e.g., initiated by the constitutional complaint – see Section II) and abstract review. The latter makes it possible to adjudicate in isolation from a specific case, i.e., in a situation where an act is to be/has been passed,<sup>93</sup> but the individual rights have not been violated yet.

For this reason, the abstract review could be a vital instrument for preventing human rights abuses. Moreover, many constitutional courts can decide on the compatibility of laws

<sup>88</sup> Slovenian Constitutional Court, Judgment of 25 April 2013, U-I-311/11, Official Gazette RS, 100/2011, 44/2013 and OdLUS XX, 6.

<sup>89</sup> US Supreme Court, *Marbury v Madison* 5 U.S. 137 (1803).

<sup>90</sup> Walter F Dodd, ‘The Growth of Judicial Power’ (1909) 24:2 *Political Science Quarterly* 193, 194. In the nineteenth century even liberal philosophers such as Alexis de Tocqueville or John Stuart Mill were sceptical about granting the judiciary the power of deciding on the (un)constitutionality of laws. See Torbjorn Vallinder, ‘When the Courts Go Marching In’, in C Neal Tate and Torbjorn Vallinder (eds.), *The Global Expansion of Judicial Power* (New York: New York University Press, 1995) 22, 26.

<sup>91</sup> There are numerous reasons for this, in particular, the settlement and coordination functions of law. See Larry Alexander and Frederick Schauer, ‘On Extrajudicial Constitutional Interpretation’ (1997) 110:7 *Harvard Law Review* 1359, 1371.

<sup>92</sup> Tate and Vallinder, note 90, 15. The authors provide also another meaning of the judicialization of politics, i.e., ‘the process by which nonjudicial negotiating and decision-making forums come to be dominated by quasi-judicial (legalistic) rules and procedures’.

<sup>93</sup> In some jurisdictions, the abstract review can be initiated after the parliament has passed the statute but before the president signs it, e.g., Poland.

with the (selected) acts of international law, particularly human rights treaties (e.g., Poland, Slovenia). In one case involving the termination of an employment contract, the Slovenian constitutional court ruled out the violation of ILO Convention no. 158 and, consequently, article 8 of the Slovenian constitution (obligation to comply with generally accepted principles of international law and binding treaties).<sup>94</sup>

The relatively broad leeway in adjudicating cases by the constitutional courts does not necessarily have to translate into a progressive interpretation of legal norms. Much depends on the personality and views of the judges who form the constitutional court at a given time. The development of the jurisprudence of international bodies and other constitutional courts (e.g., the German constitutional court or the American Supreme Court) is another influential factor. In the context of BHR, the Czech constitutional court uses the freedom granted to it, to develop a framework for assessing the admissibility of restricting social rights. When weighing political rights, judges use the so-called proportionality test; however, it turns out that there are difficulties with its application to social rights. In the case of negatively formulated rights and obligations (e.g., related to the protection of privacy or freedom of expression), it is usually easier to determine whether there has been interference by a third party. Then, the main burden of legal reasoning is based on proving whether the interference was justified, proportionate and necessary. It is more challenging to determine the interference in the case of social rights, typically formulated positively and progressively, such as the right to adequate housing or the right to the highest attainable standard of health. The difficulty arises, *inter alia*, from the interpretation of terms such as ‘adequacy’ or ‘highest attainable level’, which is necessary to determine whether there has been interference or not. In other words, the judge’s role is to assess whether the state is rationally required to provide a certain level of protection. For this reason, the traditional pattern of legal reasoning for political rights, known as the proportionality test,<sup>95</sup> has rarely been applied to economic and social rights, which are of particular significance in the context of BHR.<sup>96</sup>

Since 2008, the Czech constitutional court has been developing the so-called rationality test in its jurisprudence, which assumes a four-step analysis:<sup>97</sup>

- 1) Defining the minimum core content of a given social right;
- 2) An assessment of whether the law does or does not infringe this minimum core content (if yes, the next step involves the application of the proportionality test);

<sup>94</sup> Slovenian Constitutional Court, Judgment of 18 November 2021, U-I-16/21, U-I-27/21, Official Gazette RS, 202/21.

<sup>95</sup> The proportionality test is applied in a similar way by the constitutional courts all over the world (except for the United States). At the same time, the critics highlight that the judges compare incommensurable values and, therefore, the mechanism is ‘of political rather than of legal decision-making’ and allow the judiciary to acquire political power. See Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge/New York: Cambridge University Press, 2017) 4.

<sup>96</sup> Young, note 96, 221–247. For the application of the proportionality test to social rights by the Polish constitutional court, see Anna Śledzińska-Simon, *Analiza proporcjonalności ograniczeń konstytucyjnych praw i wolności. Teoria i praktyka* [The analysis of the proportionality of limitation of constitutional rights and freedoms. Theory and practice] (Wrocław: E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa, 2019) 101–104. In Czechia, in her dissent opinion, Judge Ivana Janů stated that ‘the biggest challenge [...] will be to develop a comprehensible, robust, and consistent case law on economic and social rights’. See Czech Constitutional Court, Judgment of 10 June 2013, Pl. ÚS 36/11. See also Ladislav Vyhnánek, ‘Proporcionálně či jinak? Problém ústavního přezkumu zásahů do sociálních práv’ [Proportionally or otherwise? The problem of constitutional review of interference in social rights] (2014) 3:22 *Časopis pro právní vědu a praxi* 203, 217.

<sup>97</sup> Jan Kratochvíl, ‘Test racionality: skutečně vhodný test pro sociální práva?’ [The Rationality Test: A Really Appropriate Test for Social Rights?] (2015) 12 *Právník* 1052, 1053. For the jurisprudence see, for instance: Czech Constitutional Court, Judgment of 20 May 2008, Pl. ÚS 1/08; Judgment of 24 April 2012, Pl. ÚS 54/10; Judgment of 5 October 2006, Pl. ÚS 61/04.

- 3) If the law does not infringe the minimum core content, one should assess whether the limiting measure pursues a legitimate aim and whether or not it is retrogressive;
- 4) Consider whether the measures implemented to achieve the legitimate aim are reasonable (rational), although not necessarily the most appropriate/efficient.

The fourth step replaces the criterion of necessity (known from the proportionality test) with rationality. Thus, limitations of social rights should be rational in light of a legitimate aim (e.g., economic stability, environment, rights, and freedoms of others). Rationality provides the state with significantly wider discretion than the requirement of necessity (the least invasive of the possible measures). So far, the test has been applied against limitations imposed by public authorities in cases related to social security,<sup>98</sup> the right to the highest attainable standard of health<sup>99</sup>, the right to strike, and collective bargaining.<sup>100</sup> Consequently, it is impossible to determine whether, in the case of a horizontal application of constitutional rights, a judiciary would be inclined to grant business actors an equally wide margin in fulfilling their human rights obligations.

On the other hand, in light of IHRL, states are primary duty bearers, so it would be illogical to oblige non-state actors to a higher protection standard. ‘Reasonableness’ has also been established as the main criterion determining the examination of communications under the Optional Protocol to the ICESCR.<sup>101</sup> Also, the UNGPs themselves indicate that human rights due diligence requires taking ‘every reasonable step to avoid involvement with an alleged human rights abuse’ (Principle 17). In this context, the approach taken by the Czech constitutional court provides solid grounds for the reception of the UNGPs in this matter.

## VI. The Challenges of the ‘Third Wave’ of Judicial Review

International law is shaped through negotiations and concessions in international fora. It was no different with the UNGPs, which came about as a result of resistance (from business actors) and silence (from States) to the Norms on the Responsibilities of Transnational Corporations in the early 2000s.<sup>102</sup> Even in a situation where the negotiation process is crowned with the adoption of a document, the negotiated solutions may not meet the expectations of a country and result in reluctance or slow implementation. Add to this the increasing activity of international actors in lawmaking and the exponential growth of soft and hard laws claiming superiority over national laws. Taking these dynamics into account, Weiler and Lustig noted that after a period of penetration of international law into the jurisprudence of constitutional courts, we are now witnessing the opposite process.<sup>103</sup>

The so-called ‘third wave of judicial review’ is characterized by the increasing resistance of national jurisdictions to international norms. In this context, the transfer of the discussion of the human rights obligations of business to the level of national constitutions can arguably facilitate progress towards the same goals (i.e., ensuring the protection of human rights) by other means, at least in the selected CEE countries. Of course, such a process can hardly be expected to ensure human rights protection in countries with resistance and disregard for the

<sup>98</sup> Czech Constitutional Court, Judgment of 24 April 2012, Pl. ÚS 54/10.

<sup>99</sup> Czech Constitutional Court, Judgment of 10 June 2013, Pl. ÚS 36/11

<sup>100</sup> Czech Constitutional Court, Judgment of 5 October 2006, Pl. ÚS 61/04.

<sup>101</sup> United Nations General Assembly, ‘Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’, A/RES/63/117 (10 December 2008).

<sup>102</sup> John Sherman, ‘Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights’ in Rae Lindsay and Roger Martella (eds.), *Corporate Responsibility, Sustainable Business: Environmental, Social and Governance Frameworks for the 21st Century* (Alphen aan den Rijn: Wolters Kluwer, 2020).

<sup>103</sup> Lustig and Weiler, note 12.

norms of international law and constitutional law, such as in Poland.<sup>104</sup> Nevertheless, even leaving aside extreme cases such as Poland or Hungary, one may note that the resistance to international norms could also downgrade human rights protection in other jurisdictions. Such a threat exists, and efforts should be made to restore respect for international law. At the same time, stimulating progressive interpretation of constitutional norms can counteract the process of widening the gap between domestic and international law. Also, history provides numerous examples of national jurisdictions establishing a higher level of human rights protection than international instruments; for instance, many constitutions recognized the right to a healthy environment before the UN General Assembly did so in 2022.<sup>105</sup>

On the one hand, Ruggie has expressly pointed out that the move to state-based law is unnecessary as the UNGPs stipulate their own constitutive framework and were a conscious ‘move beyond the conceptual shackles of traditional international human rights law’.<sup>106</sup> From the perspective of constitutional lawyers, on the other hand, the UNGPs remain just another international soft law instrument. As indicated in the previous section of the article, Pillar I of the UNGPs (State duty to protect human rights) remains relatively well-established both in the texts of the constitutions and the jurisprudence of the constitutional courts. At the same time, constitutional courts are more inclined to apply constitutional rights in horizontal relations, which corresponds to Pillar II (the corporate responsibility to respect human rights). The doctrine that originated in the 1950s in Germany has penetrated domestic and regional frameworks (e.g., the European Union<sup>107</sup>) and is gradually taking a firmer stance on the human rights obligations of non-State actors.<sup>108</sup> In other words, the constitutional law moved from asking the question of *whether* to *to what extent*. Although the answer is still unsatisfactory, as the duty to respect remains limited to businesses with significant public funding/ownership, the tendencies are clear and consistent with the UNGPs.

## VII. Conclusions

The constitutional framework of the selected CEE countries can facilitate the implementation of the UNGPs in various ways. Due to numerous constitutional similarities, the above-mentioned concepts can also be implemented in other CEE countries.

Pillar I of the UNGPs entails the obligation of public authorities to protect individuals from human rights abuses caused by third parties. Its implementation can be facilitated by constitutionalizing human rights, which entails establishing state obligations to protect the individual. The systematic expansion of the catalogue of constitutional rights primarily concerns social rights, the protection of which is vital in the context of business activity (see Section II). As indicated by comparative studies, CEE countries have not only established broad catalogues of these rights but also stand out for respecting constitutional norms in this regard (Slovenia, the Czech Republic, Slovakia).<sup>109</sup> The constitutional courts of Poland and Slovenia have also highlighted the public character of businesses controlled or owned by

<sup>104</sup> Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press, 2019).

<sup>105</sup> United Nations General Assembly, ‘The Human Right to a Clean, Healthy and Sustainable Environment’, A/RES/76/300 (28 July 2022).

<sup>106</sup> Ruggie and Sherman, note 68, 926.

<sup>107</sup> The EU is currently negotiating the horizontal anti-discrimination directive. See Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM/2008/0426 final.

<sup>108</sup> For instance, in Canada, South Africa and Hong Kong as well as the European Union (e.g., cases *Walrave v Association Union Cycliste Internationale* (1974) or *Defrence v Sabena* (1976)). For the analysis, see Stephen Gardbaum, ‘The “Horizontal Effect” of Constitutional Rights’ (2003) 102:3 *Michigan Law Review* 387.

<sup>109</sup> *ibid.*

the state (Principle 4 of the UNGPs).<sup>110</sup> It should also be noted that the constitutions of many CEE countries have established a special obligation to protect the weaker party in private relations, including consumers, employees and tenants (Czech Republic, Poland and Slovenia, among others).

The constitutional embeddedness of rights and freedoms also fosters the development of jurisprudence, particularly in lower courts, which rarely invoke sources of international law (and if they do, it is primarily the European Convention on Human Rights). In addition, the constitutional legitimacy of these rights can help mitigate the adverse effects of increasing resistance to international law norms in some countries in the region (e.g., Poland and Hungary). Even if sceptical of international human rights law, constitutional courts in these countries will always remain bound by their national constitutions.

Another constitutional mechanism that can contribute to the implementation of Pillar I is establishing a constitutional principle that obliges public authorities to pursue specific economic policies. The Polish Constitution, which establishes a social market economy model, stands out in this context (see [Section IV](#)). As it notes, the state must take measures to correct the adverse effects of free market mechanisms and ensure that economic development is carried out with the participation of all social actors, including employers, trade unions, consumer organizations, and others. According to the doctrine of constitutional law, the state should implement this principle to the maximum extent possible (also considering the identical obligation to implement other constitutional principles). This goes beyond situations where conflict between two individual rights arises and stretches to all state actions. In this context, the constitutional principle also applies to negotiating free trade or investment agreements (Principle 9 of the UNGPs).

The implementation of Pillar II, which concerns the corporate responsibility to respect human rights, raises the most significant challenges. Nevertheless, constitutional law provides mechanisms that can facilitate the uptake of the UNGPs. The most promising in this matter is the doctrine of the direct applicability of human rights in horizontal relationships between subjects of private law, e.g., an individual and an enterprise. This doctrine was born in Germany in the 1950s and has permeated the jurisprudence of many countries worldwide, including CEE countries (see [Section III](#)). Although the progressive constitutions of the CEE countries appear to provide a solid basis for applying this concept in practice, the jurisprudence of constitutional courts is still relatively limited. So far, none of the courts has expressly stated that the constitutional norms directly bind businesses. Poland's constitutional court has commented cautiously and hypothetically on obligations arising from property rights and cultural rights.<sup>111</sup> The Czech constitutional court has consistently maintained that constitutional rights 'radiate' through the norms of statutory laws.<sup>112</sup> The most emphatic statement on the need for binding human rights obligations for business and the need to rethink the existing human rights framework for corporations, specifically multi- and transnational corporations, was presented in Slovenia (although it was 'only' the concurring opinion of Judge Jan Zobec).<sup>113</sup> The Slovenian government's progressive stance in this regard has also been reflected in the NAP.

<sup>110</sup> For Poland, see Polish Constitutional Court, Resolution of 6 April 2011, SK 21/07. For Slovenia, see Slovenian Constitutional Court, Judgment of 11 April 2013, U-I-40/12, Official Gazette RS, 39/2013 and OdlUS XX, 5.

<sup>111</sup> Polish Constitutional Court, Judgment of 5 November 2019, P 14/19; Judgment of 23 June 2015, SK 32/14; Judgment of 19 June 2018, K 47/14.

<sup>112</sup> Czech Constitutional Court, Judgment of 18 December 2020, II. ÚS 1916/20. See also the judgments Pl. ÚS 34/09 of 7 September 2010 (N 187/58 SbNU 647); IV. ÚS 1735/07 of 21 October 2008 (N 177/51 SbNU 195), and II. ÚS 222/18 of 14 August 2019.

<sup>113</sup> Slovenian Constitutional Court, Judgment of 11 April 2013, U-I-40/12, Official Gazette RS, 39/2013 and OdlUS XX, 5.



Pillar III of the UNGPs deals with access to remedy. Due to its unique and far-reaching nature, judicial review is an essential element in protecting the individual. Countries of Central and Eastern Europe introduced constitutional complaints, which can be lodged by individuals whose constitutional rights have been violated (see [Section II](#)). In many countries, the judicial review can be triggered in the abstract (sometimes even before a law is signed), before any adverse effects on human rights occur (see [Section V](#)). In addition, if the court decides that a human right has been violated in a given case (therefore, satisfying an individual's access to remedy), it also removes the unconstitutional norm from the legal system (preventive function). In many countries, including those in Central and Eastern Europe, constitutional courts can assess the constitutionality of statutory laws not only with the constitution but also with acts of international law, including human rights treaties. In this context, it is worth mentioning the ruling by the constitutional court of Slovenia, which found that statutory provisions on the termination of an employment contract violated obligations under ILO Convention No. 158 and, therefore, the state's obligation to respect international law (article 8 of the Slovenian constitution).<sup>114</sup>

The above analysis shows that constitutional law can be a driver for the domestic implementation of the UNGPs, particularly Pillars I and III. In CEE countries, the jurisprudence of constitutional courts can be used in the design of NAPs and contribute to their better and more consistent implementation by public authorities, particularly the judiciary. At the same time, in some countries in the region (e.g., Poland and Hungary), growing resistance to external norms may hinder the reception of international law instruments (see [Section VI](#)). In such a situation, emphasizing the domestic legitimacy of BHR obligations can help ensure that the individual receives some protection against business violations. Last but not least, constitutional rights should not be treated as a mechanism to replace international human rights law, but rather to complement it. The constitution could be a driver only in those countries where public authorities respect constitutional norms and obligations derived from thereof. As Ambedkar, one of the founding fathers of the Indian constitution once said, '[h]owever good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However, bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot'.<sup>115</sup>

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<sup>114</sup> Slovenian Constitutional Court, Judgment of 18 November 2021, U-I-16/21, U-I-27/21, Official Gazette RS, 202/21.

<sup>115</sup> Constituent Assembly of India, Constituent Assembly Debates on 25 November, 1949, vol. XI.