ISSN 2663-0575

TARAS SHEVCHENKO NATIONAL UNIVERSITY OF KYIV

Issue 4(5) 2019

ACCESS TO JUSTICE IN EASTERN EUROPE

Editorial About Issue 4/2019

VD «Dakor» PUBLISHING HOUSE

ACCESS TO JUSTICE IN EASTERN EUROPE

Founded by East European Law Research Center Supported by Law Faculty, Taras Shevchenko National University of Kyiv

AJEE is an English-language journal covering various issues related to the access to justice and to the right to a fair and impartial trial. A specific area of AJEE is the law in East European countries, such as Ukraine, Poland, Lithuania and other countries of the region due to special features of their legal traditions evolution. While preserving the high academic standards of scholarly research, we also give the opportunity to young legal professionals and practitioners to present their essays on the most current issues.

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ISSN 2663-0575
EELRC
Publishing House VD "Dakor"

Access to Justice in Eastern Europe

Issue 4 (5) December 2019

doi.org/10.33327/AJEE-18-2.5

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ABOUT THE ISSUE 4/2019

Today, the terms 'justice' as well as 'fair trial' seem to attain a truly European context. During the last decades, we have been reopening a new general vision of these traditional categories, which often appeared very diverse. Nowadays the discussion and sharing the practices are the most proper ways for solidarity, comprehension and creation of a Genuine European Area of Justice.

The conference '*Bringing Justice Closer to European Citizens*' was held on the occasion of the *European Day of Justice* celebration and we had the privilege to be a media partner of that event. The reporters of the conference highlighted the most important problems of current judiciary and proceedings reforms within Europe, with a special focus on Poland and Ukraine due to their specific on-going legislation reforms.

The proper attention was drawn not only to courts but also to out-of-court dispute resolution, in particular, mediation and other schemes development. Taking into consideration the above-mentioned, this issue contains the most valuable and interesting reports of the participants.

The excellent article about the finality of judgments in civil cases is the result of the extensive study of *Constantin Gusarov and Viktor Terekhov*, two scholars from Lithuania and Ukraine – countries with similar backgrounds and, hopefully, a further common European perspective.

Volodymyr Kroitor and Valeriy Mamnitskyi together researched one of the most famous principles of the civil procedure that is adversariality, which alongside the new reform of civil procedure in Ukraine, approaches the world-wide tendency, transforming the balance of the judge and the parties' roles in civil cases consideration.

Currently, digitalization of the judiciary and proceedings does not seem to be a new topic for research. However, a niche sphere of research is a comparison of the two states, similar due to their historical origin: Austria, which is among the well-known leaders of e-justice, and Ukraine, which may successfully use the best European practices during the first steps of its judiciary digitalization. The research, written by *Henriette-Christine Boscheinen-Duursma* and *Roksolana Khanyk-Pospolitak*, should definitely be useful for that and help strengthen confidence of judicial rights protection.

The effective functioning of the notary in the state plays a significant role in the rule of law and democratic countries. *Maria Bondarieva* in her essay writes about efficient protection of property rights within the land market introduction in Ukraine.

Let us express our gratitude to all the reporters for their valuable contributions which will hopefully be appreciated by a wider audience of scholars.

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FINALITY OF JUDGMENTS IN CIVIL CASES AND RELATED CONSIDERATIONS: THE EXPERIENCE OF UKRAINE AND LITHUANIA

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doi.org/10.33327/AJEE-18-2.4-a000020

Summary: – 1. Introduction. – 2. The Concept of Finality and its Relevance. – 3. Considerations Related to Finality. – 3.1. View of the Court. –3.2. View of the (Post-) Soviet Doctrine. – 3.3. Considerations that Support Finality. – 4. The Experience of Ukraine. – 5. The Experience of Lithuania. – 6. Possible Implications for the Two Nations. – 7. Conclusions.

Finality of judgments is a concept that puts an end to the trial, prohibiting subsequent appeals, opening of new proceedings and disputing clearly established facts. Despite being promoted by the Council of Europe and its Court of Human Rights and familiar to most if not all states, its application still encounters misunderstandings in some Eastern European Countries. Deeply rooted ideas of substantive truth and the public role of the judiciary, a rather idiosyncratic notion of fair trial and the rule of law all lead to underestimation of the role played by finality in a peaceful life of the society. This article addresses the experience of Ukraine (where a major judicial reform has just taken place) and Lithuania – two post-Soviet nations that both, still in their unique way, worked on implementing the principle of finality into their procedural order. The paper also explores an uneasy balance to be found between this notion and other relevant considerations (access to justice, rule of law, judicial economy and some other).

Keywords: finality of judgments, legal effect, res judicata, review of judicial decisions, access to justice, rule of law, correction of errors, judicial economy.

1. INTRODUCTION

As Ukraine approaches deeper integration with the European Union, it faces the necessity of modernizing its legislation and harmonizing it with European supranational standards. Of course, membership is not the only reason for change. Ukrainian judicial system used to be biased, partly corrupted, while the procedures for case deliberation were slow and ineffective.[1] Not only were they behind the standards of the EU, but also contravening the positive obligations under the European Convention on the protection of human rights, which resulted in a number of cases lost before the ECtHR.[2] With that in mind, a comprehensive reform of judicature and procedural law was envisaged, which resulted in the law of 3 October 2017.[3] It brought changes to the structure of the Courts and their competence, as well as updated the major procedural Codes. Changes affected the role of the judge, grounds for jurisdiction, simplified proceedings, the use of ICT in civil trials and much more.

This article will, however, focus on the part of the reform which is related to the finality of judgments. As is widely known, each dispute shall conclude at some point by providing an unambiguous and mandatory solution. The decision pronounced becomes *res judicata* and cannot be disputed by the parties or changed by the courts, or put into question in some other way. Obvious as they are, such ideas still face misunderstanding in many post-Soviet jurisdictions, including Ukraine. The judiciary here was always characterized by a complex structure, numerous instances, a wide discretion of changing and putting aside decisions of the lower courts and quite extended powers of public officials. All of these were not the result of malice, but rather existed due to specific understandings of the role of the judiciary, rights and obligations of parties and the essence of rule of law and fair trial. At the same time, participation in the European Convention requires taking into account interpretations given by the ECtHR, which was quite fruitful with respect to finality, *res judicata* and the principle of legal certainty.[4]

The recent reform, although not obvious at first sight, attaches great importance to the given question. The aim is not only to formally comply with certain European ideals and values, but to modernize national law in that regard, find an appropriate balance between varying interests and to ensure a fair trial and effective administration of justice.

Together with the experience of Ukraine, we analyze the experience of Lithuania, another country of the former USSR that succeeded in becoming a member of the European Union and to change its procedural rules to encompass ECtHR standards. A major reform of Civil Procedural Law took place there back in 2002, and since then

1 Iryna Izarova, 'Reform of the Civil Process in Ukraine: Novels of Lawsuit' (2017) 8 Law of Ukraine 35; Vladislava Pukhalenko, 'Legal Bases of Cooperation between the European Union and Ukraine in the Field of Civil Justice'(2014) 126 Problems of Legality 216-225.

2 Iryna Bezzub, 'Reform of procedural law in Ukraine: expert assessment' Social Communication Research Center <http://www.nbuviap.gov.ua/index.php?option=com_content&view=article&id=3009:reforma-protsesualnogo-zakonodavstva-v-ukrajini-otsinki-ekspertiv&catid=8&Itemid=350> accessed 7 December 2019.

3 The Law of Ukraine N 2147-VIII (3 October 2017) 'On the Amendment of Economic Procedural Code, Civil Procedural Code, Code of Administrative Procedure and Other Legal Acts; <http://search.ligazakon.ua/l_doc2.nsf/link1/T172147.html> accessed 7 December 2019.

4 Dovydas Vytkauskas and Grigoriy Dikov, *Protecting the Right to a Fair Trial under the European Convention on Human Rights* (Council of Europe 2012).

it functions in a decent way. Certainly, there are states in Europe and worldwide with (presumably) more developed and structured civil justice systems, the quality of which has been tested throughout decades, if not centuries. However, their example cannot be directly transposed to Ukraine, having in mind differences in legal culture, economic development and historical background. At the same time, Lithuania is, most probably, the closest Ukrainian ally in the West: they have always had close political, social and economic ties and for quite some time have been part of one nation (1340-1648, 1795-1917, 1940-1991) with the same laws applicable to both. As will be seen later, the notion of *finality* was always of great importance to the two countries.

The article is structured as follows. Part I discusses the concept of finality and its relevance for both private and public stakeholders. Part II explores related considerations that apply to court procedures and decisions and that contend, support or even outweigh the need to keep judgments stable and unaltered. The problems faced by the courts in the application of these doctrines are also discussed there. In Parts III and IV we show the corresponding experience of Ukraine and Lithuania in bringing their legislation in accordance with the requirements of finality (as it concerns the most problematic spheres – judicial review and reopening of proceedings). Part V tries to propose solutions that can be adopted by both states in order to further improve their regulation. The paper concludes by giving the authors' opinion on keeping a delicate balance between finality and other fundamental considerations.

2. THE CONCEPT OF FINALITY AND ITS RELEVANCE

Finality of judgments is a concept (or, a legal principle), according to which the decision taken by the court at some point becomes permanent, immutable, binding and open to enforcement.[5] It cannot be disputed again, the parties may not lodge similar claims and give another interpretation to the established facts in subsequent proceedings on an interrelated matter.

The reason for such adherence to finality is that justice has been performed: a court established relations between parties, settled their dispute and gave its opinion on their rights and duties. Certainly, one or even both of the parties may be dissatisfied with the result, but allowing them subsequent forum for quarrels and altercation is not the best thing society can do for them. It involves additional time and money, the waste of judicial resources and presumably a lack of justice for other people seeking relief.[6] Courts are not one's pocket army: their aim is to resolve conflicts and not to maintain them indefinitely. Moreover, they are part of the judiciary, one of the three powers of a sovereign nation. In that regard, they shall have a high status, as their decisions bring stability and order. If, however, they are not respected and are easily changed or overturned, courts are likely to lose faith and support among people. In other words,

5 Thomas A Engelhard, 'Bringing More Finality to Finality: Conditional Consent Judgments and Appellate Review' (2015) 89 (1) St. John's Law Review 293; Κωνσταντίνος Καλάβρος, Κωδικάς πολιτικής δικονομίας (με την νομολογία της ολομελίας του Αρείου Πάγου απο το 1971 μεχρί και το Μαρτίο 2012). Καλάβρος Κ., Σταματόπουλος Σ. (Αθήνα-Θεσσαλονίκη: Εκδοσεις Σακκουλα, 2012) 725, at 537.

6 To some degree, duplicate proceedings or persisting appeals may be seen as an abuse of rights. See: Paul M Perell, 'Res judicata and Abuse of Process' (2001) 24 Advocates Quarterly 189.

their decisions must be worth something, which is not the case where they are easily overwritten by subsequent resolutions.[7] Thus, it is fair to say that there are both public and private considerations for the application of finality doctrine.[8]

To establish finality of a judgment is also important for other reasons. In this way, a final judgment is a precondition for applying to the European Court of Human Rights and, sometimes, to national institutions of constitutional control. In Ukraine, for instance, the Constitution prescribes since 2016 that a final decision shall also be present for lodging a constitutional complaint,[9] and since July 2017 the conditions and requirements of finality have been enshrined in the Law on Constitutional Court of Ukraine.[10]

The rules on finality are found in most national legal systems; however their exact contents and scope vary significantly. A great job of harmonizing national laws on the matter was done by the European Court of Human Rights (ECtHR), which is capable of providing binding guidance for the Contracting States to the European Convention. For the Court, finality is a part of the rule of law, a legal principle which is a part of the common heritage of the Contracting States.[11] From that principle ECtHR derives legal certainty, which requires *inter alia* respect for *res judicata* (once again a principle of law). The latter term has for the Court a similar meaning to that of finality:

> No party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case.[12]

In other words: you are precluded as a party from starting litigation anew if matters under consideration have already been resolved. The ECtHR has given almost the same definition to *res judicata* as originally attached to that doctrine in common law, where it was seen as a matter that has been adjudicated and that bans subsequent litigation on the same matter.[13]

However, differences are also obvious: while *res judicata* was intended to bar continued litigation of the same case,[14] the Court attached more attention to wrongly initiated appeals and the undesirability of changing the decision in higher instances.[15] Another

7 See: William E Pomeranz, 'Supervisory Review and the Finality of Judgments under Russian Law' (2009) 34 Review of Central and East European Law 15; Kevin M Clermont, '*Res judicata* as Requisite for Justice' (2016) 68 Rutgers University Law Review 1067.

8 The policy choices are usually explained by Latin maxims, such as: *interest reipublicae ut sit finis litium* ('it is in the interest of the State that there should be an end to litigation'), *res judicata pro veritate accipitur* ('an adjudged matter is accepted as the truth') and *nemo debet bis vexari si constet curiae quod sit pro una et eadem causa* ('no one ought to be twice prosecuted where the court establishes that the cause of action is the same').

9 Konstytutsiia Ukraiiny: pryiniata na piatii ses. Verkhovn. Rady Ukraiiny 28.06.1996 (The Constitution of Ukraine: Questions at the fifth session of the Verkhovna Rada of Ukraine) (1996) N 30 Vidomosti Verkhovnoii Rady Ukraiiny141 <http://zakon2.rada.gov.ua/laws/show/254к/96-вр> accessed 7 December 2019.

10 The Law of Ukraine N 35 (13 July 2017) 'On the Constitutional Code of Ukraine' <http://zakon.rada.gov.ua/laws/show/2136-19> accessed 7 December 2019.

11 *Brumărescu v Romania*, ECtHR Judgment (1999) Application No. 28342/95, 61.

12 *Ryabykh v Russia,* ECtHR Judgment (2003) Application No 52854/99, 52.

13 Yuval Sinai, 'Reconsidering *res judicata*: a Comparative Perspective' (2011) 21(2) Duke Journal of Comparative & International Law 353.

14 Alexander Kornezov, '*Res judicata* of National Judgments Incompatible with EU law: Time for a Major Rethink?' (2014) 51 Common Market Law Review 809.

15 See: *Brumărescu* (n 11); *Ryabykh* (n 12). However, compare: *Esertas v Lithuania*, ECtHR Judgment

distinction is that classical *res judicata* is addressed to the parties (it is they who are barred from starting new litigation and disputing facts in subsequent proceedings; they are also the subjects bound by the court's findings). On the other hand, ECtHR mainly uses this notion in its dialogue with national judiciaries to show them what can and cannot be done to influence the fate of judgment.

It may be said that the Court attaches more relevance to the result rather than the form used. Consequently, it prohibits not only subsequent trials or appeals (and other references to a higher instance), but all other abusive procedural tactics that would lead to the contents of a judgment being modified to the detriment of legal certainty and the right to court (*appeals in disguise*).[16]

So, does it mean that any reviews are prohibited *per se*? Not exactly. For some reason national authorities maintain courts of higher instances with review capabilities and allow them to overthrow original decisions. The ECtHR is not against review procedures as such, but rather believes they need to be used in a wise way and be intended to protect some other relevant interest.

3. CONSIDERATIONS RELATED TO FINALITY

Like many other concepts enshrined in the Convention (or derived therefrom by the Court) finality – or rather, *res judicata*, is not absolute. There are other considerations of equal or even prevailing force influencing the status of judgment. We are not speaking here of objective, subjective, temporal and territorial limits to *res judicata*. These questions are covered in detail elsewhere,[17] moreover, they are rather specific for each national jurisdiction.

We are rather referring to specific exceptions to the 'principle of finality', which play their role when it appears it may be neglected in favour of another fundamental social value. Such may be *equality before law*, *access to justice* (which means that the courts shall be reachable, and the litigants vested with rights to apply as long as they feel it necessary), *rule of law* (everyone shall have the right to defend even against a judicial institution that may be biased or mistaken in application of law) and other fundamental principles. It is widely believed that finality can never give an absolute immunity against a potential check for common and policy-relevant court errors.[18]

3.1. View of the Court

(2012) Application No 50208/06, 31 – the problem was that the courts in the second set of proceedings ignored the previous judicial process (which is contrary to issue preclusion, a part of *res judicata* doctrine).

16 See*: Driza v Albania,* ECtHR Judgment (2007) Application No 33771/02, 69-70; *Roşca v Moldova*, ECtHR Judgment (2005), Application No 6267/02, 26-27.

17 Kornezov, (n 14), 812-813.

18 Serhej Knyazkin, 'Problems of achieving legal certainty at the stage of verification of judicial acts in the civil process' (2017) 6 Bulletin of the Civil Process 60.

The European Court of Human Rights had recognized the validity of the above-mentioned inferences and built up a unique doctrine of permitted reversal of finality. Here are the arguments brought to life by this institution:

1) Priority is always given to stability and immutability of a final decision. Departure from the general rule is only possible when made necessary by circumstances of substantial and compelling character.[19] Such is the case where some fundamental errors are present and no other remedy is available to address them.[20] Quite different would be a situation, where only some minor or purely formal questions were brought to justify review. In the latter case, the Court would be most likely to find a violation of legal certainty and *res judicata*.

2) Judicial reviews are *prima facie* compatible with the Convention. Since Art. 6 ECHR as such 'does not compel the Contracting States to set up courts of appeal or of cassation',[21] it is up to the national authorities to determine whether to do so at all and on which conditions review procedures are available. Some of the national jurisdictions indeed see the right to appeal as a necessary remedy. In many legal systems a judgment is not final until the time for its first (and only) appeal lapses. In that sense, the right to appeal is an extension of the right of access to justice, since what you are interested in is not just *any* judicial institution, but *the one* which will correctly apply the law and not mess up in the factual base. In case any of this happens, you must be able to further defend your right in the appeal.

There is no problem when a person is entitled to appeal, since the court hearing the case as well as the parties involved in it are not protected from reaching wrong decision (in other words, *errare humanum est*).[22] The well-known Recommendation of the Committee of Ministers on the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases[23] also suggests that in principle, it should be possible for any decision of a lower court ('first court') to be subject to the control of a higher court ('second court').

3) Such a control, however, may be effectuated only once (on a particular subject matter). A person may disagree with the original judgment and bring his arguments to a higher instance. To the contrary, repeated setting aside of judgments on the same or similar grounds is incompatible with legal certainty and is not tolerated by the courts.[24] Enough is enough: courts cannot reasonably hear the same complaints over and over again.

4) Appeal shall be also limited in time. The ECtHR does not provide for specific dates, but notes that a case cannot be open for reconsideration *indefinitely*. The exact deadlines are to be provided in national law, however the Court is free to control their reasonableness

19 *Roşca* (n 16) 25; *Ryabykh* (n 12) 51-52.

20 *Gudkov v Russia*, ECtHR Judgment (2009) Application No 13173/03, 17.

21 See: *Delcourt v Belgium*, ECtHR Judgment (1970), Application No 2689/65, 25–26; *Brualla Gómez de la Torre v Spain*, ECtHR Judgment (1997), Applications No 155/1996/774/975, 37.

22 About the court system [of Lithuania] <https://www.apeliacinis.lt/en/court-system/about-the-court-system/129> accessed 7 December 2019.

23 Recommendation of the Committee of Ministers on the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases No R (95) 5 of 7 February 1995 <https://bit.ly/2KJ9tZt> accessed 7 December 2019.

24 *Nikitin v Russia*, ECtHR Judgment (2004) Application No 50178/99.

and effectiveness (*e.g.* in relation to reasonable time expectations).

Not only shall the law fix a concrete deadline for review – a limitation needs to be put on the possibility of the court to extend this period or restore missed deadlines.[25] In this latter case it must be assumed that any potential reason for restoration carries with it the possibility of abuse, since the national judicial authorities may apply them arbitrarily. The possible solution is putting the courts in rigid frameworks that would not allow any broad interpretations.

5) The range of persons to initiate the appeal shall not be broad. These are definitely the parties to the case and other subjects affected by the court's findings, but definitely not some random state officials, such as public prosecutors and court presidents. In certain cases, it is permissible that such subjects launch proceedings for the sake of public policy, yet they have to be limited by other relevant restrictions (*e.g.* time-limits). In any case, the *locus standi* of a governmental official before a higher court shall not be better than that of a private party in the original case.[26]

6) Access to higher instances may be (and, reading through the lines, – *must be*) limited.[27] Whatever a state calls those instances: appellate, cassation, supervisory – there have to be some filters that would stop unnecessary, unwarranted complaints and open the way only to relevant cases. Normally a party is given one chance to appeal a decision to the court of second instance (*see* above). However, her attempts to reach further review mechanisms ('third', 'fourth', *etc.* instance) may be blocked or subject to additional requirements: exhaustion of all previous remedies, presentation of substantial evidence for case reversal, relevance of the case to the precedential practice, necessity to protect some public interest and so on. Besides that, higher courts may establish special panels that would select only significant cases for consideration (all the rest would be simply left behind).

These barriers are not in contradiction with the *access to justice*, as normally a person is given enough opportunities to defend her private interests before a court, while endless deliberations might indeed constitute an abuse of rights.

7) Closely connected with the previous are the limitations need to be put on the power of higher instances to review the case (and revoke its binding nature). In fact, their powers shall be limited to the correction of judicial errors and miscarriages of justice.[28] This may be interpreted as meaning that such courts do not normally consider questions of fact, being busy with the problems of proper application of law. Thus, they are not a place for fresh trials, which means that the possibilities to raise new claims and bring additional evidence are almost unavailable.

The Court is continuously repeating that 'the mere possibility of two views on the subject

25 See *Ponomaryov v Ukraine*, ECtHR Judgment (2008) Application No 3236/03, 41.

26 Close to that finding the ECtHR was in *Varnienė v Lithuania*, ECtHR Judgment (2013) Application No 42916/04, 40.

27 Natalia Sukhova, 'Problems of Development of Civil Procedure Law: Trends and Traditions' (2014) 3(40) Herald of Omsk State University. Series 'Law' 154.

28 *Nelyubin v Russia*, ECtHR Judgment (2006) Application No 14502/04, 23.

is not a ground for re-examination'.[29] A party might change her position or decide to add something new. Still, higher instances are not designed for that. The first instance was available and ready to take whatever evidence the person needed for the trial. A fight does not need to continue in subsequent instances, since the task of the court is to *settle* a conflict (not to keep it open). If all the measures were taken, but to no good result, the parties shall be stopped from further disputing at least at the price of forcefully imposing some preclusion on them.

It makes sense to place the last judicial instance at the highest judicial organ of the state which knows better the actual problems of the judicial system and is able to eliminate systemic errors made by the courts, and to guarantee uniform application of the law.[30] This is where its true competence belongs, while the factual grounds of the case are better dealt with by the courts of first instance that are close to population and capable of examining all the relevant matters of the dispute.

From the above we can clearly see that in all cases it is necessary to find a balance between the interests of an individual and the need to ensure effectiveness of the judicial system. The former may want his case reheard time and again, while the state wants to limit attempts to appeal. On the contrary, a person may wish to have his judgment enforced, but it happens that the whole trial was such a manifest challenge to justice and fair trial that it is in no way possible to keep that decision in force. The task of keeping this balance is an uneasy one, luckily some guidelines and failed attempts are provided in the case-law of the ECtHR.

3.2. View of the (Post-)Soviet Doctrine

As both Ukraine and Lithuania were part of the vast Soviet empire, the views of the latter on the finality and *res judicata* still have their relevance and constitute part of the legal heritage. In classic Soviet theory, the doctrine of *res judicata* was never used. Instead, the concept of the legal effect (of the judgment) was elaborated, which encompassed all the features a judicial act obtained after its entrance into force (binding nature, enforceability, exclusiveness, incontestability and adjudicated nature). Conclusively, it may be said that finality was a consequence of litigation, but never a matter of highest priority.[31]

Firstly, it could be revoked upon intervention of public officials (prosecutors). They had broad authority to question final judgments. It is interesting to note that such interventions came about without a request of the parties and sometimes even without them knowing about that fact. The reason was that prosecutors helped the Soviet state to ensure *uniform application of law*.[32] Contradictory and erroneous judgments were

29 *Nelyubin* (n 28) 23 and elsewhere, when the Court faces the re-opening of proceedings for the sole purpose of a rehearing and a fresh determination of the case.

30 Anastacia Rukavishnikova, 'Variability of Understanding the Final Court Judgment in the Decisions of the European Court of Human Rights' (2015) 2(6) Russian Journal of Criminal Law 53-58.

31 Anton Ivanov, 'Principy pravovoj opredelennosti ravnogo pravoprimeneniya' ('Principles of Legal Certainty and Equal Law Enforcement. What is the Role of the Courts?') (2015) 12 Arbitration Practice for Lawyers 98-99.

32 Alexandr F Kleinman, *Izbrannye trudy* (*Selected works*), volume 1 (Sovetskaya Kuban 2008) 17.

seen as a clear violation of *zakonnost'* (legality) principle which in Soviet legal tradition played the same role as the rule of law.

The fact that private parties did not themselves dispute the decision was of no importance, since in essence, Soviet Civil Procedure was not an area of 'private litigation' (as opposed to public), as in the words of Lenin, 'there was nothing private a Soviet State could tolerate in the field of economic activity'.[33] The goals established included the struggle for the strictest compliance with socialist law, the strengthening and protection of socialist property, the fight against the disrupters of socialist construction and establishing the strictest discipline and self-discipline of the working people.[34] Protection of private interests was almost lost among these.

Secondly, an important consideration was that of *substantive truth*. It stands for such a view of the facts of the case that correctly represents objective reality. Courts were intended to seek such truth and did not stop until found it. The fact that judgment was already in force and being implemented was of no hindrance for a review, as the substantive truth was more important. An incorrect judgment did not reflect the objective circumstances of the case and could not be upheld: it had to be declared null and void.

In Soviet states, final decisions could be quashed in a procedure named *nadzor* (supervision), which gave extensive possibilities to overturn final decisions. Substantive truth was hard to establish, though the broad competence of the judge helped in that regard by obliging parties to bring relevant evidence and to prove certain things. What is also important, the competence of the higher courts was not limited, and they could easily do the same things that are normally possible only in first instance (hear witnesses, examine the written and material evidence, *etc.*)

It is not that Soviet scholars and practitioners were unaware of the difference between their approach and that of Europe and the US. However, the latter was seen as *bourgeois* and capitalist, unsuitable and undesirable for socialist society. Soviet law did not tolerate any non-objective truth and any presumption or fiction thereof. In fact, the search for substantive truth was always seen as a great advantage of Soviet civil justice.

The named features (powers of the prosecutor, role of substantive truth and competence of higher instances) are sometimes seen as the most important culturally distinctive features of some post-Soviet procedural systems as well.[35] Despite there are authors preferring to equate legal effect of judgment with finality and to modernize that concept by bringing it closer to the ideas of *res judicata*,[36] there are still problems in its understanding in many countries of the former Union. These definitely arise due to reliance on a familiar doctrine and reluctance 'to accept philosophy, according to which

33 Vladimir Lenin, *Polnoe sobranie sochinenij* (*Full collection of writings*), volume 44 <http://uaio.ru/vil/vilall.htm> accessed 8 December 2019.

34 Kleinman (n 32) 25-26.

35 See the study by Dmitrij Maleshin, *Grazhdanskaya processual'naya sistema Rossii* (*Civil Procedural System of Russia*) (Statut 2011), where he describes the Russian system of civil procedure (also a post-Soviet one) as being 'unique' and 'distinctive', different from both common law and civil law models.

36 Victor Terekhov, *Boundaries of the legal force of the court decision: territorial and temporal aspects* (author's abstract of dissertation for the degree of candidate of legal sciences) (Yekaterinburg 2014), 14.

the idea of judgment's stability as the basis for the final bringing of certainty to the legal relations'.[37]

However, it is clear that such beliefs are in contradiction to finality, at least in the way it is interpreted by the ECtHR. Moreover, they are also at variance with the principles of judicial independence, discretionary powers of the parties to the case and even the fundamental idea of the rule of law.[38] For that reason, in the post-soviet era the European approach should be learned and adapted, when necessary, sometimes facing strict criticism from the European institutions.

3.3. Considerations that Support Finality

Yet some considerations play in favour of finality. Thus, the ideas of 'judicial economy' and procedural concentration also advocate for fewer opportunities to dispute a decision for a different reason: necessity to preserve public funds and use them wisely. This idea becomes extremely popular in the age of austerity. One dispute of two parties shall be really resolved only once – all further additions, supplements and reconsiderations present an unnecessary burden on judicial system, while the same money may be spent on those really waiting for their disputes to be solved. According to this logic, parties shall be allowed one full-fledged trial (in first instance) and a chance to bring their clearly defined complaints to a higher instance once (appeal). The latter possibility, though, cannot be seen as a 'second round' of the same duel or a *revanche* for a trial previously lost. It is what it is intended to be – a complaints' hearing place, limited to their subject-matter and oriented to eliminate problems, rather than re-litigate. The parties, in their place, need to be disciplined to treat first instance with all due seriousness as the success or failure in it determines the overall result.[39] Finality stands exactly on the same positions, yet uses other arguments to prove the cause (social *v.* economic concerns).

Last but not least there is a consideration paying attention to the purpose of the trial. With the spread of the ideas of Franz Klein (father of the social school of civil procedure and an architect of Austrian procedural reform of 1890), more and more states believe that any dispute is a problem, and the society is interested in its quick and peaceful solution.[40] What we want is to restore normal relations and reconcile the parties, while the easy access to review mechanisms provokes a 'litigious mind set' and a desire to fight till the end. Sure enough, for that purpose finality is better than the lack thereof. People shall see litigation as an end process with clear *start* and *finish*. That will, apparently, promote settlements at early stages and save resources for difficult cases.

Summarizing everything said, we tend to support the view of Neil Andrews that 'in

37 Maria Filatova, 'Peresmotr sudebnyh aktov v poryadke nadzora i princip pravovoj opredelennosti' ('Supervisory Review of Judicial Acts and the Principle of Legal Certainty') in *Tendencies of development of civil procedural law in Russia* (Yuridicheskiy Tsentr Press 2008) 313.

38 SY Yakovlev, 'Cassation in Civil Proceedings: Past and Present' (2012) 121 Problemy zakonnosti.

39 More on that: Marcel Storme, 'A Single Civil Procedure for Europe: a Cathedral Builders' Dream' (2005) 22 Ritsumeikan Law Review 87.

40 Vytautas Nekrošius, 'Celi grazhdanskogo processa: ustanovlenie pravdy ili primirenie storon?' ('The Aims of Civil Procedure: Determination of Truth, or Reconciliation of the Parties?'), (2005) 4 Russian Yearbook of Civil and Arbitration Procedure 8.

devising a legal system, the state balances the need for finality and certainty with the need for justice'.[41] While both individuals and the general public are interested in certainty and stability, they also benefit from the correct application of law to the facts of the case and fairness and legality (as fundamental aspects of justice) duly preserved.

4. THE EXPERIENCE OF UKRAINE

A major judicial reform has recently taken place in Ukraine. It introduced changes to all legal instruments on courts and their competence, as well as to procedural codes. As was said, the catalyst for reform was the need to modernize national law, to bring it closer to the standards of the EU and the Council of Europe, to strengthen independence, impartiality and efficiency of the judiciary, but above all – to make it better for Ukrainian people.[42]

This is not just another ordinary reform, as the changes are brought to a significant number of legal provisions, starting with the highest level – that of the Constitution. On June 2, 2016 the amendments to the Basic Law were enacted, and for the first time ever introduced the term 'finality' to Ukrainian law. Under the new provision, the Constitutional Court has the power to rule on constitutionality of laws on a basis of constitutional complaint filed by a person, who considers that the law applied to his case is in violation of the Constitution. Thus, such a complaint is only available where other remedies have been exhausted.

At the same time, the qualities of a 'final judicial decision' are not formally enshrined in the Civil Procedural Code or elsewhere.[43] Consequently, much vagueness still remains in determining when exactly it is possible to reach the Constitutional Court. Still, if we rely on Art. 77 of the Law on the Constitutional Court,[44] it may be presumed that a final decision is the one approved on the appeal, and where it is subject to cassation review – the decision taken in that instance. For reasons of clarity it makes sense to enshrine the term 'final decision' and its contents directly in procedural law, with a view to bringing the latter in accordance with the Constitution and the European Convention. Curious, however, is that now the CPC enshrines the notion of the 'rule of law' (as one of the principles on which it is based), without any explanation of its possible contents.

Instead of 'finality' and '*res judicata*', the new law continues to rely on the well-known notion of 'legal effect'. In civil procedure this emerges in accordance with Art. 273 CPC, which provides that (as a general rule) a court decision becomes valid (acquires legal effect) after the expiry of the time-limit for filing an appeal by all parties to the case, unless an appeal has actually been filed. In the latter case, the decision (if not dismissed) is valid after the return of appeal, refusal to open or close the proceedings or the adoption by the appellate instance of the ruling on the effects of appeal review. At the

41 Neil Andrews, '*The Three Paths of Justice: Court Proceedings, Arbitration, and Mediation in England*' (Springer: Dordrecht 2012), 113-114.

42 Iryna Izarova, 'Reform of the Civil Process in Ukraine: Novelties of Lawsuit' (2017) 8 Law of Ukraine 33.

43 Viacheslav Komarov, *Civil procedural law in the dynamics of development and practice of the Supreme Court of Ukraine* (Pravo 2012), 70-73.

44 Zakon Ukrainy 'Pro Konsitucijnij Sud Ukrainy' of 13.07.2017 (The Law of Ukraine 'On the Constitutional Court of Ukraine') <http://zakon0.rada.gov.ua/laws/show/2136-19> accessed 8 December 2019.

same time, it is still possible to apply to cassation instance and to review decisions due to newly or exceptional circumstances. However, the last two options are considered as being extraordinary forms of review, available on a limited number of grounds and subject to stricter conditions of accessibility.

The judicial reform has not spared the structure and competence of the courts. There is currently a brand-new law on Judicature[45] that establishes the following system: local (district) courts, courts of appeal (functioning within special circuits) and the Supreme Court which functions as the sole cassation instance for the decisions taken in the first and appellate instances.[46] However, Supreme Court also serves as an appellate instance to the decisions taken by the courts of appeal (in first instance). A positive feature of the new law is establishing that the task of the Supreme Court is to 'ensure consistency and uniformity of judicial practice'.[47] That means a proper distribution of responsibilities between the instances was a matter of high priority to the reformers.

From now on, the law clearly differentiates between *appeal* and *cassation* review. While the former is *prima facie* open to everyone and constitutes a legal principle (Art. 2 CPC), the latter is only available 'in cases provided for by the law', which makes it a more limited and less-achievable remedy.[48] These statements are contained not only in CPC, but also appear (in a similar formulation) in Art. 129 of the Constitution and Art. 17 of the Law on Judicature.

The procedure for appeal is now regulated by the first chapter of Section V CPC (Review of judicial decisions). Despite the general desire to limit the time allowed for appeals in order for the decisions to enter into force quicker, the new law extends the time-limit for lodging an appeal from 10 to 30 days (Art. 353 CPC). This term may be restored by the Court if the applicant files a special petition and assures the court there were substantial reasons for missing the deadline. The power of the court to restore the term is not as such contradictory to legal certainty (as it aims at protecting a valid legal interest), yet needs to be approached with all due caution. It is especially true for Ukraine where an extreme extension of terms for appeal was once found in violation of Art. 6 ECHR.

As was mentioned, the ECtHR tries to prevent any threat to finality, wherever it comes from. In *Ponomaryov*, such a threat has arisen from a situation where a case was overturned in the appellate instance after the terms for filing an appeal expired.[49] Despite the fact that the review was not extraordinary in nature and no new proceedings were started, stability and legal certainty were actually put at risk, since the terms were restored on highly questionable grounds.

In that case, the time-limit for the appeal was renewed on the grounds of (allegedly) difficult economic situation of the party that prevented it from paying the court fees. The Court pointed out that the party alleged not the *lack* of funds, but rather lack of *free*

45 The Law of Ukraine 'On the Composition and Status of the Courts' of 2 June 2016 <http://kodeksy.com.ua/ka/o_sudoustrojstve_i_statuse_sudej.htm> accessed 8 December 2019.

46 See: Art. 36 of the Law 'On the Composition and Status of the Courts'.

47 The Law of Ukraine (n 45) Art. 36(1).

48 Previously, the rights to appeal and to cassation were contained in Art. 13 CPC, and the Code made no clear distinction as to the degree of their availability. Now, the new Art. 17 largely resolves that issue.

49 *Ponomaryov* (n 25) 41.

funds to pay the duty. Moreover, there was no indication that the party had ever requested to postpone the payment or to allow it to be made in installments in accordance with relevant national law. In this situation, the party had an opportunity to bring another appeal in case a significant time-limit had been missed and the enforcement of judgment was commenced. In the Court's opinion, the application of the party was made with the intention to get a rehearing of the case rather than to correct serious judicial errors. For that reason, a violation of Art. 6(1) ECHR was found. As is clearly seen, despite the question of the renewal of the time-limit for the appeal was within the competence of national courts, their power in that regard could not be unlimited. The valid grounds for renewal could include, for example, the failure by the State authorities to inform parties of decisions taken with respect to their cases. But even in such situations the possibility of renewal had to be limited. Such a conclusion may be clearly drawn from the Court's reasoning in '*Oleksandr Shevchenko v. Ukraine*'[50] and '*Trukh v. Ukraine*'.[51] In each case, the national courts were required to verify whether the grounds for renewal of the time-limits justified interference with the principle of *res judicata*, in particular in those situations where the national law did not restrict the powers of the courts (to take on cases and to renew the missed deadlines).

Currently, the Ukrainian law provides such a restriction in Art. 358 CPC. According to it, regardless of the reasons for missing the deadline, the appellate court shall refuse to commence proceedings if the appeal is filed after the expiry of one year from the day the full text of the court decision was completed.[52] This rule makes substantial contribution to finality as it removes the threat described above.

However, the same Art. 358 provides for exceptions in case an appeal is filed by a person who has not been notified of the trial or has not been involved in it had the court ruled on his rights or obligations. Another exclusion is allowed for situations of *force majeure*, the contents of which are not clearly disclosed in the Article or elsewhere in the Code.[53] For that reason, the procedure for lodging an appeal requires further clarification.

Art. 355 CPC provides that the appeal is lodged directly to the court of appeal. Further norms of the Code establish the rules the judge of the appeal (in some instances, a reporting judge) follows in deciding on the opening of the proceedings or leaving the claim without motion, its return or refusal to start proceedings. It seems that all mentioned procedural decisions shall be taken by the court of appeal or by a reporting judge by considering the materials of a civil case. Based on the above, we believe it expedient to propose such procedure for filing an appeal, where the complaint is submitted to the court of the first instance. The latter, in its turn, after the expiration of the time-limits for the appeal, will transfer the complaint together with the case materials to the court of appeal. Such is the rule in the Lithuanian CPC.

As for the scope of appeal, it is designed to be limited, rather than full-scale. The Court cannot go beyond the claims and reasons stated in the appeal, and only in exceptional

50 *Oleksandr Shevchenko v Ukraine*, ECtHR Judgment (2007), Application No 8371/02.

51 *Trukh v Ukraine*, ECtHR Decision as to the admissibility (2003), Application No 50966/99.

52 Similar grounds can also be found for refusal to open cassation proceedings (Art. 394 CPC).

53 Similar exceptions are also provided for refusal to open cassation proceedings (Art. 394). They get no clarification either.

cases may admit new evidence (Art. 367). Such exceptions are situations, where it was impossible to present these materials to the court of first instance for reasons beyond the control of the party. The court will not be bound by the reasoning of the parties if it establishes a manifest violation of procedural law (that shall make the decision of first instance void), and if it finds that the decision taken in special (uncontested) proceedings was clearly unfound. These last cases are obviously intended to defend public interest in civil procedure, but in their application the courts in Ukraine need to find an appropriate balance. Appeal can never be regarded as 'another first instance' and the judges shall think of their job in term of judicial control, limited to the core questions and unrelated to things that can possibly be avoided with no harm to justice and the rule of law.

In a way, the procedure of acquiring finality by a decision is influenced by a possibility of reviewing an appeal without the notice of participants to the case. According to Art. 369(1) and (2) of the Civil Procedural Code of Ukraine, appeals in claims up to one hundred living wages for persons of working age (except those that cannot be heard in simplified proceedings) shall be dealt with by the court of appellate instance without the affected parties being notified. The same rule is established for appeals against court orders referred to in Art. 353 CPC, paras. 1, 5, 6, 9, 10, 14, 19, and 37-40.

In this regard, it is worth noting that the implementation of such provision, to the author's opinion, will not contribute to ensuring the *accessibility of justice*. On the contrary, it presents a form of interference with the access of citizens to the court. Natalia Sakara reasonably advocates the establishment of the methods and mechanisms of overcoming such problems, as well as the conditions or factors that can guarantee the most favourable circumstances for the implementation of the right to judicial protection,[54] *inter alia*, in the court of appellate instance. This is quite different from participation of the parties in the court of cassation, in which several limitations may be validly justified. The latter form of review is of extraordinary nature, and due to that reason is not as easily accessible to general public. This follows from the requirements of the Convention and the practice of the ECtHR. Thus, in *Monelean v. Sweden* (Judgment of February 22, 1984) and *Maurice v. Sweden* (Judgment of March 2, 1987), the question arouse of the possibility to derogate from the principle of oral trial, which presumes that a person needs to be present during the hearing and be able to defend his/her position, taking into account the peculiarities of national procedural law. The Court ruled that if the trial in the court of first instance was open, the absence of a person's participation in the courts of higher instances could be justified by the peculiarities of the procedure. If the complaint concerns only the matters of law, but not fact, then, in the Court's opinion, the requirements of the open trial are fulfilled even when the applicant was not given the opportunity to be heard personally in the court of cassation.[55]

Ukrainian appellate instance is, however, an ordinary form of review and the one which presupposes determination of both law and facts. For that reason, it seems superfluous to limit the rights of the parties to participate in trial or, at least, to be made aware of the

54 Natalia Sakara, *The problem of access to justice in civil cases* (Pravo 2010).

55 Volodymyr Averyanov et al (eds), *The Constitution of Ukraine: scientific and practical commentary* (Pravo 2003) 648-649.

date and place of hearing.

The institute of cassation has also been changed a lot. As was mentioned, it is available only in cases, provided by the law. Thus, for the first time in Ukraine certain filters are introduced in cassation instance. The CPC establishes that reasons for cassation review include incorrect application of substantive law or violation of procedural law. Only those decisions that passed through appeal can make their way to cassation (which is now placed at the newly established Supreme Court).

It is also important that a decision may be reviewed in this procedure only once. Previously it was a problem for Ukrainian legislation, and in *Sovtransavto* it was held that repeatedly setting aside of judgments [in post-final procedures] is incompatible with legal certainty.[56] Finally, cassation becomes an institute of extraordinary, and not of regular, nature.

Access to cassation is closed for certain categories of cases, which include: (1) decisions that are subject to appellate review in the Supreme Court; (2) decisions in small (of little importance) cases. The latter category, however, presupposes its own exceptions (when the review may actually take place). Among them: a fundamental relevance of the case for precedent-formation; a lack of possibility for the person to dispute the circumstances established by the court in another case; a significant public interest or exceptional importance to the participant in the case who submits the cassation complaint; a prior characterization of a case as 'of little importance' made by mistake.

The ECtHR has agreed that the limitations on cassation are a matter within internal regulation of each state, and national authorities possess a wide margin of appreciation here. They are allowed to apply various filters, limit access for certain categories of cases and introduce other restrictions as long as they are in accordance with the right of access to justice and are not arbitrary and discriminating. In *Trukh*, for example, there was no violation when the national court required the payment of a State tax.[57]

The new provisions of the Code may be misleading in practice. There is no established definition of cases 'of little importance' and no clarity of the criteria for the mentioned exceptions. In fact, the very limitation for cases of little importance seems unnecessary, as in almost any situation it can be overcome by one of the corresponding exceptions. For that reason, it would be better to give more discretion to the Panel of the Supreme Court in deciding, which cases may be admitted for a cassation review. Of course, for that purpose it will need a set of guidelines that shall have nothing to do with the monetary value of the case, but rather refer to its importance for the development of uniform practice and development of law.

Some other restrictions are provided in Art. 394 CPC. Thus, the Supreme court may declare the complaint unreasonable and refuse to open proceedings if it has already given its decision on the application of the rule relied on in the complaint, or if the correct application of the rule seems obvious and does not cause reasonable doubts as to its application or interpretation. Such power may be exercised only in relation to cases

56 *Sovtransavto Holding v Ukraine*, ECtHR Judgment (2002), Application No 48553/99, 77.

57 *Trukh* (n 51).

that are under 500 living wages for persons of working age. This distinction may seem artificial, as the same problem (statement of a problem that has already been solved) may occur with relation to any case, whatever its monetary value is. Consequently, the Supreme Court will not have the chance to get rid of them in the same fashion, while its work will be certainly limited to repeating its old reasoning.

Finally, the Court is obliged to refuse to open proceedings in cases for review of the ruling on the return of the application to the plaintiff (the applicant), the consideration of complaints on actions (or inaction) of the bodies of the state executive service, the private executor where the decision of the cassation court on the consequences of considering such a complaint will not contribute to formation of a single law enforcement practice. This limitation is probably justified by the tasks and mission of the last instance, but its application in practice is yet to be seen. Surprising only is that such power of the Court only exists for some administrative (public) cases, while most other complaints can easily reach cassation *regardless* of their relevance for the uniform law enforcement practice.

Finality of judgment of the appellate and cassation courts is also negatively influenced by the possibility of reviewing the cassation complaint filed after the hearing of the complaint had taken place (Art. 405 CPC of Ukraine). As a result of such procedure a court of cassation may overturn its own decision, which leads to the loss of its finality. The mentioned rule provides that where a cassation complaint reaches the court of cassation after examination of the case is over, and the complainant has not been participating in the trial, the court hears such complaint under the rules of cassation proceedings. In case the proceedings are opened on the basis of such complaint, the court of cassation may suspend the effects of previously adopted resolutions and appealed decisions. The court of cassation examines the complaint within the limits of the arguments that were not previously discussed under the complaint of another participating party.

Following such examination the court gives its ruling. If relevant grounds are present, the previous decision of the cassation court may be dismissed. This form of self-control, despite being known to some other national jurisdictions and reasonable for the sake of access to justice and equality before law and court, can have a negative impact on the finality of judgment and lead to continuing uncertainty as to the legal status of case participants.

Last but not least, court decisions may be reviewed under newly discovered or exceptional circumstances, under the rules of Chapter 3 Section V CPC. Luckily, in this case the Code further clarifies what both of these are. The procedure itself contributes to legality and correct application of the law. Most of the grounds for this type of review are typical for such form of proceedings and do not require further comments. For Ukraine, however, it is extremely important that the new Art. 424 CPC not only establishes certain time-limits, but also stipulates their preclusive nature: their restoration is not allowed on any grounds.

5. THE EXPERIENCE OF LITHUANIA

The ideas of finality and stability of judicial decisions play a significant role in both constitutional and procedural legislation of Lithuania, since there is always a natural

need to ensure human rights and endurance of legal relations, as well as to maintain the authority of the judiciary and public confidence in it.[58]

The same old 'legal force' term is still used to describe qualities a judicial act acquires on becoming final and binding. It becomes indisputable, prejudicial (predetermined for all future disputes on the points provided therein) and may be executed (Art. 281 CPC of Lithuania). The notion of *res judicata* belongs rather to academic literature, where it is revealed as an official prohibition of lodging identical claims and a powerful tool to prevent raising of contradictory facts.[59] Judicial proceedings cannot last indefinitely, and the sole persistence of dispute between parties should not inevitably oblige the court to consider their arguments on the merits time and again – these are the ideas that have become – not without help of the ECtHR[60] – a part of contemporary Lithuanian law and order.

In the same way, the legal system relies heavily on the ideas of concentration and judicial economy (Art. 7 CPC of Lithuania), hearing of the case within a reasonable time, *etc*. These rules and policies also place a limitation on the total length of proceedings (including the time necessary for review) and, in principle, demand the concentration of all relevant proceedings in the court of first instance.[61] Important to note also is that the CPC is intensively pushing the idea of 'conflict elimination' as one of the purposes of civil litigation. This goes in line with some of the ideas of Franz Klein on the *Sozialfunktion* of civil procedure expressed back in 1890-s during the reform of Austrian civil procedural law. In terms of finality it means that 'the lesser litigation – the better litigation [is]'. Consequently, repeated trials, extensive appeal possibilities and reopening possibilities go against these goals and are definitely not welcome in modern-day Lithuania.

This does not necessarily imply a total impossibility of changing or cancelling a decision (with a reversal of *res judicata*). The legal force does not imply absolute immunity from checking for the presence of legal or factual errors.[62] However, Lithuania tries to minimize such possibilities and leave only the required remedial minimum.

There are three possible ways to overcome legal force of a judicial act: (1) appellate process (*apeliacija*), (2) cassation (*kasacija*) and (3) renewal of trial (*proceso atnaujinimas*). All three are comprehensively regulated by Part III CPC of Lithuania. The formerly known supervisory procedure (*priežiūros procesas*) has been abolished as contradicting to the modern Lithuanian legislation and its fundamental principles (*i.e.* judicial independence). The reduction of instances and limitation of opportunities for bringing appeals can be definitely seen as a victory of stability and inviolability of the judgments initially given.

In practice, the judicial system functions as follows. Civil cases are dealt with in first instance by local (*apylinkes teismai*) and district (*apygardos teismai*) courts. The former

58 Egidijus Laužikas, Valentinas Mikelėnas, Vytautas Nekrošius, *Civilinio proceso teisė* (2 tomas) (Justitia, 2005) 167.

59 Egidijus Krivka, 'Res judicata principo įgyvendinimo grupės ieškinių procese problemos' (2004) 53(45) Jurisprudencija 54.

60 Indrė Jocytė, Indrė Venslovaitė, 'Res judicata principas teismų praktikoje' (2017) 1(15) Teisės apžvalga 113.

61 Virgilijus Valančius, 'Lietuvos civilinio proceso kodeksas: pirmųjų metų patirtis' (2005) 69(61) Jurisprudencija 54.

62 Knyazkin (n 18) 63.

are busy with majority of private disputes, while the latter are only available in more complex proceedings (Art. 27 CPC of Lithuania). District courts also hear appeals to the decisions of the local courts, while their own judgments in the first instance may be appealed to the only institution – the Lithuanian Court of Appeal (*Lietuvos apeliacinis teismas*). Cassation as a separate instance is designed to hear complaints against those decisions that have already entered into force. The only competent authority in such matters is the Supreme Court (*Aukščiausiasis Teismas*), a place of ultimate redress for all civil claims within the state.[63] Its decisions may no longer be reviewed by any other body (including the Court itself). Renewal of the trial deserves special attention since this stage remains independent and *extra-instantiational*, available with respect to decisions of any instance under the conditions provided by the law.

The first and most accessible form of control is the appeal. It cannot be regarded as an exemption from the general rule of *res judicata*, as the decision has not entered into force by the time the petition for appeal is lodged. Therefore, it has not yet become 'settled' and 'closed for consideration'. Parties may still have two separate views of the subject-matter and wish to defend their case. Moreover, Lithuania follows the example of some Western states, where the right to appeal is enshrined in constitutional law and considered an integral part of the right to judicial protection (in terms of access to courts). In this way, such form of review does not contradict the principle of legal certainty and on the contrary, duly secures the right to fair trial (Art. 6 ECHR), since a person needs to have not only the right to lodge a claim in first instance, but also a remedy against an unlawful and biased verdict produced there. This is especially true where a single judge is responsible for taking decisions and the risk of error is reasonably high.

In Lithuania, the Constitution does not explicitly mention such a possibility, however the norm eventually acquired recognition in the jurisprudence of the Constitutional and Supreme Courts. Both of them gave a broad view of Art. 30 Constitution (on the right to judicial protection) and found that the right to appeal is an integral part of it.

At the same time, this does not mean that no restrictions are placed on the proceedings in second instance. The one that immediately comes to mind is time-limit: a party has 30 days of the date a judicial decision is issued to lodge an appeal (Art. 307 CPC of Lithuania). This term is not preclusive and may be restored, the applicant having submitted a petition in that regard. If that happens, the court will, in a legal sense, put a dispute already resolved back into a state of uncertainty (until the decision in the appeal is taken). That is why the legislator is approaching such delicate situation with all due thoroughness and does not provide for an unjustified extension of the right to restore. Firstly, there is a time-limit of 3 months to lodge a petition, running since the announcement of the decision in first instance. After its expiration, the right to appeal is exhausted and a person is further precluded to call the merits of the case into question.[64] Secondly, even within a three-month period, the court evaluates the reasonableness of applicant's conduct and the importance of arguments presented for appeal.

63 Teismu įstatymas, Nr I-480 (31 May 1994), Art. 23 <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.5825?jfwid=fhhu5mvyf> accessed 8 December 2019.

64 Goda Ambrasaitė, 'Apeliacinis procesas: pagrindinės civilinio pproceso kodekso naujovės' (2003) 37(29) Jurisprudencija 8.

Timely submission of an appeal postpones the moment the decision enters into force. The dispute is not yet considered to be resolved: it continues in the second instance, thus most provisions regulating proceedings in lower courts are equally applied there. Despite that, Lithuania opted for a limited rather than a full model of appeal. While the latter presupposes re-examination of the case, the former just involves a form of control over legality and validity of the decision pronounced in first instance.[65] That is why it limits the possibility to raise new claims, bring new evidence and hold repeated hearings (since the written form of proceedings predominates). The limited model is more consistent with the ideas of stability and finality of judicial decisions. Little by little this model is being adopted in most European states, not least due to the role of the Recommendation of the Council of Ministers already mentioned before.

It must be admitted though that the limits for appeal are justified not only by the ideals of finality, but also by the principles of concentration and judicial economy. The two require key litigation issues to be determined in first instance due to its proximity to the case and the parties. A complete repetition of all procedural steps taken in first instance would increase the time for consideration of the case and the costs of proceedings, as well as create an additional burden on the judiciary. The so-called 'litigious mind set' should not be promoted among the population. In no way shall the parties believe that the first instance is just a 'test of strength', whereas a genuine judicial combat occurs at a later stage. In this regard, the current legislation carefully promotes their proper preparation for the trial already in the first instance and encourages presenting all relevant arguments and evidence before it.[66]

Neither the raising of new demands, nor the submission of new evidence is allowed[67] in the appellate instance (Art. 314 CPC of Lithuania). The last prohibition, though, is not absolute: the court may accept additional evidence in case the court of first instance refused without grounds to accept it or where the necessity of submitting such evidence arose later. The evidence that proves non-substantiation of the actions and decisions taken in the first instance, as well as the modified claims for the award of penalties and interest shall not be considered new either.

Appellate proceedings presume checking a case on both factual and legal grounds. Still, it will be handled only within the boundaries that the appellant herself sets up in the complaint (it is always possible to dispute only a part of judgment). The court may however dispense with these limitations if so required by public interest. In addition, the court checks *ex officio* the violation of those procedural rules that present unconditional grounds for cancelling a decision (Art. 329 CPC of Lithuania). These include: an illegal composition of the court, a court's ruling on the rights or obligation of persons not involved in the trial, a decision not taken by the trial judge, an absence of the court's reasoning in the decision, an absence of the minutes where the case was heard in

65 Ambrasaitė (n 64) 9. These two opposite models of the appellate instance are sometimes referred to as trial *de novo* and trial *revisio prioris instantiae*.

66 Michail Bron, Salomėja Zaksaitė, 'Teisė apskųsti pirmosios instancijos teismo sprendimą kaip pamatinė konstitucinė teisė' (2008) 66(2) Teisė 146.

67 Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus teisėjų kolegijos 2007 m. vasario 19 d. nutartis civilinėje byloje Nr. 3K–3–52/2007 <http://www.teisesgidas.lt/lat.php?id=30951> accessed 8 December 2019.

oral proceedings, violation of patrimonial jurisdiction and failure of the first instance court to rule on all matters of the lawsuit. Two additional grounds are: the inadequate notification of persons involved in the case and the resolution of dispute in violation of the rules on language of the proceedings (however, these two are only checked at the request of the appellant).

In case a miscarriage of justice is found, the court of the second instance can either adopt its own decision (changing or cancelling the original one), or return the case to the first instance for reconsideration. Here the legislator once again opts for judicial economy: where an error may be quickly eliminated on appeal, there is no need to send the whole case back requiring the parties and the court to repeat unnecessary procedural steps. Such a solution is well in accordance with legal certainty, the latter being damaged by any undue delays. Yet, participation in the second instance cannot always replace the proper absence of the first instance court, since the procedures in the two are not exactly the same. That is why, as an exception, it is still possible to dismiss the original decision and send the case back for a fresh hearing. In these situations, the court is required to indicate one of the grounds provided by the Code or to demonstrate impossibility of resolving the problem on the merits in appellate instance.

It is worth noting that a judgment, legitimate and justified *per se*, cannot be overturned on purely formal grounds (Art. 328 CPC of Lithuania). This again meets the desire for stability, since otherwise the judgment could easily be cancelled due to non-essential flaws. The grounds for unconditional cancellation of a decision set in the CPC are not seen as 'formal violations', since they demonstrate its unjustness and violation of the rule of law and fair trial. In presence of such grounds, the decision shall not enter into legal force and become binding.

Despite all these limitations, appellate proceedings are still an ordinary form of revision: it is applicable to all civil cases and available for all categories of applicants, since the dispute is not deemed exhausted until the decision becomes valid and acquires the force of *res judicata*. The legislative provision that existed before, limiting possibility of appeal to claims over 250 LT (approx. 72 EUR), was lifted after 2011 due to the position expressed by the Constitutional Court on the essence of the appeal.

The second form of control known to Lithuanian law is cassation. It is available with respect to decisions that have already become final and binding. Therefore it is a more radical measure having a direct impact on the stability of judgments. Several legislative tools are aimed at minimizing the negative effect of this type of review in relation to judgments that are being (or have already been) implemented. First of all, cassation is in no way as accessible as the appellate proceedings are. It may take place only on the grounds enumerated by the Code (Art. 346). These include: (1) violation of substantive or procedural rules, in case it has an essential significance for the uniform interpretation and application of the law (if that violation could have affected the adoption of a wrongful judgment); (2) deviation of the previous court from the relevant case law of the Supreme Court on the same subject; (3) lack of uniform case law of the Supreme Court on an issue raised in the complaint (and the need to establish it).

Cassation is possible where any of these grounds is present. At the same time, the applicant shall not only indicate its presence, but also provide a proper legal justification

of his complaint. Nevertheless, even this does not guarantee that the case will be accepted for examination, due to a permissive system existing in the Supreme Court. All incoming cassation appeals are sent to a special panel that possesses a wide discretion in selecting cases for further hearing on the merits. More than a half of incoming disputes are being rejected by the panel, while its own decisions are not subject to any appeal.

These strict limitations are justified by the special tasks put before the Supreme Court. The mentioned CoE Recommendation emphasizes that a redress to such a body shall be exclusive and available only in cases which merit a third judicial review, *e.g.* which would develop the law or contribute to its uniform interpretation. An extraordinary status of the cassation was also stressed by the Supreme Court, when it declared that an unconditional hearing of the case before it does not constitute an applicant's right (and an integral part of the right to judicial protection, as is the case with the appeal), but rather represents an exclusive form of control over legality of judicial decisions.[68]

The mechanism of cassation serves not only private, but also public interests. There is no doubt that it is aimed at correcting judicial errors that initially have led to an unjust decision. However, at the same time it is called upon to provide trust to the judicial system, to explain legal provisions, to establish new precedents and to promote the progressive development of law. That is why cassation powers are entrusted to the sole and the highest body in the judicial hierarchy – the Supreme Court of Lithuania. Legislative restrictions and the permissive system allow for only those cases that actually help developing law and ensuring its uniform application make their way to the cassation review.

Despite the preponderance of public interests, the right to bring a case to the Supreme Court belongs to persons participating in the case. They have 3 months from the date of entry into force of the disputed decision, and they lose the right to renewal after 6 months from the same date.

The second significant limitation of cassation proceedings is the prohibition to commence them bypassing the appellate instance. The case may be heard by the Supreme Court only after it has been consequentially heard in two lower instances (Art. 341 CPC of Lithuania). At the same time the monetary-related limitation has now been lifted (previously in disputes over property with a ceiling of 5,000 LT (1,500 EUR) no cassation was allowed), as it constituted discrimination and was seen as an obstacle to the access to justice for certain categories of citizens. It is now believed that even disputes on a small amount may raise an issue important for the case law, and therefore the right to 'pick' cases for cassation review shall lie with the panel of the Supreme Court, rather than be based on a peremptory norm of the Code.

As for the procedure in cassation, it is important to note that only questions of law (but not of fact) are examined there. The Court controls respect for the laws by the lower instances and the unity of their interpretation, but takes the facts and legal relations

68 Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus Atrankos kolegijos 2009 m. lapkričio 30 d. nutartis, Nr. 3P- 1435/2009 <https://eur-lex.europa.eu/legal-content/LT/TXT/?uri=CELEX%3A62016TJ0561> accessed 9 December 2019.

previously determined *as is*.[69] This allows to reduce court expenses and duration of trial, to get rid of analysing legal relations of the parties by concentrating on solving purely doctrinal questions of law enforcement. The possibility to go beyond the boundaries of a submitted complaint exists in exceptional cases, where the public need requires that. Case hearing in cassation does not suspend the enforcement of the contested judgment, due to the presumption of its validity and compulsory nature. The case may be heard in cassation only once (Art. 340(3) CPC of Lithuania), *i.e.* second cassation or supervision are impossible, and the final decision of the Supreme Court is 'final' in true sense of the word.

The Court has the power to change a previous decision, dismiss it wholly or in part, as well as to maintain one of the acts taken in previous instances (in case it correctly applied the law to the facts).

In sum, we may conclude that the activity of the Supreme Court always implies a careful balancing of fairness of judicial decisions and stability of legal relations. In legal doctrine, the term 'third instance' is never used to describe the essence of cassation, since the latter is not easily accessible and has nothing to do with revision of the factual side of the case. Its limitations only highlight the importance of the first instance, which cannot be substituted even by the highest judicial authority in the country.

The ultimate opportunity to influence the fate of decision is the ***reopening of proceedings***. Just like the cassation, this stage constitutes an extraordinary remedy, available only on the grounds established by law. The difference is that reopening also constitutes an *extra-instantional* method of control and not a kind of appeal: there is no complaint as such in respect to any previous court decision, but rather a request to resume litigation of a particular dispute. What is of interest to us is not the terminology used, but the result to be achieved by invoking this measure. One does not need to go far to learn that the latter may be the loss of *res judicata* by a judicial decision.

The purpose of the reopening is to ensure the rule of law within Civil Procedure. The court looks for the existence of one of the specific circumstances and decides whether the case actually deserves re-examination on that basis. The circumstances are the following: (1) adoption by the ECtHR of the decision on violation of the Convention by Lithuania while handling a particular case; (2) disclosure of a newly discovered essential fact (which was not and could not be known to the applicant); (3) establishment in the court verdict of unlawful actions by a party, a third person, a witness or an expert in the proceedings of the case; (4) establishment in the verdict of unlawful actions of a judge in the proceedings of the case; (5) dismissal of a court decision or an act of law enforcement that was a basis to the decision in question; (6) incapacity of the party to the dispute if there was no representative in the case; (7) adoption by the court of a decision on the rights and obligations of persons not involved in the trial; (8) resolution of a dispute by an illegal composition of the court; (9) an obvious legal error that was committed by the court of first instance (provided the case was not duly appealed).

69 Valentinas Mikelenas, 'The development of civil procedural law in Lithuania in the period 1990-2015' in Dmitry Maleshin (ed), *Eurasian civil process: to the 25th anniversary of the CIS and Baltic countries (a collection of scientific articles)* (Statut 2015) 176-202.

Reopening of procedure provides an opportunity to correct significant judicial errors and accordingly to protect both private and public interests. The availability of this option is a necessary minimum to guarantee the rule of law. In case one of the named circumstances is known to the party, but the deadline for resorting to the appellate or cassation instances is missed, this measure remains the sole possibility to seek justice. Moreover, ground (7) is especially designed for persons who did not take part in the case. For them an ordinary type of review is unavailable, thus they have no other way to defend their rights.

At the same time, even such form of revision shall have certain limitations. The first of them is temporal: a request to the court must be made within 3 months since the time the person learned or should have learned of the relevant circumstances. The ultimate deadline to ask for resumption of procedure is 5 years from the moment an original decision was taken. Another limitation is the prohibition to reopen proceedings in matrimonial matters if they concern dissolution or annulment of marriage and at least one of the parties has concluded a new marriage. Such a restriction is justified not only by legal certainty, but also by ethical aspects of family relations (as well as potential interests of children from a new marriage).

The competence to decide on reopening of proceedings belongs (in most cases) to the court of first instance. Having established the actual existence of relevant circumstances and assessed their impact upon the substance of the dispute, the court has a power to change or even dismiss its own previous decision.

There is a possibility to apply to the court with a request to reopen proceedings on the same ground only once. If the court does not grant this request or refuses to admit the case, a person is precluded to take further actions on the same set of facts (Art. 374 CPC of Lithuania).

6. POSSIBLE IMPLICATIONS FOR THE TWO NATIONS

We can clearly see that both in Ukraine and Lithuania the problem of finality of judicial decision is approached through the prism of legal effect of judicial decision. However, legal effect has certain limitations, which makes it possible to appeal the judgment and deprive it of *res judicata* effects.

It may seem that most problems of the two countries lie with review system, and are associated with the struggle to drive it away from Soviet *nadzor* to a well-balanced Western approach of limited and 'targeted' intervention in the judgment's finality. Still, problems are found elsewhere, too. Thus, in *Esertas* the ECtHR found a violation of issue preclusion (one of the main features of *res judicata*), which was protected not only by the Convention, but the national law as well.[70]

Both Lithuania, and Ukraine try to settle a clear and comprehensive system for the review of judgments, limit the number of instances and distinguish between the tasks of their judges. Still, sometimes it happens that one and same judicial body has several

70 *Esertas* (n 15) 31.

functions – such is the case with the Supreme Court of Ukraine which serves as both cassation and appellate institution (the latter function is performed in relation to decisions of the courts of appeal taken in first instance). In contrast, Lithuania solved a similar problem (though, not in the most elegant way) by establishing a separate Court of Appeal only to deal with appeals to the decisions of regional courts. It helped to relieve the Supreme Court from the caseload and undue extension of competence.

In Ukraine, unlike Lithuania, cassation is still more 'ordinary' a stage than the instance with the same name in Lithuania. While the latter state clearly restricts public access to that remedy and speaks frankly of its public purposes, Ukraine tries to maintain the balance and allow more cases to reach that phase. Well, next there go exceptions, and then – exceptions from them – and it all makes the rules quite complicated and the actual position of the applicant, defendant and judge quite vague. Such uncertainty leads to divergent interpretations and, quite likely, some of them would not be in accordance with ECtHR standards of finality.

It is also to note that Ukraine seemingly does not draw so much attention to the other relevant considerations, such as judicial economy, concentration and the goals of civil litigation (resolution vs. settlement of the dispute), at least in their application to the problem of finality. Some of the provisions seem old-fashioned, and some require further clarifications and comments.

Lithuanian law, in fact, is also far from perfect. The country has succeeded in implementing provisions of the CoE Recommendation and modifying its appeal and cassation institutions, though there are still debates on the potential scope of these review instances and the powers given to the courts in that regard.

7. CONCLUSIONS

The main dilemma was always between the right of access to court and the principle of finality. On the one hand we have the necessity to guarantee a private party judicial protection and remedies for all possible situations (i.e. against another party, against a biased court, against a court of second instance, etc.). On the other side lie the thoughts of stability of relations, conflict prevention, judicial economy. At the same time, both considerations can be seen as emanations of the core principle of the rule of law. Each state is given power to design its legislation in such a way as to take account of both considerations. Fortunately, we have European Court of Human Rights and other supranational institutions to provide meaningful guidance. Neither Ukraine, nor Lithuania shall neglect the solutions reached by the Court on Art. 6 ECHR that involve *res judicata* / legal certainty (even when these are given in relation to third states). The great advantage of ECtHR lies in the fact that it looks at the essence of the problem with finality and not solely at formal legislative statements. For that reason, it was able to find violations where no one ever knew they had existed. In order to build a more perfect judicial system it is also relevant to take a complex view, and when the reforms are being introduced – not to limit their reach for one or several parts of the Code, but rather take due attention of the whole system.

ADVERSARIAL PRINCIPLE UNDER THE NEW CIVIL PROCEDURE IN UKRAINE

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doi.org/10.33327/AJEE-18-2.4-a000021

Summary: – 1. Introduction. – 2. The Adversarial Principle of Civil Justice in Ukraine: Traditional Concepts of Implementation. – *2.1. Post-Socialist Trends in the Reform of Civil Procedural Legislation. – 2.2. The Right to a Fair Trial and the Competitiveness of Civil Proceedings.* – 3. Balance of Adversarial Principles and Cooperation between Parties and Court in the Process of Civil Cases Consideration: a New View from Ukraine. – *3.1. Exchange of Pleadings and a New Procedure for Submitting Evidence in a Case. – 3.2. Prevention of Abuse of Procedural Rights during the Implementation of Adversarial Principle.* – 4. Conclusions.

This work deals with the evolution of adversarial principle in civil process under the conditions of post-socialist regression and post-reform civil justice as well as the introduction of the principles of case management and cooperation between the court and the parties in the process. In particular, it analyses the main provisions of such new guarantees of realization of the right to a fair trial, which were introduced in the CPC of Ukraine in 2017-2018 as a court's right to prevent abuse of procedural rights, as well as the exchange of competitive documents between the parties. The authors argue that effective protection of the rights today is to be based on the adversarial principles that shall be supplemented by the security of the balance of rights of the parties and the authority of the court on the examination of civil matters.

Keywords: adversariality, equality of parties, principles of the civil procedure, competitiveness, procedural activity of the court, principle of cooperation between the parties and the judge

1. INTRODUCTION

At the current stage of formation of a rule-of-law state in Ukraine, the aspiration of society for high standards of administration of justice and ensuring a real basis for the adaptation of the EU law require the conduct of scientific research on the conformity of national legislation and the European standards. In particular, there is a need to improve the rules of the judiciary, which provide real, effective protection of the rights of those who appeal to the court.

The improvement of procedures for the administration of civil justice was first determined by the fact that on 17 July 1997,[1] Ukraine ratified the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereafter referred to as the Convention). The fact of such ratification imposed the obligation on Ukraine to comply with those requirements for the protection of human rights, as defined by the European community and above all, the requirements regarding the accessibility of justice and human rights to a fair trial.

The signing of the Association Agreement between Ukraine and the EU in 2014 and the introduction of a comprehensive and deep free trade area has become a prerequisite for deepening and spreading economic and other social relations between the Union and our country. Subsequently, this has led to the need for further approximation of rules and approaches to the administration of justice, especially in civil cases.

The changes that have taken place in Ukraine over the past few years indicate a move towards further restructuring and approximation of legislation to the EU law, in particular in the area of civil process. Revision and rethinking of the role of the court in the process of reviewing and resolving civil cases has become one of the evolutionary steps in this direction. At the same time, this calls for a comprehensive balanced scientific understanding of the concerted action of all institutes of civil procedural law. In particular, it concerns the balance of interests of the parties and new guarantees of the implementation of the adversarial principle in the process, which has been repeatedly subjected to evolutionary changes. The adversarial principle is one of the fundamental principles of civil justice, which has traditionally been considered an immanent feature of the administration of justice and the search for truth in a dispute. In order to improve the existing model of domestic civil justice in Ukraine, the purpose of this study is to justify the need to introduce a more balanced approach to the implementation of the adversarial principle in civil justice and optimize the procedure for judicial review of cases in order to improve the efficiency of the administration of justice and create a coherent justice system in accordance with European standards of justice.

1 The law of Ukraine 'On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms' of 1950, The First Protocol and Protocols № 2, 4, 7 and 11 to the Convention of 17 July 1997 (1997) 40 Bulletin of the Verkhovna Rada of Ukraine 263.

2. THE ADVERSARIAL PRINCIPLE OF CIVIL JUSTICE IN UKRAINE: TRADITIONAL CONCEPTS OF IMPLEMENTATION

2.1. Post-Socialist Trends in the Reform of Civil Procedural Legislation

At a time when Ukraine was a part of the Soviet Union, the dominant basis of civil justice was the adversarial principle with substantive investigative basis, which, at times, hindered the adversarial principle itself. According to Art. 30 of the Civil Procedural Code of the Ukrainian SSR in 1963 (hereafter referred to as the CPC of 1963),[2] each party shall prove the circumstances to which it refers as a basis for its claims and objections. However, in other articles of the CPC of 1963 it was also recognized that the court shall, without limiting to the material provided and the parties' explanations, use all the measures envisaged by law to comprehensively, fully and objectively clarify the actual circumstances of the case, the rights and responsibilities of the parties (part one of Article 15 of the CPC of 1963); if the evidence provided was insufficient, the court offered the parties and other persons involved in the case to submit additional evidence or gather them on their own initiative; the court was obliged to assess the evidence on the basis of a comprehensive, complete and objective consideration of all the circumstances of the case (Article 62), that is, not only submitted by the parties, but also all those that the court had to gather itself.

According to the analysis of these articles of the CPC of Ukraine, the content of the adversarial principle was in fact neutralized by the active role of the court in clarifying the circumstances of the case and consolidation of the principle of objective truth. As a result, the burden of gathering evidence was assigned to the court, while the parties could restrain from any actions without liability. It is necessary to note that this position was in line with the social, economic and political principles of society that existed at that time. Accordingly, in Soviet law, with the domination of a politicized thought that the contradiction between the interests of the individual and the state is unthinkable, the competition of the parties in the court was considered not as a confrontation, but as a martial art in the name of achieving objective truth, and therefore the principle was filled with a completely different ideological meaning.

Significant evolutionary changes regarding the content of the adversarial principle have taken place during the time of Ukraine's independence. On 2 February 1996, the Law of Ukraine 'On Amendments and Additions to the Civil Procedural Code of Ukraine' created an almost 'perfect' adversarial model of civil justice, which was based almost on a 'pure' competition without any investigative principles. The court's initiative to collect evidence was minimized, and the only case of court intervention in managing evidence was the right and the duty of the court to require forensic psychiatric examination in case of recognition of a citizen as incapacitated (Article 255 of the CPC of Ukraine).

2 The Civil Procedural Code of the Ukrainian SSR: The Law of Ukraine of 18 July 1963 (1963) 30 Bulletin of the Verkhovna Rada of the USSR 464.

In 2004 the Verkhovna Rada of Ukraine, conducting judicial reform, adopted a new CPC of Ukraine,[3] in which the content of the adversarial principle acquired new features, which were not inherent to it earlier. The legislator generally took into account the proposals of processualists and practitioners on the need to change the role of the court in the process of collecting evidence in the new CPC of Ukraine. According to Article 10 of the CPC of Ukraine (as of 2005, at the moment of its entry into force), civil proceedings are conducted on the basis of the parties' adversarial procedure, and the parties and other persons involved in the case have equal rights to submit evidence, to investigate and prove them before the court. Accordingly, each party is obliged to prove the circumstances to which it refers to as a basis for its claims or objections, except in cases established by the CPC of Ukraine. The court, in accordance with the provisions of the new CPC, should contribute to a comprehensive and complete clarification of the circumstances of the case: to explain to the persons involved in the case their rights and duties, to warn about the consequences of committing or not proceeding with procedural actions and to promote the exercise of their rights in cases, as established by law.

The desire to reorganize and achieve effective protection of parties in contrast to the model of active court in the process of post-socialist civil proceedings has led to such changes in the provisions of the CPC, which resulted in an almost complete neutralization of the role of the court in the course of consideration of the case. While managing the course of the trial and consideration of the case, the judge did not have the powers and instruments of effective influence on the parties' behaviour, which became a reliable ground for the development of a systematic abuse of procedural rights, and eventually to a significant reduction in the level of trust in the judiciary.

Such an imbalance of rights of the parties and the powers of the court in the process did not ensure the timely consideration of cases by the court: over the decades, Ukraine has been leading in the number of appeals to the ECHR for the violation of the right to fair judicial protection within a reasonable time. Thus, such a system required changes.

In the light of recent legislative reforms in the justice system, the traditional approaches and approaches introduced in the CPC of 2004 have been substantially revised. In the CPC of Ukraine of 2017[4] the adversarial principle has acquired such new features that were not inherent to it earlier, which will be analysed in detail in the subsequent sections.

2.2. The Right to a Fair Trial and the Competitiveness of Civil Proceedings

Modern democratic reforms in Ukraine directly affect the necessity of further formation and development of the national judicial system, increase of efficiency of administration of justice, updating of procedural legislation and creation of a system of legal proceedings in accordance with the European standards of justice. In drafting the current CPC of Ukraine of 2004, including the provisions relating to the basic principles of the civil

3 The Civil Procedural Code of Ukraine: The Law of Ukraine of 18 March, 2004 (2004) 16 Official Bulletin of Ukraine 1088.

4 The Law of Ukraine of 03.10.2017 'On the Amendments to the Commercial Procedural Code of Ukraine, Civil Procedural Code of Ukraine, Code of Administrative Justice of Ukraine and other Legislative Acts' (2017)221-222 Holos Ukrainy.

process, the fundamental postulates embodied in the international legal acts ratified by Ukraine were taken into account.

In particular, the CPC of Ukraine is based on the consolidation of the principles of the civil process in accordance with Art. 8 of the Universal Declaration of Human Rights of 10 December 1948, which enshrines the right of every person to effectively restore rights in the competent national courts in cases of violation of his/her basic rights granted to him/her by the Constitution and the law.[5] In addition, the CPC of Ukraine reflects the basic provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, which became a part of national legislation as a result of their ratification by Ukraine on 17 July 1997,[6] as well as Art. 55 of the Constitution of Ukraine,[7] which proclaimed the protection of the rights and freedoms of a person and a citizen by a court.

Article 6 of the Convention establishes the right to a fair trial. However, the right of access to justice, as well as the right to a fair trial, which are enshrined in the convention, are abstract and they are personified only in a concrete process and in relation to a certain circle of subjects of procedural activity, which are, first and foremost, the parties and other interested persons. Accordingly, we consider that one of the main components and substantive elements of the right to a fair trial, which is inherent to the interested parties of procedural activities, is the due process of law, which, in our opinion, is the result of the construction of a certain model of civil justice at the legislative level.

In its decisions, the ECHR often refers to the analysis of the essence of the adversarial principles, the equality of parties in the process, as well as the study of the balance of rights of the parties and the powers of the court in the process. Thus, in the case of *Vermulen versus Belgium*, the European Court of Human Rights found the violation of part 1 of Article 6 of the Convention, that is, the right to a fair trial, that the applicant could not, through the assistance of his lawyer, respond to the statement made by the Deputy General Prosecutor at the Court of Cassation, as well as to apply to the court himself during the hearings in the Court of Cassation. The court noted that the adversarial principle means that the parties in the criminal or civil process have the right to get acquainted with all the evidence or remarks made in the case and to comment on them; this also applies to the findings made by the independent representatives of the prosecutor's office, which influence the decision of the court.[8] In the case of *Kostovskyi versus The Netherlands*, the European Court emphasized that, in accordance with the principle of adversarial proceedings, all evidence should be presented in the presence of the accused at an open hearing. As a rule, these rights require the accused to have equal and proper opportunity to refute the testimony of the witness and his interrogation.[9] In the case of *Krtsmar versus The Czech Republic*, it was stated that in the course of the adversarial process, any party

5 The Universal Declaration of Human Rights of 10 December 1948 <http://zakon5.rada.gov.ua/laws/show/995_015> accessed 8 December 2019.

6 Convention for the Protection of Human Rights and Fundamental Freedoms of 04.11.1950 < http://zakon0.rada.gov.ua/laws/show/995_004> accessed 8 December 2019.

7 The Constitution of Ukraine : adopted at the fifth session of the Verkhovna Rada of Ukraine on 28.06.1996 (1996) 30 Bulletin of the Verkhovna Rada of Ukraine 141.

8 The European Court of Human Rights: Selected decisions, vol 1 (Norma 2000) 175-177.

9 The European Court of Human Rights Practice. Decisions. Commentaries (2002) №1 203.

to the proceedings should have the opportunity to review the evidence before the court, and to have the opportunity to express their opinion on their availability, content and authenticity in the appropriate form and at the appropriate time, and if necessary – in writing and in advance.[10] Based on the case law of the European Court of Human Rights, it is logical to conclude that the adversarial principle, balanced by the principles of equality of parties in the process, is integral to the right to a fair trial.

For the Strasbourg judges, procedural equality prevails over adversariality, which is a means of achieving parity of opportunities and knowledge of the parties in regards to evidence in civil proceedings.[11] The proof of this is the ruling of 28 August 1991 in the case of *Brandstätter versus Austria*, some provisions of which read as follows: 'The right to an adversarial proceeding means that ... should be given the opportunity to review and comment on the observations submitted and the evidence put forward by the other party. National legislation can enforce this requirement in a variety of ways. However, regardless of the method chosen, it shall ensure that the other party is informed about the comments provided and has a real opportunity to state their opinion about them'.[12]

The ECHR approaches to the implementation of the adversarial principle are aimed at securing the right of a person to a fair trial. But over the time elapsed since the ratification of the Convention by Ukraine, it has become clear that such a concept of the national civil process is not entirely consistent with the realities and practices of the ECHR, which has become an important ground for modern reform.

3. BALANCE OF ADVERSARIAL PRINCIPLES AND COOPERATION BETWEEN PARTIES AND COURT IN THE PROCESS OF CIVIL CASES CONSIDERATION: A NEW VIEW FROM UKRAINE

3.1. Exchange of Pleadings and a New Procedure for Submitting Evidence in a Case

The reform of civil justice in Ukraine during 2014-2018 began with changes to the Constitution of Ukraine, which consolidated the right of everyone to professional legal assistance, and also changed the approach to judicial jurisdiction. Under the new provisions, the precondition for applying to the court for the protection of rights is the application of the extrajudicial ways of resolving disputes provided by law.

Accordingly, the general principles of civil justice have also undergone changes. General provisions on the implementation of the adversarial principle are reflected in Part 1 of Art. 12 of the CPC of Ukraine. Thus, it is assumed that the parties to the case have equal rights to exercise all procedural rights and obligations provided for by law, and each party shall prove circumstances relevant to the case and which it refers to as grounds for their claims or objections, except in cases, established by this Code.

10 The European Court of Human Rights Practice. Decisions. Commentaries (n 79) 35-36.

11 D Homien , D Harris, L Zvaak, The European Convention on Human Rights and the European Social Charter (Moscow 1998) 221.

12 Case of *Brandstetter v Austria* <http://hudoc.echr.coe.int/eng?i=001-57683 http://echr.coe.int/echr> accessed 8 December 2019

But the new civil procedural law puts certain limits on the parties to the case in regards to adversarial trial realization. Thus, in Part 4 of Art. 12 of the CPC it is stipulated that each party bears the risk of consequences arising from the commission or non-execution of procedural actions. This norm is disclosed in the special rules of the CPC of Ukraine. This is a special procedure for the exchange of pleadings, which did not exist before the reform of the CPC, as well as the powers of the court to prevent the abuse of procedural rights, which is also a novelty for Ukraine.

In particular, according to Art. 175 of the CPC of Ukraine, a statement of claim shall be submitted to the court in writing and signed by the plaintiff or his representative, or another person whom the law granted the right to apply to the court in the interests of another person.

The statement of claim shall contain a list of documents and other evidence attached to the application; indication of evidence that cannot be filed together with the statement of claim (if any); indication as to whether the plaintiff or other person has the original written or electronic evidence, copies of which are attached to the application. That is, the evidence shall be indicated by the plaintiff immediately upon presentation of the statement of claim.

After the opening of the proceedings and receipt of the defendant's statement of claim, the latter has the right to exercise his/her right of revocation to the statement of claim. According to Art. 178 of the CPC of Ukraine, in the revocation of the defendant, he/she sets out the objections to the claim, as well as a list of documents and other evidence, and the indication of documents and evidence that cannot be filed together with the revocation, with the reasons for not filing them.

In addition, in accordance with Part 5 of Art. 178 of the CPC of Ukraine evidence confirming the circumstances on which the defendant's objections are based are added to revocation if such evidence is not provided by the plaintiff; as well as documents confirming the sending (giving) of the revocation and the evidence attached to it by other participants of the case.

The legislator provided that the revocation should be filed in due time, established by a court, which should not be less than fifteen days from the date of the order to open the proceedings. The court was also empowered to set such time-limits for filing a revocation, which would enable the defendant to prepare the revocation and the relevant evidence and enable other parties to the case to receive a revocation no later than the first preparatory meeting in the case. In case of failure to provide the defendant with a revocation within the time limit established by the court without good reason, the court shall settle the case on the available materials. A defendant who failed to provide the court with evidence against the stated claims is unable to refer to such evidence in future.

Similarly, according to Art. 83 of the CPC of Ukraine, the defendant, a third person who does not declare independent claims regarding the subject of the dispute, shall file evidence to the court together with the filing of the statement or written explanations of the third person.

If the evidence cannot be filed in the designated term for objective reasons, the party to the case shall notify the court in writing and indicate: the evidence which cannot

be filed; the reasons why evidence cannot be filed within the specified time period; evidence that the person has made all the possible actions to obtain the said evidence.

In the event of the recognition of valid reasons for failure by the party to submit evidence in the designated term, the court may impose an additional time limit for the submission of the said evidence. However, evidence that is not filed within the term designated by law or court is not admitted, except when the person submitting them substantiates the impossibility of submitting them within the specified time for reasons that were not under his/her control.

At the same time, the question of the sufficiency of evidence to establish circumstances relevant to the case is attributed to the powers of court. It decides the question in accordance with its internal conviction. Accordingly, a balance is struck between the rights of parties and the powers of court, which ensures the implementation of the principle of their cooperation in order to review the case.

This is confirmed by the following example of judicial practice. Thus, in a ruling of the Supreme Court of 4 October 2018 in the case No. 686/24319/16-ц in the lawsuit of PERSON_1 to Malynitske village council of the Khmelnytskyi rayon of Khmelnytskyi oblast, PERSON_5 on invalidation and cancellation of the decisions of village council session, invalidation of the state act on the right of property to a land lot, the court notes the following. Paragraph 1 of the first part of Article 60 of the CPC of Ukraine (as amended at the time of the decision of the court of first instance) stipulates that each party is required to prove the circumstances to which it refers as a basis for its claims and objections (part one of Article 81 of CPC of Ukraine of 2017).

Having established that the granting PERSON_5 the right of property to a land lot did not violate the rights of PERSON_4, and the plaintiff was not provided with proper and admissible evidence that the disputed land was transferred to him free of charge into private property, the court of first instance, which conclusion was agreed by the court of appeal, made a reasonable conclusion of the refusal to satisfy the claim.

The ECHR indicated that, in accordance with its common practice, which reflects the principle of proper administration of justice, the decisions of courts and other bodies of disputes resolution should adequately state the grounds upon which they are based. Although item 1 of Article 6 of the Convention obliges courts to justify their decisions, it cannot be construed as requiring a detailed answer to every argument. The measure to which the court shall fulfil the obligation to substantiate the decision may vary, depending on the nature of the decision (*Seriavin et al. versus Ukraine*, No. 4909/04, § 58, ECHR, of 10 February 2010).

The following example of judicial practice reflects the procedure for the submission and examination of the originals of evidence referred to by the parties to the case. The Supreme Court in the ruling of 10 October 2018 in the case No. 442/3989/17 on the claim of PERSON_1 to PERSON_5, the third person - PERSON_6, on the collection of alimony payment for maintenance of an adult son, who is continuing his education, notes that the evidence provided by the defendant is not properly certified and is erroneous in the light of the following.

According to part one of Article 76 of the CPC of Ukraine, evidence is any data on the basis of which the court establishes the presence or absence of circumstances (facts) justifying the claims and objections of the participants in the case and other circumstances that are relevant for the resolution of the case.

Parts one, two, five, and six of Article 95 of the CPC of Ukraine stipulate that written documents are documents (other than electronic documents) containing information about the circumstances relevant to the proper resolution of the dispute. Written evidence is filed in the original or in a duly certified copy, unless otherwise provided by this Code. A participant to the case, who submits written evidence in copies (electronic copies), shall indicate that he/she or another person has the original written evidence. The participant to the case shall confirm the correspondence of a copy of the written evidence to the original which he/she has, with his/her signature indicating the date of such certification. If a copy (electronic copy) of written evidence is filed, the court may, at the request of the participant in the case or on its own initiative, request the original written evidence from the person concerned. If the original of the written evidence is not filed, and the participant or the court questions the conformity of the submitted copy (electronic copy) with the original, such evidence is not taken into account by the court.

From the technical record of the Court of Appeal hearing, which took place on 19 December 2017, it was established that the court of appellate instance investigated the originals of the evidence submitted by the defendant to confirm the circumstances set out in the appeal.

Other arguments of the cassation appeal are disproved by the circumstances of the case established by the appellate court and are essentially reduced to disagreement with the court's findings regarding the establishment of these circumstances, contain references to the facts that were the subject of study and assessment by the court, which it justifiably denied.

The ECHR pointed out that the first paragraph of Article 6 of the Convention obliges courts to justify their decisions, but this cannot be taken as a requirement to provide a detailed answer to every argument. The boundaries of this duty may vary, depending on the nature of the decision. In addition, it is necessary to take into account, among other things, the variety of arguments that the party can submit to the court and the differences existing in the participating States, taking into account the provisions of the law, traditions, legal conclusions, statements and the formulation of decisions. Thus, the question whether the court fulfilled its obligation to submit a substantiation arising from Article 6 of the Convention can be determined only in the light of the specific circumstances of the case (paragraph 23 of the ECHR ruling of 18 July 2006 in the case of *Pronin versus Ukraine*).

Consequently, procedural law establishes not only the timeframe for the submission of evidence, but also the procedure of submitting evidence, which shall be sent to other participants in the case. If the parties to the proceedings fail to comply with such conditions for the submission of evidence, the court will not take them into consideration and consider the case only on the materials available.

3.2. Prevention of Abuse of Procedural Rights during the Implementation of Adversarial Principle

In accordance with these provisions of the current CPC of Ukraine of 2017, during the implementation of adversarial principle in civil justice, the court now plays a decisive role. According to Part 5 of Art. 12 of the CPC of Ukraine, the court, while maintaining objectivity and impartiality, controls the course of the trial; facilitates the settlement of a dispute by reaching an agreement between the parties; clarifies, in case of necessity, the procedural rights and obligations of the participants in the judicial process, the consequences of committing or not committing procedural actions; encourages participants in the judicial process to exercise their rights provided for in this Code; prevents the abuse of rights of the participants in the judicial process and takes steps to fulfil their duties. It received such a set of powers that allows it to guarantee the right of a person to a fair trial more effectively.

In particular, the clarification of the court procedural rights and obligations of the participants in the process is crucial for ensuring effective legal proceedings. Thus, L. Rosenberg and K. Schwab consider that in the civil process the adversarial principle is not an immutable dogma, but in the interests of the efficiency of legal proceedings, judicial assistance for the clarification of the circumstances of the case is necessary.[13] The authors argue that the adversarial principle places the burden of proof on the parties, and in connection to this it is impossible to ignore the significant role of the court, which is to assist the parties in providing relevant evidence. Such promotion of the court (procedural activity of the court) is carried out through the obligation of the judge to provide the relevant explanations (richterliche Aufklärungspflicht).

But along with this, the court should provide tools to prevent the abuse of procedural rights, without which clarification of the rights of participants becomes an illusory fiction, which is not implemented during the consideration of the case. Thus, for the first time in Ukraine's independence, the court received the right to apply measures to influence the unfair behaviour of the participants in the case.

Article 148 of the CPC of Ukraine provides for the application of a fine to the participants in the case for failure to comply with the legal requirements of the court, including the failure to comply with the decision to require evidence. Thus, the said norm stipulates that the court may order a decision on the collection a fine in the amount of 0,3 to 3 times the subsistence minimum for able-bodied individuals to the state budget from the person concerned in the following cases:

1) failure to perform procedural duties, in particular, evasion from the commission of actions imposed by a court on a participant in a judicial process;

2) abuse of procedural rights, commission of acts or assumption of inactivity in order to interfere with legal proceedings;

3) failure to inform the court of the impossibility of submitting evidence demanded by the court, or failure to submit such evidence without good reason;

13 L Rosenberg, K Schwab, Zivilprozessrecht, 15 Aufl (Beck 1993) 425.

4) failure to comply with the decision on the securing of claim or evidence, failure to provide a copy of the revocation for review, appeal or cassation appeal, the response to the revocation, the objection to another party to the case within the time limit prescribed by the court.

In the event of repeated or systematic non-compliance with procedural obligations, repeated or systematic abuse of procedural rights, repeated or systematic failure to submit evidence sought by the court without good reason or without notification, the failure to secure the claim or evidence, the court, taking into account specific circumstances, collects a fine in the amount of one to ten times the subsistence minimum for able-bodied individuals to the state budget from the relevant participant in the trial or another person concerned.

In case of non-fulfilment of procedural obligations, abuse of procedural rights by a representative of a participant in a case, the court may, after taking into account the particular circumstances of the case, collect a fine from both the participant in the case, and his/her representative.

The court also promotes the parties in requesting evidence, thus influencing the course of the case. According to Art. 84 of the CPC of Ukraine, a party to the case, in case of impossibility to provide evidence on its own, is entitled to file a petition requesting evidence by a court. Such a petition shall be filed within the term specified in parts two and three of Article 83 of this Code. If such a request is filed outside the specified term, the court leaves it without satisfaction, except when the person who submits it justifies that it was impossible to submit it in due time for reasons outside his/her control.

Any person who holds evidence shall submit it to the court on request. Persons who are not in a position to file evidence, which the court requests, or are not able to submit such evidence within the established time limits, are required to inform the court of the reasons within five days from the date of delivery of the ruling.

In case of failure to inform the court of the impossibility to submit the evidence requested by the court, as well as of failure to submit such evidence for reasons recognized by the court as not important, the court applies to the person concerned the measures of procedural coercion provided for in this Code.

The prosecution of guilty persons does not relieve them of the obligation to file evidence requested by the court.

The court may recognize the circumstances for which the evidence was sought, or refuse to recognize it in case of failure by the participant in the case to submit the evidence requested by the court for disreputable reasons or without notification about the reasons for not submitting the evidence. It depends on the person who avoids the submission and on the significance of this evidence. Court may also consider the case on the evidence available at the time, or, in case the plaintiff fails to submit such evidence, also leave the claim without consideration.

Thus, summing up the foregoing, one may come to the following conclusion. The violation by the participants in a civil case of the order for submission of evidence, the timing of submission of evidence, or failure to comply with a court order regarding the

reclamation of evidence may lead to negative consequences for them. Among such ones are the consideration of the case on the merits, which in the future can lead to a refusal to satisfy a claim or to leave a claim without consideration.

4. CONCLUSIONS

Judicial reform has unquestionably changed the function of the court in the trial. Now the law is based on the provision that civil judicial proceedings are carried out on the adversarial basis, but with the active assistance of the court, that is, on the terms of their cooperation, in order to effectively deal with the case.

At the same time, the economic conditions of the activity of the bar and the notary, which provide the opportunity for citizens to receive qualified legal aid, have changed. It should be noted that in the present situation in the country a significant part of low-income population as a result of rather progressive changes to the CPC of Ukraine in 2017, face significant obstacles to the realization of their right to judicial protection. As practice shows, the system of legislation is so complicated that without a professional legal assistance from a lawyer or specialist in the field of law it is almost impossible to hear a civil case in court.

The adoption of appropriate new measures and the improvement of existing procedures aimed at a more efficient administration of justice should not worsen the situation of citizens regarding the possibilities to exercise their right to judicial protection.

The problem of access to justice in the conditions of the effect of the adversarial principle can certainly not be limited to the possibility of providing free legal aid of lawyers and appropriate compensation by the state. A number of public institutions that will help protect the rights of the poor and those who find themselves in a difficult situation because of their health or age need to be developed.

The rights of the parties and the powers of the court, enshrined in the law, according to our conviction, aim at maintaining the balance between the parties' adversarial power in their attempt to prove their correctness and the activity of the court, which ensures effective consideration and resolution of the case. Such a balance should penetrate the entire CPC of Ukraine: the rules on the procedural activity of the parties (and other persons involved in the case) and the courts interact with and complement each other. This is the right way to realize the main task of civil justice and to achieve a fair, impartial and timely consideration and resolution of civil cases with the aim of effectively protecting violated, unrecognized or challenged rights, freedoms or interests. The active powers of the court should be considered only as a guarantee of realization of the right to a fair trial and ensuring the balance of public-law and private-law interests.

AUSTRIAN AND UKRAINIAN COMPARATIVE STUDY OF E-JUSTICE: TOWARDS CONFIDENCE OF JUDICIAL RIGHTS PROTECTION

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doi.org/10.33327/AJEE-18-2.4-a000022

The article is devoted to the comparative analysis of e-justice in Ukraine and Austria, in particular, the authors describe the current situation, strategy of e-justice development in Ukraine and Austria, as well as the potential risks, problems and benefits of introducing e-justice in Ukraine.

The link between the goals and task of civil proceeding with e-justice was succinctly shown in this article. Also, the common elements of e-justice in Ukraine and Austria were highlighted, among them the following three elements were analysed in depth: an appeal to court with different documents, electronic evidence and consideration of the case in electronic form.

Based on the comparative analysis, conclusions about what is common and different in e-justice in Ukraine and Austria and the value Ukraine should take from the experience of e-justice in Austria were drawn.

Keywords: e-justice, Single Judicial System, elements of e-justice, electronic legal communication, Austrian e-justice system.

1. INTRODUCTION

Ukraine is a member of the Council of Europe and therefore the right to judicial protection is reflected in Art. 55 of the Constitution of Ukraine,[1] as well as in the procedural codes, in particular the Civil Procedural Code of Ukraine, the Commercial Procedural Code of Ukraine and the Code of Administrative Proceedings of Ukraine.

In 2014, Ukraine signed an Association Agreement with the European Union, where Art. 14 Section III stipulates that 'Within the framework of cooperation in the field of justice, freedom and security, the Parties attach particular importance to the establishment of the rule of law and the strengthening of institutions of all levels in the field of general administration and law enforcement and judicial authorities in particular. Cooperation will be aimed, in particular, at strengthening the judiciary, improving its effectiveness, ensuring its independence and impartiality and fighting corruption. Cooperation in the field of justice, freedom and security will take place on the basis of respect for human rights and fundamental freedoms'.[2]

Since 2016 Ukraine has been undergoing judicial reforms. Corresponding changes were made to the Constitution of Ukraine in the area of justice and a new version of the Law of Ukraine 'On the Judiciary and Status of Judges' was adopted, according to which the court system is changed and new approaches are introduced in the selection and appointment of judges.

In the further amendments to the Constitution of October 2017, the new editions of the three procedural codes of Ukraine – Civil Procedural, Commercial Procedural and the Code of Administrative Proceedings – were adopted. The new codes, despite their shortcomings, look at the best European approaches to justice. The results of the reform have been modest so far, but hopefully the situation will improve, even though slowly.[3]

One of the tasks of the judicial reform was the introduction of effective mechanisms for the protection of the rights and interests of individuals and legal entities and the simplification of the accessibility of justice. Among the mechanisms aimed at facilitating access to justice is the introduction of e-justice, which has long been successfully functioning and applied in other EU countries and in particular in Austria, where e-justice is highly developed. Therefore, with the introduction of e-justice in Ukraine, the experience of Austria (both positive and negative) is of considerable interest.

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1 The Constitution of Ukraine <http://zakon2.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80> accessed 9 December 2019.

2 EU-Ukraine Association Agreement <http://ukraine-eu.mfa.gov.ua/en/page/open/id/2900> accessed 9 December 2019.

3 See Elisabetta Silvestri , 'Notes on Case Management in Italy' (IAPL 2017 China Conference On Judicial Management from comparative perspective',Tianjin, 8-10 Nov. 2017), Session 2 on 'Case Management', General Reporter – Dr. John Sorabji.

2. E-JUSTICE IN UKRAINE AND IN AUSTRIA

2.1. E-justice and the Tasks of the Civil Procedure

It would be easy to state the obvious and repeat that in all justice systems of the world the role of civil justice is to apply the applicable substantive law to the established facts in an impartial manner and pronounce fair and accurate judgments.[4]

The main tasks of the civil process are fair, impartial and timely consideration and resolution of civil cases in order to protect the violated, unrecognized or disputed rights, freedoms or interests of individuals, the rights and interests of legal entities and the interests of the state. Different institutes, tools and mechanisms are used to achieve the purpose of legal proceedings and the accomplishment of tasks. One of these can be called e-justice. E-justice is a mechanism that enhances transparency, effectiveness and access to justice. Use of appropriate communication technology - especially when parties cannot physically be present in court - is considered to be one of the common minimum standards of civil procedure.[5]

2.2. Current State and S-trategy of E-justice Development in Ukraine

In all three new procedural codes – the Civil Procedural, Commercial Procedural and the Code of Administrative Proceedings, adopted by the Parliament of Ukraine on 3 October 2017, the introduction of the Single Judicial Information and Telecommunication System (hereinafter, the *Judicial System*)[6] is envisaged. The consolidation of the law on the Judicial System is evidence of the penetration of the latest information technologies into the field of justice and the subsequent consistent implementation of e-justice in Ukraine. This fully corresponds to the tasks set out in the Strategy for the reform of the judiciary, justice and related legal institutes for 2015-2020.[7]

It is worth pointing out that the introduction of the Judicial System is not something completely new to Ukrainian legal proceedings. The procedural codes that had been in force before already contained a norm on the Automated System of the Documentation of the Court (Article 11-1 of the CPCU, Article 2-1 of the CPCU, Article 15-1 of the CAPU).[8] If one compares the rules of the existing procedural codes with the previous

4 See Alan Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014) 3.

5 European Parliament Resolution of 4 July 2017 with recommendations to the Commission on common minimum standards of civil procedure in the European Union (2015/2084(INL)).

6 In addition to the Judicial System in Ukraine there are number of other registries that are in some way related to the judicial system: the Register of Enforcement Proceedings, the Single Register of Debtors, the Register of Advocates of Ukraine, Unified State Register of Legal Entities, Individual Entrepreneurs and Public Associations and others.

7 See Strategy for the reform of the judiciary, justice and related legal institutes for 2015-2020 <http://zakon2.rada.gov.ua/laws/show/276/2015> accessed 9 December 2019.

8 See Civil Procedure Code of Ukraine <http://zakon3.rada.gov.ua/laws/show/1618-15/ed20170803> accessed 9 December 20191; Commercial Procedural Code of Ukraine <http://zakon2.rada.gov.ua/laws/show/1798-12/ed20170803> accessed 9 December 2019; Code of Administrative Proceedings of Ukraine <http://zakon2.rada.gov.ua/laws/show/2747-15/ed20170803> accessed 9 December 2019.

codes, one can notice immediately not only the textual differences, but also the differences in the content.

The Judicial System contains elements of e-justice already in operation, such as the registration of documents submitted to courts; the distribution of cases between judges, that is the determination of a judge or board of judges for the consideration of a particular case. There are also new elements, in particular the submission of documents in electronic form; the dispatching of subpoenas not only in paper form; electronic evidence, and so on. There is one example where, in the judicial system, e-justice was incorporated as an experiment in some courts of Ukraine. In particular, the experimental elements used were the exchange of documents between the court and participants in the process

The new Judicial System is broader in terms of content and range of its users. The automated system of document circulation concerned only the circulation of documents within a particular court and only judges and court personnel could have access to it. Through the Judicial System, a broader circle of individuals – not only court employees, but also other participants (parties, representatives, and the like) – is participating in this process. The Judicial System should become a kind of information platform for the whole array of documents circulating in the courts.

Such an expansion testifies the developments in the implementation of IT technologies in the field of legal proceedings in Ukraine, in particular the availability of experience in its administration and use by potential consumers such as judges or other subjects of procedural legal relations.

The idea is to create, in Ukraine, an electronic court, meaning a single platform mirroring the European Union space called E-justice. The introduction of e-justice will facilitate the establishment of mutually beneficial cooperation between Ukraine and the EU, and will be an important step towards a modern legal system.[9]

Currently,[10] there are no documents on the Strategy for the development of electronic justice in Ukraine. The main task is to draft a Regulation on a Single Judicial Information and Telecommunication System to fully execute the rules of procedural codes. The only way to enable said system to work in Ukraine's Judicial System is to develop and fully enforce the Regulation. Until that moment, the previous system continues to operate.

2.3. Development, Current State and Strategy of E-Justice in Austria

Austria has a leading role in the field of e-justice in Europe and the experience of e-justice development is very important and useful for other countries.[11] Actually,

9 See Iryna Izarova, 'Rozvytok electronnoho pravosyddia v tsuvilnykh spravah u ievropeiskyh krainah' ('Development of e-justice in civil cases in the European countries') (2014) 6 Yurydychnyi Visnyk218.

10 As of August 2018.

11 See Henriette Christine Duursma-Kepplinger, 'Deiaki aspekty avstriiskoho tsyvilnoho prozesualnoho prava yak imovorna model dlia novoho ukrainskoho tsyvilnoho protsesualnoho zakonodavstva' ('Some Aspects of Austrian Civil Procedure Law as a Possible Model for New Ukrainian Civil Procedure Legislation') (2017) 8 Pravo Ukrainy 158.

Austria was the first country worldwide that established the electronic legal communication.[12]

Information and communications technology is used in the Austrian Justice System in particular in the following areas:[13] case automation in the justice system ('Verfahrensautomation Justiz'); electronic legal communications; Land Register ('Grundbuch'); Business Register ('Firmenbuch'); documents submission service; database of official publications ('Ediktsdatei') (publications of the Business Register, real property auctions, insolvency database, etc.); Electronic Documents Archive; electronic signature; advances on maintenance; Federal Law Information System (RIS); Justiz Intranet; IT application for the European Payment Order; European Business Register (EBR); video conferencing; form sheets / online submissions.

Before turning to the most important individual applications, the temporal evolution of the e-justice in Austria should be described[14] (See Table 1)

Table 1. The evolution of the e-justice in Austria

Date	Historical Events
1976	The advances on maintenance process resulted in the first IT application in the justice department.
1980	In land database was set up at the Federal Computing Centre and the Austrian justice system started to build a comprehensive IT network.
1986	The 'external searches' of the migrated Land Registers were possible.
1990	The electronic legal communication with the courts was introduced and gradually expanded until 2019.
1991	The change from commercial register law to the Business Register Statute [Firmenbuchgesetz] laid the foundation for the central electronic Business Register.
1997	The Austrian justice system tested voice recognition systems.
1999	The Austrian Land Register could be inspected via the internet from all over the world. Also the European Business Register (EBR) enabled access to the official commercial or business register data of (currently) France, Italy, Germany, the United Kingdom, Belgium, Luxembourg, Spain, Ireland, Latvia, Lithuania, Estonia, Finland, Sweden, Denmark, Norway, Greece, the Netherlands, Malta Jersey, Guernsey, Ukraine, Slovenia, Serbia, Macedonia and Austria via the relevant national provider (in Austria: MANZ'sche Verlags- und Universitätsbuchhandlung GmbH) as part of the European Economic Interest Grouping (EEIG). In total more than 20 million business entities can be retrieved online via the EBR.

12 See more Federal Ministry of Justice, e-Justice Austria, IT applications in the Austrian justice system, Information (Revised in December 2017), brochure, p. 4 <https://www.justiz.gv.at/web2013/home/e-justice~8ab4ac8322985dd501229ce3fb1900b4.de.html> accessed 9 December.

13 *Ibid*, 3.

14 Source Federal Ministry of Justice, e-Justice Austria, IT applications in the Austrian justice system, Information (Revised in December 2017), brochure, p. 4 <https://www.justiz.gv.at/web2013/home/e-justice~8ab4ac8322985dd501229ce3fb1900b4.de.html> accessed 9 December 2019.

2000 The Integrated Prison Administration (IVV) was introduced. In the same year the insolvency database was opened. Insolvencies (bankruptcies, compositions, debt regulations) have been exclusively published on the internet and are legally binding as such.

2001 The electronic submission of annual financial statements to the Business Register was introduced.

2002 The database for real property auctions was set up.

2003 The Database of Official Publications was expanded by inclusion of auction edicts regarding movable items and by the option to search for property owners in criminal cases

2004 The list of expert witnesses, interpreters, mediators, insolvency administrators and official receivers, and the Lobbying and Interest Group was established.

2005 All publications prescribed for legal proceedings started to be made exclusively in the Database of Official Publications.

2005 All applications and documents received by the Business Register Courts started to be recorded and stored electronically.

2005 - 2006 The electronic signature of the justice system, by which the court decisions that would be sent and signed via ELC was introduced.

2005 - 2017 Video conferencing was introduced and constantly expanded.

2006 The New Land Register – the Electronic Collection of Documents was set up. By now more than 90% of the documents are submitted electronically. All documents have been available for inspection on the Internet via the clearing offices.

2006 The Electronic Documents Archive was set into force.

2007 The Mail Processing Service was put into operation for the first time.

2009 All orders and decisions issued by the Business Register Courts were stored electronically. All relevant documents are available electronically, which allows a completely digital file management in Business Register proceedings.

2009 Electronic search option for the youth welfare offices was implemented and the website of the justice system was completely revised.

2010 Every office belonging to the justice system was connected to the Federal Computing Center at least by an 8 MBit line (CNAx). Also the Electronic Certification Register was established in 2010.

2012 Following other milestones, such as connecting the Land Register to Electronic Legal Communication, processing of court fees in the Land Register and automated issuing of decisions, a technically updated version of the application including new features was made available as of 7 May 2012; since mid-2013 partitioning plans have been registered in the Land Register automatically in cross-departmental cooperation with the surveying offices.

2012 The intranet website, which had initially been designed in a uniform style for the entire department, was completely revised and newly designed and since then has presented itself in a new look in terms of technical, organisational, structural and visual aspects. Localisation was introduced, which means that every court, office and prison has its own virtual intranet site.

2013	The Statistics, the Data Warehouse was set up.
2013	The website of the justice was regularly enhanced and expanded. Every court, every public prosecutors' office and penal institution had its own area and, thus, virtually its own internet presence.
2014-2015	The Family and Youth Court Support Register was established. The form sheet service was extensively revised; submissions could be transmitted to the courts and public prosecutors' offices via secured electronic communication ('ELC for Everyone'); MOVE (Mein Office Vorlagen Editor (MOVE) [My Office Template Editor]) was installed on all workstations of the justice system.
2015	Austrian bailiffs were provided with the possibility to auction moveable items on the Internet auction platform of the justice system.
2016	Structured processing of titles and liens started to be possible. In the same year training in voice recognition software became a fixed part of the training schedule of trainee judges.
2016-2018	The Strategic Justiz 3.0 Initiative was introduced, with several parallel projects running to establish and optimise the bases of digital file management. Among other things, the prerequisites for a viable Austria-wide scanning process and text recognition, a file document management and workflow system were created. For the purposes of a holistic view of the operations of the justice system this initiative aimed to find best possible IT support for all the different user groups up to a fully electronic handling of procedures in the light of current trends and opportunities.
2017	Condominium ownership rights were registered systematically and automatically as well. At the same time the European order for payment procedure started ist operation for Austria and Germany by the (Austrian) Federal Computing Centre.
2017	The second, parallel system to the current system of EBR started to be available for EU-wide linking of companies. The Business Registers Interconnection System (BRIS) was established by the European Commission and provided the possibility to search for companies and corporations and to obtain commercial or business register excerpts and documents free of charge. In addition, the registers exchanged information about changes regarding parent companies.
2017	The IT support in criminal proceedings was set up.
2018	A total of 191 home typists (thereof 22 on parental leave and 26 retired staff members) were working as part of the Electronic paperwork Management system in Austria.
2018	It came to the digitisation and artificial intelligence. Since that time an AI service that has been 'trained' to meet the specific requirements of the justice system has been in use, which can be expanded step by step to other areas.
2019	The Electronic Enforcement Management (eVM) was set into force.
2019	Since 2019 online submission application for expert witnesses and interpreters should be mandatory.
2019-2022	The E-Codex – ME-Codex shall be adopted. The project will be operated and maintained by an existing European agency, presumably from 2022, the duties are being fulfilled by the bridging project me-CODEX until November 2018 and presumably by the follow-up project me-CODEX II from 2 February.

In the following a short overview of the most important aspects of the Austrian e-justice system will be given with the focus on the electronic legal communication, the electronic registers, the electronic documents archive, the database of official publications, the Federal Law Information System, the Justiz-intranet, video conferencing and data security.

The Case Automation in the Justice Administration application supports all courts and public prosecutors' offices in keeping the registers.[15] Some types of proceedings, for example the order for payment procedure are fully automated. Court decisions are issued automatically and dispatched via a centralized mailing line.[16] Submissions and decisions are transmitted via the Electronic Legal Communication system.[17] Court fees are collected as cashless payments.[18]

One of the most important achievements in Austrian e-justice is the electronic legal communication with the courts. It was introduced in 1990.[19] The relevant legal source is the Regulation of the Federal Minister of Justice on the electronic legal communication ('ERV 2006'),[20] which is based on Section 89b para. 2 Court Organisation Akt ('Gerichtsorganisationsgesetz – GOG').[21]The electronic legal communication has the same footing as submissions in hard copy. For submissions via electronic legal communication apply the same regulations as for submissions in hard copy (Section 89c para. 1 GOG). The electronic legal communication enables electronic transmission of submissions and an automatic receipt of the details in the case to the IT applications of the justice system.[22] Submissions via electronic legal communication must be signed with an appropriate electronic signature. In accordance with Section 89c para. 5 GOG in particular lawyers, notaries, credit and financial institutions, insurance companies or social insurance agencies are obliged to participate in the electronic legal communication within the bounds of the technical possibilities. Since 2013 every citizen, who owns a citizen card[23] is able to send electronic submissions to all courts and public prosecutors' offices via www.eingaben.justiz.gv.at by means of secured communication.[24]

In 1999 the 'justice system's data highway' was opened. It enables electronic service of process documents from the courts to the parties in the so-called 'return communication'.[25] Since 2009 courts and public prosecutors' offices are able to send judgments, transcripts and other documents as pdf attachments via electronic legal communication. For

15 Brochure (n 97) 5.

16 Brochure (n 97) 5.

17 Brochure (n 97) 5.

18 Source Federal Ministry of Justice, e-Justice Austria, IT applications in the Austrian justice system, Information Brochure (n 97) 5.

19 Der Elektronische Rechtsverkehr (ERV) <https://www.justiz.gv.at/web2013/home/e-justice/elektronischer-rechtsverkehr-erv~2c9484852308c2a60123708554d203e7.de.html> accessed 9 December 2019.

20 BGBl (2005) II (481).

21 Bundesrecht konsolidiert: Gesamte Rechtsvorschrift für Elektronischer Rechtsverkehr, Fassung vom 02.08.2018 <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004493> accessed 9 December 2019.

22 Brochure (n 97) 7.

23 Brochure (n 97) 15.

24 Brochure (n 97) 7.

25 Brochure (n 97) 7.

court rulings and other documents via electronic legal communication apply the same regulations as for court rulings in hard copy (Section 89c para. 3 GOG).

The importance of the electronic legal communication is shown by the key figures for 2016:[26] 14,7 million transactions, including 4,8 million submissions (this is more than 94% of all actions and approx. 76% of all petitions for enforcement) 7,6 million electronic submissions plus 2,3 million case number replies.

Court-appointed and certified expert witnesses and interpreters are able to submit expert opinions or translations, including attachments, in a secured electronic way to the offices of the justice system via the documents submission service.[27]

A further priority of the Austrian e-justice system is the register databases. As the first register database the Land Register database was set up at the Federal Computing Centre in the early 1980s. It has enabled automated keeping of the Land Register by the courts and automated keeping of the cadastre by the surveying offices.[28] Since the middle of 1999 the Austrian Land Register can be inspected via the internet throughout the world.[29] For external searches of the Land Register database so-called clearing offices were established.[30]

In 1991 the foundation for the central electronic Business Register was laid. The Business Register contains the data of all Austrian business entities that are subject to registration (main register).[31] The documents which are relevant to registration are stored in the Electronic Archive of Documents of the justice system (Collection of Documents – 'Urkundensammlung').[32]

The electronic Business Register as well as the Land Register database have been integrated into the service landscape of the justice system. Applications may be filed electronically or as a hard copy. Public announcements of the Business Register Courts are made fully automatically in the Database of Official Publications ('Ediktsdatei').[33] Business Register documents are served via Electronic Legal Communication System, via the justice systems' delivery service or via a central dispatch office ('mailing line') by post. Since 2017 the Business Register has been linked with other European registers via BRIS (Business Registers Interconnection System). Focused on corporations the system features Europe-wide search functions and document queries as well as notifications of insolvencies, liquidations and mergers.[34]

By virtue of the migration of the Land Register and the Business Register to IT-based systems it became necessary to establish an electronic documents archive too.

26 Brochure (n 97) 7.

27 Brochure (n 97) 12.

28 Brochure (n 97) 8.

29 See Information zum ERV <http://edikte.justiz.gv.at//edikte/km/kmhlp05.nsf/all/gbneu!Open Document> accessed 9 December 2019.

30 Brochure (n 97) 8; for further information please see <http://www.justiz.gv.at> accessed 9 December 2019.

31 Das Firmenbuch <https://www.justiz.gv.at/web2013/html/default/8ab4a8a422985de30122a90fc2ca620b.de.html> accessed 9 December 2019.

32 Brochure (n 97) 9.

33 Brochure (n 97) 9 f.

34 Brochure (n 97) 10.

Nevertheless it took several years until a central archive of documents emerged.[35] The electronic documents archive can be used for all types of applications, proceedings and procedures. There will be a possibility to archive documents (e.g. electronically signed contracts) from the court in a database in any application and in any type of proceedings, and to establish a link to the same. In this way a document once stored in the archive could be used in different legal proceedings. Since 2005 the collections of documents of all Business Register courts have been kept exclusively electronically. Since 2006 the same applies for the Land Register.[36]

Notices or other official documents get announced in the database of Official Publications ('Ediktsdatei').[37] The database of Official Publications is available to the general public without any registration or costs via internet.[38] In this database all matters from the area of insolvency (in particular, opening of insolvency proceedings, compositions, debt regulations)[39] are exclusively published and legally binding.[40] Furthermore the following matters are published in this database: official publications about auctions of real property; announcements of the Business Register Courts; auction edicts regarding movable items; the option to search for property owners in criminal cases, declarations of death, court declarations of invalidity etc.

A significant facilitator in the procedure of taking evidence is the use of video conferencing.[41] Since 2005 the procedural law requirements have been fulfilled for use of video conferencing equipment in examinations of witnesses and defendants in preliminary criminal proceedings, of witnesses at trials, and of witnesses, parties, interpreters and expert witnesses in civil proceedings (Section 277 Civil Procedure Order – ZPO). Video conferencing technology offers the judges a possibility to summon persons who must be examined by a different court by way of judicial assistance to the court equipped with a video conferencing system which is the closest to their home and to directly examine them via video conferencing.[42]. Video conferencing ultimately leads to a saving of time and costs for the courts, the parties and the persons being examined. Since 2011 all courts, public prosecutors' office and prisons have been equipped with video conferencing systems. In 2016 a total of around 3,700 video conferences were held Austria-wide, of which approximately 25% were with foreign courts.[43]

35 Brochure (n 97) 14.

36 Brochure (n 97) 14.

37 Der Ediktsdatei <https://www.help.gv.at/Portal.Node/hlpd/public/content/99/Seite.991589.html> accessed 9 December 2019; for a list of the legal basis of the Database of Official Publications see Ediktsdatei – Impressumsdaten <http://www.univie.ac.at/zib/pdf/Ediktsdatei_Impressumsdaten.pdf> accessed 9 December 2019.

38 Ediktsdatei <http://edikte.justiz.gv.at/edikte/edikthome.nsf> accessed 9 December 2019.

39 Section 14 Insolvency Introductory Act – IEG; Section 255 ff Insolvency Code – IO.

40 Brochure (n 97) 13; see also Henriette-Christine Duursma/Duursma-Kepplinger, 'Funktion und Wirkungen der österreichischen Insolvenzdatei' (2002) 19 ZInsO 913.

41 More about the success story of video conferencing in Austrian procedural law please see Die Justiz und die Videokonferenz – eine Erfol gsg eshchichte <https://www.justiz.gv.at/web2013/home/justiz/aktuelles/aeltere-beitraege/2012/die-justiz-und-die-videokonferenz--eine-erfolgsgeschichte~2c948485342383450134cd9be45e0304.de.html> accessed 9 December 2019.

42 Brochure (n 97) 34.

43 Brochure (n 97) 34.

A very useful facility is the Federal Law Information System (RIS).[44] It was established in the course of Austrian e-Government.[45] It is an online documentation of the Austrian legislation and jurisdiction. It is available to the general public without any registration or costs via Internet. The staff of the justice system can use this database tool at all workplaces.[46] The new RIS, which is based on Internet technology, allows for an even more efficient search for desired information and, therefore, a faster decision-making process. Important parts of the RIS system, such as, e.g., the statutory provisions or the rulings of the Supreme Administrative Court ('Verwaltungsgerichtshof') or of the Supreme Constitutional Court ('Verfassungsgerichtshof') and those of the ordinary courts of law are available to the general public free of charge on the Internet.[47]

The intranet of the justice system is an internal information portal only for all staff of the department and an important work tool.[48] It is based on the same concepts and technologies as the Internet. The intranet is a central access point to all internal and to selected external web applications and information for the staff of the justice system.[49] Internal web applications such as the Integrated Prison Administration, Webmail, the Collection of Forms, the Collection of Ministerial Orders, international judicial assistance or maintenance of the Database of Official Publications may be retrieved quickly, easily and in a structured manner. External applications, including but not limited to the Federal Law Information System RIS, the Land Register, the Business Register or the Central Register of Residents, may be reached via these applications as well.[50]

2.4. Common Elements of E-justice in Ukraine and Austria

What elements of e-justice are introduced in Ukraine? And which elements of e-justice are common in Ukraine and Austria? Elements of electronic justice[51] are fixed in the three Procedural Codes of Ukraine (Art. 14 of the Civil Procedural Code of Ukraine, Art. 6 of the Commercial Procedural Code of Ukraine and Art. 18 of the Code of Administrative Proceedings of Ukraine).[52] In Austria this is fixed in various legal sources. Most important is the Regulation of the Federal Minister of Justice on the electronic legal communication ('ERV 2006'),[53] which is based on Section 89b para. 2

44 Das Rechtsinformationssystem des Bundes (RIS), <http://www.ris.bka.gv.at> accessed 9 December 2019.

45 E-Government in Österreich <https://www.digitales.oesterreich.gv.at/e-government-in-osterreich> accessed 9 December 2019.

46 Brochure, *op.cit.* Brochure (n 97) 25.

47 Brochure (n 97) 25.

48 Brochure (n 97) 29.

49 Brochure (n 97) 29.

50 Brochure (n 97) 29.

51 Note: in Ukraine there was a unification of processes, which, before 2017 had significant differences. The relevant articles of the procedural codes are identical in content.

52 Civil Procedural Code of Ukraine<http://zakon2.rada.gov.ua/laws/show/1618-15> accessed 9 December 2019; Commercial Procedural Code of Ukraine <http://zakon3.rada.gov.ua/laws/show/1798-12> accessed 9 December 2019; Code of Administrative Proceedings of Ukraine <http://zakon3.rada.gov.ua/laws/show/2747-15> accessed 9 December 2019.

53 BGBl (3005) II (481).

Court Organisation Akt ('Gerichtsorganisationsgesetz – GOG').[54]

These elements can be called differently in each legal system, but the content is almost identical. This situation is quite understandable, since the development of the provisions on e-justice in Ukraine took into account the experience of electronic justice in the United States and Europe. So, if to compare e-justice in Austria and Ukraine, then the following elements of e-justice are common: 1) submission of a statement of claim, applications, other documents to the court in electronic form; 2) payment of court fee; 4) exchange of documents between the courts, the court and the participants in the process; 5) sending of announcements, communications, decisions to the participants of the court process; 6) consideration of the case in electronic form; 7) holding a videoconference; 8) electronic evidence and so on.

Let's take a look at some of these elements. It is worthwhile to focus on three elements – submission of the statement of claim, applications, other documents to the court in electronic form, electronic evidence and consideration of the case in electronic form, because they are actually new if to compare provision of old and new Procedural Codes of Ukraine

2.4.1. Submission of the Statement of Claim, Applications, Other Documents to the Court in Electronic Form.

Until April 2017, the Provisional Rules for the Exchange of Electronic Documents between the Court and the Participants in the Court Process,[55] where the procedure for the submission by the participants of the court proceedings to the court of documents in electronic form was established, as well as the electronic submission of such procedural documents to the participants in parallel with the documents in paper in accordance with the procedural law. At the same time, such electronic court communication was unilateral, since there was only the possibility of sending procedural documents to the court at the request of the participants in the process. Since July 2015, three pilot courts in Ukraine have been identified, in which such communication was electronically carried out bilaterally. In general, the results of this pilot project can be evaluated positively. Since there is a huge demand for such services, namely, that a person, without leaving home, had the opportunity to apply to the court for the protection of the violated right and get a judicial decision in the shortest possible time.[56] But in any case, such communication could only take place after the opening of the proceedings. The only judicial system provides for the two-way exchange of documents in all courts of Ukraine, as well as the possibility of applying to the court in electronic form in fact with the requirement to open proceedings in order to protect rights or interests.

In Austria complaints have to be filed via electronic communication, if a party is represented by a lawyer. In this case all written submissions in civil procedural

54 Bundesrecht konsolidiert: Gesamte Rechtsvorschrift für Elektronischer Rechtsverkehr, Fassung vom 02.08.2018 <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20004493> accessed 9 December 2019.

55 Temporal Regulation of court documents exchange between court and parties <https://ck.court.gov.ua/tu24/gromadyanam/timreglament/> accessed 9 December 2019.

56 The results of pilot project of e-court were presented in Odessa, see <http://rsu.gov.ua/ua/news/v-odesi-prezentovano-rezultati-pilotnogo-/proektu-elektronnij-sud> accessed 9 December 2019.

proceedings have to be lodged via electronic communication. Only not represented parties are not forced to use the electronic communication. But they can use it as far as they have a citizen card with electronic signature. For the return communication apply the same rules.

2.4.2. Electronic Evidence

Evidence lies at the heart of every civil procedure.[57] Their introduction into the process is important in today's conditions when the contracts are concluded on the Internet. Electronic evidence is information in an electronic (digital) form that contains facts relevant to the case, including electronic documents (including text documents, graphic images, plans, photographs, video and audio recordings, etc.), web-sites (pages), text, multimedia and voice messages, metadata, databases and other data in electronic form. Such data may be stored, for example, on portable devices (memory cards, mobile phones, etc.), servers, back-up systems, and other places of data storage in electronic form (including the Internet).

It cannot be said that electronic evidence was not used in Ukrainian practice at all. However, there was no complete understanding of this legal institution. Therefore, often the courts did not take them as evidence at all in the case. Irregularity of electronic evidence in the Ukrainian national civil procedural law prevented their effective use.[58] Electronic evidence is actually a 'novelty' in the processes.[59]

In Austria documents can also be transmitted via electronic communication. This particular applies for civil procedural proceedings. In other proceedings, such as proceedings concerning the Land Register or the Business Register documents can also be transmitted in electronic way via registration in the Electronic Archive of Documents. It is not provided to send documents e.g. via email or USB-stick. Another question is, if video, mobile phones and other data carrier may be used as evidence. Austrian law provides this.

2.4.3. Consideration of the Case in Electronic Form

This element of e-justice provided for by Ukrainian law, from our point of view, is both interesting and complicated. Since the procedural codes contain only one phrase: 'The court conducts consideration of the case on the materials of the court case in electronic form'. The following articles do not contain any provisions on how this should be done. Perhaps the legislator plans that this will be done by the Regulation of the Single Judicial

57 See *Cornelious H van Rhee*, Alan Uzelac, 'Evidence in civil procedure: the fundamentals in light of the 21st century' <https://www.academia.edu/29595337/Evidence_in_Civil_Procedure_the_fundamentals_in_light_of_21st_century > accessed 9 December 2019.

58 See AYu Kalamaiko, 'Electronni zasoby dokazuvannia v tsyvilnomu protsesi' ('Electronic means of proof in civil process') (PhD thesis, Yaroslav Mudryi National Law University 2016) <dspace.nlu.edu.ua/bitstream/123456789/10659/1/Kalamaiko_A_Yu_2016.pdf> accessed 10 December 2019.

59 See Viktoriia Melnychenko, 'Elektronni dokazy: "novynka" u protsesi' ('Electroni proof; a "novelty" in the process') (2017) 52 (602) Yurydychna Hazeta <http://yur-gazeta.com/publications/practice/sudova-praktika/elektronni-dokazi-novinka-u-procesi.html> accessed 10 December 2019.

Information and Telecommunication System. But at the present time, the question arises whether a trial should be held in such a case, which process participants should be notified of? At the moment there is no answer. And on this occasion, neither theorists nor practitioners express their position.

In Austria it is not provided to conduct a case in electronic form in general. Only the electronic order for payment procedure ('ADV-Mahnverfahren') provides a decision of the court without an oral proceeding (Section 250 ff Civil Procedure Order – ZPO).[60] Apart from that a deviation from the principle of directness is only provided due to video conferencing.

The consolidation in the procedural codes of the relevant article on the Judicial System also did not mean its full-scale use since the entry into force of these codes. The legislator has foreseen a transitional period for this. According to the transitional provisions, the Uniform Judicial System 'starts functioning 90 days after the announcement by the State Judicial Administration of Ukraine and the web portal of the judiciary about the creation and maintenance of the functioning of the Single Judicial Information and Telecommunication System'. When it happens in Ukraine we can not to say.

3. POTENTIAL RISKS AND BENEFITS OF E-JUSTICE EXPERIENCE IN AUSTRIA AND UKRAINE

3.1. The Main Features of E-justice and Risks

The Austrian e-justice demands a high standard on security and further qualitative requirements on IT solutions.[61] For this purpose the federal ministry of justice has formulated an Austrian e-justice strategy.[62] According to this an adequate performance and availability of the IT solutions and data has to be ensured. The authenticity, integrity and confidentiality of the stored or transmitted data have to be guaranteed. It must be ensured, that unauthorised third parties without permission cannot use or compromise the IT solutions. The IT security includes all endangered and worth protecting technical equipment and facilities, e.g. hardware, software, networks, communication facilities, operating instructions and other software solution documentation.[63] IT security demands administrative and technical measures to reduce the potential risk for the IT solutions. Protective measures comprise elaborating security designs for developing and operating the IT solutions and implementing the security standards set force within

60 See Hanz Dolinar, Marianne Roth, Henriette Duursma-Kepplinger, *Zivilprozessrecht*, 14 vol (Jan Sramek Verlag 2016) 328.

61 Federal Ministry of Justice, Österreichische e-Justiz Strategie (Austrian e-justice strategy), Version 3.3. (Stand: 12.06.2017) p. 24, 25 (in the following: Strategy) p. 24, 25 <https://www.justiz.gv.at/web2013/home/e-justice~8ab4ac8322985dd501229ce3fb1900b4.de.html> accessed 10 December 2019.

62 *Ibid*. The currently valid 'e-Government Vision 2020' as well as the 'E-Government-Strategy' of the platform Digital Austria ('Plattform Digitales Österreich – PDÖ) <https://www.digitales.oesterreich.gv.at/e-government-strategie-des-bundes> accessed 10 December 2019, <https://www.digitales.oesterreich.gv.at/e-government-vision-2020> accessed 10 December 2019.

63 Strategy (n 144) 24, 25.

those designs, e.g. the use of access permissions.[64] Measures of IT security should in particular detect and prevent unauthorised access to systems, applications and data. They should detect and avoid safety-critical software and configuration errors.[65] Measures of IT security are subject to economic aspects. The level of protection depends on a risk assessment. Efficient security measures have to be established at all levels such as data, applications and infrastructure.[66] This is ensured through a proactive and systematic approach of an IT security structure. The emphasis is on high system security at storage and transmission of data. The risks of use of new communication channels had to be reduced through appropriate measures.

The long-term storage of all proceedings' data increases the risk of loss of physical data, such as the paper files.[67] In the course of the widespread use of mobile data carriers, e.g. smartphones, USB memory cards special attention should be given on securing digitally stored data.[68]

Since 2007 the electronic legal communication works on a web-based technology using open standards, such as, e.g., XML, WebServices or SOAP. ELC, which is secured by SSL and certificates. It can be accessed via several transmission points and inter alia provides for the possibility to send exhibits in the form of attachments together with the electronically submitted brief. [69]

When introducing the Judicial System in Ukraine it is necessary to take into account the potential risks and problems that may arise. It is clear that it takes some time to find out all the problems and make suggestions to fix them.

However, certain risks and problems are already available because Ukraine has some experience due to using of separate elements of electronic justice. And also it is necessary to take into accounts the experience of Austria in this point.

The first risk that can be called is the total or partial destruction of information contained in the Judicial System. In June 2017, a number of hack attacks were carried out on various Ukrainian structures, in particular, the State Fiscal Service of Ukraine.[70] In this aspect, it is important to create the proper protection of information contained in the Judicial System, for example, by copying information to an additional server. They should not even be the potential disappearance of a large amount of information on court cases in particular in the context of guaranteeing basic human rights and freedoms.[71]

The second potential risk is the ability to get information about process participants to third parties (names, addresses, etc.), that is, that according to the legislation is personal

64 Strategy (n 144) 24, 25.

65 Strategy (n 144) 24, 25.

66 Strategy (n 144) 24, 25.

67 Strategy (n 144) 24, 25.

68 Strategy (n 144) 24, 25.

69 Strategy (n 144) 7.

70 See SFS suspends acceptance of documents because of virus Petya.A attack <https://tsn.ua/groshi/dfs-prizupinila-priyom-elektronnih-dokumentiv-cherez-ataku-virusu-petya-a-952577.html> accessed 9 December 2019.

71 See *Dubinskaya v Russia,* application No 4856/03 <http://hudoc.echr.coe.int/eng?i=001-76343> accessed 10 December 2019.

data. As noted above in Austria, an entire strategy has been developed on this subject, which provides for high standards on security.

Are there other problems / risks of e-justice in Ukraine? Yes, exactly, for example, a problem as the lack of 'computer literacy'.[72] Other authors also note among the problems: lack of funds and dissonance of information technology and procedural rules.[73] We think that each year, these problems will gradually diminish / disappear, because Austria at the beginning of establishment of e-justice had similar problems. Such similar problems are characteristic of almost all the states that introduced e-justice.[74]

Another important problem, in our opinion, is the availability of e-mail addresses for the possibility of using the Judicial System. As for legal entities, lawyers, notaries, experts, etc., the participants are required to register electronic addresses using the electronic digital signature in the Judicial System. As for ordinary citizens, such a duty does not exist. Therefore, the question arises how simple citizens can be in the situation when they became participants in the process? At present, this problem is solved in such a manner that individuals submit court applications, where they specify the electronic addresses to which it is possible to send information (notice of the court hearing, documents on the case). However, this information is used only for one specific case. Austria has similar approaches for the inclusion of individuals in the court portal. Individuals are voluntarily included in this portal. In our view, the problem may disappear when individuals will understand the necessity of the legal advice provided by lawyers who are already included in this system.

Speaking about the risks and problems, we consider it most important to pay attention to the advantages of the full implementation of the Judicial System in Ukraine and Austria.

In our opinion, the first and most important advantage is saving time and money. Most Ukrainian scientists and practitioners point to these advantages. Other advantages include speeding up of disputes, facilitating access of process participants to case materials; simplifying the work of all subjects of legal proceedings.

The Austrian e-justice system can be described as stable and secure. It is based on a very high technical standard. Technical failures or disruptions are very rare, indeed. Damages due to hacker or other cyber-attacks on the Austrian E-justice System are as far as can be seen not reported.[75]

3.2. What Makes the Procedure More Effective?

The benefits of the Austrian e-justice system prevails the potential risks and problems so far. The most important risk factor is the field of data security and cyber-attacks. As said,

72 See NV Kushakova-Kostytska, 'Elektronne pravosuddia: ukrainski realii ta zarubizhnui dosvid' ('E-justice: Urrainian realities and foreign experience') (2013) 1 Yurydychnyi Chasopys Natsionalnoi Akademii Vnutrishnikh Sprav 103-109.

73 See Draft Law On the Main Grounds of Cyber Security in Ukraine <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?id=&pf3516=2126%D0%B0&skl=9> accessed 10 December 2019.

74 João Rosa, Risk factors in e-justice information systems <https://www.sciencedirect.com/science/article/pii/S0740624X13000385> accessed 10 December 2019.

75 For further information to cyber security in Austria see <http://archiv.bundeskanzleramt.at/DocView.axd?CobId=66026> accessed 11 December 2019.

the Austrian e-justice system operates at a very high technical level. Furthermore there is great effort to ensure data security. With this background the risks are tolerable in comparison to the benefits. The implementation of the e-justice system has led to a significant reduction of costs in the area of justice. This applies in particular to savings in publication costs, postage and personnel costs. Solely the database of Official Publications has led to a reduction in publication costs of 95%.[76] Once the final stage of electronic legal communication is reached, it will mean an estimated 133 staff members less.[77] In 2016 savings on postage worth more than EUR 12 million were made due to electronic legal communication.[78] Overall the implementation of e-justice system has the advantage for the Federal Republic of Austria of expenses saved.

The users of the e-justice system (staff of the courts, parties, attorneys, etc.) also benefit due to shorter length of proceedings, saving of time because of the (full) automation in various types of proceedings etc. Nonetheless, it cannot be overlooked that the initial acquisition costs for the necessary hard and software represent a not insignificant cost factor for external users (in particular attorneys and notaries). When introducing a liable e-justice system this factor should be considered. Appropriate long transitional phases can help to solve this problem.

4. CONCLUSION

Introduction of the Judicial System in Ukraine in the area of justice is an objective phenomenon and meets the requirements of time. However, for its full-fledged work, it is necessary to adopt the relevant Regulation, where all aspects (procedural, technical, etc.) related to its functioning will be settled in more detail and clearly correlated with the norms of the procedural codes. It is worth considering the security of this Judicial System in order to protect personal data and prevent the destruction of all given as such in general in the case of hacker attacks. In this field the technical experience of the Austrian e-justice and e-government systems could be helpful. Austrian Justice System is very broad. Some parts available in Austria are not yet available in Ukraine, such as Family and Youth Court Support Register. Other components, such as the Business Registry exist in Ukraine, but they are not part of a Judicial System.

When developing the Regulation on a Judicial System in Ukraine, it is necessary to take into account such aspects as providing information security, protecting personal data, expanding the elements of electronic justice which exist in Austria. When implementing an e-justice system in the Ukraine, the emphasis should be set on the electronic communication. To support this, the establishment of an electronic documents archive and a database of official publications would be very useful. At the second stage Business Registry, Land Register and other Registers should be automatically connected with the justice electronic communication system.

The introduction of e-justice is an important element of modernization of legal

76 Brochure (n 97) 7.

77 Brochure (n 97) 7.

78 Brochure (n 97) 7.

proceedings, promotes the rule of law and increases public trust to the state as a whole and in particular to the court system. The introduction of electronic justice in the Ukrainian justice will bring it closer to the common minimum standards of civil procedure that are being declared in the European space.

Lastly, the full implementation of e-justice in Austria lasted more than 30 years. In Ukraine, the introduction of e-justice has been going on for more than 10 years. We do not agree with the opinion of some scholars that fully electronic civil proceedings will only be achieved in several decades.[79] The development of IT technology is at an insidious pace. Therefore, we believe that the electronic justice system in Ukraine will function fully in the next ten years. This is confirmed by the experience of Austria.

79 See Yu Navrotska, O Ugrynovska, 'Tendentsii electronizatsii tsyvilnoho sudochynstva Ukrainy' ('Tendencies of digitalization of civil procedure in Ukraine') (2017) 8 Pravo Ukrainy 130.

THE ROLE OF THE NOTARY IN THE EFFICIENT PROTECTION OF PROPERTY RIGHTS

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doi.org/10.33327/AJEE-18-2.4-a000023

Summary: 1. Introduction. – 2. The Modern Concept of the Registration of Rights to Real Estate and Their Encumbrances in the Light of Their Implementation. – *2.1 General Regulations. – 2.2. Agencies Authorized to Conduct State Registration. – 2.3 Arguments in Favor of Acknowledging State Registration of Real Rights and Their Encumbrances as Interior State Functions and the Introduction of Responsibility of the State for Mistakes and Intentional Violations Made by State Registrars.* – 3. Forms of Participation and Functions of Notaries in the Process of Actualizing State Politics Pertaining to the Registration of Rights to Real Estate and Their Encumbrances. – *3.1. Historical Development of the Notaries Public on the Territory of Ukraine. – 3.2 Subjects of the Implementation of Notarial Activities. Arguments for Creation of Open Corporations.* – 4. Conclusions.

The relevance of the research is substantiated by the chain of factors, two of them being of particular importance. Firstly, it is connected with the process of creating the stable model of property institute operation and its protection: at the level of conceptual decisions on land market introduction, and in practical context – through determination and elimination of legislative gaps, which facilitated numerous abuses in the process of acquisition and/or conveyance of title to immovable property. Secondly, announcement and prolongation of the realization of the legal reform also stipulates the reformation of notarial system – not only in the context of its internal organization, methodological support of its operation, authorities and functions, but also considering the interaction with the other authorities, which are competent in title registration.

The author analyses the role and functions of notarial authorities in the common system of title protection in Ukraine; defines the sufficiency, effectiveness and performance of the legal regulation level in the process of succession; considers the purpose and the tasks of notarial performance in the area of title protection and analyses the offered legislative novelties at the conceptual level.

The author of this article comes to the conclusion that an extensive scholarly discussion shall be held on the grounds of which the contents and functions of notarial system in the system of property rights protection should be settled.

Keywords: Notary Public, Rights to Real Estate, Encumbrance of Ownership Rights, System of State Registration Agencies, State Registrars, Protections of Rights, Subjective Jurisdiction of Judicial Cases to State Registrars

1. INTRODUCTION

Just like the Russian Empire, whose lands included Ukrainian lands, did a hundred years ago, modern Ukraine resolves the issues of land market introduction. Then this process was known as providing liquidity of private land ownership, or 'real estate mobilization'.[1] However, the contemporary Ukrainian situation differs from that of the Russian Empire one hundred years ago. First of all, the events of 1917 and later development of the country erased not only the concept of 'mobilization', but also the very concept of village and farm land as private property. This was due to the practice of collectivism and the creation of state and cooperative collective farms, the difference of which was not very significant. Secondly, because of a whole array of factors, among which the social awareness of larcenous actions conducted in the 1990's in connection with certified privatizations of real estate, 73% of Ukrainians do not support opening the real estate market, under such conditions as are announced by the mass media.[2]

On 13 November 2019, the Verkhovna Rada of Ukraine voted in the first reading for and approved as a basis the draft law 'On Amendments to Some Legislative Acts of Ukraine on the Circulation of Agricultural Land' recommended by the Verkhovna Rada of Ukraine Committee on Agrarian and Land Policy and submitted by deputies M.T. Solsky, M.V. Nikitina, A.S. Nagaevsky and others (Reg. No. 2178-10 of 10 October 2019). [3]

The socio-economic situation in the country was reflected in the usual discussions during the implementation of any reform, polarizing points of view. Generally, they can be represented by the following pattern: one opinion is to resolve the issue of introduction of the agricultural land market within a national referendum; another opinion is that the very fact of the election of a majority to the parliament has already given its representatives a mandate of trust.

According to the Prime Minister of Ukraine Oleksiy Goncharuk, the land market will be in operation from 1 October 2020,[4] and according to Radio Svoboda, 'Western

1 V Sviatlovskyi, *Mobilizatsiia zemelnoi sobstvennosti v Rossii (Mobilization of land property in Russia)* (Luch 1909) 6.

2 Attitude of Ukrainians towards the introduction of land market <http://ratinggroup.ua/research/ukraine/otnoshenie_ukraincev_k_vnedreniyu_prodazhi_zemli.html?fbclid=IwAR2b-W80wQ47POdWgBhF91tkQVdRNbYyXSqz8DgN1032D_Dehd9MZ0l0LZg> accessed 11 December 2019.

3 The draft law 'On Amendments to Some Legislative Acts of Ukraine on the Circulation of Agricultural Land' <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66948> accessed 14 December 2019.

4 Radio Svoboda, 'Honcharyk: The Land Market Will Be In Operation from 1 October 2020' (19 September 2019) <https://www.radiosvoboda.org/a/news-honcharuk/30172740.html> accessed 14 December 2019.

organizations, such as the International Monetary Fund and the European Court of Human Rights, support the opening of the land market.'[5]

By the second reading, the draft law will be finalized; perhaps the remarks of the Main Scientific and Expert Directorate of the Verkhovna Rada of Ukraine will be taken into consideration. Consensus may emerge not only in the parliament, but also in society. That is, it is important to understand that the introduction of the land market will inevitably happen. That is why it is important to anticipate what challenges this process will bring about and have a sound and logical answer to them.

The establishment of the agricultural land market is not only the goal of routine reforms, but at the same time, an occasion to conduct analysis of the functioning of the land market in general, regarding its availability, stability and security, since all existing problems, without doubt, will take hold on a new foundation, if we do not bring them to light and substantiate their resolution today.

2. THE MODERN CONCEPT OF THE REGISTRATION OF RIGHTS TO REAL ESTATE AND THEIR ENCUMBRANCES IN THE LIGHT OF THEIR IMPLEMENTATION

2.1 General Regulations

The current Civil Code of Ukraine (part 3, article 334)[6] directly associates the moment of obtaining rights to real estate with the fact of exercising the right of state registration on the basis of the agreement by which the property was obtained. Termination of property rights occurs as the result of the property's destruction (point 4, part 1, article 346 of the Civil Code of Ukraine),[7] or its alienation, while the destruction of the property until recently was to be corroborated by an expunction of that property from the State Register of Rights to Objects of Real Estate and Their Encumbrances, based on part 2 of article 349 of the Civil Code of Ukraine. The legislation has excluded this standard from the Civil Code on the basis of the codified law No.2597-VIII of 18 October 2018 – the Code of Ukraine on Bankruptcy Procedures, which makes unclear not only the grounds for excluding the legal standard, but also any of its connection with the subject of regulating bankruptcy procedures . The only possible explanation of such connection is a conspiratorial version, that the Code itself contains a statutory loophole for hiding properties from creditors by way of their fictive destruction. At least, until recently the named legal standard protected owners' and/or co-owners' properties through the opportunity of implementing procedures of vindication in cases of partial damage in the process of their illegal reconstruction.[8] Now such means of protection is under question, which speaks of the quality of legislation and its validity in the process of implementation.

5 Radio Svoboda, 'The Verkhovna Rada Supported the Draft Law on the Land Market' (13 November 2019) <https://www.radiosvoboda.org/a/news-rada-rynok-zemli/30269447.html> accessed 15 December 2019.

6 The Civil Code f Ukraine <https://zakon.rada.gov.ua/laws/show/435-15> accessed 11 December 2019.

7 The Civil Code f Ukraine (n 168).

8 See The Ruling of the Supreme Court of 10 October 2019 in the case No 761/32301/16-ц <http://reyestr.court.gov.ua/Review/85075415> accessed 11 December 2019.

According to paragraph 1, part 1, Article 1 of the Law of Ukraine 'On State Registration of Rights to Real Property and Their Encumbrances',[9] a state registration is understood as 'an official acknowledgment and confirmation by the state of the facts of obtainment, change or termination of the rights to real estate, as well as encumbrances of such rights, by way of recording corresponding data in the state register'.

In this way, it could be said, that the occurrence, change and termination of ownership rights to objects of real estate is associated with the official acknowledgment by the state of certain judicial facts, which the law defines as the basis for the occurrence of rights and obligations, according to part 2, Article 11 of the Civil Code of Ukraine.[10] In the definition of state registration as a right supportive rather than right establishing fact, is the following unconditional logic: the right does not occur as a result of state registration (as from the court decision itself), but it occurs as a consequence of the acknowledgment by the state of the completed legal action on the part of the one receiving the right, such as the erection of a new construction, the manufacturing of a new things, the completion of deals and other such things.

In accordance with the legal position of the Supreme Court of Ukraine set forth in the ruling of 25 August 2009, in Case No. 2/394, reviewed in the first instance by the Economic Court of Kyiv,[11] the agency authorized to implement state registration completes only the corresponding actions within the guidelines of the active legislature, and of itself is not the entity that could dispute or acknowledge ownership rights.

2.2. Agencies Authorized to Implement State Registration

The Law of Ukraine 'On State Registration of Rights to Real Property and Their Encumbrances' envisages the following procedure of registration:

1) In the preamble to the Law it is stipulated that the law is directed towards 'the provision of acknowledgment and protection by the state' of property rights and their encumbrances;[12]

2) Paragraph 2, part 1, Article 2 of the Law denotes the State Register as a singular state informational system, which 'provides for the handling, preservation and presentation of data about registered rights to real estate and their encumbrances, as well as about objects and subjects of such rights';[13]

3) Paragraph 7, part 1, article 2 of the Law defines the technical administrator of the register as a unitary enterprise defined by the Ministry of Justice of Ukraine and assigned to the sphere of its administration;[14]

9 The Law of Ukraine 'On State Registration of Rights to Real Property and Their Encumbrances' <https://zakon.rada.gov.ua/laws/show/1952-15> accessed 11 December 2019.

10 The Civil Code f Ukraine (n 168).

11 *LLC 'Hotel complex "Rus"' vs Communal Enterprise 'Kyiv Municipal Bureau of Technical Inventory and Registration of Rights'* <http://reyestr.court.gov.ua/Review/2456599> accessed 11 Dcember 2019.

12 The Law of Ukraine 'On State Registration of Rights to Real Property and Their Encumbrances' <https://zakon.rada.gov.ua/laws/show/1952-15> accessed 11 December 2019.

13 The Law of Ukraine (n 174).

14 The Law of Ukraine (n 174).

4) According to Article 6 of the Law, the authority to conduct registration have the executive bodies of village, town and city councils, Kyiv and Sevastopol city, district and district in the cities of Kyiv and Sevastopol state administrations, accredited subjects and state registrars.[15] The jurisdiction of the system of state registration bodies includes the Ministry of Justice of Ukraine and its territorial agencies, which are endued with functions of regulatory, organizational and methodical provision and regulation.

Until 1 January 2013, the functions of state registration of rights to real estate and their encumbrances were implemented by the Bureaus of Technical Inventory – state enterprises, which combined the functions of registration, technical inventory control and passportization of properties,[16] and which are legal successors of technical inventory and passportization state offices, established in 1927 in the USSR.

Therefore, according to the new order, it is state registrars who directly implement the function of acknowledging in the name of the state the basis for the occurrence of real rights of an entity to real estate. State registrars organizationally may belong to the executive bodies of local councils, Kyiv and Sevastopol city and state administrations, or to the so called accredited subjects, accreditation and monitoring of accreditation requirements of which implements the Ministry of Justice of Ukraine. It is worth noting that originally the function of state registration was performed by separate registration services , which were a part of the system of State Registration Service of Ukraine (Ukrderzhreiestr), being a part of the system of central agencies of executive authority, whose activity was directed and coordinated by the Cabinet of Ministers of Ukraine through the Ministry of Justice of Ukraine.[17] These, in turn, aimed at actualizing the state politics in the sphere of implementation of registration activities. New authorities, coming in on the wake of the Revolution of Dignity, abolished the State Registration Service of Ukraine by the Decree No. 17 'Questions of Optimizing the Activities of Central Bodies of Executive Authorities of Justice Systems'[18] of 21 January 2015 temporarily transferring state registrars directly into the structure of territorial agencies of the Ministry of Justice of Ukraine, before such functions were conveyed to the executive bodies of local councils.

Simultaneously the functions of state registrars have been delegated to notaries public, who fulfil these functions only in cases where such registration is conditioned by the necessity of completing notarial actions.

2.3 Arguments in Favour of Acknowledging State Registration of Real Rights and Their Encumbrances as Interior State Functions and the Introduction of Responsibility of the

15 The Law of Ukraine (n 174).

16 *Yurydychna Entsyklopedia (Legal Encyclopedia)* (MP Bazhan Ukrainska Encyclopedia Publishing House 1998) vol 1 p 295.

17 Para 1 of The Resolution on the State Registration Service of Ukraine, approved by the Decree of the Cabinet of Ministers of Ukraine of 2 July 2014 No219 <https://zakon.rada.gov.ua/laws/show/1952-15> accessed 11 December 2019.

18 The Decree No. 17 'Questions of Optimizing the Activities of Central Bodies of Executive Authorities of Justice Systems' <https://zakon.rada.gov.ua/laws/show/17-2015-%D0%BF> accessed 11 December 2019.

State for Mistakes and Intentional Violations Made by State Registrars

It would be logical to provide for the responsibility of a state in cases of person's rights violation, when such a violation is a result of violations of state registration procedure or violations of the existing (i.e. acknowledged and registered by the state) right by conducting subsequent illegal registration considering the following: 1) the aim of the Law of Ukraine 'On the State Registration of Rights to Real Estate and Their Encumbrances' is not only acknowledgment, but also protection of real rights; 2) the occurrence of a real right and/or its encumbrance is a fact only after its state registration; 3) enduing the Ministry of Justice with functions of implementing accreditation. However, the practical situation appears differently.

A period of deep changes in economic models, deep social sphere and models of business activity is characterized by a larger amount of abuse and open violations, than a stably functioning society. There may be many reasons, but the reaction of the state must be the standard practice, which would prevent such abuses and violations, or exclude them, instead of a random struggle with consequences. Unfortunately, Ukrainian authorities didn't demonstrate such virtues in the past, and judging from practical actions rather than formal declarations, do not intend to do this in the future.

Lately the problem of using counterfeit court decisions as the basis for implementing state registration has become quite large-scaled. State register of court decisions of almost every court of first instance abounds with such matters. Only on 9 November 2016, after numerous scandals, some of which surfaced publicly, the Ministry of Justice of Ukraine was able to pass through the Cabinet of Ministers amendments to 'The Order of Registration of Real Rights to Real Estate and Their Encumbrances', ratified by Decree of the Cabinet of Ministers No. 1127 of 25 December 2015, in part of the usage of the data of all informational systems, 'the access to which is provided for in accordance with legislation', when implementing the inspection of documents presented for state registration.[19]

Considering the wide authority of the Ministry pertaining to monitoring and regulation, provided by Article 37-1 of the Law 'On State Registration of Real Rights to Real Estate and Their Encumbrances', such a reaction seems very late, while the formulation relative to 'informational systems' without a clear indication of a Universal State Registry of Court Decisions is extremely vague.

The so-called Anti-Raider's Commission (Commission Pertaining to Questions of Reviewing Complaints in the Sphere of State Registration), set forth by Article 37 of the Law on Registration, also has not proven effective. First of all, according to para. 3, part 8 of Article 37 of the Law on Registration, the Ministry of Justice refuses to satisfy complaints, if 'by the time of the approval of a decision regarding the results of the reviewing of a claim, a state registration of that right by another entity than that indicated in the plaintiff's decision has been made'.[20] This means that, according to

19 Changes to the resolutions of the Cabinet of Ministers of Urkraine pertaining state registration approved by the Decree of the Cabinet of Ministers of Ukraine No 806 of 9 November 2016 <https://zakon.rada.gov.ua/laws/show/806-2016-%D0%BF/ed20170727#n90> accessed 11 December 2019.

20 The Law of Ukraine (n 171).

the intention of the legislator, this quasi-judicial agency a priori is powerless, if by a fraudulent scheme ownership was taken from the rights-holder and successfully re-sold to a third entity. Filing another complaint will not save the situation, since on the basis of para. 8, part 8 of Article 37 of the Law on Registration, the Ministry of Justice refuses to satisfy complaints, if 'the deadline established by the law for filing complaints has expired.'[21] The deadline for filing complaints is 60 days from the moment of committing the disputed registration action, or from the moment when the person found out, or should have found out, about the fact of the violation of his right. The filing of the original complaint is the certifiable fact of awareness of violations having taken place. In such cases, when in the register a new owner is recorded, establishing the fact of the violation of the plaintiff's rights by contesting the new action of registration will be impossible.

Secondly, as the analysis of judicial practice shows, the work of the Commission cannot be positively evaluated. Thus, as it appears from the decision of the Circuit Administrative Court of Kyiv of 14 May 2018 in case No. 826/4727/17,[22] the court proclaimed illegal and cancelled the order of the Ministry of Justice about the rejection of an action on the grounds of missing deadline for its filing. At the same time the illegality of the Commission's inaction, which was expressed by not reviewing the complaint objectively, was acknowledged and the litigants were obligated to implement the review of complaints, according to the facts of their demands and arguments.

Theoretically, part 1, article 6 of the 'Convention for the Protection of Human Rights and Basic Freedoms' extends its power to the activity of the Commission as a quasi-judicial agency. Such an affirmation is inferred from the following. In accordance with para. 88 of the decision of the European Court of Human Rights in the case of '*Volkov v. Ukraine*', 'in the context of the first condition, nothing interferes with legal experts naming as 'the court' a specific national body, which is not a part of the judicial system, for the purpose of establishing its correspondence to criteria set forth in the case of '*Vilkho Eskelainen et al. v. Finland*'. An administrative or a parliamentary body may be regarded as 'a court' in the substantive meaning of that term, which leads to the possibility of applying Article 6 of the Convention to disputes of state services (see the decision of the ECHR pertaining to the cases of '*Argyrou et al. v. Greece*, statement No. 10468/04, p. 24, 15 January 2009, and '*Savino et al. v. Italy*', statements No. 17214/05, No.20329/05 and No. 42113/04, pp. 72-75, 28 April 2009). However, a conclusion about the applicability of Article 6 of the Convention does not hinder reviewing the question of observing the procedural guarantees in such procedure (see the aforementioned decision of the ECHR pertaining to the case of '*Savino et al. v. Italy*', p. 72). Therefore, in points 46 and 47 of the decision of the ECHR of 21 October 2010, in the case of '*Action 97*' *v. Ukraine*' (statement No. 19164/04) ' ...the Court repeats that the right to a fair trial, guaranteed by para. 1, Article 6 of the Convention, should be understood with regard to the preambles of the Convention, in the corresponding part of which the supremacy of the right is declared to be a part of the common inheritance of the Sides to the Agreement...'

21 The Law of Ukraine (n 171).

22 The decision of the Circuit Administrative Court of Kyiv of 14 May 2018 in case No. 826/4727/17 <http://reyestr.court.gov.ua/Review/73924750> accessed 11 December 2019.

At the same time, it is presumed that the Commission as an independent state body should act impartially and conscientiously. The relevance and justification of the aforementioned statement should be grounded on the following. As indicated in para. 70 of the decision of the ECHR of 20 October 2011, in the case of '*Risovskyi v. Ukraine*' (statement No. 29979/04), "...the Court emphasizes the special importance of the principle of 'Consciencious Authorities'. It provides that, regarding the questions of common interest, in particular, if the case influences such foundational human rights as property rights, the state bodies shall act timely and appropriately in the most efficient manner as possible. In particular, the obligation has been laid on state bodies to conduct interior procedures, which enhance the transparency and clarity of their actions, minimize the risk of mistakes... and will facilitate judicial accuracy in civil rights relations, where property interests are concerned... According to paragraph 71, of the abovementioned decision, 'The Principle of Conscientious Authority', as a rule, should not hinder the state bodies from correcting occasional mistakes, even those that result from their own negligence (see the decision of the ECHR in the case '*Moskal v. Poland*', p. 73.) Any other position would be the equivalent of, inter alia, the sanctioned misallocation of limited state resources, which of itself would contradict common interests (see above). ... In other words, state bodies that do not introduce or do not adhere to their own procedures should not have opportunity to receive profit from their illegal actions or to escape fulfilling their obligations (see the decision of the ECHR in the case of '*Lelas v. Croatia*', p. 74). The risks of any mistakes of a state agency should be carried by the same state, while the mistakes may not be corrected at the expense of the person, whom they concern...'.

Obviously, such an algorithm of work is not intrinsic to the Commission on reviewing complaints in the sphere of state registration: as it is seen from information on the official site of the judicial authorities, the circuit administrative court of Kyiv is currently reviewing the case No. 640/11369/19 with the participation of the plaintiff, who has been repeatedly rejected on the other grounds. However, in the original review of the complaint the expiration of the deadline was acknowledged as the only reason for the rejection.

To the defence of the rights' owners stood the administrative courts, which have well established, precise and standardized practices that may be illustrated by one example. According to the ruling of the Supreme Court of Ukraine of 22 June 2017 in case No. 6-1047, section 17, the designated grounds for cancelling a decision about completing state registration on the basis of a counterfeit judicial decision are the following: 'the judicial decision is the basic act of public justice, the act of the implementation of constitutional authorities of a state judicial body, by which legal disputes are resolved in the name of the Ukrainian state. Therefore, for the state and society of indisputable interests are respect to the judicial decision, acknowledgment of the obligation of its fulfilment, and trust to ratified judicial decisions.' That is why '...social interests in the requirements of the prosecutor, relative to interference in property rights of the litigant, consist in securing the observing of one of the basic principles of the judicial process, which is the binding nature of the judicial decision, in the consolidation of principles of respect and trust to judicial decisions, in the formation of law enforcement practices,

which make using counterfeit judicial decisions for the illegal possession of property and its future transfer impossible.'[23]

It should be noted that the reviewing of cases pertaining to state registration by the administrative courts had one essential advantage for plaintiffs, which lay in the following. According to part 2, Article 7 of the Code of Administrative Procedure of Ukraine, when reviewing cases of illegal decisions and the actions of state authorities, in cases when they disagree with the stated claims, the burden of proof rests on them. This is important, since the plaintiff doesn't always have access even to registration documents of the case, especially, if another person had acted as the plaintiff, appropriating for himself the property of the plaintiff, using counterfeit documents or employing other tactics.

However, since the spring of 2018 the Supreme Court, which was restructured in 2017 after a routine judicial reform, has changed the practice, acknowledging such a category of cases as disputes about rights, and referring them to the review of general (or commercial) courts. It should be added that judicial motivation was changed to the opposite direction in less than a year, because of which many plaintiffs suffered, whose cases were not reviewed in a timely fashion due to a large load of courts and judges, as well as because of the process of their restructuring and/or protraction with the designation of judges to the office, arising from the political ambitions of former authorities.

The change of the legal position of the Supreme Court can be illustrated by data of judicial practices, which can be found (without uncovering personal data) in open access on the site of the Universal State Registry of Judicial Decisions of Ukraine. Hence, in the ruling of the Supreme Court of 26 June 2018 in case No. 826/7921/13-a it was noted that '...the subject of inspection by the administrative courts in this category of cases (questions of state registration – author's note) is the observation of law established order for ratification by a subject of executive authority of a decision about state registration of rights and their encumbrances, as well as carrying the corresponding record into the state registry of real rights to real estate property. The question of private persons or legal entities lawfully or unlawfully obtaining ownership rights to real estate property was the subject of consideration in another case. Administrative courts shall examine the observance and scrupulous execution of state registration procedures exclusively on the grounds of lawful requirements, since the nonfulfillment of the requirements of legislation by a subject of authority leads to the illegality of all procedures of state registration.'[24] At the same time the Grand Chamber of the Supreme Court in the ruling of 16 May 2018, noted that the relationship occurring in the process of state registration with the participation of the state registrar belongs to public law, while the conclusion of the court on public law disputes in the sphere of state registration is unsound (ruling of the Grand Chamber of the Supreme Court of 16 May 2018 in case No. 826/4460/17).[25]

23 The ruling of the Supreme Court of Ukraine on of 22 June 22, 2017 in case No. #6-1047, section 17 <http://www.scourt.gov.ua/clients/vsu/vsu.nsf/(documents)/F77709B8ADEF709AC22581550028341F> accessed 11 December 2019.

24 The ruling of the Supreme Court of 26 June 2018 in case No 826/7921/13-a <http://reyestr.court.gov.ua/Review/74988686> accessed 11 December 2019.

25 The ruling of the Supreme Court of 16 May 2018 in case No 826/4460/17 <http://reyestr.court.gov.ua/Review/74309887> accessed 11 December 2019.

As has already been noted, since the second half of 2018, the practice has changed cardinally and in the changed form has finally become unified.[26] Obviously, some judges did not agree with the new practice, but expressed their dissent in the correct, procedural form especially established for this – in the form of a separate opinion.[27]

Consequently, we have several tentative conclusions.

The state plays a special role in the question of state registration of the rights to real estate and their encumbrances. It establishes the rules of binding acknowledgment by it of judicial facts for the sake of the very occurrence of such rights. Simultaneously it creates and delegates the competencies to 1) the bodies, which implement such a registration; 2) the bodies which are obligated to implement standardization of the process on the one hand, and implement monitoring and control of its actualization on the other hand.

In this regard, as the Universal State Registry of Judicial Decisions shows, courts are overloaded with lawsuits against the state registrars, as well as against the Ukrainian Ministry of Justice. Lawsuits against the former are because of multiple violations, while those against the latter are because of its inefficiency.

The problem is catalysed by the absence on the part of the state of guarantees pertaining to the securing of fundamental rights i.e. ownership rights. In many cases people are afraid to enter information about their own real estate in the State Registry, due to apprehensions of losing it and being caught in the net of many years of court proceedings. One of the examples of this is the case from judicial practice No. 826/15145/16. The administrative lawsuit was filed on 27 October 2016, and during its review three different presided officials were changed. In the first instance the case was finally reviewed in July 2018, when judicial practice began to lean toward transferring this category of cases to general courts. The review of the case was finished on 7 August 2019. Almost three years after filing suit the Grand Chamber of the Supreme Court affirmed the ruling of the Circuit Administrative Court of Kyiv about the closing of proceedings on the grounds of violations of subject-matter jurisdiction rules when filing an administrative suit, although at the time of its filing the old wording of the Administrative Procedure Code of Ukraine was in force, according to which the case belonged to the jurisdiction of administrative court. Such pattern of provision by the state of the effective means of judicial protection is in open access. However, the most important thing is not that all know about this, but more glaring is the fact of the massiveness of such a statement.

Things are not easier with the new wording. According to part 3, Article 19 of the Administrative Procedure Code of Ukraine, administrative courts do not review the claims, which are derived from the claims of the private law and are filed together with them, provided that such a claim is subject to review in an order other than administrative and is under the review of the corresponding court.

26 See The Resolution of the Grand Chamber of the Supreme Court of 7 August 2019 in case No 826/15145/16 <http://reyestr.court.gov.ua/Review/83846715> accessed 11 December 2019.

27 Separate opinion of a judge of the Grand Chamber of the Supreme Court OB Prokopenko on the Resolution of 7 August in the case No 826/15145/16 < http://reyestr.court.gov.ua/Review/84305392> accessed 11 December 2019.

According to part 2, article 2 of the Administrative Procedure Code of Ukraine, the task of the administrative procedure is the just, impartial and timely resolution of disputes by the court in the sphere of public law relationships with the aim of effectively protecting rights, freedoms and interests of private persons, and the rights and interests of legal entities from violations on the part of subjects of executive authority.

According to para. 2, part 1, Article 5 of the Administrative Procedure Code of Ukraine, a public law dispute is a dispute, where at least one side provides administrative services on the basis of legislature, which empowers or obligates exclusively the subject of executive authority to provide such services and the dispute occurs in connection with the provision or non-provision by that side of indicated services.

Thus, the object competency of administrative courts clearly arises from the aforementioned and almost verbatim referenced standards of the Codex of Administrative Judicial Procedures of Ukraine. It is not subject to expanded or constricted interpretation due to the introducing additional, non-specific legal criteria, as the Supreme Court had done in aforementioned examples. Such a position is not a theoretical rationale. It is grounded on the standard of Article 17 of the Law of Ukraine 'On the Execution of Decisions and the Application of Practices of the European Court of Human Rights',[28] in accordance with which the courts shall apply the Convention and the practice of the European Court of Human Rights as a legal source.

The practice, however, is the following. Paragraph 98 of the Decision of the ECHR in the case of '*Coëme et al. v. Belgium*' states that '...in countries where the law is codified, the organisation of the judicial system cannot be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation.' The abovementioned absolutely fits into general theoretical terms and conditions relative to negation of the role of judiciary in countries of the continental legal system in law establishment, failure to recognize the status of legal sources behind judicial decisions and recognizing the right of judicial bodies to interpret legal standards.

Arbitrary interpretation of standards of procedural rights in part of the provision for legal procedures of case review organization, and determining the competency of the court by the interior legal court itself is recognized by the European court as a violation of para. 1, article 6 of the Convention. This point is supported by the legal position of paragraph 101 of the decision of the ECHR in the case of *'Coëme et al. v. Belgium*', which, in view of the universal character of the interpretation of the Convention standard by the European court irrelevantly to the subject and to the procedure, cannot be applied exclusively to procedures (administrative or criminal) of a repressive character.

Hence the following legal position: 'As a result, the parties could not ascertain in advance all the details of the procedure which would be followed. They could not foresee in what way the Court of Cassation would amend or modify the provisions governing the normal conduct of a criminal trial, as established by the Belgian parliament. In so doing, the Court of Cassation introduced an element of uncertainty by not specifying which

28 The Law of Ukraine 'On the Execution of Decisions and the Application of Practices of the European Court of Human Rights' <https://zakon.rada.gov.ua/laws/show/3477-15> accessed 11 December 2019.

rules were contemplated in the restriction adopted. Even if the Court of Cassation had not made use of the possibility, it had reserved for itself of making certain changes to the rules governing procedure in the ordinary criminal courts. The task of the defence was made particularly difficult, because it was not known in advance whether or not a given rule would be applied in the course of the trial.' is universal and applicable in any event.

Para. 25 of the decision of the ECHR in the case '*Sokurenko and Strigun v. Ukraine*' (statement No. 29458/04 and statement No. 29465/04) points to this as follows: 'in pp. 107-109 of the decision in the case of '*Coëme et al. v. Belgium*' (as noted above) the Court came to the conclusion that the national court did not have jurisdiction to try some of the applicants, relying on practices that were not established by law and accordingly, could not be considered a court "established by law"." The position of the Supreme Court is appropriately grounded, but at the same time does not correspond to the motivation of the European Court of Human Rights, the jurisdiction of which Ukraine has accepted as binding. Besides this, it 1) did not allow resolution of judicial cases the consideration of which had started by the moment of its introduction, and which were filed when another understanding of subjective jurisdiction was in force; 2) exacerbated the plight of the plaintiff, transferring to him the burden of proof of the circumstances of the suit.

A couple of words are worth stating about the so-called subjects accredited by the Ministry of Justice of Ukraine. This legal novelty has brought to life a set-up, wherein in the setting of some local village or small town council somewhere in a far off province a community enterprise is created, which must have its representatives in the centres of focused business life, before all else, in Kyiv. The Ministry of Justice accredits such a communal enterprise (hereinafter - CE), endorsing it as corresponding to all requirements of qualifications. The Ministry simultaneously monitors its activity, but as practice shows, for some reason quite randomly.

It is worth illustrating by an example. Under the Golovanivska town council in Odessa oblast a communal enterprise was created, while some of its representatives resided in the capital. Lawsuits against not only violations, but abuses made by state registrars of this were filed to courts regularly, whereas in monitoring, the Ministry of Justice of Ukraine obviously passed over it. Only after a significant scandal pertaining to the illegal redrafting of the network of servicing stations, the Ministry accepted responsibility and revoked the CE's accreditation. Incidentally the explanation came forth that the state registrars (and from the very title it appears that they even being the members of the CE, were acting in the name of the state) were using keys of access to the Registry that were not their own, which is a significant violation. Also, it was discovered that there were in fact more users of keys than there were actual registrars. Those prosecuting the CE in court couldn't fail to appreciate that 'timely' movement of the regulator to bring about order. The victory, however, turned out to be hollow, since from the moment of the revocation of accreditation the registration files quickly disappeared along with the registrars, whereas, without copies of those affairs the court cannot substantively review the case.

Hence, it would seem correct to speak namely about the responsibility of the state for violations in the sphere of state registration of rights to real estate. Also such a

responsibility cannot be considered as a transferral of accountability from a person guilty for concrete violations, entailing the violation of the rights of a certain deponent (rights holder). As is evident, the state systematically tolerates violations at a general level, involving the approval of ineffective and unworkable legislation, inefficient execution of monitoring functions, inspections and regulations, ineffective judicial protection of violated rights and so forth.

This is why it is necessary to speak about the responsibility of the state itself, as well as about the fact that, having recognized the necessity of state registration, it simultaneously has recognized its own accountability and also the fact that the whole composite of events pertaining to the provision of the process of state registration and especially the protection of registered rights is the actualization of its interior functions.

Insuring risks when implementing state registration, by Canada's example, might be seen as another way out, but this way may be hindered by constricted deadlines for introduction (violations already exist today and are characterized by their massiveness), inadequate development of the insurance market and the low living level of the population, wherein Ukraine is recognized as the poorest country of Europe. It is functional to transfer the cost of the insurance package to the final consumer cost, but this will not facilitate a rebound even without a 'boosted' real estate market.

3. FORMS OF PARTICIPATION AND FUNCTIONS OF NOTARIES PUBLIC IN THE PROCESS OF ACTUALIZING STATE POLITICS PERTAINING TO THE REGISTRATION OF RIGHTS TO REAL ESTATE PROPERTY AND THEIR ENCUMBRANCES

3.1 Historical Development of the Notaries Public on the Territory of Ukraine

Historically the notarial system was considered to be the agency 'which affixed the property rights to the person',[29] an agency of indisputable public justice, and the appearance of such agencies was recognized as life itself, the fulfilment of the social and judicial lifestyle, the freedom of a person from the power of old, domestic and relative, unionized forms.[30]

In the Russian empire, which encompassed a large portion of Ukrainian lands, the Notarial Regulation of 1866 was active, pertaining to which 'obligations of patrimonial establishments' were laid upon senior notaries public, which could be found in county courts and kept books of title deeds and conducted notarial archives.[31]

Through the events of October 1917 the old notarial system, based on the Regulation of 1866, was destroyed, and a new, state notarial system was created, which, however,

29 AM Femelidi, *Russkii notariat. Istoriia notariata I deistvuiuschee notarialnoe polozheniie 14 Aprelia 1866* (*Russian Notarial system. History of development and current Notarial Resolution 14 April 1866*) (AYa Kantotovych Publishing House 1902)2.

30 Femelidi (n 191) 2.

31 YeV Vaskovskyi, *Uchebnik grazhdanskogo prava (Civil Law Textbook)* (Statut 2003) 273.

in full measure satisfied the existing demands, inasmuch as 'civil transactions were extremely insignificant'.[32]

3.2 Subjects of the Implementation of Notarial Activities. Arguments for Creating Open Corporations

Today notarial activity is standardized by the Law of Ukraine 'On the Notarial System' in the 1993 wording with significant amendments and appendixes.

According to Article 1 of the designated Law, 'the notary system in Ukraine is a system of bodies and official persons, upon which is laid the obligation to certify rights, as well as facts having judicial significance, and to fulfil other notarial actions provided by this Law with the aim of providing them judicial veracity'.[33]

The system of notarial agencies includes state notarial offices, rudiments of the Soviet past, a subject of endless disputes, but from which none can be rid of, as well as private notaries public.

In order to receive a license to conduct notarial activity it is required to meet qualification demands pertaining to education, pass practical training and qualification exams. When conducting notarial activity one will face monitoring on the part of the territorial agencies of justice and strict regulation.

Pertaining to professional association, the notaries public have created a voluntary union at the Notarial Chamber of Ukraine. Hence, by all signs the notary system presents itself as an open, professional corporation.

From this a tentative conclusion may be made.

First of all, the system of registration bodies exists, functions and its activity is legally controlled.

Secondly, the state notary system as a rudiment of the Soviet past and an expense article in the budget, being a complete duplicate of the functions of the state and private notaries public and shall eventually be discontinued.

Thirdly, notaries public fulfil functions of state registrars, as they complete notarial actions. Together with state registrars among local authorities they are able to satisfy the existing demands of state registration.

Fourthly, attempts to draw into the notarial world of the persons who are not subjected to strict selection in accordance with the requirements of the Law of Ukraine 'On the notary system', as it happened with draft law No. 9311 of 21 November 2018, contains corruption elements to which the Notarial Chamber of Ukraine[34] justly gave

32 VV Komarov, VV Barankova, *Notariat v Ukraini (Notarial System in Ukraine)* (Pravo Publishing House 2011) 25.

33 The Law of Ukraine 'On the Notarial System' <https://zakon.rada.gov.ua/laws/show/3425-12> accessed 11 December 2019.

34 The Notarial Chamber of Ukraine. Official website <https://npu.org.ua/news/mizhnarodnij-soyuz-notariatu-visloviv-zasterezhennya-shhodo-zakonoproektu-9311/> accessed 11 December 2019.

attention. Having such a lively judicial practice pertaining to 'accredited subjects' and their numerous violations, to create a new simulacrum is the path of searching for institutional infrastructures on the threshold of the opening of the agricultural land market, but it is in no way the standard provision of the process of opening a market.

4. CONCLUSIONS

The process of state recognition of judicial facts as the condition of the occurrence of personal rights is constant; such a model has proven its vitality and optimality.

Hence, considering this standpoint, it should be said that 1) questions of state registration of rights to real estate (from the standardization of the process of regulation to the creation of effective defence mechanisms of rights) should be recognized as interior functions of the state; 2) consequently, the state has a positive obligation to create a system of effective and valid legislature, as well as to develop effective management in this area. Such posing of a question should be closer to the modern government of young reformers, who departing from the classical understanding of the state, define it as the 'creation of civil service, the main task of which is to resolve existing problems and to prevent potential threats against citizens by providing a balance of interests of various parts of society.'[35] The understanding is not indisputable, but it correlates in the part of threats and effective management with the vision of the author, in the sense, that the existing status of the state registration of rights is on the threshold of opening the land market, actually contains and will directly model threats in the future. Therefore it should not be forgotten that the threat of losing property is a hindrance for foreign investment in Ukraine, and consequently, the threat of unfulfilled governmental programs with a record prognosis of indicators of that investment. Therefore, purely theoretically, there is the basis to consider that the approval of appropriate measures is simply a question of time.

Taking into account the ability of the notary system to self-organize, considering its standard and functional provision, the best completion of its reforms will become the cancellation of the provision on state notarial office, as well as the implementation of desktop audit of notaries public, not necessarily periodically, but incidentally and exclusively pertaining to complaints.

Opening the market of agricultural land suggests not only investment and the opportunity to earn, but also the possibility to receive work and income by those functions, which it will service. Obviously, from the moment of ceasing massive mortgage crediting, such an incident might become the renaissance of the Ukrainian notary system.

The state is only required to create equal conditions of access to professions with no setups and simulacrum directed toward the achievement of goals of personal wealth.

35 Draft program of the government of 29 September 2019 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66959> accessed 11 December 2019.

Ideally, notaries public could become the only candidates to the execution of functions of state registrars, since they, differing from other state registrars, answer for violations at the expense of all their property, and this could be the worthy alternative to insuring registration activities. At least, we are at the first phase. However, fees for completing registration actions are a weighty addition to the means of budgets, wherefore notaries public will have to work in their habitual paradigm of self-employed persons, as well as persons who create a work place for their workers.

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Typeset by Iryna Roina, Dakor.

Cover-list by Oleksandra Kovalenko

Printed by Publishing House VD "Dakor": Bandery Stepana str., 20A, Kyiv, 04655, Ukraine

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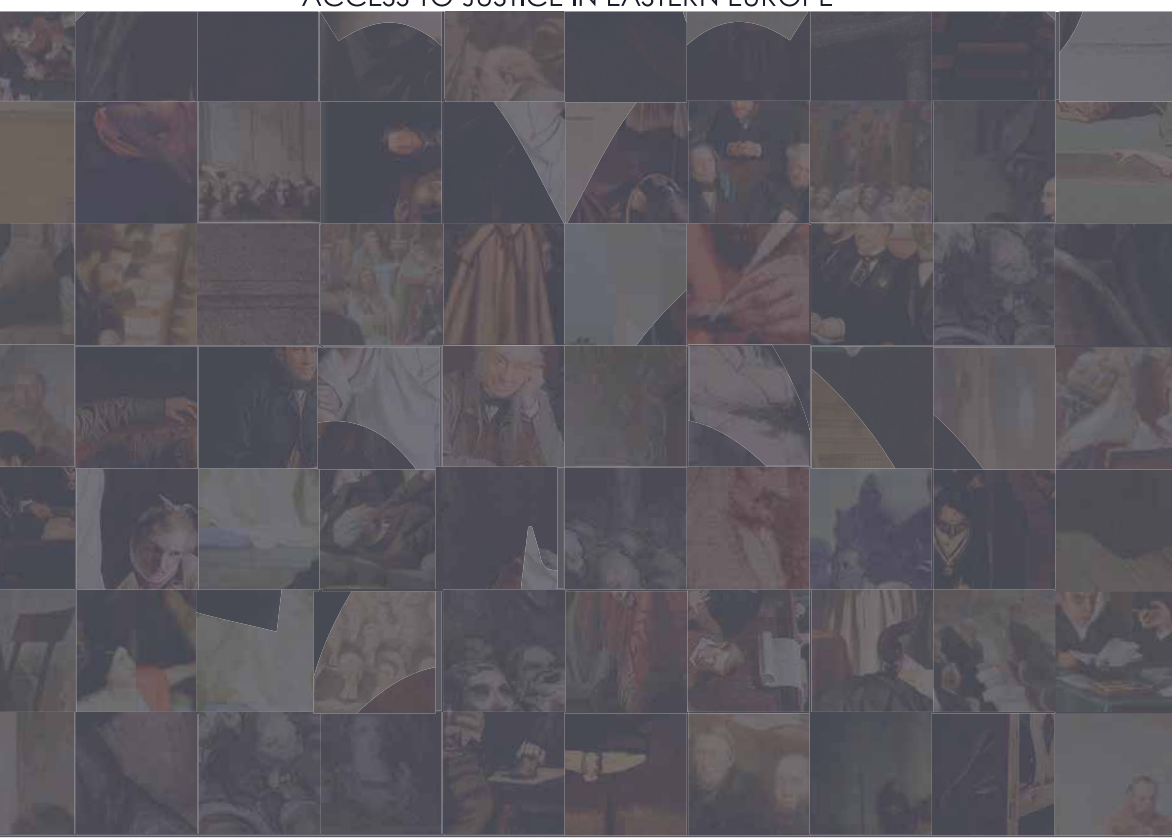

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