ACCESS TO JUSTICE IN EASTERN EUROPE

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Reforming the Legislation on the International Commercial Arbitration of Ukraine: Realities or Myths

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ABOUT ISSUE 3 OF 2021 AND THE EVOLUTION OF JUSTICE IN UKRAINE DURING THE PERIOD OF INDEPENDENCE

This issue of *Access to Justice in Eastern Europe* consists of the collection of research articles focused on the evolution of justice in independent Ukraine. This year, we celebrate an outstanding event – 30 years ago, Ukraine became an independent state, and now, we have a great occasion to summarise some of our challenges and achievements.

Ukraine has come a long and intricate way to the final assertion of its independence as a state. According to various estimates, the emergence and proclamation of state formations on the territory of Ukrainian lands took place seven or perhaps even nine times.[1] In 1990, during the collapse of the Soviet Union,[2] Ukrainian society clearly decided its fate – in a 1991 referendum, 90.32% confirmed the Act of Independence of Ukraine, 'continuing the millennial tradition of statehood in Ukraine'.[3] The recognition of Ukraine as an independent state by Poland, Canada, Hungary, the Baltic States, and other countries of the world finally marked the recognition of Ukraine's statehood on an international scale.[4] Since then, the urgent task of the Ukrainian government has been to build independent state institutions, including the judiciary, on radically different principles of democracy and the rule of law.

A great deal of our present may be clarified by past events, and this helps us to understand current problems deeply and to find the most appropriate ways of solving them. Not surprisingly, this issue began with the historical study of *Ivanna Matseliukh* devoted to the interrelation of the Church and the Ukrainian judiciary.

Like European countries, where canon law has had a huge impact on the development of both the judicial system and the formation of basic approaches to the administration of justice, in particular, civil justice, the Orthodox Church played an important role in Ukraine. Traditionally we recognise the romano-canonic model of civil procedure and the general impact of the Church on judicial evolution in western Europe. Ukraine found itself at a crossroads between the influence of the Roman Catholic and Orthodox churches of Byzantium. In the distant tenth century, Princess Olga of Kyiv visited Constantinople and converted to their rite of Christianity, although she was later canonised by both the

1 See more about Ukrainian history in S Plokhy, *The Gates of Europe: A History of Ukraine Basic Books* (Reprint edition 2017); I Ševčenko, *Ukraine between East and West: Essays on Cultural History to the Early Eighteenth Century* (2nd edn CIUS Press 2009); R Szporluk, *Russia, Ukraine, and the Breakup of the Soviet Union Hoover Institution Press* (1st edn 2000); MH Taranenko, MN Taranenko, 'The First State Formations on the Territory of Ukraine' (2016) 1 Visnyk NTUU 'KPI' Politology, Sociology, Law <https://doi.org/10.20535/2308-5053.2016.1/2(29/30).119171>

2 On the difficult times of 'perestroika' before the proclamation of Ukraine's independence in the 1990s, see T Kuzio, *Ukraine: Perestroika to Independence* (Macmillan Press Ltd 2000).

3 Resolution of the Verkhovna Rada of the Ukrainian SSR 'On the Declaration of Independence of Ukraine' <https://zakon.rada.gov.ua/laws/show/1427-12#Text> accessed 22 July 2021.

4 An interesting overview of Ukraine's identity can be found in C Shinar, *Ukraine's Struggle for Independence* (Cambridge University Press 2020).

Orthodox and Catholic churches. The influence of the Church, which has operated in the form of the Kyiv Metropolitanate since 988 and, since 2019, has become an independent church, is seen as decisive in the development of the judicial system and the judiciary in Ukraine, especially in the socio-cultural and worldview aspects. In the article, you can learn more about this, as well as about the main sources of ecclesiastical law – Kormcha books, the jurisdiction of the Church, and the structure of ecclesiastical justice. The conclusions deserve support, especially the idea that the study of socio-cultural and state-church relations will provide a deeper understanding of the traditions and stereotypes of Ukrainian society that have developed over the centuries and, in turn, help us to understand the basic principles of justice, which will foster effective reform of judicial system at the present stage. Several interesting images are included in this issue to illustrate the study.

One of the most important and most difficult tasks facing the Ukrainian authorities in the 1990s was the development of the criminal justice system. Blatant and tragic human rights violations in Ukraine were pervasive, partially as a result of the use of an entire apparatus of affiliation created in the Soviet totalitarian state. Ensuring the rights and freedoms of individuals during pre-trial investigations and court proceedings in criminal cases was an urgent and significant task. The adoption of the new CrPC of independent Ukraine twenty years after the declaration of independence marked an evolutionary step towards the adoption of world standards for ensuring the rule of human rights. The article by *Vasyl Shybiko*, one of the leading legal scholars of Ukraine and co-author of the CrPC, analyses in detail the intricate method of reforming Ukrainian criminal procedure legislation and describes the main stages of evolution and formation of modern criminal justice in Ukraine. We sincerely hope that this work will be interesting for an international professional audience and that the Ukrainian experience will provide lessons for future generations of lawyers.

Building a system of criminal justice based on democratic legal values and ensuring the rule of law is a difficult task, especially given the traditionally established views of society, which are always contemplating the past. There is no doubt that today, it is much easier to compare the conditions of the totalitarian system of our past and selectively assess their advantages, while a comprehensive evaluation of the approaches prevailing at the time will always testify against them. In *Oksana Kaluzhna's* article, our readers will find an extremely interesting and thorough study devoted to the rather trivial (at first glance) issues of clothing and ranks of prosecutors – one of the most elite classes of lawyers of all time. The article contains a detailed analysis of the proposals of one of the latest draft laws submitted to the Ukrainian Parliament, as well as the requirements of almost all Council of Europe states and a comparison of their experience in ensuring the activities of prosecutors.

Another research paper in this issue is devoted to one of the most interesting and controversial issues in the functioning of the judiciary – the issue of judicial law-making, the history of its formation, and the current situation in Ukraine. Endless judicial reform, together with certain fluctuations in the approaches introduced, create the basis for distrust in the judiciary in Ukraine and its ability to provide justice. At the same time, certain steps in the creation of strong and peaceful judicial institutions have been made. The article by *Taras Didych* provides a detailed discussion of the legal regulation of judicial law-making, its forms and procedures, and judicial enforcement of acts and their impact. The author naturally paid special attention to the activities of the judiciary in the areas of law enforcement and law-making, which require strengthening the mutual interaction and influence in the current context of reforming the judicial system and the judiciary in Ukraine. Read more about this, as well as about the results of recent judicial reforms and the legislative powers of the Supreme Court and the Constitutional Court of Ukraine, in this article.

During the building of an independent state, which was supported by the vast majority of Ukrainians in the early 1990s, the level of trust in state institutions, in particular the

judiciary, unfortunately, fell dramatically. Of course, the level of public confidence in the judiciary depends on the effectiveness of its functioning. The assessment of judicial reform in Ukraine, as well as analysis of some of its achievements and flaws, are contained in the Reforms Forum note by *Maryna Stefanchuk*, *Oleksandr Hladun*, and *Ruslan Stefanchuk* and will be of interest to our audience.

Another Reforms Forum note is dedicated to the reform of arbitration – one of the oldest and deservedly most effective ways of resolving disputes. One of the recent Draft Laws proposed expanding the arbitrability of disputes that could be referred to international commercial arbitration, as well as the possibility of establishing permanent arbitration institutions in Ukraine, which provoked discussion among legal practitioners and scholars. We hope that the authors' analysis of these proposals, prepared by the leading Ukrainian experts in the field of arbitration *Yuriy Prytyka, Vyacheslav Komarov*, and *Serhiy Kravtsov*, will be of interest to our readership.

Several interesting and informative notes have also been included in this issue due to their importance for further research, among which is the study of limits of a judge's freedom of his/her opinion expression in the context of Ukrainian and ECtHR case-law by *Oksana Khotynska-Nor* and *Lidiia Moskvych*. The particular note should attract attention due to its connection to legislative reform and creating relevant case-law.

Finally, let me share some of our latest accomplishments. Last month, AJEE was finally fully indexed in **Scopus, Elsevier**, and, on this occasion, I want to thank all our team – my excellent managing editors, respectful Editorial Board members, attentive reviewers and language editors, and authors, who helped us to share the results of research in the area of judiciary and civil justice, as well as criminal procedure among the wide audience of professional scholars and practitioners. I sincerely hope that legal science will blossom and bring the fruit of peace and strong institutions, the rule of law, and equal access to justice to our world.

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Research Article

THE EVOLUTION OF UKRAINIAN JUSTICE UNDER THE INFLUENCE OF THE CHURCH: FOR THE 30TH ANNIVERSARY OF UKRAINE'S INDEPENDENCE

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Summary: 1. Introduction. – 2. The Influence of the Church on the Formation of Domestic Legal and Political System. – 3. The System of Justice in Matters within the Jurisdiction of the Orthodox Church. – 4. The Scope of Ecclesiastical and Judicial Jurisdiction in Kyivan Rus. – 5. Features of the Church-Judicial Process. – 6. Conclusions.

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CONFLICTS OF INTEREST

The author declares no conflict of interest of relevance to this topic. Although the author serves at same institution as one of the editors of AJEE, which may cause a potential conflict or the perception of bias, the final decisions for the publication of this article was handled by the editors, including choice of peer reviewers, and Editorial Board Members, who are not affiliated to the same institution.

DISCLAIMER

The author declares that she was not involved in any bodies of the Church or any other religious organisation.

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THE EVOLUTION OF UKRAINIAN JUSTICE UNDER THE INFLUENCE OF THE CHURCH: FOR THE 30TH ANNIVERSARY OF UKRAINE'S INDEPENDENCE

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Abstract *This article examines significant factors that y influenced the formation of the Ukrainian legal system, the structure of the judiciary, in particular, and political development in general. The main focus is the influence of the Orthodox Church.*

The normative provision of ecclesiastical jurisdiction, which was formed in the first centuries after Christianisation, was reflected in the complex of sources of law. The symbiosis of national and foreign, ecclesiastical and secular regulations, as well as the need to understand Greek sources, gave rise to the need to create their own codification collections called Kormcha Books, which became the main source of law for ecclesiastical practice in Ukraine.

The jurisdiction of the Orthodox Church in the Ukrainian territories included the administration of justice in specific categories of cases, which are analysed in detail in this article. Subsequently, the separation of jurisdiction between church and secular authorities formed the basis for the formation of tense state-church relations, which provided each other with political support. The influence of the Orthodoxy on the formation of the judiciary is analysed, as the church institution becomes one of its structural elements, as well as the influence on the legal system because religion is a catalyst for the formation of new legal norms that meet the principles of justice and morality. As a result, the influence of the church on the formation of civil society in modern Ukraine, which should operate on religious and ethical values, becomes obvious.

The structure of the church judiciary in Kyivan Rus had a three-tier system, which can be assessed as a prototype for the formation of the later secular system of justice in modern Ukraine.

The article also analyses the jurisdiction of the ecclesiastical court in Kyivan Rus, which was clearly defined, enshrined state origin in the sources of ecclesiastical law, and remained unchanged throughout the existence of the state.

Additionally, it traces the process of consideration of cases in the ecclesiastical courts of the Kyivan Rus state, which had special features. The first is that in Kyivan Rus, slaves and servants who were not subjects of secular legal relations had the right to take part in the process. It seems probable that the change in approaches to determining the circle of participants in the church-judicial process was due to the need to spread Christian ideas, precepts, and principles to the general public, including servants and slaves. For the Orthodox Church, which promoted its doctrine and came under the rule of polytheism, the priority was to gain recognition and public support, to conduct missionary and educational activities, and to use cultural and educational influence to root its religion and canonical precepts in all parts of the Kyivan Rus state.

Keywords: *justice, judiciary, church jurisdiction, Kyivan Rus state*

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1 INTRODUCTION

The thirtieth anniversary of Ukraine's independence prompts us to look at the place of legal, religious, and moral factors in the development of the state from a different angle. Problems related to the disunity of Ukrainian Orthodoxy and the existence of religious communities centred in the aggressor country are now particularly acute. Threats of an ideological nature have become obvious, and the support for anti-state, separatist sentiments has become clear, which, in turn, cause not only social unrest but also created direct threats to national security and hinder the institutional development of the independent Ukrainian Orthodox Church.

Under these conditions, the steps of state authorities aimed at the consolidation of Orthodoxy in Ukraine and the formation of a local Orthodox Church of Ukraine have become quite logical and historically motivated. At the same time, new challenges have arisen, inciting religious enmity between existing Orthodox churches. Their solution is found in promoting the consolidation of society around the values of the Ukrainian people, which have been formed throughout the history of national law and the state. Their evolution can be traced through knowledge of individual industries and institutions, including the justice system. The justice system had special features in matters belonging to the Orthodox Church and was immediately formed in Kyivan Rus according to a three-tier structure of the judiciary, which would, in the future, become a prototype for the formation of a secular, democratic system of justice.

2 THE INFLUENCE OF THE CHURCH ON THE FORMATION OF THE DOMESTIC LEGAL AND POLITICAL SYSTEM

One of the most important institutions of the political system of the Kyivan Rus state after the adoption of Christianity was the church. As the state religion, Christianity met the ideological needs of the princely power, justifying, on the one hand, its divine origin, and on the other, ensuring the obedience of its subjects. In turn, the Grand Prince (Knyaz) of Kyiv generously shared with the church significant property rights and administrative powers, allocating land plots to it, granting significant tax preferences, and allowing it the administration of justice in some cases. As the Kyivan Rus researcher I. Belyaev rightly said about this symbiosis in the nineteenth century: 'The Church and the Prince were one indivisible power, and the clergy and the army became its main tool… The first acted by conviction and moral influence on the laity, and the second – by force of princely power'.[1]

3 THE SYSTEM OF JUSTICE IN MATTERS WITHIN THE JURISDICTION OF THE ORTHODOX CHURCH

Justice for ecclesiastical offences in the Kyivan Rus state was administered through a new institution, namely, the ecclesiastical court. A significant number of pre-revolutionary and modern researchers have been interested in the problems of its functioning. However, given the small number of original sources, the conclusions of these researchers are not consistent. In addition, many researchers unconditionally transfer the Byzantine jurisprudence, covered

1 ID Belyaev, *History of Kyivan Rus legislation* (Typo-lithography of SA Petrovsky and NP Panin 1879) 85.

in detail in the sources, to the church-judicial process in Kyivan Rus, which, in our opinion, is unjustified. Therefore, in this study, we aim to analyse the evolution of the domestic justice system in matters within the jurisdiction of the Orthodox Church.

The boundaries of ecclesiastical jurisdiction in Kyivan Rus were determined by a set of regulations of domestic and foreign origin, both ecclesiastical and secular. In periods of the relative centralisation of Kyivan Rus, the primacy belonged to the Grand Prince of Kyiv, under the conditions of feudal fragmentation, it belonged to separate princes, and, in the period of Mongol domination, it belonged to the Golden Horde khans.[2]

The nature of our research in this part of the work requires a focus on the structure of the judicial system, the scope of competence of each link, and the organisation of the church-judicial process. Some researchers of ecclesiastical law, when analysing the ecclesiastical judiciary, transfer the structure of the ecclesiastical court of Byzantium to the legal basis of Kyivan Rus, referring to the rules of the Ecumenical Councils.[3] We are convinced that the legal reality of pre-Christian Kyivan Rus created favourable conditions for laying the foundations of an original system of ecclesiastical justice that often differed from the Byzantine one. As I. Berdnikov said

> The functioning of the ecclesiastical court in Kyivan Rus was determined by the Nomocanons, but in the Kyivan Rus church these principles were perceived somewhat differently than in the Greek one, because of the low level of public consciousness in the newly baptized Kyivan Rus people and the high moral and educational mission of the Kyivan Rusn clergy among the people'.[4]

Modern researchers of ecclesiastical law, including A. Gerashchenko, M. Levchuk, and I. Pristinskaya, concluded that the first court in Kyivan Rus was the ecclesiastical eparchial court. At the same time, scholars acknowledge the significant territorial sizes of dioceses, due to which a large portion of court powers had to be transferred in practice to local auxiliary bodies, namely, governors, archimandrites, abbots, and archpriests, who were considered representatives of the bishop.[5] However, in the nineteenth century, researchers took a different view. Sharing their opinion, we believe that the lowest level of the ecclesiastical courts in Kyivan Rus was the court of the presbyter, the middle was the episcopal court, and the highest was the court of the Metropolitan Archbishop of Kyiv.[6]

Although the Grand Ducal Statutes of Volodymyr and Yaroslav indicated the existence of two courts (the lower was the court of the bishop, the higher was the metropolitan),[7] A. Popov rightly argued that the practice of justice was not so unambiguous in terms of the sequence of judicial units in Kyivan Rus. According to him, the first link of the ecclesiastical court belonged to the presbyters, while in Byzantium, it belonged to the bishops. His position is based on the fact that at the time of adoption of Christianity by Kyivan Rus and in the first years thereafter, the number of dioceses was insignificant, and the territory covered by its jurisdiction was vast. Under such circumstances, the bishop could not control church life in certain parishes of his diocese. It is plausible that local ecclesiastical justice was carried out not by bishops but by priests.[8]

2 IA Matseliukh, *Sources of church law during the Ukrainian Middle Ages* (Talkom 2015) 101-102.

3 MV Levchuk, 'Church Court in Kyivan Rus (historical and legal research)' (Candidate of law thesis 2010) 113.

4 IS Berdnikov, *Brief course of church law of the Orthodox Church* (Imperial University Printing House, 1913) 109.

5 IO Pristinsky, 'Diocesan courts as ecclesiastical courts of first instance' (2011) 3 Law Forum 634-638.

6 IK Smirnov, *On the church court system in ancient Russia* (II Glazunov Typography 1874) 19.

7 Matseliukh (n 2) 242, 244.

8 A Popov, *Court and punishment for crimes against faith and morality under Kyivan Rus law* (Typography of the Imperial University 1904) 48-49.

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In the process of our research, we were able to find chronicle evidence that indicates a lack of church hierarchs.[9] In order to fill vacancies in church institutions, Prince Volodymyr was even forced to equip an embassy to Constantinople, which was to recruit dignitaries for church service.[10] The lack of church hierarchs in Kyivan Rus made it impossible for the bishop's court to function as a court of first instance. That is why this mission was transferred to the lower clergy, that is, to the presbyters.

I. Popov's theory is confirmed by the early sources of ecclesiastical law, namely, the 'Sacred Teaching to the Newly Ordained Priest,' which is contained in the Sofia edition of the Kormcha Book. It directly indicates the responsibilities of presbyters: 'to teach, to correct the actions of the community, to prohibit sinful acts, to impose penances, and to ban the disobedient from the church'.[11] Information about the parish priest's court was found in the 'Episcopal Teachings of the Council of the Diocesan Clergy' of the thirteenth century, which noted the importance of the presbyter's court, which was under the supervision of the diocesan bishop. The teaching says

> If anyone does not understand you, ask me, and I will not be lazy and I will tell you; if anyone opposes your judgment, tell me, I will expose and ban… you must understand how to keep spiritual children: neither weakly, lest they be lazy, nor cruel, lest they despair… Understand who should be banned from the body and blood of the Lord, who should be expelled from the church, and for how long… perform hard service with trepidation.[12]

The existence of presbyter courts as the lower ecclesiastical court is directly pointed out by the pre-revolutionary church leaders. Thus, Metropolitan Macarius claimed that 'in addition to the court of the eparchial bishop, in Kyivan Rus, there were auxiliary judicial bodies in the local areas and in the districts'.[13] The main source on which the metropolitan relied was the Kyivan Rus chronicles, which preserve information about the existence of numerous parables with presbyters who were part of the Desiatynna Church in Kyiv. Among them was the senior archpriest, who headed its ecclesiastical court.[14]

Independent of the presbyter's courts, ecclesiastical courts functioned at monasteries, which received appropriate gifts from the central or local authorities. They gave the abbot of the monastery the right to prosecute monks, parishioners, and lay attendees who lived in the territory subordinate to the monastery.[15] When there were complex cases, a council of senior monks was convened to help make a fair court decision.[16]

Thus, in contrast to the Byzantine Empire, where historically the first and lowest instance court was the bishop's, in Kyivan Rus, there was a different practice. The lowest instance in the structure of ecclesiastical justice was the court of the presbyter and abbot of the

9 T Barsov, *Patriarch of Constantinople and his power over the Kyivan Rus Church* (Typography of PA Remezov 1878) 338-353.

10 P Stroev (ed), *Sophia Times or Kyivan Rus Chronicle from 862 to 1534*. Part 1 – from 862 to 1425 (Publishing House of Semen Silivanov 1820) 87.

11 *Russian Historical Library published by the Archaeographic Commission: In 40 volumes*. Vol 6 – Monuments of Ancient Russian Canon Law. Part 1 – Monuments of XI-XV centuries (Typography of the Imperial Academy of Sciences 1880) 107.

12 ibid, 114.

13 M Bulgakov (Macarius, Bishop of Kharkov), *History of the Russian Church*: *In 12 volumes*, 2nd ed. Vol 1 – History of the Russian Church in the period of its complete dependence on the Patriarchate of Constantinople (988-1240) (Typography of YA Bokram 1868) 29-30.

14 ibid, 30.

15 Smirnov (n 6) 37.

16 ibid, 39.

monastery. Each of them managed their parish and performed judicial functions in the affairs of parishioners under the jurisdiction of the church. The church clergy themselves came under the jurisdiction of the eparchial bishop, who was the audience of first instance for this category of cases.

The second link in the system of ecclesiastical jurisdiction of Kyivan Rus was the bishop's court in each diocese. Complaints against the presbyter court rulings and cases against the clergy of the district were considered here. The bishop's court was characterised by independence and autonomy. It was independent of the secular administration, and other church hierarchs were forbidden to interfere in its work. 'And this should not be violated by my children, grandchildren, or my whole family forever, not to change church people, not to interfere in their courts', as was said in the church Charter of Volodymyr.[17] The bishops conducted the proceedings in person, assisted by representatives of the *kliros* (administrative-judicial body of church administration, which included the clergy, church elder, and individual parishioners). In the absence of the bishop or the impossibility for other reasons of carrying out judicial proceedings, the governor who issued the corresponding court decisions was temporarily appointed.[18]

The highest court in the system of ecclesiastical courts was the Metropolitan of Kyiv. He was responsible for considering the most high-profile cases concerning the protection of the foundations of the Christian faith and the church system, as well as appeals against decisions of diocesan courts. Only he could carry out proceedings against the higher clergy, like bishops, abbots of large monasteries. The following court cases of Kyiv metropolitans over bishops are well-known in history: in 1280, Metropolitan Cyril III banned Bishop Ignatius of Rostov; Metropolitan Maxim dismissed Bishop Yakov from the Volodymyr Chair in 1290, and in 1311, Metropolitan Peter deprived Daniyil of the rank of Bishop of the Saray Chair.[19]

Traditionally, the metropolitan made decisions alone, but in particularly difficult cases, he convened a local council. It included the Metropolitan of Kyiv, diocesan bishops, governors of the largest monasteries, and individual representatives of the white clergy. Sometimes the Grand Prince of Kyiv was invited. The council was headed by the metropolitan, and the decisions made were unconditional for the Kyivan Rus Orthodox Church.

Sources indicate isolated cases of convening councils, as the remoteness of dioceses made it difficult to convene them. Instead, in Kyivan Rus, the practice of holding 'private or domestic councils' consisting of the hierarchs of the nearby dioceses was established. According to pre-revolutionary researchers, the Metropolitan of Kyiv convened a congress of bishops of the St George, Pereyaslav and Belgorod *cathedras*. Resolutions of such councils were advisory in nature, and the metropolitan made the final decision.[20]

As the position of the bishop of Kyiv in the metropolitanate of the Kyivan Rus state was absent, the metropolitan was obliged to carry out an episcopal court within the diocese under his jurisdiction. As we can see, the powers of the second and third courts of the Orthodox Church were combined in one person.[21]

Given that the Kyiv metropolitanate was part of the Patriarchate of Constantinople, the Patriarch of Constantinople and its council were the highest court. He could file lawsuits against Kyiv metropolitans. In practice, the patriarchs of Constantinople, as a rule, did not

17 Matseliukh (n 2) 242.

18 Smirnov (n 6) 25-27.

19 Archpriest Volodymyr Vakin, 'Ukrainian canonical heritage: Cathedral of 1274 in Volodymyr on Klyazma' (2015) 3 Volyn Herald 141.

20 Smirnov (n 6) 19-24.

21 I Skvortsov, *Notes on church law* (University Typography 1857) 69.

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interfere in the church-judicial system of Kyivan Rus, so the latter retained full autonomy.[22] Sources record only a few cases of appeals of Kyivan Rus metropolitans for help to Constantinople, in particular, in terms of coordination of court decisions on the most high-profile cases.[23] Thus, in Kyivan Rus, as in Byzantium, a three-tier system of ecclesiastical justice was formed, but there were differences between them: in Byzantium, the lower court was the bishop's court, but in Kyivan Rus, it was the court of presbyters and abbots. The second link of the ecclesiastical court in Kyivan Rus was the court of the bishop, and in Byzantium, it was the court of the metropolitan. The functions of the third instance in Kyivan Rus were concentrated in the Metropolitan of Kyiv, who either made his own decisions, convened a local council, or sought the help of the Patriarch of Constantinople.

4 THE SCOPE OF ECCLESIASTICAL JURISDICTION IN KYIVAN RUS

Each of the above-mentioned courts considered cases of crimes against the church, morals, and marital and family relations within its competence. In the Byzantine Empire, the scope of ecclesiastical jurisdiction was constantly changing and underwent a long evolution of its formation, but in Kyivan Rus, immediately after the introduction of Christianity, the ecclesiastical statutes of the Grand Princes of Kyiv clearly defined the jurisdiction of the ecclesiastical court.

Following the pre-revolutionary scholar I. Berdnikov, the modern researcher M. Levchuk expressed an opinion on the division of jurisdiction of the ecclesiastical court of the Kyivan Rus state in the range of jurisdiction into personal, territorial, and substantive.[24] Personal jurisdiction was determined by the subject of the commission of a church offence and was determined by the special legal status of the population as 'church people'.[25] The Charter of Grand Prince Volodymyr and the Charter of Prince Lev Danylovych of Halych-Volyn named all those who fell into this category. Thus, the list of church people included: metropolitan, abbot, abbess (head of the monastery), priest, deacon, deaconess (a priest's wife) and their children, and those who are in the *krilos*, monk, nun, *proskurnitsa* (a person engaged in baking church bread), *palamar*, reader, blind, crippled, foreigner, pilgrim (a person travelling to holy places), doctor, and lunatics.[26] Accordingly, civil and criminal cases involving church support staff, temple beggars, maimed persons, pilgrims, doctors, and lunatics were heard by a court of first instance. Any cases brought against the clergy, members of their families, monks, and ministers of the church were considered by the court of the bishop.[27]

The provisions of the statutes not only reflect the personal jurisdiction of the ecclesiastical court but also demonstrate the continuity of the legal system of the Kyivan Rus state. The duplication of the provisions of the Charter of Volodymyr by the head of the Halych-Volyn state testifies to the inseparable connection, the complete acceptance by Halych of the political, cultural, and legal tradition of Kyivan Rus.

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22 R Lashchenko, *Lectures on the history of Ukrainian law*, Part 1: Princely era (Prague, Circulation of the Ukrainian University, State Printing House1923) 138.

23 Smirnov (n 6) 19.

24 Levchuk (n 3) 64-110, 167.

25 Lashchenko (n 22) 80.

26 OI Chistyakova (ed), *Russian legislation of the X-XX centuries: In 9 volumes,* Vol 1 – Legislation of Ancient Russia (Legal Literature 1984) 139; *Akta grodzkie i ziemskie z czasow rzeczypospolitej Polskiej z archiwum tak zwanego bernardynskiego we Lwowie w skutek fundacyi,* Vol 1 / sp. Alexandra hr. Stadnickiego (Galicyjskiego wydzialu krajowego 1868) 97.

27 Berdnikov (n 4) 509.

Territorial jurisdiction delineated the jurisdiction of the ecclesiastical court to hear subordinate cases between homogeneous courts depending on the territory to which their jurisdiction extended. According to the principle of territorial jurisdiction, a case was to be considered by the ecclesiastical court within which the relevant offence was committed or at the place of residence of the ecclesiastical community or 'church people'. In determining the territorial jurisdiction, we should take into account the relevant deeds of gift issued by the princes. Along with land awards, the clergy were given the right to judge the people who lived there. These courts had a medieval feudal nature of patrimonial subordination. Thus, the abbots of monasteries and temples who owned lands and settlements had the right to judge their slaves and servants. The jurisdiction of the patrimonial ecclesiastical court concerned civil and criminal cases, in addition to murder, robbery, and 'litigation'.[28] In addition, during the disintegration of the centralised Kyivan Rus state, there are deeds of gift that limit the territorial jurisdiction of the ecclesiastical court. For example, 'By the letter of the Halych prince Lev Danilovich to the monastery of Saints Peter and Paul in the land of Peremyshl' from 1299,[29] lower clergy and abbots of the monasteries were released from the jurisdiction of the local bishop and fell under the jurisdiction of the nobleman Kostkov Berezhnytsky. For military service, the prince gave him not only territory with a monastery, subjects, and their duties, but also the right to conduct spiritual and secular trials over them.

Thus, territorial jurisdiction was determined by the boundaries of dioceses and the boundaries of parishes. It could be adjusted by appropriate deeds of gift, as a result of which the proceedings against people living in this area were transferred to the abbots of temples and monasteries, as well as laypeople. In the Byzantine Empire, this practice was absent, which indicates a redistribution of jurisdiction between secular and ecclesiastical justice in Kyivan Rus in terms of its decentralisation.

Subject jurisdiction covered a range of cases referred by the legislation of the Kyivan Rus state to the ecclesiastical jurisdiction. The charters of Volodymyr and Yaroslav provided an exhaustive list of them. Thus, criminal cases included: crimes against the faith and the church (confessions of polytheism or performance of pagan rites, heretical acts, contempt for the temple or worship, blasphemy, sorcery, sacrilege, etc.); crimes against family and morals (bride abduction, arbitrary divorce, adultery, fornication, incest, violence between parents and children, birth of an illegitimate child, abortion, intentional murder by the mother of a new-born child, bigamy); crimes against personal freedom and honour (kidnapping of a girl for the purpose of marriage, rape, murder at a wedding, insult of honour, fights between women, infliction of bodily harm to another's wife, etc.); certain property crimes (theft of hemp, flax or other grain; theft of white clothes or cloth and pieces of cloth; theft of wedding attire or other property prepared for the wedding).[30] In civil cases, the ecclesiastical court was responsible for marriage and family disputes over the validity of marriage, divorce, engagement, dowry, cases of illegitimate children, adoption, and inheritance.[31]

During the period when Kyivan Rus was a vassal of the Golden Horde, the sphere of ecclesiastical jurisdiction was significantly expanded by khan's labels. Thus, the 'Label of Khan Mengu-Tymer, issued to Metropolitan Kirill' included the whole family of the priest who lived with him in the circle of church people. 'And whoever lives with the priest and the deacon in the same house and eats the same bread, we also welcome them', says one of the

28 O Kupchynsky, *Acts and documents of the Halych-Volyn principality of the XIII-XIV centuries. Research. Texts* (Shevchenko Scientific Society 2004) 516.

29 ibid, 619.

30 Berdnikov (n 4) 513.

31 Berdnikov (n 4) 515.

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provisions of the label.[32] In addition, the metropolitan and the bishops were given the right to include any of the laity in the church at their own discretion. 'If the metropolitan wants to accept other people who want to pray to God, then let them do their will,' as was said in another part of the document.

The 'Label of the Uzbek Tsar, Peter, Metropolitan of All Kyivan Rus' in 1313 made changes to the scope of the substantive jurisdiction of the church. The first hierarch was now allowed to prosecute all criminal and civil cases in which the parties were so-called church people. 'The metropolitan must judge his people in any case', the source says, 'and in robbery, and in litigation, and in all cases'.[33] Thus, in addition, the khan referred to the ecclesiastical court jurisdiction all criminal cases against 'church people' who did not fall under the jurisdiction of the church.

The jurisdiction of the ecclesiastical court was established immediately after the introduction of Christianity by the ecclesiastical statutes of the Grand Princes of Kyiv. Crimes against religion and the church, against family and morals, personal liberty and honour, and crimes against some types of property belonged to its jurisdiction. The sphere of ecclesiastical jurisdiction in civil matters was limited to marital and family matters and certain inheritance disputes. The ecclesiastical court in Kyivan Rus did not have jurisdiction over disputes of a private law nature between secular persons, which was characteristic of Byzantine justice in the period of early Christianity. Instead, the range of criminal cases in Kyivan Rus was much wider.[34]

5 FEATURES OF THE ECCLESIASTICAL-JUDICIAL PROCESS

The study of ecclesiastical justice cannot be complete without clarifying the procedural component. Unfortunately, there are few princely legislative regulations that would dictate the procedure for the ecclesiastical court's consideration cases, and they do not produce a complete picture. Prince Volodymyr's Charter prohibits the presence of outsiders during a court hearing. 'To judge the metropolitan and the bishops in the absence of the laity', is required by Art. 11 of the said law.[35] We find a similar norm in the church Charter of the Halych-Volyn prince Lev Danilovich.[36] Therefore, the trial was held behind closed doors in the absence of representatives of the local community or outsiders in the courtroom. This is the only known legislative instruction of the princely power that objectively concerned the church-judicial process.

In this uncertain situation, the opinions of scholars on the organisation of ecclesiastical justice in Kyivan Rus were divided. Some researchers, including M. Levchuk, claim that

32 LV Cherepnina (ed), *Monuments of Russian law.* Issue. 3 – Monuments of law of the period of formation of the Russian centralized state of the XIV-XV centuries (State Publishing House of Legal Literature 1955) 467-468.

33 VV Grigoriev, *On the authenticity of labels given by the khans of the Golden Horde to the Russian clergy* (University typography 1842) 113; N Novikov, *Ancient Russian vivliophics, containing a collection of Russian antiquities, to the history, geography and genealogy of the Russian concerning*, 2nd edition. Part VI (Typography of the printing company 1788) 11-12.

34 IA Matseliukh, 'On the problem of church judiciary in the Kyivan Rus state' (2018) 31 Scientific Bulletin of the International Humanities University. Jurisprudence series 8-10.

35 Chistyakova (n 26) 139.

36 Akta grodzkie (n 26) 97.

> The legislator did not need to issue its own laws and create its own norms in this area, as ecclesiastical justice was sufficiently defined by the canons of the Eastern Christian Church, namely Rules of the Holy Apostles, resolutions of the Ecumenical and Local Councils, which were reproduced in the nomocanons and became the basis of the Kormchaia books, which were used in Kyivan Rus, primarily due to the Greek metropolitans.[37]

Instead, other researchers minimised the influence of the Byzantine process on the legal system of Kyivan Rus. M. Suvorov explained it as follows

> The ecclesiastical process of the Eastern Roman Empire did not have a perfect, complete form, and therefore could not affect the procedural law of the Kyivan Rus state, instead, domestic procedural ecclesiastical law immediately after the introduction of Christianity became a direct reflection of secular court practice.[38]

The modern Russian researcher E. Belyakova speaks about this identification. Based on the analysis of the sanctions applied by the ecclesiastical courts, she comes to the following conclusion

> Since the practice of applying penalties was borrowed by the ecclesiastical court from the secular court, then the process of consideration of the case, the appointment of such punishment had to comply with the principles of the latter.[39]

In expressing these considerations, researchers are guided by the principle of probability rather than legal and historical facts. In our opinion, this approach is misguided for the following reasons. The prescriptions of the Ruska Pravda, as the main source of secular law governing the organisation of the proceedings, are of an accusatory and adversarial nature, where the duty to investigate, prove guilt, and execute the decision rested with the victim, and the judge was only a mediator. This cannot be said of the ecclesiastical court of the Kyivan Rus state. According to the content of the Kormcha Book, its task was to 'teach, correct, forbid', and it had the authority to initiate the case, consider it, and make appropriate decisions.[40] The second difference between secular and ecclesiastical courts was that the former was public, and the latter was closed. The third difference was traced via the existence of a three-tier system of ecclesiastical justice, which is not inherent in the secular court, which did not have a clearly defined hierarchical structure. In addition, the Greek metropolitans and bishops were closer to the Byzantine model of ecclesiastical justice than the practice of secular justice in Kyivan Rus. Consequently, there were polar differences between secular and ecclesiastical courts.

In the discussion we started, an important evidence base is contained in the work of a researcher of the nineteenth century, Gustav Rosenkampf. Analysing the content of the Kormchaia Book, the author drew attention to the activities of the local council of the Kyiv metropolitanate. One of the issues on the agenda of his work was the consideration of the case. It took place as follows: the presiding or trusted bishop began the meeting, and he interrogated the defendant, the victim, and witnesses. This was followed by a face-to-face dispute between the parties to the process. The provision of evidence was entrusted directly to the defendant and the victim, who confirmed their legal positions. Then the case passed to the stage of court debates, during which the members of the council expressed their views on the merits. The resolution was adopted by a majority vote and declared chairman of the council. If the offender committed a crime that simultaneously violated secular law, he was

37 Levchuk (n 3) 126-139.

38 NS Suvorov, *Course of ecclesiastical law*. Vol 2 (Typography GV Falk 1890) 181.

39 EV Belyakova, *Church court and problems of church life* (Typography Science 2004) 89.

40 Russian Historical Library (n 11) 107.

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transferred to the secular court so that it could consider the case and impose additional punishment.[41]

The description of the process resembles the Byzantine practice of considering the case. However, we do not share the opinion of scholars about the unconditional, direct reception of Eastern ecclesiastical procedural law. Our disagreement is prompted by the mention in a chronicle source of an event that took place in 1155. It is a case initiated by a church court on the claim of a slave and domestic servants against Luke, Bishop of Novgorod. According to Byzantine law, such persons had no right to address in court,[42] and the legislation of the Kyivan Rus state did not consider them subjects of legal relations.

The domestic ecclesiastical court process was certainly built on the principles of the Byzantine model of ecclesiastical justice and was based on the Nomocanons.[43] Yet, it was not an identical reproduction of it because the socio-political and historical conditions of the society's development made adjustments, laying the foundations of their own tradition of ecclesiastical justice. These circumstances are related to the different ways ecclesiastical courts functioned in the two legal systems. The Byzantine legal system provided for the struggle against violators of canonical precepts, but the activity of the ecclesiastical court in Kyivan Rus had an educational character. For the Orthodox Church, which came under the rule of polytheism (paganism), the priority was to win their place through missionary and educational work,[44] where the ecclesiastical court was an element in the mechanism of spreading Christian ideas and principles to the whole public, not excluding servants and slaves.

The ecclesiastical court occupied an important place in the political system of the Kyivan Rus state. Its main task was to protect the church order based on Christian morality, which, for the most part, rested on the shoulders of hierarchs and presbyters. They were the ones who had to set an example of piety, morality, the Christian way of life, and the observance of church rites and canons. In this way, the main tools were persuasion, preaching, and only then coercion, which was ensured by the authority of the ecclesiastical court. Church hierarchs, who were judges at the same time, raised the authority and affirmed the status of the Orthodox faith and its church in the Kyivan Rus state.[45] At the same time, the head of the Kyivan Rus church played a consolidating, political role. According to the nineteenth-century scholar F. Leontovych, the metropolitan was the only unifying centre of all principalities, which had 'all-Kyivan Rus power' in the absence of a common political centre of the fragmented Kyivan Rus state.[46]

41 G Rosenkampf, *Review of the Kormchaia Book in historical form* (University Typography 1829) 217; N Turchaninov, *About the cathedrals which were in Russia from the time of introduction of Christianity in it to reign of John IV Vasilyevich* (Typography of Medical Department of the Ministry of Internal Affairs 1829) 54; Smirnov (n 6) 20.

42 *Complete collection of Russian chronicles: In 43 volumes* Vol. 1. Lawrence and Trinity Chronicles (Typography of Eduard Prats 1846) 148.

43 IA Matseliukh, *Legal responsibility in the church law of medieval Ukraine* (Talcom 2018) 253-254.

44 O Lashchenko, Cultural life in Ukraine (Section of Artists, Writers and Journalists UNO in Prague 1941) 8-10.

45 Nikolai (Yarushevich), *Church Court in Russia before the publication of the Conciliar Law of Alexei Mikhailovich in 1649* (Petrograd 1917) 226.

46 FI Leontovich, *The national question in ancient Russia* (Warsaw 1895) 36.

6 CONCLUSIONS

Justice for ecclesiastical offences in the Kievan Rus state originated in the era of Christianity and the spread of ecclesiastical law. The incorporation of ecclesiastical justice into the legal system of the Kyivan Rus state was a difficult task. The difficulty was due to the need to combine two established legal traditions: Christian-Byzantine practice on the one hand and the extant pagan customs on the other. In these circumstances, a symbiosis developed, creating a new model of ecclesiastical justice, which included the entire system of its provision, including the source base, the judiciary, the powers of the judicial enforcement, and the procedural component based on local grounds. In the presence of gaps that had no analogues in Kyivan Rus law, the church turned to the experience of organising the judicial system of the Byzantine Empire.

In this way, Kyivan Rus created its own ecclesiastical and legal tradition, which had a number of unique features. These include the formation of a three-tier system of ecclesiastical justice, which became a prototype for the formation of a secular system of justice. The next feature concerns the procedural component, where slaves and servants who were not subjects of secular legal relations had the right to take part in the courts. We are convinced that the change in approaches to determining the circle of participants in the church-judicial process was due to the need to spread Christian ideas and principles to the general public, including servants and slaves.

Thus, it is not difficult to see the interpenetration between the two institutional spheres of church and state. They have been closely intertwined for two thousand years, so the impact is obvious. The study of the analysed socio-cultural, state-church relations will allow us to better understand the traditions and stereotypes of Ukrainian society that have formed over the centuries and, in turn, understand the basic principles of justice, which will contribute to effective reform of the judiciary.

A tithe church built on Starokyivska Hill in Kyiv in 989-996. It is considered to be the first stone church in Kyivan Rus. It was destroyed during the Mongol assault on Kyiv in 1240.

'Kyiv. The city of Volodymyr'. Diorama from the Archaeological Museum of the Institute of Archeology of the National Academy of Sciences of Ukraine (fragment), which contains a reconstruction of the Tithe Church.

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Viche, Painting by A.M. Vasnetsov, 1909.

Nomocanon (Kormcha Book) – Moscow: Printing House, 1653.
Such collections recorded state and church legislation.
Photo from the Museum of Rare Books of the Library named after M.O. Lavrovsky
of Mykola Gogol Nizhyn State University.

A miniature depicting the baptism of Prince Volodymyr in the Crimean Korsun, decorated with the text 'The Tale of Bygone Years' in the Radziwill Chronicle of the fifteenth century. 'The Tale of Bygone Years' was a chronicle from the period of Ukraine-Kyivan Rus, compiled in the eleventh-early twelfth century.

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Research Article

THE EVOLUTION OF CRIMINAL PROCEDURE IN UKRAINE OVER 30 YEARS OF INDEPENDENCE

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Summary: 1. Instead of an Introduction. – 2. The Formation of the Criminal Procedure of Ukraine since its Independence. – 3. The Development of the Criminal Procedure of Ukraine after Ukraine's Accession to the Council of Europe and the Adoption of the Constitution of Ukraine in 1996. – 4. The Development of the Criminal Procedure after the Adoption of the CrPC of Ukraine in 2012. – *4.1. Features of Legal Regulation of Criminal Procedural Activity in the Conditions of Anti-terrorist Operation. – 4.2. Introduction of Special Criminal Proceedings (in absentia). – 4.3. Improving the Legal Regulation of the Right to Liberty and Security of Person. – 4.4. Changes in the System of Bodies Conducting Criminal Proceedings for Corruption Crimes.* – 5. Conclusions.

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Prof. Shybiko was a member of the Working Group of the Verkhovna Rada of Ukraine in preparation for the second reading of the Draft Law № 9700, which was adopted by the Verkhovna Rada of Ukraine and is the current Criminal Procedure Code of Ukraine in 2012. However, this does not limit this study or affect the objectivity of the results.

CONFLICTS OF INTEREST

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THE EVOLUTION OF CRIMINAL PROCEDURE IN UKRAINE OVER 30 YEARS OF INDEPENDENCE

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Abstract *In this article, the author explores relevant issues of the formation and development of the Ukrainian criminal process over the 30 years of existence of the state of Ukraine since the proclamation of its independence.*

The main stages of the development of the criminal procedure are highlighted and analysed in detail, namely: the stage of its formation since Ukraine's independence proclamation in 1990-1991; the stage of development of the criminal procedure after Ukraine's accession to the Council of Europe and the adoption of the new Constitution of 1996; the stage of development of the criminal procedure after the adoption of the new Criminal Procedure Code (CrPC) of Ukraine in 2012. The novelties of the CrPC of 2012 are comprehensively analysed. Firstly, the Code incorporated the relevant key provisions of the Constitution of Ukraine and international legal acts on human rights and justice. Secondly, it settled a number of issues that were important for criminal proceedings but were either unregulated or partially regulated by other laws or regulations.

The article provides an analysis of the principle of access to justice enshrined in the CrPC of 2012, which provides for the right of participants in criminal proceedings who have a vested interest in the results of these proceedings (suspect, accused, victim), not only to obtain a fair trial but also to use broad procedural rights and to take an active part in criminal proceedings both during the pre-trial investigation and during the trial, contributing to the comprehensive, complete, and impartial establishment of the circumstances of the criminal proceedings and the adoption of a fair trial.

The author also touches on the amendments to the CrPC of 2012, which are related to the military aggression of the Russian Federation against Ukraine and the impossibility of pre-trial investigation and trial in the areas of the anti-terrorist operation, as well as those related to the implementation of the UN Convention against Corruption, aimed at strengthening the fight against corruption crimes.

Keywords: *criminal procedure, independence of Ukraine, Ukrainian CrPC of 2012, human rights, judicial control, access to justice, special criminal proceedings (in absentia), waiver of obligations under the ECHR, criminal proceedings of corruption crimes*

1 INSTEAD OF AN INTRODUCTION

Thirty years is a rather short period in the history of Ukrainian statehood, but it is enough to analyse the path of development of this statehood after Ukraine finally gained the status of an independent and sovereign state in all spheres of its activity, including criminal procedure. To properly assess the current state of Ukraine's criminal procedure and determine the current

directions of its development, it is necessary to investigate how it emerged after Ukraine's independence, what was left of the Soviet criminal procedure, and what is perceived from the experience of established rule of law, as well as international standards of criminal procedure, enshrined in international legal acts on human rights and justice. The author of this article has tried to make a modest contribution to such research.

It is possible to allocate the following main stages of legislative regulation of the formation and development of criminal procedure in the independent state of Ukraine:

> 1) from the adoption of the Declaration of Independence of 1990 and the Act of Independence of 1991 (from gaining independence) to the accession of Ukraine to the Council of Europe and the adoption of the Constitution of Ukraine in 1996;
> 2) from the adoption of the Constitution of 1996 to the adoption of the CrPC of Ukraine in 2012;
> 3) from the adoption of the CrPC in 2012 until now.

Highlighting these stages will provide a clearer understanding and assessment of the changes that have taken place, as well as the problems that remain unresolved.

2 THE FORMATION OF THE CRIMINAL PROCEDURE OF UKRAINE SINCE INDEPENDENCE

After the collapse of the USSR, the former Union Republic of the Ukrainian SSR, in its first fundamental legal act, which was the Declaration of State Sovereignty of Ukraine, declared that it intends to be an independent state governed by the rule of law with comprehensive human rights and freedoms.[1]

On 24 August 1991, the Verkhovna Rada of Ukraine stated in the Act of Independence of Ukraine that

> Based on the mortal danger that loomed over Ukraine in connection with the coup in the USSR of 19 August 1991, the Act of Independence of Ukraine was adopted, proclaiming the independence of Ukraine and the creation of an independent Ukrainian state - Ukraine and the validity of the Constitution and laws of Ukraine.[2]

In 1990, the legislator of Ukraine immediately began active work on the creation of new laws, including those that were to properly regulate criminal procedure.

From 1990-1994, laws were passed that determined the legal status of the main subjects of criminal proceedings – court,[3] prosecutor,[4] pre-trial investigation bodies,[5] and lawyer[6] — as

1 Declaration of State Sovereignty of Ukraine adopted by the Verkhovna Rada of the Ukrainian SSR on 16 July 1990 <https://zakon.rada.gov.ua/laws/show/55-12#Text> accessed 20 June 2021.

2 Act of Independence of Ukraine approved by the Resolution of the Verkhovna Rada of Ukraine of 24 August 1991 No 1427-XII <https://zakon.rada.gov.ua/laws/show/1427-12#Text> accessed 20 June 2021.

3 Law of Ukraine 'On the Status of Judges' of 15 December 1992 <https://zakon.rada.gov.ua/laws/show/2862-12#Text)> accessed 20 June 2021.

4 Law of Ukraine 'On the Prosecutor's Office' of 5 November 1991 <https://zakon.rada.gov.ua/laws/show/1789-12#Text)> accessed 20 June 2021.

5 Law of Ukraine 'On the Police' of 25 December 1990 <https://zakon.rada.gov.ua/laws/show/565-12#Text)> accessed 20 June 2021; Law of Ukraine 'On the Security Service of Ukraine' of 25 March 1992 <https://zakon.rada.gov.ua/laws/show/2229-12#Text)> accessed 20 June 2021.

6 Law of Ukraine 'On the Bar' of 19 December 1992 <https://zakon.rada.gov.ua/laws/show/2887-12#Text)> accessed 20 June 2021.

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well as on other important issues of criminal proceedings, including pre-trial detention,[7] the procedure for compensation caused to the citizen by illegal actions of bodies of inquiry, preliminary investigation, the prosecutor's office and court,[8] the state protection of employees of court and law enforcement bodies,[9] ensuring the safety of the persons participating in criminal proceedings,[10] and operational investigation activity related to criminal process.[11]

At the same time, the Criminal Procedure Code of the Ukrainian SSR, approved by the Law of the Ukrainian SSR, which came into force on 1 April 1961[12] (hereinafter the CrPC of 1960), continued to operate after the proclamation of Ukraine's independence.

The first law that introduced significant changes to the CrPC in 1960 was the Law of Ukraine of 1992,[13] which provided for changes in the provisions on the appointment of the CrPC. Art. 1, titled 'Legislation on Criminal Procedure', provided that the procedure in the Ukrainian SSR is determined by the Fundamentals of Criminal Procedure of the USSR and the Union Republics and other laws of the USSR and the Code of Criminal Procedure of the Ukrainian SSR issued in accordance with them, was replaced and renamed to 'The Purpose of the Criminal Procedure Code of Ukraine' with a summary

> The Purpose of the Criminal Procedure Code of Ukraine is to determine the procedure in criminal cases.

The new version of Art. 2 of the CrPC, which brought to the fore the protection of the rights and legitimate interests of participants in the process, was indicative in terms of determining the priority in the legislative regulation of criminal proceedings

> The tasks of criminal justice are to protect the rights and legitimate interests of individuals and legal entities involved in it, as well as prompt and full disclosure of crimes, exposing the perpetrators and ensuring the proper application of the law so that everyone who committed a crime is prosecuted, and no innocent is punished.

It should be emphasised that this Law established some important procedural decisions that were related to the restriction of a person's fundamental rights and were taken during the pre-trial investigation by the prosecutor and investigative bodies under judicial control, with their consent.

Special attention was paid to defining the basic principles of judicial reform in the Concept of Judicial Reform of 1992 (Section II), which provided, in particular

> Establishment of judicial control over the legality and validity of procedural decisions of investigative bodies, which restrict the rights of citizens.[14]

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7 Law of Ukraine 'On Pre-trial Detention' of 30 June 1993 <https://zakon.rada.gov.ua/laws/show/3352-12#Text> accessed 20 June 2021.

8 Law of Ukraine 'On the Procedure for Compensation for Damage Caused to a Citizen by Illegal Actions of Bodies Carrying Out Operational and Investigative Activities, Bodies of Pre-trial Investigation, Prosecutor's Office and Court <https://zakon.rada.gov.ua/laws/show/266/94-%D0%B2%D1%80#Text)> accessed 20 June 2021.

9 Law of Ukraine 'On State Protection of Court and Law Enforcement Employees' of 23 December 1993 <https://zakon.rada.gov.ua/laws/show/3781-12#Text)> accessed 20 June 2021.

10 ''ibid.

11 Law of Ukraine 'On Operational and Investigative Activities' of 18 February 1992 <https://zakon.rada.gov.ua/laws/show/2135-12#Text)> accessed 20 June 2021.

12 Criminal Procedure Code of the Ukrainian SSR approved by the Law of the Ukrainian SSR of 28 December 1960 <https://zakon.rada.gov.ua/laws/show/1001-05#Text> accessed 20 June 2021.

13 Law of Ukraine of 15 December 1992 'On Amendments and Addenda to Certain Legislative Acts of Ukraine' <https://zakon.rada.gov.ua/laws/show/2857-12/ed19921215#Text> accessed 20 June 2021.

14 Resolution of the Verkhovna Rada of Ukraine on the Concept of Judicial Reform of 1992 (Section II) <https://zakon.rada.gov.ua/laws/show/2296-12#Text> accessed 20 June 2021.

For the first time, it was possible to appeal to the relevant district (city) court decisions of the investigator, inquiry body, and prosecutor to refuse to initiate a criminal case and to close the criminal case by the person concerned or their representative after the prosecutor. If such a decision were issued by the prosecutor, the superior prosecutor would refuse to cancel the appealed decision within seven days from the date of receipt by the person of a copy of the decision (Arts. 99-1,215, 236-1, 236-5 of the CrPC). In addition, there was a possibility to appeal to the court the sanction of the prosecutor for arrest. The complaint was filed with the court directly or through the administration of the pre-trial detention centre, which was obliged to send the complaint to the relevant court within 24 hours.

It should be noted that under the CrPC of 1960, the prosecutor did not only have a decisive procedural position in the pre-trial proceedings, i.e., at the stages of initiating a criminal case and pre-trial investigation. Procedural law allowed them to have significant influence over the court even after the pre-trial investigation. The prosecutor submitted the indictment based on the results of the pre-trial investigation to the court, together with all the materials collected during the pre-trial investigation, which, in their opinion, confirmed the guilt of the accused. The court, in preparation for the trial, had to read all these materials of the prosecutor, thus studying the position of only one party – the prosecution.

The legislator only refused such an approach in the CrPC of Ukraine of 2012, where it prohibited, together with the indictment, to provide the court with pre-trial investigation materials before the trial (Part 4 of Art. 291 of the CrPC). This was a new stage in the development of criminal procedure in Ukraine, which is discussed in more detail in the next section of this article.

3 THE DEVELOPMENT OF THE CRIMINAL PROCEDURE OF UKRAINE AFTER UKRAINE'S ACCESSION TO THE COUNCIL OF EUROPE AND THE ADOPTION OF THE CONSTITUTION OF UKRAINE IN 1996

Ukraine's accession to the Council of Europe, the adoption of the new Constitution of Ukraine, and the ratification of the ECHR were fundamentally important for the beginning of the formation of the modern criminal procedure of independent Ukraine on the way to the rule of law.

In 1995, Ukraine joined the Statute of the Council of Europe

> Reaffirming Ukraine's commitment to the ideals and principles common to the peoples of Europe and recognizing that the interests of preserving and furthering those ideals and promoting economic and social progress require closer unity among all European countries,[15] and as a member of the Council Europe has undertaken to 'recognize the principles of the rule of law and the enjoyment of human rights and fundamental freedoms by all persons under its jurisdiction (Art. 3 of the Statute).

A year later, the Verkhovna Rada of Ukraine adopted the Constitution,[16] in which Ukraine was proclaimed a state governed by the rule of law (Art. 1), and person, their life and health, honour and dignity, inviolability, and security to be the highest social values (Art. 3), as

15 Law of Ukraine 'On Ukraine's Accession to the Statute of the Council of Europe' of 31 October 1995 <https://zakon.rada.gov.ua/laws/show/398/95-%D0%B2%D1%80#Text> accessed 20 June 2021.

16 The Constitution of Ukraine was adopted at the fifth session of the Verkhovna Rada of Ukraine on 28 June 1996 <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 20 June 2021.

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emphasised in the Preamble to the Constitution, 'based on the centuries-old history of Ukrainian statehood' and 'ensuring human rights and freedoms'.

Indeed, as evidenced by the provisions of the Constitution, it incorporated the most important provisions on human rights, which were enshrined in the historical monuments of Ukrainian law and in major international human rights law, in particular, in the Universal Declaration of Human Rights of 1948, ICCPR of 1966, ratified by the Ukrainian SSR in 1973,[17] determining which of them and to what extent they can be limited, by whom, under what conditions and in what order, and providing guarantees against unjustified restrictions.

This is important from the point of view of the criminal procedure, as a sphere of state activity in which the rights of a person may be significantly limited on legal grounds in the interests of the criminal procedure in the interests of justice. The rights, freedoms, and responsibilities of persons and citizens are devoted to a separate section II, as well as numerous provisions in other sections of the Constitution, in particular, section VIII 'Justice'.

The Constitution of Ukraine of 1996 not only proclaimed human rights but also provided for their guarantees against unjustified restrictions, the main ones being judicial. If, before the adoption of the Constitution of Ukraine, the main guarantor of a person's rights in pre-trial proceedings was a prosecutor who authorised sanctions for detention, search, and seizure of correspondence, now, the guarantor of these and other fundamental rights is the court (judge).

In particular, according to Part 2 of Art. 29 of the Constitution of Ukraine, no one may be arrested or detained except by a reasoned court decision and only on the grounds and in the manner prescribed by law. It is not allowed to enter a person's home or other property or conduct an inspection or search without a reasoned court decision (Part 2, Art. 30 of the Constitution). Restrictions on the secrecy of correspondence, telephone conversations, telegraph, and other correspondence are also possible only by a court decision (Art. 31 of the Constitution).

The Constitution of Ukraine enshrines the right of everyone to judicial protection. Everyone also has the right, after using all national means, to apply for protection of their rights and freedoms to the relevant international judicial institutions or the relevant bodies of international organisations of which Ukraine is a member or participant (Art. 55 of the Constitution of Ukraine).

An important successive step towards the further formation of the rule of law in Ukraine and a better, in terms of recognition, enshrinement in law and protection of individual rights and criminal procedure, was the ratification by Ukraine of the ECHR. It fully recognised the provisions in its territory, in particular, the Art. 46 of the Convention on the recognition of the binding nature and without the conclusion of a special agreement the jurisdiction of the ECtHR in all matters concerning the interpretation and application of the Convention.[18]

Directly related to the criminal process are the provisions of the ECHR, in particular, Art. 1 'Obligation to Respect Human Rights', Art. 2 'The Right to Life', Art. 3 'Prohibition of Torture', Art. 5 'The Right to Liberty and Security of Person', Art. 6 'The Right to a Fair Trial',

17 Decree of the Presidium of the Verkhovna Rada of the Ukrainian SSR 'On Ratification of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights of 19 October 1973 <https://zakon.rada.gov.ua/laws/show/2148-08#Text> accessed 20 June 2021.

18 Law of Ukraine 'On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, First Protocol and Protocols Nos 2, 4, 7 and 11 to the Convention' of 17 July 1997 No 475/97-BP (as amended by the Law of Ukraine 'On Amending some Laws of Ukraine No 3436-15 of 9 February 2006) <https://zakon.rada.gov.ua/laws/show/475/97-%D0%B2%D1%80#Text)> accessed 20 June 2021.

Art. 7 'No Punishment without Law', and Art. 8 'The Right to Respect for Private and Family Life', the application of which by the ECtHR radically influenced the further development of criminal procedure in Ukraine in its decisions.

It should be noted that the legislator of Ukraine reaffirmed its obligation to comply with the final decisions of the Court in a separate law, emphasising that the courts apply the Convention and the case-law of the Court when considering cases.[19]

The provision of the Constitution of Ukraine that justice in Ukraine is administered exclusively by courts, which is based on the relevant provisions of international human rights law, especially the Universal Declaration of Human Rights (Art. 10), ICCPR (Part 1 of Art. 14), is important for all types of justice, especially criminal justice. In particular, the delegation of court functions and the assignment of these functions to other bodies or officials are not allowed (Part 1 and 2 of Art. 124), nor is the creation of emergency and special courts (Part 6 of Art. 125).

There is a certain element of tautology in this formulation. However, the legislator emphasised this, remembering the bitter lessons of the past about the political repression in the USSR in the 30s-40s to early 50s of the last century, when the role of the court was ignored. Thus, in 1934, a resolution of the central authorities was adopted, which established a simplified procedure for the investigation and trial of cases of terrorist organisations and terrorist acts: the investigation in such cases should be completed within 10 days, the indictment was served on the accused in one day before the case in court, the cases were heard without the participation of the parties, and the cassation appeal of sentences, as well as the submission of petitions for pardon, was not allowed; the death sentence was carried out immediately after the sentence.[20]

Such a shortened procedure for criminal proceedings was provided for in the CrPC of the USSR.[21] In 1937, appropriate amendments were made to the current CrPC of the Union Republics,[22] including the CrPC of the USSR, which dealt with cases of counter-revolutionary sabotage and diversions. In these cases, the indictment was served on the accused one day before the trial. No cassation appeal was allowed. Sentences of capital punishment (execution) were to be carried out immediately after the rejection of convicts' requests for pardon.

In order not to 'burden' themselves with such a shortened procedure in cases concerning the so-called 'Counter-revolutionary crimes', the authorities resorted to extrajudicial repression. As noted in the Decree of the President of the USSR Mikhail Gorbachev 'On the Restoration of the Rights of Victims of Political Repression in the 20-50s',[23] mass repressions were carried out mainly through extrajudicial killings in the so-called special meetings, boards, 'dvoikas', and 'troikas', although the basic rules of justice were violated in the courts.

19 Law of Ukraine 'On Enforcement of Judgments and Application of the Case Law of the European Court of Human Rights' of 23 February 2006 <https://zakon.rada.gov.ua/laws/show/3477-15#Text)> accessed 20 June 2021.

20 Resolution of the Central Executive Committee and the Council of People's Commissars of the USSR 'On Amendments to the Current Criminal Procedure Codes of the Union Republics' of 1 December 1934 in Collection of Laws of the USSR (1934) 64, Art 459.

21 Resolution of the All-Ukrainian Central Executive Committee 'On Amendments to the Criminal Procedure Code of the USSR' of 9 December 1934 in Assembly of laws and orders of the workers' 'and peasants'' government of Ukraine (1934) 36, Art 288.

22 Resolution of the Central Executive Committee of the USSR 'On Amendments to the Current Criminal Procedure Codes of the Union Republics' of 14 September 1937 in Collection of Laws of the USSR (1937) 67, Art 266.

23 'Decree of the President of the Union of Soviet Socialist Republics 'On the Restoration of the Rights of all Victims of Political Repression in the 20-50s' of 13 August 1990' (1990) Izvestia 227.

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The author of 'Historical Truth', Deputy Director of the Ukrainian Institute of National Memory (UINP) Dmytro Veneneyev said in his report at a meeting of the UINP Academic Council on the occasion of the 75th anniversary of the Great Terror in the USSR and the Ukrainian SSR and honouring the memory of its victims

> In the 1920's and 1930's, the ideology and norms of "revolutionary law" were introduced in the USSR, on the basis of which political repressions were carried out. "Revolutionary legality" was based on the principles of "revolutionary expediency" of the struggle against the counterrevolution.
>
> During the 1930s and the 1937s, the Criminal Code of the USSR was supplemented by almost 60 new articles interpreting more than 80 new components of "counterrevolutionary crimes".
>
> According to generalized statistical reports (signed in 1964 by the head of the KGB of the USSR V. Nikitchenko – Sectoral State Archive of the Security Service of Ukraine, Fund 42, file 312) during the Great Terror of 1937-1938 in Ukraine 197,617 people were convicted, the lion's share of them sentenced to executions – 122,237.
>
> Through special troikas of the NKVD-UNKVD of the USSR passed 75,670 convicts (of whom 29,268 were sentenced to death, the figure is given in parentheses), convicted by the decision of the People's Commissar of Internal Affairs of the USSR and the Prosecutor of the USSR - 38,266 (32,191), convicted by a special meeting of NKVD of the USSR – 5891 (1826).
>
> As a result, almost 120 thousand convicts became victims of extrajudicial bodies (more than half of them received death sentences).[24]

According to the KGB of the USSR, in 1930-1953, judicial and various non-judicial bodies passed sentences and rulings on charges of counter-revolutionary state crimes on 3,778,234 people, of whom 786,098 were shot. Among them were state and party leaders, great scientists, military leaders, figures of literature and art, economic leaders, workers and peasants, and chekists, who were against the methods of Ezhov and Beria executioners.[25]

One of the most important normative acts on the basis of which the process of rehabilitation of repressed citizens was carried out was the Decree on Additional Measures to Restore Justice for Victims of Repression, which took place in the 1930s and early 1950s, issued at the end of the USSR.[26] This Decree annulled extrajudicial decisions made by troikas, boards, meetings that were not annulled in court at the time of issuing the Decree. All citizens repressed by the decisions of these extrajudicial bodies were considered rehabilitated.

In Ukraine, the legal basis for the full-scale work of courts and prosecutors and security for the rehabilitation of citizens was the Law, which gave the Supreme Court of Ukraine the power to review and supervise newly discovered criminal cases considered by the Supreme Court of the Ukrainian SSR, the Supreme Court of the USSR, military tribunals, and extrajudicial bodies, including outside the territory of the former Soviet Union, in respect of persons who at the time of the repression were citizens of Ukraine (Part 7 of Art. 7[27]).

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24 D Vedeneev, 'Illegal Political Repressions of 1920-1980 in Ukraine and Problems of Formation of National Memory' <https://www.istpravda.com.ua/research/2012/12/26/105584/> accessed 20 June 2021.

25 In the Committee for Security of the USSR (1990) 37 Working Tribune <http://publ.lib.ru/ARCHIVES/R/"Rabochaya_tribuna"/_"RT".html#1990)> accessed 20 June 2021.

26 Law of the USSR 'On Approval of Decrees of the Presidium of the Supreme Soviet of the USSR on Amendments and Addenda to Legislative Acts of the USSR' of 31 July 1989 <https://zakon.rada.gov.ua/laws/show/v0304400-89#Text> accessed 20 June 2021.

27 Law of Ukraine of 17 April 1991 'On Rehabilitation of Victims of Political Repression in Ukraine' <https://zakon.rada.gov.ua/laws/show/962-12/ed19910417#Text> accessed 20 June 2021.

A similarly important aspect of the development of criminal proceedings under the Constitution of Ukraine of 1996 was the resumption of appellate proceedings as the main modern form of review of court decisions, which was abandoned by the Soviet authorities. Appeal, as one of the main forms of review of court decisions, has long been known in Ukraine. In particular, the appellate proceedings were regulated in detail in the so-called first Ukrainian code of law – in the 'Rights under which the People of Malorosia Act in Courts' in 1743[28] (hereinafter, 'Rights…'). According to its provisions, an appeal was defined as 'the correct revocation and transfer from a lower court to a higher case of the parties to the trial when one of them considered themselves wronged by the verdict handed down in their case in that lower court' (Art. 35 para. 1). Both the parties in the civil proceedings and the defendant and the victim in the criminal proceedings had the right to appeal on the grounds that the court decision did not comply with the law and justice. The 'Rights…' determined the terms of filing an appeal, the list of circumstances under which the appeal was not allowed, the grounds, time, and procedure for its consideration and decision, unconditional grounds for cancellation of the court decision (Arts. 36-37), etc.

According to the Statute of Criminal Procedure of the Russian Empire of 1864, which also applied to Ukrainian lands, the right to appeal included the defendant, private prosecutor, prosecutor, civil plaintiff, and civil defendant, and in some cases – the police (chapter two of section V 'On Responses and Protests to Nondefinitive Judgement').[29]

During the period of the Ukrainian People's Republic, the Central Rada, seeking to create its own judicial system through its Law of 17 December 1917 'On the Establishment of Courts of Appeal'[30] provided for the establishment of three appellate courts – Kyiv, Kharkiv, and Odesa – instead of the former Kyiv, Kharkiv, and Novocherkassk judicial chambers, which were liquidated on 1 December 2017. The Central Rada determined the status of these courts, although the powers, scope, and internal organisation of new appellate courts did not differ from previous judicial chambers, and liquidated the previous ones 'for alienation and dislike of Ukrainian life'. The order of staffing of courts was determined by the Law of 23 December 1917 'On the Conditions of Siege and the Procedure for Electing Judges of the General Court and Courts of Appeal'.[31]

However, the Soviet authorities did not accept the appeal as an opportunity for the court of second instance to consider the case on its own. In 1918-1919,[32] in connection with the liquidation of the judicial system that existed in the Russian Empire and the introduction of the People's Court, the appeal was annulled as allegedly weakening the activities of the court of first instance, complicating and delaying the process, and introducing a cassation that did not allow the court of second instance to reconsider a civil or criminal case again with its own judicial investigation.

28 Rights under which the People of Malorosia are Judged (1743) <http://history.org.ua/LiberUA/966-02-0202-4/966-02-0202-4.pdf> accessed 20 June 2021.

29 Charter of Criminal Proceedings (St Petersburg 1892) 11-118 <https://constitution.garant.ru/history/act1600-1918/3137/)> accessed 20 June 2021.

30 See Central State Archive of Supreme Bodies of Power and Government of Ukraine (TSDAVO of Ukraine), Fund 1115. Ukrainian Central Council, Description 1. Sheet 178. See also Bulletin of the General Secretariat of the Ukrainian People's Republic (1918) 1.

31 See TSDAVO (n30) 169-170. See also Bulletin of the General Secretariat of the Ukrainian People's Republic (1917) (7) 1.

32 'Resolution of the People's Secretariat of Ukraine "On the Introduction of the People's Court"' (1918) in Chronological Collection of Laws, Decrees of the Presidium of the Verkhovna Rada, Resolutions and Orders of the Government of the Ukrainian SSR (1917-1941) (1963) 1, and 'Decree of the SNC "On the Court"' of 14 February 1919 in Law of the USSR (1919) 14, Art 154. It can also be found in: Chronological collection of laws, decrees of the Presidium of the Verkhovna Rada, resolutions and orders of the Government of the Ukrainian SSR (1917- 1941) (1963) 1.

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Immediately after Ukraine's independence, the issue of resumption of appeal was raised in the Concept of Judicial Reform in Ukraine,[33] which provided for the basic principles of judicial reform, in particular, the creation of proceedings that would guarantee the right to judicial protection and equality before the law and create conditions for real competitiveness, the implementation of presumption of innocence, and the verification of the legality and validity of court decisions on appeal, in cassation, and on newly discovered circumstances.

The resumption of the appeal took place at the constitutional level in the form of one of the main principles of judicial proceedings, ensuring appellate and cassation appeal of court decisions, except when provided by law (para. 8 of Part 3 of Art. 129 of the Constitution of Ukraine, 28 June 1996). It should be noted in advance that in the wording of the Law amending the Constitution of Ukraine on justice in 2016,[34] this basic principle of justice was renamed into 'Ensuring the Right to Appeal and to Cassation Appeal of the Court Decision in Cases Specified by Law'. That is, the appellate review was defined as the main form of review of court decisions (para. 8, Part 2 of Art. 129). According to Part 1 of Art. 424 of the CrPC, sentences and rulings on the application or refusal to apply coercive measures of a medical or educational nature of the court of first instance may be appealed in cassation after their review on appeal.

An important aspect of the development of Ukraine's criminal procedure legislation was the so-called 'small judicial reform' of 2001. It is closely linked to the ratification of the ECHR and the adoption of the Constitution of Ukraine, namely, the reservations set out in the Law on Ratification of the Convention and in the Transitional Provisions of the Constitution of Ukraine. This reform strengthened judicial guarantees of the rights of the person during pre-judicial investigation.

Adopting the 1996 Constitution, the Verkhovna Rada of Ukraine noted in para. 13 of Section 15 of the 'Transitional Provisions' that for five years after the entry into force of this Constitution, the existing procedure for arrest, detention, and seizure of persons suspected of committing a crime and conducting a review or a search of a person's home or other property would remain in place. In the Law on Ratification of the Convention, the Verkhovna Rada also made a reservation that the provisions of paragraph 1 of Art. 5 and Art. 8 of the Convention shall apply insofar as they do not contradict para. 13 of Section 15 of the 'Transitional Provisions' and Arts. 106 and 157, 177, and 190 respectively of the CrPC of Ukraine on the detention of a person and the sanction of arrest by the prosecutor and the sanctioning of a search by the prosecutor, as well as the inspection of housing.

These reservations were to apply until the relevant amendments to the CrPC of Ukraine or the adoption of a new CrPC of Ukraine, but no longer than 28 June 2001. This meant that the introduction of a court permit to restrict the constitutional and convention rights of a person to liberty and security of person and respect for private life was postponed for five years. At the same time, a five-year 'postponement' was not provided with the need to observe the judicial guarantee of secrecy of correspondence, telephone conversations, and telegraph and other correspondence (Art. 31 of the Constitution of Ukraine); it was to operate from the date of entry into force of the Constitution of Ukraine (Art. 160 of the Constitution).

33 The concept of judicial and legal reform in Ukraine, approved by the resolution of the Verkhovna Rada of Ukraine on 28 April 1992 <https://zakon.rada.gov.ua/laws/show/2296-12#Text> accessed 20 June 2021.

34 Law of Ukraine 'On Amendments to the Constitution of Ukraine (regarding justice)' of 2 June 2016 <https://zakon.rada.gov.ua/laws/show/1401-19#Text> accessed 20 June 2021> accessed 20 June 2021.

In 2001, amendments were made to the CrPC of Ukraine,[35] which enshrined and specified these judicial guarantees of individual rights during the pre-trial investigation in the relevant articles of the CrPC of Ukraine. Now, they provided not the sanction of the prosecutor (Arts. 157, 183, 187 of the CrPC of 1960), but only on the basis of a reasoned decision of the judge to choose a measure of restraint in the form of detention and extension of detention (Arts. 165-2, 165-3 of the CrPC), search of housing or other property of a person and forcible seizure of housing or other property of a person (Arts. 177, 178 of the CrPC), and seizure of correspondence and removal of information from communication channels – only on the basis of a reasoned decision of the head of an appellate court or his deputy (Art. 167 of the CrPC).

In the same year, the law[36] deprived the prosecutor and investigator of the power to release the accused (person) from criminal liability by closing the criminal case when, as a result of a change in circumstances, the act committed by a person lost its socially dangerous character; in connection with effective repentance, in connection with the reconciliation of the accused with the victim; in connection with the application to a minor of coercive measures of an educational nature in connection with the expiration of the statute of limitations (Arts. 7, 7-1, 7-2, 7-3, 8, 9, 10, 11-1 of the CrPC of Ukraine of 1960), and handed them over to the court. The prosecutor or the investigator (with the consent of the prosecutor) was instead given the authority to decide to transfer the case to court to resolve the issue of releasing the accused (person) from criminal liability.

During the next 10 years, numerous amendments to the CrPC of 1960 significantly contributed to the creation of a procedural mechanism for properly clarifying the circumstances of a criminal case and ensuring the rights of participants in criminal proceedings, especially with the introduction of judicial guarantees of pre-trial coercion. However, the introduction of unsystematic changes to a largely outdated general procedural form of criminal proceedings could not replace the preparation and adoption of the new CrPC of Ukraine, built on modern principles defined by international human rights and judicial acts and the Constitution of Ukraine of 1996. In cases against Ukraine, the ECtHR noted non-compliance with a number of provisions of the ECHR ratified by Ukraine on the fair procedure of criminal proceedings, in particular, on the right to liberty and security of person and the right to a fair trial (Arts. 5 and 6 of the Convention). In the judgment in *Kharchenko v. Ukraine*,[37] the ECtHR pointed to the systemic nature of the problem of ensuring the right to liberty and security of person and the need to immediately implement specific reforms in law and practice to ensure their compliance with Art. 5 of the Convention (Art. 101 of the judgment).

Back in 1995, the PACE identified as one of the conditions for granting Ukraine the status of a member of the Council of Europe the need 'to adopt a new Criminal Procedure Code within a year from the date of accession to the Council of Europe'.[38] This was emphasised in a number of subsequent PACE resolutions.[39]

35 Law of Ukraine 'On Amendments to the Criminal Procedure Code of Ukraine' of 21 June 2001 <https://zakon.rada.gov.ua/laws/show/2533-14/ed20010621#Text> accessed 20 June 2021.

36 Law of Ukraine 'On Amendments to the Criminal Procedure Code of Ukraine' of 12 July 2001 <https://zakon.rada.gov.ua/laws/show/2670-14/ed20010712#Text> accessed 20 June 2021> accessed 20 June 2021.

37 *Kharchenko v Ukraine* App No 40107/02 (ECtHR, 10 February 2011) <https://zakon.rada.gov.ua/laws/show/974_662#Text)> accessed 20 June 2021.

38 PACE Opinion No 190 (1995) 'On Ukraine's Application to Join the Council of Europe' of 26 September 1995 (para 11.5) <https://zakon.rada.gov.ua/laws/show/994_590#Text> accessed 20 June 2021.

39 In one of them (PACE Resolution No 1755 of 4 October 2010 'Functioning of Democratic Institutions in Ukraine' para 3.7.3 <https://zakon.rada.gov.ua/laws/show/994_a19#Text)> accessed 20 June 2021), PACE called Ukrainian authorities to adopt the CPC as soon as possible and to apply to the Venice Commission (European Commission for Democracy through Law) for an examination of this Code.

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All this time, work continued on the preparation of the new CrPC of Ukraine, which became more intensive with the adoption of new concepts on improving the judiciary and reforming the criminal justice system of Ukraine.[40] During this period, various working groups prepared several drafts of the new CrPC of Ukraine, the provisions of which were the subject of lively discussions and debates between both scholars and practitioners, expert assessments of Council of Europe experts.[41] Finally, on 13 April 2012, the Verkhovna Rada of Ukraine, based on a draft CrPC prepared by a working group of the Ministry of Justice of Ukraine together with the National Commission for Strengthening Democracy and Rule of Law under the President of Ukraine,[42] adopted a new Criminal Procedure Code of Ukraine,[43] which came into force on 20 November 2012.

Like other large-scale laws, this Code is not perfect, as perfect ones simply do not exist. But in order to improve the legal regulation of criminal proceedings in Ukraine, it first incorporated the relevant key provisions of the Constitution of Ukraine and international legal acts on human rights and justice and, second, settled a number of issues that were important for criminal proceedings, but were either unregulated or partially regulated by other laws or regulations.

From this point of view, the important novelties in the CrPC of Ukraine in 2012 are the following.

First, with an emphasis on the rights of the person, the content of the criminal procedural legislation of Ukraine and the tasks of criminal proceedings are determined. In disclosing the content of the criminal procedure legislation of Ukraine (Part 2 of Art. 1 of the CrPC), which determines the procedure of criminal proceedings in Ukraine, the CrPC provided for its components, in addition to the Code, the relevant provisions of the Constitution of Ukraine, and international treaties, consent to the binding nature of which was given by the Verkhovna Rada of Ukraine. The need to comply with their requirements by bodies and persons conducting criminal proceedings is also emphasised in Art. 9 of the CrPC, which establishes the principle of legality.

Defining the tasks of criminal proceedings, the legislator emphasises the need to ensure the rights of the individual in each component of these tasks.

> The objectives of criminal proceedings are to protect the individual, society and the state from criminal offenses, to protect the rights, freedoms and legitimate interests of participants in criminal proceedings, and to ensure prompt, complete and impartial investigation and trial so that anyone who commits a criminal offense is prosecuted to the extent of their guilt, no innocent person is accused or convicted, no person is subjected to unreasonable procedural coercion and that each participant in criminal proceedings is subject to due process of law (Art. 2 of the CrPC).

40 The concept of improving the judiciary to establish a fair court in Ukraine in accordance with European standards, approved by the Decree of the President of Ukraine No 361 of 10 May 2006 <https://zakon.rada.gov.ua/laws/show/361/2006#Text> accessed 20 June 2021; The concept of reforming the criminal justice of Ukraine, approved by the Decree of the President of Ukraine of 8 April 2008 No 311/2008 <https://zakon.rada.gov.ua/laws/show/311/2008#Text> accessed 20 June 2021; The concept of criminal justice for juveniles in Ukraine approved by the Decree of the President of Ukraine No 597 of 24 May 2011 <https://zakon.rada.gov.ua/laws/show/597/2011#Text> accessed 20 June 2021.

41 See, in particular, the Opinion on the Draft Criminal Procedure Code of Ukraine, prepared by the Directorate for Justice and Human Dignity of Directorate General 1 - Human Rights and the Rule of Law, based on the expertise of Lorena Bachmeier-Winter, Jeremy McBride and Eric Svanidze, Strasbourg, 2 November 2011 DG-1 (2011) 16 <https://rm.coe.int/16802e707c> accessed 20 June 2021.

42 Criminal Procedure Code of Ukraine. Draft [2009] Bulletin of the Ministry of Justice of Ukraine (special issue) 13-243.

43 The Criminal Procedure Code [2013] VVR 9-13 <https://zakon.rada.gov.ua/laws/show/4651%D0%B0-17/print1330026115579985#Text> accessed 20 June 2021.

Secondly, for the first time in the CrPC, a separate chapter (Chapter 2, Section 1) defines the principles of criminal proceedings, on which the whole system of criminal proceedings is based, and which testify that, in addition to those principles that were separately enshrined in the CrPC earlier, particular attention is paid to those new ones that are related to the need to ensure human rights in criminal proceedings, such as the rule of law, access to justice, adversarial proceedings, and freedom to present evidence to the court and prove their persuasiveness, reasonable procedural deadlines, and the full recording of the trial by technical means.

Thirdly, the right of each accused to a jury trial (consisting of two judges and three jurors) is enshrined in criminal proceedings in the court of first instance for crimes for which the Criminal Code of Ukraine provides for life imprisonment, at the request of the accused or one of them, if there are several persons in the criminal proceeding (Part 5 of Art. 124 of the Constitution of Ukraine, Part 3 of Art. 31 of the CrPC), and provides for proceedings in a jury trial as a special procedure in the court of first instance (para. 2 of Chapter 30 of the CrPC).

Fourthly, compared to the CrPC of 1960, the powers of the investigating judge related to the protection and defence of the rights of the individual at the stage of pre-trial investigation have been expanded. At the same time, the CrPC stipulates that an investigating judge is a judge of a court of first instance whose powers include exercising judicial control over the observance of the rights, freedoms, and interests of persons in criminal proceedings. In the case provided for in Art. 247 of the CrPC, it is the chairman or another judge of the relevant appellate court, as recognised by him/her.

The investigating judge (investigating judges) in the court of first instance is elected by the assembly of judges from among the judges of this court (para. 18, Part 1 of Art. 3 of the CrPC). During the pre-trial investigation, the investigating judge considers:

1) the request of the investigator or prosecutor for permission to conduct investigative (search) actions, in particular, search and seizure (Art.s 233-235 of the CrPC) and covert investigative actions (detection);
2) the request of the participants of the pre-trial investigation on the application of precautionary measures and other measures to ensure criminal proceedings – at the same time, to assess the needs of the pre-trial investigation, the investigating judge must consider the possibility to obtain things and documents that can be used during the trial to establish the circumstances of the criminal proceedings (Art. 132 of the CrPC);
3) all motions for revocations filed with any participant in the pre-trial investigation (Part 2 of Art. 81 of the CrPC);
4) complaints against decisions, actions, or omissions of pre-trial investigation bodies or the prosecutor (Art. 303 of the CrPC);
5) motions of participants in criminal proceedings for interrogation of a witness, a victim in exceptional cases related to the need to obtain their testimony during the pre-trial investigation if there is a danger to the life and health of the witness or victim, their serious illness, or other circumstances that may prevent their interrogation in court or affect the completeness or accuracy of the testimony ('deposit of testimony'); when making a court decision based on the results of the trial of criminal proceedings, the court may not take into account evidence obtained in this manner, only giving the reasons for such a decision (parts 2 and 3 of Art. 225 of the CrPC);
6) performance of other duties to protect human rights (Art. 206 of the CrPC).

Fifth, considerable attention is paid by the legislator to the definition of inadmissibility of evidence obtained as a result of a significant violation of human rights and freedoms

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(Part 1 of Art. 87 of the CrPC) and the procedure for declaring evidence inadmissible by the court both during their evaluation in the deliberation room and during the trial. Further, the parties to the criminal proceedings, the victim, or the representative of the legal entity in respect of which the proceedings take place are given the right during the trial to file a motion to declare evidence inadmissible, as well as to object to the recognition of evidence as inadmissible (Art. 89 of the CrPC).

In particular, it ordered the court to recognise the following acts as significant violations of human rights and fundamental freedoms:

- carrying out procedural actions that require prior permission of the court, without such permission or in violation of its essential conditions;
- obtaining evidence as a result of torture, cruel, inhuman, or degrading treatment or threat of such treatment;
- violation of a person's rights to protection;
- receiving testimony or explanations from a person who has not been notified of his/her right to refuse to testify and not answer questions, or to receive them in violation of this right;
- violation of the right to cross-examination (Part 2 of Art. 87 of the CrPC).

Sixth, based on the fact that precautionary measures and other measures to ensure criminal proceedings (Art. 131 of the CrPC) are measures of procedural coercion, which are associated with the possibility of significant restriction of individual rights, the CrPC not only defined the grounds, conditions, procedure, and terms of their application but also, for the first time, established a requirement that the bodies and persons conducting criminal proceedings and applying measures to ensure criminal proceedings are obliged to consider the possibility of obtaining relevant things and documents or ensure proper conduct of participants in criminal proceedings in other ways related to such restrictions of rights and not applying them (Part 4 of Art. 132 of the CrPC).

Regarding the application of precautionary measures, which is associated with the greatest restriction of individual rights, the CrPC provided even more severe prohibitions. The investigator, coroner, and prosecutor have no right to initiate the application of a precautionary measure without grounds for this, which are the existence of reasonable suspicion of committing a criminal offence, as well as the risks that give sufficient grounds to the investigating judge or court to believe that the suspect, accused, or convicted may hide from the bodies of pre-trial investigation and/or court, obstruct criminal proceedings, or commit another criminal offence or continue the one in which he/she is suspected or accused (Art. 177 of the CrPC). The investigating judge or court refuses to apply a precautionary measure if the investigator or prosecutor does not prove that the circumstances established during the consideration of the application for precautionary measures are sufficient to convince the judge that none of the milder precautionary measures can prevent the examination of risk or risks (Part 3 of Art. 176 of the CrPC).

Seventh, the law (Art. 223 of the CrPC) establishes a number of stricter and newer requirements for investigative (search) actions, which are related to ensuring the rights of participants in the pre-trial investigation:

- the taking of appropriate measures by the investigator or prosecutor to ensure the presence during the investigative (search) action of persons whose rights and legitimate interests may be limited or violated;
- explanation before conducting an investigative (search) action to the persons participating in it, outlining their rights, duties, and responsibilities;
- prohibition of investigative (search) actions at night (from 22 to 6 o'clock), except for urgent cases, when the delay in their conduct may lead to the loss of traces of a criminal offence or the escape of the suspect;

- when receiving evidence during the investigative (search) action that may indicate the innocence of a person in the commission of a criminal offence, the investigator or prosecutor is obliged to conduct the relevant investigative (search) action in full, attach the procedural documents to the pre-trial investigation, and submit them to the court in the case of an indictment, or request the application of coercive measures of a medical or educational nature or for release from criminal liability;
- investigative (search) action carried out at the request of the defence, the victim, or the representative of the legal entity against which the criminal proceedings are conducted is carried out with the participation of the person who initiated it and (or) his defence counsel or representative, except when investigative (search) action is impossible or such a person refuses in writing to participate in it, etc.

Eighth, for the first time in the new CrPC of Ukraine (Chapter 21), covert investigative actions (hereinafter, CIA) as a type of investigative (detection) actions, information about the fact, and methods are not subject to disclosure, except as provided this Code (Part 1 of Art. 246 of the CrPC).

It is clear that the secret nature of these procedural actions does not provide the same rights of participants in criminal proceedings as during the usual investigative (search) actions. This is taken into account by the legislator when setting certain conditions for their implementation. Thus, according to Part 2 of Art. 246 of the CrPC, they are conducted only in cases where information about the crime and the person who committed it cannot be obtained in any other way.

The vast majority of CIA are conducted exclusively in criminal proceedings for serious or especially serious crimes. In cases provided for by the CrPC, the decision to hold them is made by the investigating judge at the request of the prosecutor or at the request of the investigator in agreement with the prosecutor. The investigator is obliged to inform the prosecutor about the decision to conduct certain CIAs and the results obtained. The prosecutor has the right to prohibit or suspend further actions. Only the prosecutor has the right to make a decision on carrying out such CIA as control over the commission of a crime. In the decision on carrying out CIA, the term within which it is to be carried out (which can be prolonged) must be specified.

Art. 253 of the CrPC stipulates that persons whose constitutional rights were temporarily restricted during the CIA, as well as the suspect and their defence counsel, must be notified in writing by the prosecutor or on behalf of the investigator of such a restriction. The specific time of notification shall be determined, taking into account the presence or absence of threats to the achievement of the purpose of the pre-trial investigation, public safety, life, or health of the persons involved in the CIA. Relevant notification of the fact and results of the CIA must be made within 12 months from the date of termination of such actions, but no later than the prosecutor's appeal to the court with an indictment.

The results of CIA can be used as proof. According to Art. 256 of the CrPC, protocols on conducting CIA, audio or video recordings, other results obtained through the use of technical means, and items and documents or their copies seized during the conduct of CIA may be used in evidence on the same grounds as the results of conducting other IA (investigative actions) during the pre-trial investigation. Persons who have conducted or been involved in CIA, as well as persons whose actions or contacts have been carried out, may be questioned as witnesses.

Materials obtained during the pre-trial investigation through CIA and which the prosecutor must use in court as evidence of the accusation should, if possible, be declassified and disclosed

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to the defence under Art. 290 of the CrPC of Ukraine. As the procedure of declassification of materials can be quite complicated and lengthy, these materials, as the Grand Chamber of the Supreme Court clarified in its ruling,[44] can be opened by the prosecution not only after the pre-trial investigation before the indictment is sent to court but also during the trial in court, provided that the prosecutor takes all necessary measures to obtain them in a timely manner.

In enshrining the CPD in 2012, the legislator of Ukraine tried to take into account the recommendations of the Council of Europe,[45] which stated that 'special methods of investigation' means methods used by the competent authorities in criminal investigations to detect and investigate serious crimes and identify suspects. In order to avoid arousing the suspicion of the 'object of investigation' (para. 1 of section 1 of the Annex to the Recommendation), member states should, in accordance with the requirements of the ECHR, indicate in their legislation the circumstances and conditions under which competent authorities have the right to use special methods of investigation (para. 1 of Section II of the Annex).

Ninth, in the proceedings under the CrPC of Ukraine from 2012, more complete and consistent implementation of the principle of adversarial parties and freedom to submit their evidence to the court and prove before the court their persuasiveness is provided for (Art. 22 of the CrPC).

The court, maintaining objectivity and impartiality, creates the necessary conditions for the parties to exercise their procedural rights and perform their procedural obligations (Part 6 of Art. 22 of the CrPC). At the same time, the presiding judge directs the course of the court session, ensures compliance with the sequence and procedure of procedural actions and the exercise of their procedural rights and obligations by the participants of the criminal proceedings, directs the trial to ensure clarification of all circumstances of the criminal proceedings, and ensures consideration of everything that is irrelevant for criminal proceedings (Part 1 of Art. 321 of the CrPC).

Tenth, the CrPC of 2012, based on a new system of principles of criminal proceedings (rule of law, access to justice, reasonable time of criminal proceedings, etc.), abandoned the institution of returning a criminal case for further investigation on the grounds of incomplete or incorrect pre-trial investigation, although incompleteness or incorrectness cannot be eliminated in court (Part 1 of Art. 281 of the CrPC of 1960).

This institution was envisaged and widely used under the CrPC in 1960, and, often, the prosecutor decided to close a criminal case returned for additional investigation on rehabilitative grounds – in the absence of a crime, lack of *corpus delicti*, failure of a person accused of committing a crime to participate (paras 1 and 2 of Part 1 of Art. 6, para. 2 of Art. 213 of the CrPC of 1960) – according to which the court, as a body of justice, should pass sentence (Part 4 of Art. 327 of the CrPC of 1960).

Unlike the CrPC of 1960, under the current CrPC of Ukraine, if, during the trial, there is a need to establish circumstances or verify circumstances that are essential for criminal proceedings, and they cannot be established or verified in any other way, the court, when requested, has the right to instruct the pre-trial investigation body to carry out certain investigative (search) actions. In the event of such a decision, the court postpones the trial for a sufficient period to conduct an investigative (search) action and familiarise the participants in the proceedings with its results. However, the court denies the prosecutor's request if it

44 Resolution of the Grand Chamber of the Supreme Court of 16 October 2019 in case No 640 / 6847/15-к (proceedings No 13-43кс19 https://reyestr.court.gov.ua/Review/85174578> accessed 20 June 2021.

45 Recommendation No Rec (2005) 10 of the Committee of Ministers of the Council of Europe to member states 'On Special Methods of Investigating Serious Crimes as well as in the Case of Terrorist Acts' of 20 April 2005 <https://zakon.rada.gov.ua/laws/show/994_670#Text> accessed 20 June 2021.

does not prove that the investigative (search) actions could not have been carried out during the pre-trial investigation because of the circumstances proving their necessity (Part 3 and 4 of Art. 333 of the CrPC).

Lastly, the CrPC of 2012 provides for a number of new types of criminal proceedings:

- criminal proceedings containing information constituting a state secret (Chapter 40),
- criminal proceedings on the basis of conciliation agreements between the victim and the suspect or accused, as well as agreements between the prosecutor and the suspect or accused on the admission of guilt (Chapter 35),
- criminal proceedings against a particular category of persons (Chapter 37),
- criminal proceedings on the territory of diplomatic missions, consular posts of Ukraine on an aircraft, sea, or river vessel located outside Ukraine, if this vessel is assigned to a port located in Ukraine (Chapter 41).

For the first time, the CrPC also regulated the recovery of lost materials from criminal proceedings (Section VII). Further, it considered the provisions of international treaties relating to criminal proceedings and the issue of international cooperation in criminal proceedings: international legal assistance in proceedings (Chapter 43); extradition of persons who have committed a criminal offence (extradition) (Chapter 44); criminal proceedings in the order of adoption (Chapter 45); recognition and enforcement of foreign court decisions and transfer of convicted persons (Chapter 46).

The importance of this stage for the development of the criminal process in Ukraine is, first of all, that during this period, considerable work was done to systematise the criminal procedure legislation of Ukraine. As a result of this work, taking into account the Constitution of Ukraine, international legal acts on human rights and justice, and decisions of the European Court of Human Rights, the first new Criminal Procedure Code in independent Ukraine was adopted, which is a kind of procedural constitution defining the due process for bodies and persons conducting criminal proceedings and for individuals and legal entities involved in criminal proceedings. Emphasising the importance of the CrPC of Ukraine, the legislator stressed that the laws and other regulations of Ukraine, the provisions of which relate to crime, should ensure the prompt, complete, and impartial pre-trial investigation and that trial proceedings must comply with this Code. When conducting criminal proceedings, a law that contradicts this Code may not be applied (Part 3 of Art. 9 of the CrPC).

4 THE DEVELOPMENT OF CRIMINAL PROCEDURE AFTER THE ADOPTION OF THE CRPC OF UKRAINE IN 2012

Since its adoption in 2012, the CrPC of Ukraine has undergone important changes and additions, especially to the articles of the CrPC, which were aimed at improving the legal regulation of the rights of everyone to access to justice, fair trial, protection, liberty, and security of person (Arts. 5 and 6 of the ECHR) both during the pre-trial investigation and in the court proceedings, including changes related to the tragic events in the life of the state of Ukraine.

4.1 Features of Legal Regulation of Criminal Procedural Activity in the Conditions of Anti-terrorist Operation

In the context of the annexation of Crimea by the Russian Federation, the occupation of certain districts of Donetsk and Luhansk regions, and the inability to administer justice there, Ukraine was forced to take advantage of Art. 4 of the ICCPR and Art. 15 of the ECHR to derogate from obligations during an emergency in time of war or other public danger

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threatening the life of the nation. The articles stipulate that any High Contracting Party may take measures which derogate from its obligations under this Covenant and under this Convention, only to the extent required by the urgency of the situation and under conditions that such measures do not conflict with its other obligations under international law.

In May 2015, the Verkhovna Rada of Ukraine approved the Statement of the Verkhovna Rada of Ukraine 'On Ukraine's Derogation from certain obligations defined by the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms by its resolution'.[46] It concerns a waiver of the obligations set out in Art. 2 § 3, Arts. 9, 12, 14, and 17 of the ICCPR and Arts. 5, 6, 8, and 13 of the ECHR (on the right to liberty and security of person, the right to a fair trial, the right to respect to private and family life, the right to effective legal protection), for the period until the complete cessation of the armed aggression of the Russian Federation, namely, until the withdrawal of all illegal armed formations controlled and financed by the Russian Federation, Russian occupation forces, and their military equipment from the territory of Ukraine, the restoration of full control of Ukraine on the state border of Ukraine, and the restoration of the constitutional order in the occupied territory of Ukraine.

The digression was that the Laws adopted by the Verkhovna Rada of Ukraine on 12 August 2014 provided:

> 1) as an exception, the possibility of preventive detention of persons involved in terrorist activities in the area of long-term anti-terrorist operations for a period of more than 72 hours, but not more than 30 days, with the consent of the prosecutor and without the decision of the investigating judge;[47]
>
> 2) at the time of the anti-terrorist operation, a special pre-trial investigation regime is introduced, according to which the powers of investigating judges defined by the current CrPC of Ukraine are temporarily transferred to the relevant prosecutors, who acquire additional procedural rights. This regime operates exclusively in the area of anti-terrorist operation, provided that the investigating judge is unable to perform the powers specified by the current CrPC of Ukraine.[48] The CrPC of Ukraine was supplemented with a new section IX-1 'Special regime of pre-trial investigation in martial law, state of emergency or in the area of anti-terrorist operation' with Art. 615 with the same title, which now has a new version as of 27 April 2021.[49]
>
> Art. 615 of the CrPC provided that in the area (administrative territory) where the legal regime of martial law, state of emergency, or an anti-terrorist operation is in power, in case of impossibility to perform investigative judge powers within the statutory time, these powers are exercised by the relevant prosecutor under Arts. 163, 164 (consideration and resolution of temporary

46 Statement of the Verkhovna Rada of Ukraine 'On Ukraine's Derogation from Certain Obligations' defined by the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms approved by the Resolution of the Verkhovna Rada of Ukraine of 21 May 2015. <https://zakon.rada.gov.ua/laws/show/462-19#Text> accessed 21 July 2021.

47 Law of Ukraine 'On Amendments to the Law of Ukraine "On Combating Terrorism" on Preventive Detention in the Area of Anti-terrorist Operation of Persons Involved in Terrorist Activities for a Period of More than 72 hours' of 12 August 2014 No 1631-VII <https://zakon.rada.gov.ua/laws/show/1630-18#Text> accessed 21 July 2021.

48 Law of Ukraine 'On Amendments to the Criminal Procedure Code of Ukraine on a Special Regime of Pre-trial Investigation in Martial law, State of Emergency or in the Area of Anti-terrorist Operation' of 12 August 2014 No 1631-VII <https://zakon.rada.gov.ua/laws/show/1631-18#Text> accessed 21 July 2021.

49 Law of Ukraine 'On Amendments to the Criminal Procedure Code of Ukraine to Improve Certain Provisions in Connection with the Special Pre-trial Investigation' of 27 April 2021 No 1422-IX <https://zakon.rada.gov.ua/laws/show/1422-20#Text> accessed 21 July 2021.

access to things and documents), 234, 235 (granting permission to conduct a search of housing or other property of a person), 247, and 248 (granting permission to conduct covert investigative (search) action) of this Code, as well as the authority to choose a measure of restraint in the form of detention for up to 30 days to persons suspected of committing crimes under Arts. 109-114-1, 258-258-5, 260-263-1, 294, 348, 349, 377-379, 437-444 of the CrPC.

3) at the time of the anti-terrorist operation or a change in the territorial jurisdiction of court cases, the courts located in the area of the anti-terrorist operation and the jurisdiction of criminal offences committed in the area of the anti-terrorist operation are provided for in case of the impossibility of conducting pre-trial investigation in separate regions of Donetsk and Luhansk regions, caused by the armed aggression of the Russian Federation and the actions of terrorist groups supported by the Russian Federation.[50]

4.2 Introduction of Special Criminal Proceedings (in absentia)

In the context of the military aggression of the Russian Federation against Ukraine, a special pre-trial investigation and special court proceedings (*in absentia*) were introduced.

These are proceedings against persons suspected of committing serious and especially serious crimes against the foundations of national security of Ukraine, against the life and health of a person, against public security (in particular, actions aimed at forcible change or overthrow of the constitutional order or seizure of state power (Art. 109 of the CrPC), encroachment on the territorial integrity and inviolability of Ukraine (Art. 110 of the CrPC), treason, sabotage, espionage, premeditated murder, creation of a criminal organisation, banditry, terrorist act, etc., but hidden from the investigation and the court in order to avoid criminal liability and being declared wanted interstate and/or internationally (Part 5 of Art. 139, Chapter 24-1 'Features of the Special Pre-trial Investigation of Criminal Offenses', Part 3 of Art. 323 of the CrPC).[51]

Later, the Law of 27 April 2021[52] clarified the definition of the subject against which special criminal proceedings are to be conducted – in respect of a suspect, except a minor, who is hiding from the investigation and court in the temporarily occupied territory of Ukraine, in a state recognised by the Verkhovna Rada. Ukraine is an aggressor state so that it can avoid suspects evading criminal liability and/or being declared internationally wanted.

According to Part 5 of Art. 139 of the CrPC, evasion from appearing on the summons of an investigator or prosecutor or summons of an investigating judge or court (failure to appear on summons without good reason more than twice) by a suspect or accused, who is declared internationally wanted, and/or left, and/or is in the temporarily occupied territory of Ukraine, the territory of the state recognised by the Verkhovna Rada of Ukraine as the aggressor state, is the basis for a special pre-trial investigation or special court proceedings.

The amendments and additions made to the CrPC of Ukraine regulated the peculiarities of establishing the circumstances of criminal proceedings against a missing suspect or accused

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50 Law of Ukraine 'On the Administration of Justice and Criminal Proceedings in Connection with the Anti-terrorist Operation' of 12 August 2014 No 1632-IX <https://zakon.rada.gov.ua/laws/show/1632-18#Text> accessed 21 July 2021.

51 Law of 7 October 2014 No 1689-VII 'On Amendments to the Criminal Procedure Code of Ukraine on the Inevitability of Punishment for Certain Crimes Against the Foundations of National Security, Public Safety and Corruption Crimes' <https://zakon.rada.gov.ua/laws/show/1689-18#Text> accessed 21 July 2021.

52 Law of Ukraine 'On Amendments to the Criminal Procedure Code of Ukraine to Improve Certain Provisions in Connection with the Special Pre-trial Investigation' of 27 April 2021 No 1422-IX <https://zakon.rada.gov.ua/laws/show/1422-20#Text> accessed 21 July 2021.

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and the procedure for serving a notice of suspicion, indictment, and other procedural documents and ensuring other rights of a missing suspect or accused.

In this case, according to Part 2 of Art. 7 of the CrPC, the content and form of criminal proceedings in the absence of a suspect or accused (*in absentia*) must comply with the general principles of criminal proceedings specified in Part 1 of this article, taking the peculiarities established by this law into account. The prosecution is obliged to use all possibilities provided by law to respect the rights of the suspect or accused (in particular, the rights to protection, access to justice, secrecy of communication, non-interference in private life) in criminal proceedings in the absence of the suspect or accused (*in absentia*).

The decision to conduct a special pre-trial investigation of the missing suspect is made by the investigating judge at the request of the investigator or prosecutor, and, in special court proceedings against the missing accused, it is made by the court at the request of the prosecutor (Part 3 of Art. 297-4, Part 3 of Art. 323 of the CrPC). In the case of a sentence resulting from a criminal proceeding involving a special pre-trial investigation or a special trial (*in absentia*), the court shall separately justify whether the prosecution has taken all possible measures provided by law to respect the rights of the suspect or accused to protection and access to justice, taking into account the features of such proceedings established by law (Part 5 of Art. 374 of the CrPC).

The amendments to the CrPC introduced by the Law of 27 April 2021 established additional guarantees for the right of an accused who appeared in court for a fair trial. According to Part 4 of Art. 323 of the CrPC, if, after the ruling on special court proceedings, the accused appeared or was brought to court, the trial would continue from the moment of the ruling in accordance with the general rules provided by this Code. At the request of the defence, the court continues the trial from the moment the accused appears in court and re-examines individual evidence that was examined in the absence of the accused (if the defence requests such an examination of the evidence).

4.3 Improving the Legal Regulation of the Right to Liberty and Security of Person

The CrPC of Ukraine in 2012 also made very important changes and additions aimed at improving the legal regulation of the constitutional and convention right of every person to liberty and security (Art. 29 of the Constitution of Ukraine, Art. 5 of the ECHR) during the pre-trial investigation and in litigation.

First, the provision of Part 5 of Art. 176 of the CrPC, which was supplemented by the Law of 7 October 2014 in connection with the introduction of special criminal proceedings in the form of personal obligation, personal guarantee, house arrest, or bail may not be applied to persons suspected or accused of committing crimes against the foundations of national security of Ukraine and public safety, provided for in Arts. 109-114-1, 258-258-5, 260, 261 of the CrPC. That is, only one precautionary measure was to be applied, which is detention, and, according to which precautionary measures were found, it was considered to have not met the requirements of the ECHR and the Constitution of Ukraine.

In this regard, the ECtHR, based on the provisions of Art. 6 of the ECHR, repeatedly stressed in its decisions that the gravity of the crime is a significant circumstance, but it should not require the lack of alternative to the most severe precautionary measure.[53] For the same reasons, the Constitutional Court of Ukraine year No 7-p/2019 declared the provisions of

53 Judgment in the case of *Kharchenko v Ukraine* App no 40107/02 (ECtHR, 10 February 2011) para 80 <https://zakon.rada.gov.ua/laws/show/974_662#Text> accessed 21 July 2021; decision in the case of *Hairedinov v Ukraine* App no 38717/04 (ECtHR, 14 October 2010) <https://zakon.rada.gov.ua/laws/show/974_665#Text> accessed 21 July 2021.

Part 5 of Art. 176 of the CrPC of Ukraine unconstitutional and invalid from the date of its decision.[54]

Secondly, the issue was finally resolved concerning the possibility provided by the Code (third sentence of part 3 of Art. 315 of the CrPC) of automatic continuation by the court, in the absence of motions of the parties, during the preparatory proceedings of interim measures of criminal proceedings, including precautionary measures selected in relation to the accused during the pre-trial investigation. This approach of the legislator did not comply with the provisions of Art. 5 of the ECHR on the grounds and procedure for restricting the human right to liberty and security and the decision of the ECtHR on the application of this article, in which it drew attention to the fact that detention in custody without an appropriate court decision, especially during the period after the investigation and before the trial, as well as on the basis of judgments rendered at the trial stage which do not contain certain terms of further detention, is contrary to the requirements of Art. 5 of the ECHR.[55] According to the ECtHR's practice of Art. 5 para. 3 of the ECHR, after a certain period of time, only a reasonable suspicion ceases to be a ground for deprivation of liberty, and the judicial authorities must give other grounds for continuing detention. In addition, such grounds must be clearly stated by the domestic courts (para. 60 of the judgment of 6 November 2008 in the case of *Yeloyev v. Ukraine*).[56]

In its decision, the Constitutional Court of Ukraine stated that the provisions of the Code, in the part providing for the extension of the application of measures to ensure criminal proceedings, namely, precautionary measures in the form of house arrest or detention, chosen during the pre-trial investigation, without requests of participants in criminal proceedings, in particular, the prosecutor, and without verification by the court of the validity of the grounds for their application, on which such precautionary measures were chosen at the stage of pre-trial investigation, contradicts the requirements of the Constitution of Ukraine, is unconstitutional, and therefore expires from the moment of this decision.[57]

In fact, this is how the issue of court proceedings has already been settled. According to Part 3 of Art. 331 of the CrPC of Ukraine, regardless of the motions of the prosecution or the defence, the court is obliged to consider the expediency of continuing the detention of the accused until the expiration of two months from the date of receipt of the indictment, motion on the usage of coercion measures of a medical or disciplinary nature, or from the date of application by the court to the accused as a measure of restraint in the form of detention. Following the consideration of the issue, the court cancels the measure of restraint in the form of detention, changes it, or extends its validity for a period not exceeding two months by its reasoned decision.

Thirdly, there has long been a problem that has attracted the attention of the ECtHR in connection with the finding violations of the requirements of Arts. 5 and 6 of the ECHR on Reasonable Time for Detention of the Accused and the Constitutional Court of Ukraine in

54 Decision of the CCU of 25 June 2019 No 7-p/2019 in the case of constitutional complaints of Kovtun Marina Anatoliyivna, Savchenko Nadezhda Viktorivna, Kostoglodov Igor Dmitrovich, Chornobuk Valery Ivanovich on the constitutionality of the fifth part of Art 176 of the Criminal Procedure Code of Ukraine <https://zakon.rada.gov.ua/laws/show/v007p710-19#n40> accessed 21 July 2021.

55 Decision in the case *Kharchenko v Ukraine* App no 40107/02 (ECtHR, 10 February 2011) <https://zakon.rada.gov.ua/laws/show/974_662#Text> accessed 21 July 2021.

56 Decision in the case *Yeloyev v Ukraine* App no 17283/02 (ECtHR, 6 November 2008) <https://zakon.rada.gov.ua/laws/show/974_433#Text> accessed 21 July 2021.

57 Decision of the Constitutional Court of Ukraine of 23 November 2017 No 1-p/2017 in the case of the constitutional petition of the Commissioner of the Verkhovna Rada of Ukraine for Human Rights on the constitutionality of the third sentence of part three of Art. 315 of the Criminal Procedure Code <https://zakon.rada.gov.ua/laws/show/v001p710-17#n63> accessed 21 July 2021.

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its decisions. The legislator of Ukraine also had to pay attention to this. Essentially, a court's decision to apply a measure of restraint in the form of detention could be challenged by the defence only at the same time as the decision concluding the trial, and the trial could take quite a long time – months and sometimes years.

Part 2 of Art. 392 of the CrPC provided that decisions made during court proceedings in the court of first instance before the adoption of court decisions under Part 1 of this article are not subject to separate appeal. Objections to such rulings may be included in the appeal against the court decisions provided for in Part 1 of this article.

In its decision, the Constitutional Court of Ukraine concluded that the provisions of the Code regarding the impossibility of a separate appeal against the decision of the court of first instance to extend detention do not guarantee a person the effective exercise of his/her constitutional right to judicial protection, do not meet the criteria of fairness and proportionality, do not ensure a fair balance of interests of the individual and society, and therefore contradict the requirements of the Constitution of Ukraine. It found that the provision of the CrPC of Ukraine on the impossibility of a separate appeal against the court's decision to extend the term of detention issued during the trial in the court of first instance until the court decision on the merits is inconsistent with the Constitution of Ukraine (is unconstitutional).[58]

In accordance with this decision, on 2 December 2020, the Verkhovna Rada of Ukraine adopted a law, which, in particular, supplemented Art. 331 of the CrPC with part four of the following content

> A court decision on choosing a measure of restraint in the form of detention, on changing another measure of restraint to a measure of restraint in the form of detention or on extending the term of detention, rendered during the court proceedings before the court of first instance may be appealed. Filing such a complaint does not suspend the trial in the court of first instance.[59]

4.4 Changes in the System of Bodies Conducting Criminal Proceedings for Corruption Crimes

After ratifying the UN Convention against Corruption[60] and the Criminal Convention against Corruption[61] in 2006, Ukraine became a Party to the United Nations Convention against Corruption on 2 December 2009 and the Criminal Convention on Corruption of 1 March 2010 on their application of measures to prevent, investigate, and prosecute corruption in accordance with their provisions.

After the adoption of the CrPC of Ukraine in 2012 to implement these international legal obligations, in 2014 the Law 'On Prevention of Corruption',[62] which determines the legal

58 Judgment of the Constitutional Court of Ukraine of 13 June 2019 No 4-д/2019 in the case of constitutional complaint of Glushchenko Viktor Mykolaiovych regarding the compliance of the Constitution of Ukraine (constitutionality) with the provisions of Part Two of Art 392 of the Criminal Procedure Code of Ukraine <https://zakon.rada.gov.ua/laws/show/v004p710-19#Text> accessed 21 July 2021.

59 Law of Ukraine 'On Amendments to the Criminal Procedure Code of Ukraine to Ensure the Implementation of the Decision of the Constitutional Court of Ukraine on Appeals against the Court Decision to Extend the Detention period' of 2 December 2020 No 1027-IX <https://zakon.rada.gov.ua/laws/show/1027-20#Text> accessed 21 July 2021.

60 UN Convention against Corruption of 31 October 2003 and the Law of Ukraine 'On Ratification of the United Nations Convention against Corruption' of 18 October 2006 <https://zakon.rada.gov.ua/rada/show/251-16#Text> accessed 21 July 2021.

61 Criminal Convention against Corruption <https://zakon.rada.gov.ua/rada/show/994_101#Text> accessed 21 July 2021.

62 Law of Ukraine 'On Prevention of Corruption' of 14 October 2014 No 1700-VII <https://zakon.rada.gov.ua/laws/show/1700-18#Text> accessed 21 July 2021.

and organisational basis for the functioning of the anti-corruption system in Ukraine, the content and procedure for the application of preventive anti-corruption mechanisms, and rules for eliminating the consequences of corruption offences.

Laws on bodies to conduct criminal proceedings on corruption crimes have also been passed:

- on the National Anti-Corruption Bureau of Ukraine63 as a state law enforcement body, which is responsible for preventing, detecting, terminating, investigating, and disclosing corruption offences under its jurisdiction (Part 5 of Art. 216 of the CrPC of Ukraine), as well as preventing the commission of new ones (Art. 1 of the Law);
- on the Specialized Anti-Corruption Prosecutor's Office,64 which supervises compliance with the law during operational and investigative activities, pre-trial investigation by the National Anti-Corruption Bureau of Ukraine, and support of public prosecution in relevant proceedings (Art. 8 of the Law);
- on the Supreme Anti-Corruption Court,65 which is a permanent higher specialised court in the judicial system of Ukraine and administers justice as a court of first and appellate instances in criminal proceedings concerning criminal offences within its jurisdiction by procedural law, as well as by carrying out judicial control over the observance of the rights, freedoms, and interests of persons in such criminal proceedings in cases and in the manner prescribed by procedural law (Part 1 of Art. 1 and Part 1 of Art. 4 of the Law). According to Part 1 of Art. 33-1 of the CrPC, the Supreme Anti-Corruption Court is charged with criminal proceedings against corruption offences provided for in Art. 456 of the Criminal Code of Ukraine, Arts. 206-2,209, 211, 366-2, 366-3 of the CrPC, if at least one of the conditions provided for in paragraphs 1-3 of the fifth article 216 of the CrPC of Ukraine.

In criminal proceedings for corruption offences, a new participant in criminal proceedings appeared, who is designed to assist in exposing acts of corruption. This is a corruption detector – a natural person who, in the presence of conviction that the information is reliable, files a statement or notification of a corruption criminal offence to the pre-trial investigation body (para. 16-2 of the CrPC, para. 1.1 of the Law of Ukraine 'On Amendments to the Law of Ukraine "On Prevention of Corruption" Regarding Corruption Detectors' of 17 October 2019)[66] and who is entitled to payment of remuneration for the report of a corruption crime and assistance in its disclosure (Art. 131-1 of the CrPC).

It should also be noted that after the adoption of the CrPC in 2012, there were other changes in the system of bodies conducting criminal proceedings. First, the issue of depriving the prosecutor's office of the function of conducting a pre-trial investigation was finally resolved due to the inadmissibility of conducting a pre-trial investigation by one body and overseeing the legality of this pre-trial investigation.

Even during the adoption of the Constitution of Ukraine in 1996, the legislator provided in para. 9 of Section 15 'Transitional Provisions' that

63 Law 'On the National Anti-Corruption Bureau of Ukraine' of 14 October 2014 No 1698-VII <https://zakon.rada.gov.ua/laws/show/1698-18#Text> accessed 21 July 2021.

64 Law 'On the Prosecutor's Office' of 14 October 2014 No 1697-VII (Part 5 of Art 8, Art 8-1) <https://zakon.rada.gov.ua/laws/show/1697-18#Text> accessed 21 July 2021.

65 Law 'On the Supreme Anti-Corruption Court' of 7 June 2018 No 2447-VIII <https://zakon.rada.gov.ua/laws/show/2447-19#Text> accessed 21 July 2021.

66 Law of Ukraine 'On Amendments to the Law of Ukraine "On Prevention of Corruption" Regarding Corruption Detectors' of 17 October 2019 <https://zakon.rada.gov.ua/laws/show/198-20#Text> accessed 21 July 2021.

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> the prosecutor's office continues to perform the function of pre-trial investigation in accordance with current laws until the functioning of the bodies to which the law will transfer relevant functions.

Some of the criminal cases under investigation by prosecutors (in particular, murders and rapes) were transferred to the investigation of internal affairs bodies (now, the investigative bodies of the National Police of Ukraine) before the adoption of the CrPC in 2012.[67] Para. 4 of Section XIII 'Transitional Provisions' of the Law on Prosecutor's Office'[68] provided that investigators of the prosecutor's office conduct pre-trial investigations in the manner prescribed by the CrPC of Ukraine before the State Bureau of Investigation, but no later than five years after the entry into force of the CrPC of Ukraine before the State Bureau of Investigation.

In 2015, the Law on the State Bureau of Investigation (hereinafter referred to as the SBI) was adopted. After the SBI began its pre-trial investigation, criminal proceedings were transferred to it by investigators from the prosecutor's office.

Secondly, in order to create a single state body responsible for combating economic crimes and avoid duplication of relevant functions in different law enforcement agencies, the Law 'On the Bureau of Economic Security of Ukraine'[69] was adopted, which entered into force on 25 March 2021 and created The Bureau of Economic Security of Ukraine (BES of Ukraine) which is a body of central executive power entrusted with the task of counteracting offences that encroach on the functioning of the state economy (Art. 1 of the Law).

This body was created instead of the tax police, which is being liquidated, and it also takes over the functions of the National Police of Ukraine and the Security Service of Ukraine for Investigation of Crimes in Public Finance and Management to avoid duplication of functions in different law enforcement agencies. Detectives of the BES of Ukraine must, within their competence defined by the Law 'On Operational and Investigative Activities' and the CrPC of Ukraine, carry out operative and investigative activities and pre-trial investigation of criminal offences referred by law to the BES of Ukraine (Art. 216 of the CrPC).

5 CONCLUSIONS

After the fall of the Soviet Union and the proclamation of independence, Ukraine, as a subject of international law, in the first fundamental document, which is the Declaration of State Sovereignty of Ukraine, immediately declared recognition of the superiority of universal values over class ones and the priority of universally recognised norms of international law over domestic law, based on the needs of comprehensive human rights and freedoms and recognising the need to build the rule of law. These provisions determined the main content of the formation and development of the criminal procedure in Ukraine at all stages. At the first stage, during 1990-1994, a number of laws were adopted that determined the legal status of the parties to criminal proceedings (court, prosecutor's office, SSU, police, advocacy) and other important issues related to the criminal procedure (on pre-trial detention, on ensuring the safety of persons involved in criminal proceedings, on the procedure for compensation

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67 Law of Ukraine 'On Amendments to Art 112 of the Criminal Procedure Code of Ukraine' of 19 April 2007 No 965-У <https://ips.ligazakon.net/document/KD0007> accessed 21 July 2021.

68 Law on the Prosecutor's Office of 14 October 2014 <https://zakon.rada.gov.ua/laws/show/1697-18#Text> accessed 21 July 2021.

69 On 28 January 2021, the Law 'On the Bureau of Economic Security of Ukraine' was adopted <https://zakon.rada.gov.ua/laws/show/1150-20#Text> accessed 21 July 2021.

for damage caused to a citizen by illegal actions of pre-trial investigation, prosecution and court). Amendments were made to the CrPC of 1960 in terms of the tasks of the criminal procedure and its content, emphasising the need to ensure the rights of the individual both during the pre-trial investigation and in court proceedings.

The main stage in the development of the criminal procedure was the period when Ukraine adopted its Constitution in 1996, in which it proclaimed itself a state governed by the rule of law (Art. 1), declared the establishment and protection of human rights and freedoms as its main duty (Art. 3), enshrined the basic principles of justice, human rights, and their judicial guarantees, and, having ratified the ECHR in 1997, undertook to recognise the jurisdiction of the ECtHR and the binding nature of the Court's judgments in cases of its citizens against Ukraine.

This determined the content of further amendments to the CrPC of 1960 and the adoption on 13 April 2012 of the new CrPC of Ukraine, which established a system of general principles of criminal procedure inherent in the state governed by the law (rule of law, access to justice, etc.) and judicial control over rights and legitimate interests of persons during the pre-trial investigation and adversarial proceedings in the litigations, taking into account the basic requirements of the Constitution of Ukraine and international legal acts to ensure the rights of the person.

It is clear that with the adoption of the new Code, the development of criminal procedure legislation has not been completed. Both external and internal factors forced Ukraine to make changes and additions (Russia's military aggression against Ukraine in eastern Ukraine and the anti-terrorist operation, the issue of fighting corruption, etc.).

The process of improving criminal procedural legislation continues, including the further strengthening of judicial guarantees of human rights in criminal proceedings and the need to combine public and private interests in criminal proceedings. This is due to the rather disappointing statistics of citizens' appeals for protection of their rights to the ECtHR, resulting in Ukraine ranking highest for numbers of appeals from year to year.[70]

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70 European Convention on Human Right, Press Country Profile <https://www.echr.coe.int/Documents/CP_Ukraine_ENG.pdf> accessed 21 July 2021.

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Research Article

THE STRUGGLE FOR CLASS RANKS AND PROSECUTOR'S DRESS DURING UKRAINIAN INDEPENDENCE: HISTORICAL, LEGAL, AND CULTURAL PERSPECTIVES

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Summary: 1. Introduction. – 2. A Retrospective Review of the Reform of the Prosecutor's Office of Ukraine during the Period of Independence, with Class Ranks and Prosecutor's Dress as Elements. – 3. Draft Law (No. 3062 of 13 February 2020) on the Restoration of Class Ranks and Uniforms of Prosecutors. – *3.1. Passing the Regulatory Procedure. – 3.2. Arguments 'for' Class Ranks and Prosecutor's Dress.* – 4. Analysis of the Idea of Returning Class Ranks and Prosecutor's Dress in the Prosecutor's Office of Ukraine. – *4.1. The International Law Aspect (pacta sunt servanda). – 4.2 The Constitutional-functional Aspect. – 4.3. The Procedural Aspect. – 4.4. The Financial (material) Aspect. – 4.5. The Encouraging (stimulating) Aspect. – 4.6. The Psychological Aspect. – 4.7. The Comparative Encouraging Aspect. – 4.8 The Globalisation (comparative law) Aspect. – 4.9. The Cultural (symbolic) Aspect. – 4.10. The Professional Deontological Aspect. – 4.11. The Sociological Aspect.* – 5. Conclusions.

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CONFLICTS OF INTEREST

The author declares no conflict of interest of relevance to this topic.

DISCLAIMER

The author declares that she was not involved in the preparation of the analysed law draft and does not represent any views of the legislative or other state bodies. The author serves as an attorney-at-law, thus, this does not bind her and does not reflect in this study.

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THE STRUGGLE FOR CLASS RANKS AND PROSECUTOR'S DRESS DURING UKRAINIAN INDEPENDENCE: HISTORICAL, LEGAL, AND CULTURAL PERSPECTIVES

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Abstract *This article is devoted to the problem of confrontation between researchers about the dress of Ukrainian prosecutors and whether prosecutors should have class ranks (special ranks, equated to military ranks and providing bonuses to salaries). This confrontation has lasted for more than 10 years. Ukrainian MPs have proposed legislative amendments to solve this problem, but the approaches of the proposals are in opposition to each other.*

According to the Law of Ukraine 'On the Prosecutor's Office' of 19 September 2019, the Ukrainian Parliament, at the ninth convocation, completely abolished the class ranks and military-like dress of prosecutors. At the same time, a Draft Law on their restoration is being considered by the current session of the same parliament, and the initiators call their abolishment a 'premature mistake'. Regardless of the consequences of the consideration of this Draft Law, this issue may not be resolved in the near future in Ukraine, as it is an integral part of the worldview and culture of the pro-Western or Eurasian vector of the prosecutor's office.

The aim of the present piece of legal scholarship is to provide a report that is as informative as possible on the consistency between class ranks, prosecutor's dress, and the principles of justice, the functions of the prosecutor, and his/her role in the justice system in comparison with the approaches of other states. Moreover, it is important to advise the legislative initiatives, and the voice of parliamentarians since this issue has gained traction in the professional environment and in society.

The author analysed the issue of prosecutor's dress and class ranks in relation to various aspects – constitutional functions and roles of prosecutors, procedural law, comparative law, international law, incentive, as well as psychological, value-philosophical, cultural, and deontological aspects, etc.

The prosecutor's dress code of the Council of Europe's 47 member states has been clarified; it was found that only prosecutors from Russia, Azerbaijan, and Armenia have the military dress; in other countries, prosecutors wore a robe or business suit. Periods of transformation of the prosecutor's office had taken place in all the post-Soviet republics as a part of their European integration processes – Lithuania, Latvia, and Estonia, as well as Georgia and Moldova, abandoned the military dress of prosecutors as associate members of the EU.

The remuneration system of prosecutors in Poland and Germany is analysed in detail, where seniority, experience, qualifications, and position are taken into account in the 'rates' (Poland) or 'R levels' (Germany) of the basic salary of prosecutors. 'Rates' and 'R levels' are important only for calculating wages and are not analogous to class ranks.

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Keywords: *prosecutor's class ranks, prosecutor's dress, prosecutor's uniform, prosecutor's mantle, prosecutor's dress code, judiciary, criminal procedure*

1 INTRODUCTION

After the collapse of the USSR and the proclamation of Ukrainian independence in 1991, a difficult process of transformation continues for all state institutions, which Ukraine inherited with the system and models of government from the Soviet era.

Since Ukraine's accession to the Council of Europe in 1995 and the signing of an association agreement with the EU in 2014, the reform of the justice system, the prosecutor's office, and law enforcement agencies has intensified to bring them closer to European standards. In particular, the prosecutor's office has been modernised not only in its internal essence (functions, structure, and powers) but also in the appearance and status of the prosecutor's office and prosecutors.

Amendments to the Ukrainian Constitution in the field of justice dated 2 June 2016 No. 1401-VIII[1] removed the prosecutor's office from the so-called fourth 'control and supervision' branch of government and included it in Section VIII 'Justice' and deprived the prosecutor's office of the general supervision and pretrial investigation functions. After the above-mentioned amendments, as well as the enshrinement of the European and Euro-Atlantic direction of Ukraine, in the Preamble of the Constitution of 7 February 2019 No. 2680-VIII,[2] the reverse 'innovation' of the prosecutor's office back to Soviet traditions seemed impossible.

However, nowadays, the Verkhovna Rada of Ukraine (hereinafter, the Verkhovna Rada, VRU) is considering Draft Law No. 3062 of 13 February 2020 on the return of class ranks and the prosecutor's uniforms, which was recently abolished by the parliament of the same convocation on 19 September 2019.

This situation shows that parliamentarians do not have strong beliefs on this issue. Instead, they are guided by likes/dislikes and intuition when choosing one approach or another in the legislative regulation of issues related to the prosecutor's dress. Legal science also does not contribute to the stabilisation of this issue, as research and publications, especially from a comparative legal perspective, on the prosecutor's dress and the peculiarities of their status in society are absent.

The aim of the present piece of legal scholarship is to provide a report that is as informative as possible on the consistency between class ranks, prosecutor's dress, and the principles of justice, the functions of the prosecutor, and his/her role in the justice system in comparison with the approaches of other states. It seems that this study could contribute to the rationality of future legislative initiatives and the choice of parliamentarians and help us to reach a consensus in the professional environment and society as a whole.

To do this, in the first section, an excursion into the recent history of the reform of the prosecutor's office is made, mainly focusing on class ranks and prosecutor's dress that will have historical value in the future. Next, the conclusions of parliamentary committees and

1 Law of Ukraine 'Amendments to the Constitution of Ukraine (Regarding Justice)' of 2 June 2016 No 1401-VIII <https://zakon.rada.gov.ua/laws/show/1401-19#n2> accessed 7 June 2021.

2 Law of Ukraine 'Amendments to the Constitution of Ukraine (concerning the strategic course of the state for the acquisition of full membership of Ukraine in the European Union and in the North Atlantic Treaty Organization)' of 7 February 2019 No 2680-VIII <https://zakon.rada.gov.ua/laws/show/2680-19#n2> accessed 7 June 2021.

expert institutions that are authorised to approve Draft Laws are collected and presented, as well as the opinions of deputies in defence of the idea of returning class ranks and prosecutor's uniforms. The next section is the largest and presents a detailed analysis of class ranks and prosecutor's dress in terms of constitutional, procedural, labour, international public law, comparative law, deontology, psychology, sociology, and philosophy of law approaches.

2 A RETROSPECTIVE REVIEW OF THE REFORM OF THE PROSECUTOR'S OFFICE OF UKRAINE DURING THE PERIOD OF INDEPENDENCE, WITH CLASS RANKS AND PROSECUTOR'S DRESS AS ELEMENTS

After the Act of Independence of Ukraine[3] on 24 August 1991, the Verkhovna Rada of Ukraine, as a legislative body, began to create its own legal basis for the activities of key state bodies. Thus, on 5 November 1991, the Verkhovna Rada adopted the Law 'On the Prosecutor's Office',[4] which enshrined the same functions, structure, and status of the prosecutor's office that it had in the USSR. This included Art. 47 of the Law, which stipulated that prosecutors, investigators of the prosecutor's office, and employees of scientific and educational institutions of the prosecutor's office are assigned class ranks depending on their positions and length of service. Art. 53 of the Law stipulated that prosecutors who are assigned class ranks have uniforms with appropriate decorations, which they get free of charge.

In accordance with Part 2 of Art. 47 of the Law, the procedure for assigning and depriving class ranks is determined by the Regulation on class ranks of employees of the Prosecutor's Office of Ukraine. The next day, 6 November 1991, the Verkhovna Rada approved the provision.[5] The regulation establishes 10 class ranks, which are assigned in sequential order. As an exception, early assignment of the highest-class rank could be carried out for the exemplary performance of official duties, initiative in work, or other significant merits in work, taking into account the length of service (para. 2, item 4 of the Regulations). Prosecutors get class rank for life, and deprivation of class rank is possible upon dismissal of the prosecutor for vicious misconduct (para. 10 of the Regulation) or in case of conviction for a serious crime (Art. 37 of the Criminal Code of Ukraine 1960[6]).

Prosecutors receive salary supplements for class ranks (Art. 49 of the Law, para. 11 of the Regulation). According to the procedure of assignment, the system of hierarchy, and legal significance, class ranks of prosecutors have the status of special ranks, and, according to the resolution of the Presidium of the Verkhovna Rada of 29 June 1992 No. 2517-XII, these are equated to military ranks and special ranks of law enforcement officers.[7]

3 Resolution of the Verkhovna Rada of the Ukrainian SSR on the proclamation of Ukraine's independence 'Act of Independence of Ukraine' of 24 August 1991 No 1427-XII (the first edition of the Law) <https://zakon.rada.gov.ua/laws/show/1427-12#Text> accessed 7 June 2021.

4 Law of Ukraine 'On the Prosecutor's Office' of 5 November 1991 No 1789-XII <https://zakon.rada.gov.ua/laws/show/1789-12/ed19911105#Text> accessed 7 June 2021.

5 Resolution of the Verkhovna Rada of Ukraine 'On approval of the class ranks of prosecutors Ukraine' of 6 November 1991 No 1795-XII <https://zakon.rada.gov.ua/laws/show/1795-12/ed19911106#Text> accessed 7 June 2021.

6 Criminal Code of the Ukrainian SSR of 28 December 1960 (expired on September 1, 2001) <http://search.ligazakon.ua/l_doc2.nsf/link1/KD0006.html> accessed 7 June 2021.

7 Resolution of the Presidium of the Verkhovna Rada of Ukraine 'On establishment of a ratio between class ranks of employees of Office of Public Prosecutor of Ukraine and military ranks and special ranks of employees of law-enforcement bodies of Ukraine' of 29 June 1992 No 2517-XII <https://zakon.rada.gov.ua/laws/show/2517-12#Text> accessed 7 June 2021.

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For reference and illustration, the system of class ranks looked like this:

Class rank	Term	Relevance to the position of prosecutor	Compliance with military rank[8]	Subject of assignment
3rd class lawyer	2 years	assistants to city and district prosecutors, depending on the length of service	lieutenant	Prosecutor General of Ukraine
2nd class lawyer	2 years		senior lieutenant	
1st Class Lawyer	3 years		captain	
Junior Justice Counsellor	3 years	assistant prosecutors, prosecutors of departments and divisions in regional prosecutor's offices, deputy prosecutors of cities and districts, senior assistant prosecutors,	major	
Counsellor of Justice	4 years	prosecutors of departments and divisions of the General Prosecutor's Office, city prosecutors, deputy city prosecutors	lieutenant colonel	
Senior Justice	4 years	city prosecutors, deputy regional prosecutors	colonel	
3rd Class State Counsellor of Justice	not specified	regional prosecutors, first deputy regional prosecutors, heads, and deputy heads of departments of the General Prosecutor's Office	major general	President of Ukraine[9]
2nd class State Counsellor of Justice		Deputy Attorneys General, regional prosecutors	lieutenant general	
1st Class State Counsellor of Justice		First Deputy Prosecutor General of Ukraine	colonel-general	
State Counsellor of Justice		Prosecutor General of Ukraine	general of the Army of Ukraine	

Thus, the class ranks of prosecutors have the same purpose, legal nature, and essence as military ranks and reflect the same internal system of subordination and hierarchy. After all, military ranks establish the relationship of subordination and seniority between military personnel (except for subordination by position): one who has any senior military rank is authorised to provide commands to other military officers to a certain extent.

By joining the Council of Europe on 9 November 1995, Ukraine undertook the obligation to bring the prosecutor's office up to European standards, in particular: to abandon the idea of the prosecutor's office as a 'guard dog' of public administration; to abandon the uncharacteristic function for the prosecutor's office of general supervision of legality in a democratic society; to abandon the excessive centralisation combined with the Prosecutor General's dependence on parliamentary confidence (as a purely political tool), which hinders the independence of prosecutors; to abandon a militarised structure with internal unconditional subordination of

8 ibid.

9 Law of Ukraine 'On the Prosecutor's Office' (n 4) (Art. 47).

prosecutors to their chiefs, which was formed in Soviet times;[10] and to turn the prosecutor's office into a horizontal institution.

Since then, almost all political forces that have come to power have declared their intention to change the prosecutor's office and 'bring it in line with democratic Western standards'. But only with the adoption of the new Law of Ukraine 'On the Prosecutor's Office'[11] on 14 October 2014 was a real reform of the prosecutor's office launched. The previous six unsuccessful attempts to reform the Ukrainian prosecutor's office at the stage of Draft Laws have been devastatingly criticised by the Venice Commission for

> the special role given to the principles of unity and centralization of the prosecutor's office modeled on Soviet-style "prosecutor's offices"; for the fact that lower-ranking prosecutors do not have sufficient guarantees of independence or independent performance of their functions (para. 13 of the Opinion).[12]

Art. 3 of the current Law 'On the Prosecutor's Office' of 14 October 2014, which defines the principles of the prosecutor's office activity, for the first time in the history of independent Ukraine, did not establish the principle of unity of command and centralisation. Obviously, to be consistent with the rejection of the unity of command and centralisation principle, the legislator went further and (unlike all versions of the 1991 Law, which regulated the status of the prosecutor's office) the 2014 Law did not have articles on the class ranks of prosecutors, their designation on the prosecutor's dress, and their impact on the remuneration of the prosecutor.

The conclusion of the Venice Commission in this part of the Draft Law of 2013, which became the Law of 14 October 2014, was approving, although in general, the historical tradition of the domestic prosecutor's office remained centralised in many aspects due to other provisions of the Law. In particular, in para. 194 of the conclusion, the Venice Commission stated: 'the removal of the article on the official prosecutors' dress' is characterised as 'the implementation of significant progress in meeting the requirements of Council of Europe standards'.

So, the Law of 2014 abolished the class ranks of prosecutors and the prosecutor's dress for the future. According to the principle of the 'direct effect of the law in time', the assignment of class ranks to prosecutors ceased, and, in accordance with Art. 81 of the Law, they are no longer taken into account as a basis for additional payments in the prosecutor's remuneration.

Thus, the demilitarisation and transformation of the prosecutor's office into a European-style civil service was one of the achievements of the prosecutor's office reform in recent years. The prosecutor does not need incentives in the form of class ranks, which are military in nature, for the effective performance of his/her duties due to the nature of the functions performed, namely, the procedural management of pretrial investigation and the maintenance of public prosecution in court.

However, for those prosecutors who had already been assigned class ranks by the time the Law came into force in 2014, subpara. 1 of para. 3 of Section XII (final provisions) of the 2014 Law remained in force according to Art. 47, part 1 of Art. 49, part 5 of Art. 50, parts 3, 4, 6, 11 of Art. 50-1, part 3 of Art. 51-2, p. 53 of the 1991 Law on class ranks. That means that prosecutors who were assigned class ranks before the entry into force of the new Law continued to receive allowances for class ranks in accordance with part 1 of Art. 49 of the 1991 Law.[13] The Cabinet of Ministers approved the number of class allowances.

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10 Conclusion on the Draft Law of Ukraine 'On the Prosecutor's Office' (CDL-AD (2009) 048), paras 5-6, 21, 28-30) <https://minjust.gov.ua/m/str_23374> accessed 7 June 2021.

11 Law of Ukraine 'On the Prosecutor's Office' of 14 October 2014 No 1697-VII <https://zakon.rada.gov.ua/laws/show/1697-18#Text> accessed 7 June 2021.

12 Conclusion on the Draft Law of Ukraine 'On the Prosecutor's Office' adopted by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013) <https://rm.coe.int/1680097f7d> accessed 7 June 2021.

13 Law of Ukraine 'On the Prosecutor's Office' (n 4) (Art. 47).

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On 18 April 2018, the Council of Prosecutors of Ukraine decided to address the Prosecutor General with a proposal to initiate amendments to the Law of Ukraine 'On the Prosecutor's Office' on the possibility of assigning class ranks to prosecutors working in the Prosecutor's Office of Ukraine and initiating compliance with the Resolution of the Verkhovna Rada of 6 November 1991 'On Approval of the Regulations on Class Ranks of Employees of the Prosecutor's Office of Ukraine', in accordance with the requirements of current legislation.[14] The Council of Prosecutors justified the decision by the fact that 'the lack of class ranks of prosecutors and the procedure for equating them to a special or military rank makes a difference in approaches to material and social security of prosecutors, disciplinary responsibility and encouragement, which negatively affects the unity of the system of prosecutors of Ukraine'.

In addition, the Council of Prosecutors referred to 'scientific opinions of leading higher law schools'. However, unfortunately, there are no academic publications about the class ranks of prosecutors in open access, which would indicate at least some scientific interest in this topic. Therefore, I wonder how comprehensive and modern (comparative) these scientific opinions can be.

However, there is a real reason to agree that the approach of the Law of 2014 was discriminatory in the remuneration of prosecutors: 1) hired after the entry into force of the Law (26. October 2014) or who at the time of its entry into force held prosecutorial positions but did not have acquired class ranks; 2) which were assigned class ranks until 26 October 2014, and for which the salary supplement was retained. At the same time, for the second category of prosecutors, the allowance for class ranks became fixed (frozen), as prosecutors lost the opportunity to increase class rank. Further, demotion in class rank ceased to be a disciplinary sanction (Art. 49 of the Law). Therefore, in terms of class allowances, the approach of the Final Provisions of the Law 2014 contradicted the uniform status of prosecutors in Ukraine (part 2, Art. 15 of the Law).

Is the argument that the two approaches to the remuneration of prosecutors are discriminatory an automatic justification and a sufficient basis for the reinstatement of prosecutor's class ranks? Of course not. This is exactly what the legislator decided by the Law 'On Amendments to Certain Legislative Acts of Ukraine Concerning Priority Measures to Reform the Prosecutor's Office'[15] of 19 September 2019 No. 113-IX. Most notably, this Law is one of the most profound and reformist versions of the Law 'On the Prosecutor's Office' of 2014 during the two dozen changes and additions to it. Thus, the Law (dated 19 September 2019) finally abolished the class ranks of prosecutors and the prosecutor's dress, recognising the following points as invalid in part 2 of Section II (Final Provisions): para. 8 of Part 1 of Art. 15, part 4 of Art. 16, para. 1 part 2 Art. 46-2, Art. 47, part 1 of Art. 49; Part 5 of Art. 50, part 3 of Art. 51-2, and Art. 53 and Art. 55 of the Law 'On the Prosecutor's Office' of 1991, with the following amendments, as well as the Resolution of the Verkhovna Rada of 6 November 1991 'On Approval of the Regulations on Class Ranks of Employees of the Prosecutor's Office of Ukraine'.[16]

Since then, prosecutors not only have not received class ranks but also class ranks that they held have been abolished. This means that prosecutors who were assigned ranks before 2014 are considered prosecutors without class ranks. The media reported that the Law 'permanently **deprives prosecutors of class ranks – analogues of officer ranks**, which were

14 Decision of the Council of Prosecutors of Ukraine 'On taking measures to initiate amendments to current legislation on the possibility of assigning class ranks to prosecutors' of 18 April 2018 No 30 <https://rpu.gp.gov.ua/ua/rishenya/vdiyalnist.html> accessed 7 June 2021.

15 Law of Ukraine 'On Amendments to certain legislative acts of Ukraine concerning priority measures to reform the Prosecutor's Office' of 19 September 2019 No 113-IX.

16 Resolution of the Verkhovna Rada of Ukraine 'On approval of the class ranks of prosecutors Ukraine' of 6 November 1991 No 1795-XII <https://zakon.rada.gov.ua/laws/show/1795-12/ed19911106#Text> accessed 7 June 2021.

perceived a*s vestiges of the Soviet past and signs of militarization of the prosecutor's office*'.[17] Thus, class ranks should become history, a historical artefact (an object of material culture), along with the prosecutor's dress (where it was used at the discretion and initiative of individual prosecutors in the interim period from 2014-2019).

3 DRAFT LAW (NO. 3062 OF 13 FEBRUARY 2020) ON THE RESTORATION OF CLASS RANKS AND UNIFORMS OF PROSECUTORS

The struggle for the class ranks and uniforms of prosecutors is still ongoing. Thus, on 13 February 2020, a group of MPs of the Verkhovna Rada (V. M. Neklyudov, Yu. G. Yatsyk, O. S Bakumov, etc.) submitted to the Verkhovna Rada a Draft Law 'On Amendments to the Law of Ukraine "On the Prosecutor's Office" to increase the efficiency of the prosecutor's bodies activity' (No. 3062). This Draft Law, among other things, proposes: to return the assignment of class ranks to prosecutors in the manner approved by the Verkhovna Rada and determine the grounds for deprivation of these class ranks; provide payments to prosecutors of the monthly allowance for class rank in accordance with the procedure approved by the Cabinet of Ministers; provide prosecutors' uniforms free of charge, with appropriate honours for prosecutors who have been assigned class ranks.[18]

3.1 Passing the regulatory procedure

On 13 March 2020, the Main Scientific and Expert Department of the Verkhovna Rada (hereinafter, the GNEU of the Verkhovna Rada) issued an opinion on the aforementioned Draft Law, which was generally approving: 'according to the results of consideration in the first reading, the Draft Law can be adopted as a basis, taking into account the comments and suggestions'. Among the remarks of the GNEU of the Verkhovna Rada was the following: 'the doubtfulness of the idea of returning prosecutor's uniforms to prosecutors with class ranks' because of the previous opinions of the Venice Commission on this issue. In addition, the GNEU of the Verkhovna Rada argued

> Unlike the assignment of class ranks, prosecutor's uniform is not associated with incentives for quality work and a career in government bodies. The prosecutor's uniform in most cases is associated with *special conditions of its use* in the implementation of the functions of a state body. The special uniform is proposed for making of the maximum comfort for the performance of professional tasks in difficult conditions. Taking the functions of the modern prosecutor's office into account, the need for employees' uniforms can be purely psychological.[19]

On 15 July 2020, the Verkhovna Rada Committee on Law Enforcement Activities issued an opinion, noting, 'The adoption of this Draft Law will help increase the efficiency of

17 A Lapkin, 'Prosecutor's Office Reform: Prosecutor General with legal education, plus 'fresh blood', minus the military prosecutor's office' (23 September 2019) <https://hromadske.ua/posts/reforma-prokuraturi-genprokuror-iz-yuridichnoyu-osvitoyu-plyus-svizha-krov-minus-vijskova-prokuratura> accessed 7 June 2021.

18 Draft Law 'On Amendments to the Law of Ukraine "On the Prosecutor's Office" to increase the efficiency of the prosecutor's office' 13 February 2020 No 3062 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=68135> accessed 7 June 2021.

19 See 'Conclusion of the Main Scientific Expert Department 13 February 2020 on Draft Law on Amendments to the Law of Ukraine "On the Prosecutor's Office" to increase the efficiency of the prosecutor's office' of 13 February 2020 No 3062 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=68135> accessed 7 June 2021.

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the prosecutor's office bodies and stimulate the work of prosecutors, the pursuit of career growth', and recommended taking the Draft Law as a basis as a result of consideration in the first reading.[20]

On 2 February 2021, the Draft Law was included in the agenda of the 1164-IX 5th session of the Verkhovna Rada.

3.2 Arguments 'for' class ranks and prosecutor's dress

1) The authors of Draft Law 3062 wrote in the explanatory note to the Draft Law that

> the return of the mechanism of assigning class ranks and prosecutor's uniform would stimulate the work of prosecutors and, in addition, would discipline other participants in criminal proceedings in the performance of his duties as a prosecutor and will promote respect for his procedural status. Also, assignment of ranks (classes, special ranks, etc.) provided by the Laws of Ukraine "On Diplomatic Service", "On Civil Service", "On Service in Local Self-Government Bodies", "On National Police", "On military duty and military service", etc., discriminates against the rights of prosecutors along with other public service employees. The Law of Ukraine "On the Prosecutor's Office" is almost the only one in Ukraine that regulate the conduct of professional public and civil service (except for political positions), which does not provide such an element of a career as the possibility of assigning class ranks (ranks, special titles, etc.). Therefore, in our opinion, the possibility of assigning class ranks to prosecutors should be preserved, as it is one of the effective mechanisms for improving the skills of prosecutors, ensuring high quality and effectiveness of their performance.[21]

2) On 25 February 2020, MPs H. Mamka, Deputy Chairman of the Verkhovna Rada Committee on Law Enforcement Activities (Opozytsiina Platforma 'Za Zhyttia' fraction), PhD, published an article in the 'Yurydychnii Hazeti', in which he set out the following arguments

> In order for certain professional "activists" not to spread the information about another "betrayal" that this draft law allegedly hinders the reform of the prosecutor's office, I decided (as one of its co-authors) to explain its main provisions. Class ranks are personal ranks assigned to employees of the prosecutor's office in accordance with their position and work experience, because they indicate the official and professional growth of the employee. The keyword in this is motivation! Because of the fact that class rank symbolizes the experience, qualifications and professional path that a person has taken in the prosecutor's office. Of course, this should include monthly allowances for class rank. Because no one argues in the private sector, that for experience, contribution to the work of the company or the quality of work should be paid a higher salary? So are the people, who work in the prosecutor's office worse? Ranks, by the way, are also a system of punishment for negligent work. … There is also a discussion about prosecutor's uniform, which, according to the "activists" opinion, cannot be returned to prosecutors. It reminds me of certain historical events after 1917… And those who oppose the prosecutor's uniform remind me of the Bolsheviks of the level of argumentation …'[22]

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20 See 'Conclusion of the Main Scientific Expert Department' (n 19).

21 Explanatory note to the Draft Law of 13 February 2020 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=68135> accessed 7 June 2021.

22 Hryhoriy Mamka 'Draft law No 3062: Motivation and Discipline of Prosecutors' <https://yur-gazeta.com/publications/practice/inshe/zakonoproekt-3062-motivaciya-ta-disciplina-prokuroriv.html> accessed 7 June 2021.

3) The Prosecutor General of Ukraine, I. Venediktova, supported the legislative initiative

> We need to take care of the honor of the prosecutor's uniform. This step will restore the prestige of the prosecutor's office and encourage employees to perform their professional duties even more effectively. The class rank symbolizes the experience, qualifications and professional path that the employee has passed in the prosecutor's office.[23]

4) V. Neklyudov, Chairman of the Subcommittee on the Activities of the Prosecutor's Office of the Verkhovna Rada Committee on Law Enforcement, Political Party 'Sluha Narodu' explains

> The abolition of class ranks and prosecutor's uniform in the prosecutor's office as a result of its reform was a reaction to the need of making the prosecutor's office more civilian, devoid of elements of any departmental separation with attributes of "militarism". However, this decision was wrong and hasty, a superficial look at the issue. The class ranks is an ancient tradition of civil service, which was adapted from the examples of European states. Class rank and prosecutor's dress were not an invention, created only for prosecutors, but once were a part of the entire civil service system.[24]

4 ANALYSIS OF THE IDEA OF RETURNING CLASS RANKS AND PROSECUTOR'S DRESS IN THE PROSECUTOR'S OFFICE OF UKRAINE

The author is aware that at the time of publication, the Ukrainian Parliament may have either approved or rejected Draft Law 3062. However, regardless of the consequences of its parliamentary procedure, this legislative initiative on class ranks and the prosecutor's uniform will not be final in the near future, as there are both staunch supporters and opponents of this idea in Ukraine. Therefore, the idea and legislative initiatives to restore or abandon the class ranks and prosecutor's uniform will rise again and again until the view of this issue in the professional community of lawyers and in society as a whole becomes more or less unanimous. At the same time, ideological instigators and lobbyists, as well as opponents of this idea, are mostly guided by intuitive likes or dislikes in their views and arguments. The task of scholarship, instead, is to give a rational report on the advantages and disadvantages of approaches in other countries to the regulation of the prosecutor's dress and class ranks, their consistency with the principles of justice, the functions of the prosecutor, and his/her social role in justice and society as a whole, etc. Therefore, we will try to analyse the issues of the prosecutor's dress and class ranks from various aspects – comparative law, constitutional functions, and role of the prosecutor's office, as well as procedural, international law, incentive (labour, material), value-philosophical, ontological, and other aspects.

*4.1 The international law aspect (***pacta sunt servanda***)*

The international legal aspect has become the main foreign and domestic political catalyst for the reform of the prosecutor's office in Ukraine. By joining the Council of Europe on 9 November 1995, Ukraine undertook the obligation to bring the prosecutor's office up to European standards. The signing by Ukraine of the Opinion No. 190 (1995) of the

23 Prosecutor General Iryna Venediktova discussed with people's deputies proposals for amendments to the Law of Ukraine 'On the Prosecutor's Office' <https://www.gp.gov.ua/ua/news?_m=publications&_t=rec&id=269702> accessed 7 June 2021.

24 'Class ranks are not for generals, but for ordinary prosecutors' <https://censor.net/ru/blogs/3253460/klasn_chini_ne_dlya_generalv_a_dlya_prostih_prokurorv?fbclid=IwAR265VU64JDERZAM5RJvZOHUYjmC7iR6aPAXrdDpGtRhtjTd2tnAy9773Hg> accessed 7 June 2021.

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Parliamentary Assembly of the Council of Europe on Ukraine's application to join the Council of Europe (Strasbourg, 26 September 1995) preceded this.

In accordance with para. 11 of Conclusion No. 190 in the context of the assurances of the state highest officials (the letter of the President of Ukraine, the Speaker of Parliament, and the Prime Minister of Ukraine of 27 June 1995) and on the basis of the following, the Assembly considers that according to Art. 4 of the Statute of the Council of Europe, Ukraine is able and willing to perform the duties of a member of the Council of Europe, defined in Art. 3

> Every member of the Council of Europe must recognize the principles of the rule of law and the fulfillment of human rights and fundamental freedoms by all people under its jurisdiction, and must cooperate sincerely and effectively in achieving the Council's purpose.

In accordance with subpara. 6 of para. 11, Ukraine undertook that

> the role and functions of the Prosecutor General's Office would be changed (especially with regard to the exercise of general control over the rule of law) by transforming this institution into a body in line with Council of Europe standards.[25]

Later, during the development of Draft Law on the reform of the prosecutor's office, Ukraine sent it to the Venice Commission[26] of the Council of Europe to monitor it from the point of view of the rule of law and the observance and strengthening of democratic institutions.

In the opinions on the Draft Laws, the Venice Commission regularly reminded Ukraine of the excessive centralisation of the prosecutor's office and the need to strengthen the independence of prosecutors and abandon the function of general oversight and the militarised structure with internal unconditional subordination of prosecutors to its chiefs, which was formed during the Soviet, period and turn the prosecutor's office into a 'horizontal institution'.[27]

Since then, up to a dozen Draft Laws have been drafted in Ukraine to reform the prosecutor's office, which the Venice Commission devastatingly criticised at the stage of Draft Laws. Finally, the Venice Commission gave a positive opinion on the Draft Law of 2013, which became the Law 'On the Prosecutor's Office' of 14 October 2014.

Of course, the Verkhovna Rada does not send like 3062, relating to certain issues of the activity of the prosecutor's office to the Venice Commission for monitoring Draft Laws. At the same

25 Opinion No 190 (1995) of the Parliamentary Assembly of the Council of Europe on Ukraine's application to join the Council of Europe, Strasbourg, 26 September 1995 <https://zakon.rada.gov.ua/laws/show/994_590?fbclid=IwAR2D6U-iwzHgBXv7chyUFXWWG-Od2MuEhkB7QapBl08400SHgqUReErJZN8#Text> accessed 7 June 2021.

26 The European Commission for Democracy through Law – better known as the Venice Commission, where it meets, – is an advisory body of the Council of Europe on constitutional matters.
The mission of the Venice Commission of the Council of Europe is *to provide legal advice* to its member states and, in particular, to assist those who wish to bring their legal and institutional structures in line with international standards and experience. in matters of democracy, human rights and the rule of law. The full name of the Commission is *'European Commission for Democracy through Law'*.
It also contributes to *the dissemination and development of* a common *constitutional heritage*, plays a unique role in conflict management and provides 'emergency constitutional assistance' to states in transition.
The Commission comprises *62 member states: the 47 member states of the Council of Europe* are members of the Venice Commission, as well as *15 other countries* (Algeria, Brazil, Canada, Chile, Republic of Korea, Costa Rica, the United States, Israel, Kazakhstan, Kyrgyzstan, Kosovo, Morocco, Mexico, Peru and Tunisia). For more about the status, structure, competence of the Venice Commission, see Venice Commission: Council of Europe <https://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN> accessed 7 June 2021.

27 Conclusion on the Draft Law of Ukraine 'On the Prosecutor's Office' (CDL-AD (2009) 048), paras 28-30; 5-6 <https://minjust.gov.ua/m/str_23374> accessed 7 June 2021.

time, first implementing and complying with the requirements of the Venice Commission in the main Law, and then deviating from to make some amendments to the Law and return to our own long military tradition of the prosecutor's office is a kind of tactical trick and a move away from international agreements. For example, such a scheme was implemented by the legislator on the issue of bonuses in the remuneration of prosecutors, when, on the recommendation of the VC, the legislator did not provide it in the first (main) version of the Law of 2014, and later, in 2015, quietly returned bonuses to prosecutors (see para. 4.5).

4.2 The constitutional-functional aspect

According to the Constitution of Ukraine in the version of 2 June 2016, the public prosecution and the advocacy are referred to the sphere of justice as its constituent elements (Arts. 131-1, 131-2 of Section VIII 'Justice'). Independence (external and internal), freedom of expression, and personal maturity (regardless of the reasoning, senior position, or the presence of more experienced colleagues) based on one's own knowledge, free evaluation of evidence, inner conviction, and the ability to independently make procedural decisions and qualitatively substantiate them are fundamental components for the effective performance of their functions (prosecution, defence, justice) for three legal professions in the field of justice. From the point of view of the sociocultural factor of relations, the class rank is an element of the culture of rank-veneration – the junior honouring the senior because of the rank, class, etc. As a result, class ranks subconsciously stimulate a culture of veneration. According to the cyclical pattern, 'the system is formed by people, and the system forms the person'. Therefore, to ensure *internal independence* – as a fundamental principle of building a system of relations within the corporate community of judges, prosecutors, and lawyers – for officials of these professions, their common legal status, lack of hierarchy, subordination, and dependence (including psychological and ethical) in decision-making processes are especially important. Thus, the specific legal status of judges and prosecutors is enshrined in the relevant laws.

It is worth recalling that from the Soviet period until 2010, judges in Ukraine were also assigned qualification classes – higher, first, second, third, fourth, and fifth (Art. 88 of the Law 'On the Judiciary and the Status of Judges' of 2002,[28] which expired under the Law of 2010[29]). However, the judiciary has painlessly departed from the tradition of qualifying classes. The answer to the question of what influenced the perception of the judiciary to abandon qualifications – their own legal awareness, understanding of the place and mission of judges in the state and society, awareness of international standards of judicial status, training, and educational activities with international organisations in the field of justice – has yet to be answered. Nevertheless, the fact is that the qualification classes of judges have become outdated, and judges no longer mention it.

Thus, the argument in the explanatory note to Draft Law 3062 on discrimination against prosecutors in their careers due to the impossibility of class promotion (rank, special rank) compared to other public or professional public service[30] is irrelevant, contrary to the nature of the prosecutorial activity.

28 Law of Ukraine 'On the judiciary and the status of judges' of 7 February 2002 No 3018-III <https://zakon.rada.gov.ua/laws/show/3018-14#o705> accessed 7 June 2021.

29 Law of Ukraine 'On the judiciary and the status of judges' of 7 July 2010 No 2453-VI <https://zakon.rada.gov.ua/laws/show/2453-17#Text> accessed 7 June 2021.

30 Explanatory note to the Draft Law of 13 February 2020 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=68135> accessed 7 June 2021.

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4.3 The procedural aspect

The prosecutor indicated the class rank in all his/her procedural documents, in the documents of the investigator with his/her consent (visa) during the period of the existence of class ranks. Of course, the reference to the class rank contains information about the author of the document – whether the person is a beginner in the prosecutor's office (third-class lawyer), an experienced prosecutor (10-year justice counsellor), or a high-ranking prosecutor in the prosecutor's office (third-first class State Counsellor of Justice). This information about the author of the document ***overemphasises the court's attention*** from assessing ***the motivational part of the document and the prosecutor's arguments to the external factor – the status*** (regalia) ***of the prosecutor.***

From the point of view of the legal awareness, social maturity, and psychological stability of a judge, this factor should not influence his/her decision-making. Still, such influence is possible. Moreover, in real life, it may be tendentious, especially in situations when a young, early-career judge reviews petitions/acts of high-class position prosecutor. Thus, from the point of view of the ***procedural principle of free evaluation of evidence***, the meaning of class ranks in the procedural documents of the prosecutor, as well as his/her participation in court hearings in the prosecutor's dress with rank designations is undesirable, as it may have a suggestive psychological influence on the court decision-making process. In addition, para. 1 of Part 2 of Art. 129 of the Constitution of Ukraine enshrines ***the equality of all participants in the trial before the law and the court*** as a principle of justice. Also, Art. 22 of the Ukrainian CPC enshrines ***the principle of procedural equality and adversarial proceedings*** between the prosecution and the defence. So, from *the point of view of the principle of procedural equality of the parties and adversarial proceedings*, what regalia and honours should a defender indicate in his/her procedural documents in order to balance his/her status with the prosecutor? – Is that the information about awarded honours, letters of gratitude from the National Bar Association of Ukraine, information that he/she is included in various rankings of the top 50 or top 100 lawyers of Ukraine, or has the honorary title of 'Honored Lawyer of Ukraine' or other state and non-state awards? Is the purpose of the court competition appropriate and reasonable according to the status merits of the parties? Alternatively, are such competitions not only inappropriate and unnecessary but also harmful, as they distract the court from analysing ***the arguments*** of the parties? *From the point of view of the principle of equality before the law and the court,* it is possible that the suspect or accused might express dissatisfaction: Why is the head of the pretrial investigation or public prosecutor in their trial a new prosecutor (3rd or 2nd class lawyer) instead of a justice counsellor, like the person appointed for other defendants?

4.4 The financial (material) aspect

Undoubtedly, a decent salary is the best incentive (encouragement) for effective work in the prosecutor's office and attracting new staff.

The authors of Draft Law 3062 use this well-known argument, justifying the need to preserve class ranks

> It is extremely important to involve highly professional, impartial, honest, decent employees, who are able to resist attempts to improperly influence their official activities. Achieving this goal is possible due to the incentives in the work of prosecutors (decent wages, adequate material support, favourable working conditions, etc.)… (para. 2, section 1 of the Explanatory Note)[31]

31 Explanatory note dated 13 February 2020 to the Draft Law of Ukraine 'On Amendments to the Law of Ukraine "On the Prosecutor's Office" to improve the efficiency of the prosecutor's office' <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=68135> accessed 7 June 2021.

I propose to analyse what the material support of prosecutors really is and if the quotation from the Explanatory Note is a logical basis for the conclusion about the need for additional material incentive in the form of surcharges for class ranks.

The Law of 19 September 2019, which finally abolished class ranks, raised the prosecutors' basic salaries from 12 to 15 and from January 2021 to 20 subsistence minimums for able-bodied persons. Thus, the minimum salary of prosecutors gradually increased from UAH 22,200 in 2019 to UAH 30,000 and UAH 40,420 in 2021 – a growth rate of 1.8 times the original salary.

As we can see, *firstly,* the salaries of prosecutors have almost doubled, and no allowance for class rank can or will affect a salary increase of 1.8 times the original amount. *Secondly,* UAH 40,420 is the minimum basic salary (gross) without taking into account other surcharges and, in accordance with Part 2 of Art. 81 of the Law 'On the Prosecutor's Office' in its current version, the salary of the prosecutor consists of the salary and surcharges for: 1) years of service; 2) performance of duties in an administrative position and other payments provided by the legislation; 3) bonuses. Therefore, the real salary of prosecutors can reach twice as high. *Thirdly*, in terms of the average salary in Ukraine – 12,337[32] as of January 2021 – the salary of prosecutors is quite decent because it is at least four times and a maximum of 10 times higher than the average income of employees in Ukraine (the ratio is from 1:4 to 1:8). In addition, basic salaries and total salaries of prosecutors are significantly higher than the basic salaries and salaries of civil servants. In particular, taking into account the categories, subcategories, and levels of state bodies in 2021, salaries in civil service positions are set from UAH 4,540 for an employee of district public authorities to UAH 37,800 for the head of a state body (Chief of Staff of the Verkhovna Rada, Chief of the Secretariat of the Cabinet of Ministers, heads of ministries, departments, etc.).[33] As we can see, the minimum salary of district prosecutors (the lowest level) (UAH 40,420) exceeds the highest salaries (UAH 37,800) in the highest civil service (category A – heads of ministries, departments). Consequently, the current level of prosecutors' salaries is clearly an expression of prestige and an assessment of the state of the complexity of prosecutorial work, a serious motive for the attractiveness of work in the prosecutor's office and its effectiveness in terms of fear of losing a job for improper performance. *Fourthly*, the salaries of Ukrainian prosecutors are the highest among the salaries of prosecutors in neighbouring countries in terms of average salaries.

For example, in accordance with Arts. 123 and 124 of the Statute 'Law on the Prosecutor's Office', 11 rates could be applied for the calculation of salaries of prosecutors of Poland, which are the same for prosecutors and judges of the relevant judicial instance (Art. 127) and are tied to the average salary using a multiplier.[34]

This multiplier is set from 2.05 to 4.13 by the Regulation of the Council of Ministers of 2 April 2010 'On the basic remuneration of prosecutors and the amount of functional allowances for public prosecutors'.[35] So, the correlation of the average salary in Poland to the salary of prosecutors is from 1:2 for beginning prosecutors of district prosecutor's offices to 1:4 for the prosecutor general. The Central Statistical Office of Poland publishes monthly reports on average earnings. Thus, in January 2021, the national average salary was PLN 5,973.75

32 Ministry of Finance, 'The average monthly salary in the regions of Ukraine in January 2021' <https://index.minfin.com.ua/ua/labour/salary/average/2021-01/> accessed 7 June 2021.

33 'The Scheme of Salaries of Civil Servants for 2021 has been approved' (13 January 2021) <https://nads.gov.ua/news/zatverdzheno-shemu-posadovih-okladiv-derzhsluzhbovciv-na-2021-rik?fbclid=IwAR2WEnofyd1kPBltI56YGnUYWPNsf7fMgfLQ_-216MHuTwXemqO-g__Uwc0> accessed 7 June 2021.

34 Prawo o prokuraturze. Ustswa z dnia 28 stycznia 2016 r. Aktualna 19.01.2021 r. <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20160000177/U/D20160177Lj.pdf> accessed 7 June 2021.

35 Prokurator zarabia conajmniej 6 tys. PLN na rękę. 01.09.2014 Maria Hajec. <https://wynagrodzenia.pl/artykul/prokurator-zarabia-co-najmniej-6-tys-pln-na-reke?fbclid=IwAR01kjraVwa8ow8XCfb3ieGvKJQXzCuGcPeH1ViTslvxc_y9DxO-7DgIPeQ> accessed 7 June 2021.

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gross (equal to €1,314), in 2020 – PLN 5,411.45 gross, and, according to forecasts in 2022, is expected to exceed PLN 6,000.00 gross.[36]

With the average salary of full-time employees in Germany was €3,975[37] (gross) as of December 2020, the initial minimum salary for prosecutors is €3,470 – €3,860, and the average is €9,400.[38] At the same time, the work of a prosecutor is the most prestigious and popular among legal professions in Germany (42 candidates for the position with the highest scores [minimum 9 out of 10] for the state exam in law).[39] Thus, the ratio of the initial salary of a prosecutor to the average salary in Germany is almost 1:1, which increases with the length of service and career of a prosecutor to an average of 1:2.3 and a high of 1:3.7.

To summarise: a) the abolition of allowances for class ranks in 2019 should not be considered in isolation, but as part of the whole material support of prosecutors; b) the abolition of class rank allowances in 2019 did not have a bad influence on the prosecutors' financial situation in Ukraine– on the contrary, it significantly improved due to higher salaries; c) prosecutors' salaries are 4-10 times higher than the average salary in Ukraine, and the minimum salary of the lowest level prosecutor exceeds the highest possible salary in the highest categories employees of the civil service; d) prosecutors' salaries in Ukraine are twice as high as the salaries of their colleagues from Poland and Germany in relation to the average salaries in these countries. Thus, the complaints that the material support of prosecutors is insufficient and requires additional motivation by setting allowances for class ranks are surprising and detached from the reality and proportionality of income in the country.

4.5 The encouraging (stimulating) aspect

Next, it is necessary to find out how the prosecutor's salary reflects his/her experience (experience), professional path, qualification, the performance of tasks of increased complexity, and performance of managerial functions.

As already mentioned, Art. 81 of the Law 'On the Prosecutor's Office' in its current version provides for ***three types of additional payments*** to the basic salary: **a)** ***for years of service***, which is differentiated depending on the length of prosecutorial experience – this type encourages people not to change job, ***b) for administrative duties, c) bonuses.***

Part 7 of Art. 81 contains nine gradations of surcharges for years of service: if you have more than one year of service – 10%, more than three years – 15%, more than five years – 18%, more than 10 years – 20%, more than 15 years – 25%, more than 20 years – 30%, over 25 years – 40%, over 30 years – 45%, over 35 years – 50% of the basic salary.

Part 4 of Art. 81 sets the salary rates for regional prosecutors and the prosecutors of the Office of the Prosecutor General (hereinafter, UPG) with the coefficient: 1) the prosecutor of the regional prosecutor's office – 1.2; 2) the Prosecutor of the Office of the Prosecutor General – 1.3; 5.

Part of Art. 81 sets the rates of basic salaries of prosecutors holding administrative positions – 1) from 1.7 for the Prosecutor General from of basic salaries of the UPG prosecutor to 1.10

36 Ile zarabia przeciętny Polak? 31 mar. <https://businessinsider.com.pl/poradnik-finansowy/najnizsza-krajowa-ile-wynosi/9qqnwse?fbclid=IwAR01hz8pbbgStqxn3STs98LyuF5redHqHECfR7hYeIF3Pz9mzTHv-kU2RR8> accessed 7 June 2021.

37 J Rudnicka, 'Durchschnittsgehalt in Deutschland' (4 December 2020) <https://de.statista.com/themen/293/durchschnittseinkommen/> accessed 7 June 2021.

38 'Staatsanwalt als Beruf – Infos zur Arbeit in der Justiz' <https://www.karista.de/berufe/staatsanwalt/> accessed 7 June 2021.

39 'Staatsanwalt als Beruf – Infos zur Arbeit in der Justiz' (n 38).

for the deputy head of the unit in the UPG (paras. 1-5 of Part 5 of Art. 81); 2) from 1.5 for the head of the regional prosecutor's office from the basic salaries of the prosecutor of the regional prosecutor's office to 1.10 for the deputy head of the subdivision of the regional prosecutor's office (paras. 6-10 part 5 of Art. 81); 3) from 1.5 for the head of the district prosecutor's office from the basic salaries of the prosecutor in the district prosecutor's office to 1.10 for the deputy head of the district prosecutor's office.

Thus, the basic salaries of the heads of regional prosecutor's offices can reach UAH 72,750 (40,420x1.2x1.5), and the UPG – 89,330 (20,420x1.3x1.7) without taking into account surcharges for years of service, and taking into account, for example, 20 years of experience – UAH 87,300 for the management staff of regional prosecutor's offices up to UAH 107,000 for the heads of the UPG.

In accordance with paras. 2 part 2 of Art. 81 of the Law 'On the Prosecutor's Office', bonuses for prosecutors are carried out in the manner approved by the Prosecutor General, *based on the results of assessing the quality of their work for a calendar year* within the bonus fund formed of at least 10 per cent of salaries and savings (version of the Law of 19 September 2019).

From the point of view of the history of the issue, it is interesting to note that the Draft Law that became the Law 'On the Prosecutor's Office' did not provide for such types of surcharges as bonuses. The Venice Commission approved it because 'the above-mentioned bonuses were considered potentially problematic, in particular, due to the risk of corruption and loss of independence that they cause. Therefore, their absence in the Law is appropriate'.[40]

Over time, it has been noted that the Venice Commission was unequivocally right about the corruption dangers of bonuses as a tool to stimulate the effectiveness of prosecutors. Thus, bonuses for Ukrainian prosecutors were restored by the version of Law No. 578-VIII of 2 July 2015. This version of Law set the minimum amount of bonuses – no less than 10 per cent of basic salary – but did not set their maximum size.[41] In practice, this was reflected in such consequences as regular high bonuses (sometimes higher than the basic salaries), which the heads of the prosecutor's office provide for themselves or to certain prosecutors (according to the media, to their 'favourites').[42] In 2017, one of the Deputy Attorneys General explained: 'The system of bonuses in government is very bureaucratic – everyone is rewarded at the same percentage (as a percentage of the rate). If there are no problems- you are rewarded regardless of the results'.

The version of the Law of No. 113-IX of 19 September 2019 did not eliminate the bonus system but set their a) maximum limit – the amount of the prosecutor' annual bonus may not exceed 30 per cent of the amount of his basic salary for the calendar year and b) award criterion – based on the results of assessing the quality of their work for a calendar year.[43] However, the subjective discretion of the heads of prosecutor's office regarding the awarding of prosecutors is fully maintained. In particular, according to the Prosecutor General's Order No. 503 of 30 October 2020, the evaluation is to approve the prosecutor's report (on

40 Comments of the Directorate General for Human Rights and the Rule of Law (Directorate for Human Rights) of the Council of Europe on the Law of Ukraine 'On the Prosecutor's Office' of 14 October 2014 145 §34-35 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802e75b6> accessed 7 June 2021.

41 Law of Ukraine 'On Amendments to the Law of Ukraine "On the Prosecutor's Office" on the improvement and features of the application of certain provisions' of 2 July 2015 No 578-VIII <https://zakon.rada.gov.ua/laws/show/578-19#n180> accessed 7 June 2021.

42 Vladimir Pirig, 'Employees of the Prosecutor General's Office gave themselves the most bonuses for work in 2016' (29 May 2017) <https://zaxid.net/naybilshe_premiy_za_robotu_v_2016_rotsi_vipisali_sobi_pratsivniki_genprokuraturi_n1427123> accessed 7 June 2021.

43 Law of Ukraine 'On Amendments to the Law of Ukraine "On the Prosecutor's Office" on the improvement and features of the application of certain provisions' (n 40).

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the effectiveness of duties, number, and types of assignments, their results, etc.) by his/her immediate supervisor and senior supervisor.[44]

Thus, in practice, bonuses can be both an effective tool to stimulate the efficiency of prosecutors with a fair approach of the heads of the prosecutor's office (as a bonus for productivity or for outstanding, special achievements), and nominal, another type of surcharge to increase prosecutors' earnings on equal terms (when everyone is rewarded equally). In addition, the bonuses can play the role of a tool for managing the team, showing likes or dislikes, influencing subordinates, encouraging their loyalty to management, and so on. Therefore, the bonus tool is not perfect in terms of ensuring the internal independence of prosecutors. For example, there are no bonuses in the remuneration system of Polish prosecutors (Art. 123-127 Usyawy z dnia 28 stycznia 2016 r. Prawo o prokuraturze).[45] But there are bonuses for German prosecutors (Art. 42a BBeG – Federal Law on Salaries).[46] Given the importance of the independence of prosecutors in the performance of their functions in the legal system, it is important to cancel the bonus system.

In sum, we would like to say that the existing system of supplements to the basic salary – for years of service, for performing functions in administrative positions, and, depending on the level of prosecutor's office, combined with bonuses (if their distribution is fair)) – aims to systematically take into account a) experience (duration of service), b) qualifications (organisational responsibilities and level of the prosecutor's office), and c) the specific impact and success of the prosecutor. Altogether, the amount should proportionally balance the final salary. On the other hand, the surcharge for a class rank would duplicate the surcharge for years of service and does not have any independent orientation in the system of incentives for prosecutors.

4.6 The psychological aspect

As you can see, in determining the remuneration of prosecutors, the legislator takes all factors into account – experience, qualifications, career, position, duties, and even their results. Therefore, the main motive for prosecutors to return to class ranks is not material incentives (monetary incentives in the form of a salary supplement for a class rank). Obviously, the main motive for prosecutors to restore the system of class ranks is psychological. Let me remind you that the Main Scientific Expert Department of the Verkhovna Rada, in its opinion on Draft Law No. 3062, expressed the hypothesis of an 'exclusively psychological justification' of the prosecutor's dress.

Considering the psychological aspect of the legislative return of class ranks and prosecutor's dress, we can distinguish three components:

Internal psychological – associated with emotional satisfaction from the self-awareness of their own class rank, a sense of self-realisation because of the long professional experience and approval of their work by the chief;

External psychological – class rank can be used as proof of professional success; it is a status symbol. As a result, employees who have such a class rank expect respect, attention, honours,

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44 Order of the Prosecutor General of Ukraine No 503 of 30 October 2020 'On approval of the Interim Regulation on the system of evaluation of the quality of work of prosecutors and rewarding of prosecutors' <https://zakon.rada.gov.ua/laws/show/v0503905-20#Text> accessed 7 June 2021.

45 Prawo o prokuraturze. Ustswa z dnia 28 stycznia 2016 r. Aktualna 19.01.2021 r. <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20160000177/U/D20160177Lj.pdf> accessed 7 June 2021.

46 Bundesbesoldungsgesetz (BBesG) Ausfertigungsdatum: 23.05.1975. Änderung durch Art. 9 G v. 30.3.2021 I 607 (Nr. 14) <https://www.gesetze-im-internet.de/bbesg/BJNR011740975.html#BJNR011740975BJNG000611311> accessed 7 June 2021.

and recognition. If no one knows or only a limited number of people know about the class rank of the prosecutor, the external psychological motive does not work. In order to be effective, the class rank must have the effect of 'public value'; that is, it should be emphasised. For this reason, it was demonstrated on the uniform (on the shoulder straps), indicated in the documents of the prosecutor, and so on. This ostentatious and demonstrative status aspect has an influence on employee motivation and career choices in societies in which modesty is not cultivated as a principle of coexistence and communication.

Historical-psychological – there is a historical memory (experience) of Ukrainian prosecutors about the 'honour of the uniform', the desire to continue its culture, and nostalgia for youth. After all, all professional Ukrainian prosecutors (with no less than 6.5 years experience – from 2014 to 2021) worked in the system with class ranks and the military prosecutor's dress. As the Venice Commission has repeatedly noted

> The only historically known model of the prosecutor's office in Ukraine is the Soviet (and before that, the tsarist) model. This model is a reflection of an undemocratic past and does not meet European standards and the values, declared by the Council of Europe. That is why, Ukraine, gaining membership in the Council of Europe, Ukraine had to undertake the obligation to reform the prosecutor's office in line with Council of Europe standards.[47]

4.7 The comparative (encouraging) aspect

It is remarkable to compare whether there are other, perhaps better, systems of accounting for experience, qualifications, and professional paths in determining the prosecutor' salary.

For example, the Law on the Prosecutor's Office in Poland (Art. 124) stipulates that the remuneration of a prosecutor is determined by, of which there are nine. The instance, position, and professional experience influence the choice of rate. There are rates 1-5 in the district prosecutor's office (*prokuratura rejonowa*), 4-8 in the district prosecutor's office (*prokuratura okręgowa*), 7-9 in the regional prosecutor's office (*prokuratura regionalna*), and the rate of the Prosecutor General. A prosecutor gets the next rate every five years. This term may be extended by three years if a disciplinary sanction has been applied to the prosecutor. If the prosecutor goes to the highest instance of the prosecutor's office, he/she receives a salary at the lowest (base) rate for that instance (for example, rate 4 for the district prosecutor's office – *prokuratura okręgowa*). If he/she has already received a salary at the lowest position at rate 4 or 5, he/she will receive a salary at rate 5 or 6, respectively (paras. 2-3 §3 Art. 124). That is, the rate cannot be raised early or 'jumped' due to promotion in the same instance of the prosecutor's office. In the case of the professional promotion of the prosecutor to a higher instance of the prosecutor's office, he/she can immediately claim the minimum rate for this prosecutor's office. However, if the prosecutor has substantial professional experience (20-25 years) and the highest rates of the instance in which he/she worked, the position in a higher instance will be an opportunity for the prosecutor to gradually increase his/her salary. If the prosecutor moves to another (less significant) position, he/she continues to receive the previous rate reached (§4 Art. 124). This approach guarantees stability, predictability, and confidence of prosecutors in the future regarding their salaries, even in the case of demotion. Therefore, there are real guarantees of holding a position in the prosecutor's office. The rate is supplemented by a) a surcharge for years of service, starting from the 6th year of service with 5% and then annually increasing by

47 Conclusion on the Draft Law of Ukraine 'On the Prosecutor's Office' (CDL-AD (2009) 048), para 16 <https://minjust.gov.ua/m/str_23374> accessed 7 June 2021); Conclusion on the Draft Law of Ukraine on the Prosecutor's Office, adopted by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013), para 27 <https://rm.coe.int/1680097f7d> accessed 7 June 2021.

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1% to a 20% maximum; b) a functional supplement (for duties); c) in accordance with Art. 126, social insurance contributions are not deducted from the salaries of prosecutors. Such a system seems more flexible because it takes into account more factors and does not depend on a subjective factor, unlike bonuses.

The approach to the remuneration of German prosecutors is similar to the Polish one. The only difference is that prosecutors and judges in Poland are not considered civil servants, are not equated with them, and their status, remuneration, material, and other support is determined by the relevant laws on the prosecutor's office and the judiciary. Instead, German prosecutors and judges are considered civil servants in the context of receiving salaries from the federal or relevant land budgets, but any departmental instructions and subordination specific to the civil service do not apply to them. Sometimes, there is information in the sources that prosecutors in Germany have 'R levels' and, apparently, some researchers draw hasty conclusions that German prosecutors have ranks similar to the class ranks of Ukrainian prosecutors. Such considerations are only false assumptions. 'R levels' means that the salary of prosecutors is the salary with rank R in accordance with §§37 and 38 of the Federal Law on Salaries (BBesG). The BBesG determines the salaries of all civil servants, soldiers, professors at public universities, judges, prosecutors, police officers, etc. BBesG sets four salary ranks – A, B, W, and R; each rank sets levels (categories). Appropriate rank indicates the scope and nature of the activity, the amount of responsibility and risk, etc., for example, in rank W, employees receive the salary of professors and university administrations, and in rank R, employees receive the salary of prosecutors and judges (§ 37, 38 BBesG).

Rank R has nine classes – from R2 (R1 not applicable) to R10 depending on the position and type of court (prosecutor's office). According to Part 3 of § 27 BBesG, the basic level of R2 increases after two years of experience. At levels R2 to R4, you need to work for three years, and at levels R5-7, for four years. Periods during which the employee is not entitled to remuneration are not included in the period of stay at the level. Annex No. 3 to the BBesG sets out the range of prosecutors' and judges' posts for each level from R2 to R9, and Annex No. 4 sets out the network of federal prosecutors' rates for each level from R2 to R9 (€5,400 to €14,800).[48] Similarly, the laws set the basic salaries of 'ranks R'.[49]

As we can see, the 'rates' of Polish prosecutors and the 'ranks R' of German prosecutors are not analogous to the class ranks of Ukrainian prosecutors. They are not related to the awarding of special ranks to prosecutors in a solemn atmosphere as 'lawyer of the 1st-3rd class – justice counsellor of the 1st-3rd class – state justice counsellor', which are equated to military ranks. The rates in Poland and Germany concern only the system of remuneration of prosecutors and determine the basic salary of prosecutors depending on the length of service and promotion. 'Rates' or 'ranks R' are not mentioned in the procedural documents of prosecutors, are not demonstrated, and are not emphasised in any procedural and public legal relations that the prosecutor enters into, do not express the expected honours to the prosecutor, and are not aimed at 'ensuring discipline and respect for the prosecutor from the participants in the judicial process'.

4.8 The globalisation (comparative law) aspect

Now, we will analyse the prosecutor's dress in Europe. One of the arguments for amendments to legislation is the international experience, especially the practice of European states.

48 Bundesbesoldungsgesetz (BBesG) Ausfertigungsdatum: 23.05.1975. Änderung durch Art. 9 G v. 30.3.2021 I 607 (Nr. 14) <https://www.gesetze-im-internet.de/bbesg/BJNR011740975.html#BJNR011740975BJNG000611311> accessed 7 June 2021.

49 'Staatsanwalt als Beruf – Infos zur Arbeit in der Justiz' (n 38).

Unfortunately, the authors of the Draft Law who appeal to the European experience do not specify what this experience of European countries is. Thus, discussion on this issue is often based on one's own ideas or conjectures.

Thus, in European countries, there is no single model of organisation for the prosecutor's office, but despite the diversity of these models, the legal status of prosecutors is tied to the sphere of justice. In most European countries, the relevant laws provide for largely common (cross-cutting) approaches to regulating the status of judges and prosecutors:

- uniform qualification requirements for positions;
- mutual enrolment of passed qualification exams for a judge, prosecutor, or lawyer;
- similar grounds for disciplinary liability and types of disciplinary sanctions;
- encouraging the transition from profession to profession (for example, in Austria, only a judge or a retired judge can become a federal prosecutor);
- uniform tariffs and incentives for wages, uniforms, etc.

The qualification classes, ranks, etc. of judges and prosecutors are not mentioned by the relevant laws (like the Law of Ukraine 'On the Prosecutor's Office' of 2014), probably because it does not exist (except for military prosecutors, who, for example, in Switzerland (die Staatsanwälte Auditoren) and in Poland, may have military ranks).[50]

At the same time, taking into account the place of the prosecutor's office in the system of power, its organisation, and its main functions, the following models can be distinguished in Europe:

- The prosecutor's office is a part of the Ministry of Justice (France, Belgium, Germany, Poland, Denmark, the Netherlands, Romania, and Estonia) – the prosecutor's office is assigned to the executive branch and is subordinate to the Ministry of Justice. Prosecution officials are very close to the judiciary – they receive the same training, have the possibility to move from being prosecutors to judges during their careers (or vice versa). In Germany, prosecutors' offices operate in general courts at all levels. The Attorney General exercises his

50 When analysing military prosecutors, one should first of all understand that specialised military prosecutors' offices are uncommon in European countries because of the political contradictions. As a rule, it is an element of the military justice system (military courts). For example, the system of military justice also exists in Switzerland, the abolition of which was proposed in the referendum in 1921 but was not supported. 'Volksabstimmung vom 30.01.1921' <https://www.bk.admin.ch/ch/d/pore/va/19210130/index.html> accessed 7 June 2021. Swiss military prosecutors are still called auditors (the name dates back to Austro-Hungarian times) and have military ranks. For example, the chief auditor of the army (der Oberauditor) has the rank of foreman (den Grad eines Brigadiers). } Art.17 Militärstrafprozess (MStP) vom 23. März 1979 (Stand am 1. Februar 2020)' <https://www.fedlex.admin.ch/eli/cc/1979/1059_1059_1059/de#art_17> accessed 7 June 2021. Also, §2-4 of Art. 3 of the Law on the Prosecutor's Office of Poland provides for the specialisation of military prosecutors, and Art. 125 establishes that 'regulations applying to professional servicemen shall apply to military prosecutors, who are professional servicemen, on issues not regulated by this Law'. Prawo o prokuraturze. Ustswa z dnia 28 stycznia 2016 r. Aktualna 19.01.2021 r. <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20160000177/U/D20160177Lj.pdf> accessed 7 June 2021.Therefore, Polish military prosecutors serving in the army may have military ranks and military uniforms on par with other servicemen.
The Laws on the Prosecutor's Office of Austria (§ 5 Staatsanwaltschaftsgesetz, Fassung vom 07.07.2021) <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000842> accessed 7 June 2021, and Germany (§ 143 Gerichtsverfassungsgesetz) <https://dejure.org/gesetze/GVG/148.html> accessed 7 June 2021 do not establish the internal specialisation of prosecutors' offices, but only stipulate that, if necessary, structural subdivisions can be made in each prosecutor's office in the most priority areas (types of offences). Therefore, the cases of servicemen are carried out by ordinary civil prosecutor's offices.

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powers under the general direction of the Minister of Justice. In Poland, the Attorney General is the Minister of Justice.

- The prosecutor's office is part of the judiciary and operates in the courts (Bulgaria, Spain, Italy, Latvia) – for example, the Latvian prosecutor's office is a body of the judiciary that independently monitors compliance with the law.
- The prosecutor's office or its literal analogue does not exist in all countries (see, for example, Great Britain). In the system of public authorities, the Royal Prosecutors Service functions as an independent and autonomous authority, coordinated by the General Attorney.
- The prosecutor's office has a separate system and is accountable to parliament or the head of state (Lithuania).[51]

So, do prosecutors in European countries have prosecutor's dress?

Prosecutors do not have prosecutor's dress in Sweden (prosecutors and judges do not have prosecutor's dress in this country of minimalism; they wear business suits), Poland, Hungary, Latvia, Estonia, Georgia, or Moldova.

Prosecutors have such formal dress as the mantle in Germany, Austria, Italy, Spain, France, the Czech Republic, Slovakia, Norway, the Netherlands, Belgium, Great Britain,[52] Lithuania,[53] Turkey,[54] and the French-speaking cantons of Switzerland.[55] Prosecutors wear the mantle in court during proceedings. They perform their other official functions in business suits (usually plain dark suits).

In these states, the obligation to wear the mantle extends to both prosecutors and lawyers, with the peculiarity that there is no obligation to wear it in civil, administrative cases in the first and appellate instances. The mantle is used only in cassation courts (supreme, federal, land) and in criminal proceedings (in all instances).[56]

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51 L V Omelchuk, A R Klitynska, 'European experience in the organization of prosecutor's offices' (2016) 1 International Legal Bulletin: A collection of scientific papers of the National University of the State Tax Service of Ukraine 199-204 <http://nbuv.gov.ua/UJRN/muvnudp_2016_1_34> accessed 7 June 2021; S V Banah, 'International experience in the organization of the prosecutor's office' (2020) 29 Bulletin of V N Karazin Kharkiv National University, 'Pravo' series 276-280.

52 *The Prosecutors* (27 March 2018) <https://www.open.edu/openlearn/whats-on/tv/series-one-the-prosecutors> accessed 7 June 2021); 'Ireland's top prosecutors earned €14.8million in 2016, with one enjoying STAGGERING €449,623 pay' (14 March 2017) <https://www.irishmirror.ie/news/irish-news/irelands-top-prosecutors-earned-148million-10021731> accessed 7 June 2021; 'Help of Trinidad prosecutor Keith Scotland is necessary, DPP Baptiste says' (12 December 2016) <http://sundominica.com/articles/help-of-trinidad-prosecutor-keith-scotland-is-nece-4010/> accessed 7 June 2021.

53 'Lietuvos Respublikai prisiekė trys nauji prokurorai' (1 April 2018) <https://www.prokuraturos.lt/lt/naujienos/prokuraturos-aktualijos/lietuvos-respublikai-prisieke-trys-nauji-prokurorai/5606> accessed 7 June 2021.

54 Savcı,. 1 Aralık 2020 tarihinde eklendi <https://hakkinda-bilgi.nedir.kim/savci/> accessed 7 June 2021; Hakim ve savcıların cübbeleri değişiyor. 13.09.2014 – Güncelleme: 13.09.2014 <https://www.haberturk.com/gundem/haber/989749-hakim-ve-savcilarin-cubbeleri-degisiyor> accessed 7 June 2021.

55 A Renens, 'Les activistes climatiques sont condamnés en appel' (24 September 2020) <https://www.letemps.ch/suisse/renens-activistes-climatiques-condamnes-appel> accessed 7 June 2021.

56 O Kaluzhna, 'The prosecutor is met on clothes' (15 May 2021) <https://zbruc.eu/node/105183< accessed 7 June 2021.

- In **Italy**, judges, prosecutors, and lawyers wear black mantles in higher courts and in all courts resolving criminal cases.[57] In addition, judges and prosecutors wear red mantles lined with ermines at ceremonies, such as the opening of the judicial year.

In **Germany,** the official costume of lawyers is 'eine Robe', 'deutsche Juristenrobe' – robe, mantle (the robes of lawyers and judges). At court hearings, prosecutors wear a mantle that matches the judge's clothing – black wool with a velvet border 12cm wide,[58] red for federal prosecutors.[59] The mantle of the lawyer and the trainee has a velvet strip 8cm wide.

In **Austria**, they wear a black mantle with a black velvet collar with red elements and cuffs,[60] in **France**[61] **and Belgium**[62] – red silk with black lapels and cuffs and a white collar; in the Netherlands,[63] judges, lawyers, and prosecutors wear black mantles, with the difference that judges' robes have silk ties on their sleeves and clasps; in **Norway**[64] – the black mantle.

In the **Czech Republic**, lawyers have black mantles with coloured decorations. The colour of the border depends on the profession – purple (judges of general courts), red (prosecutors), blue (lawyers), or just black (secretaries, court administrators).[65] Similar mantles are worn in **Slovakia**.[66]

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57 Antonio Chiappani, procuratore capo di Bergamo, 'Italia impreparata al Covid, si è improvvisato' (9 December 2020) <https://www.huffingtonpost.it/entry/antonio-chiappani-procuratore-capo-di-bergamo-italia-impreparata-al-covid-si-e-improvvisato_it_5fd0ddf9c5b652dce584fe06> accessed 7 June 2021; Corte dei Conti, 'Il terremoto è ancora la priorità: aperti nuovi fascicoli' (8 March 2019) <https://www.anconatoday.it/cronaca/terremoto-corte-conti-2019.html> accessed 7 June 2021.

58 Julia Bröder, 'So arbeiten Staatsanwälte in Deutschland. Neutral und im Dienst der Gesellschaft: fünf Fakten zum Beruf des Staatsanwalts' (20 May 2019) <https://www.deutschland.de/de/topic/politik/so-arbeiten-staatsanwaelte-in-deutschland> accessed 7 June 2021.

59 'Plädoyer der Bundesanwaltschaft. Halle-Attentäter soll lebenslang in Haft' (18 November 2020) <https://www.tagesschau.de/inland/halle-bundesanwaltschaft-101.html> accessed 7 June 2021.

60 'Roben für Juristen, Talare für die Österreichische Justiz' <https://www.gewandmeisterei.de/shop/Talar-Talare-Richtertalar-Richtertalare-Anwaltstalar-Anwaltstalare/> accessed 7 June 2021; 'Staatsanwälte: "Grasser und seine Freunde haben kassiert"' (13 October 2020) <https://www.wienerzeitung.at/themen/buwog/2078880-Staatsanwaelte-Grasser-und-seine-Freunde-haben-kassiert.html> accessed 7 June 2021.

61 Fiche Métier, 'Procureur de la République' <http://etudiant.aujourdhui.fr/etudiant/metiers/fiche-metier/procureur-de-la-republique.html> accessed 7 June 2021; Rémy Heitz, 'Un procureur de la République sous pression' (2 April 2019) <https://www.lemonde.fr/societe/article/2019/04/02/remy-heitz-un-procureur-de-la-republique-sous-pression_5444623_3224.html> accessed 7 June 2021.

62 'Pierre Vanderheyden est le nouveau procureur général de Liège' (7 May 2021) <https://www.rtbf.be/info/regions/detail_pierre-vanderheyden-est-le-nouveau-procureur-general-de-liege?id=10757416> accessed 7 June 2021; 'Elisabeth Dessoy procureur à Marche' (2 November 2010) <https://www.sudinfo.be/art/d-20130104-Z1AR1U> accessed 7 June 2021.

63 'Aanklager Pistorius in beroep tegen "te lage" straf' (27 October 2014) <https://www.rtlnieuws.nl/buitenland/artikel/1554886/aanklager-pistorius-beroep-tegen-te-lage-straf> accessed 7 June 2021; 'Openbaar aanklager wil dat moordverdachte schuldig wordt verklaard' (25 June 2015) <https://www.focus-wtv.be/nieuws/openbaar-aanklager-wil-dat-moordverdachte-schuldig-wordt-verklaard> accessed 7 June 2021.

64 'Aktor om terrortiltalt 16-åring: – Planla et større angrep i Norge' (18 May 2021) <https://www.document.no/2021/05/18/aktor-om-terrortiltalt-16-aring-planla-et-storre-angrep-i-norge/> accessed 7 June 2021.

65 'Státní zastupitelství' <https://verejnazaloba.cz/> accessed 7 June 2021; 'Sháníějte praxi již při studiu, doporučuje státní zástupce' (4 February 2014) <https://www.jdipracovat.cz/shanejte-praxi-jiz-pri-studiu-doporucuje-statni-zastupce/> accessed 7 June 2021; 'Čeští advokáti začnou nosit taláry, zřejmě s modrým límcem' (12 February 2009) <https://www.idnes.cz/zpravy/domaci/cesti-advokati-zacnou-nosit-talary-zrejme-s-modrym-limcem.A090212_150011_krimi_js> accessed 7 June 2021.

66 Taláre – prokurátorské, advokátske, sudcovské sa objednávajú na mieru a sú jedinečné pre každého zákazníka. Vzhľad prokurátorského talára. <https://www.niltex.sk/talare-pre-prokuratorov/> accessed 7 June 2021.

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Only three post-Soviet countries have a militarised prosecutor's dress of all 47 member states of the Council of Europe – the **Russian Federation**,[67] **Armenia**,[68] and **Azerbaijan**[69] – as the tradition of the USSR prosecutor's office. The Baltic States, **Georgia**,[70] and **Moldova**,[71] as former Soviet republics, have abandoned this tradition. Georgia, Moldova, and Ukraine have had associate membership with the EU since 2014.

As we can see, all the post-Soviet republics that have chosen the path of European integration have passed the stage of reforming their prosecutor's offices, particularly regarding the regulation of functions of prosecutors and prosecutor's dress.

None of these states that prosecutors who use a robe or ordinary business suit are uncivilised, underdeveloped, or have no history of civil service. Therefore, the reference of the lobbyists in Draft Law 3062 to the European experience and traditions of prosecutor's dress does not correspond to reality and will create the wrong impression for people unfamiliar with such an experience.

4.9 The cultural (symbolic) aspect

The prosecutor's dress is not only a matter of psychological attachment and its attractiveness to certain categories of people. The prosecutor's dress is about the ideas and values that it symbolises – the type of legal system, the worldview, culture, and narrative.

The militarised form of clothing of a professional participant in the process of justice (judge, prosecutor, lawyer) brings a touch of militarism and gives a military look to the judiciary. Therefore, because of the socio-political system and/or historical past of these states, the military uniform of prosecutors, to an outside observer (foreigner), is associated with an authoritarian (quasi-democratic) type of government and/or the post-Soviet space and traditions. Thus, the uniform of prosecutors characterises and symbolises the type of legal culture. This issue is primarily one of cultural and ideological values rather than encouraging the work of prosecutors.

The prosecutor's dress, of course, is not associated with incentives for quality work and career growth, but they symbolise belonging to the profession and therefore are one of the *psychological factors* that a) attract young people to work in the prosecutor's office; b) allow prosecutors to play a certain role in society. Hence, the prosecutor's dress is an *internal psychological motive* in people's choice of profession when the factor is important in terms of their ambitions and ideas about the prestige of the profession (to which their belonging can be determined by external, recognisable features).

If prosecutors objectively do not need a prosecutor's uniform to perform their functions effectively in modern conditions, the attentive reader might ask, what is the reason for the mantle of prosecutors in other European countries?

The mantle serves different purposes. On the one hand, like the military-like prosecutor's dress (uniform), the mantle is an external symbol, a visual distinguishing feature of belonging to the profession. However, unlike the military uniform, the mantle is a 'symbol of judicial dignity', the traditional attire of legal practitioners involved in the administration

67 В России сменился генпрокурор. 22 января 2020. <https://lenta.ru/news/2020/01/22/general/> accessed 7 June 2021.

68 'Prosecutor General of the Republic of Armenia, Candidate of Legal Sciences, Second Rank State Counsellor of Justice' <https://www.prosecutor.am/en/Biography/> accessed 7 June 2021.

69 Prosecutor General's Office of the Republic of Azerbaijan, 'Leadership' <https://genprosecutor.gov.az/en/page/prokurorluq/azerbaycan-prokurorlugu/rehberlik> accessed 7 June 2021.

70 Prosecutors General of the Republic of Georgia <https://pog.gov.ge/en/employee/prosecutor-list> accessed 7 June 2021.

71 Directorate of the General Prosecutor's Office of the Republic of Moldova <http://procuratura.md/en/infoproc/> accessed 7 June 2021.

of justice, who share the same knowledge, principles, ethical standards, maturity, and independence of opinions. The mantle allows professional participants of the process – judge, prosecutor, lawyer – to be distinguished from the other participants (witnesses, victims, suspects, etc.) so that their position as independent people responsible for the administration of justice is more easily recognisable. The mantle clarifies the situation in the courtroom and contributes to the creation of an atmosphere of balance, impartiality, and objectivity in court.

On the other hand, the lawyer wears a mantle over his/her clothes, covering his/her personal appearance. People dressed in the mantle do not act as private persons but exclusively as functionaries of the legal system in the positions determined by the legislator. Due to the homogeneity of the mantle of all justice officials (judges, prosecutors, lawyers), it also states that people who wear the mantle are on an equal footing due to the powers granted to each of them by law, regardless of whether someone can afford an expensive suit or ordinary, casual, street clothes.

Thus, the prosecutor's dress – military uniform, mantle, or business suit – has the opposite meaning. The Soviet-style prosecutor's uniform, together with the shoulder straps that indicate class rank, aims to attract attention, to emphasise and elevate the status of the prosecutor in the process, and instil timidity and obedience (i.e., discipline) in other participants in communication with him. The initiators of Draft Law 3062 openly note this.

In contrast, the idea of the mantle is to hide the social position of the prosecutor and the lawyer, regardless of achievements, merits, respectable clothes, or property status, so that no external, visible factors distract from ***the arguments of the prosecutor and the lawyer***. The mantle is used in the court process so that the external form does not prevail over the internal content of the person's professional activity and does not become a tactical and psychological element of overemphasising the attention of the court, other participants, and all those present in the courtroom on the prosecutor or lawyer's competence and skills. This positioning of the prosecutor and the lawyer is in line with the principles of adversarial proceedings and the procedural equality of the parties. In those countries where there is no mantle for prosecutors, the usual business suit is used – suits with a restrained cut and dark colours. Their dress is not intended for self-expression. The idea of a restrained suit is the same as the mantle – to avoid attracting attention with its appearance.

Consequently, the uniform of prosecutors is a material artefact of the inherent culture, an indicator of the worldview of that society. Lobbyists and supporters of the idea of restoring the uniform of prosecutors may be aware of this but do not report unpleasant and inconvenient facts. 'But the thing is that selective truth is a distorted truth',[72] as was said by M. Marynovych, a well-known public figure, dissident, human rights activist and publicist, and vice-rector of the Ukrainian Catholic University in Lviv.

Therefore, Ukraine declared a course for European integration in the preamble of the Constitution in 2019 – in the conditions of war and its possible aggravation, when the northern neighbour on our borders is brandishing weapons, to continue and spread the culture of the prosecutor's office of this neighbour is an incomprehensible step.

The analysis of the ***cultural aspect*** would be incomplete without assessing the possibility and prospects of introducing a mantle for Ukrainian prosecutors.

a) The mantle is a tradition that has been formed historically. It is a customary national law (enshrined in the statutes of professional communities and codes of professional ethics), and its origins date back to the 18th century in those European countries where prosecutors and

72 Myroslav Marynovych, 'Avoid the fourth tyranny' (17 July 2020) <https://m.tyzhden.ua/Columns/50/245696?fbclid=IwAR29jM2aNCrOXjtGicVsbDUivCfWrGe32M63Us2f5Rpnjp3bcdlBPUmB6aw> accessed 7 June 2021.

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lawyers, as well as judges, wear mantles. This does not mean that Ukraine, like other states in which there are no mantle traditions, cannot start such a tradition because all European states 'started from something'. For example, in Slovakia, mantles as uniforms for lawyers were proposed only in 2006, and the Czech Republic began a public debate on the mantles only in 2007 so that lawyers could express their opinion on the mantles.[73] As Dr Peter Tümmel, a member of the General Professional and Basic Duties and Advertising Committee of the German Federal Bar Association (BRAK), said

> We have long fought for our recognition as a body of justice, including the Federal Constitutional Court.[74] The mantle is an outward sign of confirmation of this; for those involved, as well as for customers and outsiders, which is important.[75]

Currently, Ukraine has sufficient constitutional preconditions for the introduction of mantles for prosecutors and lawyers by virtue of the constitutional changes of 2 June 2016 in the area of justice (Chapter VIII of the Constitution of Ukraine),[76] according to which the Prosecutor's Office (Art. 131-1) and the Bar enshrined in the Constitution as elements of the justice system.

b) The law should provide the obligation to wear mantles for both prosecutors and lawyers, not the right to wear them. Any other approach would distort the mantle idea for forensic lawyers and be out of context and detrimental to the principle of equality of arms. For example, on 18 December 2012, Draft Law No. 1115[77] on a mantle for lawyers was submitted to the Verkhovna Rada. The first draft of the law proposed to supplement Art. 47 of the CPC (duties of a defence counsel). The main idea of the Draft Law was that the defence counsel in criminal proceedings in court would be obliged to wear a lawyer's mantle.

Later, in the revised version of the Draft Law, the voluntary nature of wearing a mantle in all types of litigation was enshrined. Thus, the amendments to Art. 47 of the CPC and proposed amendments to Art. 20 (professional rights of a lawyer) of the Law of Ukraine 'Law on the Bar and Advocates' Activity' have been cancelled. However, on 27 November 2014, the legal community withdrew[78] the document due to significant resistance towards and a negative assessment of that Draft Law.

On 6 September 2018, the Draft Law 'Law on the Bar and Advocates' Activity' No. 9055,[79] Art. 18 (symbols of the Bar of Ukraine) was proposed. The Draft Law provided for the voluntary right of a lawyer in court to carry out their professional activities in a mantle and with a badge. The sample of this practice was approved by the Bar Council of Ukraine.

As we can see, the disproportion is that the introduction of mantles for prosecutors has never been proposed. This issue was raised only in the framework of the round table 'Professional

73 'Na taláry si dělají zálusk i advokáti' (8 May 2007) <https://tn.nova.cz/clanek/zpravy/domaci/na-talary-si-delaji-zalusk-i-advokati.html> accessed 7 June 2021.

74 In Germany, there is no legal provision to wear a mantle in court – this obligation is enshrined in the professional code of conduct for lawyers.

75 'Bald auch ohne Robe zu Gericht? Von Pia Lorenz' (3 May 2019) <https://www.lto.de/recht/juristen/b/satzungsversammlung-brak-antrag-abschaffung-robenpflicht/> accessed 7 June 2021.

76 Law of Ukraine 'Amendments to the Constitution of Ukraine (Regarding Justice)' of 2 June 2016 No 1401-VIII <https://zakon.rada.gov.ua/laws/show/1401-19#n2> accessed 7 June 2021; Constitution of Ukraine, Version of 1 January 2020 <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#n5259> accessed 7 June 2021.

77 Draft Law on Amendments to the Law of Ukraine 'Law on the Bar and Advocates' Activity' concerning the lawyer's mantle of 18 December 2012 No 1115 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?id=&pf3516=1115&skl=8> accessed 7 June 2021.

78 See the stages of passing the Draft Law on Amendments to the 'Law on the Bar and Advocates' Activity' regarding the lawyer's mantle (n 77).

79 Draft Law 'Law on the Bar and Advocates' Activity' of 6 September 2018 No 9055 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64557> accessed 7 June 2021.

ethics of the trial' (Kyiv, 24 November 2017). After this event, a resolution was proposed, which contains the idea of the introduction of mantles in court for prosecutors and lawyers.[80]

The introduction of the mantle for prosecutors and lawyers on a voluntary basis will lead to chaos and does not correspond to the idea of the mantle – the principle of equality of arms. The voluntary wearing of the mantle will make lawyers happy to simplify their lives and rarely use the mantle. A defence attorney in civilian clothes will oppose a prosecutor in a mantle or vice versa, which completely distorts the idea of a mantle for court lawyers.

In addition, in the case of the introduction of the mantle, it is necessary to address organisational and technical issues. First, changing rooms for lawyers need to be arranged in the courts, as it is difficult to come to court in a mantle (weather conditions, tidiness, etc.). In addition, lawyers and prosecutors practice in different courts in the region or in different regions (several dozen courts), and it is financially impossible for them to keep a mantle set in each court. Conversely, it is not possible for courts to keep such a large number of mantles on the premises. Therefore, lawyers need to be aware that they will have to carry the mantle to each court hearing.

Secondly, a significant period should be arranged in the introduction of mantles for the entry into force of such a law (six months to a year), so that court lawyers have enough time to purchase mantles and a market for their manufacture will appear. Otherwise, the person (client) will be deprived of the right to the legal assistance of the chosen defence counsel due to his/her inadmissibility to the court hearing due to improper appearance.

Thirdly, the mantle is an additional expense for the prosecutor and the lawyer. For example, the approximate cost for a lawyer's mantle of lawyers in the Czech Republic is CZK 2,800,[81] in Germany, from €180 to €340 (price may vary depending on the size, manufacturer, quality of accessories, and fabric).[82]

The idea of mantles for prosecutors and lawyers must go through a stage of psychological perception and acceptance of this idea within the legal community, which currently rejects this idea as being imposed on it from the outside, likely due to ignorance on this issue. In the Czech Republic, at the time of the public debate on the introduction of the mantle for lawyers, according to initial estimates, about two-thirds of the legal community was in favour of the mantle,[83] and the mantle became obligatory in 2010.[84]

Beyond these organisational and psychological difficulties and barriers, the idea of the mantle is meaningful and correct because the mantle proves that prosecutors and lawyers act on an equal footing with judges. The mantle ennobles court lawyers and adds dignity and courtesy to the trial. The mantle does not allow for emotions, kinship, familiarity, etc. Undoubtedly, the mantle would promote and raise the prestige of the judicial legal professions.

80 'Judicial ethics: The vision of judges, prosecutors and lawyers' (26 November 2017) <https://ukrainepravo.com/news/ukraine/yekhyna-ftsesvsgs-tusshchyefts-bayerrya-ftseekv-tusntsusukv-k-aevsnakhkv-/> accessed 7 June 2021.

81 'Talár pro státní zástupce černá – červená, žena' <https://www.papper.cz/cs/talary-pro-soudce-a-absolventy/16005-talar-pro-statni-zastupce-soudkyne.html> accessed 7 June 2021.

82 'Natürlich von Soldan: Roben-Klassiker für Anwälte, Richter, Staatsanwälte' <https://www.soldan.de/fachbedarf/roben> accessed 7 June 2021.

83 'Na taláry si dělají zálusk i advokáti' (8 May 2007) <https://tn.nova.cz/clanek/zpravy/domaci/na-talary-si-delaji-zalusk-i-advokati.html> accessed 7 June 2021.

84 'Taláry pro advokáty jsou blíže. Kývl na ně senát. Advokáti by se do taláru mohli obléct příští rok. Jak bude oděv vypadat, se zatím neví.' (17 June 2009) <https://zpravy.aktualne.cz/domaci/talary-pro-advokaty-jsou-blize-kyvl-na-ne-senat/r~i:article:640254/> accessed 7 June 2021.

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4.10 The professional (deontological) aspect

The prosecutor must properly understand the essence of his profession and its social role in society. In addition, prosecutors should reasonably and in the spirit of respect for human rights use the powers granted to them in accordance with the principles of the rule of law, legality, and justice, improve their skills, deepen their legal knowledge, improve the general and legal culture, and master foreign experience in their activity**.**

From the deontological perspective, Ukrainian prosecutors have certain problems. According to V. Neklyudov (chairman of the subcommittee on the activities of the prosecutor's office of the Verkhovna Rada Committee on Law Enforcement)

> Polls of prosecutors show that 41% of respondents believe that *the class rank is a marker of a prosecutor's career*, although less significant, than holding an administrative or higher position. Moreover, a career for prosecutors is a significant motivating factor, but *the strongest influence on the motivation of professional activity is exerted by a career*, *not a professional career*. At the same time, for 29% of respondents, the class rank is an indicator of the professionalism of the prosecutor…[85]

Unfortunately, Neklyudov does not provide information about which sociological service or interdepartmental research conducted this survey or what is its representativeness was (total number, sampling principle), so there are many unknown sociological factors in the survey.

Analysing the arguments, ***firstly***, the system of motives for working in the prosecutor's office is multifaceted, but the fact that 'a career for prosecutors is a significant motivating factor, and *the strongest influence on motivation has a job* (administrative or higher position*), not a professional career*' should alert us. This means that in the pyramid of motivation of prosecutors, career growth is the highest motivation: people want to hold administrative (managerial) and/or senior positions and increase their class rank. What does this indicate? On the one hand, the focus on career growth is a positive motive, but, on the other, service careerism is traditionally inherent in military, hierarchical types of service ('Those soldiers who are not willing to be a general are not good soldiers'). For professions characterised by such features as intrinsic independence of professional activity and an analytical and creative nature, the central motives, it seems, are intellectual and emotional satisfaction from work and its results, self-awareness in the profession, gaining a professional image, and respect among colleagues, clients, and society as a whole. In other words, the priorities of prosecutors' motivation demonstrate their worldviews and self-awareness of the profession as a vertical hierarchical service or as a professional activity characterised by independence, with elements of administrative subordination to higher-level prosecutors (Art. 17 of the Law 'On Prosecutor's Office'[86] 2014). After analysing the survey data, it is unclear what place the prosecutor's activity itself as a professional affair occupies in the hierarchy of prosecutors' motivation. However, this motivation should play a key role for prosecutors. After all, trust and respect for the prosecutor's office in society directly depend on successful criminal proceedings, fair sentences, and the impossibility of avoiding criminal liability. Society is indifferent to the positions, regalia, honours, awards, ranks, experience, etc., of the prosecutor who managed to ensure this social effect. It is the effectiveness of prosecutors more than anything else that is important to society.

Secondly, it should be understood that '41% of respondents consider a class rank a career marker', as the vast majority of the Ukrainian prosecutor's office was formed before 2014, i.e., in the spirit of the values of the prosecutorial community according to the Law 'On

85 Vladlen Neklyudov, 'Class ranks are not for generals, but for ordinary prosecutors' <https://censor.net/ru/b3253460> accessed 7 June 2021.

86 Law of Ukraine 'On the Prosecutor's Office' of 14 October 2014 No 1697-VII <https://zakon.rada.gov.ua/laws/show/1697-18#Text> accessed 7 June 2021.

the Prosecutor's Office' from 1991 and the Constitution of 1996 – the cultural successor of the prosecutor's office of the USSR (Soviet model of the prosecutor's office). Therefore, *on the one hand*, we should not be surprised by the commitment of some Ukrainian prosecutors to the military uniform and class ranks – this is a natural manifestation of their psychological attachment to historical traditions and customs in the corporate community. However, *on the other hand*, the prosecutor must understand the essence of his/her profession and what determines its standards of ethics, pay, positioning, and trust in society. They must actively engage in self-education, expand the idea of the prosecutor's office in the legal system in a comparative context, and not remain in the decades-old information vacuum. In accordance with Part 2 of Art. 19 of the Law 'On the Prosecutor's Office', the prosecutor is obliged to improve his/her professional level. The prosecutor is periodically trained at the Ukrainian Training Center of Prosecutors, which should include the study of the rules of prosecutorial ethics.

Therefore, if the said sociological survey proves the real state of the prosecutors' worldview, more attention should be paid to the professional deontology of prosecutors. Round tables, seminars, conferences (national and international), etc., should forward this educational mission. The Training Center of Prosecutors of Ukraine could play an important role in the field of education, acquainting prosecutors of Ukraine with the international standards of the prosecutor's office.

Attention should also be paid to this issue in the educational process in law schools and faculties in the courses on prosecutor's law or criminal justice, as it is presented only in a summary style (class ranks and uniforms of prosecutors exist/do not exist, and when they were cancelled). Thus, generations of future lawyers are formed in the information vacuum – questions remain about the dress code of prosecutors, whether they have classes or ranks and why, whether this is consistent with the functions of the prosecutor in the judiciary and the principles of the process, and so on. As a result, the current and younger generation of lawyers are poorly informed about these issues, and therefore, it is easy to persuade them of one idea or another.

4.11 The sociological aspect

The best expression of respect for prosecutors and an incentive for their dedication to work and the prestige of the profession is a high level of public trust in the prosecutor's office, when prosecutors are popular, respected, and appreciated for their hard, dangerous, risky work.

For example, according to the data and methodology of public opinion polls of EU member states of the Eurobarometer Standard, as of April 2019, the highest level of trust in prosecutors was recorded in Denmark at 44% (1,019 respondents). In comparison, the rate was 20% in Sweden, 13% in Poland, and 14% in Germany (the EU average is 10% of the 27,655 interviewees). This percentage of respondents believes that the prosecutor's office conducts criminal prosecutions correctly, regardless of whether the crime was committed by politicians or other influential people or in their own economic interests, and nothing in the work of prosecutors needs to be improved.[87] At the same time, for 99% of Swedes and Germans surveyed, 94% of Danes, and 91% of Poles, it is important that the prosecutor's office performs its functions properly, despite the influence of the suspects and regardless of their own economic interests. That is, respondents have high demands and expectations, and this issue is important in their lives.

The results of the Eurobarometer polls are incomparable with the polls of Ukrainian sociological services, as Ukrainians were not asked questions in a specific context but only about trust/distrust in general. In any case, according to the latest polls conducted by the

87 European Commission, 'Eurobarometer, Rule of Law' (July 2019) <https://europa.eu/eurobarometer/surveys/detail/2235> accessed 19 May 2021.

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Razumkov Center on March 2021, 2.7% of Ukrainians fully trust the prosecutor's office, and 14.6% somewhat trust it (a total of 17.3%).[88] It is unknown by what criteria (or general feelings) the Ukrainian respondents were guided.

4.12 The value (ethical- philosophical) aspect

As stated in the explanatory note to Draft Law 3062, 'the return of the mechanism for assigning class ranks and uniforms to prosecutors …will discipline other participants in the criminal process in the exercise of their powers by the prosecutor and promote respect for his procedural status'. 1) This thesis is, in folk wisdom, that 'a place (uniform) beautifies a person, or a person a place'. 2) Respect for the prosecutor and discipline on the part of other participants in criminal proceedings in the performance of the prosecutor's functions depends on the proper ethical conduct of the prosecutor – his/her courtesy, professionalism, and competence. If these features are not present, no uniform or rank will forcibly provide an emotional response of respect from other participants in the process, the community, and society. 3) If, on the contrary, the prosecutor allows unethical behaviour or shows incompetence – it discredits not only the identity of the prosecutor but also the uniform and the system of ranks. 4) All participants in criminal proceedings have the right to respect for procedural status by the principle of equality (para. 1, part 2 of Art. 129 of the Constitution), and respect for the prosecutor cannot be an exception. 5) Could the provision of additional incentives for respect for the prosecutor be the aim for the state, in which the person and his/her rights are declared the highest value? After all, the institute of the prosecutor's office is a state service for rendering law enforcement, human rights, and justice.

We should briefly note the controversy of the internal party policy of the presidential party 'Sluha Narodu' (SN), which forms a parliamentary mono-majority. On the one hand, the president has repeatedly said that: 'the state is a service that creates conditions for business'[89] and 'we are debureaucratizing the relationship between the state and the citizen'.[90] At the same time, MPs from the 'Sluha Narodu' introduced Draft Law 3062 and passed it through the parliamentary Committee on Law Enforcement, where the SN has a majority. Similarly, on 20 May 2021, the Verkhovna Rada voted in the first reading on the Draft Law 'On De-Sovietization of the Legislation of Ukraine' (Reg. No. 4284),[91] and later on the same day, the possibility of considering Draft Law 3062 was discussed in the session hall.[92]

88 Razumkov Center, 'Assessment of the situation in the country, trust in the institutions of society and politicians, electoral orientations of citizens' (March 2021) <https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/otsinka-sytuatsii-v-kraini-dovira-do-instytutiv-suspilstva-ta-politykiv-elektoralni-oriientatsii-gromadian-berezen-2021r> accessed 19 May 2021.

89 V Zelensky, 'The state is a service that creates conditions for business' (24 June 2019) <https://news.dtkt.ua/society/politics/56066> accessed 7 June 2021.

90 V Zelensky, 'Minus Medvedchuk, What is the meaning of the policy of de-oligarchization in Ukraine and who will be next' (14 May 2021) <https://focus.ua/uk/opinions/482442-kolonka-zelenskogo-medvedchuk-v-chem-smysl-politiki-deoligarhizacii-v-ukraine?fbclid=IwAR2cGoJwROS8jRaxsGVqiiFg40l132DKWQUaU0NDqEu4ecaHPaLe9Kosuic> accessed 7 June 2021.

91 Draft Law 'On de-Sovietization of the legislation of Ukraine' No 4284 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70276> accessed 7 June 2021.

92 Results of consideration of the issues on the agenda of the Verkhovna Rada of Ukraine for 20 May 2021, unofficial result of the consideration formed by the 'Rada' system according to the words of the chairman at the sitting <http://w1.c1.rada.gov.ua/pls/radan_gs09/ns_pd2?day_=20&month_=05&year=2021&nom_s=5> accessed 7 June 2021.

5 CONCLUSIONS

A comparative analysis of the class ranks and prosecutor's dress in the Council of Europe member states revealed common historical, transnational features characteristic of the former Soviet republics. Of all the 47 member states of the Council of Europe, prosecutors have a militarised uniform in only three states – Russia, Armenia, and Azerbaijan – as a continuation of the tradition of the USSR prosecutor's office. The Baltic States, Georgia, and Moldova have abandoned this tradition. This is primarily due to European integration processes: Lithuania, Latvia, and Estonia have been members of the EU since 2004, and Georgia, Moldova, and Ukraine have had associate membership with the EU since 2014. The reform of prosecutor's offices in these countries has covered the functions and organisation of the prosecutor's office, including the status and the appearance of prosecutors.

When they are in court, prosecutors of European countries wear a mantle like a judge's with distinctive features of decoration or a business suit and do not have class ranks, classes, or special honorary titles, which are advertised in procedural documents of the prosecutor or displayed in the form of special badges, marks, or elements of decoration on the mantles, emphasising the status of the prosecutor in any way.

For comparison, Polish prosecutors have 'rates', and German prosecutors have 'R levels', which depend on the length of service and prove the prosecutor's experience and level of office. They are basic salaries and are taken into account for additional allowances, i.e., they are used only for the remuneration of prosecutors.

Forms of prosecutor's dress – military, mantle, or business suit – are a material artefact of the inherent culture and an indication of worldview, symbolising certain ideas and values and types of legal systems. Military uniform, mantle, or business suit – all these choices have different meanings.

Class ranks and the military uniform of prosecutors do not comply with the constitutional principles of justice, namely, adversarial proceedings and equality of all participants in the process before the law and the court, as well as with the procedural principle of free evaluation of evidence.

I hope that the information provided in this article will provide a fresh perspective on the problem of the expediency of returning to Ukrainian prosecutors' military uniforms and go beyond stereotypes. The article can contribute to lawyers' self-awareness of their attitude towards this issue and understanding of how Ukrainian approaches are perceived in the world, and why, after Ukraine's accession to the Council of Europe in 1995, the Venice Commission demanded the abolition of the military image of the prosecutor's office.

Please, see the full list of references on p. 209-214.

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Research Article

JUDICIAL LAW-MAKING AND ITS REGULATION IN INDEPENDENT UKRAINE: ITS HISTORY AND DEVELOPMENT

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Summary: 1. Introduction. – 2. Methodology. – 3. Prerequisites for the Occurrence of Judicial Law-making in Ukraine (1991-1995). – 4. Constitutional Support for the Judicial System and the Judiciary in Ukraine (1996-1999). – 5. Small Judicial Reforms and Judicial Law-making in Ukraine (2000-2009). – 6. The Crisis of Judicial Legislation in Ukraine (2010-2013). – 7. The Conceptualisation of Legal Support for Judicial Law-making in Ukraine (2014-present). – 8. Conclusion.

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The author declares that he was not involved in any state bodies or any other organisations activities, related to the discussed draft laws and case-law.

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JUDICIAL LAW-MAKING AND ITS REGULATION IN INDEPENDENT UKRAINE: ITS HISTORY AND DEVELOPMENT

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Abstract *The article studies the history of the origin and development of legal regulation of judicial law-making in Ukraine. The analysis of doctrinal ideas about judicial law-making, as well as the peculiarities of its formation in Ukraine, allowed us to emphasise that our scientific research is relevant because of: 1) the duration of the domestic judicial system and judicial reform, which dates back to the proclamation of Ukraine's independence (1991) and continues to this day; 2) the ambiguity of the legal support for judicial law-making in Ukraine, the high level of its variability, and the uncertainty of the legal status of the subjects of judicial power in the mechanism of domestic law-making; 3) the doctrinal uncertainty of the place of judicial law-making in the domestic legal system, the ambiguity of its scientific perception, and the understanding of its function in the domestic mechanism of legal regulation.*

This paper analyses the provisions of the legislation of Ukraine in terms of legal support for forms and procedures of judicial law-making, the legal significance of judicial law-making acts, and their impact on administering justice in Ukraine. Particular attention is paid to the activities of the judiciary in the areas of law enforcement and law-making, the relationship and interaction of which requires strengthening in the current context of reforming the judicial system and the judiciary in Ukraine.

The stages of development of the legal regulation of judicial law-making in Ukraine are revealed, the peculiarities of the legal support for judicial law-making are determined, and the content of the legal regulation of the mechanism of participation of the subjects of the judicial power of Ukraine in the national law-making is characterised.

Analysis of the history of the legal regulation of judicial law-making in Ukraine and the current state of its legal provision allowed us to conclude that despite the scale of legislative changes in the legal support for the judicial system of Ukraine today, neither the Supreme Court, nor the Constitutional Court of Ukraine, nor any other court institution is recognised by the legislation of Ukraine as subjects of law-making. The legislation of Ukraine does not contain a clear definition of their status as the subject of law-making with the right to accept generally obligatory acts of this process. It is noted that such uncertainty significantly weakens both the legal support for the courts and their activities. At the same time, it is noted that as a result of the adoption of legislative acts within the judicial reform during 2014-2017, which are still in force today, the legislator has made a significant step towards recognising and consolidating the official status of judicial law-making, namely: 1) a number of legislative powers of the Supreme Court and the Constitutional Court of Ukraine were consolidated; 2) the legislative regulation of the stages of the law-making process by the Supreme Court and the Constitutional Court of Ukraine has been strengthened; 3) the legal consolidation of the status of law-making acts of the Supreme Court and the Constitutional Court of Ukraine has been improved.

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Keywords *law-making, judicial law-making, court practice, judicial precedent, legal regulation of judicial law-making, Supreme Court, Constitutional Court of Ukraine*

1 INTRODUCTION

One of the important issues of any scientific research is the involvement of historical patterns of the origin, functioning, and development of a particular process, phenomenon, or category. In this article, we show that the involvement of the current state and history of the legal regulation of judicial law-making in Ukraine contributes to significant scientific integration, resulting in certain patterns of origin, formation, development, and improvement. A fair statement in this context is the position of the Ukrainian scholar O.A. Pidopryhora, who notes that the elements of judicial law-making in its modern sense were already introduced into the legal system of ancient Rome, manifested in the activities of the courts. This is because the nature of judicial law-making stems from the idea of justice through the conformity of rights to the demands of life. And it is this idea that should govern the courts, so they should not only deal with practical situations but also create law, ensuring justice in society.[1] Over time, judicial law-making is legitimised and becomes legally cemented, thus reflecting the affiliation of the legal system to the Romano-Germanic (European) type of legal system, which affects European civilizational legal values and standards. Thus, the need to present issues of the legal regulation of the administration of justice in general, as well as in the context of judicial law-making in Ukraine, is due to the very nature and functional purpose of the judiciary, especially in terms of the fact that today, the functional load on it is expanding and deepening. This process is connected to the introduction of rights to carry out certain forms of law-making, and such official activities require the provision of appropriate legal support.

The relevance of the scientific study of the problems concerning the legal support for judicial law-making in Ukraine is significantly increased by the role of judicial practice in the modern conditions of the judicial system and the legal system as a whole, as well as the emergence of so-called 'quasi-judicial precedent', which is not identified in the legislation of Ukraine but is still formed as a result of the activities of the Supreme Court and the Constitutional Court of Ukraine. Thus, the relevance of scientific research on the history of formation and current state of the legal support for judicial law-making in Ukraine is due to the following:

1. To begin, there is the duration of the reform of the domestic judicial system and the judiciary, which dates back to the proclamation of Ukraine's independence (1991) and continues to this day. An important condition for reform is not only institutional and organisational changes in the functioning of the judiciary but also doctrinal and conceptual changes in its nature and content. First of all, judicial law-making becomes an integral part of judicial functioning, along with traditional legal interpretation and law enforcement activities. Therefore, the incomplete reform of the court system of Ukraine and the judicial system is caused by the ambiguity of the doctrinal-conceptual understanding and perception of the integral law-making role of courts and the need for its legal recognition and consolidation as part of modern judicial activity.
2. Next, there is the ambiguity of the legal support for judicial law-making in Ukraine, the high level of its variability and inconsistency in consolidating the participation of judicial authorities in the mechanism of domestic law-

1 OA Pidopryhora, EA Kharytonov, *Roman law: Textbook* (Yurinkom Inter 2003) 231-232.

making, the status of their law-making acts, and the peculiarities of their adoption, change, and abolition. Today, in the conditions of official non-recognition of judicial law-making, the law-making status of court legal positions, that is, judicial precedent as an element of forms (sources) of Ukrainian law, it should be noted that certain rules of law give the Supreme Court the power to adopt provisions that are, to a certain extent, binding and give the Constitutional Court of Ukraine the power to declare unconstitutional a certain range of normative legal acts or their parts, to adopt obligatory legal conclusions, etc. Such an ambiguous situation in the field of legal support for the participation of judicial entities in Ukraine requires a critical analysis of the history of the origin and development of legal support for judicial law-making in Ukraine and a clarification of the current state of legal consolidation of judicial law-making.

3. Lastly, there is the doctrinal uncertainty of the place of judicial law-making in the domestic legal system, the ambiguity of its scientific perception, and the uncertainty of its functional purpose in the domestic mechanism of legal regulation. The long-standing influence of Soviet legal doctrine and official ideology in terms of the non-recognition of judicial law-making and its perception as a harmful institution inherent exclusively in the legal systems of Europe and the United States has led to the fact that legal science still has a negative attitude towards it and does not recognise it as an independent type (form) of modern law-making in Ukraine. This is reflected in the ambiguity of its legal support in Ukraine, the lack of political, legislative will to consolidate judicial law-making, the lack of adequate legal support, and the inclusion of judicial law-making in the sources (forms) of the law of Ukraine.

2 METHODOLOGY

Scientific research into any problems of state and legal reality requires the determination of the methodological potential of the topic. That is, it is necessary to establish the features of the methodology of scientific knowledge, which should ensure the comprehensiveness, objectivity, and effectiveness of research. Given this, a scientific study of the history of the formation and current state of legal support for judicial law-making in Ukraine requires identifying the features and functionality of the principles of scientific knowledge, methodological approaches, research methods, and predicting the scientific consequences that can be achieved by applying appropriate methodological approaches and methods of scientific knowledge.

Methodologically, the scientific study of the history of formation and state of legal support for judicial law-making in Ukraine requires the use of a wide range of components of the methodological foundations of jurisprudence. Given the specifics of the subject of this study, the approach is based on a system of principles of scientific knowledge, methodologies, and methods of scientific research, which, in an organic combination, can ensure the comprehensiveness, objectivity, and effectiveness of research. First of all, we should note the system of principles of scientific knowledge (historicism, objectivity, systematicity, etc.), which determine the system of ideas and provisions that form the basis of any scientific research. The principle of historicism, which is the basis of the idea of studying the legal support for judicial law-making through the prism of the history of its formation and current state, is central. These aspects determine the patterns of general cognitive topics, in this case, judicial law-making. Accordingly, the results of studying the history of the formation and current state of legal support for judicial law-making

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will not only clarify the dynamics of such support but also form a methodological basis for further study of judicial law-making as a theoretical, legal, sectoral, and special legal format. In addition to the principles of scientific knowledge that form the basis of any scientific activity, an important place in the methodology of this work is occupied by methodological approaches. The functional approach, which is universal in nature, is used in various sciences, the main idea of which is to study the functional purpose, place, and role among the phenomena of the legal reality of any phenomenon subject to research. In the context of our work, the functional approach plays a key role, as it generally allows us to reveal the problems of origin and formation of legal support for judicial law-making through the prism of the functional purpose that was entrusted to it in the relevant historical periods of judicial reform. However, while determining the overall cognitive strategy of this work, the functional methodological approach to understanding the legal support for judicial law-making in Ukraine characterises problems in the general context, which requires the specification of its application through the use of different research methods. Research methods ensure the objectivity, efficiency, reliability, specificity, and unity of scientific research and predictable scientific results.

Legal support for judicial law-making in Ukraine as a historical and legal issue requires the use of a system of philosophical and general scientific methods that provide the study of these problems in terms of the general concept of knowledge and a special, scientifically determined phenomenon. An important role belongs to the historical and legal method of scientific knowledge, the technical and legal characteristics of which will allow us to characterise retrospectively the legislative consolidation of the powers of judicial law-making in Ukraine, its implementation, requirements for subjects, and the procedure for carrying out judicial law-making, as well as the status and place of acts of judicial law-making in the system of forms (sources) of the law of Ukraine.

3 PREREQUISITES FOR THE OCCURRENCE OF JUDICIAL LAW-MAKING IN UKRAINE (1991-1995)

The subject of this scientific work determines the time limits for clarifying the features of legal regulation of judicial law-making in Ukraine, which, in our opinion, should be limited to the early 90s of the twentieth century (1991-the year of Ukraine's declaration of independence) and the current stage of court system reform, which is accompanied, *inter alia*, by the introduction of certain elements of judicial law-making. In particular, such time limits are determined primarily by the laws of origin and formation of the domestic judicial system because, at the turn of the millennium, the Soviet Union collapsed and Ukraine gained its independence, something that was impossible without its own national legal system, judicial system, and law-making. It was this moment that marked the time in which the independent state of Ukraine opened a new page in the history of its formation and development. With the proclamation of independence, Ukraine set a course to recognise the principle of the rule of law and state-building, the content and direction of which are aimed at ensuring human rights and freedoms as the highest social value. The very proclamation of Ukraine's independence marked the beginning of the construction of the judicial system as the basis for the administration of justice, based on universal and general legal principles in compliance with the law. The adoption of the Act of Independence of Ukraine[2] and the

2 Resolution of the Verkhovna Rada of the Ukrainian SSR 'On the Proclamation of Independence of Ukraine' of 24 August 1991 <http://zakon2.rada.gov.ua/laws/show/1427-12> accessed 26 June 2021.

Declaration of State Sovereignty of Ukraine[3] became the legal basis for the establishment of its own judicial system. In particular, the provisions of the Declaration of State Sovereignty of Ukraine enshrined the principle of the division of state power in the Republic into legislative, executive, and judicial. Thus, there was a need to develop a new judicial system in Ukraine and to adopt the necessary regulations, which formed the basis for its further legal support. It should be noted that since Ukraine had been part of the Soviet Union, Ukrainian legal doctrine acquired certain ideological ideas about the recognition or denial of the usefulness of certain legal categories, phenomena, and processes. These included judicial law-making and judicial precedent, which were considered ideologically and legally harmful to the Soviet judicial system and inherent exclusively in bourgeois legal systems. In this regard, we must agree with K.G. Kravchuk that the scientific ideas about judicial law-making developed in Soviet jurisprudence are marked by their ideological 'colour'. Law-making, in general, is considered through the prism of its supporting role in the system of legal practice.[4] Although the proclamation of Ukraine's independence required rethinking and forming new approaches in the context of state-building and law-making, it was extremely difficult to move away from dogmatic Soviet ideology, as can be seen in the legal literature today. This was reflected in a certain inconsistency in the legal provision of judicial law-making in Ukraine and the lack of unambiguous political will for its legal recognition and granting it official legal status.

Given Ukraine's long membership in the Soviet Union, it is logical that with the acquisition of independence, a significant part of the regulations of the all-Union and republican levels were 'inherited' by Ukraine. At the same time, this led to and, in a way, accelerated the development and adoption of new legislation relating to the consolidation of the legal basis for the formation of the judiciary in independent Ukraine. In 1991, the domestic legal system faced one of its main tasks – the formation of an independent and autonomous judiciary, which, above all, required a determination of the basic principles of its operation, structure, instance structure, and procedural basis and the place of the judiciary in the system of lawmakers. In terms of legal support for the functioning of the judiciary in Ukraine, the first amendments were made to the Constitution of the Ukrainian SSR, which was supplemented by new provisions regarding the establishment of the Constitutional Court.[5]

It should be noted that these legislative acts have essentially become the legal basis for the legal consolidation and implementation in the legal system of Ukraine of the first forms of judicial law-making. Thus, in accordance with the provisions of the then Constitution of the USSR and to reform the judiciary and the legislation of Ukraine on the judiciary, the Law of the USSR 'On Arbitration Court' of 4 June 1991 was adopted, which introduced a system of arbitration in Ukraine. It should be noted that the content of Art. 12 enshrined one of the functions of arbitral tribunals, which was one of the forms of classical judicial law-making, namely: the study and generalisation of the practice of judicial application of legislation, the analysis of statistics of commercial disputes, and explanations to arbitral tribunals on the application of legislation of the Ukrainian SSR, which regulates relations in the economic sphere.[6]

Active work on the formation of domestic legislation in the field of justice continued and was marked by the adoption of the Concept of Judicial Reform, which was approved

3 Declaration of State Sovereignty of Ukraine of 16 July 1990 <http://zakon2.rada.gov.ua/laws/show/55-12> accessed 26 June 2021.

4 KG Kravchuk, 'Theoretical, legal and practical aspects of the relationship between lawmaking of the Supreme Court and the Constitutional Court of Ukraine' (Candidate of Law thesis, Taras Shevchenko National University of Kyiv 2019) 41-42.

5 Закон УРСР «Про зміни і доповнення Конституції (Основного Закону) Української РСР від 24.10.1990 <https://zakon.rada.gov.ua/laws/show/404-12#Text> accessed 26 June 2021.

6 Law of the Ukrainian SSR 'On the Arbitration Court' of 4 June 1991 <http://zakon2.rada.gov.ua/laws/show/1142-12/ed19910604> accessed 26 June 2021.

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by the Resolution of the Verkhovna Rada of Ukraine on 28 April 1992.[7] According to O.Z. Khotynska-Mor, this Concept of Judicial Reform in Ukraine actually initiated the reform of the judicial system in Ukraine; it was the first well-thought-out, conceptual document tracing a systematic approach to reforming the judicial system of the state and the use of scientific methodology.[8]

The Concept formed the basic principles of judicial and legal reform, which provided for the separation of powers of the judiciary, guaranteed the independence and autonomy of the judiciary from the influence of the legislature and the executive, enshrined the right of citizens to consider their case in competent, independent, and impartial court, creating a judicial system that would guarantee the right to judicial protection and equality of citizens before the law and create conditions for real competition and the realisation of the presumption of innocence. In addition, new principles of the legal status of judges were determined, and the peculiarities of the formation of judicial bodies were envisaged. An important step was the introduction of administrative proceedings through the creation of administrative courts. As we can see, the reform provided for a number of important measures and principles that ensured the independence and autonomy of the judiciary and furthered the creation of a system of legislation on the judiciary, which would allow it to achieve the relevant objectives. At the same time, it can be argued that it is the Concept that provided for the establishment of the Constitutional Court and general and arbitral tribunals with clearly defined jurisdiction, which included powers in the field of law-making.

However, it was not possible to achieve all the goals set by the Concept, which, in our opinion, was due to various objective and subjective factors, including ones of socio-economic, legal, and political natures. The predominant point of view among researchers on the main shortcomings of this Concept is that it lacked deadlines for the implementation of its tasks. Despite this, this Concept still became the basis for ensuring the formation and further development of the judicial system of Ukraine, as well as initiated the formation of legal regulation of the judicial system.

In accordance with the tasks set by the Concept, a system of normative legal acts was adopted over the next two years, which established the legal basis for the organisation and functioning of the judicial system of Ukraine. Thus, the Laws of Ukraine 'On the Constitutional Court of Ukraine' of 3 June 1992 and 'On the Status of Judges' of 15 December 1992 were adopted. It was the Law of Ukraine 'On the Constitutional Court of Ukraine' that determined the procedure for its formation and main functions. Chapter 3 of this Law defines the powers of the Constitutional Court of Ukraine, including consideration of cases of inconsistency with the Constitution and laws of Ukraine of Decrees and Orders of the President of Ukraine, Resolutions of the Presidium of the Verkhovna Rada of Ukraine, laws and other acts adopted by the Verkhovna Rada and the Presidium of the Autonomous Republic of Crimea, and as resolutions and orders of the Cabinet of Ministers of Ukraine and the Council of Ministers of the Autonomous Republic of Crimea,[9] which is evidence the Constitutional Court of Ukraine having an independent role in the law-making mechanism of Ukraine in terms of constitutional control, with the possibility of declaring these acts unconstitutional.

7 The concept of judicial and legal reform, approved by the Resolution of the Verkhovna Rada of Ukraine on 28 April 1992 <https://zakon.rada.gov.ua/laws/show/2296-12#Text> accessed 26 June 2021.

8 OZ Khotynska-Nor, 'The significance of the Concept of Judicial and Legal Reform in Ukraine of 1992 in the reform of the judicial system. A look through time' (2015) 12 Bulletin of the Academy of Advocacy of Ukraine 8.

9 Law of Ukraine 'On the Constitutional Court of Ukraine' of 3 June 1992 <http://zakon3.rada.gov.ua/laws/show/en/2400-12> accessed 26 June 2021.

However, the functions and powers provided by law could not be fully implemented, as it was not possible to immediately form the composition of the Constitutional Court of Ukraine, as it was limited to the appointment of the Chairman of the Constitutional Court of Ukraine. In our opinion, this normative legal act nevertheless formed the principles of constitutional jurisdiction and determined the legislative competence of the Constitutional Court of Ukraine, giving it the right to consider invalid cases of normative acts adopted in violation of the Constitution of Ukraine, as well as cases on the inconsistency of the Constitution with international acts of any law or other normative acts that violate constitutional human rights and freedoms.

It should be noted that in the early 90s of the twentieth century, the Soviet-era Law of the Ukrainian SSR 'On Judiciary Ukraine' of 5 June 1981 was still in force.[10] In 1994, it was amended,[11] which provided for the renaming of people's courts to (district) city courts. Additionally, their jurisdiction began to include cases of administrative offences.

The provision enshrined in Art. 40 of the relevant law was important for clarifying the law-making activity of courts of general jurisdiction. In particular, it was envisaged that the Supreme Court of Ukraine would study and summarise judicial practice, analyse judicial statistics, and provide guidance to courts on the application of national legislation arising in court cases. Guidance explanations of the Plenum of the Supreme Court of Ukraine are binding on courts, other bodies, and officials that apply the law under which the clarification is given. The provisions of this law also provided that the system of courts of general jurisdiction consisted of local courts, courts of appeal, higher specialised courts, and the Supreme Court of Ukraine.

Thus, the relevant legislative changes of 1994 implemented the principle of division of jurisdictions into general and constitutional, as well as made the normative determination of the status of the binding nature of explanations of the Plenum of the Supreme Court of Ukraine. Such changes in the status of the bindingness of explanations of the Plenum of the Supreme Court of Ukraine, on the one hand, became a continuation of the legislative role, which was determined by the Supreme Court of the Soviet Union. On the other hand, such changes showed a gradual legislative recognition of certain legislative powers of The Supreme Court of Ukraine.

In addition, the provisions of the Law of Ukraine 'On the Status of Judges' of 15 December 1992 stipulate that judges are officials of state power who are constitutionally empowered to administer justice and perform their duties on a professional basis.[12] However, despite the fact that the relevant law would logically provide for the powers of judges, it only stipulates that judges have the necessary powers to administer justice under the laws of Ukraine. Since Ukraine's independence, the decisions of the Plenum of the Supreme Court of Ukraine have not lost their significance and, in fact, have begun to play a more important role in the administration of justice due to a large number of gaps in legislation and wording that ambiguously interprets their content.[13]

10 Law of the Ukrainian SSR 'On the Judiciary of Ukraine' of 5 June 1981 (remained in force until 2002) <https://zakon.rada.gov.ua/laws/show/2022-10#Text> accessed 26 June 2021.

11 Закон України Про внесення змін і доповнень до Закону Української РСР «Про судоустрій Української РСР» від 24.02.1994 <https://zakon.rada.gov.ua/laws/show/4017-12#Text> accessed 26 June 2021.

12 Law of Ukraine 'On the Status of Judges' of 15 December 1992 <http:/zakon3.rada.gov.ua/laws/show/2862-12/ed19940202> accessed 26 June 2021.

13 VI Yamkovy, 'Introduction of judicial precedent as a necessary element of harmonization of Ukrainian legislation with European legal systems' (2009) 2 Comparative Legal Research 27.

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4 CONSTITUTIONAL SUPPORT FOR THE JUDICIAL SYSTEM AND THE JUDICIARY IN UKRAINE (1996-1999)

The next important step in the formation of the judicial system of Ukraine and the introduction of the institution of judicial law-making was the adoption of the Constitution of Ukraine (1996), in connection with which the Resolution of the Verkhovna Rada of Ukraine 'On the Concept of Judicial Reform' (1994) expired. In fact, the provisions of the Constitution of Ukraine became the foundation for the creation and development of legislation on the organisation and functioning of the judicial system.

It is impossible to underestimate the importance of the adoption of the Constitution of Ukraine as a whole, as well as the formation of the judiciary, because, as noted by R.O. Kuybida, the Constitution of Ukraine has become the most radical document in the field of judicial reform.[14] Particular attention is paid to the normative definition of important and fundamental principles of the judicial system of Ukraine, in particular, in Section VIII 'Justice' and Section XII 'Constitutional Court of Ukraine'. Thus, it was declared that: 1) the jurisdiction of the courts extends to all legal relations in the state; 2) the powers of the courts are defined solely by the administration of justice; 3) the legal status of judges, the principle of territoriality, and specialisation of justice are determined. In addition, two forms of organisation of the court system were distinguished: courts of general and constitutional jurisdiction. The first was represented by general and special courts, and the other by the Constitutional Court of Ukraine as the only body of constitutional jurisdiction in Ukraine.[15] Virtually, the Constitutional Court of Ukraine, as a body of constitutional control, was entrusted with the authority to establish the constitutionality of laws and other normative legal acts and compliance of existing international treaties with the Constitution, as well as the official interpretation of the Constitution and laws of Ukraine. In our opinion, the separate list of powers emphasises and indicates the law-making nature of the powers of the Constitutional Court of Ukraine.

Thus, in the course of its activity, the Constitutional Court analyses the legislation and identifies gaps and other negative phenomena in the legal system, and improves legislation. Moreover, considering the legal positions of the Constitutional Court is an imperative requirement for the subjects of law-making activity.[16] T.V. Rosik's point of view is important in the context of our vision of the law-making nature of the functions of the Constitutional Court of Ukraine. According to her, it is the obligatory status of decisions of the Constitutional Court of Ukraine that is taken as the basis for substantiating the law-making significance of judicial practice, thus substantiating the law-making nature of the powers of the Constitutional Court.[17]

In accordance with the enshrined constitutional provisions, work has been actively carried out since 1996 to adopt special laws in the field of justice. Important among them is the Law of Ukraine 'On the Constitutional Court of Ukraine' of 16 October 1996. The basic principles of the Constitutional Court of Ukraine, provided by the relevant law as amended in 1992, were reflected in the law adopted in 1996, but a significant novelty of the relevant law was the amendment of the powers of the Constitutional Court of Ukraine. The provisions of

14 RO Kuybida, *Reforming justice in Ukraine: Status and prospects* (Attica 2004) 20.

15 Constitution of Ukraine of 28 June 1996 <http://zakon2.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/page3> accessed 26 June 2021.

16 KY Kudrina, 'Legal factors influencing lawmaking in the Russian Federation' (Candidate of Law thesis abstract, Voronezh 2006).

17 TV Rosik, 'The role of judicial practice in modern lawmaking: Theoretical and applied aspects' (Candidate of law thesis, MP Dragomanova National pedagogical University 2016) 128.

the new law limited the power to consider cases on the conformity of acts of the President and the Cabinet of Ministers of Ukraine only to the Constitution of Ukraine and not to the Constitution and laws as provided by the 1992 law. Without resorting to debatable issues concerning the participation of the Constitutional Court of Ukraine in law-making and recognition/non-recognition of its decisions as sources of law, we should note that we can speak about its special law-making activities based on the legal status of the relevant body, which has a special nature and scope of powers at the legislative level of authority. The legislative powers were, to some extent, limited by the law adopted in 1996, which provided for the reduction of the category of cases that require the adoption of conclusions on the compliance/non-compliance to the Constitution of Ukraine and laws. This is confirmed in the study of V.O. Serdiuk, noting that the competence of the Constitutional Court of Ukraine and the legal nature of its decisions directly suggest that the decisions of the Constitutional Court of Ukraine not only clarify the current legislation on constitutionality but also change and supplement the law. During its existence, the Constitutional Court of Ukraine has established many precedents that are actively used.[18] An important role in the legal regulation of the law-making activity of the Constitutional Court of Ukraine also belonged to the Rules of Procedure of the Constitutional Court, which was approved by the decision of the Constitutional Court of Ukraine of 5 March 1997. This document defined the procedural principles of the Constitutional Court of Ukraine, in particular, the procedure for electing the Chairman of the Constitutional Court of Ukraine, his powers and deputies, and the procedure for holding sittings of Chambers of Judges and their powers, as well as procedural aspects of plenary sittings of the Constitutional Court of Ukraine, the procedure for preparing materials on constitutional submissions and appeals for consideration at plenary sessions, and the procedure for consideration of cases.[19]

5 THE SMALL JUDICIAL REFORM AND JUDICIAL LAW-MAKING IN UKRAINE (2000-2009)

The next important step in the legal regulation of the organisation and activities of the judiciary was the adoption in the early 2000s of a number of laws amending existing regulations, in particular, in science and practice, called the 'small judicial reform'.

One of the important grounds for the introduction of the 'small judicial reform', according to O. Khotynska-Nor, was the expiration of the Transitional Provisions of the Constitution of Ukraine, which postponed the implementation of constitutional norms that provided a completely new model of the judiciary for five years; the date of 28 June 2001 was critical.[20] Thus, within five years after the adoption of the Constitution of Ukraine, a new judicial system was envisaged in accordance with the provisions of the Constitution of Ukraine. Yet, as reality shows, this was not achieved, as no legal act was adopted during this period. Therefore, the main purpose of the small judicial reform was to bring the judicial system in line with the provisions of the Basic Law of the state. On 21 June 2001, the Verkhovna Rada of Ukraine adopted ten laws in the framework of the implementation of the so-called 'small judicial reform': 'On Amendments to the Law of Ukraine "On the Judiciary of Ukraine"'; 'On Amendments to the Law of Ukraine "On Arbitration Court"'; 'On Amendments to

18 VO Serdiuk, 'The role of judicial law-making in the process of judicial reform in Ukraine' (2014) 27 (4) Scientific notes of VI Vernadsky Taurida National University. Series 'Legal Sciences' 29.

19 Rules of Procedure of the Constitutional Court of Ukraine of 5 March 1997 <http://zakon2.rada.gov.ua/laws/show/v001z710-97/ed19970305> accessed 27 July 2021.

20 OZ Khotynska-Nor, 'The impact of "small judicial reform" on the development of the judicial system of Ukraine: organizational aspects' (2016) 1 (42) Court Appeal 7.

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the Law of Ukraine 'On the Status of Judges'"; 'On Amendments to the Law of Ukraine "On Judicial Self-Government Bodies"'; 'On Amendments to the Law of Ukraine "On Qualification Commissions, Qualification Attestation and Disciplinary Responsibility of Judges of Courts of Ukraine"'; 'On Amendments to the Criminal Procedure Code of Ukraine'; 'On Amendments to the Civil Procedure Code of Ukraine'; 'On Amendments to the Arbitration Procedure Code of Ukraine'; 'On Amendments to the Laws of Ukraine "On the Police", "On Pre-trial Detention", "On Administrative Supervision of Persons Released from Places of Imprisonment"; "On Amendments to the Law of Ukraine 'On the Prosecutor's Office'".

The restructuring of the judicial system on the basis of the adopted package of laws was called the 'small judicial reform' because, according to R.O. Kuybida, it was based on the principle of implementation of the Constitution through small changes in the legislation and judiciary. However, these changes were minimal (even 'episodic and inconsistent') because they could not fully implement the constitutional norms and were only part of the stage of judicial reform preventing the paralysis of the judiciary system of 2001.[21]

According to the changes, a single system of judges of general jurisdiction was formed, which included a system of arbitration courts, which were renamed into commercial courts. Thus, a system of specialised commercial courts was formed, consisting of appellate commercial courts and the Supreme Commercial Court of Ukraine. Procedures for appealing court decisions in appellate and cassation forms, court authorisation of arrest, detention in custody and interim custody of persons suspected of committing a crime, inspection and search of a person's home, etc., were planned to be introduced. In our opinion, these measures did not bring radical changes in the implementation of the proper mechanism of judicial law-making, as they did not fully ensure the completeness of legislative regulation of the judicial system. However, these changes strengthened the establishment of the basic principles of justice in society and the further adjustment of the mechanism of the judiciary, creating favourable conditions for the adoption of the Law of Ukraine 'On the Judiciary of Ukraine'. Therefore, the implementation of the 'small judicial reform' was not the final stage of reforming the judicial system in Ukraine and introducing judicial law-making.

A further and more urgent task was to develop a single piece of legislation that would unify the basic principles of the judiciary and ensure the full legal regulation of justice in the state and, as a result, resolve the issue of granting official status to law-making courts. As a result, on 7 February 2002, the Verkhovna Rada of Ukraine adopted the Law of Ukraine 'On the Judiciary of Ukraine'. One of the defining provisions of the new law was the introduction of the principle of consideration of cases by courts in the form of civil, commercial, administrative, and constitutional proceedings and the introduction of appellate courts. However, despite the significant list of introduced novelties, the abolition of Art. 40 of the Law of Ukraine 'On the Judiciary of Ukraine', which provided for the binding nature of the decisions of the Plenum of the Supreme Court of Ukraine, provides an explanation of the law became important for law-making activities by courts of general jurisdiction.[22] The motivation for this decision was the idea of strengthening the implementation of the principle of independence of judges, which provided for the submission of their law rather than a guiding explanation enshrined in the decisions of the Plenum of the Supreme Court of Ukraine. In this regard, scholars have expressed the opinion that the Law of Ukraine 'On the Judiciary of Ukraine', the adoption of which was a decisive step towards judicial reform, allowed a number of issues related to

21 R Kuybida, 'Analysis of the current stage of judicial reform and prospects for its development' (*Jurisprudence*) <http://www.lawyer.org.ua/?w=r&i=5&d=244> accessed 27 June 2021.

22 Law of Ukraine 'On the Judiciary of Ukraine' of 7 February 2002 No 3018-III <https://zakon.rada.gov.ua/laws/show/3018-14#Text> accessed 27 June 2021.

the courts and the organisation of the judiciary to be addressed.[23] Conversely, O.I. Yushchyk claims that the Law of Ukraine 'On the Judiciary' became a product of a compromise, which had to be found in the conditions of time lag when the five-year term of judicial reform, defined in the 'Transitional Provisions' of the 1996 Constitution, was coming to an end.[24]

Despite the existing views of legal scholars on the role and importance of the adoption of this law, it should be noted that its appearance did not affect the intensification or inhibition of judicial law-making. In this regard, we should agree with the opinion of A.A. Selivanov that the provisions of the Law of Ukraine 'On the Judiciary of Ukraine' continued the position of 'neutrality' on the binding nature of the decisions of the Plenum of the Supreme Court of Ukraine, which clarifies current legislation. They are no longer mandatory or 'guiding'.[25]

6 THE CRISIS OF JUDICIAL LEGISLATION IN UKRAINE (2010-2013)

The next step in the process of reforming the judicial system was the adoption of the Law of Ukraine 'On the Judiciary and the Status of Judges' of 7 July 2010, which aimed to bring the judicial system of Ukraine in line with international standards.[26] It is expedient to pay attention to those innovations that further influenced the formation of judicial law-making. In particular, the formation of a four-tier judicial system was completed by this legislative act. In accordance with this, the Supreme Specialized Court of Ukraine for Civil and Criminal Cases was established, and the Supreme Commercial Court of Ukraine and the Supreme Administrative Court of Ukraine continued to operate as a cassation instance. Their powers included the study and generalisation of judicial practice, providing methodological assistance to lower courts in uniformly applying the provisions of the Constitution and laws of Ukraine in judicial practice on the basis of its generalisation and analysis of judicial statistics. At the same time, the power to clarify the application of the law remained 'recommendatory', as defined by the previous law.

However, the powers of the Supreme Court of Ukraine underwent significant changes. Thus, according to the adopted law, the power to give explanations to courts of general jurisdiction on the uniform application of the law was transferred to higher specialised courts, including the Supreme Administrative Court of Ukraine. As such, the Supreme Administrative Court of Ukraine carries out similar activities on the interpretation of legislation, which is *de facto* inherent in the Constitutional Court of Ukraine. When interpreting legislation by adopting rulings, the Supreme Administrative Court of Ukraine ensures the uniform application of laws.

It is worth noting that the 4-tier judicial system is not typical of the EU, which, to some extent, did not agree with the official vector of the integration of Ukraine and its legal system into the EU. However, it was difficult to exclude the Supreme Court of Ukraine from the judiciary at that time, as the Supreme Court was a subject that was provided for in the Constitution of Ukraine, and the possibility to amend the Constitution of Ukraine was quite difficult from a political point of view, given the lack of appropriate support from parliamentarians. Thus,

23 IS Zubachova, 'Historical and legal issues of the formation of the judiciary in Ukraine' (2015) 5 (20) Part 3 Molodyi Vchenyi 45-47 <http://molodyvcheny.in.ua/files/journal/2015/5/91.pdf> accessed 27 June 2021.

24 OI Yushik, 'Judicial reform would not be hampered by more common sense' <http://www.viche.info/journal/2098/> accessed 27 June 2021.

25 AA Selivanov, 'The right to interpret laws and legal consequences of the application of official interpretation' (2006) 7 Bulletin of the Supreme Court of Ukraine 2.

26 Law of Ukraine 'On the Judiciary and the Status of Judges' of 7 July 2010 No 2453-VI <https://zakon.rada.gov.ua/laws/show/2453-17#Text> accessed 27 June 2021.

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the legislator took a different path, narrowing the powers of the Supreme Court of Ukraine and leaving it the right to provide clarifications of a recommendatory nature. This indicates that the law-making activity of the Supreme Court of Ukraine was not a priority.

However, Art. 46 of the Law of Ukraine 'On the Judiciary and the Status of Judges' provides that the Plenum of the Supreme Court of Ukraine gives opinions on draft legislation relating to the judiciary, proceedings, the status of judges, enforcement of judgments, and other issues related to the judicial system of Ukraine, as well as ensures the uniform application of the law by courts of different specialisations in the manner and order prescribed by procedural law. However, the Rules of Procedure of the Plenum of the Supreme Court provided for the exercise of powers to make decisions on appeals to the Constitutional Court of Ukraine on the constitutionality of laws other legal acts, as well as on the official interpretation of the Constitution of Ukraine and laws, providing explanations to courts of general jurisdiction on issues of application of legislation and declaring invalid explanations of higher specialised courts.[27]

The next attempts to reform the judiciary, both in our opinion and those of other scholars, not only did not lead to the expected result but instead formed a significant level of public distrust of the judiciary and especially the results of their activities. According to V.M. Sushchenko, during 2010-2014, the judiciary, thanks to its spontaneous and chaotic reform, reached the extreme limit of distrust by society regarding both the persons of judges and the court decisions they make. Given that in 2013-2014, all the branches of state power, including the institution of the president, suffered a severe political, organisational, and legal crisis, at the request of society, a new wave of reform, including the judiciary, began.[28] The change of political forces and a certain reorganisation of state power led to a reform of the judicial system and the mechanism of justice in Ukraine.

7 THE CONCEPTUALISATION OF LEGAL SUPPORT FOR JUDICIAL LAW-MAKING IN UKRAINE (2014-present)

The call for a new wave of reform is declared by the Presidential Decrees 'On the Sustainable Development Strategy of Ukraine 2020' of 12 May 2015 and 'On the Strategy for Reforming the Judicial System, Judiciary and Related Legal Institutions for 2015-2020' of 20 May 2015.[29]

In our opinion, their adoption was largely due to the political crisis in the country and attempts to reform the judiciary by 'cleansing' them of courts that in the past did not 'appropriately' show their professional qualities as judges during the Revolution of Dignity. Such legislative acts were the Laws of Ukraine 'On Restoration of Confidence in the Judiciary in Ukraine' of 8 April 2014 No 1188-VII, 'On Purification of Power' of 16 September 2014 No 1682-VII, and 'On Ensuring the Right to a Fair court' of 12 February 2015 No 192-VIII.[30]

27 Rules of Procedure of the Plenum of the Supreme Court of Ukraine of 10 June 2002 No 7 <http://zakon3.rada.gov.ua/laws/show/v0007700-02> accessed 30 June 2021.

28 VM Sushchenko, 'Reforming the judiciary: Integrated approach' (2015) 168 <http://ekmair.ukma.edu.ua/bitstream/handle/123456789/7782/Sushchenko_Reformuvannia_sudovoi.pdf> accessed 27 June 2021.

29 Decree of the President of Ukraine 'On Sustainable Development Strategy Ukraine 2020' of 12 May 2015 <http://zakon5.rada.gov.ua/laws/show/5/2015> accessed 27 June 2021; Decree of the President of Ukraine 'On the Strategy for Reforming the Judiciary, Judiciary and Related Legal Institutions for 2015-2020' of 20 May 2015 <http://zakon3.rada.gov.ua/laws/show/276/2015> accessed 27 June 2021.

30 Law of Ukraine 'On Restoration of Confidence in the Judiciary in Ukraine' of 8 April 2014 No 1188-VII; Law of Ukraine 'On Purification of Power' of 16 September 2014 No 1682-VII; Law of Ukraine 'On Ensuring the Right to a Fair Trial' of 12 February 2015 No 192-VIII.

The next reform of the judiciary was carried out to realise the right of every person and citizen to a fair and independent trial.

The next step in the process of reforming the judiciary, which characterises the current state of legal support for judicial law-making, was the adoption of legislation that made significant changes to the Constitution of Ukraine and the Law of Ukraine 'On the Judiciary and the Status of Judges'. Thus, the Verkhovna Rada of Ukraine adopted the Law of Ukraine 'On Amendments to the Constitution of Ukraine (regarding justice)' of 2 June 2016 No 1401-VIII.[31] Analysing the novelties of judicial reform, Y.S. Shemshuchenko points out that they were aimed at depoliticising and ensuring the independence of the judiciary, creating an honest, transparent, accessible, and fair court for all citizens. These laws open real constitutional and legal opportunities for fundamental judicial reform in Ukraine, based on our own experience and European standards of justice.[32] However, according to another scholar, S.G. Shtogun, the corresponding reform is questionable because

> …even if we consider abstractly that the main task of the reform has already been achieved, which is to eradicate corruption in the judiciary and recruit new judges who will serve justice perfectly, we still have a lot of problems in the judiciary and, paradoxically, new laws have created new problems…[33]

In this context, it is necessary to dwell on the changes that have been made to the Constitution of Ukraine. The basic principles of judicial proceedings have changed, as the provision that judicial proceedings are carried out by the Constitutional Court of Ukraine and courts of general jurisdiction has been removed. Instead, the current Art. 124 of the Constitution of Ukraine stipulates that justice in Ukraine is administered exclusively by courts. This content of the article has several points: 1) it does not indicate the legal status of the Constitutional Court of Ukraine because the relevant provision can be interpreted such that the Constitutional Court of Ukraine is a separate link in the judicial system of Ukraine; 2) it may be possible to talk about strengthening its role in the performance of judicial control because, by its legal nature, it is not a judicial body, and therefore, in performing the function of control, we can assume the strengthening of its law-making activities.

In addition, the Constitutional Court of Ukraine was limited in its interpretive function, as it now retains the right to interpret only the provisions of the Constitution of Ukraine. The question of the status of acts of the Supreme Court of Ukraine remains unclear, as, in light of the changes, the latter was renamed as the Supreme Court, consolidating its status as the highest in the judicial system of Ukraine. It is logical that the question arises again in determining the place of the Constitutional Court of Ukraine and other judicial bodies in the judicial system of Ukraine. Thus, it can be argued that at present, there is no division of courts of Ukraine into general and constitutional jurisdiction, although the provisions of the Law of Ukraine 'On the Constitutional Court of Ukraine' state that it is a body of constitutional jurisdiction that ensures the supremacy of the Constitution of Ukraine, compliance with the Constitution, the laws of Ukraine, and other acts in cases provided by the Constitution, and carries out the official interpretation of the Constitution, as well

31 Law of Ukraine 'On Amendments to the Constitution of Ukraine (Regarding Justice)' of 2 June 2016 No 1401-VIII <http://zakon3.rada.gov.ua/laws/show/1401-19> accessed 27 June 2021; Law of Ukraine 'On the Judiciary and the Status of Judges' of 02 June 2016 No 1402-VIII <http://zakon2.rada.gov.ua/laws/show/1402-19> accessed 27 June 2021.

32 YS Shemshuchenko, 'Judiciary in Ukraine: Modern doctrine, mechanisms and prospects for implementation. Transcript of the scientific report at the meeting of the Presidium of the NAS of Ukraine on 21 December 2016' (2017) 2 Visnyk NAS of Ukraine 37-40.

33 SH Shtogun, 'Judicial reform or cosmetic repair of the judiciary' (2016) 2 (14) Journal of the National University 'Ostroh Academy'. Law series 1 <http://lj.oa.edu.ua/articles/2016/n2/16sshssv.pdf.> accessed 27 June 2021.

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as other powers in accordance with the Constitution.[34] In this context, attention should be paid to the novelties introduced by the Law of Ukraine 'On the Judiciary and the Status of Judges' of 2 June 2016. One of the main innovations has been the return to a three-tier judiciary, as the judiciary now consists of local courts, appellate courts, and the Supreme Court. At the same time, certain provisions of both the Law and the Constitution of Ukraine provide for the possibility of establishing High Specialized Courts, which should administer justice as courts of first instance to consider certain categories of disputes (Art. 32 of the Law of Ukraine 'On Judiciary and Status of Judges'). In addition, according to the law, today, the Supreme Court is the highest court in the judicial system of Ukraine, which ensures the stability and unity of judicial practice in the manner and order prescribed by procedural law. Among the powers of the Supreme Court (Part 2 of Art. 36 of the Law of Ukraine) are those of a legislative nature, namely: analysing judicial statistics; generalising judicial practice; providing opinions on draft legislation related to the judicial system, the judiciary, the status of judges, the execution of court decisions, and other issues related to the functioning of the judiciary; appealing to the Constitutional Court of Ukraine regarding the constitutionality of laws and other legal acts, as well as regarding the official interpretation of the Constitution of Ukraine; ensuring the uniform application of the law by courts of different specialisations in the manner and order prescribed by procedural law.[35] The new collegial body in the structure of the Supreme Court is the Grand Chamber of the Supreme Court, which is also competent to exercise its powers as a court of appeal in cases considered by the Supreme Court as a court of first instance on the analysis of judicial statistics, the study of judicial practice, and the generalisation of judicial practice.

An important role in the mechanism of the law-making activity of the Supreme Court is assigned to the Plenum of the Supreme Court to ensure the equal application of legal norms in resolving certain categories of cases, the generalisation of the practice of substantive and procedural laws, and the systematisation and promulgation of legal positions of the Supreme Court with references to court decisions in which they were formulated. Since 2017, the Plenum of the Supreme Court has been given additional powers similar to those under the Soviet Union – clarifications of a recommendatory nature on the application of the law in resolving court cases based on the analysis of judicial statistics and the generalisation of judicial practice.[36]

8 CONCLUSIONS

Despite the scale of legislative changes in the issue of legal support for the judicial system of Ukraine, neither the Supreme Court, nor the Constitutional Court of Ukraine, nor any other judicial institution are recognised by Ukrainian law as subjects of law-making. Ukrainian legislation does not clearly enshrine their status as the subject of law-making with the right to adopt mandatory acts of law-making. This uncertainty significantly weakens the legal support for both the courts and their activities. At the same time, it should be noted that because of the adoption of these legislative acts during 2014-2017, which are still in force today, the legislator has made a significant step forward in recognising and consolidating the official status of judicial law-making. In this context, we are speaking about the following.

34 Law of Ukraine 'On the Constitutional Court of Ukraine' of 13 July 2017 No 2136-VIII <https://zakon.rada.gov.ua/laws/show/2136-19> accessed 27 June 2021.

35 Law of Ukraine 'On the Judiciary and the Status of Judges' of 02 June 2016 No 1402-VIII <https://zakon.rada.gov.ua/laws/show/1402-19/card2#Card> accessed 27 June 2021.

36 Law of Ukraine 'On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legislative acts' of 3 October 2017 <https://zakon.rada.gov.ua/laws/show/ 2147% D0% B0-19 # n771> accessed 30 June 2021.

First, the legislative powers of the Supreme Court and the Constitutional Court of Ukraine were established, and the courts implement them by regulating:

a) binding conclusions on the application of the rules of law set out in the decisions of the Supreme Court, which, on the one hand, are mandatory for all subjects of power that apply in their activities a legal act containing the relevant rule of law (Part 5 of Art. 13 of the Law of Ukraine 'On the Judiciary and the Status of Judges'), and on the other hand, are taken into account by other courts application of such norms of law (Part 6 of Art. 13 of the Law of Ukraine 'On the Judiciary and the Status of Judges') (Part 6 of Art. 368 of the CrPC of Ukraine, Part 4 of Art. 236 of ComPC of Ukraine, Part 4 of Art. 263 of the CPC of Ukraine, Part 5 Art. 242 of the CAP of Ukraine);
b) the status of the decision of the Constitutional Court of Ukraine as binding on the territory of Ukraine, final, and such that it cannot be appealed (Arts. 151-2 of the Constitution of Ukraine);
c) opportunities for the Constitutional Court of Ukraine to develop, specify, and change its own legal position in its subsequent acts (Part 2 of Art. 92 of the Law of Ukraine 'On the Constitutional Court of Ukraine');
d) features of proceedings in cases of appeal against regulations of executive authorities, the Verkhovna Rada of the Autonomous Republic of Crimea, local governments, and other subjects of power (Art. 264 of the CAP of Ukraine), which leads to their loss of force;
e) the powers of the Constitutional Court of Ukraine to decide on compliance of the Constitution of Ukraine (constitutionality) of legal acts of the Verkhovna Rada of Ukraine, acts of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, and legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea (item 1, Part 1 of Art. 7 of the Law of Ukraine 'On the Constitutional Court of Ukraine');
f) appeal against acts, actions or omissions of the Verkhovna Rada of Ukraine, the President of Ukraine, the High Council of Justice, the High Qualifications Commission of Judges of Ukraine, and the Qualification and Disciplinary Commission of Prosecutors (Arts. 266-267 CAP of Ukraine) regarding nature of acts, actions, or omissions;
g) the mandatory status of the legal opinions of the Supreme Court set out in the decision on the results of the exemplary case, which must be taken into account by the court in deciding in an exemplary case that meets the criteria set out in the decision of the Supreme Court on the results of the trial case (Part 3 Art. 291 of the CAP of Ukraine).

Secondly, the legislative regulation of certain stages of the law-making process by the Supreme Court and the Constitutional Court of Ukraine was strengthened, namely: 1) the procedure for transferring cases to the Supreme Court; 2) the procedure for making decisions by the Supreme Court based on the results of the consideration of exemplary cases; 3) grounds and procedure for transfer of proceedings when the case contains an exclusive legal problem and such transfer is necessary to ensure the development of law and the formation of a single law enforcement practice; 4) the procedure for conducting constitutional proceedings, defining the issues of constitutional petition, constitutional appeal, and constitutional complaint, which are forms of appeal to the Constitutional Court of Ukraine, regulates the procedure for adopting constitutional appeals to the Constitutional Court of Ukraine, the process of opening constitutional proceedings, forms of constitutional proceedings, features, procedure meetings, and plenary sessions of the Grand Chamber and the Senate, and the terms of constitutional proceedings are

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determined; 5) the procedural order for adoption of acts of the Court (Section II of the Law of Ukraine 'On the Constitutional Court of Ukraine').

Thirdly, the legal consolidation of the status of law-making acts of the Supreme Court and the Constitutional Court of Ukraine was improved. Thus, it is regulated that acts of law-making of the Supreme Court are both mandatory and subject to consideration by courts, while acts of law-making of the Constitutional Court of Ukraine are mandatory, final, and cannot be appealed. The possibility of deviating from the Supreme Court's conclusions on the application of the law by referring the case to a chamber, joint chamber, or the Grand Chamber of the Supreme Court, while deviating from the legal positions of the Constitutional Court of Ukraine, is possible if the Senate refuses to consider the case by the judgement of the Grand Chamber. The possibility of appealing certain acts of law-making of the Supreme Court on appeal has been established, while law-making acts of the Constitutional Court of Ukraine are not subject to appeal.

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Note

ESTABLISHING TRUST IN THE COURT IN UKRAINE AS A STRATEGIC TASK FOR JUDICIAL REFORM

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Summary: 1. Introduction. – 2. – Stages of Reform. – 3. International Standards and Recommendations. – 4. The Practice of the ECtHR. – 5. Evaluation of International Institutions. – 6. The National Dimension. – 7. Jury Trial. – 8. Independence of Judges vs Abuse of Power. – 9. Reform Strategy. – 10. Conclusions.

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DISCLAIMER

The authors declare that they were not involved in the analysed law drafts during their collaboration with the legislative body.

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ESTABLISHING TRUST IN THE COURT IN UKRAINE AS A STRATEGIC TASK FOR JUDICIAL REFORM

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Abstract This article highlights the key conclusions of international and national sociological research and observations on the current state of the judicial system of Ukraine. It analyses the achievements and failures at the main stages of the implemented judicial reform and highlights the importance of standards and recommendations for the proper organisation and functioning of the judiciary. Particular attention is paid to the conclusions of the ECtHR, which enshrine legal positions on issues that are essential for the implementation of effective justice: the inadmissibility of the use of independence guarantees of judges to avoid legal liability; the need to improve the institution of the jury; and balanced and strategic planning of further reforms in the field of justice.

Keywords: *judicial reform, virtue, rule of law, judiciary, public trust, independence of judges, international standards*

1 INTRODUCTION

The justice system in Ukraine is in a permanent state of reform, primarily due to the crisis of its legitimacy. Given that this system is a defining element of the national mechanism of legal protection, the level of its legitimacy is an indicator of the effectiveness of the judiciary through the prism of Art. 3 of the Constitution of Ukraine, according to which the establishment and protection of human rights and freedoms is the main duty of the state and determines the content and direction of its activities.

The extent to which the state fulfils this obligation is subject to evaluation based on the results of both international and national sociological surveys and observations. In 2020, Ukraine ranked 72nd among 128 countries on the rule of law, as is published on the website of the World Justice Project, an international, non-governmental organisation.[1] The Index relies on national surveys of more than 130,000 households and 4,000 legal practitioners and experts to measure how the rule of law is experienced and perceived worldwide. Ukraine's highest levels of progress were noted in such elements of the rule of law as Open Government

1 WJP Rule of Law Index 2020 <https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf> accessed 10 April 2021.

(ranking 42nd among other countries) and Fundamental Rights (ranking 49th). Ukraine took the worst position in terms of such criteria as Absence of Corruption and Regulatory Enforcement (ranking 100th). At the same time, the assessment of the state of affairs in the field of Civil Justice determined that Ukraine took 61st place in the global ranking. In the field of Criminal Justice, unfortunately, the situation seems much less optimistic: Ukraine ranked only 90th out of the 128 countries in the world in which the survey was conducted. These results are unlikely to satisfy the aspirations of civil society and confirm the need for radical progress in ensuring the judicial protection of human rights.

2 STAGES OF REFORM

The legislator is currently seeking to overcome the crisis of the legitimacy of the justice system in Ukraine by reforming it. The primary stage of this reforming is the so-called 'personnel reset'. This personnel replacement is regulated by the provisions of the new Law of Ukraine 'On the Judiciary and the Status of Judges',[2] the task of which was, *inter alia*, to strengthen the responsibility of the judiciary to society and to optimise and update the judiciary, creating an effective model of judiciary standards. It is designed to meet the public demand for a fair trial in the best way possible. A key innovation in the field of judicial staffing has been granting the opportunity to become a judge of the Court of Appeal, a higher specialised court, as well as a judge of the Supreme Court, to persons who do not have experience as judges, such as lawyers and scholars. Thus, according to the results of the competition in 2018, more than a third of the vacancies of judges in the newly created Supreme Anti-Corruption Court were filled by persons of this category.

Further reform of the judicial system was marked by an attempt to restart the work of the High Qualifications Commission of Judges of Ukraine, which was carried out on the basis of the Law of Ukraine 'On Amendments to the Law of Ukraine "On the Judiciary and Status of Judges" and Some Laws of Ukraine on Activities of Judicial Authorities',[3] which provided for the reduction of personnel and the appointment of all members of the High Qualification Commission of Judges of Ukraine (HQCJ) as a single entity –the High Council of Justice (HCJ). However, the Constitutional Court of Ukraine, in its decision of 11 March 2020 No. 4-p/2020, recognised these legislative provisions as unconstitutional, noting that the change in the number and subjects of appointment of HQCJ members without the introduction of a transitional period is recognised as such, which created significant obstacles to the functioning of effective justice and in some cases made it impossible to exercise everyone's right to access to justice as a requirement of the rule of law.[4]

Also, in accordance with the requirements of this Law, the powers of all the members of the HQCJ were terminated, but a new composition of this body has not yet been formed. This contradicts the provisions of Art. 92 of the Law of Ukraine 'On the Judiciary and the Status of Judges', which secures the status of the HQCJ as a body of judicial governance, operating in the justice system of Ukraine on a *permanent basis* (emphasis added by the authors). Meanwhile, without an acting HQCJ, which is responsible for the selection of candidates for judicial positions and the qualification evaluation of judges, it is impossible to fill vacancies in courts, the number of which has already reached about two thousand and continues to grow.

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2 Law of Ukraine No 1402-VIII 'On the Judiciary and Status of Judges' of 2 June 2016 <https://zakon.rada.gov.ua/laws/show/1402-19> accessed 10 April 2021.

3 Law of Ukraine No 193-IX 'On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and Some Laws of Ukraine on the Activities of Judicial Authorities' of 16 October 2019 <https://zakon.rada.gov.ua/laws/show/193-20> accessed 10 April 2021.

4 Decision of the Constitutional Court of Ukraine of 11 March 2020 No 4-p/2020 in case No 1-304/2019(7155/19) <https://zakon.rada.gov.ua/laws/show/v004p710-20> accessed 10 April 2021.

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Transitional provisions of the Law of Ukraine of 4 June 2020 No. 679-IX,[5] according to which the HCJ, in the absence of plenipotentiary composition of the HQCJ, is authorised to make the decision to send a judge to another court, transfer a judge, or submit the position of a judge to the President of Ukraine in the cases specified by this Law without recommendation or submission of the HQCJ, did not significantly improve the situation with the staffing of courts. Due to the lack of judges, cases in the courts have been waiting for years to be resolved, which creates obstacles to access to justice. Therefore, on 3 March 2021, the parliament adopted the draft Law 'On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and Some Laws of Ukraine on the Resumption of the High Qualifications Commission of Judges of Ukraine' in the first reading.[6] The draft Law provides for additional qualification requirements for HQCJ members, and the HQCJ itself is to be formed on a competitive basis out of sixteen members, eight of whom are appointed from among judges or retired judges.

Lack of staff, which prevents the court from fully administering justice, indirectly affects the efficiency of the prosecutor's office in Ukraine as a related legal institution in the justice system and determines the appropriate level of public trust in the prosecutor's office as a whole.

The institutional reform of the Prosecutor's Office of Ukraine, based on the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Concerning Priority Measures to Reform the Prosecutor's Office',[7] has now been completed. Renewed prosecutor's offices at all levels – the Office of the General Prosecutor and regional and district prosecutor's offices, the staff of which has passed the certification procedure – have started their work. It is noteworthy that the criterion of low-level civil society trust in the prosecutor's office in Ukraine was used to justify the timeliness and demand for such a reform. In such circumstances, the authors of the draft Law saw the possibility of further reforming the prosecutor's office only if the priority measures to assess the compliance of current prosecutors with the criteria of professional competence, integrity, and professional ethics are implemented, and on the condition that opportunities for external candidates with relevant training and experience in the field of law to hold positions in the prosecutor's office of all levels are provided.

Among the main steps identified for this reform, emphasis was placed on the reorganisation of the prosecutor's office, which consisted of reloading and optimising the organisational structure of the prosecutor's office in accordance with strategic activities and requirements of society, as well as a new model of human and managerial development, conduct, and disciplinary liability of prosecutors. The relevant legislative initiative to address these issues has been supported by the Office of the General Prosecutor and is already under the consideration of the parliament.[8]

Currently, a number of non-governmental organisations are calling for judicial reform to reset the HCJ, the judiciary body responsible for forming a conscientious and highly professional

5 Law of Ukraine No 679-IX 'On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" on the Travel of Judges and Settlement of Other Issues of Ensuring the Functioning of the Justice System in the Absence of the Plenipotentiary Composition of the High Qualification Commission of Judges of Ukraine' of 4 June 2020 <https://zakon.rada.gov.ua/rada/show/679-20> accessed 10 April 2021.

6 Draft Law 'On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and Some Laws of Ukraine on the Resumption of Work of the High Qualification Commission of Judges of Ukraine' register No 3711-д of 29 January 2021 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70949> accessed 10 April 2021.

7 Law of Ukraine No 113– IX of 19 September 2019 'On Amendments to Some Legislative Acts of Ukraine on Priority Measures for Reform of Prosecutor's Bodies' <https://zakon.rada.gov.ua/laws/show/113-20> accessed 10 April 2021.

8 Draft Law 'On Amendments to Certain Laws of Ukraine on Improving the Selection and Training of Prosecutors', register No 5158 of 25 February 2021 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71239> accessed 10 April 2021.

judiciary in Ukraine, which they believe is a major obstacle to the cleansing of judicial power.[9] Moreover, in 2020, Ukraine made a commitment to the International Monetary Fund, including those points that concern judicial reform. Thus, the Memorandum of Economic and Financial Policy of 2 June 2020[10] outlines the intention to amend the Law defining the legal status of the HCJ in order to strengthen the quality of selection so that members of the HCJ would be people with impeccable reputation and integrity. This document also refers to the establishment of a commission to pre-evaluate potential candidates for the HCJ and assess their integrity, as well as to conduct a similar one-time evaluation of current members of the HCJ. It is projected that at least half of the committee members will be respected experts with recognised ethical standards and judicial experience, including relevant experience from other countries, to whom the Commission will give a decisive role and voice.

In order to legislate these intentions, on 15 February 2021, draft Law No. 5068 was registered in the parliament, which stipulates that members of the HCJ must meet the criteria of professional ethics and integrity. The Ethics Council was created to confirm the compliance of candidates for the HCJ with these criteria and perform one-time evaluations of the members of the HCJ elected (appointed) before the entry into force of this Law.[11] It is meant to include three persons from among judges or retired judges appointed by the Council of Judges of Ukraine, as well as three persons designated by international organisations with which Ukraine has been cooperating for at least the last three years in the field of preventing and combating corruption and/or the judiciary reforms in accordance with international treaties of Ukraine.

Currently, it is premature to assess the effectiveness of the reforms in the field of justice, given their incompleteness. At the same time, in the process of monitoring the progress of these reforms, one of the defining indicators of their prospects is, quite rightly, considered to be how they are perceived by civil society in general and by the expert professional (legal) community in particular.

Thus, the results of a survey conducted by the Razumkov Centre's sociological service, together with the Ilko Kucheriva Democratic Initiatives Foundation of 3 to 9 July 2020 on the assessment of citizens' activities and the level of trust in social institutions, have attracted attention to the perception of these reforms by civil society. The poll showed distrust, expressed towards the judiciary as a whole (77.5%) and towards the prosecutor's office (73%).[12] It is noteworthy that according to a survey conducted by the Razumkov Centre's sociological service on citizens' assessment of government activities, the level of trust in social institutions as of 6-11 September 2019, i.e., before the above-mentioned personnel reforms in the justice system, showed that distrust towards the judiciary, in general, was at 72% and towards the prosecutor's office, 61%,[13] which indicates the unresolved problem of ensuring the legitimacy of the judiciary and the prosecutor's office in Ukraine at the intermediate stage of reforms of these institutions.

9 The public calls on the parliament to ensure a fair composition of the judiciary and the Constitutional Court <https://dejure.foundation/tpost/z6h994xiy1-gromadskst-zaklika-parlament-zabezpechit> accessed 10 April 2021.

10 Memorandum of Economic and Financial Policies of 2 June 2020 <https://mof.gov.ua/uk/memorandum_of_economic_and_financial_policies_by_the_authorities_of_ukraine-435> accessed 10 April 2021.

11 Draft Law 'On Amendments to Certain Laws of Ukraine Concerning the Procedure for Election (Appointment) to the Positions of Members of the High Council of Justice and Activities of Disciplinary Inspectors of the High Council of Justice', register No 5068 of 15 February 2021 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71089> accessed 10 April 2021.

12 The beginning of a new political year: Trust in social institutions (July 2020) <https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/pochatok-novogo-politychnogo-roku-dovira-do-sotsialnykh-instytutiv-lypen-2020r> accessed 10 April 2021.

13 The level of trust in public institutions and electoral orientations of Ukrainian citizens <http://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/riven-doviry-do-suspilnykh-instytutiv-ta-elektoralni-oriientatsii-gromadian-ukrainy> accessed 10 April 2021.

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3 INTERNATIONAL STANDARDS AND RECOMMENDATIONS

In a democratic society, the justice system operates in accordance with the standards of productivity and efficiency of its procedures, the quality of its services, and the expectations of people who are the users of this system. At the same time, the assessment of the justice system is plausible if it is based on specific quality standards, the assessment of which is carried out on the basis of proven, reliable methods. Obviously, the basis for these standards is public expectations about the quality of services such a system provides.

Today, there is a process of reforming the justice system towards building an optimal model, taking into account the requirements and recommendations of European institutions, as well as national legal traditions of its operation in Ukraine. At the level of the Basic Law, the Ukrainian state declared the irreversibility of Ukraine's European course, which was initiated by joining the Statute of the Council of Europe.[14] Thus, the Opinion of the Parliamentary Assembly of the Council of Europe No 190 (1995) of 26 September 1995[15] on Ukraine's accession to the Council of Europe states that, *inter alia*, the state has committed to the following: the role and functions of the prosecution will be changed by transforming this institution into a body that will comply with the principles of the Council of Europe (para 11.6); the independence of the judiciary, in line with Council of Europe standards, will be ensured, in particular with regard to the appointment and holding of judges; a professional association of judges will be involved in the procedure for appointing judges (para 11.8).

At the present stage, the European institutions set a number of requirements, including some for the reform of the justice system in Ukraine, taking European standards into account, which are mainly presented in the form of 'soft law' instruments. They embody the visions of the European institutions on the functioning of the justice system and set out a general framework approach in this area, in particular for the judiciary,[16] the public prosecution service,[17] and their interaction, the ultimate goal of which is to ensure the efficiency of the justice system.

Among the leading organisations whose activities are aimed at the unification of approaches and the formation and implementation of standards in the field of justice, the Consultative

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14 Law of Ukraine Nos 398-95 'On Ukraine's Accession to the Statute of the Council of Europe' of 31 October 1995 <https://zakon.rada.gov.ua/laws/show/398/95-%D0%B2%D1%80> accessed 10 April 2021.

15 Opinion 190 (1995) Application by Ukraine for membership of the Council of Europe <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=13929&lang=en> accessed 10 April 2021.

16 Recommendation CM/Rec (2010)12 'Judges: Independence, Efficiency and Responsibilities' adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies and explanatory memorandum <https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d> accessed 10 April 2021; Venice Commission, 'Report on the Independence of the Judicial System Part I: The Independence of Judges' adopted at 82nd Plenary Session (Venice, 12-13 March 2010). CDL-AD(2010)004-e <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e> accessed 10 April 2021.

17 Recommendation Rec (2000)19 'On the Role of Public Prosecution in the Criminal Justice System' adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 and Explanatory Memorandum <https://rm.coe.int/16804be55a> accessed 10 April 2021; Parliamentary Assembly Recommendation 1604 (2003) (Reply adopted by the Committee of Ministers on 4 February 2004 at the 870th meeting of the Ministers' Deputies) 'Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law CM/AS (2004). Rec 1604 final 6 February 2004 –<https://rm.coe.int/16805dde1c> accessed 10 April 2021; Recommendation CM/Rec (2012)11 of the Committee of Ministers to member states 'Role of Public Prosecutors outside the Criminal Justice System' adopted by the Committee of Ministers of the Council of Europe on 19 September 2012 *at the 1151st meeting of the Ministers' Deputies* and explanatory memorandum <https://rm.coe.int/16807096c5> accessed 10 April 2021; Venice Commission, 'Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service' adopted at 85th plenary session (Venice, 17-18 December 2010). CDL-AD(2010)040-e <https://www.venice.coe.int/webforms/documents/default.aspx?ref=cdl-ad(2010)040&lang=EN> accessed 10 April 2021.

Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) play an important role. The so-called 'legal legacy' of the CCJE includes the Magna Carta of Judges (Fundamental Principles)[18] and conclusions on various aspects of the organisation and functioning of the judiciary.[19] In turn, the CCPE's findings reflect the best practices of Council of Europe member states on issues related to the prosecution service.[20]

In reforming the judiciary, Ukraine is also actively using the consultative conclusions of the European Commission 'For Democracy through Law'. In particular, the Conclusion of the Venice Commission on amendments to the legislation of Ukraine regulating the status of the Supreme Court and judicial authorities emphasised that trust in the judiciary can grow only within the framework of a stable system. While judicial reforms in Ukraine have been considered necessary in order to increase public trust in the judicial system, persistent institutional instability where reforms follow changes in political power may also be detrimental to the public trust in the judiciary as an independent and impartial institution (para 13 of the Conclusion).[21] According to the Conclusion of the Venice Commission

> Draft amendments to the Law "On the Judiciary and the Status of Judges' and certain laws on the activities of the Supreme Court and Judicial Authorities", Draft Law No 3711 maintains a mixed national / international body, the Competition Committee for the selection of the new members of the HQCJ. This follows the successful model chosen for the Anti-Corruption Court and is welcome (para 78 of the Conclusion).[22]

4 THE PRACTICE OF THE ECtHR

It should be noted that according to ECtHR statistics for the entire period of its activity, almost half of all violations of the European Convention on Human Rights (ECHR) recognised by the ECtHR were violations of the right to a fair trial, a significant part of which are violations of reasonable time and enforcement. This indicates the existence of problems in the field of compliance with a reasonable time of a trial and enforcement proceedings in general at the level of the European region.

Non-compliance with national court decisions is also a serious problem for the judicial system in Ukraine. Its systematisation was established in the pilot decision in *Yuriy Nikolayevich Ivanov v. Ukraine*,[23] in which the ECtHR stated that the violations of human rights originated in a practice incompatible with the ECHR consisting in the respondent state's recurrent

18 'Magna Carta of Judges (Fundamental Principles)' CCJE (2010)3 Final. Strasbourg, 17 November 2010 <https://rm.coe.int/2010-ccje-magna-carta-anglais/168063e431> accessed 10 April 2021.

19 AO Kavakin (ed), *Documents of the Consultative Council of European Judges* (3rd ed, Ratio Decidendi Publishing House 2020).

20 'Opinions of the Consultative Council of European Prosecutors' <https://rm.coe.int/compilation-of-opinions-of-the-consultative-council-of-european-prosec/168074fa32> accessed 10 April 2021.

21 Venice Commission, 'Opinion on the Legal Framework in Ukraine Governing the Supreme Court and Judicial Self-governing Bodies' CDL-AD (2019)027-e, adopted at the 121st Plenary Session (6-7 December 2019) <https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)027-e> accessed 10 April 2021.

22 Venice Commission, 'Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the draft amendments to the Law "On the Judiciary and the Status of Judges" and certain Laws on the activities of the Supreme Court and Judicial Authorities (draft Law no 3711)' CDL-AD(2020)022-e Ukraine, adopted at the 124th online Plenary Session (8-9 October 2020) <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)022-e> accessed 10 April 2021.

23 *Yuriy Nikolayevich Ivanov v Ukraine* App no 40450/04 (ECtHR, 15 October 2009) <http://hudoc.echr.coe.int/eng?i=001-95032> accessed 10 April 2021.

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failure to comply in due time with domestic decisions for the enforcement for which it is responsible and in respect of which aggrieved parties have no effective domestic remedy.

Despite this decision of the ECtHR and the fact that a long time has passed since its adoption, this problem still remains unresolved in Ukraine. Moreover, a significant number of similar complaints submitted after the pilot decision prompted the ECtHR to take drastic action, which resulted in the decision in *Burmych and Others v. Ukraine*. In this decision, the Court expressed concern that it runs the risk of operating as part of the Ukrainian legal enforcement system and substituting itself for the Ukrainian authorities, noting that the task is not compatible with the subsidiary role which the Court is supposed to play in relation to the High Contracting Parties.[24]

5 EVALUATION OF INTERNATIONAL INSTITUTIONS

The restoration of the legitimacy of the judiciary is possible only with the help of the best international experience in the construction and operation of judicial systems. Information on such practices is contained, in particular, in the reports of the European Commission for the Efficiency of Justice (CEPEJ),[25] which functionally pays considerable attention to the monitoring and evaluation of the performance of courts in member states of the Council of Europe. The CEPEJ was established in September 2002 to develop acceptable solutions aimed at effectively implementing the fundamental principles of the Council of Europe on the administration of justice, ensuring that state policy on the functioning of courts meets the needs and expectations of judicial users, and reducing the burden on the ECtHR by making proposals on effective ways to resolve disputes before applying to the ECtHR and preventing violations of the right to a fair trial.

In its regular biennial reports, CEPEJ emphasises the importance and necessity of monitoring the efficiency and quality of the judiciary. The latest report, published in October 2020, examines indicators that provide an opportunity to assess the state of the judicial system of individual countries and better understand the specifics of the functioning of national courts. The ultimate goal of the periodic evaluation process is to develop recommendations and propose specific tools to improve the quality, impartiality, and efficiency of judicial systems.

Among the conclusions reached by CEPEJ, the following trends should be noted. As stated by the Venice Commission

> In order to maintain the independence of the court system, it will be necessary to provide the courts with resources appropriate to enable the courts and judges to live up to the standards laid down in Article 6 of the ECHR and in national constitutions and perform their duties with the integrity and efficiency which are essential to the fostering of public trust in justice and the rule of law.[26]

According to the latest report, the member states have slightly but consistently increased the average budget allocated to the judicial system. It should be noted that the strongest

24 *Burmych and Others v Ukraine* App no 46852/13 (ECtHR, 12 October 2017) para 155 <http://hudoc.echr.coe.int/eng?i=001-178082> accessed 10 April 2021.

25 Council of Europe European Commission for the efficiency of justice (CEPEJ) <https://www.coe.int/en/web/cepej/home> accessed 10 April 2021.

26 Report on the Independence of the Judicial System Part I: The Independence of Judges adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010). CDL-AD(2010)004-e <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)004-e> accessed 10 April 2021.

increases are registered in Ukraine (+83%, +105% in local currency). Ukraine, as part of its judicial reform, invested heavily in the judiciary by increasing the salaries of judges and court staff, improving conditions of accessibility for court users, equipping courts with videoconferencing systems, and renovating court buildings.[27]

Thus, Ukraine demonstrates compliance with European standards for adequate budget funding of the justice system to ensure its independence. Nevertheless, the cost of resolving a dispute in court is often a barrier to access to justice. According to the World Bank, today, the cost of resolving a commercial dispute through a court of first instance in Ukraine is on average 46.3% of the value of the claim, which includes legal aid (25% of the price of the claim), court fees (9.9%), and executive fees (11.4%).[28] For comparison, in Turkey, such costs collectively reach 24.9% of the value of the claim (almost half of the costs in Ukraine); in Slovakia, these are 20.5%, and in Poland, 19.4%.

The explanatory note to para. 10 of the Bordeaux Declaration 'Judges and Prosecutors in a Democratic Society' states that

> The highest level of professional skill is a pre-requisite for the trust which the public has in both judges and public prosecutors and on which they principally base their legitimacy and role.[29]

In other words, the level of professionalism of prosecutors and judges can be objectively assessed by determining the level of trust of civil society in these institutions, which are the defining components of the justice system.

In this regard, the data of the Eurobarometer Standard are of interest, according to the methodology of which, with the support of the European Commission, a sociological survey of citizens of the EU member states and candidate countries is conducts, in particular, on trust in institutions representing justice. Thus, the results of a study published in October 2020 showed that

> Trust in justice/the national legal system is predominant in 15 Member States (compared with 13 in autumn 2019). However, among these countries, trust levels range from 85% in Denmark and the Netherlands, where they are the highest, to 49% in Cyprus (vs. 46% 'tend not to trust'), where it is the lowest. Distrust is predominant in the other 12 EU Member States and is particularly high in Croatia (73%), Slovakia (72%) and Bulgaria (70%).[30]

The 2020 EU Justice Scoreboard shows a continued improvement in the effectiveness of justice systems in the large majority of member states. Nevertheless, challenges remain to ensure the full trust of citizens in the legal systems of those member states where guarantees of status and position of judges, and thereby their independence, might be at risk.[31]

27 Evaluation of Judicial Systems <https://www.coe.int/en/web/cepej/cepej-work/evaluation-of-judicial-systems> accessed 10 April 2021.

28 Doing Business: Measuring Business Regulations. The World Bank <https://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts> accessed 10 April 2021.

29 Opinion No 12 (2009) of the Consultative Council of European Judges (CCJE) and Opinion No 4 (2009) of the Consultative Council of European Prosecutors (CCPE) to the attention of the Committee of Ministers of the Council of Europe 'On the Relations between Judges and Prosecutors in a Democratic Society' <https://rm.coe.int/1680747391 https://rm.coe.int/opinion-no-12-2009-on-the-relations-between-judges-and-prosecutors-in-/16806a1fbd> accessed 10 April 2021.

30 Public opinion in the European Union. Standard Eurobarometer 93 (Summer 2020) <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/91061> accessed 10 April 2021.

31 The 2020 EU Justice Scoreboard. European Commission <https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2020_en.pdf> accessed 21 June 2021.

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6 THE NATIONAL DIMENSION

Against the background of these trends, it is of particular interest to assess the level of trust in Ukrainian courts. The United States of America's Department of State annually presents a Country Report on Human Rights Practices on all countries receiving assistance and all United Nations member states to the US Congress. The Denial of Fair Public Trial section of this report on Ukraine in 2020 states

> While the constitution provides for an independent judiciary, courts were inefficient and remained highly vulnerable to political pressure and corruption. Trust in the judiciary remained low.[32]

In the autumn of 2020, the Razumkov Centre's sociological service conducted two sociological surveys on 'Attitudes of Ukrainian citizens to the judicial system',[33] commissioned by the Office of the Council of Europe in Ukraine. Among the key findings of this study is the following:

> Because most citizens do not have personal experience of communicating with the courts and determine their attitude to the judiciary on the basis of other people's experience or information in the media, the attitude of the general population to the judiciary is negative and trust is one of the lowest among state and social institutions (only 13% of respondents rather trust or fully trust the courts). However, the level of trust of citizens who have their own recent experience of communicating with the courts is much higher and is at 48%. At the same time, according to the results of a nationwide survey among respondents who have experience of interaction with the courts, and according to the results of the exit poll, most respondents believe that the court's decision was legal and fair.

Thus, one of the determining factors that support citizens' distrust of the judiciary is the disapproving information narratives that are actively spread in the media. The confirmation of these destructive processes is found in specialised media studies. In particular, according to the Institute of Mass Media, whose experts monitored 18 national online media sources' coverage of the activities of law enforcement agencies and courts during 22-28 February 2021, the coverage of court activities is significantly dominated by negative reports: 41.2% vs 3.4% positive. Such a disproportion is extremely abnormal and can contribute to the formation of significant distrust in the judiciary.[34] Therefore, it is not surprising that according to the latest sociological observations,[35] citizens consider themselves the least protected in the fields of justice (26% rated it well or satisfactorily) and protection against corruption (12%).

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32 2020 Country Reports on Human Rights Practices: Ukraine. United States Department of State. Bureau of Democracy, Human Rights and Labor <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/ukraine> accessed 10 April 2021.

33 O Razumkov's Ukrainian Center for Economic and Political Studies, 'Report on the results of the study "Attitudes of Ukrainian citizens to the judiciary"' (Kyiv, 2020) <https://rm.coe.int/zvitsud2020/1680a0c2d7> accessed 10 April 2021.

34 A Bratushchak, 'Someone is snoring. How the media cover the work of the courts' <https://imi.org.ua/monitorings/htos-hrope-yak-media-vysvitlyuyut-robotu-sudiv-i38178?fbclid=IwAR1nQAWFum_AJ4yJLqriVzVmFtaEmX-7CY1ZQND6X0blgBIeJL-1WoFejwA> accessed 10 April 2021.

35 Sociological Group Rating, 'Ukraine in quarantine: Monitoring of public sentiment' (March 26-28, 2021) <http://ratinggroup.ua/research/ukraine/ukraina_na_karantine_poryadok_i_bezopasnost_26-28_marta_2021.html?fbclid=IwAR0yg9dLHEbwZgCP6Au5sTTEYb4sKw8nP4ksyGoufudCDNTrM6NxbFulbz0> accessed 10 April 2021.

7 JURY COURT

Promising means of restoring trust in the domestic judiciary rightly include the expansion of the personal participation of citizens in the administration of justice. For example, the President of the Criminal Court of Cassation of the Supreme Court is convinced that the jury mechanism should be developed and used and that this will help strengthen trust in the judiciary.[36]

Art. 124 of the Constitution of Ukraine stipulates that the people are directly involved in the administration of justice through juries. However, we can state that the level of implementation of this constitutional provision is extremely low. In particular, criminal proceedings with a jury are possible only in respect of crimes punishable by life imprisonment and provided that at least one of the accused has applied for it (Part 3 of Art. 31 of the CPC of Ukraine). In civil proceedings, a trial with the participation of a jury in accordance with Part 4 of Art. 293 of the CPC of Ukraine is provided only for specific categories of cases of separate proceedings. According to the statistics of the State Judicial Administration of Ukraine, in 2020, the jury considered 44 criminal proceedings and 8,543 civil cases of separate proceedings.[37] Given this data, it is difficult to disagree with the conclusions of domestic scientists who say that the jury is still relatively unknown and needs both legislative improvement and an additional awareness campaign on its specifics and possibilities of application in Ukraine.[38]

Realising the need to address the problems of the jury in Ukraine as a matter of priority, the committees of the Verkhovna Rada of Ukraine held joint hearings on 12 February 2020 on the topic 'Prospects for development, issues of formation and functioning of the jury in Ukraine'. The recommendations adopted as a result of these hearings emphasise that an important component of improving the jury trial is inextricably linked to the introduction of systematic training of candidates involving the judiciary, justice, psychologists, international partners, etc., as well as broad campaigns for a nationwide education campaign on the importance of expanding forms of democracy through the participation of citizens in the administration of justice.[39]

8 INDEPENDENCE OF JUDGES VS ABUSE OF POWER

Trust in the judiciary obviously cannot be restored without guaranteeing the real independence of judges. Judicial independence is a fundamental element of an effective justice system. However, independence cannot consist of unrestricted freedom and the complete uncontrollability of the judiciary in the administration of justice. Otherwise, it would mean the independence of judges from the people, who are the only source of power

36 The challenges of the digital age were discussed by the participants of the III International Criminal Law Forum <https://pravo.ua/vyklyky-tsyfrovoi-epokhy-obhovoryly-uchasnyky-iii-mizhnarodnoho-kryminalno-pravovoho-forumu/> accessed 10 April 2021.

37 State Judicial Administration of Ukraine, 'Report of local general courts on consideration of court cases for 2020' <https://court.gov.ua/inshe/sudova_statystyka/IV_kvartal_20> accessed 10 April 2021.

38 I Myshchak, 'Reforming the jury in Ukraine as an important element in increasing public confidence in the judiciary' (2020) 18-19 (203-204) Public opinion on lawmaking 15-20 <http://nbuviap.gov.ua/images/dumka/2020/18-19.pdf> accessed 10 April 2021.

39 Recommendations of joint committee hearings in the Verkhovna Rada of Ukraine committees on law enforcement and legal policy on the topic 'Prospects for development, issues of formation and functioning of the jury in Ukraine', approved by the decision of the Verkhovna Rada Committee on Law Enforcement (protocol No 37 of 1 July 2020) <http://komzakonpr.rada.gov.ua/uploads/documents/32665.pdf> accessed 10 April 2021.

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in Ukraine. After all, judges, as well as other officials of public authorities, are obliged to act only on a certain basis, within the powers and in the manner prescribed by the Constitution and Laws of Ukraine. In this aspect, the decision of the Constitutional Court of Ukraine No 13-p/2020, based on an absolute (unlimited) interpretation of the independence of the judiciary, was subjected to well-founded public criticism. In particular, it is difficult to agree with the Court's conclusion that any forms and methods of control in the form of inspections, monitoring, etc. of the functioning and activities of courts and judges should be implemented only by the judiciary and exclude the establishment of such bodies in the executive and legislature powers.[40]

Guarantees of judges' independence should not be used to avoid legal liability. The ECtHR, which guards human rights and fundamental freedoms, also does not support the reference to guarantees of the independence of judges as a means of protection against legitimate restrictions. Thus, rejecting the complaint on compliance with the principle of 'an independent and impartial tribunal established by law' in t *Xhoxhaj v. Albania*, the Court stated

> The Court must take account of the extraordinary nature of the vetting process of judges and prosecutors in Albania. This process was introduced in response to the urgent need, as assessed by the national legislature, to combat widespread levels of corruption in the justice system. It consists of the assessment of three criteria and precisely targets all serving judges and prosecutors. It is for this reason that the vetting process of judges and prosecutors in Albania is sui generis and must be distinguished from any ordinary disciplinary proceedings against judges or prosecutors. In the Court's view, the fact that members of the IQC did not come from amongst serving professional judges was consistent with the spirit and goal of the vetting process, namely to avoid any individual conflicts of interest and ensure public trust in the process.[41]

Based on the approaches used in this decision, it can be concluded that a more meticulous review of integrity and enhanced public control over the lifestyle of judges in countries with high levels of corruption is legitimate. The limits of interference with the privacy of public figures, including judges, to assess their integrity are somewhat broader due to the urgent need to restore public trust in the judiciary and the public interest in the purification of the judiciary over the private interests of the individual. Given the slight progress of Ukraine in the world ranking of perceptions of corruption (ranking 117th among 180 countries in 2020), this conclusion is more than relevant for our country.

9 REFORM STRATEGY

The constitutional status of the judiciary and enshrining the principles of justice, the guarantees of judges in the Basic Law of Ukraine, require special care in the development and implementation of reforms and consistent, mutually agreed measures to overcome problems in this area. Until recently, Ukraine had a Strategy for the Reform of the Judiciary and Related Legal Institutions for 2015-2020.[42] However, its long implementation period, as we see, did not provide significant progress in the implementation of the right to a fair trial.

40 Decision of the Constitutional Court of Ukraine of 27 October 2020 No 13-p/2020 in case No 1-24/2020(393/20) <https://zakon.rada.gov.ua/rada/show/v013p710-20> accessed 10 April 2021.

41 *Xhoxhaj v Albania* App no 15227/19 (ECtHR, 9 February 2021) paras 299-300 <http://hudoc.echr.coe.int/eng?i=001-208053> accessed 10 April 2021.

42 Strategy for reforming the judiciary, the jurisdiction and related legal institutions for 2015-2020: Approved by the Decree of the President of Ukraine of 20 May 2015 No 276/2015 <https://zakon.rada.gov.ua/laws/show/276/2015> accessed 10 April 2021.

Therefore, taking into account the experience gained, and in accordance with the current challenges facing the judiciary, it is necessary to create a new strategic plan to restore public confidence in judges.

On 1 March 2021, at the All-Ukrainian Forum 'Ukraine-30. Development of Justice', the Strategy for the Development of Justice and Constitutional Judiciary for the next three years was presented. The purpose of the Strategy is to establish the main directions of policy and priorities for further improvement of Ukrainian legislation on the judiciary, the status of judges, and the judiciary in cooperation with other institutions of justice for the practical establishment of the rule of law, efficient and fair justice, strengthening the functional basis of the organisation of the judiciary in accordance with the standards of protection of human rights and values defined by the Constitution of Ukraine, the obligations of Ukraine as a member of the Council of Europe, and bilateral agreements with the European Union. To achieve this goal, the Strategy provides for appropriate measures in such areas as improving access to justice, strengthening judicial independence and accountability to society, judicial careers and the accountability of judges, the system of prosecutors, and improving the bar.

10 CONCLUSIONS

We can state that the true attitude of the citizens of Ukraine towards the judicial system cannot be simply analysed or presented in the form of only one statistical indicator. Such an assessment should be based on an integrated approach, which also takes into account the national characteristics of the judiciary, the degree of involvement of citizens in this area, and the background of negative information against which domestic courts operate and which facilitates the rejection of the judiciary by the majority. According to international professional organisations and in accordance with the case-law of the ECtHR, domestic justice is characterised by the presence of systemic problems that need to be addressed immediately. In this regard, Ukraine is in an active phase of judicial reform, the main objectives of which are to implement the best international standards in the field of justice, increase personal participation in the administration of justice, ensure the rule of law and effective protection of human rights, establishing public trust in judges and court decisions. A new comprehensive strategy for such a reform must be approved as soon as possible.

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Note

REFORMING THE LEGISLATION ON THE INTERNATIONAL COMMERCIAL ARBITRATION OF UKRAINE: REALITIES OR MYTHS

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Summary: 1. Introduction. – 2. The Possibility of the Consideration of Investment Disputes by International Commercial Arbitration. – 3. The Correlation of the 'Place of Dispute' ICA with the Theory of Delocalisation. – 4. The Procedure for Establishing Institutional Arbitration Courts. – 5. Changing the Procedure for Appointing Arbitrators. – 6. Conclusions.

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CONFLICTS OF INTEREST

The authors declare no conflict of interest of relevance to this topic. Prof. Prytyka serves as a Member of the Advisory Board of the journal; thus, he was not involved in decision making, and this note underwent the full process of peer review and editing. Although two authors serve in AJEE, which may cause a potential conflict or the perception of bias, the final decisions for the publication of this note was handled by other editors, including choice of peer reviewers.

DISCLAIMER

The authors declare that they were not involved in any state body's activities related to the discussed Draft law. Prof. Prytyka serves as a Member of the International Commercial Arbitration Court in Ukraine but does not represent any views of this body in this research, nor is he bound by that body in his opinion.

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REFORMING THE LEGISLATION ON THE INTERNATIONAL COMMERCIAL ARBITRATION OF UKRAINE: REALITIES OR MYTHS

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Abstract *International commercial arbitration (ICA) is an alternative way to resolve foreign economic disputes. Initially, arbitration itself was seen as a neutral court in which the parties to the dispute were independent of national courts. Arbitration agreements and decisions must be recognised by national courts without any complications or review procedures.*

Although granting commercial parties some independence to agree that their dispute will be considered by independent arbitrators is a key principle in ICA, the struggle for supremacy between national laws and national courts on the one hand and the autonomy of the parties and the independence of the international arbitration system on the other continue. Over the years, national laws have sought to control, regulate, interfere with, or support ICA in various ways. To counter attempts to 'localise' ICA and promote equality in this area, private, professional institutions and international and intergovernmental organisations have developed a significant body of law designed to ensure self-government and dispute settlement procedures in ICA.

Nevertheless, international commercial arbitration cannot exist independently of national jurisdictions. Examining the activities of ICA, it can be seen that the importance and impact of national arbitration laws and national judicial supervision are significantly reduced, but the lex fori still plays an important role in arbitration. Thus, the reform of the normative regulation of international arbitration also affected Ukraine. The article analyses the radical changes proposed by the legislator regarding the procedure for establishing institutional arbitrations, expanding the arbitrability of disputes.

Keywords: *international commercial arbitration, delocalisation, arbitration agreement*

1 INTRODUCTION

International commercial arbitration (ICA) occupies an important place among alternative methods of dispute resolution in the field of international trade. Therefore, the improvement of its legal regulation in light of current trends in the development of this institution is permanent in all countries. In many countries, arbitration law reflects the nature of arbitration as an alternative means of resolving disputes arising in the field of economic circulation, which is based on contract and excludes the jurisdiction of state courts to consider a particular case. The contractual nature of arbitration means that its formation is the prerogative of the parties. The establishment or election of arbitration is carried out by the parties between whom there is a dispute over the right. The legislation of different states, as a rule, provides for the possibility of international commercial arbitration of civil cases between national and foreign legal entities and, in some cases, the possibility of arbitration of civil cases in disputes between foreign entities of rights.

The harmonisation of national legislation on international commercial arbitration in Ukraine is a rather complex process, as the attractiveness of using this alternative method of dispute resolution is growing, and legislative consolidation cannot always keep pace with modern challenges. The legislation of Ukraine governing international commercial arbitration includes two main sources: the Law of Ukraine 'On International Commercial Arbitration'[1] of 1994 and the Code of Civil Procedure of Ukraine,[2] which contain tools for monitoring and facilitating international commercial arbitration. In general, the arbitration legislation of Ukraine meets international standards, in particular, those provided for in the UNCITRAL Model Law on International Commercial Arbitration.

An important recent reform of the arbitration legislation of Ukraine was the adoption of amendments to the CPC of Ukraine of 2017, which introduced separate chapters on procedural issues of the recognition and enforcement of ICA decisions and the procedure for revoking ICA decisions. Following these changes, the case-law has become more pro-arbitration.

In 2021, the Ministry of Justice of Ukraine developed a new Draft Law aimed at improving the regulation of ICA. Thus, the Draft Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Concerning the Improvement of Arbitration' was registered in the Verkhovna Rada of Ukraine (No. 5347 of 8 April 2021).[3] According to the analysis of the Draft Law, it proposes to amend the legislation of Ukraine in the following areas: 1) expanding the arbitrability of disputes that can be referred to international commercial arbitration through: a) civil contractual relations in the areas of property privatisation and public procurement; b) corporate relations; c) disputes involving a non-resident related to investments made by a foreign investor in Ukraine or a Ukrainian investor abroad; 2) the possibility of establishing permanent arbitration institutions in Ukraine, the founders of which are proposed to determine non-profit organisations registered in accordance with the legislation of Ukraine or branches and representative offices of organisations registered in accordance with foreign law and that are founders of arbitration institutions abroad; 3) establishing the procedure for resolving issues related to determining the composition of the arbitration by the state court.

1 Law of Ukraine 'On International Commercial Arbitration' of 24 February 1994 No 4002-XII (updated on 15 December 2017) <http://zakon5.rada. gov.ua/laws/show/4002-12/ parao171#o171> accessed 16 July 2021.

2 Law of Ukraine 'Civil Procedure Code of Ukraine' of 18 March 2004 No 1618-IV (updated on 4 November 2018) <http://zakon.rada.gov.ua/laws/show/1618-15> accessed 16 July 2021.

3 Draft Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Concerning the Improvement of Arbitration Activities' of 08 April 2021 No 5347 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71614> accessed 25 July 2021.

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The proposed changes have caused considerable discussion among legal practitioners and scholars, who have been quite critical of some provisions of the Draft Law. While carrying out own analysis of the mentioned offers, it is necessary to focus on the following problematic moments.

2 THE POSSIBILITY OF THE CONSIDERATION OF INVESTMENT DISPUTES BY INTERNATIONAL COMMERCIAL ARBITRATION

According to the Draft Law 'On Amendments to Certain Legislative Acts of Ukraine on Improving Arbitration' of 8 April 2021, 'disputes involving a non-resident related to investments by a foreign investor in Ukraine or a Ukrainian investor abroad' are to be referred to the competence of ICA in Ukraine. The proposals set out in the Draft Law on the inclusion of investment disputes with the participation of a non-resident to the authority of ICA are of a somewhat controversial nature and should be considered in a certain set of applications of international and national legislation.

Investment arbitration is a procedure for settling disputes between foreign investors and host countries. The possibility for a foreign investor to file a lawsuit against the host state is a guarantee for the foreign investor that in resolving the dispute, they will be able to obtain consideration of such dispute by independent and qualified arbitrators, and such arbitral awards will be effectively enforced. This allows a foreign investor to bypass national jurisdictions, which may be perceived as biased and not endowed with sufficient qualifications to deal with such disputes as provided for in international treaties.

For a foreign investor to apply to investment arbitration, the host state must give consent to it. Consent to investment arbitration is most often given by host countries in international investment agreements, including bilateral investment agreements, as well as free trade agreements and multilateral agreements. For example, in Part 3 (a) of Art. 26 of the Energy Charter Treaty, ratified on 6 February 1998, it is stated that subject to subparagraphs (b) and (c) only that each Contracting Party hereby gives its unconditional consent to the transfer of the dispute to international arbitration or conciliation in accordance with the provisions of this article.

To a lesser extent, such consent to investment arbitration may be enshrined in investment agreements concluded directly between the state and a foreign investor, or it may be contained in the domestic legislation of the host country, such as legislation governing mining or investment. The United Nations Conference on Trade and Development (UNCTAD) maintains a list of such agreements that provide for the consent of the host country to investment arbitration, which should be consulted from the outset of any potential dispute to determine whether investment arbitration can be envisaged.

As a rule, the consent is based on the rules of citizenship of the individual investor or the location of the legal entity, which provides some flexibility in terms of international agreements, according to which arbitration of investment disputes may be initiated.

For an investor to be able to choose the consideration of their dispute in international commercial arbitration, they must have appropriate material protection. Material protection provided to foreign investors depends on the international investment agreement on the basis of which their claims are made. They differ from the protection provided by the domestic law of the receiving state.

For most investment arbitration agreements, a six-month period is typically provided for, during which the investor and the host country are invited to enter into negotiations to find a

mutually acceptable solution. The starting point for the conciliation period is usually a notice of intent to sue the host state against the arbitral tribunal. In the event of an unresolved dispute during the conciliation period, as is usually the case (many states prefer to wait and see if a foreign investor is willing to pay the high costs required for investment arbitration), the foreign investor must apply for arbitration in accordance with applicable arbitration rules.

The average term of arbitration in investment disputes is a little over three years. According to statistics from the International Center for the Settlement of Investment Disputes (ICSID), in 2015, the length of arbitration proceedings was '39 months on average'. The longest-running dispute in the history of ICVIS lasted for nineteen years, but this was an exceptional case.

Thus, the proposals set out in the Draft Law may completely disregard the advantages of ICA in terms of speed of dispute resolution in contrast to national jurisdictions. In addition, the inconsistency of national legislation and international agreements on the possibility of consideration of investment disputes by ICA will be an indisputable ground for refusing to recognise and grant permission to enforce the decision of ICA and revoke such arbitral decisions in accordance with Art. 478 and Art. 459 of the CPC of Ukraine.

In addition, these changes actually duplicate Part 5 of Art. 1 of the Russian Federation Law 'On International Commercial Arbitration', in accordance with which in cases provided for by international treaties of the Russian Federation and federal law, disputes involving a foreign investor in connection with foreign investment in the territory of the Russian Federation or Russian investments abroad not covered by this article may be transferred to international commercial arbitration.

In our opinion, the proposal to submit investment disputes that arise between a foreign investor and the state to ordinary international commercial arbitration is not realistic enough because bilateral interstate investment agreements provide a special procedure for resolving investment disputes and embody established practice. As an example, we can cite Art. 9 of the Agreement on Promotion and Mutual Protection of Investments between Ukraine and Qatar in 2018, which provides for the following ways to resolve investment disputes: a) negotiations, b) appeal to the competent state court of the country of investment; c) settlement of a dispute by the International Center for the Settlement of Investment Disputes, established in accordance with the 1965 Convention on the Settlement of Investment Disputes between States and Foreign Persons; d) the establishment of an ad hoc Arbitration Tribunal to settle the dispute in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).[4]

The idea of the Draft Law to improve the investment climate in Ukraine by transferring investment disputes to national arbitrations has been criticised in Ukrainian periodicals. V. Nahnybida notes that the idea of creating an arbitration attractive to investors was also worked out by 'bringing here (to Ukraine) arbitrators, foreign judges' and creating an arbitration 'that would have great reputation, would be reliable, would work on a par with Stockholm and London'. Although such initiatives and the format of their implementation have been criticised (often fairly) in professional circles, until recently, the fact that the current government realised the direct connection between the institution of arbitration and investment attractiveness and investor confidence in the state gave hope. In addition, such statements indicate the government's intention to offer Western partners and European-level businesses a platform for resolving international commercial and investment disputes by highly professional, experienced, and reputable arbitrators. And this is also the right

4 Agreement on Promotion and Mutual Protection of Investments between the Government of Ukraine and the Government of the State of Qatar <https://zakon.rada.gov.ua/laws/show/634_004-18#Text> accessed 25 July 2021.

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approach. After all, the legal nature and specifics of these disputes really require quality administration of their resolution and professional arbitrators, and since the latter decisions are executed mainly in foreign jurisdictions, the confidence of foreign investors and the country's image in the eyes of foreign partners and companies really depend on the quality of such decisions.[5]

Therefore, in most cases, investment disputes are considered in a special manner, and national ICAs perform the functions of the competent authorities to assist in the organisation of arbitration under the UNCITRAL regulations. It is unlikely that a foreign investor, in the event of a dispute with a state, will choose that state as the place of arbitration with an appropriate mechanism for reviewing the arbitral decision by the state courts of that state.

3 THE CORRELATION OF THE 'PLACE OF DISPUTE' ICA WITH THE THEORY OF DELOCALISATION

It should be noted that along with the unification of the ICA, the issues of its delocalisation, which is understood as the separation of arbitration from the national legislation of the state of the arbitration, including its substantive and procedural rules, are currently being actively discussed.

Most scholars and practitioners[6] traditionally hold the view that the activities of an international arbitral tribunal are carried out only within the framework of national law. In doing so, they draw attention to the following: a) international commercial arbitration is a national legal institution provided for by national law; b) even special rules related to arbitration between different countries and established by international conventions have legal force only to the extent to which the force within each of the national legal systems is recognised by those conventions; c) the legal force of an international arbitral decision and the possibility of its enforcement in a particular state depend on whether the relevant procedure established in that state was followed during its issuance.

Representatives of the theory of delocalisation consider international arbitration separate from national legal systems and their norms and principles and believe that the sphere of international commercial relations can be better served by a system of more or less codified universal norms developed on the basis of international experience.

Thus, according to D.K. Moss, unlike a state judge who is obliged to act in accordance with the rules of conflict law of the state on which behalf they administer justice, an arbitrator is not bound by such rules.[7] Many supporters of the delocalisation theory assume that the independence of the law of the place of arbitration or any other national law emphasises the principle of autonomy of the parties as the leading idea relevant to the delocalisation process.

The theory of delocalisation is related to approaches that consider international commercial arbitration exclusively as a contractual phenomenon and is based on the following arguments: separation from any national rules, both procedural and private international law, but compliance with mandatory rules of public order; separation from the norms of private international law and public order of the state, but compliance with procedural norms; separation from any norms of the national legal system.

5 V Nahnybida, 'The Crisis of Trust' (2021) 4 (129) Court Bulletin.
6 D Janićijević, 'Delocalization in International Commercial Arbitration' (2005) 3 (1) Law and Politics 63.
7 DK Moss, *Autonomy of Will in the Practice of International Commercial Arbitration* (Moscow 1996) 11.

Despite the significant differences between these approaches, neither excludes the possibility of international treaty unification of procedural rules. The analysis of the traditional approach shows that its supporters recognise the possibility of international treaty unification, but such unification should take place only to the extent that it is recognised by the states, which are parties to the relevant international treaties. Supporters of the theory of delocalisation recognise the international unification of the legal regulation of the dispute resolution process by an international arbitral tribunal as a necessary condition for the existence of the ICA as such. At the same time, as for the method of unification, they insist on the application of the substantive law and not the conflict method, as the latter actually leads to the application of procedural law of a particular country. However, this creates problems related to the implementation of the arbitration award, as well as to the unification process itself.[8]

One of the most prominent supporters of delocalisation theory, Ian Paulson, argued that ICA should not be limited by procedural law to the place of arbitration, as arbitration powers are not provided by law to the place of arbitration and should not be subject to judicial review. According to this point of view, the parties may enter into a foreign trade contract in which the arbitration proceedings will be deprived of the intervention of state courts for their own interest. Such arbitration in the theory of law enforcement is called 'flexible' because it does not depend on the domestic law of the country where the arbitration is taking place. Thus, it can be seen that the theory of delocalisation is very attractive for both arbitrators and sides of arbitration review, as quite often the place of arbitration is chosen for reasons of convenience or neutrality, ignoring any coercion by the state and making it impossible for the state court to decide about the non-arbitrability of the dispute. Thus, the theory of delocalisation ultimately improves the liberalisation of the choice of procedural law in international arbitration.[9]

In modern conditions, it is noticeable that the processes of delocalisation of the ICA are manifested in the formation of universal arbitration rules, which are designed to be self-sufficient to prevent any interference of state courts. However, negative views on delocalised arbitration are based on the premise that arbitration should always have a 'place' and be implemented in national law. As F. Mann noted, every arbitration is a national arbitration according to the system of national law. Each arbitration must be subject to the law of a state. Every system of law or state power derives from a system of national law, which may be called the law of arbitri.[10] Yet, over time, some scholars, as well as practitioners, lay the foundations of the theory and practice of delocalised arbitration, which is manifested in non-interference by the state. The function of state courts should be aimed only at controlling the arbitration process.

Delocalisation of international commercial arbitration is characterised by its universal nature. It contributes to the improvement of new international trends in the development of arbitration, in particular, in the form of implementation of international commercial contracts, which are mainly related to public authorities. As an example, the UNCITRAL Model Law can be seen as a right for the delocalisation procedure, as it gives greater freedom to seek any other alternatives for resolving any dispute between the parties in ICA proceedings.[11]

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8 K Piątkowska, 'The Concept of "Denationalization" (or the Equivalent "Delocalization") in the Context of the US Federal Court Decision in Chromalloy Aeroservices Inc v Arab Republic of Egypt 939 F Supp 907 (DDC 1996) and the Amsterdam Court of Appeal Decision in Yukos Capital SARL v OAO Rosneft' (Wrocław 2009).

9 J Paulsson, *The Idea of Arbitration* (Oxford University Press 2013).

10 FA Mann, 'Lex Facit Arbitrum' in P Sanders (ed), *International Arbitration: Liber Amicorum for Martin Domke* (The Hague: Martinus Nijhoff 1967) 157-183.

11 United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration*, adopted by UNCITRAL on 21 June 1985 in the wording of 2006 (United Nations Publication 2008) 40.

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By becoming more independent of national legal systems, arbitration acquires new qualities. Conventionally speaking, in resolving a dispute, arbitration does not 'join' any legislation and primarily supports the interests of international trade. Thus, delocalised arbitration can be considered as a form of arbitration of foreign economic disputes, which is independent of any national legal system.

The main feature of delocalised arbitration is that it is based on the agreement of the parties. The second characteristic feature of delocalised arbitration is that its procedure should not violate the basic rules of international arbitration, which are recognised in each country where arbitration is practiced. These norms include the concepts of natural justice and other minimum norms of transnational legislation, which are reflected in the main international conventions.

If the arbitration is not based on these standards, it is impossible to recognise the law of the place of arbitration or the place of execution of the arbitral award. Similarly, delocalised arbitration does not give the arbitrator the right to act as a mediator.[12] Finally, delocalised arbitration allows the application of a law provided for in a treaty or the law of another state, while the question of the arbitration procedure is determined at the level of autonomy of the parties. Regarding such rules, it can be said that delocalisation does not provide an opportunity to consider the case in the state where the arbitration is located. Although the state may not always exercise its powers in relation to the delocalised arbitration where it is located, it may, in accordance with national law, refuse to hear a case in international commercial arbitration.

In addition to being critical, two principles can be formulated for delocalised arbitration. The first is that arbitration cannot contradict the public order of the state. The second is that the limits of delocalisation of the ICA are determined by the autonomy of the parties and the harmonisation of their interests beyond the regulation of national law.

The advantages of delocalised arbitration are that it guarantees neutrality in litigation and limits the role of national courts in litigation, offers government agencies and institutions the ability to resolve disputes without interfering with foreign law, allows parties to choose the law that best suits them in accordance with the specifics of the agreement and their interests.[13]

Thus, delocalised arbitration in the aspect of international legal reality acts as the main factor in the realisation of the right to protection of the parties in a foreign economic dispute. To assume that all international arbitration is based on certain national legal systems is to ignore the existing reality. Therefore, the proposals set out in the Draft Law contradict the international doctrine of delocalisation of international commercial arbitration.

4 THE PROCEDURE FOR ESTABLISHING INSTITUTIONAL ARBITRATION COURTS

The Draft Law stipulates that Permanent arbitration institutions may be established and operate under:

> a non-profit organization registered in accordance with the legislation of Ukraine and entered in the Register of non-profit institutions and organizations, the term of which from the moment of state registration to the decision to establish a permanent arbitration institution is more than ten years;

12 P Fouchard, 'L'autonomie de l'arbitrage commercial international' (1965) 1 Revue de l'arbitrage 99-120.

13 SO Kravtsov, *International Commercial Arbitration and National Courts* (Pravo 2014) 232.

a branch or representative office of an organization registered in accordance with the legislation of a foreign state on the territory of Ukraine, provided that such organization is the founder of an arbitration institution abroad, the term of which is more than five years.

These proposals were not accepted by experts in the field of international commercial arbitration. Taking into account the existing mechanism in Ukraine for resolving international commercial disputes by arbitration, it is difficult to find certain preconditions that would support the proposed government initiative to establish a regulatory mechanism for the establishment and operation of permanent arbitrations under public organisations. After all, taking into account that the ICAC at the Ukrainian Chamber of Commerce and Industry currently performs the function of resolving such disputes, statistics for the last 10 years convincingly show that quantitative and qualitative indicators of decisions made, as well as the annual number of cases accepted for consideration, are far from those needed to ensure the necessity to introduce (revise) a mechanism for resolving such disputes by creating 'other permanent arbitrations'. There is no such practice in foreign countries, where for many decades there are leading national arbitration centres for dispute resolution, which are the focus and leading institutions for resolving international commercial disputes and within which best practices are developed, around which the arbitration community and leading experts are formed. Dispute resolution, which embodies and implements the highest standards of arbitration, has a high authority and enjoys the trust of business (ICC, LCIA, AAA, SCC, VIAC, SIAC, CIETAC, and others). In most countries, as mentioned above, such institutions are established and operate at the Chambers of Commerce (International Chamber of Commerce, Stockholm Chamber of Commerce, Milan Chamber of Commerce, China Chamber of International Trade, Chamber of Commerce of Poland, Romania, Swiss Chamber of Commerce Association, etc.).[14]

In addition, O. Podtserkovnyi claims that Draft Law No. 5347 gives the right to create international arbitrations an indefinite number of non-profit organisations deprived of such trust. At the same time, in accordance with sub-clause 133.4.1 of clause 133.4 of Art. 133 of the Tax Code of Ukraine, a non-profit organisation is a legal entity that is on the general taxation system but is not a payer of income tax. That is, it is a legal entity that does not pay personal income tax. According to the Tax Code of Ukraine, the status of non-profit organisations are obtained by: budgetary institutions; public associations, political parties, creative unions, religious organisations, charitable organisations, pension funds; unions and other associations of legal entities; housing construction cooperatives, country (country construction), horticultural and garage (garage construction) cooperatives (societies); association of co-owners of apartment buildings, associations of homeowners; trade unions, their associations, and trade union organisations, as well as employers' organisations and their associations; agricultural service cooperatives and their cooperative associations; other legal entities whose activities meet the requirements of para. 133.4 of Art. 133 of the Tax Code of Ukraine. As can be seen from the above list, the right to establish international arbitrations will be granted to thousands of legal entities in Ukraine. And the condition of 10 years from the moment of registration will serve here as a very formal restriction. This threatens to destroy the credibility of the institution of ICA, as it will open the way to abuse of jurisdiction in international arbitration, the creation of arbitration under an 'economically strong entity', a monopolist, and not in the interests of the legal system and arbitration.[15]

14 V Kovalskyi, 'New Initiatives for Improving the Legislation of Ukraine in the Field of International Arbitration: Pro Et Contra' (2 May 2021, *Yurinkom Inter*) <https://yurincom.com/legal_practice/analitychna_yurysprudentsiia/novi-initsiatyvy-shchodo-vdoskonalennia-zakonodavstva-ukrainy-u-sferi-mizhnarodnoho-arbitrazhu-pro-et-contra/> accessed 25 July 2021.

15 O Podtserkovnyi, 'Reform and Content' <https://icac.org.ua/wp-content/uploads/Stattya-Podtserkovnogo.pdf> accessed 25 July 2021.

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In our opinion, in making such a proposal, the authors of the Draft Law did not take into account the negative experience of the establishment and operation of domestic arbitration courts after the adoption of the Law of Ukraine 'On Arbitration Courts' in 2004, when 'pocket' arbitration courts began to be created. In particular, due to overly liberal requirements for the establishment and registration of arbitration courts. That is why the Cabinet of Ministers of Ukraine submitted to the Verkhovna Rada of Ukraine in 2020 a draft Law of Ukraine 'On Amendments to Certain Laws of Ukraine (on Improving the Establishment and Operation of Arbitration Courts in order to restore confidence in arbitration)', which was adopted in the first reading. This project proposes: to change the procedure for state registration of arbitration courts, to strengthen the requirements for organisations under which permanent arbitration courts may be established; to expand the powers of the Arbitration Chamber of Ukraine, in particular, its powers will include establishing compliance of the founder of the permanent arbitral tribunal with the requirements of the Law and providing a conclusion, and in case of non-compliance by the founder of the permanent arbitration court with the requirements of the Law, the Arbitration Chamber of Ukraine will have to apply to the state registration body with a corresponding application. Thus, as we see, the Cabinet of Ministers proposes stricter mechanisms to control the 'quality' of domestic arbitration courts and, for some reason, proposes to use a more liberal approach to ongoing international commercial arbitration.

This proposal creates a potential opportunity to establish ICAs dependent on financial and industrial groups and other large enterprises with an unclear reputation. Indicative in this respect is the experience of Latvia, which legislation has long contained minimum requirements for the founders of arbitration courts, which can also consider international commercial disputes, and in which there are more than 100 arbitrations. Now, Latvian lawyers comment on this situation as follows

> The inability of an arbitral tribunal (which, according to national law, has the right to hear international disputes) to provide the foreign party with confidence in impartiality and independence, as well as in its procedural rights, appointment of highly qualified arbitrators subject to the obligation to include in standard contracts a reference to such 'departmental arbitrations' makes such departmental business 'localised', reduces the inflow of foreign investment into the state, which, declaring the possibility of arbitration, gives it to corporate interests.[16]

The following proposal of the Draft Law would allow international arbitrations to be established at a branch or representative office of an organisation registered in accordance with the legislation of a foreign state on the territory of Ukraine, provided that such organisation is the founder of an arbitration institution abroad, the term of operation of which is five years if it led to the establishment of branches of the most famous and authoritative arbitration institutions in the world in Ukraine, could be supported, but this is unlikely given the following. First, the arbitration regulations of the ICC, LCIA, SIAC, and others provide for the possibility of conducting arbitration in any country by agreement of the parties to the dispute, and arbitration institutions do not need to spend money on the establishment and maintenance of branches for this. Secondly, the establishment of branches implies that it should ensure the consideration of an adequate number of disputes per year, and not one or two (according to statistics in 2019, the Arbitration Institute of the Stockholm Chamber of Commerce considered seven disputes with the participation of Ukraine). Third, the place of arbitration has legal significance, which is that the challenge of the arbitral award will be made to the state courts of the country of the decision and under the laws of that country. Therefore, it is unlikely that the Arbitration Institute of the Stockholm Chamber of

16 'Long Live Baltic Arbitration' (2005) 26 (392) International Arbitration (*Pravo.ua*) <https://pravo.ua/articles/da-zdravstvuet-baltijskij-arbitrazh/> accessed 25 July 2021.

Commerce or the parties to the arbitration agreement that have chosen this arbitration are willing to transfer the procedure for challenging the arbitration decision from the courts of Sweden to the courts of Ukraine.

5 CHANGING THE PROCEDURE FOR APPOINTING ARBITRATORS

Proposal to amend Art. 461 of the CPC of Ukraine regarding the right of the appellate court to decide on the appointment, revocation, and termination of powers (mandate) of the arbitrator of permanent arbitration institutions needs significant refinement, as it does not provide criteria for selection of arbitrators, terms, and procedures for appointment, revocation and does not regulate other important procedural issues.

In addition to these comments, it should be noted that the imposition on the court of the power to appoint an arbitrator is not fully in line with recognised international practice. In cases where the appointment of an arbitrator is complicated (a party does not participate in the formation of the arbitration or the mechanism chosen by the parties does not otherwise allow the formation of the arbitration) and the rules of regulation do not allow to find an effective way out of this situation, in particular, by making an appointment by an arbitration institution, the appointment is made by an authorised institution (*appointing authority*).

6 CONCLUSIONS

Any reform of legislation, including arbitration, must be objectively determined by the specific needs of society and aimed at improving the mechanism of legal regulation of relevant public relations. Unfortunately, the purpose of the Draft Law in terms of creating new permanent arbitration courts for non-profit organisations in Ukraine is not due to the growing number of cases and the workload of the ICAC at the CCI of Ukraine, or long deadlines or low-quality arbitration awards in Ukraine, or high rates of revocation of arbitral awards by state courts.

It cannot be said that the adoption of the Draft Law will increase the effectiveness of legal regulation or the quality of the rules governing international commercial arbitration. On the contrary, the proposed changes in legislation may lead to the loss of authority of international commercial arbitration in Ukraine, create problems related to the lack of mechanisms and criteria by which state courts must appoint arbitrators, and so on.

Given the fair criticism of the Draft Law by lawyers, scholars, and arbitrators, the lack of objective preconditions for the adoption of the law in the proposed version is hardly appropriate for its adoption by the Parliament of Ukraine.

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Note

CONSTITUTIONAL RESTRICTIONS ON HUMAN RIGHTS AND FREEDOMS IN THE DEVELOPMENT OF LIBERAL DEMOCRACY IN EUROPE

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Summary: 1. Introduction. – 2. Derogations of Human Rights under the British Constitutional Model. – 3. Restrictions of Human Rights in Continental Europe. – 4. Legal Scope of Restrictions in Eastern Europe. – 5. Peculiarities of Human Rights Restrictions in Balkan Countries. – 6. Restrictions of Human Rights in Baltic States. – 7. The Scandinavian Model of Exceptions to Ensure Constitutional Human Rights. – 8. Conclusion

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CONSTITUTIONAL RESTRICTIONS ON HUMAN RIGHTS AND FREEDOMS IN THE DEVELOPMENT OF LIBERAL DEMOCRACY IN EUROPE

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Abstract This article is dedicated to the constitutional restrictions on human rights and freedoms within the genesis and development of liberal democracy.

The article argues that European countries implement the provisions of the ECHR in various ways regarding the application of restrictions of rights and freedoms in their own national legal systems in order to support: 1) the state and public security or economic well-being of the country; 2) the prevention of riots or crimes; 3) health or morals or for the purpose of protecting the rights and freedoms of others; 4) the protection of national security or territorial integrity; 5) protecting the reputation of others; 6) the prevention of disclosure of confidential information; 7) maintaining the authority and impartiality of judicial authorities.

The research defines a common feature of all constitutional restrictions of human rights and freedoms within the European countries' application, taking into account the objective circumstances necessary in a democratic society. The authors underline that under no circumstances should the restrictions distort the essence of human rights and freedoms that fall under such derogations.

The article underlines that the restrictions on human rights and freedoms are a necessary component of the legal system of any state and modern society. Such restrictions should be of a legal nature and should be imposed only in accordance with the general interest – national security, law and order, the protection of moral norms, and the protection of the rights and freedoms of other persons when the right of another person in a legitimate balance prevails. The emergence of challenges to human rights does not negate their effectiveness, and they continue to operate, which testifies to their effectiveness and guarantees the inviolability of the rule of law principle when resolving specific cases on human rights restrictions.

Keywords: *rule of law, constitutional restrictions, constitutional control, human rights, fundamental freedoms, access to justice, European Court of Human Rights, national legislation, legal scope, judicial system.*

1 INTRODUCTION

Nowadays, the majority of democratic systems in Europe arose under the influence of liberalism. Liberalism has always been associated with individual freedom and protection from state tyranny. Liberal democracy has been a significant step towards respecting human dignity. The modern democracy of many European countries follows the main principles of a liberal political system: constitutionalism, the separation of powers, and values such as individual freedom, human rights, minority autonomy, etc.

At the same time, the ensuring of principles and values requires states to impose certain restrictions to guarantee sovereignty, public order, the protection of the health of their own citizens, and the common welfare.

Regarding the scientific constitutional doctrine of Ukraine, for instance, M. Savchyn revealed the content of the criteria for limiting human rights, indicating that the systematic nature of human rights causes the value-based independent determination of permissible restrictions of fundamental rights, which should be tied to specific circumstances and urgent needs in a democratic society. In conformity with this author, the requirement for a democratic structure of society determines certain standards in establishing criteria for human rights restrictions that should correspond to urgent social needs.[1]

To ensure the democratic structure of states and fundamental human rights and freedoms, the European countries formed the Council of Europe in 1949.

With the establishment of the Council of Europe, this international organisation faced the need to adopt a legally binding document, that is, an international treaty that would fix the fundamental human rights and freedoms at the European level. This situation is explained by the fact that from the very beginning of its creation, the Council of Europe considered it necessary to act as an international organisation serving as a comprehensive standard for the protection of human rights, regardless of certain circumstances (peaceful or martial law) over the following centuries.[2]

Therefore, on 4 November 1950, the governments of Western European countries adopted the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, ECHR).[3] The document became the first international human rights document that not only declares human rights and calls for their observance but also imposes certain legal obligations on the parties and introduces a system of control over the exercise and observance of human rights in the Council of Europe member states.[4] The approach introduced by the General Declaration and the European Convention is unique – whatever the law of the member states, everyone is guaranteed the rights enshrined in these documents. These are rights that unite all people, not ones that divide national and ethnic attitudes and traditions.[5]

1 M Savchyn, *Current Trends in Constitutionalism in the Context of Globalization and Legal Pluralism*: Monograph (RICK-U 2018) 123-124.

2 V Muraviov V, N Mushak, 'Legal Issues of the Implementation of the Convention for the protection of Human Rights and Fundamental Freedoms 1950 in Ukraine' (2021) 1 (9) Access to Justice in Eastern Europe 11-22.

3 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms [1950] <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 20 May 2021.

4 M Muraviov, N Mushak, 'Judicial Control of Public Power as Legal Instrument for Protection of Human Rights and Fundamental Freedoms in Ukraine' in *Rule of Law, Human Rights and Judicial Control of Power* (Springer 2017).

5 I Izarova, S Kravtsov, 'About the Special Issue on the Occasion of the 70th Anniversary of the European Convention on Human Rights' (2021) 1 (9) Access to Justice in Eastern Europe 5-7.

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At the same time, the issues of application by the ECHR member states of a number of restrictions on fundamental human rights and freedoms are almost entirely investigated in both foreign and domestic doctrines on constitutional law.[6] We would like to emphasise that the ECHR is not only the foundation of the whole complex of international legal regulation in the field of human rights, its legitimate interests, and needs but also acts as a guideline for its member states, thereby defining a clear framework for the application of restrictions on such rights. In particular, in accordance with Art. 18 of the ECHR, the restrictions permitted under this Convention shall not apply for purposes other than those for which they are established.[7]

In addition, within the ECHR, we can see that the objectives of limitations of human rights in comparison with the Universal Declaration of Human Rights 1948[8] and the International Covenant on Political and Civil Rights 1966[9] were significantly expanded and introduced to support: 1) the state and public security or economic well-being of the country; 2) the prevention of riots or crimes; 3) health or morals or for the purpose of protecting the rights and freedoms of others; 4) protection of national security or territorial integrity; 5) protecting the reputation of others; 6) the prevention of disclosure of confidential information; 7) maintaining the authority and impartiality of judicial authorities.[10]

2 DEROGATIONS OF HUMAN RIGHTS UNDER THE BRITISH CONSTITUTIONAL MODEL

The issue of restrictions on human rights and freedoms enshrined in the ECHR is most comprehensively implemented in the United Kingdom, which is one of the ten founding countries of the Council of Europe.

It should be noted, of course, that in British law, there is no single classification of the rights and freedoms of citizens. As a rule, rights and freedoms are primarily individual rights that may be limited by the state by virtue of a contract. This means that everyone can do things that are not expressly prohibited by law.

In addition, when studying human rights and fundamental freedoms in the UK, the specifics of the country's legal system should also be taken into account since international conventions on its territory are not directly valid. That is, persons in the territory of this country cannot directly refer to international legal acts in terms of ensuring their rights and fundamental freedoms, with the exception of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, for which the Human Rights Act of 1998 (hereinafter, Act) was adopted in the UK.[11]

In accordance with this Act, the provisions of Art. 1-12 and Art. 14 of the Convention, Art. 1-3 of Protocol No. 1 and Art. 1-2 of Protocol No. 6 to the Convention were implemented

6 N Siskova, 'European Union's Legal Instruments to Strengthen the Rule of Law? Their Actual Reflections and Future Prospects' in N Šišková (ed), *The European Union – What Is Next? A Legal Analysis and the Political Visions on the Future of the Union* (Wolters Kluwer 2018) 157-162.

7 B Sydorets, 'Restrictions on Human Rights (in the context of the ratio of the Constitution of Ukraine and the Convention for the Protection of Human Rights and Fundamental Freedoms)' (2012) 1 Elections and Democracy 63-69.

8 Universal Declaration of Human Rights [1948] <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 20 May 2021.

9 International Covenant on Civil and Political Rights [1966] <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed 20 May 2021.

10 R Arnold, 'Anthropocentric Constitutionalism in the European Union: Some Reflections' in *The European Union – What Is Next?* (Wolters Kluwer 2018) 112-13.

11 Human Rights Act [1998] <www.legislation.gov.uk/ukpga/1998/42> accessed 20 May 2021.

into the national legislation. Also, it provides for the duties of state bodies that are obliged to ensure the relevant rights.

The mechanism of implementation for the Act was built on a classic British constitutional model with the modernisation of new approaches.[12] The ECHR was incorporated into the legal system of the UK without the establishment of a special regime for the application of Convention law by British courts. It should be noted that incorporation did not provide the Convention with the status of fundamental norms that human rights have in the legal systems of other states, such as the Czech Republic, Germany, Poland, etc.

According to Art. 10 of the Act, everyone has the right to freedom of expression. This right includes the freedom to think, receive, and transmit information and ideas without interference by the state authorities and regardless of borders. At the same time, subpara. 2 of the same article states that the exercise of these freedoms may be subject to such formalities, conditions, restrictions, or punishments that are provided for by law and are necessary for a democratic society, in the interests of national security, territorial disorder, or for the protection of the health, morality, reputation, or rights of others, to prevent the disclosure of information obtained in secret, or to preserve the authority and impartiality of the judiciary.

This provision was reinforced by the ECHR's judicial practice in *The Observer and The Guardian v. the United Kingdom.*[13]

The point of the case was that *The Guardian* and *The Observer* newspapers published excerpts from Peter Wright's book 'The Spy Catcher', which contained allegations that MI5 acted unlawfully.

The UK government received a court order prohibiting newspapers from printing additional further materials until the secrecy proceedings are over. But when the book was published, *The Guardian* complained that the continuation of the court order violated the right to freedom of speech. In this regard, the ECtHR ruled that the court order was legal because it was fully in the interests of national security. However, the ECtHR also noted that this was not enough to continue the ban on the publication of newspapers after the publication of the book since the information is still not confidential. Compared to the UK, in continental Europe, in particular, Germany and Spain, at the level of the constitutions of both countries, there are significantly more constitutional restrictions on human rights and freedoms, which can only be applied by law.

3 RESTRICTIONS OF HUMAN RIGHTS IN CONTINENTAL EUROPE

In Germany, at the level of the Constitution of 23 May 1949, a number of constitutional restrictions on human rights and freedoms were established.[14] For instance, Art. 8 regulates that the right of German citizens to peaceful assembly without prior application or permit restriction can be imposed only by law or on the basis of law. The same conditions are

12 AL Young, P Birkinshaw, V Mitsilegas, TA Christou, 'Europe's Gift to the United Kingdom's Unwritten Constitution – Juridification' in A Albi, S Bardutzky (eds) *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) <https://doi.org/10.1007/978-94-6265-273-6_3> accessed 24 June 2021.

13 S Coliver, 'Spycatcher - The Legal and Broader Significance of the European Court's Judgment' (1992) 142 Tolley's J Media L & Prac <https://heinonline.org/HOL/LandingPage?handle=hein.journals/tojmedlp13&div=8&id=&page> accessed 20 May 2021.

14 Basic Law for the Federal Republic of Germany of 23 May 1949 <https://www.btg-bestellservice.de/pdf/80201000.pdf> accessed 20 May 2021.

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provided for in Art. 10 on ensuring the secrecy of correspondence, along with the secrecy of postal and teleconference. That is, restrictions can be established only on the basis of the law. This law may establish that such restrictions are not reported to the interested person if they are aimed at the protection of the foundations of a free democratic system or the existence or preservation of the Federation or any land. The judicial procedure is replaced by the verification by special and auxiliary bodies appointed by the people's representative office.

The following article of the German Basic Law states that all Germans enjoy the freedom of movement throughout the federal territory (Art. 11). At the same time, this right may be limited by law or on the basis of the law and only in cases where there are no sufficient funds for its implementation, as a result of which there would be special difficulties for society. Another case is when such restrictions are necessary to prevent danger that threatens the foundations of the free democratic order of the Federation or any land or their existence, or when they are necessary to combat the danger of epidemics, to take measures against natural disasters or especially serious accidents, or to protect young people from carelessness or to prevent criminal acts.[15]

Some cases of human rights restrictions relate to housing integrity. Such situations may take place only to prevent public danger or danger to the lives of individuals, as well as on the basis of law to prevent an immediate threat to public safety and order, in particular, to eliminate the need for housing, combat epidemics, or protect young people from future danger.

In general, when analysing those provisions of the German Constitution that directly relate to restrictions on human rights, it can be noted that human rights can be limited only by law or on the basis of law.[16] Moreover, this law should be general in nature and not be applied to a separate case.

The Spanish Constitution of 27 December 1978, for example, in Art. 16, guarantees the freedom of ideology, religion, and worship of individuals and communities with no restrictions on their expression.[17] At the same time, restrictions may be applied that are necessary to maintain public order as protected by law. These rules also apply to obtaining information by any means (Art. 20). The Law regulates the use of this right, taking into account the restrictions imposed by the requirements of morality and the preservation of professional secrecy during the exercise of these rights.[18]

At the same time, the Basic Law of Spain stipulates that the right to free choice of place of residence and movement within its territory and the right of free entry/exit to and from Spain cannot be limited for political or ideological reasons (Art. 19).[19] The Spanish Basic Law does not provide for restrictions on human rights and freedoms in a broad sense.

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15 M Savchyn, 'Basic Constitutional Criteria for Limitation of Human Rights and Fundamental Freedoms' (2008) 2 (16) Elections and Democracy 21-28.

16 K Lachmayer, 'The Constitution of Austria in International Constitutional Networks: Pluralism, Dialogues and Diversity' in A Albi, S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) <https://doi.org/10.1007/978-94-6265-273-6_27> accessed 24 June 2021.

17 Constitution of Spain, 27 December 1978 <https://www.constituteproject.org/constitution/Spain_2011.pdf?lang=en> accessed 24 June 2021.

18 J Solanes Mullor, ATorres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' in A Albi, S Bardutzky (eds) *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) <https://doi.org/10.1007/978-94-6265-273-6_12> accessed 24 June 2021.

19 U Mussig, 'A New Order of the Ages. Normativity and Precedence' in U Mussig (ed), *Reconsidering Constitutional Formation II Decisive Constitutional Normativity. Studies in the History of Law and Justice*, vol 12 (Springer 2018) <https://doi.org/10.1007/978-3-319-73037-0_1> accessed 24 June 2021.

These restrictions set up in the constitutions of Spain and Germany reflect the main approaches to the formulation of human rights restrictions of countries of Western Europe.

4 LEGAL SCOPE OF RESTRICTIONS IN EASTERN EUROPE

Unlike the countries of Western Europe, in Eastern Europe, particularly in Poland and the Czech Republic, a clear scope of restrictions on freedoms and human and citizens' rights during periods of martial law and exceptional status, as well as during periods of natural disasters, is fixed at the constitutional level. Compared to the Basic Law of Germany, the Constitution of Poland defines the legal norms governing restrictions on the use of constitutional freedoms and rights in a broader sense. In particular, such restrictions may be established only by law and only if they are necessary in a democratic state for its safety or for the provision of public order, for the protection of the environment, health, and public morality, or the freedoms and rights of others (Art. 31).[20] In addition, such restrictions cannot contradict the essence of freedoms and rights.

At the same time, like the German Constitution, the Basic Law of Poland provides for certain constitutional restrictions on human freedoms regarding personal inviolability (Art. 41), freedom and protection of the secrecy of correspondence (Art. 49), the right of access to official documents and data banks relating to it (Art. 51), and freedom of organisation of peaceful assembly and participation in such assemblies (Art. 57) in accordance with the principles and in the order defined by law.

It is important that the Constitution of Poland enshrines a clear scope of restrictions on freedoms and human and citizen rights during periods of martial law, exceptional status, or natural disaster.[21] For instance, in periods of martial law or exceptional condition, Art. 233 stipulates that it cannot restrict the freedoms and rights defined in Art. 30 (human dignity), Art. 34 and Art. 36 (citizenship), Art. 38 (protection of life), Art. 39, Art. 40 and Part 4 of Article 41 (human treatment), Art. 42 (criminal liability), Art. 45 (access to court), Art. 53 (conscience and religion), Art. 63 (petition), and Art. 48 and Art. 72 (family and child).

In turn, during periods of natural disaster, it is possible to limit the freedoms and rights established in Art. 22 (freedom of economic activity), parts 1, 3, and 5 of Art. 41 (personal freedom), Art. 50 (inviolability of housing), part 1 Art. 52 (freedom of movement and stay in the territory of the Polish Republic), part 3 Art. 59 (right to strike), Art. 64 (right of ownership), part 1 of Art. 66 (right to safe and healthy working conditions), part 1 of Art. 65 (freedom of work), and part 2 of Art. 66 (right to rest).

This does not assume restriction of freedoms and rights of a person and a citizen depending solely on race, gender, language, religion or lack thereof, social origin, birth, or property status. In our opinion, compared to a number of European countries we have already analysed, a more complete consolidation of restrictions not only on personal but political and economic human rights is contained in the Constitution of the Czech Republic of 1992.[22] The document states that legal restrictions on fundamental rights and freedoms must

20 Constitution of the Republic of Poland of 2 April 1997 <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> accessed 20 May 2021.

21 S Biernat, M Kawczyńska, 'The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context' in A Albi, S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) <https://doi.org/10.1007/978-94-6265-273-6_16> accessed 24 June 2021.

22 Constitution of the Czech Republic of 16 December 1992 <https://www.psp.cz/en/docs/laws/1993/1.html > accessed 20 May 2021.

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act equally in all cases that meet the specific conditions. When applying norms on the limits of the realisation of fundamental rights and freedoms, their essence and meaning should be taken into account. In addition, restrictions on rights can be carried out only for the purposes for which they are established.

Thus, according to Art. 7, the inviolability of the person and his/her privacy is guaranteed. Restrictions are allowed only in cases established by law. The same rules are applied to restrictions on ownership, which is allowed only in the public interest, on the basis of law, and subject to proper reimbursement.

As in most European countries, freedom of movement and residence is guaranteed. However, if it is necessary for the safety of the state, to maintain public order, for health care, to protect the rights and freedoms of others, or for the purposes of protecting nature, then these freedoms may also be limited by law.

In comparison with the Constitutions of Germany, Poland, Croatia, Lithuania, and Estonia, the Basic Law of the Czech Republic clearly distinguishes between restrictions in political rights on the one hand and economic, social, and cultural rights on the other. Thus, we believe that the Constitution of the Czech Republic most fully reflects the restrictions on the rights and freedoms of persons defined in international documents. Here, we are speaking about the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966.

In particular, the restrictions of political rights are established (Art. 17), along with freedom of speech and the right to information. These restrictions are defined by law and are necessary for a democratic society to protect the rights and freedoms of others, the security of the state, public safety, health, and morality. As for another right, namely, the right to peaceful assembly, it may be limited by law in cases of holding meetings in public places, if such measures are necessary in a democratic society to protect the rights and freedoms of others, public order, health and morals, property, or to ensure the safety of the state. The right to gather cannot be conditioned by the permission of a public administration body.

The right to unions, which is enshrined in Art. 20 of the Czech Constitution, may be limited only in cases established by law if it is necessary to ensure the security of the state, protect public safety and order, prevent crimes, or protect the rights and freedoms of others in a democratic society.

A separate section of the document is devoted to restrictions on economic, social, and cultural rights. Thus, taking into account the fact that everyone has the right to free choice of profession and preparation for it, as well as the right to engage in entrepreneurial, economic, and other activities, the law may set conditions and restrictions for the implementation of certain professions or activities. This is provided in Art. 26 of the Basic Law of the Czech Republic.[23]

The Constitution of the Czech Republic and Poland can be used as examples of the constitutional development of countries of Eastern Europe whose constitutions were modified in the 90s as a result of the countries' integration into the European Union.

23 N Mohammad, SM Hasan, 'Human Rights' in D Crowther, S Seifi (eds), *The Palgrave Handbook of Corporate Social Responsibility* (Palgrave Macmillan 2020) <https://doi.org/10.1007/978-3-030-22438-7_22-1> accessed 24 June 2021.

5 PECULIARITIES OF HUMAN RIGHTS RESTRICTIONS IN BALKAN COUNTRIES

The main peculiarities of Balkan countries' constitutions arise from the fact that these countries became independent after the disintegration of the former Socialist Republic of Yugoslavia.

In Balkan countries, for example, in Croatia and Montenegro, the types of restrictions on human rights can be traced like those in Germany and Poland.

According to the Croatian Constitution, the freedom and rights of citizens may be limited only by law in order to protect the freedoms and rights of others, as well as law and order, public morality, and health (Art. 16).[24] In each case, any restriction of freedoms or rights must correspond to the nature of the need to limit them.[25]

The Constitution of Croatia establishes the scope and conditions of application by the state of a number of restrictions (Art.17).[26] In particular, certain freedoms and rights of citizens guaranteed by the Constitution may be restricted during martial law or in cases of direct threats to the independence and unity of the state, as well as during significant natural disasters. The decision to restrict the rights and freedoms of citizens is taken by Croatian Parliament (Sabor) by a majority of two-thirds of the total number of deputies. If Sabor cannot be convened at the suggestion of the Government and in the presence of a counter-assembly of the Head of Government, then the decision is made by the President of the Republic.

The scope of restrictions must correspond to the nature of the danger, and the measures taken should not lead to inequality of citizens depending on race, skin colour, gender, language, religion, or national and social origin. Even in cases of immediate danger to the existence of the state, the application of the provisions of this Constitution on the right to life, prohibition of torture, cruel or degrading treatment or punishment, the need for legal justification of criminally punishable acts and punishments, as well as provisions on freedom of thought, conscience, and religion cannot be limited.

A set of restrictions under the Basic Law of Croatia can be applied both on the basis of law and by a court decision on human freedom (Art. 22), the right to free association in order to protect their interests or to express social, economic, political, national, cultural or other beliefs and purposes (Art. 43). The right to freedom of association is restricted by a ban on violence against a democratic constitutional order, as well as the independence, unity, and territorial integrity of the Republic of Croatia.

Restrictions also apply to freedom of movement and choice of place of residence (Art. 32). Thus, the right to move within the territory of the Republic of Croatia and the right of entry or exit abroad may be limited by law in exceptional cases if it is necessary to protect the law and order or health, rights, and freedoms of other citizens.

In turn, the Basic Law of Montenegro establishes the same restrictions on human rights and freedoms as Croatia. It should be noted that only 4 articles of the Constitution of Montenegro

24 Constitution of the Republic of Croatia of 22 December 1990 <https://www.usud.hr/sites/default/files/dokumenti/The_consolidated_text_of_the_Constitution_of_the_Republic_of_Croatia_as_of_15_January_2014.pdf> accessed 20 May 2021.

25 I Goldner Lang, Z Đurđević, M Mataija, 'The Constitution of Croatia in the Perspective of European and Global Governance' in A Albi, S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) <https://doi.org/10.1007/978-94-6265-273-6_24> accessed 24 June 2021.

26 B Kostadinov, 'Human Dignity in Croatia' in P Becchi, K Mathis (eds), *Handbook of Human Dignity in Europe* (Springer 2018) <https://doi.org/10.1007/978-3-319-27830-8_7-1> accessed 24 June 2021.

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contain a list of restrictions on human rights and freedoms.[27] Such restrictions concern the freedom of movement and residence of persons (Art. 39), freedom of expression (Art. 46), the right to freedom of assembly (Art. 52), and the right to property (Art. 58).[28]

In particular, freedom of movement, residence, and departure from Montenegro may be restricted if required for criminal proceedings, prevention of the spread of infectious diseases or for security reasons in Montenegro. Freedom of thought, conscience, and religion (Art. 46) may be restricted only if it requires the protection of people's lives and health, public order, and other rights guaranteed by the Constitution.

The right of persons to freedom of assembly (Art. 52) may be temporarily limited by the decision of the competent authority in order to prevent disorder or execution of a criminal offence or a threat to health, morality, or safety of people or property in accordance with the law. The right to property (Art. 58) by the Constitution of Montenegro is limited solely in the public interest with equivalent compensation.

6 RESTRICTIONS OF HUMAN RIGHTS IN BALTIC STATES

In the Baltic states, in particular Lithuania, in Art. 26 'Freedom of thought, religion and conscience', a person's freedom to profess and spread religion or faith cannot be limited otherwise, as only by law and only if it is necessary to guarantee public safety, public order, health and morality of people, as well as the fundamental rights and freedoms of other persons.[29]

Restrictions on human rights and granting privileges depending on a person`s gender, race, nationality, language, origin, social status, religion, beliefs, or views are not allowed (Art. 29).

In addition, unlike in a number of the European countries that have already been analysed, the Basic Law of Lithuania also provides for the introduction of restrictions within the framework of social and economic rights. We are talking about the right of workers to strike (Art. 51).[30] It should be noted that the restrictions, conditions, and procedure for exercising this right are established by law.

The provisions enshrined in the Constitution of Estonia are like those of the Constitution of Lithuania. In particular, the document states that rights and freedoms may be limited only in accordance with the Constitution (Art. 11).[31] Such restrictions should be necessary for a democratic society and should not distort the essence of human rights and freedoms that are limited.[32]

27 D Franeta, 'Human Dignity in Montenegro' in P Becchi, K Mathis (eds), *Handbook of Human Dignity in Europe* (Springer 2019) <https://doi.org/10.1007/978-3-319-28082-0_29> accessed 24 June 2021.

28 Constitution of Montenegro, 25 October 2007 <https://www.wipo.int/edocs/lexdocs/laws/en/me/me004en.pdf> accessed 20 May 2021.

29 Constitution of the Republic of Lithuania, 25 October 1992 <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.21892?jfwid=-wd7z8ivg5> accessed 20 May 2021.

30 I Jarukaitis, G Švedas, 'The Constitutional Experience of Lithuania in the Context of European and Global Governance Challenges' in A Albi, S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) <https://doi.org/10.1007/978-94-6265-273-6_21> accessed 24 June 2021.

31 Constitution of the Republic of Estonia, 28 June 1992 <https://www.constituteproject.org/constitution/Estonia_2015.pdf?lang=en> accessed 20 May 2021.

32 M Ernits et al, 'The Constitution of Estonia: The Unexpected Challenges of Unlimited Primacy of EU Law' in A Albi, S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) <https://doi.org/10.1007/978-94-6265-273-6_19> accessed 24 June 2021.

According to the Basic Law of Estonia, restrictions may also apply to human rights to property (Art. 32), freedom of movement and residence (Art. 34), the right of a person to receive information (Art. 44), freedom of expression (Art. 45), and the right to peaceful assembly (Art. 47).

For example, according to Art. 44 each person has the right to receive information distributed for public use. It means that the Estonian citizens have the right, in accordance with the procedure established by law, to familiarise themselves with their data stored in state institutions and local self-government bodies, as well as in state and municipal archives. Under the law, this right may be limited for the purpose of protecting the rights and freedoms of others and the secrecy of a child's origin, as well as for the purpose of preventing a crime, detaining a criminal, or clarifying the truth during criminal proceedings.

As for the right of persons to freely express their ideas and views, this right may be limited by law for the purposes of protecting public order, moral principles, rights and freedoms, health, honour, and the good name of others.[33] This right may be limited by law to civil servants and officials of local self-government bodies for the purpose of protecting state or trade secrets, which became known to them due to their official position or information obtained by them confidentially, as well as for the purpose of protecting the family and privacy of others and in the interests of justice.

In general, such restrictions are established exclusively by law in order to protect the rights and freedoms of others, in the interests of the defence of the state, in the event of a natural disaster, in order to stop the spread of infectious diseases, protect the natural environment, etc.

At the same time, the Constitution of Estonia provides for cases where under no circumstances fundamental rights and freedoms can be subject to restrictions. This norm is established in Art. 130 of the Basic Law of the State. Thus, the rights and freedoms established by Art. 8 (right to citizenship), Art. 12 (prohibition of discrimination due to national and racial affiliation, skin colour, gender, language, origin, religion, political or other beliefs), Art. 16 (right to life), the right to honour and a good name (Art. 17), the right to moral and material compensation in case of harm (Art. 25), the right to freedom of conscience and religion (Art. 40), and the right to nationality (Art. 49).

7 THE SCANDINAVIAN MODEL OF EXCEPTIONS TO ENSURE CONSTITUTIONAL HUMAN RIGHTS

The Scandinavian constitutions have their own model of exceptions to ensure constitutional human rights and freedoms.[34] The Scandinavian countries are historically connected and are characterised by the democratic development features such as equality, sustainability, a welfare state, and a unicameral form of governance.

For example, the Constitution of Finland in regard to the protection of privacy states that in order to protect fundamental rights or disclose crimes, the law may provide for actions related to housing integrity. The law may also establish the necessary restrictions on the

33 A Albi, S Bardutzky, 'Revisiting the Role and Future of National Constitutions in European and Global Governance: Introduction to the Research Project' in A Albi, S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) <https://doi.org/10.1007/978-94-6265-273-6_1> accessed 24 June 2021.

34 M Klamberg, 'International Human Rights Law and States of Emergency' in D Rogers (ed), *Human Rights in War. International Human Rights* (Springer 2021) <https://doi.org/10.1007/978-981-15-5202-1_6-1> accessed 24 June 2021.

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observance of secrecy of information in the investigation of crimes that encroaches on the safety of the individual, society, or the inviolability of housing, in court proceedings, and control over security, as well as during imprisonment.[35]

Restrictions on constitutional rights also apply to the right to freedom of speech (para. 12).

Para. 23 of the Basic Law of Finland establishes that during a state of emergency, fundamental rights may be temporarily restricted by law or resolution of the State Council, adopted on the basis of powers enshrined by law for a special reason and clearly limited in their field of application, as necessary during an armed attack on Finland or during another kind of state of emergency that seriously threatens the security of the nation and is enshrined in law. At the same time, the restrictions must meet international human rights requirements, which Finland is obliged to comply with. However, the law should enshrine grounds for temporary restrictions.[36]

Resolutions of the State Council related to temporary restrictions should be immediately sent to the Parliament for consideration. Parliament can decide on the validity of resolutions. There are no other provisions regulating the introduction by the state of restrictions stipulated by the Constitution of the country.

As for the Constitutions of Norway and Denmark, the texts of both documents do not refer to restrictions on human rights of both political and economic nature.

8 CONCLUSION

The overwhelming majority of ECHR Member States implement the provisions of the Convention regarding the application of restrictions on rights and freedoms in their own national legal systems in various ways.

The scope and types of constitutional restrictions depend on the peculiarities of the legal traditions of each individual state.

The specifics of constitutional restrictions depend to a large extent on the European region in which one or another country is located. While in the countries of Continental and Eastern Europe, the constitutional restrictions of human rights are defined quite clearly with the establishment of the legal scope of such restrictions, in particular, during the period of martial law, exceptional status, as well as in the period of natural disaster, in the constitutions of the Baltic countries constitutional restrictions are distinguished depending on the political, economic or social nature of human rights.

A common feature of all constitutional restrictions on human rights and freedoms is that their application is due to objective circumstances and is necessary for a democratic society and under no circumstances should distort the essence of human rights and freedoms that fall under such restrictions.

35 Constitution of Finland, 11 June 1999 <https://oikeusministerio.fi/en/constitution-of-finland> accessed 20 May 2021.

36 T Ojanen, J Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism' in A Albi, S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) <https://doi.org/10.1007/978-94-6265-273-6_9> accessed 24 June 2021.

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Note

ARTIFICIAL INTELLIGENCE AND SUI GENERIS RIGHT: A PERSPECTIVE FOR COPYRIGHT IN UKRAINE?

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ARTIFICIAL INTELLIGENCE AND SUI GENERIS RIGHT: A PERSPECTIVE FOR COPYRIGHT IN UKRAINE?

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Abstract This note explores the current state of and perspectives on the legal qualification of artificial intelligence (AI) outputs in Ukrainian copyright. The possible legal protection for AI-generated objects by granting sui generis intellectual property rights will be examined. As will be shown, AI remains a very challenging subject matter for legal regulation. This article seeks to identify the pros and cons of proposals in the Draft Law of Ukraine 'On copyright and related rights' on sui generis right relative to AI-generated objects. A comparative analysis of the EU Database Directive provisions is conducted regarding sui generis right to non-original databases. Investment theory will be considered as the only justification for a sui generis right protection of AI outputs aimed at the protection of substantial investments. The special criteria identifying the scope of the substantial investments in computer-generated objects are unclear in the Draft Law of Ukraine 'On copyright and related rights'. The proposed provisions are considered premature since they cover the concept of fully autonomous AI. The article concludes that the adoption of the proposed provisions may lead to excessive legal protection, as a special category of protected object is not identified.

Keywords: *AI-generated object, copyright, sui generis right*

1 INTRODUCTION

Changes in the socio-economic situation in a certain country inevitably entail changes in legal approaches to established concepts. After years of debate and various legislative experiments on the national level, computer programs have taken their place among objects protected by copyright subject matter at the international level. Today, the main technical challenge to be resolved by legal means is artificial intelligence (hereinafter, AI). The International Data Corporation predicts that by 2024, the AI market, including software, hardware, and services, is expected to reach $500 billion.[1] AI has become firmly embedded in our everyday life, including in creative industries. Currently, AI-related technologies are often used in content creation, information analysis, music production, and post-production of audio-visual works.[2] It is hard to disagree with Andrew Ng that 'AI is the new electricity',[3] a statement that raises a growing number of legal issues requiring in-depth analysis.

1 'IDC Forecasts Improved Growth for Global AI Market in 2021' (*IDC.com* 23 February 2021) <https://www.idc.com/getdoc.jsp?containerId=prUS47482321> accessed 9 April 2021.

2 See N Anantrasirichai, D Bull, *Artificial Intelligence in the Creative Industries: A Review* (2020).

3 Andrew Ng, 'AI is the new electricity'. AI Frontiers Conference (2017).

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Today's main legal challenge is to evaluate autonomous computer systems generating new objects that may be subject to copyright, with this stipulation – that there is the absence of a human in the process of creation. For decades, the *droit dateur* system of copyright has maintained the position that the author can only be an individual because the process is characterised by creativity, which has originality as the main prerequisite. In the absence of these criteria, copyright cannot protect an object, so moral and economic rights do not occur. This approach forms an incentive for the author to pursue further creative activity. This anthropocentric approach has always been based on the protection and safeguarding of the rights of the individual, but the modern world has shifted from the views that were formed in the days of Victor Hugo. Recently, the leader of the famous Ukrainian music band 'Okean Elzy', Svyatoslav Vakarchuk, said that their latest song, 'Without you, I'm not here', was created by AI based on previous works of the band.[4]

This raises several practical issues related to the validity of copyright in music and the poetry of such a musical work: the need to obtain permission for performance; the possibility of collective management; the use of music and words by third parties. These and other questions are only a small part of the legal uncertainty of the new technological world in which we already live because there is no certainty as to who created the song: a human or an AI? Today, AI is used in various creative fields, for example, in painting and in translating literary works. This means that while we still have writers, musicians, artists, and game designers in charge of the creative process, a large number of tasks, particularly mechanical tasks, might be given to machines.[5]

At the end of 2020, the European Parliament issued Resolution 2020/2015(INI) on Intellectual Property Rights for the development of Artificial Intelligence Technologies.[6] The Resolution distinguishes human-assisted and fully autonomous AI-outputs – 'AI-generated creations'. In this respect, the parliament is adamant about the legal personality of AI technologies and points to the possible negative impact on incentives for human creators. At the same time, legal challenges to the regulation of fully autonomous AI outputs are anticipated.

To conduct the present research, this paper will analyse different approaches to defining AI and the notion of authorship in relation to it. The paper will identify trends in the practice of intellectual property law protection of AI-based on individual decisions of Chinese courts and EU patent offices. In addition, a comparative analysis of current legislative regulation in the EU, the USA, and the UK will be carried out to assess the Ukrainian legislative initiative to protect AI outputs by *sui generis* right. This, together with a review of scientific thought on AI, will enable the author to make a modest attempt to assess and predict at an early stage the success of establishing a *sui generis* right for AI outputs.

2 INTELLECTUAL PROPERTY RIGHT PROTECTION FOR AI-GENERATED OBJECT

Research and legal regulation will not forge ahead without defining the main characteristics of AI systems. For the purposes of this study, the various definitions of AI will be considered in the context of possible application to the legal policy framework.

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4 'Vakarchuk claimed that song "Without you, I'm not here" was written by artificial intelligence' (*The-village.com.ua*, 16 February 2021) <https://www.the-village.com.ua/village/culture/culture-news/307755-vakarchuk-zayaviv-scho-pisnyu-bez-tebe-mene-nema-napisav-shtuchniy-intelekt?fbclid=IwAR2j6EtGhKQxSyTPWqFdnpWXICOJSJ9gAnUl3qz4gSqufRarmGLnmy7949c> accessed 5 April 2021.

5 A Guadamuz, 'Do Androids Dream of Electric Copyright?' (2017) IPQ 169.

6 European Parliament resolution of 20 October 2020 on intellectual property rights for the development of artificial intelligence technologies (2020/2015(INI)).

The understanding of AI given in the most recent European Parliament resolution on AI[7] may define the concept in a further legal framework. It links AI with intelligence and autonomy, which are generally accepted to be core characteristics; yet, there may be different understandings of these concepts. The Resolution defines an 'AI system' as 'a system that … displays behaviour simulating intelligence by, *inter alia*, collecting and processing data, analysing and interpreting its environment, and by taking action, with some degree of autonomy'. In this regard, it is worth noting the position of Gerald Spindler that AI is not 'intelligent' in a legal sense and cannot be compared to a human will.[8] At the same time, the parliament clearly states that any required changes in the existing legal framework should start with the clarification that AI systems have neither legal personality nor human conscience and that their sole task is to serve humanity.[9] A. Ramahlo very aptly interprets J. Copeland's definition of AI as machines, implying human-type behaviour in this context, in the sense that it means actions performed by computers that require intelligence when performed by humans.[10] In this sense, the human will involves the independent (autonomous) setting and modification of goals. The parliament defines 'autonomous' as an AI system that operates by interpreting certain input and using a set of predetermined instructions, without being limited to such instructions, despite the system's behaviour being constrained by and targeted at fulfilling the goal it was given and other relevant design choices made by its developer. That legal framework on AI, which includes intellectual property rights, will remain its anthropocentric fundamentals.

However, a generalised understanding of AI, which includes potential future developments, has also been proposed among scholars. P. Morhat identifies AI as a fully or partially autonomous self-organising computer-hardware (virtual) or (cyber-physical), including (bio-cybernetic), system (unit) that is not alive in the biological sense but endowed with appropriate mathematical software and software-synthesised (emulated) abilities and capabilities.[11] With this definition, the author tried to cover the current and future state of AI, at least as we can imagine it based on the information currently available. As we understand it, any attempt to define something that does not yet exist is futuristic. However, this definition is valuable because it may prepare us for legal uncertainty in the future.

Since AI has no common academic definition, it can be deceiving rather than informative to evoke one's own. AI technology is in a constant state of development, and the definition only captures the process at a certain stage. Furthermore, according to a thorough analysis conducted by P. Wang, there is no correct working definition of AI, as each of them has theoretical and practical values.[12] Some scholars have taken the position that the definition of AI under today's conditions is inappropriate and confusing.[13] We agree with the last position since, as various types of AI have been classified, namely, reactive machines, limited

7 European Parliament Resolution of 20 January 2021 on Artificial Intelligence: Questions of interpretation and application of international law in so far as the EU is affected in the areas of civil and military uses and of state authority outside the scope of criminal justice (2020/2013(INI)).

8 G Spindler, 'Copyright Law and Artificial Intelligence' (2019) IIC 50, 1049-1051 <https://doi.org/10.1007/s40319-019-00879-w>.

9 European Parliament Resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)).

10 A Ramalho, 'Will Robots Rule the (Artistic) World? A Proposed Model for the Legal Status of Creations by Artificial Intelligence Systems' (2017) 21 Journal of Internet Law 12.

11 PM Morhat, 'The Legal Personality of Artificial Intelligence in Intellectual Property Law: Civil Law Issues' (Dr. Sc. (Law) thesis, Russian State Intellectual Property Academy 2018).

12 P Wang, 'On Defining Artificial Intelligence' (2019) 10 (2) Journal of Artificial General Intelligence 1-37. doi: 10.2478/jagi-2019-0002.

13 J-A Lee, K-C Liu, R Hilty (eds), *Artificial Intelligence & Intellectual Property* (Oxford University Press 2021).

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memory, the theory of mind, and self-awareness,[14] it is hard to form the universal definition of AI. An additional complication is that some types of AI do not exist yet, such as the theory of mind and self-awareness machines. Thus, it is hard to be entirely prognostic when considering the development of future technology and its interaction with society.

AI-generated objects, according to their form of expression, can be covered by intellectual property rights, which brings into question notions of a 'creator' from the point of originality. If we compare the cognitive functions, the difference between machine and human efforts at executing the same algorithms is that the quality of the result depends on the quantity of data being processed. A computer system can process much larger amounts of data in less time than any unaided human is capable of achieving.[15] For example, in an experiment conducted by a team of highly qualified lawyers and an AI named Law Geex, the latter won. It took only 26 seconds for the AI to define all the inconsistencies in a non-disclosure agreement in comparison with 92 minutes for the human team.[16] Although at first glance, humans could not have won this competition, it was still a human who determined the main aim and preferences of the task. Thus, the AI acted for the benefit of human-determined objectives without the awareness and ability to change this. This experiment, which was conducted mostly for fun, does not reflect the low intellectual abilities of humans but rather creates more space for performing truly creative and priority tasks.

The question of authorship is also closely linked to the requirement of originality. Both EU and Ukrainian law stipulate that work must be original to be copywritten. But does this necessarily require a human as an author? According to *Eva-Maria Painer v. Standard Verlags GmbH and Others*, only a person can fulfil the necessary requirements: making various creative choices and stamping the work with a 'personal touch' reflecting a personality.[17] A similar position on copyright in US law can be seen through an analysis of law enforcement practices. For example, in the famous *Naruto v. Slater* (Monkey Selfie) case, the court has repeatedly related the concept of a 'creator' to humans, thereby denying the possibility of an animal creator.[18] The Compendium of US Copyright Office Practices[19] also hints at the inadmissibility of non-personal authorship, which, although recommendatory in nature, helps to confirm such a conclusion. It is stated that to qualify as a work of 'authorship', a work must be created by a human being. Thus, the Office will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author. The provision of Compendium is based on the case *Burrow-Giles Lithographic Co*.[20]

Legal research on AI is often conducted for AI tools and AI output. Because of the personal nature of this type of protection, there is no such thing as non-human intellectual property

14 A Hintze, 'Understanding the Four Types of Artificial Intelligence', Cloud and Computing (2016) <https://www.govtech.com/computing/Understanding-the-Four-Types-of-Artificial-Intelligence.html> accessed 5 April 2021.

15 'Written Comments on the WIPO Draft Issues Paper on Intellectual Property Policy and Artificial Intelligence' (*WIPO*, 2020) <https://www.wipo.int/export/sites/www/about-ip/en/artificial_intelligence/call_for_comments/pdf/org_aippi.pdf> accessed 5 April 2021.

16 'An A.I. Just Outperformed 20 Top Lawyers (and the Lawyers Were Happy)'(Inc.com, 9 November 2018) <https://www.inc.com/jessica-stillman/an-ai-just-outperformed-20-top-lawyers-and-lawyers-were-happy.html> accessed 5 April 2021.

17 Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others ECR* 2011-00000.

18 *Naruto v Slater*, 15-cv-04324-WHO, 2016, 5 ≤http://cases.justia.com/federal/district-courts/california/candce/3:2015cv04324/291324/45/0.pdf?ts=1454149106> accessed 6 June 2021.

19 US Copyright Office. Compendium of US Copyright Office Practices (3rd ed, 2021) <https://www.copyright.gov/comp3/docs/introduction.pdf> accessed 6 June 2021.

20 *Burrow-Giles Litographic Co. v Napoleon Sarony* [1884] 111 US 53, 58.

rights.[21] Thus, the practical interest is focused on the intellectual property protection of AI outputs: inventions and copyrighted works. The practice of protecting AI outputs through intellectual property is not extensive. The few decisions by national courts and patent offices concerning the registration of inventions form the basis of practice. The position of the patent offices is unanimously negative with regard to the possible identification of the creator as the AI itself. For illustration, this article will explore the individual decisions of the European Patent Office (EPO) and the German Patent and Trademark Office. In this context, the position of the courts is expected to be more difficult, as the formal requirements for a decision are not sufficient. In this context, the decisions of Chinese courts, which have explored the concept of authorship and 'human involvement', are particularly interesting.

The current position on the protection of AI outputs by patent law is negative. Such an approach was expressed in the EPO decision of 27 January 2020 on EP 18 275 163[22] and the EPO decision of 27 January 2020 on EP 18 275 174.[23] The decisions concern the refusal of the European patent applications EP 18 275 163 and EP 18 275 174, in which an AI system called 'DABUS' was designated as the inventor. The EPO considered provisions of the European Patent Convention and the term 'inventor' and held that the term refers to a natural person, noting that this appears to be an internationally applicable standard and that various national courts have issued decisions to this effect. In the decision T 0161/18 of 12 May 2020, the EPO did not grant a patent on determining cardiac output with the aid of an artificial neural network. This decision points to a lack of descriptive sufficiency because a subject matter expert could not reproduce the training of an artificial neural network. In March 2020, the German Patent and Trademark Office also rejected two applications for inventions because the declared inventor was the AI system 'DABUS'. The reasoning for these decisions was due to sections 6, 37, and 63 of the German Patent Act, as well as Section 7 of the German Patent Ordinance, similarly stating that an inventor can only be a natural person.[24]

The possibility for the copyright protection of AI outputs is different from the point of view of the Chinese courts. On 2 April 2020, the Beijing Intellectual Property Court ruled in a case titled *Gao Yang v Youku.*[25] In this case, a sports camera attached to a hot air balloon automatically took videos of the earth's surface. When discussing the copyright issues, the court determined that although the camera was out of human control during the automatic overhead recording process, there still was a human intervention reflected in the preselection of a video recording mode, video display format, sensitivity, and other parameters of the camera. These parameters were considered to be set in advance; therefore, screenshots selected from the videos taken automatically by the camera constitute photographic works, and the unauthorised use of these pictures by others constitutes an infringement of the copyright of the plaintiff's photographic work. In *Shenzhen Tencent v Shanghai Yingmou*,[26] the Beijing Intellectual Property Court decided that computer-generated content is copyrightable, as

21 A Guadamuz, 'Do Androids Dream of Electric Copyright?' (n 5)

22 'Grounds for the decision of 27 January 2020 on EP 18275163' (*European Patent Office*, 2020) <https://register.epo.org/application?documentId=E4B63SD62191498&number=EP18275163&lng=en&npl=false> accessed 7 April 2021.

23 'Grounds for the decision of 27 January 2020 on EP 18275174' (*European Patent Office*, 2020) <https://register.epo.org/application?documentId=E4B63OBI2076498&number=EP18275174&lng=en&npl=false> accessed 7 April 2021.

24 'Decisions relating to patent applications 10 2019 129 136.4 and 10 2019 129 136.4' (*DPMA, 2020*) <https://register.dpma.de/DPMAregister/pat/register?lang=en&fromSprachWechselLink> accessed 7 April 2021.

25 'Does China Back Copyrights for Automatic Photos from a Hot-Air Balloon?'(*China Justice Observer*, 2020) <https://www.chinajusticeobserver.com/a/does-china-back-copyrights-for-automatic-photos-from-a-hot-air-balloon> accessed 7 April 2021.

26 'Court rules AI-written article has copyright' (*The Supreme People's Court of the Peoples Republic of China,* 2020) <http://english.court.gov.cn/2020-01/09/content_37531788.htm> accessed 7 April 2021.

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there is human intervention in created work. The Tencent Technology personnel used the company's own independently developed AI computer program, 'Dreamwriter', to write articles on sports, weather, and other issues. Shanghai Yingmou published one of the articles on its website, which was considered copyright infringement in the ongoing court decision. On 24 December 2019, the Nanshan District People's Court, Shenzhen, Guangdong Province, held that an article completed by an AI program is covered by the copyright of China.[27] The most remarkable position in this court decision is that the court formed the final position on copyrightability through human intervention in the process of drafting the articles under question. On the one hand, this decision states a clear need for human presence in the creation of copyrightable works. On the other hand, the notion of 'human involvement' is broader than it previously appeared. The discussion concerning the cautions on the meaning of creators or authors apart from humans is premature, as autonomous AI has not developed yet. Until an AI has developed to a fully autonomous level, a human author has a chance to benefit from AI-generated works. In this context, the practice of EPO on patent claims with AI involvement could seem unsustainable, as it was pointed out that the claimants did not meet the formal requirements for obtaining the patent. Furthermore, the EPO is not authorised to decide on such uncertain and tricky legal issues.

In this regard, we can assume a quick conclusion that AI-generated objects in the US and EU are in the public domain, a position that is also supported by a number of academics.[28]

3 LEGAL POLICY SOLUTIONS RELEVANT TO AI-GENERATED OBJECTS

Obviously, IP policy relevant to AI is very topical, as some countries have already developed strategies on this issue. The UK was the first country that decided to grant computer-generated work copyright protection (s9(3) of Copyright, Designs and Patents Act 1988).[29] Computer-generated work is defined as work generated by a computer in circumstances such that there is no human author of the work. The law considers the author to be the person by whom the arrangements necessary for the creation of the work are made and sets 50 years of protection. A similar legal regime is provided for in some other common law countries, e.g., India[30] and Ireland.[31] A. Guadamuz evaluates this model as successful and suggests it should be spread more widely.[32] However, the *sui generis* right for AI-generated objects has not yet been explicitly established at the legislative level.

Ukrainian policymakers attempted to cover this issue in the Draft Law 'On copyright and related rights' (hereinafter, Draft Law).[33] The Draft Law proposes, in Art. 35, 'the *sui generis* right to non-original objects, generated by computer program'. Such a proposition could be considered the awaited compromise between legal ignorance and the undermining of

27 B Zhou, 'Artificial Intelligence and Copyright Protection. Judicial Practice in Chinese Courts' (*WIPO*, 2020) <https://www.wipo.int/export/sites/www/about-ip/en/artificial_intelligence/conversation_ip_ai/pdf/ms_china_1_en.pdf> accessed 5 April 2021.

28 A Ramalho, 'Will Robots Rule the (Artistic) World? A Proposed Model for the Legal Status of Creations by Artificial Intelligence Systems' (2017) 21 Journal of Internet Law 12.

29 Copyright, Designs and Patents Act of United Kingdom (1988) <https://www.legislation.gov.uk/ukpga/1988/48> accessed 14 June 2021.

30 Indian Copyright Act S. 2(d)(vi).

31 See Section 2(1) Irish Copyright and Related Rights Act 2000.

32 A Guadamuz, 'Do Androids Dream of Electric Copyright?' (2017) (n 5).

33 Draft Law of Ukraine 'On copyright and related rights' (2020) <https://www.me.gov.ua/Documents/Detail?lang=uk-UA&id=cf7b9e32-1995-4b66-995a-4ab3dcac1a8f&title=ProktZakonuUkrainiproAvtorskePravoISumizhniPrava&isSpecial=true#docAddCommentBox> accessed 7 April 2021.

established conceptions of the author in copyright, particularly in the *droit dateur* system, but it is accompanied by a vast range of questions. Undoubtedly, the previous empiric inquiry should be undertaken to find justification for such a legal proposition.

The Draft Law defines a computer-generated object as a non-original object resulting from computer program activity without the direct involvement of an individual. It proposes to grant *sui generis* intellectual property rights to computer program rightsholders: authors of the computer program, their successors, and other subjects of copyright to whom the writs were assigned. The Draft Law provides *sui generis* rights as economic rights similar to copyright for 25 years, counted from the year of creation.

Based on the given definition, we can assume that the *sui generis* solution was chosen because computer-generated work is not considered original at all. That is, it does not reflect the author's own creation. At the same time, substantial investment can potentially be made into such computer-generated work; thus, it should be protected. The authors of the Draft Law did not express such a justification explicitly, but a short analysis could shed some light on this issue.

All the main intellectual property theories are anthropocentrically positioned, which means they include the direct involvement of humans. In this course, it is curious to consider 'whether deontological theories might preclude IP protection for other reasons where no human is sufficiently involved'.[34] Theories relevant to intellectual property rights, such as incentive theory, can be viewed from two approaches: general initiative theory and investment protection theory. The first approach makes the creation of new works conditional on the existence of intellectual property rights, while the second provides for the need to protect the investment made through intellectual property rights. The general theory of incentive has been questioned by some scholars on the grounds that exclusive rights themselves cannot replace market demand for the product of intellectual labour.[35] It is difficult to disagree with this point because the psychological arguments in favour of a general theory of initiative are not convincing enough when there is no commercial gain from intellectual and creative results. In this regard, the protection of AI outputs by intellectual property can be justified by investment protection theory through the provision of a *sui generis* rights solution. The investment theory justifies the emergence of exclusive rights because of the need to protect the investment made. In case of the impossibility of protection by other means, e.g., technical ones, the legislative granting of exclusive rights for a limited period of time will help the owner to recover the investment and prevent illegal use. A similar approach has been used to protect non-original databases in the EU. The experience of the legislative implementation of the *sui generis* right will be considered in more detail below to identify positive developments for the Ukrainian regulation of AI outputs.

The *sui generis* right in intellectual property can be considered as an option for the legal regulation of subject matter that deviates from accepted concepts of intellectual property but is closely related. Some scholars have discussed the possibility of providing a national *sui generis* right for traditional knowledge as a solution.[36] M. Halewood refers to *sui generis* intellectual property rights as a legal system of protection for knowledge that shares some characteristics with intellectual property law but which is different in unique ways to enable

34 J-A Lee, K-C Liu, R Hilty (eds.), *Artificial Intelligence & Intellectual Property* (n 4).

35 R Hilty, J Hoffmann, S Scheuerer, 'Intellectual Property Justification for Artificial Intelligence' in J-A Lee, K-C Liu, R Hilty (eds.) *Artificial Intelligence & Intellectual Property* (Oxford University Press 2021).

36 D Gervais, 'Traditional Knowledge & Intellectual Property: A TRIPS-compatible Approach' (2005) 137 Mich St L Rev; M Halewood, 'Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection' (1999) 44 McGill L J 961 <https://lawjournal.mcgill.ca/wp-content/uploads/pdf/7355599-44.Halewood.pdf> accessed 8 April 2021.

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the protection of new subject matter.[37] In the EU, under the Database Directive, *sui generis* right was granted for the protection of databases regardless of their originality, based on substantial investment.[38] The concept of *sui generis* in EU copyright has emerged due to the legal structure in Dutch law – 'geschriftenbescherming' – which provides legal protection for non-original works. It is this approach that has been taken as the basis for determining the legal protection of non-original databases in the EU. In Dutch law, this construction is applied primarily to literary works and provides protection that is essentially similar to copyright protection. Historically, this unique right appeared to protect the rights of book publishers and was enshrined in the Copyright Act of the Netherlands of 1912, in particular, in Art. 10 (1), which provides for the protection of an open list of works. Thus, the wording of the article on 'protection of books, brochures, newspapers ... and other written works' gave rise to a contradictory diversion of the last two words.[39] At the same time, this background should not be taken as the sole scope of *sui generis* right for databases, but rather as a historical illustration of the development.[40] For now, the Database Directive is the only legal act that provides such *sui generis* intellectual property protection. In 1996, WIPO presented the draft of the 'Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases to be Considered by the Diplomatic Conference',[41] which combined the EU and the US proposals concerning *sui generis* right in databases, although WIPO's draft treaty was never adopted.

The Database Directive does not explicitly connect *sui generis* to intellectual property rights, but an analysis of the Database Directive provisions leads to the conclusion that *sui generis* may be classified as an intellectual property right. Like copyright, exceptions, and limitations to *sui generis* rights are provided (e.g., a term of protection), and *sui generis* rights can be licensed and assigned. Yet, it should be pointed out that *sui generis* is not copyright.[42] The adoption of the Database directive was driven by different factors. The EU stated that there is 'very great imbalance in the level of investment in the database sector both as between the Member States and between the Community and the world's largest database-producing third countries'.[43] Substantial investment was set as the key criterion for *sui generis* databases. The scope of substantial investment partially undiscovered in the Database Directive as an investment that may consist in the deployment of financial resources and/or the expending of time, effort, and energy.[44] Also, the ECJ made it clear in its decision in *Fixtures Marketing Ltd v. Oy Veikkaus* that substantial investment must be construed in relative terms, first in relation to costs and their redemption, and secondly in relation to the scale, nature, and contents of the database and the sector to which it belongs.[45] As the protection of the investment made by the owner of the AI is the main justification for legal protection, it would be appropriate to outline similar criteria for computer-generated objects. Another question is the scope of such investment in terms of AI. Since there is a practice based on the provisions of Database Directive application, the scope of investment in terms of AI-generated output could be considered to have its own

37 M Halewood, 'Indigenous and Local Knowledge in International Law' (n 36).

38 See Art. 7 of the EU Database Directive.

39 P Bernt Hugenholtz, 'Goodbye geschriftenbescherming!' (Kluwer Copyright Blog, 6 March 2013) <http://kluwercopyrightblog.com/2013/03/06/goodbye-geschriftenbescherming/> accessed 7 April 2021.

40 Case C-46/02 *Fixtures Marketing Ltd v Oy Veikkaus* [2004] ECR I-10365.

41 World Intellectual Property Organisation, 'Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases to be Considered by the Diplomatic Conference' (1996) <https://www.wipo.int/edocs/mdocs/diplconf/en/crnr_dc/crnr_dc_6.pdf> accessed 7 April 2021.

42 I Stamatoudi, P Torremans, *EU Copyright Law* (Edward Elgar Publishing 2014) 320.

43 EU Database Directive, recital 11.

44 ibid, recital 40.

45 *Fixtures Marketing Ltd v Oy Veikkaus* (n 17).

nature. Thus, the economic and legal research on this issue can form the basis for defining these criteria.

Despite the overall perspectives of the *sui generis* solution for AI output, there are other misleading sections in the Draft Law of Ukraine. From the given definition, it seems that the right to a computer-generated object covers the concept of fully autonomous AI, as indicated by the absence of direct human participation in its creation. Although, from time to time, information appears in the media that an AI created a new work, such as a song or a picture,[46] these works were generated based on information created by a human. Some AI-generated works that follow the style of a certain artist are possible only thanks to machine learning based on data created by that particular artist. However, such works could be considered to have been created with the sufficient involvement of a human, not independently. This position partially coincides with the decision in *Shenzhen Tencent v Shanghai Yingmou*, which was discussed above. Modern technology does not yet allow us to recognise the existence of this type of AI. Thus, the most technologically advanced machines of our era are little more than faithful agents of the humans who design or use them.[47]

The Concept of Recodification of the Civil Code of Ukraine[48] also addresses AI questions in brief. It proposes to amend a list of general principles of civil law with the following provisions: 'conscious, responsible human interaction with autonomous robots and AI'; adjusting the tort system with provisions on 'compensation for damage caused by AI'. Notions 'autonomous work' and 'artificial intelligence'[49] are included in the extended list of objects of civil rights, which indicates that the authors of the Draft Concept consider AI as an object dependent on humans.

4 CONCLUDING REMARKS

The Draft Law does not define the specific type of subject matter for which legal protection can be granted. As previously analysed, only the economic value of computer-generated objects justifies this special type of protection. In this regard, more economic research is needed on the need for protection for specific computer-generated content. Otherwise, the adoption of the proposed provisions as they are could lead to excessive protection, e.g., of translations made by AI-based platforms (e.g., the Google translate platform).

Despite the overall promise of the legal regulation of AI-generated output through a *sui generis* solution, the analysed legislative initiative is premature due to various factors: the lack of previous economic and legal empirical research to justify protection; the need for additional legislative refinement of draft provisions. Otherwise, the adoption of such a Draft Law could result in unpredictable consequences for both intellectual property law and the creative industries. The *sui generis* right solution for AI output is promising since it responds to few legal issues, but more is yet to come.

46 'The first piece of AI-generated art to come to auction' (*christies.com*, 12 December 2018) <https://www.christies.com/features/A-collaboration-between-two-artists-one-human-one-a-machine-9332-1.aspx> accessed 7 April 2021.

47 JC Ginsburg, LA Budiardjo, 'Authors and Machines' (2019) 34 Berkeley Technology Law Journal.

48 AS Dovgert et al, *Concept of Renovation of Civil Code of Ukraine* (ArtEk 2020).

49 ibid, chapter III.

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Note

DOES NORMATIVITY CONTRIBUTE TO THE EFFECTIVE PROTECTION OF RIGHTS? REFLECTIONS ON THE CONCEPT OF NORMATIVITY IN THE MODERN UKRAINIAN DOCTRINE OF LAW

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Summary: 1. Introduction: The Concept of Social Norms and Their Role in Modern Society. – 2. Normativity and Due Diligence of the Law: How a Subject Should Act and Why Coercion Is Not Effective. – 3. The Concept of Normativity in Modern Philosophical Writing and Its Significance for the Development of Modern Law and the Effective Protection of Individual Rights. – 4. Conclusions and Reflections on the Further Study of the Essence of Law in Modern Society.

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DOES NORMATIVITY CONTRIBUTE TO THE EFFECTIVE PROTECTION OF RIGHTS? REFLECTIONS ON THE CONCEPT OF NORMATIVITY IN THE MODERN UKRAINIAN DOCTRINE OF LAW

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Abstract *Normativity is considered the basis for the implementation of social regulation. However, this regulation of social relations must be organised and have a positive impact on the development of society. Normativity is considered to be the primary, original property of social reality due to the natural demand for establishing order and its integral ability for self-organisation. The integration of elements into a balanced system is carried out through their coordinated interactions, resulting in something new, which has a unique integrative quality, provided that this quality was absent before their integration into the system.*

At the same time, nowadays, the phenomenon of normativity is studied mostly from traditional positions. A number of well-known works that raise the issue of normativity were written in the middle of the last century under conditions of an ideological monopoly and are unlikely to enrich the modern understanding of the normative nature of law.

Today, in the Ukrainian scholarly literature, because of Soviet remnants, only the formal (positive-empirical) side of normativity is being assessed, which leads to it being replaced by the concept of state coercion. In general, this leads to the spread and dominance of extremely negative phenomena in Ukrainian society, among which the total non-enforcement of court decisions is worth mentioning. The solution to this problem cannot simply be improving coercive measures of the state alone – there must be changes to understanding the rule of law and, in particular, the nature of normativity. The analysis of the method of objectification (formation) of the due diligence of law will significantly contribute to targeting this problem because the latter is not solely derived from the dictates of the state (or the empirical phenomena). However, the key focus is finding the answer to one of the most important questions of jurisprudence and the philosophy of law, namely: 'Why should a person obey the law?'. Thus, we are highly motivated to initiate a philosophical and legal rethinking of approaches to the normativity of law and the legitimation of state and legal processes. This article is an attempt to target a discussion in this sphere.

Keywords: *law, human rights, normativity, due diligence of law, effective measures of protection of law, Ukraine*

1 INTRODUCTION: THE CONCEPT OF SOCIAL NORMS AND THEIR ROLE IN MODERN SOCIETY

Modern legal theory represents diverse approaches to understanding the problem of social norms. However, each of these views is somewhat one-sided and insufficient and therefore does not provide a full answer to the main question of social, let alone legal, normativity: *why* and *how* is a social norm mandatory? Or, in other words, what are the normative force of social norms, and why must a person comply with the norm?

In recent decades, research has been carried out primarily on issues of the normativity of law, especially in works related to the nature and content of normative systems in society[1] or devoted to the philosophical analysis of normativity in general. Other authors focus on the value of law and law-making in modern legal worldview,[2] defining it as a phenomenon that determines the socio-value dimension of law, which is formed to specifically regulate social relations.[3]

It is not true that the problem of normativity of law has bypassed the legal doctrine of Western countries.[4] They have indeed tackled the problem, formulating the definition of pseudo-problems of the normativity of law (Leslie Green) and declaring an unbridgeable gap between is and ought (Sylvie Delacroix).[5] Roger A. Shiner, in particular, devotes his research to externalist, internalist, and descriptivist theories, as well conceiving the reductionism of 'jurisprudence'.[6]

At the same time, in recent years, the issue of the normativity of law and its value and role in the legitimation of state functions has become much more acute in Ukraine. In particular, this is has been significantly facilitated by conflicts between certain branches of government (executive and judicial branches, the President of Ukraine and the Constitutional Court of Ukraine, etc.). At the initial level, even the problem of non-enforcement of court decisions shows that outdated traditional approaches to legal understanding for the totalitarian state hinder the development of Ukrainian society and have become insurmountable obstacles to ensuring real access to justice and effective legal protection.

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1 R Kabalskyi, Normativity of law as a subject of philosophical analysis (2008) Manuscript <http://www.disslib.org/normatyvnist-prava-jak-predmet-filosofskoho-analizu.html> (accessed 10 May 2021); R Kabalskyi, 'History of philosophical understanding of normativity as a socio-cultural phenomenon' (2013) 79 (37) Collection of Scientific Works 'Gileya: Scientific Bulletin'; A Babiuk, 'The concept of normative law' (2014) 4 (52) University Scientific Notes 19 <http://www.irbis-nbuv.gov.ua/cgi-bin/irbis_nbuv/cgiirbis_64.exe?I21DBN=LINK&P21DBN=UJRN&Z21ID=&S21REF=10&S21CNR=20&S21STN=1&S21FMT=ASP_meta&C21COM=S&2_S21P03=FILA=&2_S21STR=Unzap_2014_4_4> (accessed 10 May 2021); L Zamorska, 'Normativity of law as a social value' (2012) 45 Current Policy Issues 28-37 <http://dspace.onua.edu.ua/handle/11300/1259> (accessed 10 May 2021).

2 T Didych, 'Value dimension of law-making in the modern legal worldview' (2014) 5 Pravovyy svitohlyad: lyudyna i pravo 165 <http://almanahprava.org.ua/files/almanah-prava.-vipusk-5-_2014_.pdf> (accessed 10 May 2021).

3 Particular attention was paid to these issues in connection with sustainability, announced in UN goals. See Sustainability and Law. General and specific aspects, Volker Mauerhofer, Daniela Rupo, Lara Tarquinio (eds) (Springer 2020); I Izarova, 'Sustainable civil justice through open enforcement – The Ukrainian experience studying' (2020) 9 (5) Academic Journal of Interdisciplinary Research 206-216 and others.

4 L Green L, 'The normativity of law: What is the problem' <https://www.uvic.ca/victoria-colloquium/assets/docs/Green_Normativity.pdf> (accessed 10 May 2021).

5 S Delacroix, 'Understanding normativity. The impact of culturally-loaded explanatory ambitions' (2019) 37 REVUS. Journal for Constitutional Theory and Philosophy of Law 17-28 <https://doi.org/10.4000/revus.4773> (accessed 17 April 2021).

6 R Shiner, *Law and Its Normativity. A Companion to Philosophy of Law and Legal Theory: Second edition* (Blackwell Companion, 2009) <https://doi.org/10.1002/9781444320114.ch28> (accessed 10 May 2021).

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In the Soviet era, the idea of social norms as objective phenomena prevailed, and the concept of objective social norms was formulated, the core idea of which was 'stable social ties that recur and arise in the process of social activities of people in exchange for material and spiritual goods, expressing the need of social systems for self-regulation'[7] or 'a form of the external manifestation of social relations that constitute the content of these norms'.[8] However, in this approach, the norm as an expression of the due diligence of law was mixed with social laws, i.e., with the existing essence, creating the illusion of the existence of a social norm outside the subject and of its autonomy. This, according to the authors of the present article, became the basis for a limited understanding of the essence of law and its normativity.

The process of describing social facts, revealing patterns, and trying to deduce the norm awards jurisprudence with the role of empirical science. Of course, the connection between norms and due diligence has been noted by many scholars, but the justification of the binding force (element of belonging) of social norms on the basis of their repetition 1) mixes the recurrence of behaviour with the universality of norms, 2) unreasonably removes due diligence from the existing reality, and 3) results in a certain pattern of behaviour becoming the norm because of its constant recurrence, even when it remains unclear why this behaviour was constantly repeated before acquiring the status of the norm.

A striking example of the mechanism during which a socially determined rule acquires the status of normative is modern judicial practice. For instance, for several years now in Ukrainian society, there has been a lively discussion about the usage or futility of compulsory vaccination. The tendency to refuse to vaccinate children has become quite widespread and dangerous. In its decision of 17 April 2019 in case No. 682/1692/17, the Civil Court of Cassation of the Supreme Court questioned this objectively-formed social attitude by prohibiting an unvaccinated child from attending kindergarten. The court emphasised that:

> The requirement of compulsory vaccination of the population against particularly dangerous diseases, based on the need to protect public health, as well as the health of those concerned, is justified. In this case, the principle of the importance of public interests prevails over personal ones.[9]

In accordance with Part 5 of Art. 14 of the Law of Ukraine 'On the Judiciary and the Status of Judges', the conclusions of the Supreme Court are binding when applying the norm of law, which they supplement and develop.[10] However, in this situation, the normative nature of the injunction embodied in the decision of the Supreme Court raises difficulties in terms of its recurrence and universality, as the legal nature of a judicial act does not have such scope as an act of the Parliament.

Ukrainian philosopher A. Yermolenko drew attention to the fact that the norm has both prescriptive and descriptive content: it reflects not only what should be, but also what is, that is – the norm carries both counterfactual (transcendental) and factual (ontological) meaning.[11] Other scholars have noted that 'norms can also be defined as ideal general patterns of human behavior under certain typical circumstances'.[12]

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7 E Lukasheva, 'General theory of law and multidimensional analysis of legal phenomena' (1975) 4 Soviet State and Law 15-22.

8 I Sabo, *Foundations of the theory of law* (Progress 1974) 272.

9 Resolution of the Supreme Court composed of the Joint Chamber of the Administrative Court of Cassation of 11 February 2020 in administrative proceedings No 816/502/16 <https://reyestr.court.gov.ua/Review/81652333> accessed 9 April 2021.

10 Law of Ukraine on Judiciary and Status of Judges, No 1402-VIII, adopted on 2 June 2016. Official website of the Parliament of Ukraine <http://zakon0.rada.gov.ua/laws/show/1402-19>

11 A Yermolenko, *Communicative practical philosophy* (Libra, 1999) 488.

12 ibid.

Not all researchers of social norms agree with their characterisation of a norm as a fixation or an expression of due diligence, typical for research of the Soviet period. In particular, it was noted that 'The norm… is a characteristic of the actual state of affairs: not only what should be, but also what already exists, not only the proper but also the existing'.[13]

One more specific opinion on this issue is following

> The norm… only ascribes what should be, but the norm itself is what is being, what is present, what exists as reality. Because if the norms were appropriate and not existing, then there would be no signs of the due diligence at all, it would be unknown what is appropriate and what is undesirable.[14]

This approach of the scholars results from their understanding of due diligence as generated by the existence and denial of the reality of due diligence. In other words, what is not existing is non-existence. As it is quite rightly emphasised in the modern Ukrainian doctrine of law that 'the understanding of law as a system of norms emphasises its state, and denies its social nature'.[15]

Undoubtedly, the social norm always contains an element of that which exists, as there is a certain 'corporeality' with due diligence in the way it addresses social subjects. However, in our opinion, the essence of the norm is a derivative of due diligence and is instrumental. In the next part of our article, we will try to prove that normativity depends on values and due diligence, which are the essential core characteristics of law.

2 NORMATIVITY AND DUE DILIGENCE OF THE LAW: HOW A SUBJECT SHOULD ACT AND WHY COERCION IS NOT EFFECTIVE

Obviously, the answers to these questions should be considered in connection with such categories as 'due diligence', 'norm', and 'normative'. In this regard, the position of some scholars, who considered social norms as logical judgments, seems interesting and contains significant heuristic potential. The Ukrainian theorist of law E. Burlay singled out a separate direction in the study of normative systems,[16] within which the norm is considered as an 'authoritative prescription of the due diligence' and 'identify it with a judgment of a normative nature, i.e. with a judgment that contains a formulated rule of conduct'.

The vision of moral and logical judgments as single-order phenomena that equally claim universality and generality was initiated by I. Kant. This thesis was shared by well-known Ukrainian theorist of law P.M. Rabinovich.[17] The connection of norms and values was also described by another Ukrainian philosopher of law, S. Maximov. Considering the phenomenological structure of legal norms, he singled out such elements as 'the subject (the one to whom the norm is addressed), the essence of value (what the value protects) and the object of due diligence (what should be done - rights and responsibilities)'.[18]

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13 V Kudryavtsev, 'Legal norms and actual behavior' (1980) 2 Soviet State and Law 12-16.

14 R Lukich, *Methodology of law* (Progress 1981) 304.

15 A Babiuk, 'The concept of normative law' (n 1).

16 E Burlay, *Norms of law and legal relations in a socialist society* (Naukova Dumka 1987) 91.

17 P Rabinovich, 'Law as a phenomenon of public consciousness' (1972) 2 News, Jurisprudence 106-116. The latest work is 'Basics of theory and philosophy of law' <https://law.lnu.edu.ua/wp-content/uploads/2021/04/Posibnyk_maket__2021_2.pdf> (accessed 10 May 2021).

18 S Maksimov, *Legal reality: the experience of philosophical understanding* (Pravo 2002) 328.

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In our opinion, the norm is inextricably linked with due diligence. However, when considering a norm as a judgment, the question arises as to how the judgment is related to due diligence. As already noted, deontic judgment expresses a certain value, on the basis of which a conclusion is made about the need for a certain behaviour. That is, the norm (as a deontological judgment) is precisely connected with the realm of due diligence by the value.

The overriding task of norms is maintaining invariance by creating boundaries of variability. Invariance in a norm is a reference to the value that stands behind it and is expressed in it because only the latter can obtain the status of absoluteness in culture. But value, so to speak, inverts this absoluteness in the norm, reinforcing it with its authority. The norm, in turn, is a certain symbolic reflection of a value, a way of its manifestation.

In scholarly literature, the similarity of the categories 'due diligence' and 'normativity' was noted. This thesis was most vividly expressed by N. Nenovsky,[19] who declared that 'the due diligence presupposes and even absorbs the norm or, more generally, the normativity. When we say 'due diligence', we generally understand 'normativity'. The norm is a way of expressing the form of due diligence. The deontological objectifies through the normative and acquires the status of objectification independent of the individual consciousness. Because of the norms, due diligence becomes a reality. Or, in other words, norms are the reality of what is right, as scholars have noted. That is, in the process of the externalisation of due diligence (sense of value, an idea of how it should be), the value, as a kind of clot, institutionalised and objectified in social reality, became an integral element of the social norm. The value is the range of meanings of normative judgments (social norms).

Due diligence is a specific phenomenon of the social world. It does not exist in nature, outside of human society. Due diligence exists in a normative form; usually, it is the behaviour that is addressed to the subject and must be performed. It has an intellectual and emotional value composition. Due diligence is always a positive value that can be perceived by the subject as an autonomous (freely recognised) or heteronomous (externally binding) rule. In the latter case, due diligence exists in the mind of the subject as an objective reality. But even in this case, due diligence (social norms) arises only as a result of the activities of social actors, who interpret them as socially significant norms objectivated in social rules. Therefore, in its true meaning, the norm is not a specific object that exists independently of the subject but is a subjective correlation that expresses due diligence. Thus, we can declare the interdependence of the norms and the values. Thus, on the one hand, the value is manifested through the norm (deontological judgment) and, being integrated into the latter, is internalised and realised by the subject. On the other hand, it is the value, carrying in itself the element of due diligence, that endues social norms with the qualities of universality and universality and creates the essence of normativity. In this case, 'the content of the normative legal act that is being drafted and approved should be aimed at resolving the main problem or issue'.[20]

One of the best examples of a value that has gained the status of a norm through international recognition and legislative legitimacy is the concept of the rule of law. As the Venice Commission noted

> Consensus exists on the core elements of the Rule of Law, which are: (1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts;

19 N Nenovski, *Law and values* (Progress 1987) 248.

20 A Babiuk, 'The concept of normative law' (n 1).

> (5) Respect for human rights; and (6) Non-discrimination and equality before the law (p.18).[21]

The idea of the rule of law is implemented at the constitutional and statutory level in most European states and is enshrined in the acts of substantive and procedural legislation,[22] as well as embodied in the jurisprudence at supranational and national levels. For example, in *Shchokin v. Ukraine* (Application Nos. 23759/03 and 37943/06), the European Court of Human Rights, emphasising the illegality of the tax charge on the applicant, which occurred due to defects in tax law, referred to the rule of law as '… One of the fundamental principles of a democratic society, inherent in all articles of the Convention'. The Court emphasised that

> The question whether a fair balance has been struck between the general interests of society and the requirements for the protection of the fundamental rights of the individual arises only when it is established that the impugned interference complied with the law and it was not arbitrary (§ 50).[23]

The Constitutional Court of Ukraine embodies universal values in its decisions, which are mandatory for all law enforcement entities and ordinary citizens at the national level. One of the best interpretations of the concept of the rule of law in the case-law of this Court is its Judgment in the case of the imposition of a milder sentence by the Court of 2 November 2004 No. 15-rp / 2004, which states that

> The rule of law requires from the state implementation of its values in law-making and law-enforcement activities, in particular in laws, which in their content should be permeated primarily by the ideas of social justice, freedom, equality and so on. One of the manifestations of the rule of law is that law is not limited to legislation as one of its forms, but also includes other social regulators, such as morals, traditions, customs, etc., which are legitimized by society and historically achieved in the national culture. All these elements of law are united by a set of rules that corresponds to the ideology of justice, the idea of law, which are largely displayed in the Constitution of Ukraine (§ 2, item 4.1, item 4 of the motivating part).[24]

Not only the law itself but the goals which are pursued by its norms are important, as noted in the doctrine

> Law is defined as a manifestation of its value in the ability to regulate social relations, to act as a means of regulating of social relations, to ensure the corresponding social good in the form of law and order in society. In order to be valuable, law is endowed with those properties that reveal it as an important social force of society, the bearer of social energy… any legal phenomena, including the phenomenon of lawmaking, are not accidental, because they are generated to achieve a certain goal.[25]

21 Rule of Law Checklist, Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e> (accessed 10 May 2021).

22 On procedural legislation harmonisation, see Fernando Gascon Inchausti and Burkhard Hess, *The future of the European Law of civil procedure* (Intersentia 2020) and I Izarova, *Theory of the EU civil procedure* (VD Dakor 2015. For the EU and third states harmonisation, see I Izarova, 'Enhancing judicial cooperation in civil matters between the EU and Ukraine: First steps ahead' in *EU civil procedure law and third countries: Which way forward?* A Trunk, N, Hatzimihail (eds) (Hart Publishing 2021) 191-212.

23 Case of *Shchokin v Ukraine* (Application Nos 23759/03 and 37943/06) <https://zakon.rada.gov.ua/laws/show/974_858#Text> (accessed 10 May 2021).

24 Decision of Constitutional Court of Ukraine, 2 November 2004, No 15-рп/2004 <https://zakon.rada.gov.ua/laws/show/v015p710-04#Text> (accessed 10 May 2021).

25 T Didych, 'Value dimension of law-making in the modern legal worldview' (n 2).

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The norm itself does not exist in its pure form: it is always the norm for some pattern (for example, the norm of behaviour, the norm of language, the norm of exploitation, etc.). The norm is fixed as far as its material, 'objectified' carrier exists.

Due diligence (and the social norm in general) in its phenomenological perspective is the result of social objectification, one of the means that support the functioning of the social system. Having attempted a preliminary definition of normativity on the basis of the data above, we can declare that normativity is a defining feature of a normative space, which, based on human reflexive ability, is a method of objectification (form) of due diligence (value) and is focused on the emergence of the relationships of due diligence in social subjects. That is, social normativity is characterised as an integral objective quality of social reality. Any set of social phenomena, despite their chaotic state, inevitably self-organises in one form or another. This process has the character of binding law, an inevitable condition of any social development. Objective social norms that form a system of value-normative regulation are a manifestation of social normativity as an objective law of social reality. Normativity is, first of all, an objective characteristic of social matters.

Social norms (including legal) as a manifestation of social rules must reflect all the characteristics of the latter. However, the analysis of normativity distinguishes two sides of the problem: the objective requirements of social life and awareness (recognition) of the need for normativity. In the course of social practice, people begin to realise the social significance of values and the need for normativity. Its need passes through consciousness, ideology, and the subjects of society begin to form traditions, customs, commandments, norms of religion, morality, and law. In addition, the norms may be characterised by derivative features, in particular, recurrence, typicality, and normality.

Public relations and social institutions, social and individual consciousness, social norms – all these phenomena are manifestations (forms of objectification) of social norms. Speaking of the relationship between norm and normativity, we can say that the norm is the quintessence of social normativity. Social norms express normativity in a concentrated form; it is the most definite, laconic manifestation of it. Describing norms as a particularly significant manifestation of normativity, it should be emphasised that the very isolation and separation of normativity in the form of norms allows the latter to be both a means of reflecting the real needs of society and of establishing order.

Thus, based on the above, it can be stated that normativity is a reflexive combination of generally binding and significant rules, which are defined by the due element of the norm (or another medium) through its integrated value. Normativity as an integral property of law is achieved both through national or international recognition of a certain value or norm and through giving the norm imperative status by state institutions, such as parliament, government, courts, etc.

3 THE CONCEPT OF NORMATIVITY IN MODERN PHILOSOPHICAL WRITING AND ITS SIGNIFICANCE FOR THE DEVELOPMENT OF MODERN LAW AND THE EFFECTIVE PROTECTION OF INDIVIDUAL RIGHTS

In the world of philosophical writing, normativity as an independent philosophical category has hardly been singled out. At the same time, the question of the fundamental laws of construction and existence of the universe, the laws of natural processes and social regularities, has always existed. With the development of natural sciences and the emergence of social sciences, this problem has acquired new meanings, increasingly shifting into the realm of social reality. With the development of the world by means of natural sciences, social

reality, normative principles, and laws of its functioning received the status of a separate problem, which led to the allocation of a separate group of philosophers, who studied it in contrast to natural reality.[26]

G. Rickert's[27] values are very close in their meanings to Kant's *a priori* forms or norms that have a transcendental character and are timeless, non-historical, and universal principles that guide and thus distinguish human activity from processes occurring in nature. Values do not exist as any independent objects and do not arise in their understanding but in the interpretation of their meaning, so they 'mean'. Subjectively, they are perceived as an unconditional belonging (duty), experienced with apodictic obviousness. According to Rickert, values are not objects of pure contemplation for us at all. Values act as norms. The world of values is a world of what is proper, and because we act, we must strive to realise them; otherwise, our actions will not go beyond subjectivism and arbitrariness.[28] Thus, the general significance and universality of judgments and phenomena in the socio-cultural aspect, the categories of due diligence and normativity, are ensured through the world of values.

The concept of the French philosopher and sociologist of Russian law, G. Gurvych (called 'hyperemic realism'), also deserves special attention.[29] For him, realism meant abandoning attempts to find the absolute in philosophical reflection: all phenomena available to human knowledge are rooted in a being that has different dimensions – biological, social, ideal, mystical, etc. – which, of course, does not include a materialist understanding of the environment. Here, Gurvych tries to rethink and supplement Fichte's ideas about absolute reality, which does not depend on the subject and finds its manifestation in universal norms and in the subordination of man to these norms, the command of duty, and due diligence. These universal norms in the theoretical aspect form a perfect layer of social reality and are included in the structure of social life as an independent of the empirical sphere of the superstructure. But this irrational gap is bridged by the transitional sphere, which includes collective consciousness, social creativity, and normative facts.

Social integration is explained as an attempt to implement at the empirical level of absolute (transpersonal) values. Each of the spheres of social reality as an organisational unity is structured and functions on the basis of the existing 'ensemble' of normative facts, which in turn are formed from a system of values, united by a connection with a certain common absolute value. This dialectical perspective allowed Gurvych to create a model of society, where the unity of many different components becomes possible without denying their multiplicity as such.

It should be noted that these doctrinal concepts are carried out in practice, in particular, during the implementation of the ideal of the rule of law and the right of a person to a fair trial and access to justice. Absolute (transpersonal) values are the most important source in which judicial practice finds answers to questions that are not disclosed in the regulatory acts of the state, and this allows to formulate new interpretations of legislation, to 'enclose' in the content of positive rules of law general, universally recognised ideas, and concepts such as protection of law, human-centeredness, prohibition of arbitrariness and discrimination, inviolability of property rights, etc. In this way, normativity is legitimised as a property of law, and the judiciary stands as a guard over democracy, protecting the law from arbitrary encroachments and unwarranted interferences. This thesis is unequivocally confirmed by numerous modern research in the field of judicial protection

26 R Kabalskyi, 'History of philosophical understanding of normativity' (n 1).

27 G Rickert, *Philosophy of life* (Nika-Center 1998) 512.

28 ibid.

29 G Gurvych, *Philosophy and sociology of law: Selected works* (Publishing House of St-P. State Un-ty, Publishing House of the Faculty of Law of St-P. State Un-ty 2004) 848.

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of law (in particular, the work of domestic law professors as V. Borisova, O. Ovcharenko, B. Karnaukh, and others).[30]

In its decisions, the Constitutional Court of Ukraine has repeatedly emphasised that the rule of law is the dominance of law in society.[31] The requirements of certainty, clarity, and unambiguity for the legal norm derive from the constitutional principles of equality and justice, as otherwise, their uniform application cannot be ensured. Yet, the absence of these requirements does not preclude the infinity of interpretations in law enforcement practice and inevitably leads to arbitrariness.[32] Thus, the law itself, due to its social significance and value and not the legal act, must play a role of a regulator of social relations and have primary significance. Accordingly, the defining element of the rule of law is the principle of legal certainty, which, according to the experts of the Venice Commission, means that

> not only that the law must, where possible, be proclaimed in advance of implementation and be foreseeable as to its effects: it must also be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it (par. 58).[33]

A similar position has been repeatedly expressed by the European Court of Human Rights, which considers that

> A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (Olsson v. Sweden (no. 1), par. 61 a).[34]

In fact, the idea of legal certainty is borrowed from the doctrinal works of famous philosophers. Thus, the eminent German philosopher R. Zippelius emphasised that

> if the rules governing the coexistence of people should provide clear guidelines for the legitimacy of behavior, they should not contradict each other, should be mutually consistent.[35]

The scholar thus defined the interconnectedness of norms as a system of law.

For its part, the European Court of Human Rights, having borrowed this idea, developed it by applying it to specific circumstances of cases, i.e., the facts of reality. For example, regarding the institution of legal, in particular, disciplinary, liability, the Court considers that its basis must be clear and predictable in order to avoid ambiguous interpretations and too broad

30 V Borysova, I Iurevych, K Ivanova, O Ovcharenko, 'Judicial protection of civil rights in Ukraine: National experience through the prism of European standards' (2019) 1 (39) Journal of Advanced Research in Law and Economics 66-84. DOI: <https://doi.org/10.14505//jarle.v10.1(39).09> (accessed 10 May 2021); B Karnaukh, 'Standards of proof: A comparative overview from the Ukrainian perspective' (2021) 2 Access to Justice in Eastern Europe. DOI: <https://doi.org/10.33327/AJEE-18-4.2-a000058> (accessed 10 May 2021); I Izarova, *Theory of the EU civil procedure* (VD Dakor 2015).

31 Decision of Constitutional Court of Ukraine, 2 November 2004, No 15-рп/2004 <https://zakon.rada.gov.ua/laws/show/v015p710-04#Text> (accessed 10 May 2021).

32 Decision of Constitutional Court of Ukraine, 22 September 2005, No 5-рп/2005, para. 5, item 5.4 <https://zakon.rada.gov.ua/laws/show/v005p710-05> (accessed 10 May 2021).

33 Rule of Law Checklist, Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e> (accessed 10 May 2021).

34 Case of *Olsson v Sweden* (Application No 21722/11) <https://www.globalhealthrights.org/wp-content/uploads/2013/10/Olsson-Sweden-1988.pdf> (accessed 10 May 2021).

35 R Tsyppelius, *Yurydychna metodolohiya* (Ruta 2003) 143.

definitions (para. 45 of the judgment in *O. Volkov v. Ukraine*).[36] In case of non-compliance with this condition, the application of sanctions by the state is questioned by the Court. It is noteworthy that from the standpoint of the European Court of Human Rights, the state is responsible not only for the 'quality' of the law, the clarity of its content but also for the prompt resolution of legislative gaps and the clarification and interpretation of the content of law applied by courts in specific cases (decisions in the cases of *Verentsov v. Ukraine* and *Cantoni v. France*).[37]

At the level of national judicial practice, the idea of legal certainty as a component of the concept of the rule of law is widely disputed, both among theorists and practitioners. In particular, the Constitutional Court of Ukraine had repeatedly emphasised that administrative and constitutional courts are assigned a 'special role in the system of institutional support of the rule of law' because they ensure 'the coherent nature of the entire legal system providing the coexistence of contradictory norms', ensuring the effectiveness of law.[38]

The Supreme Court, in turn, formulated its own legal positions, developing the understanding of the construction of 'legal certainty', the elements of which include:

- the requirement to comply with the principle of *res judicata*, i.e., the principle of finality of the court decision and the inadmissibility of reconsideration of the case as resolved by the court. Neither party has the right to seek a review of the final and binding court decision for the sole purpose of holding a new hearing and resolving the case (Resolution of the Grand Chamber of Supreme Court of 26 January 2021 p. in proceedings No. 522/1528/15-ц);[39]
- the requirement to interpret the provisions of law solely in the interests of an individual in case of their vagueness or incomprehensibility in order to protect the subject of private law in his dispute with the state (Resolution of the Supreme Court composed of the Joint Chamber of the Administrative Court of Cassation of 11 February 2020 in administrative proceedings No. 816/502/16);[40]
- the principle according to which a person, his/her rights, and freedoms are recognised as the highest values and determine the content and direction of all of the state activities; the court must apply the principle of the rule of law, taking into account the case-law of the European Court of Human Rights, and appeal to the administrative court for protection of human and civil rights and freedoms directly on the basis of the Constitution of Ukraine is guaranteed (Resolution of the Grand Chamber of Supreme Court of 30 January 2019 p. in proceedings № 442/456/17).[41]

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36 Case of *Oleksandr Volkov v Ukraine* (Application No 21722/11) <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-115871%22]}> (accessed 10 May 2021).

37 Case of *Vyerentsov v Ukraine* (Application No 20372/11) <https://www.conjur.com.br/dl/decisao-corte-europeia-ucrania.pdf> (accessed 10 May 2021).

38 Decision of Constitutional Court of Ukraine, 18 June 2020, No 5-p(II)/2020 <https://zakon.rada.gov.ua/laws/show/va05p710-20#Text> (accessed 10 May 2021).

39 Resolution of the Grand Chamber of Supreme Court of 26 January 2021 in proceedings No 522/1528/15-ц <https://zakononline.com.ua/court-decisions/show/95509407?from=%E2%84%96%20522%2F1528%2F15-%D1%86> accessed 9 April 2021.

40 Resolution of the Supreme Court composed of the Joint Chamber of the Administrative Court of Cassation of 11 February 2020 in administrative proceedings No 816/502/16 <https://zakononline.com.ua/court-decisions/show/87901201?from=%20%D1%81%D0%BF%D1%80%D0%B0%D0%B2%D0%B0%20%E2%84%96816%2F502%2F16> accessed 9 April 2021.

41 Resolution of the Grand Chamber of Supreme Court of 30 January 2019 in proceedings No 442/456/17 <https://zakononline.com.ua/court-decisions/show/79684887?from=%E2%84%96%20442%2F456%2F17%20> accessed 9 April 2021.

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V. Horodovenko notes that the condition for the full functioning of the judiciary is its institutional independence. He believes that

> Support for the institutional independence of the judiciary is a necessary precondition for the implementation of the principles of separation of powers, the rule of law and the right for fair trial, which indicates its universality in the constitutional and legal dimension.[42]

Developing this thesis, we must note that the judiciary becomes a full-fledged branch of government in a democratic society only if it acquires the ability to apply generally accepted concepts of the rule of law, justice, and the priority of human rights. The actual application by the court in a particular case of a universal value to replace or develop a rule of law that is vague, ambiguous, contains gaps or internal conflicts, is aimed at effective restoration of violated personal rights, and testifies to the institutional independence of the judiciary and its functional ability to maintain regulations, adopted by the state.

It is quite reasonable to say that legal certainty is a principle and requirement of the rule of law, based on the traditional European approaches to this concept. Even though the fact that legal certainty does not belong to the constitutional principles directly stated in the Basic Law, this does not prevent its active application in Ukraine, in particular, in the practice of the Constitutional Court of Ukraine,[43] as well as courts of general jurisdiction. Accordingly, the normative nature of consolidation of the generally accepted principles does not affect the peculiarities of its application in practice. These approaches provide an opportunity to further argue the conclusions that are important for understanding the provisions proposed in the first part of this article.

4 CONCLUSIONS AND REFLECTIONS ON THE FURTHER STUDY OF THE ESSENCE OF LAW IN MODERN SOCIETY

S. Alekseev, a theorist of law who played a decisive role in the development of modern private law after the collapse of the Soviet Union, noted that

> Law is not only norms; without norms, without *normativityas* a feature of law, there is no law … normativity, no matter how widely this defining feature of law is interpreted, in principle can not be expressed in anything other than norms, general formalized written rules of conduct.[44]

Accordingly, for Soviet society, law is not just a system of norms but a system of norms established or sanctioned by the state.[45]

Such an understanding of normativity and law demands a focus on the formal (positive-empirical) side, neglecting its essential qualities. As a result, the essence of normativity (due diligence of law) is replaced by state coercion, not to mention an impoverished legal

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42 Horodovenko V, 'Institutional independence of judiciary in Ukraine: constitutional aspects' (2021) 1 Visnyk Konstytutsiynoho Sudu Ukrayiny 85 <https://ccu.gov.ua/sites/default/files/gorodovenko_v._instytuciyna_nezalezhnist_sudovoyi_gilky_vlady_v_ukrayini_konstytuciyno-pravovyy_aspekt.pdf> (accessed 10 May 2021).

43 G Ognevuik, 'Legal certainty principle in the decisions of constitutional courts of Ukraine and other countries' (2019) 23 Visnyk Natsionalnoho universytetu 'Lvivska politekhnika'. Serie: Yurydychni nauky 30. <http://ena.lp.edu.ua:8080/handle/ntb/47744> (accessed 10 May 2021).

44 S Alekseev, *Theory of law* (BEK 1995) 320.

45 M Marchenko, *Theory of law and state* (Velbi 2004) 640.

understanding. In addition, an important feature of normativity is not taken into account as a method of objectification (form) of the due diligence of law because the due diligence of law is not derived from the dictates of the state (empirical phenomenon). Accordingly, the vast array of legislation that becomes mandatory does not improve legal mechanisms or ensure the rule of law and access to justice but only complicates the structure of the legal system, which is saturated with cross-cutting rules that often contradict each other or established approaches.

Interpreting the normativity of law as being universally binding, different researchers have seen the source of such universality differently, i.e., who should be the subject of law-making. The prevailing approach in the Soviet era was the 'general expression in the form of state will, in the form of law' – the source of universal will and its expression is the state will

> In the normativity of law, as in other qualities, it is manifested that the content of law is formed by the state will. This allows to make the will contained in the law, universal, generally binding, authoritative.[46]

A more modern vision of normativity, proposed by the Ukrainian theorist of law M.V. Tsvik,[47] who believes that

> the normativity of law is that it contains universally binding rights and responsibilities for an indefinite number of subjects, long and repeatedly applied to the life situations provided by it… The main manifestations of law – legal relations, norms, principles and legal awareness – have a recurring nature in the establishment and implementation of law and in this sense are also normative.

According to Tsvik, it results from the fact that 'the repetition of certain actions, which eventually become a pattern of behavior, leads to their internal perception by people as obligatory'.

In our opinion, Soviet jurisprudence, in the conditions of the methodological monopoly of materialist dialectics, failed to overcome the dualism of the due diligence of law and the existing legal regulations and only made an attempt to eclectically justify the derivation of the due diligence of law from the existing legal reality. The generality of legal regulations, on the other hand, continues to rely on state security (albeit with reference to the possibility rather than the obligation to use coercion on offenders). The law applies to all because, in the case of an offence, compliance is guaranteed by the state. Thus, the normativity of law again can not get rid of state guardianship. In addition, this approach presupposes that the law can not be violated, which confirms the *a priori* negative (criminal) nature of a man.

Norms of law, being rooted in human existence, also cannot be fictions, depend on external (state) coercion, and be part of a symbolic reality. The norms of law reflect the due diligence of law in relations between people as beings with moral autonomy. Law is an adequate expression of human existence – the social dimension of objective reality. Therefore, the norms of law cannot be subjective, as they are rooted in human existence. Nor can the norms of law be called objective because such 'objectivity' disappears when a person leaves the social dimension. The norms of law are characterised by objectivity, as a synthesis of reality and effectiveness, only in the social dimension of objective reality as a space of human relations. Thus, law is intersubjective. Social beings, being immersed in the life world, directly feel for themselves (at the level of consciousness) the due diligence of law, caused by the influence of the normative force of law. Therefore, the consequence of an incorrect understanding of the essence of law and regulations is the public perception of judicial decisions and their

46 S Alekseev, *General theory of law in 2 volumes*, Volume 1 (Yuridicheskaya Literatura 1981) 361

47 O Petrishyn, S Shevchuck, *Problems of theory of law in manuscripts of M. V. Tsvik* (Pravo 2010) 272.

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non-implementation, which leads to the search for possible options for appeal, cancellation, or change to avoid the end result. The enforcement of decisions or state coercion in general as an element of law-making cannot be effective in the modern paradigm of sustainable development of the world because the cost of its maintenance far exceeds the expectations and results achieved.

Our proposed understanding of normativity as a socio-cultural phenomenon distinguishes the latter as a function of the legal system, which is intended to streamline (settle) its structural elements, including social (legal) relations. The normativity of law is a defining feature of law, which, based on the reflexive ability of a man, is a method of objectification (formation) of due diligence of law (legal values) and focused on the relationship of proper patterns of behaviour in social subjects, in particular, good faith and a proper attitude to legal norms and the objectified reality, which reflects the value for each subject and for society as a whole. At the same time, normativity is characterised by a reflexive combination of generally binding and significant nature of law for an unlimited number of subjects, which are defined by the due diligence of the norm (or another medium) through its integrated value.

The judiciary in a democratic state, governed by the rule of law, plays an exclusive role in the protection of the rule of law by means of interpreting provisions of law and restoring violations in individual cases. The effectiveness of the judiciary is ensured, among other means, by the ability to effectively fill gaps in legal regulation and apply instruments of restoring subjective rights, taking into account the content of universal values, which serve as a criterion for internal assessment of the content of legal acts in correlation with the rule of law requirements.

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Case Note

LIMITS OF A JUDGE'S FREEDOM OF EXPRESSING HIS/HER OWN OPINION: THE UKRAINIAN CONTEXT AND ECTHR PRACTICE

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Summary: 1. Introduction. – 2. The National Conception of a Judge's Communicative Behaviour. – 3. Criteria for the Admissibility of a Judge's Complaint in Violation of His/Her Conventional Right to Freedom of Expression. – 4. The Judge's Right to Express an Opinion vs Right to a Fair Trial. – 5. Conclusion.

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The authors declare that they were not involved in any state body's activities. Prof. Khotynska-Nor and Prof. Moskvych serve as Members of the Scientific Advisory Board of the Supreme Court but do not represent any views of this body in this research, nor are they bound by that body in their legal research.

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LIMITS OF A JUDGE'S FREEDOM OF EXPRESSING HIS/HER OWN OPINION: THE UKRAINIAN CONTEXT AND ECTHR PRACTICE

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Abstract *This paper examines the degree of permissible interference with a judge's freedom of expressing his/her own opinion and convictions. A question is raised about the limits of a judge's freedom of expression and discretion of the state in establishing his/her communicative behaviour, taking into account the established practice of the European Court of Human Rights (hereinafter ECtHR, the Court). Understanding these limits is important not only for individual judges but also for society as a whole, as restrictions on freedom of expression may affect the state's perception of the rule of law.*

Systematic analysis of the key documents that regulate the issue of freedom of expression of a judge in Ukraine allows us to identify several spheres of imperative regulation of a judge's behaviour in the context of communicative activity: during the administration of justice (in court procedure); in public speeches, particularly in the media; during the implementation of other activities not prohibited for the judge – literary, scientific, educational; during Internet communication; in everyday life.

ECtHR case-law in the context of assessing the limits of a judge's freedom of expressing one's opinion develops in two directions. In the first, the judge's freedom is considered in the context of Art. 10 (freedom of thought, conscience, and religion, freedom of expression, and freedom of assembly and association) of the European Convention on Human Rights (hereinafter ECHR, the Convention). In the second, the right to freedom of expression is limited to the right to a fair trial of others (in the context of impartiality and independence of a court within the meaning of Art. 6 of the ECHR). In general, the matter of judicial evaluation was the statements of judges concerning cases that were in their proceedings; those criticising judicial reform measures and other administrative actions; those which criticised their colleagues.

The results of the analysis allow us to conclude that, despite the different preconditions, different circumstances, and varying implementation reflections, the freedom of a judge to express his/her opinion is limited by his/her special status as a state servant (in a broad sense). Where the boundary is in a particular case should be determined by considering the specific circumstances. However, national law enforcement authorities must develop their own criteria for assessing the balance of public and private interests in a judge's communicative behaviour.

Keywords: *judiciary, authority of a judiciary, status of a judge, ethics of a judge, freedom of speech, freedom of expression, European Court of Human Rights.*

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1 INTRODUCTION

In any legal state, the judiciary has a special place as a guarantor of justice and the fundamental values of democracy. The effective functioning of the judiciary is a necessary condition for implementing the rule of law doctrine in any democratic state. The judge, who represents the judiciary in society as a person who administers justice, will always be in the focus of the public, experts, and all those involved in the creation of judicial reform in Ukraine.

Through the prism of assessing the judge's behaviour and his/her statements, both in court and outside it, a public image of a fair trial and trust in the judiciary is formed.[1] That is why it is important that a judge's motives and reflections correspond to the existing values and norms of morality in society. This situation determines the existence of certain restrictions, additional requirements, and responsibilities of the judge regarding his/her communicative behaviour.[2]

Thus, in his/her professional and daily activities, a judge must adhere to the rules of professional ethics, which are aimed at establishing respect for the high status of judges and the credibility of the judiciary in society. Domestic legal regulation of this issue is reduced to an ethical requirement for a judge – a judge's public speech should be characterised by restraint, caution, and neutrality. A judge's freedom of expression is also a matter of special attention for the ECtHR, which has formulated and developed a number of positions in its decisions that are valuable for the development of society, the status of a judge, and the judiciary of any country. In particular, the ECtHR is gradually developing a model for distinguishing between the civil rights of a judge as a person and the duties of a public figure in the context of freedom of expression. The Court continues to develop new concepts and approaches that could broaden the usual understanding of what is covered by the guarantees of Art. 10 of the ECHR, and it may narrow them too. Particular attention is paid to cases that form positive obligations of the state under Art. 10 of the ECHR – cases on freedom of expression in political discussion, the protection of confidential sources of information, the responsibility of news Internet portals for disseminating comments about judges, 'hate speech' between public institutions, etc.

Developing a system of reasonable and fair criteria for determining the permissible communicative behaviour of a judge is important not only for the individual judge but also for society as a whole, as restricting freedom of expression could negatively affect the perception of the rule of law.[3] The approaches the ECtHR has developed in the context of the limits of freedom of expression of judges should be gradually implemented in national law enforcement and regulatory practice and developed with consideration for the national context.

1 Canadian Judicial Council Ottawa, Ontario, Ethical Principles For Judges. <https://cjc-ccm.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf> (accessed 03 June 2021).

2 C Gray, Ethical Standards for Judges American Judicature Society. <https://www.ncsc.org/__data/assets/pdf_file/0026/17594/ethical-standards-for-judges.pdf> (accessed 03 June 2021).

3 European Commission for Democracy through Law (Venice Commission), Report on the Freedom of Expression of Judges, Venice, 19-20 June 2015. <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)018-e> (accessed 03 June 2021).

2 THE NATIONAL CONCEPTION OF A JUDGE'S COMMUNICATIVE BEHAVIOUR

The right to freedom of expression, according to researchers, is one of the most recognised human rights – it is enshrined in the constitutions of more than 87% of countries and appeared in constitutions as early as the eighth century.[4] A judge, like anyone else, has the right to freely express his/her views, which is, among other things, a reflection of his/her independence. Art. 10 of the Convention provides that everyone has the right to freedom of expression and the Constitution of Ukraine in Art. 34 guarantees everyone the right to freedom of thought and speech, to freely express one's views and beliefs. At the same time, the professional status and role assigned to a judge in society impose certain ethical constraints related to his/her responsibilities to exercise and maintain the authority of a court and judiciary.[5]

The Bangalore Principles of Judicial Conduct state that

> A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but, in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.[6]

As we can see, a judge's right to freedom of speech and its exercise is bordered, limited, and assessed in the context of threats and risks to its independence and impartiality, as well as in the context of damage to the authority of professional status, the judiciary, and public confidence in it.

In the modern conditions of the state formation and development of Ukrainian society, which is still in the whirlpool of judicial reforms, the judge has become an active participant in communication processes that encourage active positioning of the judiciary in the information space, defending their own views on the problems of its functioning, protecting the corporate interests of the judiciary community, and, sometimes, the personal interests of a judge. That is why the issue of a normative communicative model of judicial behaviour is being actualised.[7]

The provisions of the Bangalore Principles of Judicial Conduct formulate the basics of the judge's communication model: before considering a case, a judge must refrain from any comments that could in any way affect the case or call into question the fairness of the trial (para. 2.4). The norms of the Code of Judicial Ethics that are in force in Ukraine correspond to this provision. In particular, with regard to the conduct of a judge in the administration of justice, it is provided that

> a judge must perform the duties of a judge impartially and neutrally and refrain from… statements that may cause doubt on the equality of professional judges) (Art. 10);
>
> a judge could not make public statements, comment in the media on cases pending before the court, and question court decisions that have entered into force. A judge has no right to disclose information that became known to him/her in connection with the hearing of a case (Art. 12);

4 M Janice, R Kay, E Bradley, *European human rights law (Practice and comments)* (Publishing House 'Human Rights', 1997) 179.

5 Constitution of Ukraine of 28 June 1996 <http://zakon2.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80/page3> accessed 03 June 2021.

6 Bangalore Principles on Judicial Conduct of 19 May 2006: Approved by UN Economic and Social Council Resolution of 27 July 2006 No 2006/23. <https://zakon.rada.gov.ua/laws/show/995_j67#Text> (accessed 03 June 2021).

7 Ethical Principles for Judges (n 1); Code of Judicial Ethics International Criminal Court. <https://www.icc-cpi.int/NR/rdonlyres/A62EBC0F-D534-438F-A128-D3AC4CFDD644/140141/ICCBD020105_En.pdf> (accessed 03 June 2021).

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> a judge holding an administrative position in a court must refrain from statements that may cause doubt on the uniform status of judges and on the fact that judges collectively decide on the organisation of the work of a court (Art. 13).

Outside the court, a judge's participation in social networks, Internet forums, and other forms of communication on the Internet are permissible, but a judge may only post and comment on information that does not harm the authority of the judge and judiciary (Art. 20).[8]

These days, normative and law enforcement practice has developed several areas of regulation of a judge's communicative behaviour:

(a) during the administration of justice (in a trial);
(b) in public speeches, in particular in the media;
(c) during Internet communication;
(d) in everyday life.[9]

For the first one, the communicative behaviour of a judge in the trial is directly related to the requirements of independence, impartiality, and objectivity of the trial, non-discrimination of participants of the trial, and the constitutional principle of justice: respect for the honour and dignity of all participants.[10]

In the scholarly literature, it is noted that the interaction of the court with other participants of the trial on the basis of mutual respect provides a regime of a court hearing, including communication, the exercising during the trial of their rights, duties, any procedural actions performed in the context of their awareness of the importance of each other's responsibilities, and the social role of each of them.

> …Manifestations of mutual respect… during the proceedings could be varied and consist of: polite treatment of each other; respectful and calm manner of communication in court; tactful and sustained manner of behavior; … avoidance of disputes between each other and incorrect statements addressed to each other, etc.[11]

That is, both the form and content of statements by the judge during the proceedings should serve as an expression of respect for the participants of the trial. A judge may not use offensive words or words that may humiliate or discriminate against others. At the same time, his/her words and expressions must be neutral and unbiased so that there is no doubt about his/her independence and impartiality. Any verbal expression of sympathy or antipathy to the participants of the trial could be regarded as a violation of the right to justice by an independent and impartial tribunal.

Regarding the requirements for public speeches of judges, particularly in the media, there is an important balance between the right to self-expression of members of the judicial community and not harming the authority of the judiciary. Restrictions due to a direct ban on judges from speaking publicly about cases pending are fair enough.[12]

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8 Code of Judicial Ethics: Approved by the decision of the XI Regular Congress of Judges of Ukraine of 22 February 2013. <https://zakon.rada.gov.ua/rada/show/n0001415-13#Text> (accessed 03 June 2021).

9 O Khotynska-Nor, 'Judge's ethics and freedom of expression in the context of European Court of Human Rights judgments' (2020) 12 Entrepreneurship, Economy, and Law 284-289. <https://doi.org/10.32849/2663-5313/2020.12.49>

10 K Trykhlib, 'Law-making activity in the case law of the Constitutional Court of Ukraine (2019) 19 (2) International and Comparative Law Review 27-75. DOI: 10.2478/iclr-2019-0014.

11 C.H. (Remco) van Rhee, 'Towards harmonised European rules of civil procedure: Obligations of the judge, the parties and their lawyers' (2020) 1 (6) Access to Justice in Eastern Europe. <http://ajee-journal.com/upload/attaches/att_1587629785.pdf>

12 Judges' freedom of expression: Seeking a balance between constitutional right and reputation of the judiciary. <https://pirc-musar.si/en/freedom-of-expression-of-judges/> (accessed 03 June 2021).

As to the consequences of the public discussion by a judge of the course or the participants of the proceedings of a case hearing by him/her, the case of *Lavents v. Latvia* is illustrative, in which the judge

> criticized the defense's position in the press, suggested possible results of the trial before its conclusion and expressed surprise that the applicant had insisted on his innocence.

In the Court's view, these statements meant that the judge had decided on the outcome of the case and was ready to reach a guilty verdict before the case was concluded on the merits. Such statements contradicted para. 1 of Art. 6 of the Convention and forced the applicant to fear that the judge was biased. Consequently, the Court concluded that there had been a violation of para. 1 Art. 6 of the Convention regarding the lack of impartiality of the court, and there was no need to consider whether the 'court was independent', as required by the Convention.[13]

Public discussions of judicial reform with the participation of judges are of particular interest since many reform measures, particularly in Ukraine, are aimed directly at changes in legal status, which does not always find support and provoke a barrage of criticism.[14] In some cases, the rhetoric of judges may be marked by sarcasm or excessive sharpness in statements, which is incompatible with the neutrality required of the judiciary. In this regard, the Consultative Council of European Judges noted the need to uphold a balance between the right of judges to freedom of opinion, expression, and the requirement of neutrality

> Judges must (even if their participation in a political party or public discussions on the main problems of society could be prohibited) refrain from any political activity that undermines their independence or threatens their impartiality. However, judges should be allowed to participate in discussions concerning national judicial policy.[15]

Perhaps one of the most well-known current decisions is *Baka v. Hungary*, in which the ECtHR has formulated a position on the right of a judge to publicly criticise measures aimed at reforming the judiciary. In general, the ECtHR considers that since a judge is a civil servant, the administrative power has discretion in imposing restrictions on a judge's freedom of expression, but it cannot restrict a judge from expressing his/her opinion on issues that have been a matter of public debate. Still, it is empowered to assess whether a judge's statements are unacceptable public speeches that violate the honour, dignity, and professional reputation of their colleagues. For example, in *Di Giovanni v. Italy*, the ECtHR found no violations of Art. 10 of the Convention, stating that 'the serious rumors which the applicant made public in her interview concerning her fellow judge who could be identified without giving him a chance to interpret doubts in his favor were completely unfounded'.[16] In another case, *Kudeshkina v. The Russian Federation*, the applicant, who was a judge and ran for the State Duma, criticised the level of independence of judges in various interviews and accused the head of the court of pressuring the court. As a result of disciplinary proceedings, her powers were terminated. In its decision, the ECtHR recalled that

13 Judgment of the European Court of Human Rights of 28 November 2002 in *Lavents v Latvia.* <https://zakon.rada.gov.ua/laws/show/980_175#top> (accessed 03 June 2021).

14 G Borkowski, O Sovgyria, 'Current judicial reform in Ukraine and in Poland: Constitutional and European legal aspects in the context of independent judiciary (2019) 2 (3) Access to Justice in Eastern Europe. <http://ajee-journal.com/upload/attaches/att_1560677669.pdf> (accessed 03 June 2021).

15 Opinion No 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality. <https://court.gov.ua/inshe/mss/> (accessed 03 June 2021).

16 Judgment of the European Court of Human Rights of 9 July 2013 in case *Di Giovanni v Italy*. <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-4595177-5556407&filename=003-4595177-5556407.pdf> (accessed 03 June 2021).

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> judicial officials have a duty to exercise restraint in exercising their freedom of expression in all cases where the authority and impartiality of justice may be called into question.[17]

3 CRITERIA FOR THE ADMISSIBILITY OF A JUDGE'S COMPLAINT IN VIOLATION OF HIS/HER CONVENTIONAL RIGHT TO FREEDOM OF EXPRESSION

Most judges who have been prosecuted for misconduct have complained to the ECtHR about the government's violation of their Conventional right to freedom of expression under Art. 10 of ECHR.[18] The Court is often faced with the question of the admissibility of such complaints since the judge (as a subject of an appeal to the court, the complainant) could be considered both as an individual and as a representative of the state, and Art. 34 of the ECHR excludes public authorities and public institutions, as well as persons acting on their behalf, from those who are empowered to lodge a complaint with the ECtHR. Therefore, at this stage, the ECtHR conducts a test for the admissibility of the complaint.

An example of a positive decision on the admissibility of a complaint is *Baka v. Hungary*, which concerned the President of the Supreme Court of Hungary, who challenged his early dismissal due to his public criticism of certain laws adopted by parliament. The ECtHR emphasised that

> issues concerning the functioning of the justice system belong to the sphere of public interest and generally enjoy a high degree of protection under Art. 10 of the Convention… Even if the issue under discussion is of political interest, it is not in itself sufficient to prevent judges from speaking on it… Issues concerning the separation of powers may be related to very important issues of a democratic society in which the public has the right to be informed, and which are referred to political discussion sphere.[19]

The ECtHR laid down the first criterion for the system of assessing the admissibility of a judge's complaint regarding a violation of Art. 10 of ECHR by this decision. If a complaint alleging a violation of a judge's right to express an opinion is declared admissible, the ECtHR must consider whether the restriction on a judge's freedom of expression complies with the principle of reasonableness, for which the doctrine establishes three criteria:

(1) an interference in a judge's right of expression should be set by the law (that is, national law provides for this, and therefore the limits of the normatively defined model of conduct of a judge are predictable);

(2) it should have a legitimate aim (a judge is a public figure who performs state functions – they have priority over his/her civil rights, although not absolute one);

(3) it should be necessary for a democratic society (i.e., the limits of permissible state interference with a judge's right to freedom of expression must be reasonable, proportionate, and justified by social, constitutional values).

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17 Judgment of the European Court of Human Rights of 26 February 2009 in the case *Kudeshkina v Russian Federation.* <https://hudoc.echr.coe.int/eng#{%22appno%22:[%2229492/05%22],%22itemid%22:[%22001-91501%22]} > (**accessed** 03 June 2021).

18 M Rudenko, I Malinovska, S Kravtsov, 'Justice for judges in Ukraine: Looking for peace and strong judiciary institutions in a sustainable society' (2021) 10 (1) European Journal of Sustainable Development 339. <https://doi.org/10.14207/ejsd.2021.v10n1p339> (accessed 03 June 2021).

19 Judgment of the European Court of Human Rights of 23 June 2016 in the case *Baka v Hungary*. <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-163113%22]} > (accessed 03 June 2021).

In saying that the restriction of the right to freedom of expression 'must be provided by law', the ECtHR understands the term 'law' in the broadest sense of the word, which includes any form of legal regulation. The key point is that legal requirements must be accessible, understood, and determine the consequences of their violation.

The assessment of the legitimate aim of restricting a judge's freedom of speech is interpreted by the Court through the principle of respect for the authority of the court and guarantees of impartiality of justice, sometimes in combination with the protection of the rights of other persons.[20]

Most of the violations of the right to freedom of expression found by the Court in relation to a judge concerned the controversial justification of the need to restrict him/her in a democratic society. According to the case-law settled by the Court, a restriction of a right is necessary if there is a pressing social need and if it is proportionate to the legitimate aim pursued and its grounds are 'relevant and sufficient'. Applying these criteria, the ECtHR determines whether the national authorities have reached a balance between a judge's right to freedom of expression and the legitimate interest of the state to ensure the proper functioning of the judiciary.

In the case of *Wille v. Liechtenstein*, concerning the President's decision not to reappoint the President of the Administrative Court after he had spoken on a constitutional issue and his point of view did not coincide with the President's, the ECtHR stated that liabilities referred to in para. 2 of Art. 10 are of particular importance because officials belonging to the judiciary could be expected to restrict their freedom in cases where the authority and impartiality of the judiciary may be threatened. Based on this starting point, the ECtHR assesses the various circumstances of the case, including the consequences of a public opinion: for the judiciary, for society, and for the judge. Furthermore, the following are added to the system of the facts assessed:

1. the context of the public discussion;
2. the judge's motives to express himself in a certain way;
3. appropriateness of expression of opinion;
4. the quality of the national procedure for assessing the consequences of a judge's communicative behaviour and the procedure for prosecuting for violating the established restrictions on a judge's freedom of expression.

4 THE JUDGE'S RIGHT TO EXPRESS AN OPINION VS RIGHT TO A FAIR TRIAL

Public speeches by a judge and the expression of his/her opinion could be considered a violation of Art. 6 of the ECHR in the context of failure to ensure an impartial and independent court. In its practice, the ECtHR has also developed two criteria for assessing a complaint made for these reasons, using a test of subjectivity and objectivity. The test of subjectivity concerns the personal beliefs of the judge and answers the question of whether the judge has a prejudice against the case.

The ECtHR has repeatedly stated that it should be assumed that the judge is impartial until proven otherwise (presumption of impartiality (neutrality) of the judge). For example, in *Kyprianou v. Cyprus*, the ECtHR concluded that there had been a violation of para. 1 of Art.6 of the Convention (on the impartiality of the court). Among the reasons, the ECtHR noted that the judges had acknowledged in their judgment to the applicant that 'as human

20 S Dijkstra, 'The freedom of the judge to express his personal opinions and convictions under the ECHR' (2017) 13 (1) Utrecht Law Review 7.

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beings' they had been 'deeply offended' by the applicant. According to the ECtHR, such a statement demonstrated that the judges had been personally offended by the applicant's words and actions. In addition, the expressive language used by the judges in sentencing conveyed a sense of indignation and shock, contradicting the impartial approach expected of the court in proclaiming its acts. In addition, the judges had expressed their views earlier in their debate with the applicant, stating that they found him guilty of a criminal offence – contempt of court.[21]

The test of objectivity concerns other characteristics of the court, including the existence of guarantees that exclude doubts about impartiality, for example, cases of doubts about a judge's impartiality due to his/her political activity.

Thus, in *Pabla Ky v. Finland*, the applicant argued that on the basis of the theory of separation of powers, his right under Art. 6 of the ECHR was violated because the judge was also a member of parliament. The ECtHR ruled that Art. 6 of the ECHR was not violated because the judge was not involved in legislative, executive, or advisory activities on the matter which was the subject of the applicant's proceedings, so there is no evidence that he participated in 'the same' or in 'the same decision'. However, the ECtHR assumes that there is no clear line between objective and subjective impartiality, as the judge's conduct may affect both of them. Therefore, the circumstances of each case are analysed according to both criteria.

With regard to a judge's opinion expressed in the media, interviews, or open letters, the ECtHR has formulated the following general rule

> …among other things, the judiciary should exercise the utmost discretion in the cases before them in order to save the image of impartial courts. Common sense should lead them to self-limit the use of the press, even in the case of provocations. This commitment is imposed on them by the high interests of justice (*Olujic v. Croatia*).

There are also cases concerning a judge's membership in certain organisations. In particular, the ECtHR considered cases concerning the membership of judges in the Masonic lodge. Thus, in *Kiiskinen and Kovalainen v. Finland* and *Salaman v. The United Kingdom*, the ECtHR ruled that the judges' membership of that organisation did not infringe the applicant's right to a fair trial because it did not establish a link between the judge and the other party to the proceedings. Such an approach could, without a doubt, be extended to a judge's membership in other organisations and societies. However, the nature of these organisations plays an important role, as demonstrated in the dissenting opinion of the five judges in *Maestri v. Italy*, considered under Art. 11 of the ECHR (freedom of assembly and association), in which the judges considered membership in an Italian Masonic lodge to be incompatible with the status of a judge because of its specific image and links to organised crime.

The ECtHR has also paid attention to the assessment of the expression of emotions by a judge. The court found that the way the judge conducted the case, as well as the tone and content of his/her oral or written decision, may violate Art. 6 of the ECHR. An analysis of the case-law of the ECtHR reveals a gradual strengthening of the ECtHR's requirements for judges in such cases.

We can conclude that the violation of Art. 6 of the ECHR will be stated in decisions where the circumstances of the case indicate that the judge's opinions and beliefs are expressed in the form of obvious bias or when his/her activities are associated with a party or a particular case.

21 Judgment of the European Court of Human Rights of 15 December 2005 in the case *Kyprianou v Cyprus*. <https://hudoc.echr.coe.int/eng#{%22appno%22:[%2273797/01%22],%22itemid%22:[%22001-71671%22]}> (accessed 03 June 2021).

5 CONCLUSIONS

The right of a judge to freedom of thought and expression is his/her inalienable right as a person and a citizen. The ECtHR, in interpreting Art. 10 of the European Convention, which guarantees everyone 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers', highlights the crucial importance of this right for the development of democracy, emphasising that freedom of expression is one of the basic foundations of a democratic society, a fundamental condition for its development, and an important condition for the realisation of the abilities and capabilities of each person.

However, the special status of a judge and his/her role in society allows the state to restrict his/her civil right to freedom of expression and normatively determine the model of his/her communicative behaviour. In this sense, it is important to find a reasonable balance between the principle of equality of rights and the principle of proportionality and reasonableness of restricting the rights of some people, in particular, judges, that is acceptable in a democratic society.

A judge's exercise of the right to freedom of expression is a necessary condition for the development of a democratic state in which the judiciary communicates with society and influences state-building processes. At the same time, in expressing his/her opinion, a judge must adhere to ethical standards and not jeopardise the basic values of the rule of law, including the authority of the judiciary. None of his/her words should call into question the independence and impartiality of the court or violate the right of another person to a fair trial in the context of Art. 6 of the ECHR.

The abovementioned points highlight the issue of balancing private and public interests in a democratic state. The formulation of the limits of a judge's freedom of expression that is acceptable in a democratic society must be based on clear, understandable, and reasonable criteria that consistently uphold the fundamental values of a democratic state governed by the rule of law – the independence and authority of the judiciary and human rights.

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Case Note

MEDIATION AND COURT IN UKRAINE: PERSPECTIVES ON INTERACTION AND MUTUAL UNDERSTANDING

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Summary: 1. Introductory Remarks on Mediation Development in Ukraine. – 2. The Theory and Legal Regulation of Mediation. – 3. How Courts Interpret Mediation in the Ukrainian Case-law. – 4. Some Reflections and Final Remarks.

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MEDIATION AND COURT IN UKRAINE: PERSPECTIVES ON INTERACTION AND MUTUAL UNDERSTANDING

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Abstract *In this note, the authors identify some problems concerning the introduction of mediation in Ukraine in terms of its use in the consideration and resolution of court cases. Despite the lack of clear legal regulation for mediation, courts in Ukraine still try to use this mechanism of pre-trial dispute resolution. Particular attention is paid to the law enforcement activities of courts in criminal and administrative cases, in which courts try to equate the conciliation procedure with the mediation procedure. These approaches clearly follow from the Resolutions and Recommendations of the Committee of Ministers of the Council of Europe and the settled case-law of the European Court of Human Rights (ECtHR) since, back in 1975, the ECtHR in its decision* Golder v. The United Kingdom *ruled that it is unlikely that the rule of law can be imagined without access to justice. However, the presumption that the courts are the main institution for resolving disputes continues to be undermined by the proliferation of alternative forms of dispute resolution, both agreement-based and judicial.*

Keywords: *mediation, access to justice, judicial mediation, case law, dispute resolution, Ukraine*

1 INTRODUCTORY REMARKS ON MEDIATION DEVELOPMENT IN UKRAINE

One of the priority areas for justice reform in Ukraine is increasing the efficiency of the judiciary to ensure the right to judicial protection and equal access to justice for everyone.[1] According to the modern understanding of the international standard of access to justice,

1 Decree of the President of Ukraine of 11 June 2021 'On the Strategy for Reforming the Judiciary, Judicial System and Related Legal Institutions for 2015-2020' <https://zakon.rada.gov.ua/laws/show/276/2015#Text> accessed 19 June 2021; Decree of the President of Ukraine of 11 June 2021 'On the Strategy for the Development of the Justice System and Constitutional Judiciary for 2021-2023' <https://zakon.rada.gov.ua/laws/show/231/2021#n10> accessed 19 June 2021.

the state must guarantee access not only to the classic forms of the judiciary but also to alternative dispute resolution methods introduced at the national level.[2]

In this regard, alternative methods of civil law dispute resolution are becoming more relevant. On the one hand, this relieves the judicial system and increases its efficiency. On the other, it expands the protection of violated, unrecognised, and disputed rights and interests of persons to choose the most optimal way of considering the dispute, taking into account the nature and complexity of the latter, the peculiarities of parties involved in the dispute, the importance of the dispute for the person, etc.

In this context, mediation deserves special attention as a consensual (conciliatory) way of alternative resolution of civil disputes. In other countries, it has long been considered the traditional and most effective way to resolve conflicts, and recently, it has become increasingly popular in Ukraine.[3]

It should be noted that mediation, traditionally seen as an alternative to the formal administration of justice in state courts, is often used in court proceedings. In many countries today, various models of court-annexed mediation are successfully operating and developing, facilitating the direct integration of mediation procedures into the structure of civil proceedings.[4]

As a result of amendments to the Constitution of Ukraine,[5] the provision on unlimited judicial jurisdiction was changed. From now on, in accordance with Art. 124 of the Constitution of Ukraine,[6] the law may determine the mandatory pre-trial procedure for dispute resolution. In our opinion, mediation can become this kind of pre-trial procedure for settling disputes in some categories of cases, such as family and housing disputes, inheritance disputes, etc.

At the same time, the mediation procedure is not regulated by law in Ukraine,[7] even though it has already been mentioned in several legislative acts[8] and there are professional mediators operating in practice.[9] In view of this, an important issue, in our opinion, is law enforcement practice, especially judicial practice, which illuminates the understanding of the essence of the mediation procedure as it has developed in society. This may be the basis for further development of the concept of court-annexed mediation in Ukraine.

2 V Komarov, T Tsuvina, 'The Impact of the ECHR and the Case law of the ECtHR on Civil Procedure in Ukraine' 2021 1(9) Access to Justice in Eastern Europe 79-101. DOI: 10.33327/AJEE-18-4.1-a000047.

3 V Nekrošius, V Vėbraitė, Y Prytyka, I Izarova 'Legal, Social and Cultural Prerequisites for the Development of ADR Forms in Lithuania and Ukraine' (2020) 116 Teise (Law) 8-23. https://doi.org/10.15388/Teise.2020.116.1.

4 We can find examples in various jurisdictions, not only in leading states. In particular, see FK Shako, 'Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya' (2017) 1 TDM: Mediation & ADR. General vision on relations of a mediator and a judge may be found here: PN Thompson, 'Good Faith Mediation in the Federal Courts' (2011) 26 (2) Ohio St J on Dispute Resolution 363. Recent studies related to Covid challenges also cover this topic. See T Sourdin, J Zeleznokow, 'Courts, Mediation and COVID-19' Australian Business Law Review <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3595910> accessed 19 June 2021.

5 Law of Ukraine 'On Amendments to the Constitution of Ukraine (Concerning Justice)' of 2 June 2016 <https://zakon.rada.gov.ua/laws/show/1401-19#Text> accessed 19 June 2021.

6 Constitution of Ukraine <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text> accessed 19 June 2021.

7 For more the draft laws of Ukraine on mediation, see I Izarova, Yu Prytyka, S Kravtsov, 'Towards Effective Dispute Resolution: a Long Way of Mediation Development in Ukraine' (2020) 29 (1) Asia Life Sciences 389-399.

8 See Law of Ukraine 'On Social Services' <https://zakon.rada.gov.ua/laws/show/2671-19#Text> accessed 19 June 2021 and Law of Ukraine 'On Free Legal Aid' <https://zakon.rada.gov.ua/laws/show/3460-17#Text> accessed 19 June 2021.

9 'The National Association of Mediators claims 25 years of professional development in Ukraine' <http://namu.com.ua/ua/> accessed 19 June 2021.

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2 THEORY AND LEGAL REGULATION OF MEDIATION

Mediation is one of a variety of alternative dispute resolution procedures.[10] It is based on the voluntary participation of the parties, whereby a 'mediator' without auxiliary powers systematically facilitates communication between the parties to a conflict, enabling them to take responsibility for finding a solution to their conflict.[11]

Mediation offers a flexible, self-determined approach that can address all aspects of a dispute, regardless of their legal significance. Against this background, mediation, unlike litigation, is described as an alternative dispute resolution (ADR).

Given the relationship between litigation and mediation, three types of mediation are singled out:

1. Private mediation, which is completely independent of judicial proceedings. It often takes place without any subsequent court proceeding.
2. Mediation initiated by the court, which then takes place without any further court involvement.
3. Judicial mediation, which is more closely linked to the court as an institution in terms of the place of dispute resolution and the specialisation of judges-mediators.[12]

Mediation is distinguished from other types of alternative dispute resolution, such as arbitration, ombudsman procedures, conciliation, and structured negotiations. The main reasons for distinguishing these procedures from mediation reflect its characteristics: its voluntary and flexible nature, the lack of adjudicatory competence of the mediator (mediator), and the self-determination of the parties. If, for example, arbitrators and ombudsmen have the competence to issue (at least partly) binding decisions, then in the mediation process, the parties, not the mediator, decide whether the dispute can be resolved. A conciliator has a greater influence on the outcome than the mediator, for example, by announcing a (optional) decision on conciliation.

The purpose of mediation is to allow the parties to find a solution to their conflict in a sustainable and self-determined manner. The procedure is constructive by its nature and provides a chance for personal development and social growth for the parties to the dispute. The principle of voluntariness and the development of a solution by the parties themselves raises the expectation of substantive justice in resolving the dispute. It is expected that the results will benefit both parties or, at least, avoid anyone being worse off after the mediation.[13]

Ukraine has proclaimed the European integration direction of its development, so the analysis of European approaches to the legal regulation of mediation deserves more attention.

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10 This is a traditional view shared by majority of scholars. See L Boulle, A Rycroft, 'Mediation: Principles, Process, Practice' (1998) 167 JS Afr L; J Nolan-Haley, 'Mediation: The "New Arbitration"' (2012) 61 Harv Negot L Review; E Silvestri, 'The Singapore Convention on Mediated Settlement Agreements: A New String to the Bow of International Mediation? ' (2019) 3 (4) Access to Justice in Eastern Europe 5-11, V Terekhov, 'Online Mediation: a Game Changer or Much Ado About Nothing?' (2019) 3 (2) Access to Justice in Eastern Europe 33-50 and others.

11 Council of Europe, 'European Handbook for Mediation Lawmaking' (2019) 9 CEPEJ, 14 June 2019. <https://rm.coe.int/cepej-2019-9-en-handbook/1680951928> accessed 19 June 2021.

12 F Steffek, 'Mediation in the European Union: An Introduction' (2012) European Commission <https://e-justice.europa.eu/fileDownload.do?id=b3e6a432-440d-4105-b9d5-29a8be95408f> accessed 19 June 2021.

13 ibid.

The EU Directive,[14] which has been in force since 2008, defines the use of mediation as 'ensuring a balanced relationship between mediation and national justice' (Article 1). The application of this Directive is limited to cross-border civil and commercial disputes, including under EU law and in family and labour disputes.

According to the EU data, all member states implemented its provisions in national law by 21 May 2011. Many states have further developed several mandatory rules, which were followed by all member states. As noted in the report, the national mediation laws adopted in the member states differ greatly in the use of different models, in the legal provisions, and, above all, in the final results in the number of mediations generated.[15]

Eight years after the adoption of the Directive and five years after its transposition into national law, the Committee on Legal Affairs of the European Parliament (JURI) has carried out an analysis to determine which national model of mediation, among many existing ones, works most effectively to achieve the real goal of the Directive – to increase the number of EU people and businesses using mediation.[16] Therefore, the main problem in the development of mediation in the EU is to identify the main models of mediation used by member states in implementing the Mediation Directive.

As we have already mentioned, the mediation procedure is not regulated at the legislative level in Ukraine,[17] despite being mentioned in some normative acts.

In particular, in accordance with Art. 70 of the Civil Procedure Code (CPC) of Ukraine,[18] persons who are obliged by law to keep secret information entrusted to them in connection with the provision of professional legal assistance or mediation during the out-of-court settlement of a dispute may not be questioned about such information as witnesses.

In addition, according to Art. 1 of the Law of Ukraine 'On Free Legal Aid',[19] legal services include: providing legal information, consultations, and explanations on legal issues; preparing applications, complaints, and procedural and other legal documents; representing the interests of a person in courts, other state bodies, local governments, and before other persons; ensuring the protection of a person from prosecution; assisting a person in ensuring a person's access to secondary legal aid and mediation. It should also be noted that Art. 16 of the Law of Ukraine 'On Social Services'[20] defines mediation as one of the basic social services.

At the same time, the legislation lacks a legal definition of mediation and its features. This, in turn, as will be seen from our study below, leads to a somewhat improper application of

14 Directive 2008/52/EC of the European Parliament and of the Council of Europe of 21 May 2008 on certain aspects of mediation in civil and commercial matters <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF> accessed 19 June 2021.

15 Directorate-General for Justice (European Commission), 'Study for an evaluation and implementation of Directive 2008/52/EC – the Mediation Directive' (2016) <https://op.europa.eu/en/publication-detail/-/publication/6c84b6a6-913e-4231-a677-55f8fa9ccbb6> accessed 19 June 2021.

16 Directorate-General for Internal Policies, 'The Implementation of the Mediation Directive' (2016) <https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571395/IPOL_IDA%282016%29571395_EN.pdf> accessed 19 June 2021.

17 In particular, it is worth noting the efforts of the legislator to regulate the mediation procedure at the legislative level. On 15 July 2020, the Verkhovna Rada adopted in the first reading the draft Law 'On Mediation' No 3504, introduced by the Cabinet of Ministers of Ukraine, according to which one of the legal grounds is the application of mediation in any conflicts (disputes) that arise, in particular, on civil, family, labour, economic, and administrative legal relations, as well as in criminal proceedings for the conclusion of conciliation agreements between the victim and the suspect or the accused and in other areas of public relations.

18 Civil Procedure Code of Ukraine <http://zakon3.rada.gov.ua/laws/show/1618–15> accessed 19 June 2021.

19 Law of Ukraine 'On Free Legal Aid' (n 8).

20 Law of Ukraine 'On Social Services' (n 8).

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this concept in judicial practice. In our opinion, this significantly reduces the chances for the introduction and effective use of mediation in the future and should be considered very critically.

3 HOW COURTS INTERPRET MEDIATION IN THE UKRAINIAN CASE-LAW

In the case-law of Ukrainian courts, there are decisions in which courts apply the provisions on mediation. Such cases occur in civil and commercial proceedings, as well as in administrative and criminal proceedings.

During the analysis of judicial practice, a significant number of court decisions were found in which the courts mentioned mediation. At the same time, the content of the case and its application did not correspond to the generally accepted understanding.

In particular, when considering criminal cases, courts equate the mediation procedure with the conciliation procedure provided in Art. 46 of the Criminal Code of Ukraine (CrimPC).[21] In its decision, the court,[22] closing the proceedings, noted that Art. 46 of the Criminal Code of Ukraine enshrines the institution of mediation as an alternative way of resolving criminal disputes, which is based on mediation in the reconciliation of the parties, although, in fact, it goes about reconciliation with the victim (see below).

In accordance with this decision, the court notes that the release from criminal liability in connection with the reconciliation of the perpetrator with the victim allows: the victim to receive appropriate compensation more quickly for the damage caused to them; the person who committed the crime to be released from criminal liability; the state to save financial and other resources necessary for the investigation of these categories of cases.

The grounds for this type of exemption from criminal liability are the following: the person committed the crime for the first time; the act belongs to minor crimes (at the same time, it is not required that it falls within the category of so-called crimes of private prosecution); the person who committed the crime reconciled with the victim, and reimbursed the damage they caused or eliminated the damage.

Art. 46 of the CrimPC stipulates that a person who has committed a minor crime for the first time or a negligent crime of medium gravity shall be released from criminal liability if they have reconciled with the victim and reimbursed the damages.

Thus, in this case, the court, using the concept of mediation, equates it to the procedure of reconciliation between the victim and the accused, which creates a kind of illusory idea of mediation in criminal cases.

In another case, the court stated in its judgment[23] that

> During the conciliation of the parties in criminal proceedings, each of the parties to the criminal law conflict pursues its own interests. For the victim, it is the restoration of violated rights by compensating for the damage caused by the crime, for the protection of which they are endowed with the relevant rights in criminal proceedings.

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21 Criminal Code of Ukraine: Law of 5 April 2001 No 2341-III [2001] Vidomosti of the Verkhovna Rada of Ukraine (VVR) 25-26.

22 The decision of the Zolotonosha City District Court of Cherkasy region in the case No 695/2795/20 of 25 May 2021 <https://reyestr.court.gov.ua/Review/97164760> accessed 19 June 2021.

23 Decision of Vinnytsia City Court of Vinnytsia Region in case No 128/2072/19 of 5 March 2021 <https://reyestr.court.gov.ua/Review/95349004> accessed 19 June 2021.

> For the accused (suspect), it is the avoidance of criminal liability or the imposition of a minimum sentence. The state, in turn, being the bearer of public interest, regulates public relations, which are the subject of criminal procedural law. And in resolving criminal conflicts, the ECtHR obliges national courts to strike a balance between private and public interests.

Thus, in passing judgment in this case, the court referred to the Framework Decision of the Council of the European Union 'On the Standing of Victims in Criminal Proceedings' of 15 March 2001 and directly focused both the prosecution and the victim's attention on the fact that it is mediation involving a competent person (mediator) who can help them reach a clear and fair agreement. After all, when concluding such an agreement, the parties, through compromise and mutually beneficial decisions, adapt the rule of law on conciliation in relation to a particular (their) case, which satisfies their interests and, as a result, public interests. Thus, in sentencing this case, the court, exercising its discretion, prioritised the application of the conciliation procedure with the help of a competent mediator.

Frequent cases of applying the definition of 'mediation' are reflected in the consideration of cases by courts to prosecute individuals for committing administrative offences. In particular, the court, in its decision[24] to release a person from administrative liability, focused attention on the fact that the possibility of releasing a person from administrative liability is an element of the implementation of such a legal and social institution in Ukraine as mediation, which at the time of the case had no clear legal regulation

> However, based on the explanatory note to the draft Law of Ukraine 'On Mediation', mediation is one of the most popular forms of conflict resolution in developed countries. Mediation has received significant development in the European Union, Australia, the United States and is actively developing in the post-Soviet space.
>
> Therefore, the application of conciliation measures in this case, as a consequence, will contribute to the development of civil society and the formation of a culture of peaceful civilized conflict resolution on the basis of mutual interests and consent.[25]

Analysing this court decision, we can conclude that national courts, even in the absence of legal regulation of mediation in Ukraine, still focus on the possibility of its application, and, consequently, it becomes a ground for exemption from administrative liability.

In some cases, judges confuse mediation with the possibility of communicating with a litigant to obtain an illicit benefit. In particular, the commentary to the Code of Judicial Ethics[26] states that the analysis of the provisions of Art. 14 of the Code gives grounds to conclude that a judge should communicate with litigants only during the trial on the merits, ensuring equal treatment of all litigants as an independent arbitrator. The wording of the article allows simultaneous extra-procedural communication with all participants in the process. At the same time, out-of-trial communication with one participant in the absence of another may lead the absent participant to question the judge's impartiality.

As an example, we can cite the verdict of the Supreme Anti-Corruption Court, which stated that the accused (district court judge), who received an illegal benefit from a participant in the trial and did not plead guilty to his actions, claiming that the party to the case came to his office to discuss the possibility of applying the mediation procedure in a particular case, as he knew that they practiced mediation in court. According to the accused, out-

24 Resolution of the Bakhmatskyi District Court of the Chernihiv Region in case 728/313/18 of 7 March 2018 <https://reyestr.court.gov.ua/Review/72634424> accessed 19 June 2021.

25 ibid.

26 Commentary to the Code of Judicial Ethics <http://rsu.gov.ua/uploads/article/komentar-kodeksusuddivskoietiki-edd47ed191.pdf> accessed 19 June 2021.

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of-court communication with one of the parties is the ground for disciplinary liability of the judge.[27]

Special attention should be paid to the possibility of using mediation during the consideration of administrative cases by courts. As stated in Art. 2 of the Code of Administrative Procedure of Ukraine (CAP), the task of administrative proceedings is a fair, impartial, and timely resolution by the court of disputes in the field of public relations to effectively protect the rights, freedoms, and interests of individuals and the rights and interests of legal entities from the violations on the part of authorities. The specifics of parties to these cases determine the peculiarities of their consideration, as the participation of public law entities is mandatory. Despite such features, there are cases of application of mediation procedures in the law enforcement activities of courts.

Since 2011, mediation has been implemented in Ukraine within the framework of the Council of Europe's 'Transparency and Efficiency of the Judiciary' program. Four pilot courts – the Bila Tserkva City District Court of the Kyiv Region, the Vinnytsia District Administrative Court, the Donetsk Administrative Court of Appeal, and the Ivano-Frankivsk City Court – that had the opportunity to demonstrate the use of mediation in practice showed quite good results. Under the program, for the period from 5 July 2010 to 15 November 2010, 83 cases were referred to mediation, mediation took place in 50 cases, mediation ended successfully in 36 cases, and mediation agreements were concluded in 33 cases.[28] In all these cases, information meetings with the parties to the proceedings were held by the staff of these courts.

The experience of these courts should be taken into account, as it was in these courts that court-annexed mediation was introduced in Ukraine, and it was judges who conducted mediation procedures after which the parties came to a compromise solution to their disputes.

An example is the resolution of the court, according to which the proceedings on the claim of Military Unit A1231 to the Department of the State Executive Service of the Vinnytsia District Department of Justice to declare actions illegal and to oblige to act were suspended for the possibility of concluding an amicable agreement through mediation.[29] After the mediation, the guards were able to reach an agreement, and the dispute was closed. This example confirms the effectiveness of mediation in the consideration of cases in the courts of Ukraine, even if the participants in the case are subjects of public law.

In addition, the application of the mediation procedure is possible during the review of court decisions, which are considered under the rules of administrative jurisdiction, when the parties themselves decide on the possibility of resolving the dispute by referring the dispute to the mediator.

Thus, the Vinnytsia Administrative Court of Appeal, accepting the waiver of the appeal and closing the proceedings, in its decision of 20 February 2018 in case 130/2267/17, notes that the Vinnytsia Administrative Court of Appeal received a statement from the plaintiff's representative to refuse to consider appeals indicating that a mediation procedure (friendly dispute settlement) had been applied between the parties to the case and that, therefore, the subject matter of the claim between the parties was currently missing.[30]

27 Judgment of the Supreme Anti-Corruption Court of Ukraine of 22 July 2020 <https://reyestr.court.gov.ua/Review/90537916> accessed 19 June 2021.

28 Ukrainian Center for Understanding, 'Analytical report on the introduction of court-annexed mediation in 4 pilot courts of Ukraine' (2010).

29 Judgment of the Vinnytsia District Administrative Court in case No 2a / 0270/4327/11 of 5 October 2011 <https://reyestr.court.gov.ua/Review/48836081> accessed 19 June 2021.

30 Decision of the Vinnytsia Administrative Court of Appeal in case No 130/2267/17of 20 February 2018 <https://reyestr.court.gov.ua/Review/72428337> accessed 19 June 2021.

4 SOME REFLECTIONS AND FINAL REMARKS

In answering the question posed at the beginning of this study on how mediation is understood in law enforcement practice, especially judicial practice, it should be recognised that a single meaningful understanding of the essence of the mediation procedure in Ukrainian society has not developed. This may be the basis for further development of the concept of court-annexed mediation in Ukraine.

The analysis of judicial practice showed that despite some changes and development of mediation in Ukraine, the courts still do not fully understand the essence of this phenomenon, its importance, and its role in the rule of law and access to justice. We believe that the normative consolidation of the use of mediation (both judicial and extrajudicial) is an urgent issue not only in law enforcement practice but also in general doctrinal approaches to the definition of mediation as a separate type of alternative dispute resolution.

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Case Note

SOME TYPES OF COMPUTER CRIME AND CYBERCRIME IN UKRAINE

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Summary: 1. Introduction. – 2. Types of Computer Crime on the Internet and Finding Ways of Fight against Them. – 3. oncluding Remarks.

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The authors declare no conflict of interest of relevance to this topic.

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Vasyl Stratonov is responsible for the intellectual discussion underlying this paper, Dmitro Slinko and Sergey Slinko are responsible for literature review and writing. All the co-authors fully accept responsibility for the content and interpretation. The content of the note was translated with the participation of third parties under the authors' responsibility.

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SOME TYPES OF COMPUTER CRIME AND CYBERCRIME IN UKRAINE

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Abstract *In this note, the most frequent types of computer crime on the Internet in Ukraine are analysed. It is suggested that international experience in computer crime investigation should be used to combat this because cybercrime has become an international problem, causing enormous damage to governments, commercial entities, and computer systems of individual users. Governments and commercial entities spend significant funds to prevent losing information and ensure its protection. Cybercrime is based on technical knowledge, which is difficult to detect or prevent. This type of criminal activity has a high latency because of the difficulty of determining the qualification of a criminal offence.*

Keywords: *computer crime, cybercrime, types of computer crime*

1 INTRODUCTION

The constant growth of computer crimes demands the definition of new provisions in the fight against this criminal phenomenon. Informatisation, like any social phenomenon with the positive benefits, unfortunately, has negative effects as well, namely, the possibility of using computer technology to commit offences, including crimes. Thus, it is fundamentally important to study ways of committing crimes in the field of information technology.

The Centre for Cybercrime Research, referring to global statistics, indicates the growing use of the Internet and the number of cybercrimes.[1] Only in Ukraine has the level of this

1 LJ Freeh, 'Statement for the Record of Louis J. Freeh, Director of the Federal Bureau of Investigation Cybercrime for the Senate Committee Judiciary Subcommittee for the Technology, Terrorism, and Government Information Washington, DC' (28 March 2000) < https://www.nti.org/analysis/articles/statement-louis-j-freeh/ > accessed 13 July 2021.

type of crime increased by around 100%.[2] Analysis of the practice of pre-trial investigation of criminal proceedings shows that the reason for the increasing numbers of this type of crime is the savings of financial institutions on cybersecurity and, in some cases, the victim's distrust of criminal justice.

Forensic theory does not fully define the characteristics of committing computer crimes or their specific names and classifications. This problem is under theoretical and practical development.[3] Firstly, scientific development in this sphere began after the large-scale application of computer technology in practice. Secondly, based on the analysis of practice, the theory of criminology began to develop counteraction to computer crimes in the early 90s, while European researchers began in the late 70s.[4] European and American studies have produced theoretical developments and a lot of practical material, which is used in the analysis and resolution of emerging issues in the pre-trial investigation of criminal offences.

Our purpose is to analyse the methods and techniques of committing criminal offences based on the use of computer technology on the Internet and propose legal instruments for the detection, cessation, and prevention of crimes committed using computer technology.

2 TYPES OF COMPUTER CRIMES ON THE INTERNET AND FINDING WAYS OF FIGHT AGAINST THEM

Scholars have determined that the digital age provides criminals with new ways of committing crimes and provides an opportunity to establish cybercrime behaviour.[5] Generally, people are unaware of the individual threats posed by criminals on the Internet. They do not use the opportunity to prevent the actual risks that arise while on the Internet. These shortcomings lead to people becoming victims of crime. One example may be a criminal offence disclosure mechanism that is based on 'garbage collection'. This method of committing a crime consists of the illegal use by a criminal of technical waste of the information process left by the user after work on computer equipment. It is carried out in two forms: physical and electronic. In the first case, the search for waste is consists of careful inspection, and technological waste is removed. The electronic version requires the review and sometimes subsequent study of the data stored in the computer's memory. It is based on some technological features.

2 V Stratonov, '"Computer crime" features and characteristics' (2020) 2 Scientific Bulletin of Dnipropetrovsk State University of Internal Affairs 134-141.

3 See, for instance, JB Hill, NE Marion, *Introduction to Cybercrime. Computer Crimes, Laws, and Policing in the 21st Century* (CA Praeger 2016); H Jacobson, R Green, 'Computer Crimes' (2002) 39 Am Crim L Rev 273; AJ Carter IV, A Perry, 'Computer Crimes' (2004) 41 Am Crim L Rev 313, 327; A Galicki, D Havens, A Pelker, 'Annual Survey of White Collar Crime' (2014) 51 Am Crim L Rev 875; C Fehr, 'Computer Crimes' (2016) 53 Am Crim L Rev 977, 1011-12; M Trujillo, 'Annual Survey of White Collar Crime' (2019) 56 Am Crim L Rev 615.

4 See also D Icove, K Seger, W Von Sorsh, *Computer Crim: A Crime fighter's Handbook* (O'Reylli & Associates Inc 1995); H Chu, DJ Deng, H Chao, 'Potential cyberterrorism via a multimedia smart phone based on a web 2.0 application via ubiquitous Wi-Fi access points and the corresponding digital forensics' (2011) 17 Multimedia Systems 341–349; P Wang, J Li, B Ji, 'Online fraud detection model based on social network analysis' (2015) 12 (7) Journal of Information and Computational Science 2553-2562. DOI: 10.12733 / jics20105690; S Leman-Langlois, *Technocrime: Technology, crime and social control* (Wilan 2008) DOI: 10.4324 / 9781843925378; A Al-Nemrat, H Jahankhani, D Preston, 'Cybercrime victimization / criminalization and punishment' (2010) 92 CCIS 55-62. DOI: 10.1007 / 978-3-642-15717-2_7; Centre for Computer Crime Research <https://www.crime-research.ru/library/terror3.htm> accessed 13 July 2021.

5 Al-Nemrat et al (n 4) 55-62.

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Depending on the various ways in which computer crimes are committed, certain actions can be taken to obtain unauthorised access to computer equipment. The first, most common means is to enter the computer using the owner's data. Characterising this typical situation and methods of physical penetration, we can identify the main methods that are now known to employees of units engaged in operational and investigative activities. Basically, the option of the criminal's intrusion into the premises and the computer is designed based on the low vigilance of security officers. The criminal has internal elements of the psychological approach and counts on deception and fraud concerning security officers.

One of the elements includes entering the premises with the help of the institution's uniform (organisation) or using the uniform of epidemiological, sanitary, fire, medical service. Typically, a person holds items related to this role, fraudulently manipulates special professional terms that beat security guards, or exerts moral pressure so that security guards are allowed to enter the room where the computer equipment is located. By disguising his/her illegal actions, the offender is allowed to enter the premises and has unauthorised access to the object of encroachment. In this case, the security guards themselves escort the criminal to the room where the computer equipment is located. The person can then simply enter the room and commit their illegal actions. He/she may even ask a security guard to help bring the alleged devices to work on the computer.

The second method is the most common. In this case, a criminal uses the uniform of the post or food delivery, municipal service, etc. With the help of a fake ID, a person can penetrate the premises with computers.

According to the practice of criminal proceedings and their analysis (1,400 criminal proceedings), during the commission of a criminal offence, in 85% of cases, the offender entered the premises without hindrance. In one case, a person called the security post on behalf of the institution's staff and entered the premises without security guards even accompanying him. The criminal then removed the information from the computer and left the office.

A common type of crime is when the criminal 'falls on the tail of the victim'. This mechanism for accessing the computer and retrieving information includes the following types. In the first type, a criminal connects to a user's line of communication using computer communication and waits for a signal that marks the end of work, intercepts it, and then, when the user finishes an active mode, carries out access to the system. The second type is called 'computer boarding'. In this case, the crime is carried out via the random selection of the subscribed number of the computer system of the injured party using a telephone. Sometimes, to achieve the goal, the offender calls the victim, simulates the provision of information, and identifies his/her data in the computer. After receiving any information, the criminal uses an automatic password search program. The algorithm for setting the password is to use high-speed modern computer devices to go through all possible combinations of letters, numbers, and special characters installed on a standard PC keyboard. Once the character combination matches the original, the specified subscribers are automatically connected.

It should be noted that there are many programs that a person can use to 'hack' any computer. These programs become ineffective in computer systems because software products developed by owners of Intel computer systems protect computer ports.

Recently, criminals have begun to use the 'intellectual search' method, selecting the expected password based on predetermined thematic groups of affiliation. In this case, the program 'cracker' transmits some initial data about the identity of the author of the password.

Numerous experiments show that 42% of passwords are manually revealed using the 'smart search' method. For example, last names, first names, dates of birth, and other personal details of the victim allow a criminal to choose a password that works about 55% of the time.

Commonly chosen passwords include dates of birth, zodiac signs of users, names of their close relatives, their place of residence, street, house number, mobile phone number, etc. But most often, it is just a sequence of PC keys.

New forms of intervention involve 'slow choice'. The criminal achieves unauthorized access to the computer system by identifying vulnerabilities in its protection. This method is usually used for those who do not pay due attention to the recommendations of their security system use; for example, the user does not update anti-virus programs, etc.

Unlike 'slow choice', when using another method of penetration, the offender finds weaknesses in protecting the computer system and identifies errors in the logic of the software. Weaknesses detected in this way can be used repeatedly until they are detected. This method is used because programmers sometimes make mistakes when developing software products.

Sometimes a criminal enters a computer system posing as an authorised user. Computer security systems that do not have authentic identification functions, such as fingerprints, retina scans, voice recognition, etc., are vulnerable to this method. The easiest way to penetrate such systems is to obtain codes and other identifying cyphers of legitimate users. This can be done by purchasing a list of users with all the necessary information by bribery, extortion, or other illegal actions against persons who have access to this document.

The next group of methods of committing computer crimes includes those related to data manipulation methods and control teams of computer equipment. These methods are most often used by criminals to commit various illegal acts and are quite well known to law enforcement officers. The most widely used are methods of 'data substitution'. This is a simple and, therefore, very common way of committing a crime. The actions of criminals aim to change or enter new data, which is usually carried out during the input-output of information. In particular, this method is used to attribute the account to 'foreign' history, i.e., the modification of data in the automated system of banking operations, which leads to the appearance in the system of amounts that are not actually credited to this account.

A 'trojan horse' is the secret introduction into someone else's software of specially created programs, which, once they are part of the information and computer systems, pretend to be well-known service programs and begin to perform new, unplanned actions, after which computer software ceases to work and, in some cases, no information remains. With this method, criminals usually transfer funds during banking operations to a different account. A 'Trojan horse' program can be detected with great difficulty and only by qualified programmers.[6]

Examples of investigative practice testify to the use of the 'Trojan horse'. Security services used personal computer software to set up teams that did not print a cash flow statement. These amounts circulated only in the information environment of the computer. Having stolen forms for issuing money, the criminal filled them in with the code and then included certain sums of money. Relevant transactions for their issuance were also not printed and could not be documented.

The 'salami' method of committing computer crime became possible only through computer technology in accounting. It is based on transferring a trifling amount to a fictitious account, which, in professional accounting language, is called 'salami'. From the point of view of criminals, this is one of the simplest methods used in embezzlement in accounting transactions in which fractional (less than one unit of currency) amounts of money are

6 See A Manoilo, A Petrenko, D Frolov, *State information policy in the conditions of information - psychological war* (Telekom 2006).

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deducted from each transaction because in these cases, the amounts are always rounded to the established integer values. The bet that criminals make is that the victim loses so little that it is practically not recorded in each transaction.

Sometimes, it is easiest to commit embezzlement for tactical reasons by establishing a set of actions that will occur at a specific time. Criminals use the 'logic bomb' method of committing a crime, based on secretly making changes to the victim's program with a set of commands that must work when certain circumstances occur after a specific period. Then the algorithm of the 'Trojan horse' program is included. The 'logic bomb' is a kind of 'time bomb' triggered at a certain point in time.

Computer crime is characterised by the use of computer simulations. Thus, to avoid taxation, the criminal begins to use so-called 'black' or 'double' accounting, which is based on the existence of two simultaneously working programs of automated accounting with common control data. One of them operates legally and the other illegally to conduct illegal accounting transactions.

3 CONCLUDING REMARKS

Cybercrime, especially its transnational component, has become one of the biggest international problems due to the widespread introduction of global information networks that connect all the countries in the world. They cause huge losses to users, forcing them to spend significant funds on developing and implementing software, hardware, and other means of protection against unauthorised access to information.

Computer crimes have a high latency because governments and commercial entities that have been attacked, especially in banking, do not have much confidence in the possibility of identifying a suspect who has committed a criminal offence. Some problems arise at the stage of pre-trial investigation due to the difficulty of determining the qualification of a criminal offence and the specifics of individual investigative actions. The third aspect is the small number of computer technicians who have the knowledge to detect, prevent, and combat such crimes.

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Case Note

SOME ASPECTS OF ENVIRONMENTAL RIGHTS PROTECTION

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Summary: 1. Introduction – Basic Principles of Environmental Rights Protection. – 2. Environmental Rights Protection and the ECtHR. – 3. Concluding Remarks.

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CONFLICTS OF INTEREST

The authors declare no conflict of interest of relevance to this topic.

DISCLAIMER

The authors declare that they do not represent any views of the legislative or other state bodies related to environmental rights protection.

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SOME ASPECTS OF ENVIRONMENTAL RIGHTS PROTECTION

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Abstract *This note addresses some aspects of the basic principles of environmental rights protection and ECtHR practice. In particular, it analyses the new directions for environmental rights protection that the ECtHR gave us in* Tătar v Romania. *Some inconsistency of the ECtHR is highlighted since the case-law of environmental principles varies. Significant and important steps towards recognising the importance of procedural rights associated with public participation as this principle are indicated in international environmental law more generally. On the other hand, the Court's more recent forays into the territory of other environmental principles – particularly that of the precautionary principle – suggests that the Court is less eager to develop its extensive environmental case-law considering the principle of precaution.*

Keywords: *principles of environmental safety laws, environmental justice, environmental rights protection, ECtHR case law*

1 INTRODUCTION – BASIC PRINCIPLES OF ENVIRONMENTAL RIGHTS PROTECTION

The Treaty of Amsterdam (1997) complemented the Fifth Environmental Action Program, further contributing to the advancement of the environmental policy defining environmental protection as the EU's operational policy.[1] Some scholars conclude that the EU environmental policy is built on both fundamental principles (the polluting party pays – the prevention principle) and auxiliary principles (the principle of preservation of biodiversity, the principle of the source, etc.).[2]

Today, the EU is highly competent in solving environmental problems, and environmental integration is now mandatory for every EU member state and candidates for EU accession. In addition to the principle 'the polluting party shall pay', which is backed up by

1 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts – Contents. Official Journal C 340, 10/11/1997, 1-144 <https://CEr-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:11997D/TXT> (accessed 8 June 2021).

2 V Kolesnyk, 'The concept and general description of the principles of the environmental policy of the European Union' (2012) 1 Bulletin of the Chernivtsi Department of the National University 'Odessa Law Academy' 130-141.

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Environmental Liability Directive 2004/35/CE,[3] one should also mention the following EU environmental policy principles: 1) subsidiarity (joint operations where a state is unable to act alone or where this solution will be more efficient than performance on the national level alone); 2) preventive actions; 3) the precautionary principle; 4) remedial actions to eliminate damage at the early stages; 5) environmental orientation (any activity that is conducted taking the environmental needs into account); 6) integration of environmental policy in the development and implementation of all the other policies.

In addition, considering the provisions set forth in the Resolution 'Transforming our world: the 2030 Agenda for Sustainable Development' adopted by the UN General Assembly[4] and the results of adaptation thereof in accordance with the Decree of the President of Ukraine,[5] key activities to promote environmentally-friendly sustainable development are as follows: the environmentally substantiated allocation of production facilities; the environmentally-friendly development of industry, the energy sector, transportation systems, and public utilities; the environmentally-friendly development of agriculture; prudent use of renewable natural resources; rational use of non-renewable natural resources; extensive use of recoverable resources, waste management, treatment, and disposal; the improvement of environmental protection and management and the prevention and liquidation of accidents.

International environmental lawyers maintain that the principle of prevention of potential environmental risks, hazards, adverse environmental impact, and health hazards illustrates the entire current environmental policy. Its goal is to prevent potential risks, hazards, and adverse environmental impacts through the prudent use of natural resources to preserve the latter for future generations. The 'future' component represents an integral part of the principle of prudence, making it the cornerstone of all environmental impact planning programs.[6]

The principles of environmental safety law appear to be as follows: 1) sustainable development that implies equal treatment of economic, social, and environmental components, and acknowledging that no public progress will be possible in conditions of degrading environment; 2) the prevention of potential environmental risks, hazards, adverse environmental impact, and health hazards; 3) use of the natural resources on a paid basis and indemnities against the damage caused to the people and the environment or resulting from the breach of environmental safety laws; 4) free access to the environment-related information; 5) participation of all interested parties in drafting, discussion, adoption, and implementation of decisions to promote environmental safety; 6) international cooperation in the sphere of environmental safety.

Since the environmental safety principles form the cornerstone of the national environmental safety concept, one would logically expect the Coordination Center for Coal Industry Transformation to apply the same principles while drafting the Coal Industry Reform

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3 Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (30 April 2004) Official Journal of the European Union L 143/56-L 143/75.

4 Resolution adopted by the General Assembly on 25 September 2015, No 70/1, 'Transforming our world: the 2030 Agenda for Sustainable Development' <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf> (accessed 8 June 2021).

5 Decree of the President of Ukraine No. 722/2019 of 30 September 2019 'On Targets of Sustainable Development of Ukraine for the Period Up to 2030' // *Ofitsiyny Visnyk Ukrainy* of 15 October 2019 No 79, p. 7, Art. 2712.

6 Nicolas de Sadeleer, 'Environmental principles: From political slogans to legal rules' <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199254743.001.0001/acprof-9780199254743-chapter-02> (accessed 8 June 2021).

Concept and the 2027 National Program of Coal Regions Transformation,[7] with particular focus on the Environmental Component of the development of the regions resulting from the cuts in coal mining.

We agree with the idea of the Code of Environmental Laws of Ukraine (hereinafter, the CELU) development, which should be based on the principles of the rule of law and harmonising the national environmental laws with international laws.[8] Therefore, adoption of the CELU should complete the codification in the sphere regulating the public relations in connection with the use of natural resources and environment protection, creating an environmental legal network adapted to the norms and principles of the EU laws and the international law on the whole, as was rightly noted. At the same time, the practice of the European Court of Human Rights (hereinafter, the ECtHR) gave us new directions for environmental rights protection that should be highlighted and used.

2 ENVIRONMENTAL RIGHTS PROTECTION AND THE ECtHR

Notwithstanding the Court's willingness to interpret the Convention as including certain safeguards in the context of environmental risks, the specific application of environmental principles has been limited. Two exemptions, however, stand out.

First, in recent years, the Court has made tentative moves towards reconciling the Convention and its environmental case law with a precautionary approach. The *Tătar v. Romania* decision thus represents the first attempt by the Court to interpret its environmental case law in light of the precautionary principle.[9] In *Tătar*, the applicant complained about the failure of the Romanian government to take preventative steps in respect to the well-known Baia Mare mining operations, operating close to the applicant's home. Central to the applicant's argument was that several serious and well-documented accidents had occurred over the years, resulting in, among other things, large quantities of mining tailings being released into local waterways and the failure of the government to effectively regulate the activities that had resulted in the applicant's son becoming ill. Relying, in particular, on the fact that the domestic authorities had taken very little action following a particularly serious accident and the finding that the applicant had not succeeded in substantiating the claim that the mining activities had caused his son's illness, the Court turned to the precautionary principle.

The applicant in *Tătar* specifically invited the Court to interpret Art. 8 of the Convention in light of the precautionary principle, arguing that the Romanian government ought to be responsible for not taking precautionary measures as required by Art. 8.[10] With little hesitation, the Court responded to the invitation by recognising the importance of the principle and finding that the principle required the Romanian government to inform the local residents about the relevant risks originating from the mining operations and put in place preventative measures aimed at keeping accidents from occurring again. In reaching this conclusion, the Court was seemingly aided by the fact that very few steps had been taken by the government and local authorities following previous accidents at the mine; in fact,

7 'On Development of the 2027 National Coal Industry Transformation Program' <https://www.minregion.gov.ua/wp-content/uploads/2020/10/coalindustry_transformation_blue.pdf> (accessed 8 June 2021).

8 AP Hetman, 'Codification of Environmental Law in the Context of Constitutional Reform' (2016) 1-2 *Environmental Laws of Ukraine* 3-5.

9 Cauza Tătar Împotriva României (Cererea nr. 67021/01) <http://hudoc.echr.coe.int/eng?i=001-124019> (accessed 8 June 2021).

10 ibid.

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the mining operations continued with few restrictions. Moreover, the Court found that the authorities had contributed significantly to the uncertainty and anxiety of the local residents by not releasing information, which would have allowed the applicants to assess the risks arising from the mining operations. In finding in favour of the applicant, the Court referred to the principle as promulgated in Art. 174 of the EC Treaty (now Art. 191 TFEU), the Rio Declaration, the Gabčíkovo-Nagymaros decision of the International Court of Justice, and the European Commission's 2000 communication on the principle and associated case-law from the Court of Justice. In effectively interpreting Art. 8 of the Convention in light of the precautionary principle, the Grand Chamber took a potentially bold step towards shaping its environmental case-law around a well-established environmental principle, as this has been defined by other courts and other international legal instruments. This approach, however, is not entirely problem-free for a whole host of reasons.

First, in relying on the precautionary principle as it is interpreted, developed, and understood in separate and different international regimes (unrelated to the ECtHR), the Court is arguably guilty of ignoring the fact that the principle itself is likely to have a different meaning in each of the regimes. That is, a definition of the precautionary principle in the Rio Declaration is not necessarily the same as the one developed by the ICJ in the context of general international law or in a dispute between two states relating to treaty interpretation in the context of the sharing of natural resources.[11] This suggests that the meaning of the precautionary principle, as indeed any other principle, is necessarily contingent upon the context in which it is applied.[12] The Court overlooked this in its willingness to embrace the principle.

This gives rise to a further complication in how the Court identifies the principle as part of 'relevant international law'. The status of the principle in international law is not clear, and there are persuasive arguments for and against finding that the precautionary principle amounts to a customary rule of international law.[13] Having said that, from the Court's decision in *Tătar*, it is not possible to discern whether the Court thinks that the principle amounts to a customary rule of international law and hence a norm in light of which it ought to interpret the Convention. As is often the case in the Court's decisions, applicable international legal instruments and rules are often simply 'referred to' as forming part of 'relevant law', with little substantive assessment of what status these rules have.

Third, the willingness of the Court to rely on the precautionary principle is arguably at odds with the well-established margin of appreciation doctrine, which, as noted, plays an important role in environmental cases.[14] The reason for this, partly relating to the point of contingency made above, is found in the fact that the principle does not in itself mandate specific outcomes of a given decision-making process. It merely provides a basis for making such decisions under certain criteria of scientific uncertainty and where the risk of environmental harm crosses a given threshold (and, at times, where regulatory action is cost-effective). The point is that such decisions necessarily entail an assessment of costs against benefits, advantages against disadvantages, and the risk of inaction against the cost of action. These decisions are inherently political (though that does not mean that the principle is not

11 E Fisher, 'Precaution, precaution everywhere: Developing a "common understanding" of the precautionary principle in the European community' (2002) 9 Maastricht J. Eur. & Comp. L. 7.

12 OW Pedersen, 'From abundance to indeterminacy: The precautionary principle and its two camps of custom' (2014) Transnational Environmental Law 323.

13 ibid.

14 See, in particular, Hatton and Others v The United Kingdom App no 36022/97 <http://hudoc.echr.coe.int/eng?i=001-61188> (accessed 8 June 2021); *Giacomelli v Italy* App no 59909/00 <http://hudoc.echr.coe.int/eng?i=001-77785> (accessed 8 June 2021).

justiciable at all) and arguably best left to the contracting states themselves.[15] Consequently, in terms of specifying a general content and understanding of the precautionary principle, the main point to emerge is arguably that the principle's real lesson becomes one of process. That is, the objective of the principle is to secure that where environmental risks are identified, decisions are made transparently and in accordance with democratic ideals of administrative decision-making.[16] If this is the case, the Court's willingness to apply the principle in *Tătar* makes all the more sense in light of the fact that the local authorities and the Romanian government decided to do very little, notwithstanding the specific concerns expressed by local residents following serious accidents at the mine.

A strong justification for the emphasis on the principle of public participation is found in the fact that not only has international environmental law developed several important pointers in this direction over the last twenty years but also in the fact that when the Court affords contracting States a wide margin of appreciation in substantive environmental decision-making, it arguably makes sense to specifically scrutinise the procedures behind a given decision. Thus in, *Fadeyeva v. Russia*, the Court noted that

> It is not the Court's task to determine what exactly should have been done in the present situation to reduce pollution in a more efficient way. However, it is certainly within the Court's jurisdiction to assess whether the Government approached the problem with due diligence and gave consideration to all the competing interests.[17]

Similarly, in *Hatton and Others v. The United Kingdom*, the Grand Chamber observed that it would specifically consider 'the extent to which the views of individuals (including the applicants) were taken into account throughout the decision-making procedure, and the procedural safeguards available'. A particularly useful example of the Court's willingness to emphasise the principle of public participation is found in *Giacomelli v. Italy*, where the failure of the Italian authorities to implement the procedural processes found in domestic EIA obligations amounted to a violation of Article 8.[18] This strong emphasis on public participation and access to independent scrutiny of decisions represent in all but name the 'three pillars' of the Aarhus Convention, and it is evident that the Court has taken its cue from the increasingly strong emphasis afforded to public participation in international environmental law in general.

3 CONCLUDING REMARKS

To sum up, the case law from the ECtHR, as this pertains to environmental principles, blows hot and cold. On the one hand, the Court has taken significant and important steps to recognise the importance of procedural rights associated with public participation as this principle is recognised in international environmental law more generally. On the other hand, the Court's more recent forays into the territory of other environmental principles – particularly that of the precautionary principle – suggests that the Court is less eager to develop its extensive environmental case law in light of the principle of precaution. To some, this may be a disappointment, but it should not be a surprise. Just as in environmental law

15 Hatton and Others (n 14).

16 E Fisher, R Harding, 'The precautionary principle: Towards a deliberative, transdisciplinary problem-solving process' in R Harding and E Fisher (eds), *Perspectives on the Precautionary Principle* (The Federation Press 1999) 291.

17 *Fadeyeva v Russia* App no 55723/00 <http://hudoc.echr.coe.int/eng?i=001-69315> (accessed 8 June 2021).

18 *Giacomelli* (n 14).

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in general and international environmental law specifically, the contours of environmental principles are not necessarily well defined, and the exact application is often left to domestic systems.

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ABOUT ELI-UNIDROIT RULES ADOPTION AND TRANSLATION INTO UKRAINIAN

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The Model European Rules of Civil Procedure prepared by the European Law Institute with the International Institute for the Unification of Private Law during 2013-2021 have a great potential impact on the harmonisation of civil procedure and have attracted the attention of scholars from all over the world.

At the same time, Ukraine's European integration aspirations determine the scientific interest in the European legislation, as well as in current trends in its development, in particular, the harmonisation of European and domestic legislation of EU member states. In the field of civil procedure, this has led to the creation of a single comprehensive mechanism for the protection of rights in the Union: cross-border civil proceedings or EU civil proceedings. Its formation was the result of the evolution of the main civil procedural models of modern European states and their transformation under common market conditions.[1]

The creation of the EU and further European integration as a basis for the formation of the internal market of capital, goods, services, and labour necessitated the creation and provision of a common legal space. European standards of civil procedure, implemented through ECtHR decisions and Council of Europe law, have proved insufficient to meet the needs of the EU common market.[2] This necessitated the harmonisation of the legislation of the EU member states. In particular, in the field of civil procedure, a supranational mechanism for regulating relations in civil and commercial cases of a cross-border nature, the European Civil Procedure, or the EU civil procedure, was established.

It cannot be said that immediately after the publication of the results of the project on the convergence of civil procedure in the EU, these ideas were adopted, and the civil process was immediately harmonised. Yet, the main provisions were implemented in the following years in EU legislation.[3]

Further harmonisation of civil proceedings in the EU is linked to the development of common regional rules of civil procedure. Such a project was launched in cooperation

1 I Izarova, *Theory of EU Civil Procedure* (Dakor 2015); see also A Uzelac, 'Towards the European Rules of Civil Procedure: Rethinking Procedural Obligations (I Izarova, A Kovtun, T Vakhoneva trans, eds)' (2018) 1 (106) Bulletin of Taras Shevchenko National University of Kyiv, Legal Studies 23-32; C H (Remco) van Rhee 'Towards Harmonised European Rules of Civil Procedure: Obligations of the Judge, the Parties and their Lawyers' (2020) 1(6) Access to Justice in Eastern Europe 6-33.

2 See, *inter alia*, M Storme, *Approximation of Judiciary Law in the European Union* (Kluwer 1994); M Storme, 'Improving Access to Justice in Europe' (2010) Teka Kom Praw – OL PAN 209, M Storme, 'A Single Civil Procedure for Europe: A Cathedral Builders' Dream' (2005) 22 Ritsumeikan Law Review <http://www.asianlii.org/jp/journals/RitsLRev/2005/6.pdf> accessed 27 July 2021.

3 See Regulations of European Small Claims Procedure, European Order for Payment Procedure and others, adopted since 2004.

with UNIDROIT and the newly established European Law Institute (ELI). Following the completion of a joint project to prepare the Principles for Transnational Civil Procedure, UNIDROIT plans to continue working in this direction. In particular, it was decided to focus on the regional level and adapt the Principles to the peculiarities of specific legal systems.

Launched in 2013, the project 'From Transnational Principles to European Rules of Civil Procedure' (hereinafter, Rules)[4] marked a new stage in the development of civil procedural law in Europe. The theoretical basis of the Rules was the ALI-UNIDROIT Principles, the European Convention and the EU Charter of Fundamental Rights, general traditions of European countries, M. Storme's draft, the French Code of Civil Procedure, and other codes, EU Court and ECtHR judgments, and EU directives and regulations. This ensured the impact of the Rules on all states that are members of the EU and the Council of Europe, and therefore belong to European civilisation. Thus, the polycivilisation paradigm of the modern world, according to which the main unifying feature is the maintenance of the defining cultural values of the community, has ensured further convergence of EU law and the establishment of common traditions of European countries.

The main task of the Rules was to establish uniform principles of judicial proceedings, as, according to the authors of the project, they are aimed at avoiding fragmentary and unsystematic changes in European civil procedure law and are the first attempt to develop regional projects, taking into account regional legal cultures and rules.[5] It should be noted that regionality as a defining feature of the members of such an association does not characterise them territorially: among the member states of the Council of Europe, there are those countries that are not located on the European continent.

The preparation of these Rules once again confirms the change of the social paradigm from the unification direction to the harmonisation of the civil process and the formation of its new modern concept in European countries. The significant weight and influence of the Principles of Transnational Civil Procedure on the development of civil procedural law in European countries, the successful implementation of M. Storm's ideas, and the formation of the EU civil procedure system ensured the overall success of harmonisation processes in the EU.[6] At the same time, the question of the scope of application of regional rules of civil procedure is becoming extremely important, and discussions on the need to extend the EU civil process to internal disputes are moving to a new level.

Regional rules of civil procedure are designed to define common requirements and rules governing relations for the consideration and resolution of civil and commercial cases of a cross-border nature with the participation of residents of different states of one regional association. This is extremely important to protect common market participants and economic relations within its limits.

The introduction of common European rules of civil procedure and their application to the settlement of cross-border disputes on a general basis is an important area of convergence of civil proceedings in the EU. Taking into account the latest achievements of the science

4 Model European Rules of Civil Procedure (with the International Institute for the Unification of Private Law, UNIDROIT) <https://www.europeanlawinstitute.eu/projects-publications/completed-projects-old/completed-projects-sync/civil-procedure/> accessed 24 July 2021.

5 Initial report on the ELI–UNIDROIT 1st Exploratory Workshop <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Projects/ELI-UNIDROIT_Workshop_initial_report.pdf> accessed 24 July 2021.

6 See the report submitted to the the European Parliament's Committee on Legal Affairs, which was submitted to the Commission on common minimum standards of civil procedure in the EU <https://www.europarl.europa.eu/doceo/document/A-8-2017-0210_EN.html?redirect#title2> accessed 24 July 2021, and the Study Common minimum standards of civil procedure: European Added Value Assessment <https://www.europarl.europa.eu/RegData/etudes/STUD/2019/642804/EPRS_STU(2019)642804_EN.pdf> accessed 24 July 2021.

of civil procedural law will ensure further development of European integration and improvement of national systems of civil procedure, but the regulation of internal disputes through regional rules at the present stage of political and economic relations can hardly be considered appropriate.

On this occasion, AJEE warmly invites proposals for a special topic to be published in the upcoming year's issues. The main focus of the proposal should cover the ELI Model Rules and various aspects of its further adaptation in national and European law. These contributions will be published free of charge after a careful evaluation and review.[7]

For Ukraine, as well as for other EU entrance candidate countries, these Rules are an opportunity to harmonise the national civil process with EU law and create the necessary basis for the adaptation of European law and EU membership. Accession to the true European area of justice for Ukraine is an extremely important direction, as the introduction of general principles of civil justice will provide an opportunity to ensure effective protection of rights and eliminate differences in the domestic procedural system.

The movement and translation of law is a dynamic process involving diffusion and translation[8]. In view of this, the participation in the preparation of Model European Rules of Civil Procedure and, in particular, their official translation into Ukrainian, which will be carried out under the guidance of Prof. Iryna Izarova, is a relevant issue. Achieving maximum objectivity while creating the Ukrainian text of the Rules must be implemented by thorough regulation of the translation process, establishing methodological basis of translation, careful choosing sources of reference and step-by-step expert control over the quality of translation.

The organization of translation is in line with the officially approved procedure of legal translation. In particular, to address the issue of translation of *acquis communautaire*, The Ministry of Justice of Ukraine approved the order of translation[9], which serves as guidelines for the current work. Thus, the translation process includes the following stages: translation of the latest version of the Rules, professional expertise, terminological expertise, editing of the target language (Ukrainian) text.

To properly implement this task, a scientific council has been formed, which includes leading Ukrainian scientists and specialists in the field of civil procedure. The largest professional association of specialists-editors in Ukraine – the Association of Ukrainian Editors has also been involved. Moreover, in order to methodologically support the translation process, ensure terminological consistency and uniformity, a terminological English-Ukrainian glossary of Model Rules of Civil Procedure is being compiled in parallel with the translation process.

Establishing methodological basis of translation and careful choosing sources of reference is another important condition for quality translation. The task is even more difficult in light of the absence of the Ukrainian language in the plethora of resources for translators of the EU. Nevertheless, the list of these resources is well worth consulting, due to the fact that it contains translations in the Polish language, linguistically close to the Ukrainian one, and into German language, terminology of which is approximated with the continental law system. The mentioned list of resources includes publicly accessible full-text database of

7 The deadline for submitting the abstracts is 1 October 2021. After the evaluation of the proposals, the full-length manuscripts should be submitted by 1 December 2021, upon invitation of AJEE.

8 B Brake, PJ Katzenstein, 'Lost in Translation? Nonstate Actors and the Transnational Movement of Procedural Law' (2013) 67 (4) International Organization 725–757 <www.jstor.org/stable/43282085> accessed 27 July 2021.

9 The Order of Translation of European Acquis Communautaire No 144/5 of 26 November 2003 <https://zakon.rada.gov.ua/laws/show/z1081-03#Text> accessed 27 July 2021.

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EU law EUR-Lex, the database of EU terminology IATE, the multilingual wide-coverage thesaurus EuroVoc and other resources for translators. EUR-Lex provides free access to European Union law and other documents considered to be public, written in all 23 official EU languages. The IATE website (*Inter-Active Terminology for Europe*) gives access to a database of EU inter-institutional terminology. EuroVoc is a multi-disciplinary thesaurus covering fields that are sufficiently wide-ranging to encompass both Community and national points of view[10]. The preferred order for terminology search is determined by the European Commission in recommendations on linguistic resources use. It includes (in the order of relevance): IATE, EUR-Lex (existing legislation), General reference sources, professional literature[11]. Thus, these resources constitute the main sources of reference in the process of translation of the Rules.

To disseminate the results of this work, several webinars are planned with the involvement of experts and members of the Working Groups for the preparation of the Rules, where the features of the proposed approaches, the benefits of certain mechanisms, and the possibility of applying such experience to reform Ukrainian civil procedure will be discussed in detail.

The translation of this work, which is more than 400 pages, will be a serious challenge for translation specialists and editors. On behalf of all our team, let us express our sincere hope that this work will be useful to all those who are interested in civil proceedings, developing the science of civil procedural law, and reforming civil procedural legislation!

10 R Steinberger, A Eisele, S Klocek, S Pilos, P Schlüter, 'DGT-TM: A freely Available Translation Memory in 22 Languages' in *Proceedings of the Eighth International Conference on Language Resources and Evaluation (LREC'12)* (May, 2012) < http://www.lrec-conf.org/proceedings/lrec2012/pdf/814_Paper.pdf > accessed 27 July 2021.

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