ISSUE 2 (10)
MAY 2021

ACCESS TO JUSTICE IN EASTERN EUROPE

ACCESS TO JUSTICE IN EASTERN EUROPE

Founded by East European Law Research Center

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ISSN 2663-0575
EELRC
Publishing House VD 'Dakor'

Access to Justice in Eastern Europe

Issue 2 (10) May 2021

https://doi.org/10.33327/AJEE-18-4.2

TABLE OF CONTENTS

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)

Journal homepage http://ajee-journal.com

ABOUT EQUAL ACCESS TO JUSTICE IN A CONTEMPORARY WORLD

> Justice has a special value…
> Justice in those myriad realms will be impossible without a just justice system.[1]
>
> Access to justice must be interpreted in a broad manner.[2]

This issue of *Access to Justice in Eastern Europe* is related to various aspects of the development of contemporary legal doctrine. Since the UN announced sustainable development goals, more and more studies are focusing on how we can achieve them and the most effective ways to do so. No one can deny that every person seeks and deserves justice. So the question is, how can we guarantee equal justice for all in a world with so many cases? So far, the attention has been focused on area-specific rather than general approaches. Not surprisingly, in this issue, interesting studies on various aspects of justice development may be found – constitutional justice, criminal justice, digital justice, and even environmental justice, which attracts special attention from our authors.

The independence of justice is a crucial issue that enables a person to achieve a fair and impartial trial. The absence of independence inevitably leads to negative consequences, in particular, improper functioning of justice, delegitimising of judicial power, and loss of trust, which is one of the essential elements of judicial power. [3]

Nowadays, in Poland and Ukraine, society has faced an unprecedented crisis of constitutional justice, which, of course, attracts attention and stimulates research into ways to stabilise the balance of power. Consequently, in this issue, there are two contributions related to constitutional justice. In *Olena Boryslavska and Miroslaw Granat's* article, issues of independence of constitutional justice are studied in-depth, and the common problems that Ukraine and Poland faced in the process of developing constitutional courts are uncovered. It is noteworthy that in their conclusions, the authors try to prove that the other 'side of the coin' of the constitutional justice body's independence is its authority, leading to the situation in which it depends not on itself but also on political elites. More about this may be found in this article.

1 F Wilmot-Smith, Equal Justice: Fair Legal Systems in an Unfair World (HUP 2019).

2 H Ahrens, H Fischer, V Gómez, M Nowak (eds), 'Equal Access to Justice for All and Goal 16 of the Sustainable Development' (2019) 22 Studies on Effective Multilateralism for Sustainable Development Volume 396.

3 For more, see: I Kondratova, T Korotenko 'Towards Modern Challenges in Financing the Judiciary: Between Independence and Autonomy' (2020) 2/3 (7) Access to Justice in Eastern Europe 134-147; R Kuibida, 'Constitutional Court Strikes the Anti-Corruption System in Ukraine' (2020) 4 (8) Access to Justice in Eastern Europe 283.

The second contribution relates to a constitutional complaint, another similar issue. In the note by *Hryhorii Berchenko, Andriy Maryniv and Serhii Fedchyshyn*, the effectiveness of a constitutional complaint as a human rights mechanism is examined. The authors shed light on the problems and perspectives of this institute's development in Ukraine. In their conclusion, the necessity of updating the law is substantiated. In particular, they proposed to revise provisions on the interim provisional and protective measure, the implementation of the decisions of the CCU, their actions in time, and specific mechanisms for the restoration of individual rights.

A very interesting article worthy of our audience's attention is the research of *Bohdan Karnaukh*, who compares the standards of proof in common law states, such as the US, and civil law states, such as Ukraine. The example of O. J. Simpson's case, as well as others, gives us a good understanding of the differences between proofs and their assessment in civil and criminal cases. In his conclusion, the author sketches some perspectives on the implementation of rationality in Ukrainian evidence law.

In the next article by *Nazar Bobechko, Alona Voinarovych and Volodymyr Fihurskyi,* the newly discovered and exceptional circumstances in criminal procedure are analysed in comparison with the law of Germany, Poland, France, and other European states. The models of these circumstances are investigated, and features of proceedings and the concept, tasks, and structure are analysed. The authors conclude that these circumstances should be applied to eliminate the violations made during the criminal litigation but not during review, appeal, or cassation proceedings.

The next article relates to comparative historical and legal research and is devoted to juvenile justice in Ukraine and Poland in the last century. The most interesting issue of this article is its methodology, which is an essential part of every research article. *Denys Shygal and Aisel Omarova* propose ways of overcoming the discrepancy between theory and practice, recreating the sequence of actions of a comparative historian, which leads them solutions about the big data perspectives and traditional comparative historical and legal research, which we fully support. Generally, the methodology of legal research is a conservative rather than innovative field, but despite this, particular attention should be paid to how the results were achieved and what the arguments are.

One more historical research article is included in this issue due to its interesting and innovative approaches to the assessment of the notion of justice within the general ideas of criminal law and crimes. 'The winner is never to be sued' or 'Success is never blamed' like the very popular sayings announced. Nevertheless, we should clearly understand what justice means and that it performs equally for all. In *Alexandra Letková and Anna Schneiderová's* article, one may find a very interesting reflection on the trial of Jozef Tiso at the National Court in Bratislava as a good example of the justice performing.

The use of AI in the judiciary is one of the main questions for present-day legislators. Some new technological solutions are investigated in the article by *Yulia Razmetaeva and Sergiy Razmetaev*, which reveals the threats and advantages of the digitalization of justice in Ukraine.

Nowadays, more and more specific cases are requiring different approaches and solutions that enable everyone to have equal access to justice. Particular attention in this issue is paid to access to justice in environmental cases,[4] which is in the spotlight of a few contributions.

4 It is worth noting the particular attention that the ECtHR pays to environmental cases. See: OW Pedersen, 'The European Convention of Human Rights and Climate Change – Finally!' (Blog of the European Journal of International Law, 22 September 2020) <https://www.ejiltalk.org/the-european-convention-of-human-rights-and-climate-change-finally/> accessed 23 April 2021.

Environmental justice, as well as environmental disputes and environmental human rights, seem to have become a new reality of modern life. In *Anatoliy Getman's* contribution, the essential issues of this area of legal regulation are outlined.

The Reform Forum section of this issue includes a note concerning the perspective of access to justice for the protection of environmental rights in Ukraine. In the note of *Hanna Anisimova and Ievgeniia Kopytsia*, particular attention is drawn to national case-law and ECtHR case-law in environmental cases, which will be of interest to our audience.

Finally, I thank all the reviewers and managing editors who helped to improve the manuscripts, and the authors, who properly assessed all the activities involved in publishing their contributions. I would like to thank our Editorial Board members for their support and stress that their perceptive comments were incredibly helpful in shaping the final version of this issue.

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RESEARCH ARTICLE

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)

Journal homepage http://ajee-journal.com

INDEPENDENCE OF CONSTITUTIONAL JUSTICES: STUMBLING BLOCKS IN UKRAINE AND POLAND

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To cite this article: *O Boryslavska, M Granat* 'Independence of Constitutional Justices: Stumbling Blocks in Ukraine and Poland' 2021 2(10) *Access to Justice in Eastern Europe 8–24. DOI: 10.33327/AJEE-18-4.2-a000057*

To link to this article: https://doi.org/10.33327/AJEE-18-4.2-a000057

Submitted on 21 Feb 2021 / Revised 20 Apr 2021 / Approved 30 Apr 2021 / Published online: 03 May 2021 View data

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ACKOWLEDGMENTS

Authors would like to express their gratitude to the reviewers for their help and for the English editor, Sara White.

CONFLICT OF INTEREST

The authors have declared that no conflicts of interest or competing interests exist.

CONTRIBUTORS

The authors contributed solely to the intellectual discussion underlying this paper, case-law exploration, writing and editing, and accept responsibility for the content and interpretation.

INDEPENDENCE OF CONSTITUTIONAL JUSTICES: STUMBLING BLOCKS IN UKRAINE AND POLAND

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Abstract *The article is devoted to the problems of the functioning of constitutional justice in Poland and Ukraine. Applying the methodology of comparative law research and empirical analysis, the authors consider the problems of the violation of the principle of independence of constitutional justice in these countries, explore common and distinctive features of crisis situations, try to find the reasons that cause them, and deduce the relationship between the legitimacy of the decisions of the constitutional justice bodies and independence of these bodies. The authors substantiate and analyse two components of the legitimacy of the constitutional courts' decisions: substantive (fairness and compliance of decisions with the principles of constitutionalism) and instrumental (proper validity and argumentation, which leave no doubt about the fairness and correctness of such a decision).*

Keywords: *constitutional justice, constitutional crisis, independence of judges, constitutionalism*

1 INTRODUCTION. THE ROLE OF CONSTITUTIONAL JUSTICE IN THE CONSTITUTIONAL SYSTEM OF THE MODERN STATE AND SOME METHODOLOGICAL REMARKS

The modern constitutional state, which is based on the ideas of constitutionalism, is inconceivable without independent constitutional justice. It aims to ensure the supremacy and protection of the constitution, the constitutional order established by it, and the constitutional values on which they are based. The constitutional state (following F. Fukuyama on the state of liberal democracy) is founded on three pillars: the state itself, the rule of law, and democratic accountability.[1] The latter two are largely provided by constitutional jurisdiction. The doctrine of constitutionalism, which is also built on the ideology of liberal democracy, is based on the fact that without effective and efficient tools of limiting public authority, the state power, sooner or later, becomes arbitrary[2]. The Constitution, which is the most important guarantee against state arbitrariness and of the inviolability of freedom

1 F Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Present Day*, in Ukrainian (Nash Format 2019) .

2 A Sajo, *Limiting Government. An Introduction to Constitutionalism* (Central European University Press 1999) 14.

and fundamental human rights, needs 'special protection'[3]. The provision of this protection has been carried out by specialised bodies in continental European countries (with a few exceptions[4]) since 1920. However, it is hardly possible to talk about the reality and effectiveness of this function in the conditions of the political dependence of constitutional justice. Thus, the independence of constitutional justice is not an end in itself but a means of ensuring the constitutional limitations of state power and guaranteeing freedom and human rights, which is achieved through various areas of its activities.

The main activity of constitutional jurisdiction bodies, through which they ensure the achievement of these goals, is to resolve issues of the constitutionality of legal acts. Notably, constitutionality, according to the doctrine of constitutionalism, is understood not only as the correspondence of the statute wording to the letter of the constitution but in a broad sense, as was best described by John Marshall in his famous saying:[5]

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate […] which are not prohibited […] are constitutional.[6]

However, declaring acts unconstitutional is not the only function through which constitutional justice ensures the protection of the constitution. As stated in one of the Venice Commission's conclusions:

> The state constitutional courts are the institutions which can, by interpreting the wording of the constitution prevent the arbitrariness of the authorities by giving the best possible interpretation of the considered constitutional norm at the given time.[7]

Taking into account that the Court has a monopoly on binding constitutional interpretation in light of constitutional values and principles, we can thus argue that the interpretation of the constitution, as well as other activities of the constitutional jurisdiction bodies, are no less important in ensuring the non-arbitrariness of the state power. Such types of activities are, for example, the resolution of competence and other disputes, election disputes, prosecution of senior state officials, etc. They are mainly aimed at ensuring balance in the system of the separation of state power. At the same time, the last few decades have seen a rethinking of the place and importance of constitutional jurisdiction, both at the practical and doctrinal levels, in its role in defending personal human rights, which definitely increased. In the vast majority of European states, mechanisms for the protection of fundamental rights by means of constitutional jurisdiction (through the instrument of constitutional complaint) have been introduced.

Thus, the independence of constitutional justice is a condition for its effective operation and protection of constitutional values and principles and their observance by the state authorities in the process of their activities.

We started this article from the point of view that the existence of constitutional jurisdiction is directly linked with the system of constitutional democracy. Moreover, there is a two-way connection between these phenomena. It is well-known from history that unrestricted parliamentary democracy can be arbitrary, even if it is legitimised by a general election. Only if there are real constitutional means of restricting it – first of all, constitutional jurisdiction –

3 H Kelsen, 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution' (1942) 4 (2) *The Journal of Politics* 185.

4 These are Switzerland and six northern European countries: Norway, Finland, Iceland, Denmark, Sweden, and Estonia.

5 The Chief Justice of the United States in 1801-1835.

6 *McCulloch v Maryland,* US Supreme Court, 17 US (4 Wheat) 316 (1819) <https://www.history.com/topics/united-states-constitution/mcculloch-v-maryland> accessed 21 February 2021.

7 CDL-AD (2010)044 Opinion on the Constitutional Situation in Ukraine, para 52 <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)044-e#> accessed 21 February 2021.

does democracy cease to threaten individual freedom and fundamental human rights. Conversely, constitutional jurisdiction needs democracy to function. This interrelationship will be seen in the further analysis of the problems of the functioning of constitutional justice in post-socialist states, where most attempts to concentrate power in an undemocratic (or democratic only outwardly) way involve political pressure on constitutional courts, refusal to enforce their judgements, or even by blocking their activities.

The process of spreading constitutional democracy in Europe, in general, was accompanied by the introduction of constitutional courts in the vast majority of states. Their existence was foreseen by the post-war constitutions of Germany and Italy, the post-socialist constitutions of Spain and Portugal, and, ultimately, the post-communist states of Central and Eastern Europe. An attempt to explain the connection between these phenomena is contained in one of the conclusions of the Venice Commission, which states:

> Constitutional justice is a key component of the system of checks and balances in a constitutional democracy. Its importance is further enhanced when the ruling coalition can rely on a large majority and is able to appoint to virtually all state institutions individuals with loyal political views.[8]

At the same time, despite the role of independent constitutional justice in the constitutional state, a number of Eastern European countries have demonstrated crises related to the functioning of constitutional courts in recent decades. As Dieter Grimm wrote:

> Just as constitutionalism is an endangered achievement constitutional adjudication is in danger as well. Politicians, even if they originally agreed to establish judicial review, soon find out that its exercise by constitutional courts is often burdensome for them. Constitutions put politics under constraints and constitutional courts exist in order to enforce these constraints.[9]

Such crisis situations occurred, in particular, in Hungary, Romania, Poland, and Ukraine.[10] In this article, we will analyse the issues of the independence of constitutional justice in Ukraine and Poland, embracing the methodology of comparative studies. We will try to discover common and distinctive features and define the reasons for these crises, considering both commonalities and differences.

We consider constitutional justice in Ukraine and Poland to be appropriate objects for the comparative analysis, firstly, because they both use the concentrated model of constitutional review; secondly, they were introduced in the conditions of post-socialist societies with weak (at the start) institutions and relatively low levels of political culture; and finally, both countries are members of the Council of Europe and make efforts to implement the European Convention on Human Rights and the case-law of the European Court of Human Rights. At the same time, we are taking into account some important facts leading to the distinctive circumstances in which the constitutional justice of Ukraine and Poland exist. These are the membership of Poland in the European Union and the extension of the Court of Justice jurisdiction to it, as well as some institutional differences resulting from their separation of powers systems.

8 CDL-AD (2013)014 Opinion on the draft Law on the amendments to the Constitution, strengthening the independence of judges (including an explanatory note and a comparative table) and on the changes to the Constitution proposed by the Constitutional Assembly of Ukraine, para 76 <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)014-e> accessed 21 February 2021.

9 D Grimm, 'Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics' (2011) 4 (1) NUJS Law Review 18.

10 For more on this, see: O Boryslavska, *European Model of Constitutionalism: System and Axiological Analysis* (Pravo 2018).

2 ISSUES OF CONSTITUTIONAL JUSTICE INDEPENDENCE IN POLAND

Poland has managed to make significant progress in the formation of a system of constitutional democracy and creating an appropriate institutional system, and other countries in the region, including Ukraine, often refer to the Polish experience as applicable. However, in 2015, when the Law and Justice political party initially won a majority in the Senate and Seimas, formed a government, and later won the presidential election, processes related to the pressure on constitutional justice began.

2.1 Position of the Constitutional Tribunal (as a starting point)

The 1997 Constitution classifies the Tribunal as a judicial body (Art. 10). Defining the Constitutional Tribunal as a court does not generate much controversy. Arguments in favour of such a qualification are, e.g., the name is characteristic for a judicial body, members of the Tribunal are called judges, their independence is recognised, and they issue judgments after a hearing. However, one has to agree with the opinion that the principle of the separation and balance of powers does not remove all controversies related to the position of the constitutional court in the system of powers. It is emphasised in the literature that the Tribunal, in the scope of issues not regulated by the Constitution of 1997, uses legal means that are not typical of courts but are closer to bodies classified by the Constitution as 'legal protection bodies'. The arguments in favour of treating the Tribunal as a legal protection body are mainly related to the fact that – unlike a judicial body – it is not an entity that applies the law but an entity that reviews the law. However, the Tribunal does not administer justice. This is done by independent courts headed by the Supreme Court (cf. Art. 175 para. 1).[11]

The Constitutional Tribunal adjudicates on legal norms, and its main function is to determine which norms are binding. The Tribunal used to describe itself as 'a court over law'. According to this identification, it is not a court over facts, which interprets facts in accordance with a relevant norm (typical of common courts). The exception in this respect (i.e., when the Constitutional Tribunal acts as a court over facts) concerns the examination of the compliance of the activities of political parties with the Constitution (Art. 188 para. 4) and determining the President's incapacity to hold office (Art. 131). Borderline cases in the examination of the constitutionality of law that occur before the Tribunal ('court over law' – 'court over facts') are usually the subject of major disputes. A case in point is judicial review of the 2015 resolutions of the Sejm on the election of judges to the Constitutional Tribunal.

According to the Constitution (Art. 197), the organisation of the Constitutional Tribunal and the mode of proceedings before it shall be specified by statute. Since 2016, the position and work of the Tribunal and the status of its judges are regulated by the following laws:

1) the law of 30 November 2016 on the organisation and mode of proceedings before the Constitutional Tribunal, Journal of Laws 2019,[12]

2) the law of 30 November 2016 on the status of judges of the Constitutional Tribunal, Journal of Laws 2018,[13]

3) the law of 13 December 2016 on the provisions implementing the abovementioned laws, Journal of Laws 2016.[14]

11 See Dz U Nr 78, poz 483 ze zm.

12 See Dz U z 2019, poz 2393.

13 See DzU z 2018, poz1422.

14 See Dz U z 2016, poz 2074.

The Tribunal is composed of 15 judges (Art. 194 para. 1). They are elected individually by the Sejm for a term of nine years. The Constitution leaves no discretion to the legislator in determining by means of an ordinary law the entity that elects (appoints) judges. However, vesting the election of judges in the Sejm alone is sometimes criticised. From the doctrinal point of view, this solution is supported by the proximity of tribunals to the legislature (Kelsen classified them as legislative bodies). However, the rationale behind legitimising the position of the constitutional court may speak in favour of vesting the election (appointment) in, for example, several different central bodies, which will be discussed later.

Individual election means, firstly, that a separate vote is held over each candidate (no joint election is possible). Secondly, each judge has an individual term of office that lasts for a strictly defined period of time. Thirdly, the re-election of the same judge to the Tribunal is not allowed (Art. 194 para. 1). The number of judges is similar to the numbers in other countries. The same can be said about the term of office. Previously, in the years 1985-1997, the Tribunal was composed of 12 judges who were elected for a term of eight years. The increase in the number of judges resulted from the fact that the Constitutional Tribunal was equipped with new powers, and a longer term of office made judges independent from the term of office of the Parliament. This solution made it easier to differentiate the composition of the Tribunal from the point of view of the ruling majority in the Sejm. The Constitution does not specify the procedure of nominating candidates for judges, the beginning of the term of office, or the moment of taking the oath, although these issues – as indicated by the jurisprudence of the Constitutional Tribunal in the years 2015-2016 – prove to be extremely important from the practical point of view.

Constitutional judges are elected from among 'persons distinguished by their knowledge of the law' (Art. 194 para. 1 of the Constitution) who meet the requirements necessary to hold the office of a judge of the Supreme Court or a judge of the Supreme Administrative Court (Art. 3 of the law on the status of judges of the Constitutional Tribunal).

An application for election to the position of a constitutional judge may be submitted by the Presidium of the Sejm or by at least 50 MPs (Art. 30(1) of the Rules of the Sejm).[15] The application cannot be subject to vote earlier than the seventh day from the date of delivery of information on the candidates to MPs unless the Sejm decides otherwise (Art. 30 para. 4 of the Rules of the Sejm).

The Sejm adopts a resolution on the election of a judge by an absolute majority of votes in the presence of at least half of the total number of MPs. Since November 2016, this rule has been entrenched in the Rules of the Sejm (Art. 31) and not in statutory provisions. Regulating the majority necessary to elect a judge by the Rules of the Sejm undermines the significance of the election. This solution probably expresses the legislator's assumption that the staffing of the Tribunal is a legislative matter, but such an approach can be found only in the law on the Constitutional Tribunal of 1985. The seat of a constitutional judge, which is one of the most important public offices, is therefore filled by a majority determined in an internal act of the Sejm.

The beginning of a judge's term of office is not precisely defined. Until 2015, it was usually the date indicated in the resolution of the Sejm or the date on which the outgoing judge's term of office expired. It was not the day of taking the oath before the President. However, the actual practice shaped in the years 2017-2020 is that the beginning of the term of office is associated with taking the oath.

The method of staffing the Tribunal, in which judges are elected by the parliamentary majority, is relatively simpler than complex mechanisms of appointing constitutional judges in other

15 See MP z 2019, poz 1082 ze zm.

democratic states. For example, in other countries, the right to appoint constitutional judges is divided between central bodies (the president of the republic, presidents of chambers, councils of the judiciary, etc.), and the selection (appointment) procedure, as well as formal requirements for candidates for judges, are generally defined. The functioning of these procedures, however, is 'oiled' by the political culture, the trust between the parliamentary majority and minority, and by custom. These procedures are not as dependent on legal rules and yet result in the appointment of judges of unquestionable position. This observation applies even more to the staffing of the US Supreme Court.

There is no doubt that a stronger legitimacy of a judge would result from the introduction of the requirement of a qualified majority (e.g., a two-thirds majority) and not just an absolute majority. It is relatively easy to refute the objection that the election of a judge by the Sejm is political. It takes place within the parliamentary system, and judges receive their mandate indirectly from the nation. Regardless of the majority of votes or the body which elects judges, there is always a political dimension to the procedure. It must be remembered that the Tribunal is elected by the legislative branch, but according to the Constitution, it is independent (Art. 173). As shown by research, it was possible to prove the independence of the court from politicians empirically.

A constitutional judge – unlike judges of other courts – is not bound by statutory provisions when adjudicating on their constitutionality. He or she is independent in the exercise of their office and is subject only to the Constitution (Art. 195 para. 1). This property of the status of a judge played a special role in 2015 when the Tribunal ruled on the amendment of 22 December 2015 to the law on the Constitutional Tribunal. As was already mentioned, the Tribunal reviewed the constitutionality of the amendment on the basis of the Constitution and the 2015 law on the Constitutional Tribunal, excluding some of the provisions contained therein.

A constitutional judge must meet the requirements of political independence and neutrality (Art. 195 para. 3). This means that he or she must not belong to a political party or a trade union or perform public activities incompatible with the principles of the independence of the courts and judges. These requirements also hold with regard to retired judges of the Constitutional Tribunal.

Constitutional judges enjoy formal immunity and the privilege of physical integrity (Art. 196).

A judge is irremovable from office. A judge's mandate may expire before the end of the term of office only in the cases specified in the law on the status of judges of the Constitutional Tribunal, and this state must be confirmed by the General Assembly.

2.2 Changes in the Constitutional Judiciary Introduced in 2015 and in the Following Years

In 2015, after the elections to the Sejm for the eighth term (2015-2019), some politicians started to question the fundamental role of the Constitutional Tribunal in upholding the principle of constitutionalism. Instead, they emphasised the role of the Sejm and the principle of national sovereignty. Such opinions appeared independently of the conflict on the staffing of vacancies in the Tribunal, which will be referred to below. From the perspective of constitutional principles, what was much more important than this conflict was that the executive assumed the right to decide whether the rulings of the Tribunal are valid judgments. The questioning of the finality of the Tribunal's decisions by the executive after 2015 by refusing to publish some of them is the key to undermining the position of the constitutional court in general.

In October 2015, at the turn of the seventh (2011-2015) and eighth (2015-2019) term of the Sejm, a conflict broke out over the staffing of vacancies in the Tribunal, which appeared when terms of office of three judges expired. The Sejm of the seventh term elected five

judges, including three to fill the seats of the outgoing judges and two 'in advance', i.e., to fill the vacancies that would appear during the eighth term of the Sejm. It should be emphasised that the Sejm of the seventh term had the right to fill only three seats in the Tribunal because three seats were vacated before the end of its term. However, the President of the Republic did not take the oath from any of the five judges. Furthermore, the newly elected Sejm of the eighth term stated that the resolutions of the previous Parliament on the election of these five judges were not legally binding.[16] Then, it elected another five judges, who were sworn in by the President.

The Provincial Administrative Court in Warsaw, in the judgment of 20 June 2018,[17] referring to the judgments of the Constitutional Tribunal in cases K 34/15, K 47/15, and K 39/16, confirmed that the Sejm of the seventh term validly elected three judges of the Constitutional Tribunal on 8 October 2015.

The court ruled that the status of a judge of the Constitutional Tribunal is obtained upon completing the election procedure by the Sejm (which took place on 8 October 2015, during the Sejm of the seventh term). The resolution of the Sejm in this respect is final and not subject to change. As a result, the Sejm cannot revoke its decision, nullify it, state its invalidity, or convalidate it *post factum*. The competence of the Sejm to elect a judge can be exercised only when there is a vacant judicial position that must be filled. Since the three judicial positions had already been filled as a result of elections held on 8 October 2015, the Sejm of the eighth term could not validly elect another three judges (on 3 December 2015) for positions that were already occupied. Such a practice, in its effects, can be compared to selling tickets for occupied seats.

In 2021, the situation is as follows: three judges validly elected by the Sejm of the seventh term have not been sworn in by the President, and the other three judges elected by the Sejm of the eighth term have been sworn in despite having been elected to replace the former ones. Such a situation paralyses the ability of the Tribunal to function, as the position of the three judges elected for occupied seats is constantly being questioned. It also negatively affects the perception of the position of the Tribunal itself.

Despite the gravity of the conflict over the election of judges in 2015, what was more constitutionally significant was the questioning of the final character of the Tribunal's judgments. Such a situation occurred in 2016 when the Prime Minister refused to publish some of the Tribunal's rulings issued in the same year. It appeared that the recognition of the Tribunal as a judicial body depended on the assessment of its judgments by the executive. Such an attitude of the government to court judgments leads to the destruction of the rule of law.

After the 2015 elections, the ruling party pursued the idea of a political pacification of the Constitutional Tribunal, by means of solutions drawn from Hungary, *inter alia*. This plan was in accordance with the publicly available draft constitution proposed by the party, but its impetus was surprising. The draft constitution of 'Law and Justice' assumed that the Constitutional Tribunal would be reduced to the role of an insignificant body, a kind of ornament that would allow for the formal classification of bodies and institutions as a constitutional democracy. The government used various measures to undermine the position of the Tribunal. In addition to the abovementioned elimination of the three validly elected judges, they involved the enactment of subsequent remedy laws on the Tribunal, including the aforementioned law of 22 December 2015. In connection with the paralysis of

16 Cf Resolutions of the Sejm of the Republic of Poland of November 25, 2015 (MP of 2015, items 1131-1135). In its decision of 7 January 2016 U 8/15, the Tribunal discontinued the proceedings on the review of the constitutionality of the resolutions of the Sejm of 25 November 2015 and 2 December 2015.

17 See V SA/Wa 459/18, LEX no 2530153.

the Tribunal, some theorists announced the 'end of the epoch' in the latest political history of Poland or at least a crisis of the current model of the functioning of judicial review in Poland.

A series of the so-called remedy laws on the Tribunal aimed at shifting its position in the tripartite system of powers, limiting its significance, and, eventually, its takeover by the government. Remedy laws were not incidental activities of the legislator, but they essentially sought to introduce constitutional changes by means of ordinary laws. The law on the Constitutional Tribunal of 22 December 2015 was of particular importance, as the legislator intended to exclude it from the scope of the principle of constitutionalism by securing it against the possibility of being reviewed by the Constitutional Tribunal. The remedy laws were repealed in late 2016 and replaced by the laws on the Tribunal of November and December 2016.

2.3 Conclusion to Part I

As a result of the abovementioned activities, the position of the Tribunal in the judiciary was marginalised. Since the role of the Tribunal in examining the constitutionality of law and in safeguarding the rights of citizens has been weakened, there has been a discussion started in Poland on the importance of dispersed judicial review. Even the opponents of this type of review began to appreciate its potential significance. The state of legal uncertainty forces us to consider whether judicial review could be exercised, to some extent, by common courts.

3 CRISES OF CONSTITUTIONAL JUSTICE IN UKRAINE

Unlike the Republic of Poland, constitutional justice in Ukraine has not yet been in a state in which it could be said that it is an authoritative institution that enjoys the trust of society and due respect from politicians. The only exception is the period of the Constitutional Court of Ukraine (CCU) during the term of its initial composition, which managed not only to lay the foundations of the constitutional doctrine of the Court but also to accumulate the authority and respect necessary to protect the Constitution. Already in the early 2000s, the first problems related to the independence of the CCU appeared, which later became periodic and systemic, and especially intensified during the last year.

3.1 Position of the Constitutional Court of Ukraine (short overview)

The Constitutional Court of Ukraine is a relatively young institution, introduced by the 1996 Constitution and formed for the first time in 1997. Therefore, the constitutional foundations for the functioning of the current bodies of constitutional justice in Poland and Ukraine were laid almost simultaneously. The 1996 Constitution defined the Constitutional Court of Ukraine as the sole body of constitutional jurisdiction, which meant that the decision on the constitutionality of legal acts in the state belonged exclusively to this body. As in the Republic of Poland, the Constitutional Court of Ukraine initially did not belong to the judicial branch of the state power. Following the 2016 constitutional reform of the judiciary (which also covered constitutional justice), the provision that the CCU is the sole body of the constitutional jurisdiction was removed. This means that the approach to resolving the issue of the constitutionality of legal acts has changed in the state as a whole, and courts of general jurisdiction have been given additional opportunities to resolve issues of the constitutionality of legal acts. Such possibilities were legally supported by the amendments to the procedural codes, which obliged the court to directly apply the norm of the Constitution if a legal act (or its provision) contradicts it, justifying its unconstitutionality. Simultaneously with the adoption of such a decision, the general court must notify the Supreme Court (which is the subject of the constitutional submission to the CCU) in order to appeal to

the CCU on resolving the issue of unconstitutionality of the not applied (because of its unconstitutionality) law or its provisions.[18]

In addition, as a result of the 2016 reform, some powers of the CCU were changed. In particular, the institution of a constitutional complaint was introduced, and the Constitutional Court was deprived of the power to interpret laws. Instead, the powers to verify issues submitted to the national ('all-Ukrainian') referendum were added. But the key functions remained unchanged: the recognition of legal acts as unconstitutional, the official interpretation of the Constitution (which are explicitly enshrined in the Constitution), and the resolution of constitutional conflicts (which is not explicitly enshrined in the Constitution but follows from the set of powers of the CCU).

Nowadays, the legal bases for the CCU functioning in Ukraine are: 1) The Constitution of Ukraine (as of 2014 with amendments of 2016); 2) The Law on the Constitutional Court of Ukraine (2017); 3) Rules of Procedure of the Constitutional Court approved by the Court itself.

It should be noted that in addition to the changes in the powers of the Constitutional Court, in recent years, there has been some change in the doctrinal and methodological basis of its activities. Thus, for many years, the CCU, like the Constitutional Tribunal of Poland, has repeatedly emphasised that it is 'a court over law, not over the facts'. In practice, this meant that the Court in its activities did not take into account the factual circumstances of the case and did not examine what in other forms of proceedings is called evidence. Given that one of the grounds for declaring legal acts unconstitutional under the Constitution is the violation of the constitutional procedure for their adoption and entry into force,[19] based on this approach, the Court was limited to examining those elements of the constitutional procedure that could not be confirmed without analysis of the facts but had an important impact on the end result of the adoption of an unconstitutional law. For example, the violation of the constitutional requirement for personal voting of deputies could not be confirmed except than by analysing the relevant facts (in particular, the absence of deputies in the Parliament during the voting). However, since 2018, this approach has been replaced by another. Thus, in the case of the principles of state language policy, the Constitutional Court not only took into account the data of the Border Service, which confirmed the absence of some deputies in Ukraine at the time of voting for this law but found an important violation of the constitutional procedure, which, together with other violations of the constitutional procedure, became the basis for declaring the law unconstitutional.[20]

Such a change of approach has significantly strengthened the Court's position and its capacity to conduct constitutional reviews of Parliament's acts and has enabled the Court to be more active in its work on declaring laws unconstitutional. In turn, the strengthening of the Court's position did not go unnoticed by political elites and affected its independence.

18 See: Civil Procedure Code of Ukraine, 1618-IV, Art 10 <https://zakon.rada.gov.ua/laws/show/1618-15#Text> accessed 21 February 2021; Commercial Procedure Code of Ukraine, 1798-XII, Art 11 <https://zakon.rada.gov.ua/laws/show/1798-12#Text> accessed 21 February 2021; Code of Administrative Procedure of Ukraine, 2747-IV, Art 7 <https://zakon.rada.gov.ua/laws/show/2747-15#Text> accessed 21 February 2021.

19 It should be clarified here that according to the position of the CCU, a violation of the Rules of Procedure of the Verkhovna Rada when adopting legal acts is not considered a violation of the constitutional procedure, which the CCU pointed out in a large number of its decisions. Such a constitutional procedure includes, in particular, rules on legislative initiative, participation of committees in drafting a bill, requirement of personal voting, rules of signing a law by the President of Ukraine, and some others, which significantly narrows the range of procedural violations that may become grounds for declaring an act of parliament unconstitutional.

20 Judgement of the CCU on the Law on the Principles of State Language Policy, no 2-p/2018 29 February 2018 <https://zakon.rada.gov.ua/laws/show/v002p710-18#Text> accessed 21 February 2021.

As for the independence of the Constitutional Court and its guarantees, it should be noted that the Constitution of Ukraine in its original version in 1996 was based on the need to insure them. First of all, for this purpose (as well as to ensure the impartiality of the Court), the appropriate method of appointing 18 judges of the Constitutional Court by three entities was chosen: the Parliament, the President, and the Congress of Judges of Ukraine appoint six judges each. However, since the late 1990s, it has become clear that this is not enough to achieve the set goals. Thus, as of 1999, President Leonid Kuchma managed to ensure the decision of the CCU[21] on the term of office of the President of Ukraine, according to which he actually had the opportunity to run for a third time[22] (but did not use it).

This decision of the CCU became a turning point in its further fate. It was the first serious blow to the Court's reputation, which inevitably affected its authority. On the one hand, this undermined public confidence in the Court, and on the other, it demonstrated that the Court could be influenced by 'successful' manoeuvring. Actually, there have been many examples of influence and pressure on the Court over the history of its existence. For example, during October 2005 - August 2006, the work of the Constitutional Court was blocked due to a lack of judges with current powers. First, the Verkhovna Rada did not appoint CCU judges according to its quota; then later, it blocked the procedure of taking the oath by the judges of the CCU, which, in accordance with the law in force at the time, was a condition for the acquisition of their powers.[23] The activity of the Constitutional Court of Ukraine was unblocked only after the adoption by the Parliament of unconstitutional amendments[24] to the Law on the Constitutional Court of Ukraine, which limited the power of the Court to consider laws amending the Constitution, which entered into force.[25]

Another means of pressure was the arbitrary dismissal of judges of the Constitutional Court (both by the Parliament and the President) 'for violating the oath' without any justification as to how exactly such a violation manifested itself. Subsequently, on the recommendation of the Venice Commission, such a ground for terminating the powers of a CCU judge was later removed from the law. In 2008, the President of Ukraine revoked the Decree of 2004 on the appointment of the CCU judge[26] (later, this 'tool' would be used during the crisis of 2021, which will be discussed in the next section).

A serious crisis related to constitutional justice took place in 2014 when during the Revolution of Dignity, the Ukrainian Parliament issued a political act (contrary to the formal

21 This wording means that 12 judges, regardless of the subject of their appointment, supported the adoption of the said decision, applying formal approach in the interpretation of the constitutional provision of the Part 3 of Art 106 'One and the same person cannot be the President of Ukraine for more than two consecutive terms'. Using only the rules of the perspective effect of the law made it possible to conclude that the incumbent President, who was in office for the second year at the time of the Constitution adoption and later (in 1999) was re-elected for a second term, had the right to run for President for the third time. Three judges expressed a dissenting opinion on the decision.

22 Judgement of the CCU in the case concerning the term of office of the President of Ukraine, no 22-rp/2003 25 December 2003 <https://zakon.rada.gov.ua/laws/show/v022p710-03#Text> accessed 21 February 2021.

23 The purpose of such a blockade was to prevent the CCU from reviewing the constitutionality of the Law on Amendments to the Constitution of Ukraine of 2004, which was assessed by the Venice Commission (CDL-AD(2005)15 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)015-e> accessed 21 February 2021) as adopted in gross violation of constitutional procedure and later (in 2010) declared unconstitutional and by the Constitutional Court itself.

24 Judgement of the CCU in the case concerning the powers of the Constitutional Court of Ukraine, no 13-рп/2008, 26 June 2008 <https://zakon.rada.gov.ua/laws/show/v013p710-08#Text> accessed 21 February 2021.

25 Law of Ukraine no 79-V, 4 August 2006 <https://zakon.rada.gov.ua/laws/show/79-16#Text> accessed 21 February 2021.

26 Decree of the President of Ukraine no 297.2008, 3 April 2008 <https://www.president.gov.ua/documents/2972008-7308> accessed 21 February 2021.

wording of the Constitution in force at the time) to dismiss five CCU judges who took part in the decision No. 20-rp/2010 (on the basis of which the Law amending the Constitution of 2004 was declared unconstitutional[27]). A pre-trial investigation has been launched against several judges who voted in favour of this decision, but it has not yet been completed, so it seems impossible to draw any conclusions about the possible validity of such an act of the Verkhovna Rada.

These examples show that the problems with ensuring the institutional independence of the CCU are not new for Ukraine. They have accompanied the Court throughout most of the time of its functioning. At the same time, the authority of the constitutional justice body gradually declined. On the one hand, this did not add legitimacy to its decisions, and on the other hand, it was the legitimacy and validity of the CCU's decisions that became perhaps the most defining preconditions for its current position.

3.2 The Crisis Situation of 2020-2021

The next crisis related to constitutional justice in Ukraine started from the 27 October 2020 judgement of the CCU on the issues of anti-corruption policy.[28] The decision itself concerned two issues: 1) recognition of unconstitutional criminalisation of knowingly unreliable information in the declaration, as well as the intentional failure of the subject to declare the declaration; 2) the powers of the NACP[29] to verify the declarations of judges and respond to relevant violations.

Regarding the first part of the decision, the CCU pointed out the insufficient level of public danger to criminalise the act, which was fairly quickly taken into account by the Parliament (on 4 December 2020, a law was passed amending the Criminal Code and restoring criminal liability for declaring inaccurate information, as well as for failure to file a declaration by the declaring entity with an increase in the minimum amount of declaration[30]).

As for the second part of the decision, it is worth noting that the NACP interpreted its powers in a rather broad way, which the CCU considered to be excessively discretionary. Therefore, in the decision, the CCU declared unconstitutional the provisions that provided for the NACP's authority to verify judges' declarations, pointing out that if the NACP is in the structure of the executive branch, which leads to the control of the executive branch over the judiciary. However, the NACP interpreted this as a complete ban on the electronic declaration system and suspended the operation of the website, which, of course, was categorically not accepted by society. These actions of the NAPC did not follow from the decision of the CCU, but it seems to have provoked a number of problems. Let us consider them briefly, dividing them into motivational (reasons for the judgement) and operative (the judgement itself) problems.

The main problem of the operative part of the decision was its immediate entry into force. Although the CCU has repeatedly used the postponement construct to give the legislator time to respond to unconstitutionalities and adopt new legislation, taking into account the CCU's reservations, this time, the CCU decision came into force immediately (the

27 According to that Law, the Constitution of Ukraine provided for limited powers of the President in the executive branch compared to the 1996 Constitution. That is why the representatives of the parliamentary majority in 2014 believed that it was the Law on amending the Constitution of 2004 that became the basis for the usurpation of power by President Yanukovych.

28 Judgement of the CCU no 13-p/2020, 27 October 2020 <https://zakon.rada.gov.ua/laws/show/v013p710-20#Text> accessed 21 February 2021.

29 National Agency on Corruption Prevention.

30 Law of Ukraine no1074-IX, 4 December 2020 <https://zakon.rada.gov.ua/laws/show/1074-20#n15> accessed 21 February 2021.

Constitution states that provisions declared unconstitutional shall cease to be valid on the day of the decision unless otherwise established by the decision itself, but not before the day of its adoption[31]). Even if all the other issues (discussed below) were absent, but the repeal of the unconstitutional provisions would be delayed; it would not lead to such negative consequences and would not cause a wave of political and public outrage.

The second problem of the operative part of the decision was that it declared unconstitutional not only those provisions that were required to be recognised in the constitutional appeal but also a number of others, i.e., the CCU went beyond the constitutional appeal. This should be considered in detail.

The fact is that the previous Law on the CCU explicitly provided for such a possibility for the Court, even if it was another legal act. Art. 61 (3) stated:

> If in the course of consideration of a case on a constitutional petition or constitutional appeal non-compliance with the Constitution of Ukraine of other legal acts (their separate provisions) is revealed, except for those in respect of which proceedings have been opened and which influence the decision or opinion in the case, the Constitutional Court Ukraine recognizes such legal acts (their separate provisions) as unconstitutional.[32]

The current law on the CCU does not contain such a provision. This is used as almost the only argument in favour of the fact that the Court has no right to go beyond the constitutional petition. Even the Venice Commission, in its Opinion, noted that:

> The CCU went far beyond the petition it was considering, thus expanding its scope of review: the CCU declared unconstitutional several articles of the 2014 Law which were not mentioned in the petition (para. 25).[33]

However, is not the role of constitutional justice levelled and denied by such an approach? If the Constitutional Court is the guardian of the constitution and its nature, according to the Venice Commission itself, is close to the constituent power ('Disregarding a judgment of a Constitutional Court is disregarding the Constitution and the Constituent Power' – as said in its Opinions),[34] is it justified to restrict the constitutional court in resolving the issue of the unconstitutionality of a provision of a law which is not the subject of a constitutional submission, but which is clearly contrary to the Constitution? It seems that such an approach to the restriction of the Constitutional Court is not justified because, hypothetically, it may be a question of inconsistency with constitutional values, principles, or violation of constitutional rights by such an act. In the situation under consideration, it should also be taken into account that there is no prohibition on such an extended approach to the interpretation of the CCU's powers in the legislation, and, provided that the reasoning of the decision is duly justified, in our opinion, the CCU should have the right to resolve such issues.

Actually, the motivation of the Court's decision is a separate block of problems that we have identified earlier. The first thing that stands out is the disproportionately short amount of

31 Constitution of Ukraine, Art 152(2) <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text> accessed 21 February 2021.

32 Law of Ukraine no 422/96-BP, 16 October 1996 <https://zakon.rada.gov.ua/laws/show/422/96-вр#Text> accessed 21 February 2021.

33 CDL-AD (2020) 038, 11-12 December 2020 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)038-e> accessed 21 February 2021.

34 CDL-AD(2017)003, 10-11 March 2017, para 8 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)003-e> accessed 21 February 2021.
See also: A Brewer-Carías, 'Constitutional Courts' Interference with the Constituent Power' in *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge 2011). doi:10.1017/CBO9780511994760.004.

motivation regarding the number and content of provisions declared unconstitutional. However, this is not the only problem. Recognition of the provisions of the law as unconstitutional is always an important step because it is a question of the invalidation of an act of a national representative body, which, according to the doctrine of popular representation, represents the will of the people.[35] This imposes on the constitutional justice body the obligation to provide detailed and thorough arguments on each provision that is declared unconstitutional. We do not find such an argument in the Court's decision, which inevitably affected its legitimacy.

The immediate reaction of the President of Ukraine to the CCU decision was the introduction in Parliament of a bill on the dissolution of the Constitutional Court and the nulling of its decision. Qualifying the situation as a 'constitutional crisis', the President justified the need to adopt a law that clearly contradicts the Constitution of Ukraine, the principles of separation of state power, and the rule of law by the need to overcome this 'crisis'. However, after the urgent negative conclusion of the Venice Commission, the bill was withdrawn.

The Verkhovna Rada chose a more moderate approach to resolving the situation and drafted a bill on the constitutional procedure. The idea of the act is to transfer the regulation of the procedure of the Constitutional Court activities to the law (as of today, it is regulated by the Rules adopted by the Court itself). The vast majority of the provisions of the draft law are aimed at regulating various aspects of the constitutional procedure: the distribution of cases between judges of the Constitutional Court, additional measures to ensure the openness of the Court (in particular, the publication of constitutional appeals), and other generally positive innovations. However, it is alarming that the goal declared by the ruling party in the adoption of this law is to block the work of the CCU by increasing the number of votes of judges required for the decision of the Court.[36]

In this regard, let us return once again to the words of John Marshall, which we quoted at the beginning of this study, 'Let the end be legitimate…'. The question arises: Can a law, if a bill is passed, be considered constitutional if its very purpose contradicts the constitution?

The position of the Venice Commission is unexpected in this regard, which in its conclusion, after analysing the bill, indicated that 'The higher voting requirements… can be problematic'. But, at the same time, it considers temporarily raising the voting requirement in the Grand Chamber as 'justifying' in existing circumstances (paras. 61, 62).[37] When such an idea was used by the Polish authorities in 2015, the Venice Commission said that it was a non-appropriate tool, contrary to the principle of the rule of law (paras. 78, 79, 82).[38]

Clearly, this points to a link between the guarantees of the independence of the judiciary and the legitimacy of its decisions. If the decision of the Court is well reasoned, and therefore, there are no doubts about its fairness (or at least they are minimal), it creates the preconditions for their legitimacy in society, as well as in the international community. This, in turn, strengthens the guarantees of the Court's independence.

35 See: SP Croley,'The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law' (1995) 62 (2) The University of Chicago Law Review 689; A Stone Sweet, 'Constitutional Courts and Parliamentary Democracy' (2002) 25 (1) West European Politics 77. doi: 10.1080/713601586.

36 This goal has been repeatedly and openly stated by representatives of the People's Servant Party, and deputies of this party even introduced a draft bill to increase the quorum to 17 judges of the CCU (Draft Law on Amendments to Article 10 of the Law of Ukraine 'On the Constitutional Court of Ukraine' <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70312> accessed 22 April 2021.

37 CDL-AD (2021)006, 19-20 March 2021 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)006-e> accessed 21 February 2021.

38 CDL-AD (2016)001, 11-12 March 2016 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)001-e> accessed 21 February 2021.

However, despite the fact that the Venice Commission supported a moderate approach to resolving the conflict, the President of Ukraine issued a Decree revoking the President's Decree appointing two CCU judges (one of them is the CCU chairman),[39] justifying its necessity on the basis of ensuring national security.[40] It should be noted that according to the Constitution of Ukraine, the President has no authority to dismiss judges of the CCU. Moreover, given the previous experience of arbitrary dismissals of CCU judges (described above), during the 2016 constitutional reform, it was decided to strengthen the guarantees of independence of both the Court (institutional independence) and the personal independence of judges. To this end, in particular, the powers of disciplinary liability, as well as the dismissal of judges of the CCU, were assigned to the Court itself (which decides such issues in a special plenary session). So, at the time of writing, this Decree has been appealed to the Supreme Court and the Constitutional Court of Ukraine (cases have not yet been considered).

3.3 Conclusion to Part II

Ensuring the conditions for the proper functioning of constitutional justice proved to be a much more difficult task than the introduction of this institution after the adoption of the Constitution of Ukraine. The whole set of problems that exist in this area can be divided into two groups. On the one hand, there is the lack of effective and proportionate guarantees of the independence of constitutional justice, which makes it impossible for the Constitutional Court to properly perform the functions necessary for the existence of a constitutional state. On the other hand, there is a somewhat simplistic approach of the Court itself to the adoption of certain decisions, the reasoning of which does not provide them with the necessary legitimacy in society. The way out of the current crisis seems possible by finding a balance between the independence of the Court and its responsibility in a democratic society.

4 COMMON FEATURES AND DIFFERENT APPROACHES TO RESOLVING CRISIS SITUATIONS IN POLAND AND UKRAINE

Crisis situations with the constitutional justice bodies in Poland and Ukraine are not unique. Similar things have happened in other young democracies, in particular, in a number of post-socialist countries (Hungary, Romania, Moldova, etc.). The first question that seems interesting in the context of this issue is whether there can be any common causes of crises in constitutional justice. Therefore, comparative analysis gives grounds to draw some conclusions, highlighting certain common and distinctive features. Of course, it is more pleasant to analyse the causes of joint gains, but in order to have these, it is necessary to focus on existing problems, ways to solve them, and how to avoid them in the future.

If we take a purely legal component as a starting point, we could begin with the fact that Poland and Ukraine have a mixed form of government, which is somewhat different in terms of institutional design but still has many common features. In particular, in a situation where the President has his own political majority in Parliament, he receives a significant amount of power. Of course, the constitutional court, which is called upon to prevent arbitrariness

39 Decree of the President of Ukraine no 24/2021, 27 March 2021 <https://www.president.gov.ua/documents/1242021-37701> accessed 21 February 2021.

40 This is questionable from the point of view of the essence of national security, because not every violation of national interests can be considered an encroachment on national security. See: A Yezerov, 'Constitutional Security as a Component of National Security' (2017) 2 Ukrainian Journal of Constitutional Law 60.

and excessive concentration of powers in one subject, sooner or later becomes an obstacle to such actions, and therefore, naturally, becomes the object of pressure. However, a similar situation exists in countries with other forms of government (in particular, Hungary is a parliamentary republic and has also experienced serious problems with the independence of constitutional justice). So, obviously, the problem is not so much in the form of government, but in the very fact of excessive concentration of power in the hands of one political force, which is possible in different forms of government.

Alternately, there are examples of quite successful democracies in which such a political majority is present, but the bodies of constitutional justice function successfully. It seems that a high level of political and legal culture is a guarantee of the authority of constitutional justice and, at the same time, a safeguard against the emergence of crisis situations similar to those described above. In fact, the insufficiently high level of the latter is also, unfortunately, a common feature of the political and legal systems of Poland and Ukraine, which is obviously due to the socialist past and the consequent interruption of the democratic tradition.

Of course, there are a number of differences. As noted at the beginning of this study, Poland has advanced much further in terms of democratic constitutional development and the implementation of the principles of constitutionalism than Ukraine (which can be confirmed empirically by the Rule of Law and Democracy Indexes). Poland is an EU member, which implies additional obligations, as well as additional deterrents from violations of constitutional values and principles. Thus, the authorities' actions to put pressure on justice resulted in a violation of the sanctions procedure under Art. 7 of the Treaty of the EU. Ukraine does not have such deterrents, having only an association agreement with the EU, without even the prospect of future membership. So, perhaps the most limiting factor on the international scene is the reaction of the Council of Europe and its bodies. However, the position of the Venice Commission as an advisory body is not always taken into account (as demonstrated by the adopted Decree of the President of Ukraine on the dismissal of judges of the CCU).

The different positions of the Venice Commission in similar situations that took place in Ukraine and Poland are also noticeable. If an increase in the quorum for a decision by a constitutional justice body in Poland was considered by the Commission to be a violation of the rule of law, in Ukraine, it was considered an extreme but permissible measure. As mentioned above, it seems that the reason for such different approaches is the different degree of legitimacy of the constitutional justice bodies' decisions. The CCU's decision on electronic declaration undermined its legitimacy and negatively affected its guarantees of independence. Although from the constitutional law point of view, the declared unconstitutional law still raised a number of problematic issues regarding its constitutionality, but the lack of detailed reasoning of the judgement combined with the immediate invalidation of the unconstitutional provisions led to its categorical rejection by society, as well as deprived the Constitutional Court of support from international bodies. This testifies to the existence of a link between the legitimacy of decisions of constitutional justice bodies and guarantees of their independence.

5 CONCLUSIONS

The performance of constitutional justice in the conditions of a constitutional state is, in one way or another, connected with relations that have a potentially conflicting character. Protecting the constitution and preventing the arbitrariness of the political majority, which is the purpose of constitutional justice, require guarantees of its true independence. However, this independence is not an end in itself. It is a necessary precondition for the implementation in the state of the ideas of constitutionalism: respect for human dignity, human rights, democracy, the rule of law, etc. At the same time, if the independence of the

constitutional court is used to the detriment of these ideas, the body of constitutional justice loses its legitimacy, and the crisis of constitutional justice becomes threatening.

In this study, we tried to prove that the other 'side of the coin' of the constitutional justice body's independence is its authority and legitimacy of decisions. The legitimacy of the decisions of the constitutional court is ensured by two components: substantive (fairness and compliance of decisions with the principles of constitutionalism) and instrumental (proper validity and argumentation, which leave no doubt about the fairness and correctness of such a decision).

However, the authority of the constitutional justice body largely depends on itself, but not entirely. After all, political elites have a wide arsenal of means to involve the court in political disputes, where the court is limited in its status. If desired, there can be created situations that will either strengthen the authority of the court or vice versa. If, in the past, elites were aware of the benefits of having a truly independent, impartial body of constitutional justice, today, they unfortunately often prefer to administer it manually. And until the opposite becomes their strategic interest, constitutional law will have to develop many tools for resolving crisis situations.

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Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)

Journal homepage http://ajee-journal.com

STANDARDS OF PROOF: A COMPARATIVE OVERVIEW FROM THE UKRAINIAN PERSPECTIVE

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To cite this article: *B Karnaukh* 'Standards of Proof: A Comparative Overview from the Ukrainian Perspective' 2021 2(10) *Access to Justice in Eastern Europe 25–43. DOI: 10.33327/AJEE-18-4.2-a000058*

To link to this article: https://doi.org/10.33327/AJEE-18-4.2-a000058

Submitted on 10 Jan 2021 / Revised 28 Febr 2021 / Revised 10 Mar 2021 /

Approved 30 Apr 2021 / Published online: 03 May 2021 View data

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ACKNOWLEDGEMENTS

The author would like to express his gratitude to Dr Tetiana Tsuvina for her insightful comments on the manuscript and to the reviewers for their remarks and recommendations, which allowed him to improve the article, and to the editor, Sarah White.

CONFLICTS OF INTEREST

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

CONTRIBUTOR

The author was the sole contributor to the intellectual discussion underlying this paper, case-law exploration, writing, and translating, and accepts responsibility for the content and interpretation.

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STANDARDS OF PROOF: A COMPARATIVE OVERVIEW FROM THE UKRAINIAN PERSPECTIVE

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Abstract *The article addresses the issue of standards of proof from a comparative perspective. The author sketches the conventional distinction between common law and civil law countries in this regard, as well as some approaches that query the validity of the rigid division. The main purpose of the article is to characterise the Ukrainian approach to the standards of proof against the background of comparative analysis. The author concludes that recent developments in Ukrainian law have paved the way for a distinction between criminal and civil standards of proof. However, the doctrine is not yet elaborate enough to warrant a coherent application of the two different standards.*

There is a view that in civil law countries, not much attention is paid to the standard of proof. We would rather not take the liberty of generalising about all civil law countries, but with regard to Ukrainian doctrine, the assertion seems rather justified. However, some recent developments in procedural legislation give reasons to believe that the approach is being gradually changed. The disregard of the issue, underpinned by the sacred belief in the attainability of absolute truth, fades in comparison to the acknowledgement that standards of proof may differ in civil (commercial) and criminal cases. It is this inflexion point in Ukrainian evidence law that may entail far-reaching repercussions. Therefore, open discussion of the issue is needed to elaborate a doctrinal approach that could serve as a basis for the development of a coherent jurisprudence.

Keywords: *standard of proof, intime conviction, proof beyond reasonable doubt, preponderance of the evidence, balance of probability, Bayesian decision theory*

1 INTRODUCTION

The main purpose of the article is to characterise the current Ukrainian approach to standards of proof against the background of comparative analysis. For this purpose, I will start by explaining that proof is gradable, which means that some facts may be more or less proved. It is this core idea that justifies the very existence of the concept of a 'standard of proof' in law. Following this, the common law approach to standards of proof will be addressed since, in the common law countries, the issue was elaborated with great sophistication. Afterwards, I will consider the approach of civil law countries. Within this discussion, the conventional view will be outlined, according to which, in civil law countries, there is no distinction between civil and criminal standards of proof, and the unified standard is akin to the 'beyond reasonable doubt' standard in common law. At the same time, some insightful perspectives that query the sharp line between the two systems are also outlined. In the final part of the article, the Ukrainian approach is analysed. Within this part, I will address the recent changes in procedural codes and new trends in the Supreme Court's jurisprudence.

Special attention will be paid to compensation for lost profit since this concept per se implies that courts inevitably have to deal with uncertainty. Finally, I will focus on a case in which the Supreme Court touched upon the interplay between a civil case and a criminal case concerning the same fact. The paucity of legal arguments in this case once again proves the need for revisiting the standard of proof in national doctrine.

2 PROOF AS A GRADABLE CONCEPT

In the criminal trial known as the 'trial of the century'[1] and 'the most publicized criminal trial in history',[2] the jury found NFL star O. J. Simpson not guilty of the murder of his ex-wife and her friend. However, after the acquittal on criminal charges, the relatives of the deceased brought a civil action against O. J. Simpson, claiming compensation for damages caused by the deaths. The claim was satisfied: O. J. Simpson was held responsible for the deaths and was ordered to pay 33.5 million USD in compensatory and punitive damages.[3]

The following question arises: how can it be that the same fact is considered unproven in criminal proceedings and proven in civil proceedings? It can only be explained if one acknowledges that proof has degrees of comparison, which means that some statements can be more proven or less proven. Subsequently, the degree of proof can vary along a scale from 0 to 1: something can be 100% proven (equal to 1), 90% proven (0.9), or 75% proven (0.75), etc.

In this regard, it worth noting that according to contextualism, the verb 'to know' is context-dependent.[4] Thus, the same expression, such as '***A*** knows that ***x***', can be true in one circumstance (context) and false in the other. In this sense, the verb 'to know' is similar to adjectives that have degrees of comparison. Just as, for example, the adjective 'tall' implies that someone can be more or less tall ('taller' than the other), the verb 'to know' implies that something can be more or less known.[5] And the same level of knowledge may appear sufficient in one case (for a particular purpose) and insufficient in another (for some other purpose).

From the linguistics perspective, it is interesting that in their decisions, judges avoid stating that 'the court *knows*' or 'it is *known* to the court that' and prefer instead to say 'the court finds'. Nevertheless, the analogy between 'known' in the layperson's use and 'proven' in the procedural sense seems fair since hardly anyone can deny that from the civil procedure perspective, only that what is proven is known.[6]

Thus, once we recognise that a certain fact can be more or less proved, the way is opened to explain the opposite conclusions about the same fact made in criminal and civil proceedings. The existence of the two opposite conclusions is not logically contradictory if there are different proof thresholds in civil and criminal proceedings, ie, the minimum barrier that has to be overcome for some fact to be considered proven is set on different

1 J Diaz, 'Trial of the century legacy: How O.J. Simpson case changed US' (*San Francisco Chronicle,* 22 July 2017) <www.sfchronicle.com/opinion/diaz/article/Trial-of-the-century-legacy-How-O-J-11306325.php> accessed 10 January 2021.

2 R Price and J T Lovitt, 'Confusion for Simpson kids "'far from over"' (*USA Today,* 12 February 1997) <https://usatoday30.usatoday.com/news/index/nns224.htm> accessed 10 January 2021.

3 'O.J. Simpson trial' (*Encyclopædia Britannica,* 17 January 2020) <https://www.britannica.com/event/O-J-Simpson-trial> accessed 10 January 2021.

4 KN Kotsoglou, 'How to Become an Epistemic Engineer: What Shifts When We Change the Standard of Proof' (2013) 12 Law, Prob & Risk 275.

5 ibid 295.

6 On the relation between knowledge and judicial proof see: VR Walker, 'Preponderance, Probability and Warranted Factfinding' (1996) 62 Brooklyn Law Review 1075, 1079-1080.

levels. If the threshold value is higher in criminal proceedings, it may well be that in proving the guilt of the defendant, the prosecution overcomes the civil threshold but does not reach the higher, criminal threshold. Such thresholds[7] or threshold values are called the standard of proof.

While the *burden* of proof determines what facts shall be proved, the standard of proof determines the extent to which a fact must be proved in order for a court or a jury (fact-finder) to find it proven and decide a case grounding on it. In other words, the burden of proof answers the question of *what* should be proved, and the standard of proof, *how* (to what extent) it should be proved. Thus, the standard of proof is a quantitative indicator. As a result, the problem of measuring proof naturally arises.

Whether a fact is proven or not is for the court or the jury (fact-finder) to decide. For a statement to be found proven, the judge (juror) has to be convinced that it is true. Therefore, the degree of proof is determined by the degree of the fact-finder's conviction in the truth of the statement. That is why the standard of proof is also called the standard of conviction.[8] In everyday speech, we often say, 'I am one hundred per cent sure' or 'I am ninety per cent sure' and so on. Thus, the idea that conviction has degrees of comparison that can be measured (at least approximately) should not seem strange.

3 STANDARDS OF PROOF IN COMMON LAW COUNTRIES

There are two different standards of proof in the common law system: one for civil cases and the other for criminal cases. The standard of proof for civil cases is called the 'preponderance of the evidence' in the United States or the 'balance of probability' in the United Kingdom.[9]

Under this standard, some statement (as to the fact) is deemed proven if the fact-finder finds it is more probably true than not true. In other words, having considered all the evidence, the fact-finder comes to the conclusion that the probability of the statement being true is greater than the probability of the opposite. So, even the slightest deviation from the 'fifty-fifty' equiponderance (when the truth and falsity of the statement are equally probable) is sufficient. Therefore, this standard is also known as the 50+ standard, meaning that to prove a statement, it is enough that its probability is greater than 50%.[10]

In English law, the standard is enunciated in a similar way. Thus, in *In Re B (Children) (Fc)*,[11] Baroness Hale wrote

> [i]n our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place.

7 KN Kotsoglou (n 4) 275, 282.

8 S Gold, 'Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence' (1986) 96 Yale L J 376, 381; RS Bell, 'Decision Theory and Due Process: A Critique of the Supreme Court's Lawmaking for Burdens of Proof' (1987) 78 Journal of Criminal Law & Criminology 557, 576; RW Wright, 'Proving Causation: Probability Versus Belief' in R Goldberg (ed), *Perspectives on Causation* (Hart Publishing 2011), 80.

9 KN Kotsoglou (n 4) 280; RW Wright (n 8) 80; M Schweizer, 'The Civil Standard of Proof – What is it, Actually?' (2013) MPI Collective Goods Preprint 1, 1-2.

10 M Redmayne, 'Standards of Proof in Civil Litigation' (1999) 62 The Modern Law Review, 167, 168; VR Walker (n 6) 1076-1077; RW Wright (n 8) 87; S Gold (n 8) 378, 384-386.

11 [2008] UKHL 35 para 32.

However, in the United States, each state has its own model instructions for a civil jury. And although they all more or less uniformly define the civil standard of proof, one may notice some discrepancies in the formulations used.[12]

In this respect, it is worth noting the New Jersey Model Civil Jury Charges, which convey the standard as follows: 'To sustain the burden, the evidence supporting the claim must weigh heavier and be more persuasive in your minds than the contrary evidence. It makes no difference if the heavier weight is small in amount'.[13]

This formulation is somewhat different from the previous ones: while the previous formulations require that the probability of the statement being true exceeds 50%, the New Jersey variant can be read in such a way that it requires only that the plaintiff's evidence outweighs the defendant's evidence, and it does not matter that the plaintiff's evidence, despite being 'weightier', may produce a low degree of conviction, far below the threshold of 50%. It can be analogised to putting the plaintiff's evidence on one scale and the defendant's evidence on the other to see which one will prevail. In contrast, the California Instruction[14] specifically underlines that all the evidence (ie, presented by both the plaintiff and the defendant) has to be considered in the aggregate and produce a conviction greater than 50% (as if both plaintiff's and defendant's evidence were put on one scale and measured against a scale weight of 50%).

The 'more likely than not' or 50+ formulation is definitely the dominant understanding of the standard.[15] The task of the fact-finder is not to determine the winner of the proving contest but to establish whether the statement about the fact is credible enough to constitute a ground for a court judgement. Any statement of a (particular) fact, such as, for instance, 'the plaintiff's harm is caused by the defendant's actions' may be either true or false. And if the plaintiff has proved that the probability of this statement being true is 30%, the probability that this statement is false cannot be other than 100 - 30 = 70 (%). In other words, in relation to a single statement of fact, it cannot be that the plaintiff has proved that it is true with a probability of 30%, and the defendant has proved that it is false with a probability of, say, 20%. That the civil standard of proof requires 50+ probability or, equivalently, the statement being more likely true than not true is substantiated by the Bayesian decision theory, which is analysed below.

In criminal cases, another standard applies, known as proof 'beyond reasonable doubt'. According to this standard, it is not enough to incline a little bit more to the truth of the statement than to its falsity. Instead, a strong conviction is required that the statement corresponds to reality; every doubt that from the standpoint of common sense and daily life experience can reasonably call into question the probability of the statement must be excluded. The degree of conviction required by the criminal standard of proof is close to a moral certainty. It is not feasible to eliminate all the possible doubts (that is, to achieve absolute certainty). Therefore, some doubts may remain, but only those ones which experience shows are extremely implausible and based on unrealistic assumptions that hardly ever hold true in everyday life. Thus, the criminal standard of proof sets the threshold much higher than the civil one.[16] In number, it is estimated as 90% conviction.[17] In the USA, the standard 'beyond

12 J Leubsdorf, 'The Surprising History of the Preponderance Standard of Civil Proof' (2016) 67 Fla L Rev 1569, 1571-1576.

13 Charge 1.12I.

14 California Civil Jury Instructions para 200, p 40.

15 M Redmayne (n 10) 168.

16 J Kaplan, 'Decision Theory and the Factfinding Process' (1968) 20 Stanford Law Review, 1065, 1073; RS Bell (n 8) 560.

17 DH Kaye, 'Clarifying the Burden of Persuasion: What Bayesian Decision Rules Do and Do Not Do' (1999) 3 International Journal of Evidence and Proof, 1, 1; RS Bell (n 8) 561.

reasonable doubt' is considered as emanating from the due process clause enshrined in the Fourteenth Amendment to the United States Constitution.[18]

In addition to the fact that civil and criminal standards set different threshold values of conviction, some writers also point out another distinction. In its formulation, the civil standard refers more to *objective* categories, such as 'evidence' ('preponderance of evidence') or 'probability' ('balance of probability') (in this context, 'probability' can be interpreted as a mathematical concept amenable to calculation according to probability theory). In contrast, the criminal standard refers to the *subjective* concept of 'doubt'.[19] But whether it is correct that the proof threshold for civil cases is measured on an objective scale while the proof threshold for criminal cases is measured on a subjective scale is a topic of heated debate. The issue becomes especially acute in the discussion revolving around the probative value of 'naked statistics',[20] in particular, that of epidemiological data. However, as the earlier discussion shows, to prove a statement means to convince the fact-finder that it is true. Therefore, the criterion for measuring proof in both civil and criminal cases is always a subjective one – the degree of the fact-finder's conviction.[21]

The distinction between civil and criminal standards of proof in common law is rationalised by means of Bayesian decision theory.[22] The approach prevailing in common law is based on three basic tenets.[23] First, the court and the jury have to decide under uncertainty, ie, in a situation where the absolute truth about the facts of the case is not achievable.[24] Second, under uncertainty, the best thing to do is to make a rational decision based on the available knowledge, ie, a decision that minimises the total amount of expected disutility. Third, in civil cases, the disutility of the error in favour of the plaintiff equals the disutility of the error in favour of the defendant,[25] but in criminal cases, a mistake in favour of the prosecution is much worse than a mistake in favour of the defence.[26]

As a result, in a civil case where the error cost is symmetrical, it is reasonable to conclude the fact is true whenever the probability of it being true at least slightly exceeds the probability of the opposite. In contrast, in a criminal case, much greater confidence is needed since the cost of a false positive error significantly exceeds the cost of a false negative one. To sum up, under the Bayesian decision theory, the standard of persuasion to be applied depends on the ratio of false positive error cost to false negative error cost. Since those ratios differ in civil and criminal cases, the standards of proof differ as well.

18 KN Kotsoglou (n 4) 276.

19 M Schweizer (n 9) 3.

20 T Ward, 'Expert Evidence, "Naked Statistics" and Standards of Proof' (2016) 3 EJRR, 580.

21 M Brinkmann, 'The Synthesis of Common and Civil Law Standard of Proof Formulae in the ALI/UNIDROIT Principles of Transnational Civil Procedure' (2004) 9 Uniform Law Review 875, 878; M Schweizer (n 9) 3.

22 On the application of Bayesian decision theory to fact-finding process in court in general, see: NC Stout and PA Valberg, 'Bayes' Law, Sequential Uncertainties, and Evidence of Causation in Toxic Tort Cases' (2005) 38 University of Michigan Journal of Law Reform 781; RS Bell (n 8); Kaplan (n 17); Kaye (n 17); DH Kaye, 'Apples and Oranges: Confidence Coefficients and the Burden of Persuasion' (1987) 73 Cornell Law Review 54.

23 A more exhaustive list of the ten basic tenets is offered by K Kotsoglou. See: Kotsoglou (n 4) 286-287.

24 C Engel, 'Preponderance of the Evidence versus Intime Conviction: A Behavioral Perspective on a Conflict between American and Continental European Law' (2009) 33 Vermont Law Review 435, 436; J Brook, 'Inevitable Errors: The Preponderance of the Evidence Standard in Civil Litigation' (1982) 18 Tulsa L Rev 79; Kotsoglou (n 4) 275, 282; Redmayne (n 10) 167.

25 KM Clermont, 'Standards of Proof Revisited' (2009) 33 Vermont Law Review 469-470; Kotsoglou (n 4) 280; Bell (n 8) 559; Schweizer (n 9) 3; Redmayne (n 10) 171; Leubsdorf (n 12) 1580-1581; KM Clermont and E Sherwin, 'Comparative View of Standards of Proof' (2002) 50 The American Journal of Comparative Law 243, 252.

26 Clermont & Sherwin (n 25) 268; Bell (n 8) 560; Schweizer (n 9) 3.

In American law, in contrast to UK law, there is a third, intermediate standard of proof – the standard of 'clear and convincing evidence'.[27] It sets the threshold value of conviction higher than the 'balance of probabilities' but lower than 'beyond a reasonable doubt'. This higher standard applies to a limited number of civil cases where something more than just a pecuniary interest is at stake,[28] namely, personal liberty, reputation, or accusations of quasi-criminal offence. For instance, the standard applies to cases involving fraud, defamation, civil commitment proceedings, involuntary sterilisation of an incompetent person, termination of life-sustaining treatment of an incompetent person, and some others.[29]

4 STANDARDS OF PROOF IN CIVIL LAW COUNTRIES

In civil law countries, there is no distinction between civil and criminal standards of proof – in both cases, the same standard applies, known as 'intime conviction'.[30] It requires the judge (or jury) to find the fact proven only if, having considered all the evidence adduced, he/she has an inner conviction that the fact did take place. And though from the perspective of modern epistemology, it seems settled that absolute truth is hardly ever achievable, the standard of proof in civil law countries is often formulated as if it were achievable.[31] The fact-finder is supposed to search for the truth and has to be firmly convinced of the facts on which the decision is based.

In ELI/UNIDROIT Model European Rules of Civil Procedure, the rigidity of the civilian standard is softened. Thus, under Rule 87, '[a] contested issue of fact is proven when the court is *reasonably* convinced of its truth' (italics added). In the commentary, it is explained that '[t]his should be understood to mean "as close to being fully convinced as possible", accepting that being fully convinced is an ideal that cannot generally be realised in practice'.

When the civilian standard is interpreted as insisting on the search for truth, it is severely attacked for being naive, unrealistic, unfair, and ineffective.[32] In this sense, it is rightly stressed that in order to seek the actual truth, one must (a) not be limited in time, (b) be able to gather evidence on one's own (and not be content with what is presented by someone else), and (c) be free to refrain from deciding whenever the search has not led to a satisfactory result. But none of these requirements applies to the court hearing a civil case. Under the realistic conditions (when the court is limited in time, does not collect evidence on its own, and cannot refrain from making a decision), too high a standard of proof does not lead to finding actual truth in a courtroom but rather results in the victory of the party favoured by the burden of proof allocation (ie, the party not saddled by the burden, which is usually the defendant).[33] So, the burden of proof allocation turns into a decisive advantage.

Under the dominant view, the intime conviction standard is effectively equivalent to 'beyond reasonable doubt'[34] and sets the threshold value of conviction at the same level of 90%. Thus, as far as criminal cases are concerned, there is no sharp distinction between

27 *Addington v Texas* 441 US 418, 99 S. Ct. 1804 (1979).

28 ibid.

29 For a complete list, see: New Jersey Model Civil Jury Charges, Charge 1.19.

30 Wright (n 8) 80; Schweizer (n 9) 4; Engel (n 24) 435; Clermont & Sherwin (n 25) 245-251.

31 Wright (n 8) 80; Schweizer (n 9) 5.

32 Clermont & Sherwin (n 25) 259; Wright (n 8) 81.

33 Clermont & Sherwin (n 25) 271.

34 G Wagner, 'Asbestos-Related Diseases in German Law' (2013) 21 European Review of Private Law 319, 325; Clermont & Sherwin (n 25) 245.

common law and civil law,[35] but with regard to civil cases, the latter sets the standard of proof much higher.

In view of the above, the O.J. Simpson case scenario is not feasible in civil law countries. Since the standard of proof in a civil case is as high as in a criminal case, the lack of proof of the accused's guilt in criminal proceedings means that it cannot be proved in civil proceedings either. Thus, the verdict in a criminal case is decisive for a civil lawsuit based on the same fact.[36]

In civil law countries, civil lawsuits can be filed within criminal proceedings. The fact that this tool is rather popular with the aggrieved persons, according to K. Clermont and E. Sherwin, proves once again the uniformity of the standard of proof in civil law countries.[37] If it were otherwise, no one would voluntarily file a civil lawsuit in criminal proceedings, thereby significantly complicating his/her own task. Everyone would file civil lawsuits in separate civil proceedings, where the proof threshold is lower and, therefore, easier to achieve.

Thus, according to the established view, there is a unified standard of proof in civil law countries, applicable to both civil and criminal cases. This standard, though not requiring absolute certainty, requires a firm inner conviction, which is the level of conviction that is, if not identical, then at least comparable to that required by the 'beyond reasonable doubt' standard. In sum, there is no sharp dividing line between the systems of common and civil law in what relates to criminal cases. But for civil cases, the difference seems to be significant.

5 IS THE DISTINCTION ACTUALLY SO CRITICAL?

As is often the case in comparative law research, the actual significance of the distinction between the law systems is queried. Many writers doubt that civilian lawyers actually apply as high a standard of proof as follows from its wording. There are different views on the issue in the academic literature. Some writers believe that with regard to the standard for civil cases, there is a genuine and sharp difference between common and civil law.[38] Instead, others argue that, despite the differing rhetoric, in practice, everything works more or less the same in both systems.[39] Some interesting empirical data are provided in favour of the latter point of view.

M. Schweizer conducted a survey of Swiss judges and judicial clerks in which he used various methods to ascertain the threshold value of confidence that respondents consider sufficient to conclude that the fact is proven before the civil court.[40] Different methods gave different results.[41] At first, respondents were directly asked how much (by percentage) they have to believe in the truth of a statement in order to find it proven for the purposes of civil proceedings. The average value amounted to 91%.[42] At the same time, a small number of respondents indicated that 100% confidence is needed.[43] According to Bayesian decision theory, this should mean that respondents consider a mistake in favour of the plaintiff

35 Clermont & Sherwin (n 25) 246; Kotsoglou (n 4) 275.

36 Clermont (n 25) 471.

37 Clermont & Sherwin (n 25) 264; Clermont (n 25) 471.

38 J Kokott, *The Burden of Proof in Comparative and International Human Rights Law* (Brill Nijhoff 1998) 18; Clermont & Sherwin (n 25) 254-255; Wright (n 8) 79; Engel (n 24) 435.

39 Schweizer (n 9); Brinkmann (n 21).

40 Schweizer (n 9).

41 ibid.

42 ibid 17.

43 ibid 22.

(false positive) ten times worse than a mistake in favour of the defendant (false negative).[44] However, when the respondents were asked to estimate the relative costs of the two types of errors in civil litigation, the vast majority (72%) acknowledged that they are equivalent.[45] The survey led M. Schweizer to conclude that in Switzerland, the actual standard of proof applied by the judges in civil cases is significantly lower than it is declared. Therefore, the difference between common and civil law in this respect may be significantly overestimated.[46]

The clear-cut comparison of the systems is obscured because the civilian lawyers, in contrast to their Anglo-American counterparts, paying surprisingly little attention to the standard of proof issues.[47] As K. Clermont and E. Sherwin note, in common law, the jury was the catalyst for the development of the standards of proof doctrine.[48] The need to explain the standard of proof to jurors stimulated elaborate discourse on the subject. So, the educational principle worked here: explaining something to others is a way to understand the subject for yourself. In contrast, in continental Europe, the problem was hidden 'behind the closed doors of deliberation rooms'.[49]

An unorthodox point is made by M. Taruffo: he argues that civil law does not set any standard of proof whatsoever.[50] In his view, intime conviction does not really imply any threshold value of conviction. It is, instead, a principle with only a negative meaning, which replaced the medieval rule establishing a rigid hierarchy of evidence (legal proof). Intime conviction means only that no evidence has a predetermined probative value for the court, and the court evaluates it according to its inner conviction (and not according to prescribed rules of evidence hierarchy).[51] R. Wright specifies that the only thing required in civil law is that the judge must be convinced, but nothing is said about the degree of conviction necessary.[52] That is why the concept of the standard of proof in civil law is intuitive rather than explained.[53]

Yet, in European countries, there are also the supporters of the common law approach to the standard of proof,[54] and not only among academics. For example, the Italian Court of Cassation expressly embraced a common law approach, recognising that the standard applicable in civil cases is 'preponderance of evidence', while in criminal cases, it is 'beyond reasonable doubt'.[55]

44 ibid 22.

45 ibid 18.

46 ibid 24.

47 Leubsdorf (n 12) 1593; Clermont & Sherwin (n 25) 253-255, 258. In civil law countries, the following issues are addressed within the evidence law: dichotomy of adversarial and inquisitorial models of civil procedure, absolute (material) or formal truth as a goal of civil procedure, principles and types of evidences, obligations of parties and the court in terms of the case-management, etc. See: J Jolowicz, 'Adversarial and Inquisitorial Models of Civil Procedure' (2003) 52 The International and Comparative Law Quarterly 281; A Uzelac, 'Goals of Civil Justice and Civil Procedure in the Contemporary World' in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014) 3, 19-21; C Koller, 'Civil Justice in Austrian-German Tradition: The Franz Klein Heritage and Beyond' in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014) 35, 46-48; DH Nokhrin, 'Civil Litigation in Russia: "Guided Justice" and Revival of Public Interest' in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014) 183,197-198; CH van Rhee and A Uzelac (eds), *Evidence in Contemporary Civil Procedure: Fundamental Issues in a Comparative Perspective* (Intersentia 2015).

48 Clermont & Sherwin (n 25) 257-258.

49 MR Damaška, *Evidence Law Adrift* (Yale University Press 1997) 54.

50 M Taruffo, 'Rethinking the Standards of Proof' (2003) 51 AJCL 659, 666.

51 ibid.

52 Wright (n 8) 84.

53 ibid 95.

54 Schweizer (n 9) 5.

55 Cass, sez un, 11 gennaio 2008, n 581 (Pres Carbone, Rel Segreto).

6 STANDARDS OF PROOF IN UKRAINIAN LAW

6.1 Recent Developments in Legislation and Jurisprudence

In conformity with civil law tradition, the procedural legislation of Ukraine sets forth that the judge shall evaluate evidence according to his/her inner conviction.[56] The formula is further accompanied by the clarification that no evidence has a preestablished probative force.[57] Until very recently, the standard of proof concept was relatively unknown in Ukrainian law. As Supreme Court Justice K. Pilkov notes, the courts started to recognise the concept no earlier than 2018-2019.[58] Since the issue has not been addressed in the academic literature[59] and there is no empirical data revealing the actual threshold of conviction applied by the judges, it is difficult to assess whether the standard of proof was actually differentiated depending on the type of proceedings or not. Most probably, in the absence of any statutory provisions to the contrary, the common belief was that both in civil and criminal cases, the judge had to be equally convinced of the truth of the parties' statements. Interestingly, the Civil Procedure Code (CPC) replicates the provision from the Criminal Procedure Code (CrPC), under which proof cannot be based on conjectures.[60]

It is safe to say that an O.J. Simpson case scenario could not have taken place in Ukrainian law: a person acquitted in a criminal case (due to lack of evidence proving her guilt) could not have been successfully sued in civil court for damages on the same facts. As in other European countries, in Ukraine, the legislation provides for a possibility to file a civil lawsuit in a criminal proceeding. Moreover, an aggrieved person retains a right to bring a civil action (in a separate civil proceeding) even after the tortfeasor has been acquitted in a criminal case.[61] However, from this rule, it cannot be inferred, as R. Wright proffers,[62] that the standard of proof actually applied in civil cases is lower than in criminal cases (unless the civil standard is actually lower than the criminal, it does not make any sense to allow civil action against a person acquitted in a criminal case since, from the outset, it would be doomed to failure).

In Ukrainian law, the availability of a civil lawsuit in a case of the tortfeasor's acquittal on criminal charges is not incompatible with the uniformity of the standard of proof. Even under the assumption that the standard is the same in criminal and civil cases, the rule makes sense for the cases in which tort liability does not depend on fault (strict liability) because in this case, the burden of proof differs from criminal to civil case.

Imagine a motorist driving his own car knocked down a pedestrian. He was accused of committing a criminal offence under Art. 286 CrC of Ukraine 'Violation of safety rules

56 See: para 1 Art 94 Criminal Procedure Code (hereinafter – CrPC), para 2 Art 80, para 1 Art. 89 Civil Procedure Code of Ukraine (hereinafter – CPC), para 2 Art 79 Code of Commercial Procedure of Ukraine (hereinafter – ComPC), para 2 Art 76, para 1 Art 90 Code of Administrative Procedure of Ukraine (hereinafter – APC).

57 See: para 2 Art 94 CrPC, para 2 Art 89 CPC, para 2 Art 90 APC.

58 K Pilkov, 'Standard of Proof as an Element of Warranting the Right to a Fair Trial' (4 November 2019) <https://supreme.court.gov.ua/supreme/pres-centr/zmi/816559/> accessed 10 January 2021.

59 Among the rare exceptions, see: KN Pilkov, *Evidence and Proof in International Commercial Arbitration: Scientific and Practical Guide* (Osvita Ukrainy 2016), 91-105; GR Kret, *International Standards of Proof in Criminal Procedure of Ukraine: Theoretical and Practical Foundations* (Petrash 2020); AA Pavlyshyn, XR Slyusarchuk, *Standards of Proof in Criminal Proceedings* (Kolir PRO 2018).

60 Cf para 6 Art 81 CPC and para 3 Art 373 CrPC.

61 See: para 7 Art 128, para 3 Art 129 CrPC. See, for instance: Judgment of the Civil Cassation Court (Second Chamber) 23 May 2018 case no 183/7497/15 <https://reyestr.court.gov.ua/Review/74439914> accessed 10 March 2021; Decision of the Civil Cassation Court (Second Chamber) 20 June 2018 case no 219/7195/16-ц <https://reyestr.court.gov.ua/Review/74926920> accessed 10 March 2021.

62 Richard Wright (n 8) 86.

of road traffic or transport exploitation by the persons driving vehicles'. However, within the criminal trial, it turns out that the accident occurred due to an unexpected failure of the brake system. The driver could not have reasonably foreseen it since it was caused by a hidden defect of the newly purchased car. In this case, the driver is not guilty of the accident, and therefore, in criminal proceedings, he is acquitted due to the absence of the *corpus delicti*. If a civil lawsuit has been filed in this criminal proceeding, the court leaves it without consideration.[63] However, the victim in such a case is entitled to bring the same claim in separate civil proceedings.[64] Such an entitlement makes sense for the victim because, under the Civil Code of Ukraine, damage caused by the use of a car is compensated regardless of fault (strict tort liability).[65]

Thus, the fault of the driver (due to the absence of which he was acquitted by the criminal court) will not even be considered in the civil case. Consequently, the fact that he was found not guilty in the criminal case will fall beyond the court's vision in the civil trial. Therefore, due to the distinction between the burdens of proof (fault is needed in a criminal case but not in a civil case), the verdict in the criminal case does not predetermine the outcome of the civil case.

Moreover, even if the fault were relevant for the civil case, the outcome would still not be predetermined because of the rules on the issue preclusion contained in para. 6 Art. 82 CPC. According to these rules, a verdict in a criminal case is binding for a court considering a civil case only with regard to two issues: whether the alleged actions or omission were committed and whether they were committed by the particular person. The issue of fault is not encompassed. This result seems perfectly natural if it is remembered that the concept of fault in civil law is distinct from fault in criminal law. While in criminal law, the fault is a state of mind, in civil law, it is an objective category denoting that a defendant has not done his best to avoid the infliction of harm.[66]

So, one way or another, the possibility to pursue a civil claim after the acquittal does not mean that standards of proof in civil and criminal cases are actually different.

However, the approach to the standard of proof in Ukrainian law is being shifted, timidly and unsystematically, but still towards distinguishing between civil and criminal cases according to the image of common law countries. There are several reasons for this shift: (a) the impact of ECtHR case-law (which recognises, first, that the standard applicable in criminal cases is 'beyond a reasonable doubt'[67] and, second, that the standard for civil cases shall be lower than that[68]); (b) the judicial reform of 2016, as a result of which the Supreme Court was replenished with new justices from attorneys at law and academics that have fresh views on many issues; and (c) adoption of the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Concerning the Stimulation of Investment Activity in Ukraine', which amended, in particular, Art. 79 ComPC.

63 See: para 3 Art 129 CrPC.

64 See: para 7 Art 128 CrPC. See, for instance: Judgment of the Kyiv Appellate Court 10 December 2018 case no 326/299/18 <https://reyestr.court.gov.ua/Review/78482494> accessed 10 March 2021; Judgment of the Desnianskyi District Court of Kyiv 12 October 2018 case no 754/4142/18 <https://reyestr.court.gov.ua/Review/77716893> accessed 10 March 2021; Judgment of the Kyiv Appellate Court 30 January 2019 case no 754/4142/18-ц https://reyestr.court.gov.ua/Review/79573382 accessed 10 March 2021; Judgment of the Kyiv Appellate Court 24 January 2019 case no 759/13971/18 <https://reyestr.court.gov.ua/Review/79427887> accessed 10 March 2021; Judgment of the Desnianskyi District Court of Kyiv 12 March 2019 case no 754/17928/18 <https://reyestr.court.gov.ua/Review/80423354> accessed 10 March 2021.

65 See: Art 1187 Civil Code of Ukraine.

66 See: B Karnaukh, *Fault as a Precondition of Civil Liability* (Pravo 2014); B Karnaukh, 'Fault in Tort Law: Moral Justification and Mathematical Explication' (2018) 141 Problems of Legality 54.

67 Yearbook of the European Convention on Human Rights, 1969: The Greek Case. (The Hague: Martinus Nijhoff 1972) 196.

68 *Ringvold v Norway* App No 34964/97 (ECtHR, 11 February 2003) para 38.

Currently, Art. 17 CrPC expressly sets forth that an accused person's guilt must be proved beyond a reasonable doubt,[69] and the courts recognise it as the standard of proof to apply. Explaining this standard, the Supreme Court notes:

> The prosecution must prove before the court with relevant, admissible and credible evidence that there is only one version by which a reasonable and impartial person can explain the facts established in court, and this version involves person's guilt in the criminal offence in respect of which he/she was charged.[70]

In one of the recent judgements, the Supreme Court even proffers the following definition:

> reasonable doubt is an insurmountable doubt that remains with the investigator, prosecutor, investigating judge or the court as to the guilt of the accused after a thorough, exhaustive and impartial investigation of the circumstances of the case. The presence of a reasonable doubt as to the validity of the accusation prevents any impartial person who deliberates reasonably and honestly to find the accused guilty.[71]

Therefore, in criminal procedure, it is now settled that the proper standard of proof is 'beyond reasonable doubt', and it is now for the lawyers to develop a coherent doctrine that would explain how to interpret and apply the standard in practice.

Until 2017, CPC and ComPC mentioned only two criteria for the assessment of evidence – relevancy and admissibility[72] – though, in the doctrine, two more criteria were proffered, namely sufficiency and credibility.[73] In 2017, new editions of CPC and ComPC were adopted.[74] In the new editions, sufficiency and credibility were introduced into the Codes.[75] Thus, what is known as the standard of proof in Ukrainian civil procedure is addressed through those two criteria for evidence assessment.

Under Art. 79 CPC, '[e]vidence is credible if it is capable of establishing actual circumstances of the case'. Under Art. 80, '[e]vidence are sufficient if in their totality they allow to conclude on the existence or absence of circumstances comprising the subject matter of the case'. In para. 2 Art. 80 CPC, it is added that on the issue of sufficiency of evidence, the court decides according to its inner conviction. In 2019 in the commercial procedure, the standard of proof was changed by the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Concerning the Stimulation of Investment Activity in Ukraine'. The law amended Art. 79 ComPC. Under the title 'Probability of Evidence', the provision now blends a loose adaptation of the 'preponderance of evidence' standard with the declaration that the court evaluates evidence according to its inner conviction:

> The existence of a circumstance to which a party refers as the basis of its claims or objections shall be considered as proven if the evidence provided in support of such circumstance is more probable than the evidence provided to refute it.
>
> On the probability of evidence for the purpose of establishing relevant circumstances the court decides according to its inner conviction.

The wording of this article essentially implies that the plaintiff's evidence should be compared with the defendant's evidence, and if the former proves to be more probable,

69 See: para 2 Art 17 CrPC.

70 Judgement of the Criminal Cassation Court (Third Chamber) 18 December 2020 case no 187/1565/18 <https://reyestr.court.gov.ua/Review/93667121> accessed 10 January 2021.

71 Judgement of the Criminal Cassation Court (Second Chamber) 27 October 2020 case no 185/6833/17 <https://reyestr.court.gov.ua/Review/92747249> accessed 10 January 2021.

72 See: Arts 58 and 59 CPC (in edition of the Law No 1618-IV from 18 March 2004); Art 34 ComPC (in edition of the Supreme Council's Ruling no 1799-XII of 6 November 1991).

73 V Komarov (ed), *The Course of Civil Procedure* (Pravo 2011), 488–95.

74 By the Law No 2147-VIII from 3 October 2017.

75 See: Arts 77-80 CPC.

the facts substantiating the claim should be considered proven. By that logic, even if both (the plaintiff's and the defendant's) versions of the events (or 'stories', in Christoph Engel's terminology)[76] are very improbable, but the plaintiff's is at least slightly more probable than the defendant's, the claim should be upheld. Imagine that the probability of the plaintiff's version (story) is 25%, and the defendant's version (story) is 20%. According to the literal interpretation of Art. 79, the claim must be satisfied. But if we assume that the court considered four such cases, then in three of them, the decisions are wrong. So, it is clearly not the conventional meaning that 'preponderance of evidence' has in the countries of its origin. Under the conventional understanding, the fact is proven only if the consideration of all the evidence makes the fact-finder believe that the fact is more likely than not, ie, the probability of the fact is greater than 50%.

As has been noted above, the requirement is to overcome the absolute threshold value and not that the evidence of the party saddled with the burden be stronger than the evidence of the opponent.[77] Only under the former interpretation will the number of correct judgements prevail over the number of erroneous ones. So far, Ukrainian courts do not recognise the difference between the two interpretations, so the same judgement may contain contradictory points. On the one hand, the court may stress that it is sufficient to present evidence stronger than the evidence of the opposite party, while on the other, it may insist that the party's statement must be more probably true than false. The confusion of two conflicting interpretations has so far gone unnoticed.

For instance, in one of the Supreme Court's judgments, there is the following passage explaining the applied standard of proof in commercial cases:

> The "probability of evidence" standard, in contrast to the "sufficiency of evidence standard" emphasizes the need for the court to compare the evidence provided by the plaintiff and the defendant. That is, with the introduction of the new standard of proof, it is necessary not to provide sufficient evidence to prove a particular fact, but to provide the amount of evidence that can outweigh the arguments of the opposing party. […]
>
> Within the provisions of this article, the court is obliged to estimate the evidence… looking for the probability, that would allow to conclude that the facts under consideration more likely happened, than not. […]
>
> The circumstance must be proved in such a way as to satisfy the standard of preponderance of more weighty evidence, i.e. when the conclusion that the alleged circumstance exists in the light of the evidence presented seems more probable than the opposite.[78]

From the point of view of 'epistemic engineering', as K.N. Kotsoglou calls it,[79] it is important to note that the introduction of a new standard of proof in commercial proceedings has indeed led commercial courts to take a different approach to deciding on the issue of fact. And there are already cases where lower courts rejected claims with reference to the lack of proof, and afterwards, the Supreme Court overturned the judgment, emphasising that according to the newly established standard, the relevant fact shall be considered proven.[80] Note that the legislative change of the standard of proof relates to commercial proceedings

76 Cristoph Engel (n 24).

77 However, see: EK Cheng, 'Reconceptualizing the Burden of Proof' (2013) 122 The Yale Law Journal 1254, 1259.

78 Judgement of the Commercial Cassation Court 1 December 2020 case no 904/1103/20 <https://reyestr.court.gov.ua/Review/93296180> accessed 10 January 2021.

79 Kyriakos N. Kotsoglou (n 4).

80 See, for instance: Judgement of the Commercial Cassation Court 25 June 2020 case no 924/233/18 <https://reyestr.court.gov.ua/Review/90205664> accessed 10 January 2021.

only and does not affect the (regular) civil proceedings. In the latter, the inner conviction requirement and the rule that proof cannot be based on conjectures remain the only two guidelines on the applicable standard of proof.

However, in one of the civil cases, the Grand Chamber of the Supreme Court briefly remarked:

> The circumstance must be proved in such a way as to implement the standard of greater persuasiveness, according to which the conclusion that the alleged circumstance exists, taking into account the evidence presented, seems more probable than the opposite.[81]

6.2 Lost Profit in Ukrainian Law

Indicative of the standard of proof applied by the courts are the cases involving claims for compensation of lost profit. Ukrainian courts have developed a rigid approach that requires a plaintiff to prove his/her lost profit with a probability close to absolute certainty. These requirements are expressed by courts with the following passage:

> Only the income that could have been actually gained shall be reimbursed as a damage under the head of lost profit.
>
> Claiming the uncollected income (lost profit) imposes an obligation on the creditor to prove that this income (profit) is not abstract, but would really have been gained by him.
>
> The plaintiff must also prove that he could and should have gained the said income, and the wrongful acts of the defendant became the only sufficient reason that deprived him of the opportunity to make the profit.[82]

The passage is obviously aimed at preventing the reimbursement of utterly far-fetched losses. For example, if someone whose wallet with a hundred dollars was stolen then claims compensation for a million, alleging that he could have bought a lottery ticket and won a jackpot. Such speculative claims are effectively cut off by the passage.

In one remarkable case, the plaintiff was injured when the airbag in his old car unexpectedly popped out. He claimed compensation for 75 million EUR in lost profits,[83] alleging that as a result of the injuries, he was unable to perform a contract with a foreign motion picture company, under which he was supposed to construct aircraft replicas for the film. According to his estimates, the box office receipts of the film in which his works were supposed to appear should have been at least ten billion EUR. However, no written contract or other credible evidence of the plaintiff's relationship with the motion picture company was provided. Judging by the Supreme Court findings, the plaintiff must have provided only the correspondence (probably electronic), from which it is impossible to identify the addressee. The courts of all three instances found the lost profit unproven.[84]

However, it seems that Ukrainian courts, when applying excessively strict requirements for the proof of lost profit, often throw out the baby with the bathwater. For example, in a

81 Judgement of the Grand Chamber of the Supreme Court 18 March 2020 case no 129/1033/13-ц <https://reyestr.court.gov.ua/Review/88952196> accessed 10 January 2021.

82 See: Judgement of the Grand Chamber of the Supreme Court 30 May 2018 case no 750/8676/15-ц <https://reyestr.court.gov.ua/Review/74537186> accessed 10 January 2021; Judgement of the Commercial Cassation Court 12 December 2019 case no 910/5073/19 <https://reyestr.court.gov.ua/Review/86336737> accessed 10 January 2021; Judgement of the Civil Cassation Court (Second Chamber) 12 March 2020 case no 127/22717/18 <https://reyestr.court.gov.ua/Review/88294511> accessed 10 January 2021.

83 In addition to 14 million EUR in moral damage.

84 Judgement of the Civil Cassation Court (First Chamber) 4 September 2020 case no 226/569/19 <https://reyestr.court.gov.ua/Review/91337997> accessed 10 January 2021.

case where the plaintiff was wrongfully prevented from using his land, the Supreme Court refused to award the lost profit calculated as the income from rental payments the plaintiff could have received (had he rented out the land), arguing that the plaintiff did not adduce a signed lease contract (although the plaintiff did provide a draft of such an agreement and evidence of negotiating with a potential lessee).[85] Although, in this case, as in the previous one, there was no evidence of the previously concluded contract that was supposed to bring about the desired profit, nevertheless, there is a fundamental difference between the two cases. Leasing land is a routine business, and usually, there is no doubt that the owner is able to find someone willing to rent his/her land at a fair market price. In contrast, gaining a multi-million profit by a physical person dealing with a foreign filmmaker is an utterly extraordinary thing; therefore, utterly credible and firm evidence is needed to prove it. Therefore, although the two cases are similar in that both lack the proof of a signed contract (that would give the plaintiff the alleged profit), they should be treated differently.

It often seems that Ukrainian courts insist that it has to be proved that the plaintiff would *inevitably* have made a profit had it not been for the defendant's actions (which is next to impossible). Indicative are cases where the plaintiff claims the amount of money in a UAH equivalent to the sum in foreign currency. In such cases, the courts apply the exchange rate applicable on the day of the judgment.[86] However, it may happen that the judgment remains unexecuted for a long time, and the national currency depreciates in value in the meantime. Eventually, on the day of the actual execution of the court judgment, the person receives an amount of funds that is no longer equivalent to the corresponding sum in foreign currency. In some cases, during the period from the judgment delivery to its actual execution, the foreign currency doubled in value. The plaintiffs in such cases brought new actions claiming compensation for the exchange rate adjustment. They considered it as a lost profit.

However, the Supreme Court repeatedly states that such claims shall be rejected, arguing that 'the "exchange rate adjustment" can in no way constitute a lost profit since the creditor may have not received such income'.[87] Thus, the Court seems to suggest that even if the money had been paid on time, there is no guarantee that the plaintiff would have exchanged them for a strong currency the same day and thus secured him/herself against the future depreciation of the national currency.

But what could hypothetically provide such a guarantee? Should it be the previously signed contract for the exchange of currency (which the plaintiff did not have at that moment)? It is a tricky question.

Here, the Supreme Court effectively requires the plaintiff to prove with absolute certainty something that, in principle, cannot be known with absolute certainty. The lost profit is all about future events, with regard to which no one can assure in advance that they will inevitably happen. A lost profit is speculation by definition, and to demand absolute certainty about it is to ignore the obvious logical inconsistency. That is why in European countries and

85 Judgement of the Civil Cassation Court (First Chamber) 11 November 2019 case no 370/3281/15-ц <https://reyestr.court.gov.ua/Review/85903338> accessed 10 January 2021.

86 See: Ruling of the Plenary Supreme Court of Ukraine 18 December 2009 no 14 'On the judicial decision in civil case', para. 14 <https://zakon.rada.gov.ua/laws/show/v0014700-09#Text> accessed 10 January 2021; Judgement of the Civil Cassation Court (First Chamber) 18 September 2019 case no 756/4694/15-ц <https://reyestr.court.gov.ua/Review/84481515> accessed 10 January 2021.

87 See: Judgement of the Grand Chamber of the Supreme Court 30 May 2018 case no 750/8676/15-ц <https://reyestr.court.gov.ua/Review/74537186> accessed 10 January 2021; Judgement of the Civil Cassation Court (Second Chamber) 11 September 2019 case no 608/532/17 <https://reyestr.court.gov.ua/Review/84304722> accessed 10 January 2021; Judgement of the Civil Cassation Court (Third Chamber) 21 August 2019 case no 496/1300/17 <https://reyestr.court.gov.ua/Review/83775340> accessed 10 January 2021; Judgement of the Civil Cassation Court (First Chamber) 10 June 2020 case no 766/7004/17 <https://reyestr.court.gov.ua/Review/89793320> accessed 10 January 2021.

international commercial law, it is provided that when it comes to determining the amount of damages, it is not always necessary to prove the exact figure with absolute certainty. Even if there is no firm certainty about the exact amount of damages, the courts, instead of denying compensation altogether, shall determine the amount of damages at their discretion, as far as it is reasonable to do, with due regard to all the evidence presented by the parties.[88]

Under Art. 7.4.3(1) and (3) UNIDROIT Principles 2016:

> Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty.
>
> Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.

With regard to the 'exchange rate adjustment', it is noteworthy that according to the DCFR, in a case of a debtor's failure to pay in due time, the creditor may choose the applicable rate of exchange out of two – the one prevailing at the time when payment was due or the one prevailing at the time of actual payment.[89] Furthermore, it is added that even in the absence of such a special rule, the creditor would nevertheless be entitled to recover the difference under the heading of damages.[90] However, a potential disadvantage of such an approach would be the need to bring a new action.[91] To avoid complicating the matter for the plaintiff, the above rule was introduced. The rule rests on the assumption (which is taken for granted) that the plaintiff could have avoided currency fluctuation risks had he/she been paid on time.

In view of the above, the standard of proof applied by the Ukrainian courts with regard to the lost profit issue seems too rigid and hardly compatible with the very concept of lost profit. We hope the open debate on the standards of proof in Ukrainian law will eventually lead to the reconsideration of the courts' attitude towards the issue of fact and, in particular, change the approach to the proof of lost profit.

6.3 An O.J. Simpson Case Scenario in Ukraine?

As has been noted above, an O.J. Simpson case scenario could not have taken place under Ukrainian law (it certainly could not have taken place until 2019, and even now, in 2021, it seems unlikely). Yet in the Supreme Court's jurisprudence, there was at least one category of cases where the Court applied a somewhat similar approach, though without conceivable exposition.

These are cases related to compensation for damage caused by the destruction of real estate in the Anti-Terrorist Operation zone (ATO) in eastern Ukraine.[92] Art. 19 of the Law 'On Combating Terrorism' provides for the right of citizens to be compensated at the

88 For instance, according to Section 287(1) of the German Code of Civil Procedure: 'Should the issue of whether or not damages have occurred, and the amount of the damage or of the equivalent in money to be reimbursed, be in dispute among the parties, the court shall rule on this issue at its discretion and conviction, based on its evaluation of all circumstances'.

89 Art III–2:109(3) DCFR.

90 C von Bar, E Clive and H Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Interim outline ed 1), 344.

91 ibid.

92 See, for instance: Judgement of the Civil Cassation Court (Second Chamber) 1 August 2018 case no 242/1618/17 <https://reyestr.court.gov.ua/Review/75781622> accessed 10 January 2021; Judgement of the Civil Cassation Court (Second Chamber) 11 December 2019 case no 242/519/17 <https://reyestr.court.gov.ua/Review/87581077> accessed 10 March 2021; Judgement of the Civil Cassation Court (First Chamber) 25 March 2020 case no 646/4339/17 <https://reyestr.court.gov.ua/Review/88667035> accessed 10 March 2021; Judgement of the Civil Cassation Court (First Chamber) 01 July 2020 case no 185/9816/16-ц <https://reyestr.court.gov.ua/Review/90349589> accessed 10 March 2021.

expense of the State for the damage caused by a terrorist act. Invoking the article, many plaintiffs whose property in the ATO zone was demolished brought civil actions claiming compensation.[93]

One of the defendant party's arguments was that an act of terrorism is a criminal offence; hence, it cannot be claimed that the plaintiff suffered damage as a result of such an offence until the relevant fact is established in criminal proceedings. However, hostilities continue in the area, and in such circumstances, one can hardly expect effective criminal investigation and sentencing of the responsible individuals. Therefore, requiring plaintiffs to substantiate their claims with a verdict in a criminal case would mean imposing an excessive and unmanageable burden on them. Apparently, the Supreme Court recognised this and rejected the defendant's argument, stating the following:

> Based on a systematic analysis of Articles 1, 11 and 19 of the Law of Ukraine 'On Combating Terrorism', the identification of perpetrators of terrorist acts, and their conviction by a criminal court, is not necessary for the reimbursement of damage by the State under Article 19 of the said Law.
>
> The necessary condition for the satisfaction of claims…, is the location of the damaged property within the territory of Anti-Terrorist Operation.[94]

Although the Court's conclusion is praiseworthy, its reasoning can hardly be considered satisfactory or coherent in the context of the current approach to the standard of proof. The reasoning could have been much more sophisticated had the standard of proof been addressed openly and had it been recognised that the courts have to act under uncertainty. Given the different values at stake in criminal and civil proceedings, it is rational to be content with a greater or lesser probability of the facts underpinning the judgment.

7 CONCLUSION

From the conventional point of view, with regard to the standard of proof, there is a sharp distinction between common law and civil law. Common law distinguishes between criminal and civil cases and thus sets two different standards of proof: 'beyond reasonable doubt' and 'balance of probabilities', respectively. On the contrary, in civil law countries, the same standard of 'intime conviction' applies to both criminal and civil cases, and it is thought that this standard is effectively equal to 'beyond reasonable doubt'.

Yet, things may not be so straightforward. In civil law countries, the standard of proof has not been paid much attention, and, therefore, the very concept remains rather vague. Moreover, it is often formulated as if absolute certainty is attainable, which hardly corresponds to the current view of what knowledge is. As a result, it is not clear what exact percentage of the fact-finder's conviction is necessary to decide that the statement is true. It makes the standard applied in civil law countries intuitive rather than elaborate. The discourse on the standard of proof is premised on the acknowledgement that absolute truth is unattainable. Once this paramount tenet of the postmodernist epistemology is accepted by lawyers, the door is open for the search for rational decision-making under uncertainty. It inevitably leads to the dependence between the value of the interest at stake and the degree of persuasion sufficient to decide on the issue pertaining to the interest.

93 Judgement of the Grand Chamber of the Supreme Court 22 September 2020 case no 910/378/19 <https://reyestr.court.gov.ua/Review/92270718> accessed 10 January 2021.

94 Judgement of the Civil Cassation Court (Second Chamber) 1 August 2018 case no 242/1618/17 <https://reyestr.court.gov.ua/Review/75781622> accessed 10 January 2021.

For a long time in Ukrainian law, the standard of proof remained unaddressed, and it was believed that the court had to seek the truth. But recent developments have paved the way to the distinction between criminal and civil standards of proof. The current Criminal Procedure Code expressly provides that the standard is 'beyond reasonable doubt', while the Commercial Procedure Code provides for a hybrid standard titled 'probability of evidence' that blends some variation of the 'preponderance of evidence' with 'intime conviction'. However, courts still often hesitate to admit openly that a judgment can be based on probabilities. It entails too cautious an approach in cases where claimants seek compensation of lost profit. Therefore, there is an acute need for a candid discussion of the role of probability in the judicial factfinding process, and there is a long journey ahead before rationality is implemented in Ukrainian evidence law.

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RESEARCH ARTICLE

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)

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NEWLY DISCOVERED AND EXCEPTIONAL CIRCUMSTANCES IN CRIMINAL PROCEDURE OF SOME EUROPEAN STATES

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To cite this article: *N Bobechko, A Voinarovych, V Fihurskyi* 'Newly Discovered and Exceptional Circumstances in Criminal Procedure of Some European States' 2021 2(10) *Access to Justice in Eastern Europe 44–66. DOI: 10.33327/AJEE-18-4.2-a000059*

To link to this article: https://doi.org/10.33327/AJEE-18-4.2-a000059

Submitted on 24 Jan 2021 / Revised 20 Febr 2021 / Approved 30 Apr 2021 / Published online: 03 May 2021 View data

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ACKOWLEDGMENTS

Authors would like to express their gratitude to the reviewers for their help and for the English editor, David Phelan.

CONFLICT OF INTEREST

The authors have declared that no conflict of interest or competing interests exist. Prof. Nazar Bobechko serves as a Member of the Scientific Advisory Board of the Supreme Court. Nevertheless, in this particular research he does not represent any views of this body, and nor is he bound by it.

CONTRIBUTORS

All the coauthors read, approved the final version and agreed to be accountable for all aspects of this article.

NEWLY DISCOVERED AND EXCEPTIONAL CIRCUMSTANCES IN CRIMINAL PROCEDURE OF SOME EUROPEAN STATES

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Abstract *The article analyses the core and contents of the proceedings based on newly discovered or exceptional circumstances (hereinafter – PBNDEC) in the criminal procedure law of Ukraine and other European countries. The authors emphasize that the PBNDEC are not designed to eliminate shortcomings of the pre-trial investigation and the trial in criminal proceedings, providing the reserve function in discovering and correcting court errors, but rather serves its own purpose in the mechanism of legal defence. The order in the criminal procedure activity during this stage is largely determined by the grounds for its implementation – newly discovered or exceptional circumstances (hereinafter – NDEC). The differences between both groups of such circumstances are provided. Procedural features of the PBNDEC, which separate them from the proceedings on appeal and cassation, are singled out. The goals of this stage in the criminal proceedings are formulated, and the significance of this stage has been revealed. The need for improvement in the criminal procedure legislation of Ukraine which regulates the PBNDEC has been justified.*

The articles answer the questions of how efficient the regulation of the PBNDEC in the criminal procedure law of Ukraine is: whether the regulation is in agreement with the standards, whether it is established in the criminal procedure law of European countries, whether any doctrine positions regarding the core of such a stage in criminal proceedings require rethinking or additional theoretical justification, and which, of the normative regulations of such form of appeal and review of the court decisions, the principal directions for improvement are.

In order to obtain answers to the aforementioned and other questions, the legal nature and the models of PBNDEC in the criminal legislation of European countries are considered in section two of the article. Section three depicts the procedural specifics of the PBNDEC in the criminal legislation of Ukraine. Section four describes the definition, shows the goals and significance, and introduces the structure of this stage in the criminal proceedings. Section five embraces the

characteristics of features of NDEC in the criminal legislation of Ukraine. In section six the grounds for the PBNDEC in the criminal procedure law of Ukraine are analysed.

Keywords: *restoration of proceedings, newly discovered circumstances, exceptional circumstances, criminal procedure law, Ukraine*

1 INTRODUCTION

PBNDEC, such as appellate and cassation proceedings, constitute an element of the system that appeals and reviews court decisions in criminal proceedings. Despite the theoretical significance and practical demand, this method of reviewing court decisions is less studied than aforementioned stages of criminal proceedings.

In the doctrine of criminal proceedings and law enforcement activities many issues of this legal institute remain unsolved. Among those there is the legal nature of PBNDEC, its significance in the detection and elimination of judicial errors compared to appellate and cassation proceedings, the orientation of control activities, the correspondence of this criminal procedure mechanisms with the principle of legal certainty, the tasks and significance of PBNDEC, the features and optimal list of NDEC, and the structure of PBNDEC.

Therefore, there has been a need for a complex analysis of problems, connected with the functioning of proceedings based on newly discovered and exceptional circumstances.

This article aims to investigate the theoretical and practical problems of PBNDEC in the criminal proceedings of Ukraine and European countries. To achieve this goal, the following objectives are established: to characterize the essence and the models of PBNDEC in the criminal proceedings of European countries, to reveal the procedural features of PBNDEC in the criminal proceedings of Ukraine, to find out the concepts, tasks, meanings and the structure of PBNDEC in the criminal proceedings of Ukraine, to formulate the features of PBNDEC in the criminal proceedings of Ukraine, and to mention the systems of PBNDEC in the criminal proceedings of Ukraine.

2 THE ESSENCE AND MODELS OF PROCEEDINGS BASED ON NEWLY DISCOVERED OR EXCEPTIONAL CIRCUMSTANCES IN CRIMINAL PROCEDURE OF SOME EUROPEAN COUNTRIES

A person found guilty by a court of committing a criminal offence has the right to apply to a court of higher instance to verify the court decision. The procedure for exercising such a right is determined by the law – noted in Art. 2, para.1 of Protocol No. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – ECHR)[1].

In addition to the aforementioned condition, in Art. 4, para. 2, of the Protocol No.7 of the ECHR, it is noted that there is the possibility of reopening a criminal proceeding on the grounds of new facts, which may exert influence on the justice of the court decision[2].

According to the established case law of the European Court of Human Rights (hereinafter –

1 Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (1984) ETS 117 <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007a082> accessed 20 February 2021.

2 Ibid, 1.

ECtHR) the procedure of revoking the final court decision requires the existence of previously unknown substantive circumstances of the case. If the procedure is used to eliminate judicial errors, it does not contradict the principle of legal certainty.[3]

The ECtHR developed this legal position in the case *Popov v. Moldova No. 2.* The opening of proceedings on newly discovered circumstances (hereinafter – NDC) does not contradict the ECHR. However, the legislation must establish the grounds for this, otherwise the abuse of the right to use this procedure cannot be avoided.[4]

The ECtHR allows exceptions to the principle of legal certainty in order to remedy a 'fundamental defect' or a 'miscarriage of justice'. At the same time, in each case it is necessary to assess the justification for deviating from this principle.[5]

This conventional regulation and its interpretation by the ECtHR are due to the fact that sometimes it may happen that injustice, resulting from a court decision, gains legal force, and occurs due to the existence of such circumstances which were unknown to the court at the moment of the making of the decision, and which by themselves, or together with already obtained facts, question the legality, reasonableness and justice of the decision, and as such that decision does not correspond to objective reality. These kinds of circumstances are put by legislators in separate groups of grounds for the review of court decisions, which is explained, first and foremost, by the special ways to certify their existence.

Under such circumstances, there was a need for the existence of yet another form of proceedings for appeal and review of court decisions in the criminal procedure – PBNDEC.

This form of appeal and review of court decisions is a compromise resolution of the conflict of two conceptual approaches – a need to correct a miscarriage of justice that demonstrates the efficiency of the system of criminal justice and a need to provide a stable and unshakable court decision, which gains legal force, thus adhering to the principle of judicial certainty. However, for the criminal procedure legislation, this assertion has a declarative meaning since the legislators unjustifiably put cassation proceedings in one row with an extraordinary form of proceedings on appeal and review of court decisions – proceedings based on NDC, whose task is to check the court decisions that gained legal force. Unfortunately, the position of Ukrainian legislators on this issue is still far from ideal and is evidence of some conceptual defects of judicial reform which is being carried out in Ukraine.

Characterizing the resumption of the proceedings based on NDC *(Das Wiede-raufnahmeverfahren)*, German proceduralists note that this institute of criminal procedure serves the material justice, allowing deviation, in exceptional cases, from the interest of the state in ensuring the rule of law.[6] The legal force of the court decision is inferior if the additionally revealed facts testify to its evident erroneousness.[7]

3 Judgment of the European Court of Human Rights in *Pravednaya v Russia*, 18 November 2004, paras 27-28 <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Pravednaya%20v.%20Russia%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-67506%22]}> accessed 20 February 2021.

4 Judgment of the European Court of Human Rights in *Popov v Moldova*, No 2, 6 December 2005, para 46 <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Popov%20v.%20Moldova%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-71507%22]}> accessed 20 February 2021.

5 Judgment of the European Court of Human Rights in *Sutyazhnik v Russia*, 23 July 2009, para 35 <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Sutyazhnik%20v.%20Russia%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-93775%22-]}> accessed 20 February 2021.

6 K Haller and K Conzen, *Das Strafverfahren*. 6, neu bearbeitete und erweiterte Auflage (CF Müller 2011), p 513.

7 C Roxin and B Schünemann, *Strafverfahrensrecht*. 27, neu bearbeitete Auflage. (CH Beck 2012), p 488.

A similar approach is outlined in the Italian doctrine of criminal procedure – in the proceedings based on NDC *(Revisione)*, the legislators preferred justice over legal certainty.[8] The proceedings themselves are defined as an exceptional non-voluntary, non-suspensory method of appeal, which makes it possible to overturn court decisions on irrevocable conviction in exceptional cases and can lead to acquittals.[9]

A similar interpretation of resumption of proceedings based on NDC (*Wznowienie postępowania karnego*) is given by Polish researchers. Along with cassation, the resumption of proceedings is one of the exceptional methods of appeal, which is put by the legislator to the disposition of the participants in the criminal procedure. The possibility of a revision of the court decision, which gains legal force, is an exception to the principle of the steadfastness of decisions that close the criminal proceedings. This gives rise to the exceptional situation, for which the law provides an exhaustive list of grounds, for the reopening of proceedings based on NDC.[10] The reopening of proceedings is an exceptional procedural institute since its rules are applicable only after the court decision gains legal force and under the condition of the discovery of special circumstances. It entails removing erroneous court decisions from legal circulation.[11]

In the science of criminal proceedings in France, it is claimed that the issues of reviewing of the court decisions in the revision order *(La révision)*, analogous to the Ukrainian proceedings based on NDC, the legislators and judges are the real balancers between the guarantee of legal certainty, connected, on one hand, with the property, *res judicata,* and on the other hand, the urgent need for the detection and correction of judicial errors.[12]

Therefore, PBNDEC purposefully provide unique (extraordinary) forms of appeal and verifications of court decisions. This assertion is also due to the fact that the subject of such proceedings relates to questions of the legality, validity and fairness of court decision, in the first instance of NDECs that had not existed at the time of making this decision but only became known after the decision gained legal force. NDEC cannot be determined in the materials of criminal proceedings since they are not reflected in such materials due to being unknown at the time of trial. Such circumstances are discovered only after the court decision gained legal force; therefore, they need to be researched independently.

The French doctrine of criminal proceedings also mentions that the revision *(La révision)* has to have a relation to the fact that is contained in the final conviction decision.[13]

Two models of PBNDEC – judicial and mixed – are known in world theory and practice.

The first provides exclusively for court PBNDEC, for which finding out and establishing such circumstances is carried out only by the court from the initiatives of the parties. Such a model has been introduced, for example, in the criminal procedure legislation of Austria, Azerbaijan, Bulgaria, Czech Republic, Italy, France, Georgia, Germany, Kazakhstan, Poland, and Ukraine.

Otherwise, the mixed model consolidates the investigative and prosecutorial investigation or verification when discovering NDEC, exerting influence on the justice of the court decision and ensuring that further direction of criminal proceedings is carried out in court. Such a

8 P Tonini, *Manuale di procedura penale*. Quindicesima edizione (Giuffrè Editore 2014), p 961.

9 G Spangher, 'Impugnazioni straordinarie: aspetti sistematici di una categoria allargata' in Paola Corvi (ed), *Le impugnazioni straordinarie nel processo penale* (Giappichelli 2016), p 5.

10 A Kołodziejczyk, 'Wznowienie postępowania karnego na podstawie art 540 a pkt 1 kpk – zagadnienia wybrane' (2010) 14 Studia Iuridica Lublinensia 161.

11 M Mrowicki, *Wznowienie postępowania karnego na podstawie rozstrzygnięcia Europejskiego Trybunału Praw Człowieka* (Rzecznik Praw Obywatelskich 2020), p 16-17.

12 D Goetz, *La révision en matère pénale* (Université de Strasbourg 2015), p 20.

13 D Goetz (n 12) 17.

model defines two subjects of application of criminal procedure norms in the framework of PBNDEC – prosecutor and court. A special feature of the mixed model is also the fact that no other proceedings contain so many elements of pre-trial and trial stages of criminal proceedings. This is criminal proceedings in miniature. Such a model has been introduced in the Criminal Procedure Code (hereinafter – CrPC) of Belarus, Kyrgyzstan, Moldova, Russia, and Uzbekistan.

3 PROCEDURAL FEATURES OF PROCEEDINGS BASED ON NEWLY DISCOVERED OR EXCEPTIONAL CIRCUMSTANCES IN THE CRIMINAL JUSTICE SYSTEM OF UKRAINE

It is worth mentioning that in 2017 the Ukrainian legislator supplemented the criminal procedure law with the new institute, 'of exceptional circumstances'. In fact, two groups of circumstances that in the past were called 'newly discovered', [established by the Constitutional Court of Ukraine (hereinafter – CCU), the unconstitutionality of laws, other legal acts or their specific paragraphs, used by court for the resolution of the case; and establishing the guilt of a judge in committing a crime or an abuse of power by a detective, prosecutor, investigating judge or court during the criminal proceedings as a result of which the court decision has been made] received the name 'exceptional'. Apart from that, exceptional circumstances also include a determination by an international judicial institution, whose jurisdiction is recognized by Ukraine, of a violation by Ukraine of international obligations during the resolution of the case in court.[14]

A comparison of these circumstances with the corresponding circumstances provided for in the criminal procedure law of European countries provides grounds for making a conclusion about their similarity. However, in order to comply with the terminology, provided for by the CrPC of Ukraine regarding the Ukrainian criminal procedure legislation, the authors will refer to the PBNDEC.

PBNDEC are an integral part of criminal justice. Therefore, during the implementation of its norms, the principles of criminal procedure apply, which characterize how appeals are structured and how court decisions are verified. Apart from such structured forms, the PBNDEC are built based on provisions that differentiate this stage of criminal procedure activity from other stages of criminal procedure, that determine its place and role in the system of the types of proceedings on appeals and the verification of court decisions. In this, we are dealing with the procedural features of PBNDEC.

The value of procedural features of PBNDEC is in the facts that: a) they characterize the essence of the proceedings and reveal the purpose of this form of proceedings on appeal and the verification of court decisions; b) they are the fundamental rules, on the basis of which the PBNDEC are constructed; c) they make it possible to evaluate the efficiency of such controlling proceedings; d) they incorporate theoretical approaches to the construction of the verification stages of the criminal proceedings; e) they are the basis for directing the practical aspects for the courts, which are authorized to carry out PBNDEC.

The category 'procedural features of PBNDEC' means that there exist such provisions that substantially distinguish the proceedings regulated in chapter 34 of CrPC of Ukraine from the other proceedings on appeal and the verification of court decisions (appeal and cassation).[15]

14 Code of Ukraine of 13 April 2012 No 4651-VI 'Criminal Procedure Code of Ukraine' (as amended on 12 December 2020), chapter 34 <https://zakon.rada.gov.ua/laws/show/4651-17#Text> accessed 20 February 2021.

15 Code of Ukraine (n 14).

In the opinion of some French authors, the uniqueness of revision *(La révision)* is revealed both in its purpose, that is to correct a miscarriage of justice, and in its consequences that comprise the cancellation of the final court decision. Apart from that, since this is the extraordinary measure of legal protection, directed against the decision with the property *res judicata*, its implementation remains suspended in the cases of proceedings resumption, provided by the law. To conclude, the explanation of the specifics of court decisions on the review in revision order is in small number. Among 150 petitions on the review, submitted annually, only a few result in the cancellation of the conviction.[16]

The procedural features of PBNDEC in criminal procedure law of Ukraine is seen in the following.

Firstly, their verification subjects are the court decisions that gained the legal power, and which are put to execution or even partially or fully executed. At first glance, such a mechanism contradicts the principle of legal certainty *(res judicata pro veritate habetur)*. The ECtHR emphasizes that, in accordance with the principle of legal certainty, a party is not entitled to insist on a review of a final judgment solely for the purpose of a retrial and a new judgment. Courts of higher instance should use their powers to correct judicial errors, not to review cases. Exceptions to this rule may be due to circumstances that are significant and irrefutable.[17] However, the purpose of PBNDEC is not for the revision of court decisions – a reconsideration of the criminal proceedings on the merits and adoption of the new decision, for example, for the actions requalification, mitigation or the intensification of punishment – but rather the correction of the specific judicial errors.

Secondly, such proceedings are related to each major or final court decision that gained the legal force, apart from the decisions of investigating judges. PBNDEC verify the major court decisions and the decisions, in which the issues are solved during the actual execution of the court decisions under the condition that they gained the legal force.

In other words, as a result of NDEC the following might be verified: convictions and acquittals, decisions on closing criminal proceedings, decisions on closing criminal proceedings and releasing a person from criminal liability, decisions on applying the mandatory measures of an educational or medical nature, decisions, which resolve the issues, connected with the execution of court decisions, as well as sentences and decisions of appeal courts, resolutions of the cassation courts regarding the aforementioned court decisions;

Thirdly, the presence of specific grounds for the proceedings – NDEC. NDEC do not compete with the grounds for appealing and verifying court decisions in the orders of appeal and cassation; on the contrary, they directly exclude such grounds. This is also confirmed by the exclusion of PBNDEC in a separate form of proceedings for appealing and verifying court decisions. If the court decisions have not yet gained legal power, then no extraordinary procedural methods are required for the determination and establishment of the NDEC since the decision is verified from of the perspective of all the grounds for the cancellation or change of court decisions on appeal.

On the other hand, NDC as one of the groups of grounds for verifying court decisions in criminal proceedings, being different from all other grounds for the cancellation or change

16 D Goetz (n 12) 14-15, 20-21.

17 Judgment of the European Court of Human Rights in *Ryabykh v Russia*, 24 July 2003, para 52 < https://hudoc.echr.coe.int/rus#{%22fulltext%22:[%22Ryabykh%20v.%20Russia%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-61261%22]}>- accessed 20 February 2021; Judgment of the European Court of Human Rights in *Ponomaryov v Ukraine*, 3 April 2008, para 40 < https://hudoc.echr.coe.int/rus#{%22fulltext%22:[%22Ponomaryov%20v.%20Ukraine%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-85683%22]}> accessed 20 February 2021.

of court decisions in their form, are similar to those from the viewpoint of content. Indeed, if the sentence is based on knowingly false testimony of a witness and if the fact that the testimony is false is found out after the decision gained legal power (item 1, pt. 2, Art. 459 of the CrPC of Ukraine), then the court conclusions of the first instance might be inconsistent with the actual circumstances of the criminal proceedings (item 2, p. 1, Art. 409, Art. 411 of the CrPC of Ukraine). If other circumstances are revealed, which by themselves or together with the circumstances established beforehand, prove illegality, unfoundedness and unfairness of the court decision' and were not known by the court when such a decision was made (item 4, p. 2, Art. 459 of the CrPC of Ukraine), then the trial might be incomplete (item 1, p. 1, Art. 409 of the CrPC of Ukraine).[18]

At the same time, according to p. 5, Art. 459 of the CrPC of Ukraine a revision of court decisions based on NDC in the case when new laws or other legal acts are adopted, which cancel the laws that acted when the decision had been made, is prohibited.[19] Therefore, a change of legislation cannot be a ground to carry out proceedings based on NDC.

The extraordinary nature of the proceedings based on NDC is due to the existence of special grounds for the verification of court decisions that gained legal power as a fact. Moreover, establishing the circumstances, which were unknown to the court when making the decision and which by themselves or together with already reliably established facts put in doubt the justice of such a decision, in comparison with grounds on appeal or cassation is quite rare. Inconsistency with legal regulations and (or) judicial enforcement with the norms of the Constitution of Ukraine or ECHR is also not common;

Fourthly, verification of the court decision based on NDEC at the same instance (first, appeal, cassation), which was first to commit an error as a result of being unaware of the existence of such circumstances. In Art. 460, p. 1, Art. 463 of the CrPC of Ukraine it is noted about the possibility of verification of the court decision due to NDEC only by the court instances. According to parts 1–3, Art. 33 of the CrPC of Ukraine three instances are provided: first, appeal and cassation[20].

At the same time, p. 4, Art. 33 of the CrPC of Ukraine establishes that criminal proceedings based on NDC are carried out by a court that made the decision, which is under revision. Instead, according to p. 5, Art. 33 of the same article, the criminal proceedings based on NDC are carried out by a court that made a decision, which is under revision, on the grounds, established by items 1, 3, p. 3, Art. 459 of the CrPC of Ukraine, but are carried out by the Grand Chamber of The Supreme Court on the grounds established by item 2, p. 3, Art. 459 of the CrPC of Ukraine[21].

Taking into account the aforementioned provisions of the criminal procedure legislation of Ukraine, under 'court that made a decision, which is under revision', in the case of the PBNDEC, one should understand the court of the first, appeal or cassation instance.

Fifthly, the possibility of opening the PBNDEC regarding the person, for which the sentence has been made, which gained the legal power on the same accusation or the court decision, the resolution of the coroner, the investigator, the detective of the National Anti-Corruption Bureau of Ukraine (hereinafter – NABU), the prosecutor on the closure of the criminal proceedings on the same ground. In this case the procedural status of such a person during the proceedings based on NDC remains unchanged. The convict is considered convicted, the acquitted is acquitted.

18 Code of Ukraine (n 14).

19 ibid, 14.

20 ibid, 14.

21 Code of Ukraine (n 14).

Sixth, there is no such instance in criminal proceedings, of the decision being considered final and could not have been verified from the point of view of any NDEC;

Seventhly, fixing the specific methods of establishing NDEC: decision-making and gaining the legal force by the court of first instance conviction regarding the actions, established in item 1, p. 2, item 3, p. 3, Art. 459 of CrPC of Ukraine; the court decision and gaining the legal force by the court decision on the closure of criminal proceedings and release from criminal liability, the court decision on the application of coercive measures of an educational or medical nature in case of the impossibility of conviction with respect to the actions, provided in item 1, p. 2, item 3, p. 3, Art. 459 of CrPC of Ukraine and the circumstances, established in item 4, p. 2, Art. 459 of the CrPC of Ukraine; the ruling, making the decision by the coroner, the NABU detective, the investigator, the prosecutor on the closure of criminal proceedings in case of the impossibility of conviction with respect to the actions, provided in item 1, p. 2, item 3, p. 3, Art. 459 of CrPC of Ukraine and the circumstances, established in item 4, p. 2, Art. 459 of the CrPC of Ukraine; decision-making and gaining the legal force by the court of a higher instance with respect to the circumstances, provided in item 3, p. 2, Art. 459 of the CrPC of Ukraine; publication of the decision of the CCU regarding the circumstances, provided in item 1, p. 3, Art. 459 of the CrPC of Ukraine; the decision and gaining the legal force of the court of higher instance regarding the circumstances, established in item 3, p. 2, Art. 459 of the CrPC of Ukraine; the acquisition of status as final by the decision of the ECtHR regarding the circumstance, provided in item 2, p. 3, Art. 459 of the CrPC of Ukraine[22].

Eighthly, attribution to the discretionary powers of court the research of the evidence regarding circumstances, established in the court decision, which is being verified. According to p. 4, Art. 466 of the CrPC of Ukraine, the court has the power not to research the evidence regarding the circumstances, established in the court decision that is being verified on the basis of NDEC, if they are not disputed[23].

This provision is quite controversial since from the point of view of NDEC such evidence might turn out to be unreliable. Evidence, on which the court decision is based, is interconnected, and therefore the court has to check the influence of the newly discovered or exceptional circumstance on each piece of evidence separately as well as on the evidence in its entirety. Apart from that, the court can make a decision that is described in p. 4, Art. 466 of the CrPC of Ukraine only with the consent of all the parties in the proceedings[24].

Ninthly, the impossibility to change or cancel the court decision, that was being verified with respect to NDEC, with the closure of the proceedings. According to p. 1, Art. 467 of the CrPC of Ukraine, the court has the power to overturn a sentence or decision and decide on a new sentence or decision or leave the application for review of the court decision unsatisfied. When making a new court decision the court uses the powers of the court of a corresponding instance. The revision of the court decision on NDEC by the Supreme Court might also lead to the cancellation of the court decision (court decisions) fully or partially and send the case for new consideration to the court of the first instance or the Court of Appeal.[25]

The main argument in the prohibition of making changes to the court decision or its cancellation followed by the closure of criminal PBNDEC is the fact that they were not the subject of consideration by the courts of the first instance or by the Courts of Appeal. However, such an argument does not seem to be convincing. The Court of Appeal in some

22 Code of Ukraine (n 14).

23 ibid, 14.

24 ibid, 14.

25 Code of Ukraine (n 14).

cases has the power to change or cancel the court decision on the grounds of new evidence, which was not the subject of considerations in court. Then why should the competent court be deprived of a possibility to make changes in a court decision and to cancel the court decision with the subsequent closure of criminal proceedings based on newly discovered or exceptional evidence if the information about the evidence, which confirms the presence of such circumstances, is obtained in a much more reliable way, and the proceedings in court are carried out according to identical rules? The current legislative regulation of this issue is far from being optimal.

4 THE CONCEPT, TASKS, SIGNIFICANCE AND THE STRUCTURE OF PROCEEDINGS BASED ON NEWLY DISCOVERED AND EXCEPTIONAL CIRCUMSTANCES IN CRIMINAL PROCEDURE OF UKRAINE

The PBNDEC is the stage of criminal proceedings which regulates the actions of the participants of court proceedings with regard to the appeal of final decisions of the courts of the first instance, courts on appeal and courts on cassation that gained legal force as well as the specific courts established by the criminal procedure law of the materials in the criminal proceedings from the point of view of well-established circumstances, which were unknown to the court during the court proceedings, or those circumstances that appeared after the decision was made and influenced, or could have influenced the legality, reasonableness and justice of such a decision.

The goals of the proceedings based on newly discovered and exceptional circumstances are the following: a) judicial control of the courts of first instance, courts on appeal and courts on cassation, from the point of view of facts *(error facti)* and in specific cases from the point of view of the correspondence of legislative regulation and judicial enforcement *(error iuris)* with the Constitution of Ukraine, the ECHR and in the case when the existence of NDEC is established, the bringing of the appealed court decision in keeping with the other court decision of the general jurisdiction, the decision of the CCU, the ECtHR or the final act of the pre-trial investigation body; b) defense of judicial court decisions that gained the legal force from their unreasonable, unjustified change or cancellation.

In the French doctrine of criminal proceedings, it is emphasized that it is impossible to use the mechanism of review *(La révision)* under the condition of the existence of legal grounds for the correction of court (judicial) errors along with the other forms of appeal and review of court decisions.[26] The review may be used only in the cases when all traditional instruments of legal defense are completely closed.[27]

Austrian processualists categorically state that the resumption of a criminal case on the ground of the fact that the court decision was made when the procedural or material errors existed or that the evaluation of the evidence is false as well as that the sentence was too lenient or too severe, is impossible.[28]

A similar point of view is also justified in Slovak literature on criminal procedure legislation. The aim of a resumption of proceedings based on NDC is not the verification of legality and the validity of the court decision and the correct application of the criminal procedure

26 B Bouloc, *Procédure pénale*, 24-e édition (Dalloz 2014), p 1024; J Pradel, *Procédure pénale*, 17-e édition (Éditions Cujas 2013), p 900-901; ML Rassat, *Procédure pénale*, 2-e édition (Ellipses Édition Marketing SA 2013) p 737.

27 D Goetz (n 12, 16).

28 EE Fabrizy, *Kurzkommentar StPO 1975*, 11 neu bearbeitete Auflage (Manz 2011), p 771.

activity that was performed before the decision. In such proceedings the court may not investigate the factual grounds of the court decision that resulted from the preliminary trial or verify whether the order is obeyed by court and by participants during the preliminary trial. Therefore, in the proceedings based on NDC, the approach of review is not applied.[29]

Summing up the above positions, it is worth pointing out that the mistakes in factual determination of the case, an erroneous assessment of the evidence, a misapplication of criminal law and a serious breach of the requirements of the law of criminal procedure, the unfair application of non-custodial penalties cannot be considered the grounds for proceeding, based on NDEC.

Thus, the meaning of PBNDEC lies in the fact that such a form of appeal and review of court decisions is an additional guarantee of justice, a protection of rights and legal interests of the participants of judicial proceedings, the restoration of their rights and freedoms as compared to the main ones – appellate and cassation proceedings. PBNDEC have considerable potential, however, the practice of applying their norms is relatively rare as compared to the appellate and cassation proceedings.

The analysis of the provisions of chapter 34 of the CrPC of Ukraine allows us to state that the PBNDEC consist of three parts: 1) lodging the application for a review of the court decision based on NDEC and the verification of this request on the subject of correspondence to the formal requirements; 2) preparation to the review of the court decision based on NDEC *(iudicium rescindens)*; 3) verification of the court decision based on NDEC *(iudicium rescisorium)*.[30]

5 THE SIGNS OF NEWLY DISCOVERED AND EXCEPTIONAL CIRCUMSTANCES IN THE CRIMINAL JUSTICE SYSTEM OF UKRAINE

The central inception of any proceeding on appeal and a verification of the court decision is its grounds. The court decisions, in particular the court decisions which gained legal force, may not be verified from the point of view of far-fetched, abstract, ambiguous criteria. The effectiveness of the PBNDEC largely depends on the regulatory aspects of such grounds.

As mentioned in the previous section, the special nature of the PBNDEC lies in the existence of the special grounds for the verification of the court decisions which gained legal force.

Newly discovered and exceptional circumstances differ from the grounds for the change or cancellation of the court decisions in the appeal and cassation orders. Let us now establish the features of such circumstances.

Newly discovered and exceptional circumstances have the following features:

1) they have to objectively exist at the moment when the court decision is made or they have to appear after the court decision is made. However, such facts were not reflected in the materials of the criminal proceedings as a result of intentional false testimonies of the participants of court proceedings, intentional false translations, intentional false conclusions of experts, the falsification of evidence or documents, or as a result of other reasons.

Instead, the establishment by the CCU of the unconstitutionality of the law or other

29 'Trestné právo procesné' in Jaroslav Ivor (ed), Druhé, doplnené a prepracované vydanie (Iura Edition 2010); 'Trestné právo procesné. Všeobecná a osobitná časť in Josef Čentéš (ed) 2 vydanie (Heuréka 2012), p 659.

30 Code of Ukraine (n 14).

legislative act or their separate provisions, applied by the court during the resolution of the case (item 1, p. 3, Art. 459 of the CrPC of Ukraine) as well as the establishment by the ECtHR of the violation by Ukraine of international obligations during the resolution of the case in court (item 2, p. 3, Art. 459 of the CrPC of Ukraine) is possible only after the court decision is made[31];

2) they did not exist or were not known to the court during the criminal proceedings or verification of the court decision in the order of appeal or cassation that results in the impossibility of taking them into account. A preliminary, unknown circumstance to the court is a circumstance that could not have been discovered during the trial and could not have been accounted for when the court decision was made.

However, criminal procedure law (item 4, p. 2, Art. 462 of the CrPC of Ukraine) requires that such circumstances were unknown also to the parties of the criminal proceedings (*noviter reperta*). Therefore, in case of initiating PBNDEC, the participant in the court proceedings has to prove that certain circumstances that were unknown to the court were unknown also to him. In our opinion, such an approach of the legislators is erroneous. Firstly, it contradicts the provisions of item 4, p. 2, Art. 459, item 1, Art. 463 of the CrPC of Ukraine, which establish that the NDEC must be unknown only to the court[32]. Moreover, in national as well as foreign procedure theory the separate feature of NDC is considered to be axiomatic.

On the term (new) facts, the Federal Constitutional Court of Germany states: facts shall be understood as existing, identifiable occurrences or circumstances which belong to the past or the present. Whether a fact is new or not shall be judged solely according to whether or not the court has already utilized it. Therefore, in principle, new is everything which the court has not taken as a basis for forming its opinion, even if it could have taken such as a basis. Therefore, in order to assess the question of whether a fact is new, one must refer to the time of the decision, meaning the conclusion of deliberation in cases of convictions. Evidence discussed in the main proceedings may also be new if the court has not taken such as the basis for its decision[33].

The analyzed feature of NDEC is not related only to the criminal abuse by the courts during criminal proceedings (item 3, p. 3, Art. 459 of the CrPC of Ukraine)[34].

However, the discovery of the evidence that confirms or contradicts facts researched in the court after the adjudication may not be grounds for the review of the court decision based on NDEC. New evidence may be grounds for the review of the court decision in the appeal order but not based on NDEC;

3) they play a significant role in criminal proceedings. Since some circumstances may remain unknown because of a lack of information about them in the materials of the criminal proceedings and as a result may remain unresearched in the court hearing, the evidence, which was collected during the criminal procedure activity, has led to the seemingly correct but actually wrong decision in its core. In other words, NDEC allow us to make other conclusions regarding the guilt or innocence of a person or the degree of the public danger of criminal liability than the ones provided by the court when making the decision without such circumstances.

The NDEC in their nature affect or may affect the legality, reasonableness and justice of the court decision that gained the legal force. Therefore, they by themselves or together with

31 Code of Ukraine c

32 Code of Ukraine (n 14).

33 M Lindemann and F Lienau, 'Mechanisms for Correcting Judicial Errors in Germany' (2020) 4 (incomplete) *Erasmus Law Review*1.

34 Code of Ukraine (n 14).

already established facts question the justice of the court decision as such that does not correspond to the objective reality.

4) they exist in organic unity with the elements of the subject of proof in the criminal proceedings or establish correspondence to the legal regulations and (or) law enforcement activities with the Constitution of Ukraine, ECHR. The falsification of the specific piece of evidence established by the court decision that gained the legal force, may be the ground for the review of the court decision based on newly discovered evidence only in the case when such a court decision is based on this piece of evidence. Since the evaluation of the evidence is based on the comprehensive, complete and impartial research of all the circumstances in the criminal proceedings, the falsification of at least one piece of evidence that does not directly point to the guilt or innocence of a person in the criminal offence, incriminated to him or to the degree of public danger of a person, may affect the court conclusions and lead to the making of an unjust court decision.

Such exceptional circumstances as the establishment by the CCU of the unconstitutionality of the law, other legal act or its separate provision applied by the court during the resolution of the case (item 1, p. 3, Art. 459 of the CrPC of Ukraine) and the establishment by the ECtHR of the violation by Ukraine of its international obligations during the court resolution of the case (item 2, p. 3, Art. 459 of the CrPC of Ukraine), unlike the groups of the circumstances provided in p. 2 and item 3, p. 2, Art. 459 of the CrPC of Ukraine[35] do not belong to the subject of the proof in the criminal proceedings since they did not exist at the time of the court proceedings and at the moment of adjudication. They also do not point out criminal abuse by subjects in the criminal proceedings, but to the inconsistency of the procedure of court proceedings, substantive and legal grounds of court decisions with the Constitution of Ukraine, the ECHR;

5) they may be discovered only after the court decision gained the legal force. Before the court decisions gained legal force the circumstances provided in the items 2, 3 Art. 459 of the CrPC of Ukraine are seen as part of the circumstances provided in Art. 409 of the CrPC of Ukraine for the cancellation or change of the sentences, rulings and resolutions on appeal[36];

6) they have to be established by the conviction that gained the legal force, by the decision of the coroner, the investigator, the NABU detective, the prosecutor on the closure of the criminal proceedings, the court decision on the closure of the criminal proceedings and release from criminal liability, the court decision on application of coercive measures of an educational or medical nature or the decision of the CCU, the ECtHR. The specific order of discovery and establishment of the NDC is necessary since the materials that are already part of criminal proceedings are not sufficient to answer the question of justice of the court decision.

Therefore, the grounds for the PBNDEC are established by the conviction that gained the legal force, by the decision of the coroner, by the court decision on the closure of criminal proceedings and release from criminal liability, a court decision on the application of coercive measures of an educational or medical nature or the decision by the CCU, the ECtHR, sufficient pieces of information that point to the existence of any circumstances, provided in pp. 2, 3, Art. 459 of the CrPC of Ukraine that existed during the court proceedings and were unknown to the court or appeared after the adjudication and are in organic unity with the elements of the subject of proof and establish the inconsistency of legislative regulations and (or) law enforcement activities with the Constitution of Ukraine, the ECHR and result or may result in illegality, unfoundedness and unfairness of the disputed court decision.

35 Code of Ukraine (n 14).

36 Code of Ukraine (n 14).

6 THE SYSTEM OF NEWLY DISCOVERED AND EXCEPTIONAL CIRCUMSTANCES IN CRIMINAL PROCEDURAL LAW OF UKRAINE

The system of grounds for the proceedings based on NDC is provided in p. 2, Art. 459 of the CrPC of Ukraine: 1) the artificial creation or falsification of evidence, incorrect translation of the conclusion and explanations of the expert, knowingly false testimonies of the witness, victim, suspect, accused, on the grounds of which the sentence is based; 2) cancellation of the court decision, which became the grounds for the sentence or decision that has to be revised; 3) other circumstances that were unknown to the court at the moment of the trial during the decision-making and which by themselves or together with the circumstances established beforehand prove the incorrectness of the sentence or the decision that has to be revised[37].

Let us carry out an analysis of the legislative groups of NDC.

Artificial creation or falsification of evidence, incorrect translation of the conclusion and explanations of the expert, knowingly false testimonies of the witness, victim, suspect, accused, on the grounds of which the sentence is based (item 1 p. 2, Art. 459 of the CrPC of Ukraine)[38] – *propter crimina* or *propter falsa*. In the context of item 1, p. 2, Art. 459 of the CrPC of Ukraine under the artificial creation or falsification of evidence one means the falsification of physical evidence and documents, in particular the protocols of the procedural actions.

The falsification of physical evidence can consist of the deliberate artificial creation of the things in order to provide them with the properties of physical evidence, of the deliberate representation of the things which in fact are not physical evidence, or of the artificial creation of the fact of detection of the things in a certain place.

The falsification of documents can be manifested in the deliberate entering of data which are fully or partially false, in the deliberate creation of documents where the data are fully or partially false, in the forgery of documents by changing the text in them (cleaning, etching, washing, adding, etc.) or in changing their separate fragments (pasting photos, affixing a fake stamp, etc.).

Item 1, p. 2, Art. 459 of the CrPC of Ukraine amongst the grounds for the proceedings based on NDC mentions also incorrect translation of the conclusion and explanations of the expert[39]. However, from the point of view of criminal legislation, only the deliberate conclusion of the expert is recognized as a crime against justice (Art. 384 of the Criminal Code (hereinafter – CrC) of Ukraine)[40]. The expert is not criminally liable for providing a knowingly false explanation. Therefore, the requirement to establish in the sentence the fact of knowingly false explanation by the expert cannot be implemented.

The incorrect translation can also be a result either of a conscientious mistake of the translator or a deliberate distortion of information. Item 1, p. 2, Art. 459 of the CrPC of Ukraine contains an imperative norm, according to which only a deliberately false translation is established as a sentence that gained legal force[41]. And so, this is why criminal liability arises in accordance with Art. 384 of the CrC of Ukraine[42].

37 Code of Ukraine (n 14).

38 ibid, 14.

39 ibid (n 14).

40 Code of Ukraine of 5 April 2001 No 2341-III 'Criminal Code of Ukraine' (as amended of 4 December 2020) <https://zakon.rada.gov.ua/laws/show/2341-14#Text> accessed 20 February 2021.

41 Code of Ukraine (n 14).

42 Code of Ukraine (n 40).

A knowingly wrong conclusion by the expert can mean the deliberate distortion of the essence of the experiments, if the conclusions arrived at obviously contradict the facts that had been established earlier during the expert research, or if there is a deliberate denial of the established facts, or a deliberately incorrect evaluation of such facts, or a deliberate hiding of information about facts. Meanwhile, a conscientious mistake by the expert or the presentation of contradictory scientific conclusions does not result in a criminal liability according to Art. 384 of the CC of Ukraine[43].

Knowingly incorrect translation can cause a deliberate distortion of the content of documents, testimonies, explanations, replicas, questions and answers of the subjects in criminal proceedings, or a deliberate omission of separate words and phrases which distort their general content, or the deliberate concealment of certain fragments during the translation from one language to the other in order to achieve the desired results for the interested persons. If the translator commits such actions, the criminal liability follows according to Art. 384 of the CrC of Ukraine.[44] At the same time, the incompetence of the translator, which led to mistakes in the translation, gives no indication about knowingly translating incorrectly and excludes the application of criminal liability.

In item 1, p. 2, Art. 459 of the CrPC of Ukraine amongst the grounds for the proceedings based on NDC the giving knowingly of false testimony by the witness, victim, suspect, or accused are mentioned.[45] Awareness of the false testimonies can be seen in the deliberate hiding of information about the circumstances which took place in reality, in the deliberate distortion of such information during the notification of the coroner, investigator, NABU detective, prosecutor, investigating judge or court, or in the deliberate notification about such circumstances that have not occurred. Providing knowingly false testimonies can happen during the interrogation, upon presentation for identification, or during the investigative experiment. One can talk about the false testimonies only in the case, when the circumstances, within which the knowingly false information was obtained, are valuable for the criminal proceedings.

As mentioned above, as the grounds for the review of court decisions is based on NDC, the legislator recognizes the knowingly false testimonies of the suspect and the accused. However, taking into account the special procedural status, the aforementioned participants of the court proceedings are not under criminal liability for providing knowingly false testimonies. Therefore, if the suspect or the accused slanders other accomplices, with which the criminal offence was committed, then that suspect (or the accused) would not be under criminal liability for providing the knowingly false testimony. However, the suspect and the accused can slander other persons in committing the criminal offence who are innocent or guilty to a lesser degree. In such cases the court decision is due to be reviewed according to item 4, p. 2, Art. 459 of the CrPC of Ukraine.[46]

The cancellation of the court decision that has become a ground for the sentence or decision, which is due to be reviewed (item 3, p. 2, Art. 459 of the CrPC of Ukraine).[47] Such a circumstance is connected with the prejudicial nature of court decisions. However, its implementation is not a Ukrainian consideration. Such a circumstance is known to the criminal procedure legislation of other countries.

Indeed, according to item 4 para 359 of the CrPC of the Federal Republic of Germany *(Strafprozessordnung)* one of the grounds for the resumption of criminal proceedings based

43 ibid (n 40).

44 Code of Ukraine (n 40).

45 Code of Ukraine (n 14).

46 ibid (n 14).

47 Code of Ukraine (n 14).

on NDC is the cancellation of a civil law decision upon which the sentence is based, by the other court decision that gained legal force.[48] In the prevailing opinion, the scope of the application of this ground for a retrial should cover not just the civil judgements explicitly mentioned in the norm, but also judgements under labour, social, administrative and financial law[49].

The ground of similar content is also provided for in item 'b', Art. 630 of the CrPC of the Italian Republic *(Codice di procedura penale)*.[50]

Similar ground is known to the CrPC of the Republic of Estonia *(Kriminaalmenetluse seadustik)*. Indeed, according to item 4, Art. 366 of this codified act, the ground for the resumption of the proceedings based on NDC in the criminal case is the cancellation of the other sentence or court decision that became a ground for a sentence or court decision in the criminal case, in which the proceedings is resumed, if it could lead to an acquittal in the criminal case or to improving the situation of the convict.[51]

At the same time, the cancellation of the court decision by itself that resulted in a sentence or decision, is not likely to be a ground for the revision of court decisions based on NDC. This is possible, when the cancellation of the court decision is carried out in terms of such circumstances being established correctly, which made a ground for the sentence (court order) and under the condition that the use of such circumstances affected justice of such sentence (court order). In the same way it is not clear why in item 3, p. 2, Art. 459 of the CrPC of Ukraine only cancellation is mentioned and not the change of the court decision. Obviously, a change in the court decision may also affect the actual circumstances of the criminal proceedings. Even more surprising is the requirement of the legislation concerning how such circumstances are established by the sentence of the court, which gained the legal force, and in the case of the making of the decision being impossible, then the confirmation of such circumstances by the investigation materials (item 3, Art. 459 of the CrPC of Ukraine). Since in item 3, p. 2, Art. 459 of the CrPC of Ukraine, the criminal offence is not discussed[52], therefore, the regulation of the analysed ground needs to be improved.

All the other circumstances, which were unknown to the court at the time of the trial when making a court decision and which by themselves or together with other circumstances discovered earlier, prove the incorrectness of the sentence or decision that has to be reviewed (item 4, p. 2, Art. 459 of the CrPC of Ukraine)[53] – *propter noviter producta*. Criminal procedure law of Ukraine does not provide an exhaustive list of NDC. This is explained by the variety and unpredictability of situations in life which may occur. Only the instruction to all the other circumstances —which were unknown to the court at the time of making a court decision and which by themselves or together with the other circumstances discovered earlier prove the injustice of such a decision—is provided.

There are four groups of such circumstances.

48 Law of the Federal Republic of Germany of 1 February 1877 'German Code of Criminal Procedure' (as amended of 3 December 2020) < https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p2198> accessed 20 February 2021.

49 M Lindemann and F Lienau (n 33) 6-7.

50 Code of Criminal Procedure of Italy of 22 September 1988 No 477 'Codici di procedura penale' (as amended of 25 June 2020) <https://www.brocardi.it/codice-di-procedura-penale/libro-nono/titolo-iv/art630.html> accessed 20 February 2021.

51 Law of the Republic of Estonia of 12 February 2003 'Code of Criminal Procedure of the Republic of Estonia' (as amended of 26 September 2013) <https://www.riigiteataja.ee/en/eli/530102013093/consolide> accessed 20 February 2021.

52 Code of Ukraine (n 14).

53 ibid (n 14).

First group. Circumstances that prove that the conviction is false. These include information on the conviction for the murder of a person who afterwards turns out to be alive, the circumstances that indicate the insanity of the person who is serving a sentence, and a statement with the confession of a person who has not been prosecuted but who confesses to have committed the criminal offence that another person has been convicted for.

Second group. Circumstances that prove that the convict committed a criminal offence of a lesser degree. For instance, an excessive severity of punishment which ensued from the conscientious mistake of witnesses, because the court did not have reliable information about the actions of the convict at the moment when the criminal offence was committed. Erroneous expert opinion in terms of establishing the amount of stolen property, when a repeated forensic accounting examination established that the amount incriminated to the convict is unreasonable, also belongs to this group of circumstances.

Third group. Circumstances that prove that the convict committed a criminal offence of a higher degree. They can be confirmed by the following information: the discovery of new accomplices to the criminal offence not earlier known about, the discovery of new episodes of criminal activity, the information about the fact that the person having been an adult pretended to be a minor, or an erroneous conclusion of a forensic psychiatric examination of insanity.

Fourth group. Circumstances that prove the erroneous justification or closure of criminal proceedings by the court. For example, the change of testimony by one of the convicts with respect to the other about the involvement of the latter in the commission of a criminal offence.

The implementation, in the 1990s, of the new, not previously known to the domestic legislation system, institute of constitutional jurisdiction and the joining of Ukraine to the system of the protection of human rights and freedoms, the implementation in the national legislation of the provisions of the ECHR, together with the recognition of the ECtHR, forced the legislator to expand the list of the grounds for the resumption of proceedings and to include new grounds in it. The grounds, which are under consideration, are connected to the decisions of the CCU and the ECtHR, which are called to perform the restorative role with respect to the court decisions that gained legal force.

The unconstitutionality of the law, another normative act or their separate provisions established by the CCU, are applied by the court for the resolution of the case (item 1, p. 3, Art. 459 of the CrPC of Ukraine)[54] – *propter decreta*. The legal act is declared unconstitutional fully or in a specific part, if it does not comply with the Constitution of Ukraine or if the procedure of its review, approval or entry into force, established by the Constitution of Ukraine, was violated. The law (or its specific norms), which is declared unconstitutional, expires from the day when the decision is made on its unconstitutionality by the CCU. Therefore, it follows that the court decision, made by the court on the grounds of such a legal act, cannot be considered fair and enforceable. In order to correct the decision, the commencement of proceedings, based on exceptional circumstances, is required, to review the court decision and to make a corresponding decision by the competent court of the general jurisdiction.

This group of circumstances was also unknown to the court at the moment of making a decision, but possesses three properties that are uniquely inherent. Firstly, such circumstances are established not by the courts of the general jurisdiction, not by the pre-trial investigation bodies or by the prosecutor, but by the other judicial body – the CCU. Secondly, such circumstances may improve or worsen the situation of the convict, the person about whom coercive measures of an educational or medical nature are applied, or the closed

54 Code of Ukraine (n 14).

criminal proceedings. Meanwhile, it is worth mentioning that in the para. 2 Art. 540 CrPC of the Republic of Poland *(Kodeks postępowania karnego)*, establishing such circumstances is directed to improving the situation of the person and to knowingly resolving the result of the consideration of the criminal proceedings, which is required to end with an acquittal or the closure of the criminal proceedings[55]. Thirdly, the day of the discovery of such circumstances is considered the day when the decision of the CCU regarding the unconstitutionality of the legal act, applied during the criminal proceedings, gained the legal force.

Item 4, p. 2, Art. 459 of the CrPC of Ukraine does not say which law it mentions – material or procedural. In our opinion, the recognition of the provisions of the law of Ukraine on criminal liability as well as criminal procedure law as being unconstitutional, may serve as a ground for the proceedings based on exceptional circumstances.

Polish authors arrived at an identical conclusion when analysing a similar case in content para. 2 Art. 540 of the CrPC of the Republic of Poland.[56]

Having been established by the international judicial institution whose jurisdiction is recognized by Ukraine, there is a violation of international obligations by Ukraine when resolving such a case in court (item 2, p. 3, Art. 459 of the CrPC of Ukraine)[57] – *propter decreta*. The violation of the ECHR, having been established by the ECtHR, requires rectifying in order to resolve relevant criminal cases in court. Having used the norm of law during the proceedings, the court was not aware of its partial or full non-compliance with the regulations of the ECHR.

A substantial influence on the implementation of this ground into the national legislation of European countries was carried out by the Council of Europe through its bodies. In particular, the Committee of Ministers mentioned repeatedly in its acts the necessity to create the mechanism in the national legislations of the participant countries of the Council of Europe to provide for the reconsideration of criminal proceedings in the case when the ECtHR makes the final decision, which states for the violation of human rights and freedoms.

Thus, in the Recommendation No. R (2000) 2, the Committee of Ministers encourages the contracting states to improve domestic law in order to ensure the resumption of proceedings in cases where the ECtHR has found violations of the ECHR which cannot be remedied other than by consideration of the case. In particular, when the appealed court decision does not comply with the ECHR or when there are significant procedural violations that call into question the justice of such a decision.[58]

In its turn, the Recommendation No. R (2004) 6, the Committee of Ministers recommends that member states ensure effective national remedies in case of violations of the provisions of the ECHR. The contracting parties should also, if necessary, improve or create new remedies in order to avoid possible violations of the ECHR in the future.[59]

55 Code of Criminal Procedure of Republic of Poland of 6 June 1997 No 89 'Kodeks postępowania karnego' (as amended of 19 August 2020) > accessed 20 February 2021.

56 A Bojańczyk, 'Wznowienie postępowania karnego na podstawie orzeczenia Trybunału Konstytucyjnego eliminującego przepis prawa procesowego z porządku prawnego' (2010) 1 Czasopismo Prawa Karnego i Nauk Penalnych 205.

57 Code of Ukraine (n 14).

58 Recommendation No R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2f06> accessed 20 February 2021

59 Recommendation Rec(2004)6 of the Committee of Ministers to member states on the improvement of domesticremedies<https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805dd18e> accessed 20 February 2021.

Finally, in the Recommendation CM/Rec(2008)2, the Committee of Ministers recommends that the member states designate a coordinator with sufficient powers for the implementation of ECtHR decisions at a national level.[60]

The national legislation of most member states of the Council of Europe provides for the possibility of retrial and the reopening of proceedings on the basis of a decision of an international judicial body, in particular the ECtHR. According to the information of the Committee of Experts on the Reform of the Court[61] thirty-three States allow the reopening of criminal proceedings.[62] In thirty countries the reopening of criminal proceedings is provided for by laws.[63] It is worth mentioning that Ukraine is one of those countries.

The regulation takes account of the fact that decisions adopted by the ECtHR do not have any direct cassation effect, and thus, acts of law adjudged to be in contravention of the convention still require annulment by the national courts.[64]

Seven models of the resumption of criminal proceedings on the grounds of the ECtHR's decision, which are based on three criteria, can be singled out. The first criterion is concerned with the source of the norms which form the grounds for the resumption of proceedings. This criterion singles out two models: the classical model and the model of dynamic court interpretation. The classical model provides for the existence of legal grounds for the resumption of criminal proceedings on the basis of the ECtHR's decision. The model of dynamic court interpretation is a model which does not include a clear legal ground for the resumption of the criminal proceedings on the basis of the ECtHR's decision. The resumption of the proceedings can only be done by the application of the corresponding dynamic court interpretation. The second criterion requires the existence of the specific ground to start the resumption of the proceedings. Scholars distinguish the model of the result and the model *propter nova*. In order to re-initiate proceedings, the model of the result requires the existence of the severe consequences of the violation that may be eliminated only by the resumption of the proceedings. The model *propter nova* does not establish directly the condition for the resumption of the proceedings on the basis of the ECtHR's decision, although it is about the decision of the ECtHR which states the violation of the ECHR either as a result of the statutory definition or a court interpretation of the ground for the resumption of *propter nova* – the precondition to the new facts, new circumstances or new information. Finally, the third criterion is based on the type of the body making a decision on the resumption of the proceedings. One distinguishes the court model (suitable for almost all countries), the prosecutor model (common in Latvia) and the commission model (typical of France and Norway). The last two models differ from the court model in the fact that it is not the court but the prosecutor or a specially created

60 Recommendation CM/Rec(2008)2 of the Committee of Ministers to member states on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights<https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ae618> accessed 20 February 2021

61 Committee of Experts on the Reform of the Court (DH-GDR), Overview of the exchange of views held at the 8th meeting of DH-GDR on the provision in the domestic legal order for the re-examination or reopening of cases following judgments of the Court, Strasbourg 2016, para. 7 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680654d5a> accessed 20 February 2021.

62 Albania, Armenia, Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Italy, Latvia, Lithuania, the Republic of Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and Turkey.

63 Albania, Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Estonia, Czech Republic, Denmark, Finland, France, Georgia, Germany, Greece, Latvia, Lithuania, the Republic of Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Switzerland, Turkey.

64 M Lindemann and F Lienau (n 33) 8.

with this aim commission that evaluates the statements on the resumption of proceedings on the basis of the ECtHR's decision.[65]

In contrast with the circumstances, provided in items 1, 4, p. 2, Art. 459 of the CrPC of Ukraine, the 'unconstitutionality, constitutionality of the law, other legislative act, or their specific provisions, established by the CCU, applied by the court for the resolution of the case' and the 'violation of the international obligations by Ukraine during the resolution of the case in court, established by the international judicial institution, whose jurisdiction is recognized by Ukraine', as a ground for the criminal proceedings based on exceptional circumstances did not exist during the consideration of the criminal proceedings, but appeared after the court decision was made and gained the legal force. Such circumstances do not signify to the judicial an error of a factual nature, but rather signify an error from the point of view of inconsistencies in legal regulation of the order of criminal proceedings and (or) application of law of the Constitution of Ukraine and the ECHR by the court. The court was not aware, when making a decision, that the legal norm being applied and its law enforcement activity. did not fully or partially comply with the Constitution of Ukraine or the ECHR. The Ukrainian legislator combined these circumstances into one group, calling them exceptional.

Similar to the aforementioned circumstances, from the point of view of the legal nature and the method of confirmation, is a circumstance, provided in item 3, p. 2, Art. 459 of the CrPC of Ukraine, the 'cancellation of the court decision which became a ground for the court sentence or ruling, that has to be reviewed'[66]. Such a circumstance is also discovered after the court decision is made and when there is no direct connection to the subject of proof in the criminal proceedings. Yet another common property of the analysed groups of the circumstances is the method of their establishment. The existence of such circumstances is certified in the decision of higher court (item 3, p. 2, Art. 459 of the CrPC of Ukraine), the decision of the CCU (item 1, p. 3, Art. 459 of the CrPC of Ukraine), the decision of the ECtHR (item 2, p. 3, Art. 459 of the CrPC of Ukraine). The decisions of the higher court include the sentence of the courts of appeal, decisions on the cancellation of court decisions and the closure of criminal proceedings or a decision on the cancellation of court decisions and the appointment of a new trial in the court of first instance, as well as decisions of the court of cassation on the cancellation of court decisions and the closure of criminal proceedings or the decision on the cancellation of court decisions and the appointment of a new trial in the court of first instance or the court of appeal. As a result, the circumstance, provided in item 3, p. 2, Art. 459 of the CrPC of Ukraine from the point of view of the logic of legislative terminology has to belong to extraordinary and not to newly discovered.

The Ukrainian criminal procedure legislation, for a long time, linked proceedings based on NDC with committing a criminal offence by someone among the subjects of criminal procedure and this connection had a significant influence on the justice of the court decision. However, after the changes in the CrPC of Ukraine by the law of 3 October 2017, the legislator establishes that committing the criminal offence by the participants of criminal procedure not only in item 1, p. 2, but also in item 3, p. 3, Art. 459 of the CrPC of Ukraine, thus establishing the guilt of the judge committing the criminal offence or abuse by the investigators, prosecutors, investigating judges or court during the criminal proceedings, which resulted in the court decision (*propter crimina* or *propter falsa*).[67]

Item 3, p. 2, Art. 459 of the CrPC of Ukraine mentions such abuse by the investigators, prosecutors, investigating judges and court during the criminal proceedings that resulted in significant damage as one of the signs of criminal offences against the law. Therefore, it is more correct to speak about criminal and illegal abuses of the specified officials.

65 M Mrowicki (n 11) 73.

66 Code of Ukraine (n 14).

67 Ibid (n 14).

Criminal and illegal abuses by the investigator and prosecutor during the criminal proceedings may consist of knowingly illegal detention, arrest, house arrest or remand (pre-trial detention), imposition of the knowingly innocent to the criminal liability, forcing to testify by threatening, abusing, bullying the person, the violation of the right for defence, the falsification of the physical evidence, the protocols of procedural actions, the withdrawal of the documents, physical evidence from the materials of the criminal proceedings, etc. Evidence may also be falsified by inactivity (for example, the investigator refuses to add the documents that refute the already collected evidence, to the materials of the criminal proceedings). Apart from that, criminal and illegal abuses may mean giving the orders in a written form by the prosecutor which influence the illegal or unjustified decisions by the coroner, investigator, or NABU detective.

In the order *de lege ferenda*, one should add to the list of the specified officials during the pre-trial investigation, the official responsible for the procedural actions employee of the operational unit, coroner, the NABU detective, the head of the inquiry body, the head of the body of pre-trial investigation and the head of the body of prosecution.

Criminal and illegal abuses by the judges during the criminal proceedings may consist of the violation of the rights of defence, the falsification of documents, physical evidence, a journal of the court hearing and other materials of the criminal proceedings, the withdrawal of documents, physical evidence, making a knowingly unjust court decision, etc.

Injustice of a court decision may be manifested in the knowingly incorrect presentation of the facts, which happened in reality, the knowingly incorrect evaluations of such facts, the knowingly incorrect qualifications of the actions of the person, the convictions of the knowingly innocent or the acquittal of the knowingly guilty, the illegal or unjustified closure of criminal proceedings, the release from the deserved punishment of the guilty, and a conviction that does not correspond to the severity of the committed criminal offence and to the accused.

A significant indication that the actions mentioned above have been committed is self-interest or other personal interest. Therefore, the facts of the incorrect application of the law, the misevaluation of the evidence, unjustified sentencing, if there were no results from the criminal and illegal abuses by the judge, must not be considered to be exceptional circumstances.

The content of item 2, p. 2, Art. 459 of the CrPC of Ukraine is applied not only for the judges but also for the jury, since according to item 23, p. 1, Art. 3 of the CrPC of Ukraine the jury is equated to the judges.[68]

It is worth mentioning that p. 4, Art. 459 of the CrPC of Ukraine imposes that the person who applies the law needs to establish such a group of circumstances by the court decision that gained legal force, and in case of the impossibility of making the decision to confirm their existence by the court ruling or arrive at a decision on the closure of the criminal proceedings, or a decision on the application of coercive measures of a medical nature. A similar order of certification (confirmation) is defined also for the circumstances provided in item 1, p. 2, Art. 459 of the CrPC of Ukraine.[69] From this point of view, it is surprising to relate the circumstances provided in item 3, p. 3, Art. 459 of the CrPC of Ukraine not with the newly discovered but with exceptional. Such circumstances already existed at the time of carrying out the court proceedings, but the court was not aware of them. Therefore, it was not possible for the court to take them into account when making a court decision.

In item 3, p. 3, Art. 459 of the CrPC of Ukraine the legislators separate 'establishing of the guilt of the judge in the committing of crime' and 'abuse of the investigating judge or court

68 Code of Ukraine (n 14).

69 Ibid (n 14).

during the criminal proceedings which results in making the court decision'. However, the first circumstance is more abstract from the point of view of content and the legal consequences in this case are not defined in the context of chapter 34 of the CrPC of Ukraine. For example, tax evasion by the judge from paying alimony for child support (art. 164 of the CC of Ukraine) or a violation by him of the safety of traffic rules (Art. 286 of the CC of Ukraine) does not affect and may not affect the justice of the court decision.[70] In the other cases, it is necessary to evaluate the legal situation connected to the establishment of the guilt of the judge in committing the criminal offence, for example, in the sphere of official and professional activity against the law. In such a case the connection between the publicly dangerous activity of the judge and legality, reasonableness and justice of the court decision, made by the judge, is highly possible. On the basis of the research of both criminal proceedings, the court that carries out the proceedings based on exceptional circumstances must answer the following questions: a) do the circumstances of the criminal and illegal abuse by the judge exist? b) have those circumstances had an influence on the justice of court decision made by the judge or might those circumstances have had an influence on the justice of court decision made by the judge? Therefore, in our opinion the phrase 'establishment of the guilt of the judge in committing the crime' has to be excluded from the edition of item 3, p. 3, Art. 459 of the CrPC of Ukraine.

The Ukrainian legislator separates in two groups the grounds for the proceedings on appeal and the verification of the court decisions, regulated in chapter 34 of the CrPC of Ukraine. NDC in their nature, their method of certification, their existence at the moment of making the court decisions and their belonging to the elements of the subject of proof in the criminal proceedings may be used for the interest of the convicted as well as against the interest of the convicted and may significantly differ from the ones that are called 'exceptional'. Therefore, in chapter 34 of the CrPC of Ukraine, two types of criminal procedure activity on appeal and the verification of court decisions that gained legal force are actually provided: the proceedings based on NDC and the proceedings based on exceptional circumstances.

7 CONCLUSIONS

Unlike the proceedings on appeal or cassation, the PBNDEC are carried out on the grounds of the discovery of such circumstances that either appeared after the trial or have already existed at the time of the trial but were not known to the court. In such cases, not all circumstances are taken into account but only those that do not allow the possibility to evaluate court decisions in criminal proceedings as legal, reasonable and fair. Therefore, the PBNDEC are motivated by a special nature with regard to court errors, having been introduced for their certification and elimination. The law enforcement errors of such a type require a detailed regulated order of criminal procedure activity.

The approaches to the understanding of the core principles of PBNDEC in the criminal procedure doctrine of European countries are very similar. European researchers are unanimous that such a procedural institute—as a guarantee of the balance between the universality of the court decision that gained the legal force and its verification in the specific cases under certain rules—must be considered. Such proceedings correspond with both the constitutional norms and the international obligations of the members of Council of Europe with respect to the principle of legal certainty in the national legislative systems. PBNDEC do not provide for the elimination of gaps and (or) correction of violations made during pre-trial investigation and court proceedings, but rather the determination of the facts and circumstances that due to objective and subjective reasons were not considered as a subject

70 Code of Ukraine (n 40).

of investigation in the criminal proceedings before. Such a form of appeal and verification of court decisions puts beyond any doubt the resolution of the criminal proceedings at its core. Such a mechanism of criminal procedure may and should be applied by itself for the elimination of the violations, made during the criminal jurisdiction and not when the possibility of the elimination of the violations in the courts of appeal and cassation turned out to be exhausted. Therefore, with respect to the aforementioned proceedings such a mechanism should not be considered as being a reserve.

In the majority of European countries, the normative legal basis that allows for the possibility of the resumption of criminal proceedings on the basis of the ECtHR decision is implemented. However, the unique European model for the resumption of criminal proceedings on the basis of the ECtHR decision does not exist and every existing model is connected to the specifics of the national legislative system.

The legal regulation of the grounds for the PBNDEC in the criminal procedure law of Ukraine is not without drawbacks. Together with the drawbacks of a conceptual nature. the local miscalculations of the legislators, which can give rise to legal uncertainty, are also present. Therefore, legislative regulations for the PBNDEC in the criminal procedure law of Ukraine require complex and systematic improvement.

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Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)

Journal homepage http://ajee-journal.com

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To cite this note: *D Shygal, A Omarova* 'Evaluation of the Results of the Historical and Legal Comparison of the Juvenile Justice of Ukraine and Poland in the 1920s' 2021 2(10) *Access to Justice in Eastern Europe 67–85. DOI: 10.33327/AJEE-18-4.2-a000060*

To link to this note: https://doi.org/10.33327/AJEE-18-4.2-a000060

Submitted on 27 Feb 2021 / Revised 29 March 2021 / Approved / 07 Apr 2021 Published online: 01 May 2021

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ACKNOWLEDGEMENTS

The authors would like to express their gratitude to the reviewers for their help and to the English editor.

CONFLICT OF INTEREST

The authors have declared that no conflict of interest or competing interests exist.

CONTRIBUTORS

Both the co-authors contributed equally to the intellectual discussion underlying this paper, case-law exploration, and writing the draft and are both responsible for the final version of the article.

EVALUATION OF THE RESULTS OF THE HISTORICAL AND LEGAL COMPARISON OF THE JUVENILE JUSTICE OF UKRAINE AND POLAND IN THE 1920s

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A***bstract*** *The methodology of comparative historical and legal research is extremely complex, as each stage puts forward a number of specific requirements for the qualification of a historian, as well as for the procedure for working with historical and legal material. However, despite the importance of comparative analysis, which consists of comparing historical and legal objects, the stage of interpreting and evaluating the results of comparative research remains the priority in the context of heuristic knowledge. However, there are still no clear algorithms by which the comparative historian can perform this task, nor is there a general understanding of the direction in which the data obtained during the historical-legal comparison should be explained. Particular difficulties arise in interpreting the results of the comparison of specific historical and legal objects such as the court and the judiciary. In this article, we try to overcome this discrepancy between the theory and practice of the comparative historical and legal method using the comparative analysis of juvenile justice in Ukraine and Poland in the 1920s, recreating the sequence of actions of a comparative historian, which lead to important scientific results. The structure of the article is determined by its main task and therefore begins with the coverage of theoretical and methodological principles of interpretation and evaluation of the results of comparative historical and legal analysis. In particular, this part deals with the main approaches to the explanation of the data obtained during the comparison of historical and legal objects, as well as the primary rules and principles of their interpretation. The next part of the article is devoted to a specific example comparing juvenile commissions of the Ukrainian SSR and juvenile courts and probation officers of Poland in the 1920s and further explanation of the information obtained. Finally, the last part of the article explores the possibilities and prospects of historical and legal forecasting at the stage of evaluating the results of a comparative study.*

Keywords: *historical and legal comparison, evaluation of results, interpretation, explanation, forecasting, juvenile justice, juvenile commissions, juvenile courts.*

1 INTRODUCTION

The development of modern science is closely linked to the improvement of the methodology of cognitive activity. In terms of the scientific and technological progress of the 21st century, it is critical to provide the researcher with reliable methodological tools, which include both

individual techniques and methods of scientific research. At the same time, if the content of technical methods and procedures can be discussed only in the specifics of their practical application, then such unanimity of methods in the scientific community has not yet been developed. A large number of scientists refuse to recognise the method solely as a way to achieve a goal, insisting that it also includes both the principles of cognitive activity in the relevant scientific approach and a number of worldviews that permeate the way it is used. Such a different understanding of the scientific method can be explained primarily by its complex structure. Despite all these discussions in the scientific community, most researchers on this issue still agree that the method, in addition to instrumental measurement, also has theoretical fundamentals, which greatly complicates its nature and requires, in turn, a very careful attitude towards the formation of a methodological basis for any scientific research.

Bringing research into line with the new challenges of the modern methodology of historical and legal science acquires special significance in the context of the above. Without history, there is no present, and understanding and planning for the future become impossible. Oddly enough, this thesis does not seem snobbish: the rapid technological development of human civilisation, for all its contradictions, is not able to just as quickly correct the imperfections of human nature, and, therefore, the repetition of events is inevitable. In this sense, it may be salutary to turn to the historical (including historical and legal) experience of mankind, but here, the methodology of historical and legal knowledge may be the weakest link. Clearly, the improvement of the methods of legal history science in such conditions is very important.

Reflecting on possible directions for the modernisation of the methodological potential of legal history science, we think that aligning its theoretical and instrumental levels will be the best solution in modern conditions. It may be manifested, in particular, in the practical implementation of the three-member structure of the method: theory – methodology – technique. And since the most relevant scientific tool of historical and legal knowledge is the comparative method, it is necessary to begin this important work with it. This article attempts to analyse the theoretical and methodological foundations of comparative historical and legal research interpretation using the specific example of comparing the juvenile justice of Ukraine and Poland in the 1920s to trace the main components of a comprehensive assessment of the data obtained during comparative analysis. It should also be noted that the interpretation of the results of the historical and legal comparison is the final stage of comparative work, and it is possible only after all the previous stages have been successfully passed, namely: correct selection of the topic of comparative research, collection and study of its source base, conducting a comprehensive comparison of historical and legal objects, systematisation the results, etc. With this scientific work, we continue the series of articles devoted to the development of the theory, methods, and techniques of comparative historical and legal research. The comparative method, which has been the centre of our attention for a long time, has an open architecture, and any scientist can make reasonable changes to it, thus participating in a complex, relevant, and extremely important work to improve historical and legal methodology. This corresponds to the interdisciplinary nature of modern science and is in line with the paradigm of combining nonlinear, dialogical, discursive, and multidirectional approaches to knowledge acquisition.[1] In other words, the success of scientific communication depends on cooperation between disciplines.[2]

S.E. Vazhynskyi and T.I. Shcherbak rightly noted that the current stage of scientific and technological development of society puts forward some new, much higher requirements for

1 B Belcher, D Suryadarma, A Halimanjaya, 'Evaluating Policy-relevant Research: Lessons from a Series of Theory-based Outcomes Assessments' 2017 (3) Palgrave Communications. DOI: https://doi.org/10.1057/palcomms.2017.17.

2 B Fischhoff, 'Evaluating Science Communication' (2019) 116 (16) PNAS 7670. DOI: www.pnas.org/cgi/doi/10.1073/pnas.1805863115.

the creative potential of specialists, which involves mastery of new scientific methods, the ability to navigate the flow of scientific information, and finding the most rational design, technological, and organisational solutions. A modern specialist should have not only in-depth training but also a certain amount of knowledge in the field of scientific research, which involves mastering the methodological principles of scientific work and the ability to collect and process information, develop research programs, analyse the results, etc.[3]

2 INTERPRETATION AND EVALUATION OF THE RESULTS OF HISTORICAL AND LEGAL COMPARISON

The completion of the systematisation of the results of comparative historical and legal analysis does not mean the end of the comparative historian's work. The results of the comparative study have yet to be interpreted and evaluated. This is because, in a situation of understanding the historical and legal knowledge, the historian of law performs two functions: that of a mediator between the historical past and the present and that of an interpreter of the historical past from the standpoint of the present. The first function follows from his/her status as a researcher: historical and legal material as the basis of historical and legal knowledge is 'dead', unsound. The task of a historian's research activity is not only to identify traces of the past but also to 'voice' them for contemporaries, perform a kind of 'translation' of historical events into an ideal form that will be understood by contemporaries.[4] The second – interpretive – function of a comparative historian in the process of interpreting the knowledge is determined by the fact that the ideal image of the historical and legal phenomenon by itself says little to the historian's contemporaries. A historian still needs to give some semantic meaning from the standpoint of modernity, to link the results of comparative research with the current problems of modernity, to 'look' at history through the eyes of future generations, and thus give semantic significance to historical and legal events that at present seem insignificant but may significantly affect the future. Moreover, the comparative method itself necessarily has an evaluative character.[5]

The evaluation of scientific research and its results is one of the most difficult problems faced by scientists.[6] And if we talk about comparative historical and legal analysis, then there are some additional difficulties. For example, V.V. Kosolapov notes that it is the historian who bears a huge social responsibility for the scientific objectivity, content, and comprehensiveness with which he/she presents historical past to his/her contemporaries, at what level he/she conducts a kind of dialogue between the present and the past, and what meaning he/she attaches to it.[7]

The process of explaining or interpreting the results of comparative historical and legal analysis is one of the main objectives of comparative research. Any scientific explanation is

3 SE Vazhynskyi, TI Shcherbak, *Methodology and Organization of Scientific Research: Textbook* (AS Makarenko Sumy State Pedagogical Institute 2016).

4 From this point of view, the work of J. Kreinath, devoted to the micro-comparative study of religious traditions, is indicative: J Kreinath, 'Implications of Micro-Scale Comparisons for the Study of Entangled Religious Traditions: Reflecting on the Comparative Method in the Study of the Dynamics of Christian-Muslim Relations at a Shared Sacred Site' (2018) 9 Religions 2. DOI: https://doi.org/10.3390/rel9020045.

5 S Popesku, *Aims and Methods of Comparison in Law. Comparative Law* (Publishing house 'Progress' 1978).

6 N Salimi, 'Quality Assessment of Scientific Outputs Using the BWM' (2017) 112 Scientometrics 211. DOI: https://doi.org/10.1007/s11192-017-2284-3.

7 VV Kosolapov, *Methodology and Logics of Historical Research* (Publishing house 'Vyscha Shkola' 1977).

a long research process consisting of a number of stages and hierarchically organised levels. For example, T. Luukkonen-Gronow notes that evaluation is carried out at different stages of research work: at the beginning of the project (preliminary), during the study (intermediate), and after the end of the project (final).[8] Depending on the nature of the explanatory provisions, a number of epistemological types of scientific explanation can be distinguished, which can be used at the stage of systematisation and evaluation of data obtained during the comparison of historical and legal objects. In particular, these are: explanation through the analogy/model; explanation through law, or a set of laws of science; causal explanation; functional and genetic explanation; structural explanation, etc.[9] The purpose of the whole process of explaining the results of historical and legal comparison, including all its successive stages, reveals the essence of the compared objects and new historical and legal facts and identifies qualitatively new connections between historical and legal phenomena. It should be borne in mind that some types of scientific explanation, listed above, are only stages on the way to discovering the essence of objects, revealing, without touching the whole, their individual aspects and features. For example, the model explanation is simpler, less profound (compared to causal, functional, and genetic), and, as a rule, takes place at the stage of comparative analysis. A striking example of a model explanation of the results of historical and legal comparison is the work of E. Battesini, which compares the Civil Codes of Brazil and the Principles of European Tort Law.[10]

Explanations through the law are the most fundamental type of historical explanation. I.D. Kovalchenko remarks that it is the laws of genesis, functioning, and development of socio-historical reality that most deeply express its essential nature.[11] In our opinion, despite this famous statement, the question of historical laws or laws in history is still hotly debated. This is because the reconstructiveness and retrospectiveness of historical knowledge, and hence a certain subjectivity of the researcher, already interfere with giving a comprehensive and accurate assessment of historical phenomena and processes, not to mention the formulation of general laws. This is why it will be extremely difficult to use explanations through historical law in comparative historical and legal research. Nevertheless, the application of sociological laws in the interpretation of certain mass phenomena and processes will be quite appropriate.

Causal explanations of the results of comparative historical and legal analysis can be used more widely than explanations through the law. Based on the commonality of relationships that are objectively present in the historical and legal reality, they are primarily used in the disclosure of certain results of human activity, historical and legal events, and situations in which the active role of the subjective factor is clearly expressed. It is clear that there are certain objective circumstances behind this factor, but they are manifested in the nature of subjective actions.

The genetic explanation is used when the task is to reveal the essence of historical and legal phenomena and processes in their specific temporal expression.

The structural explanation is used to reveal the essence of the compared objects through the analysis of their structure. The main task of the explanation here is to identify the main, system-forming features inherent in the elements of historical and legal objects as systems, as well as to establish the nature of their relationship. The identification of system-forming features is associated with the analysis of the substantive, substantial nature of the compared objects.

8 T Luukkonen-Gronow, 'Scientific Research Evaluation: A Review of Methods and Various Contexts of Their Application' (2007) 17 R&D Management 207. DOI: 10.1111/j.1467-9310.1987.tb00055.x.

9 EP Nikitin, 'Structure of Scientific Explanation (Formal and Historical Review)' in VS Molodcov, AYa Ilyin (eds), *Methodological Problems of Modern Science* (MGU Publishing House 1964).

10 E Battesini, 'Comparison of Tort Law Systems from the Perspective of Economic Efficiency: Brazilian Civil Code, Principles of European Law and Restatements of the Law' (2017) 7 (2) Economic Analysis of Law Review 347-361.

11 ID Kovalchenko, *Methods of Historical Research* (Nauka 2003).

The functional explanation is aimed at considering the compared objects as subsystems or even elements of higher-level historical and legal systems. Analysis of the structure of the latter allows us to identify the relationship of the compared objects with the environment in which they exist and thus reveal the patterns of their functioning. The functional explanation is an effective way to identify the essence of the compared historical and legal objects at different levels of their functioning.

In addition to the above-mentioned types of explanation of the results of comparative historical and legal research, motivational, psychological, emotional, etc. types have also recently become widespread. The presence of such a number of approaches to the evaluation of the results obtained in the course of historical and legal comparison allows us to develop a structure of evaluation indicators in the future [12] and, perhaps, even to mathematise the process of data interpretation. From this perspective, the work of a team of authors devoted to the historical comparison of gender inequality in scientific careers in different countries and disciplines, in which the conclusions are based on a fairly large amount of numerical data, is quite interesting.[13] Regarding the above, M. Krause notes that to the extent that the comparison is related to the explanation, it is usually associated with a linear-causal explanation. However, there are different approaches to explanation, and comparison is also useful for interpreting both different and similar research results (for different reasons).[14] We cannot disagree with the statement of F. Esser and R. Vliegenthart that more mature comparative studies are explanatory.[15]

The highest level of explanation of the results of comparative historical and legal research (when it allows for a scale of comparison) is the construction of a scientific theory. The historical theory is the most complete and concentrated expression of knowledge in historical science. It summarises and synthesises the facts obtained by the historian at the empirical level of research. With its help, the functions of explanation and prediction of the phenomena of historical reality are carried out, and natural relations within the integral social organisation are opened.[16]

The problem of adequate interpretation of historical and legal phenomena and processes in different socio-economic and temporal dimensions is, obviously, one of the main problems of comparative historical and legal research. This is due not only to the fact that the process of interpretation is influenced by differences in the compared objects, often belonging to different socio-economic systems but also to the fact that researchers of the historical and legal past are often influenced by their own ideological and political beliefs, which in most cases makes it impossible to obtain truly objective knowledge. N. Dagnall, A. Denovan, K.G. Drinkwater, and A. Parker suggest that inflexible adherence to beliefs can affect the evaluation of evidence, regardless of thinking style. Unleashed cognition, in contrast, is impartial and involves the selection and processing of information in a way that is not affected by previous thoughts and expectations. Science, in the strictest sense, is neutral and

12 F Zong, L Wang, 'Evaluation of University Scientific Research Ability Based on the Output of Sci-tech Papers: A D-AHP Approach' (2017) 12 (2) PLoS ONE. DOI: https://doi.org/10.1371/journal.pone.0171437.

13 J Huang, AJ Gates, R Sinatra, et al, 'Historical Comparison of Gender Inequality in Scientific Careers Across Countries and Disciplines' (2020) 117 (9) Proceedings of the National Academy of Sciences 4609-4616. DOI: 10.1073/pnas.1914221117.

14 M Krause, 'Comparative Research: Beyond Linear-casual Explanation' in J Deville, M Guggenheim, Z Hrdličková (eds) *Practising Comparison: Logics, Relations, Collaborations* (Mattering Press 2016). <http://eprints.lse.ac.uk/id/eprint/68362> accessed 29 March 2021.

15 F Esser, R Vliegenthart, 'Comparative Research Methods' in J Matthes, CS Davis, RF Potter (eds), *The International Encyclopedia of Communication Research Methods* (2017) 12. DOI: ttps://doi.org/10.1002/9781118901731.iecrm0035.

16 Kovalchenko (n 11) 252.

immoral.[17] This thesis, in particular, is proved by the work of D. Cabrelli and I.-M. Esser, in which, based on the numerous data obtained during the comparative analysis, they are forced to state that the expected convergence in the field of corporate law has not taken place, and there is no reliable evidence of convergence of national laws in this area.[18]

In the course of mastering the source base of comparative historical and legal research and the reconstruction and comparison of historical and legal objects for the comparativist historian, known and new historical facts are clarified. It often happens that at the end of the actual comparative analysis, the scientist has to deal with a fairly large number of these facts. This is because the category of 'historical fact' is the foundation of the whole building of historical science. The main feature of the study of historical facts, including historical and legal ones, is that they are usually not the subject of direct observation of the researcher and are known through various sources. Historical (historical and legal) facts, along with the conclusions about the similarity or the difference of historical and legal objects, are also the results of comparative research and need to be systematised and evaluated.

The concept of 'fact' (from the Latin factum – 'action', 'event', 'done') is used in different senses. But first of all, a fact is the concrete manifestation of reality in its past or current state, that is, the objective reality. Both historical and legal facts determine the substantial nature of legal history science. There are simpler and more complex facts. In the system of historical and legal knowledge, a historical fact is a 'quantum', i.e., the smallest indivisible part of socio-historical information about the past, a kind of knowledge that retrospectively reflects any historical changes or states of historical situations and historical events that have become the subject of practical cognitive activities of society.[19]

Historical science has undergone a rather complex evolution in its relation to fact. Initially, it was *a priori* assumed that the researcher's task is to gather facts. The question of their nature was not even asked. Later, a contradiction between the fact and its interpretation gradually emerged. Some historians still reject the need to generalise and explain this reality because the fact allegedly loses its objective meaning if it is interpreted in any way. In this regard, it is worth noting the opinion of V.V. Kosolapov that the historical fact in itself, beyond its interpretation, is neither true nor false. As an element of historical knowledge and information that corresponds to a historical event, the fact is the basis on which the theoretical generalisations of historical science are based. The purpose of historical theories is to reveal the objective truth through the set of facts and the meaning of historical events that took place. And the broader and richer this factual basis of theories is, the closer the theory is to the objective truth, and the more comprehensive is the reflection of historical reality in them.[20] In this aspect, the unity and integrity of the qualitative methodology (as opposed to the quantitative) at all stages of comparative research – from the original premises to the analysis and interpretation of data – attracts attention.[21]

It is necessary to agree with the view that there is a tendency to artificially complicate the problem of historical fact. Considerations about its nature and classification are mostly speculative. In this context, it is appropriate to mention the point of view of E.H. Carr. He believes that a historical fact is not just any event, but only the one that is historically significant.

17 N Dagnall, A Denovan, KG Drinkwater et al, 'An Evaluation of the Belief in Science Scale' (2019) 10 Frontiers in Psychology 7. DOI: 10.3389/fpsyg.2019.00861.

18 D Cabrelli, IM Esser, 'A Rule-based Comparison and Analysis of Ten Case Studies. Research Paper Series' in M Siems, D Cabrelli (eds), *Comparative Company Law - A Case-Based Approach*, 2nd edition (Oxford Hart 2018) 473.

19 Kosolapov (n 7) 292.

20 Kosolapov (n 7) 293.

21 OV Chernysheva, 'Use of Qualitative Methodology in the Research of Life strategies of a Personality' (2016) 9 (14) Tavricheskij nauchnyj obozrevatel 42.

The scientist should obtain the maximum number of facts relating to the period under study in order to select from them the most significant information and turn it into historical facts and discard insignificant information as non-historical. History is an interpretation, and the relationship between the historian and the facts is a relationship of equality. They need each other. Historians without facts would have no ground under their feet: facts without historians are dead and meaningless. In other words, history is 'a continuous process of interaction between the historian and the facts, an unending dialogue between the present and the past.'[22]

The work of a comparative historian is a synthesis of empirical and theoretical approaches to the subject of study. The process of selection of factual material presupposes the presence not only of a purely professional qualification but also of a theoretical concept or hypothesis, which significantly influences the selection process. By selecting certain facts from a huge array of information, the comparative historian is already really beginning to carry out their theoretical understanding and explanation. In the course of analysis of historical and legal material and the comparison of historical and legal objects, he/she rises to a higher level of understanding of the subject of his/her work. Rising above the empirical level of comparative research, the scientist increasingly turns to the logical foundations of theoretical understanding and later reveals the true essence of historical and legal phenomena and processes. Finally, the comparative historian should not choose a passive position towards the facts he/she discovered and verified. It is also his/her direct responsibility to establish a hierarchy of facts based on the criteria of scientific significance and cognitive value in the context of a comparative historical and legal study. In particular, this is achieved by comparing historical facts and analysing their interdependence and interactions. In addition, each historical and legal phenomenon ought to be considered not only in its static form but also in its development. Any historical and legal fact established by a comparative historian should also be explained. The explanation itself gives it meaning to a scientific fact.[23] It should be borne in mind that the semantic load of the fact is different in both the amount of information and its value. This has a certain effect on the scientific nature of the facts themselves. But the reflection of the content of historical facts can only be done by description. That is why the description of the established facts is an important component of comparative historical and legal research. Thus, in the process of describing the facts, all the information obtained during the comparison of historical and legal objects is generalised, the links between the facts and the results of the comparison are established, and certain empirical regularities are revealed.

The translation of empirical data obtained during the comparison into the language of historical and legal science is the most important part of the stage of systematisation and evaluation of the results of comparative research, which is carried out in the form of a scientific explanation. In this case, the better-prepared the material for explanation, the more scientific it is. However, the preparation of historical and legal material for explanation is not always easy. As noted by R. Van Gestel, K. Byland, and A. Lienhard, any legal science is a predominantly nationally oriented discipline, closely intertwined with legal practice and without a clear scientific methodology,[24] which in itself poses significant difficulties for the comparative historian. The process of explanation is not something separate from the description – description and explanation are in dialectical unity, complementing each other. The description contains elements of explanation, and the explanation is based on the description. As the research process unfolds, penetrating deeper into historical and legal phenomena, the explanation can perform the functions of description, as it becomes

22 E Zhukov, *Review of History Methodology* (Nauka 1987).

23 GA Berezhnaja, 'Criteria of Scientific Nature of a Fact' in IA Moroz (ed), *Methodology of Scientific Perception and Development of Modern Science* (DGU 1984).

24 R Van Gestel, K Byland, A Lienhard, 'Evaluation of Legal Research: Comparison of the Outcomes of a Swiss and Dutch National Survey' (2018) 23 (1) Tilburg Law Review 3. DOI: https://doi.org/10.5334/tilr.6.

material for a deeper explanation. It should also be borne in mind that the description, as a form of intermediate explanation, is mostly characteristic of qualitative comparative studies; quantitative comparisons often involve the availability of a statistical report.[25] However, the final assessment of the results of comparative work in both cases is almost always associated with a fairly broad interpretation of the data obtained.

To explain a historical and legal phenomenon is to reveal its essence, that is, to show that this phenomenon is subject to some law (or set of laws). But the established historical and legal fact cannot always be explained by law or theory, i.e., with the help of reliable knowledge. Often hypotheses, i.e., knowledge with a high degree of probability, have to be applied. It should also be taken into account, as noted by P.J. Buckley, that the causes of historical and legal phenomena are rarely isolated. As a rule, a phenomenon becomes possible due to the combined influence of their various states, including the interaction of causes in time and space.[26] Of course, a fact whose explanation is reliable, all else being equal, is more scientific than a fact whose explanation is hypothetical.

It should be noted that in interpreting the historical and legal fact, a comparative historian can add to it such elements that will significantly affect the reliability of the reflection of historical and legal reality. Different interpretations of historical and legal facts and the absorption of a fact by interpretation create ample opportunities for subjectivism. Interestingly, one of the reasons for this is called the impact on the researcher of the so-called social comparison, which can lead to the conscious or unconscious distortion of the results obtained and their evaluation.[27] L.P. Grigorian notes that if the objectivity of the same facts is recognised, researchers may have different opinions about their interpretation. Different interpretations of facts lead to different, sometimes non-scientific, understanding of the patterns of development of socio-historical reality. Conversely, a strictly scientific, correct interpretation of socio-historical facts allows the researcher to create a truly scientific view of events and phenomena and determines the coincidence of theory with objective reality.[28] It is necessary to agree with the opinion of O.O. Razborska and Yu.Yu. Yarova that the objectivity of the assessment of the identified features and the reliability of the conclusions is ensured by the scientific competence and comprehensiveness of the historical and legal analysis, as well as the level of qualification of the comparative historian and his/her experience, morals, and business qualities.[29] In addition, we should not forget that an important component of any methodological tool is a properly selected conceptual and categorical apparatus, which provides complete disclosure of the problem chosen for research at the appropriate scientific level.[30]

The interpretation of the conclusions of comparative historical and legal analysis, as well as established facts, is a complex cognitive process of determining the meaning of historical and legal events, phenomena, and processes in the course of scientific analysis and theoretical understanding. The point of view of J.I. Piovani and N. Krawczyk deserves attention, according to which comparison is a significant analytical and interpretive resource.[31] In order to use it, it

25 HH Elkatawneh, 'Comparing Qualitative and Quantitative Approaches' (2016) SSRN Electronic Journal. DOI: 10.2139/ssrn.2742779.

26 PJ Buckley, 'Historical Research Approaches to the Analysis of Internationalisation' (2016) 56 Management International Revie*w* 888. DOI: https://doi.org/10.1007/s11575-016-0300-0.

27 S Garcia, A Halldorsson, 'Social Comparison' in R Biswas-Diener, E Diener (eds), *Noba Textbook Series: Psychology* (Champaign, IL: DEF publishers 2021) <http://noba.to/y4urxhvj> accessed 29 March 2021.

28 LP Grigorian, 'Specifics of Social-Historical Fact Interpretation' in AA Yudin (ed), *Methodological Problems of Modern Science* (Gorskyi State University Publishing 1986).

29 OO Razborska, YY Yarova, 'Estimation of the Results of Research and Conclusions Formulation by an Expert Accountant' (2011) 28 (1) Zbirnyk naukovykh prats ChDTU 66.

30 N Buhlai, 'Methodology of Research of Polish Foreign Policy (1995-2005)' (2018) 2 Naukovyi visnyk MNU imeni VO Sukhomlynskoho. Istorychni nauky, 2, 53.

31 JI Piovani, N Krawczyk, 'Comparative Studies: Historical, Epistemological and Methodological Notes' (2017) 42 (3) Educação & Realidade 835. DOI: http://dx.doi.org/10.1590/2175-623667609.

is important to bear in mind that the interpretation of historical facts has its own specifics due to the complexity and multifaceted nature of historical and legal reality. Thus, in the course of comparative analysis, it is necessary to interpret the established historical facts in two aspects: 1) in the identification of facts to real historical and legal events and 2) in including facts in the general concept of comparative historical and legal research. At the same time, the process of interpretation is influenced by a large number of factors, among which the worldview of comparative historians themselves should be singled out. Therefore, in order to obtain a correct interpretation of a historical fact, it is necessary to separate the subjective aspect and the objective meaning of the fact itself. This is achieved through the use of various logical techniques and methods: abstraction, induction and deduction, analysis and synthesis, and others. In addition, when interpreting the quantitative indicators of the compared objects, it is desirable to avoid general characteristics and focus on concretising own conclusions instead.[32] In other words, when interpreting, one should strive for clarity of formulations.[33] D. Makanju, A.G. Livingstone, and J. Sweetman also insist on caution and detail in evaluating the results of the study.[34]

Critical evaluation of comparison results is an important part of comparative historical and legal research. As K. Zweigert and H. Kotz point out, a comparativist must immediately critically evaluate their research; otherwise, it will remain a pile of unused building material.[35] In addition, it is impossible to draw conclusions about the similarities or differences of historical and legal objects without an idea of the similarities and differences in their characteristics, which are formed, in particular, in the evaluation process. In determining which of the essential features are common and which are similar or different, the evaluation of the identified characteristics of the compared objects, which is the basis for the application of the generalisation technique, is necessary. Due to this technique, the historical and legal phenomena that have common (significant, similar) features are grouped, and the groups can be identification models for comparison with other phenomena.[36]

When assessing the results of comparative historical and legal research, it is necessary to remember that the most important element of the creative search of a legal history scientist is attention not only to individual legal texts or their complexes, to individual historical and legal facts, but also to the broad socio-cultural historical context in which the scattered evidence of the historical existence of law are combined and can acquire their meaning. The legal history scientist ought to penetrate into the spiritual world of the creator of the text, come into direct contact with the society which he/she is studying, and receive unfiltered fragments of the real historical and legal reality, which make the legal history a science. Taking these factors into account, the path to truth lies in the historical knowledge of law, as well as getting rid of the factuality and descriptiveness of legal history science.[37]

Thus, the process of interpretation and evaluation of the results of historical and legal comparison is extremely important and, at the same time, quite a difficult stage of comparative research. A comparative historian, in addition to the proper general methodological preparation for this type of scientific work, must have an appropriate worldview and adhere to a number of specific

32 DC Funder, DJ Ozer, 'Evaluating Effect Size in Psychological Research: Sense and Nonsense' (2019) 2 Advances in Methods and Practices in Psychological Science 166. DOI: 10.1177/2515245919847202.

33 P Aspers, U Corte, 'What is Qualitative in Qualitative Research' (2019) 42 Qualitative Sociology 141. DOI: https://doi.org/10.1007/s11133-019-9413-7.

34 D Makanju, AG Livingstone, J Sweetman, 'Testing the Effect of Historical Representations on Collective Identity and Action' (2020) 15 (4) PLoS ONE 22. DOI: https://doi.org/10.1371/journal.pone.0231051.

35 K Cvajgert, H Kjotc, *Introduction to Comparative Law in the sphere of Private Law,* vol 1 (Mezhdunarodnyie Otnosheniia 2000).

36 LA Luts, 'Theory of Comparative Law Method. Methods and Means of Comparative Law Research' (2006) 31 State and Law. Political and Legal Sciences 494.

37 MA Damirli, 'Specifics of Historical and Legal Cognition and the New Image of Historical and Legal Science' (2003) 16 Relevant Problems in Politics 422.

rules and regulations. In particular, it is desirable for them to avoid any bias when working with systematised material within the topic of their research, to adhere to the principle of maximum objectivity, and to assess comparable historical and legal phenomena and processes on the basis of different approaches, which include, in particular, explanation through law, causal, structural, functional and genetic explanation, etc. The general theoretical training of a comparative historian and the quality of which directly affects the comprehensiveness, complexity, balance, and completeness of the interpretation of the results obtained during the comparison of historical and legal objects should also be mentioned. It is also important to understand the essence of historical and historical-legal facts. The facts are one of the first items to become available for processing by a historian, and therefore knowledge of the specifics of working with them is critical. However, the prescriptions and reservations of historical and legal science set for the stage of interpretation and evaluation of the results of comparative research are not rigid – they only outline the corridor of capabilities of a comparative historian and are only the basis for their creative and truly heuristic conclusions, some of which may even become the foundation for building a new theory.

3 JUVENILE JUSTICE AUTHORITIES OF UKRAINE AND POLAND IN THE 1920S: EXPERIENCE OF COMPARISON AND EVALUATION

On 10 March 1919, the formation of the Ukrainian SSR was proclaimed. The First World War, the instability of public administration during the national liberation struggle, the typhus and influenza epidemic, and the famine of 1921 all affected the condition of children and their rights. The child population of Ukraine needed help and protection from the state. One of the initial directions of the juvenile policy and juvenile legislation of the first Soviet governments was to combat child homelessness.

In the first years of Soviet rule, Juvenile Commissions were formed.[38] These Commissions dealt with cases of liability of persons under the age of 18 who were accused of committing crimes, cases of declaring minors homeless, and cases of adolescents who violated the rules of compulsory labour.[39] From then on, they replaced juvenile courts. In the pre-revolutionary period, even before the First World War, juvenile courts were established in Ukraine in Kyiv, Kharkiv, Odesa, Katerynoslav, and Mykolayiv. This was in line with the global trend of dealing with juvenile cases through separate courts specifically set up for this purpose. Unfortunately, this positive experience was rejected. In the first years of Soviet Ukraine's existence, the commissions for juvenile affairs included representatives from the People's Commissariats of Education, Justice, Social Security, and Health Care. That is, there were no lawyers in such commissions. This is undoubtedly a negative point in the history of juvenile justice in Ukraine. P.I. Lublinskii, noted that juvenile commissions very often treated homelessness with a formal measure of the severity of the offence and resorted to no more than simple suggestions or reprimands where social assistance and education measures were required. Precisely because the commissions were purely pedagogical in nature, there were several problematic issues:

38 P Mykhailenko, Y Kondratiev, *History of the Ukrainian Militia in Documents and Materials, Volume 1: 1917-1925* (Heneza 1997).

39 Decree of the Council of People's Commissioners of the USSR 'On the Responsibility of Minors' of 12 June 1920 in Collection of Laws and Decrees of Workers' and Peasants' Government (1920) 15, Art 281; Decree of All-Ukrainian Labour Committee of the USRR 'On the Minor's Liability for Violating the Rules on Labour Discipline' of 5 July 1920. Collection of Laws and Decrees of Workers' and Peasants' Government of Ukraine (1920) 20, Art 386; Resolution of the Council of People's Commissioners of the USSR 'On Means of Fighting Minor's Homelessness' of 11 June 1921 in Collection of Laws and Decrees of Workers' and Peasants' Government of Ukraine (1922) 11, Art 293.

1. The commissions did not have the right to impose penalties on those guilty of violating the rights and interests of minors. The right and obligation of the commissions to bring to justice those guilty of violating the rights and interests of minors were provided for. However, any official authority had these rights and responsibilities.

2. The commissions were not given the right to decide on the deprivation of parental rights. This was because no code of substantive or procedural law issued in 1922 had a provision on the possibility of deprivation of parental rights.

3. The decisions of the commissions were not of a formal nature, which was inherent in a court decision. The decisions of the commissions were not read to minors or their parents, they were not provided with copies of these decisions, and they could not be appealed. Resolutions could be reviewed only by the commissions themselves at their own discretion, at the request of persons or institutions involved in the case, and at the request of relatives of the minor.

4. The commissions did not have the right to decide on compensation for damages caused to minors. The victim had to address this issue to the people's court in a civil lawsuit, in which the minor acted as a defendant.

5. The decisions of the commissions were not subject to appeal and review by higher authorities. [40]

As rightly noted by N. M. Krestovska, the system of measures applied by juvenile commissions signified a return to some pre-revolutionary rules of juvenile justice. However, the decrees that formed the basis of these commissions were not aimed at restoring autonomous juvenile justice. On the contrary, they retained the jurisdiction of the juvenile commissions, which existed until 1935. Judicial intervention was carried out only in cases of serious juvenile delinquency. These cases were referred to the jurisdiction of general people's courts, where special panels of courts were organised.[41]

As for punishments, arrest was not applied to minors as a method of administrative and disciplinary punishment.[42] If it was necessary to impose administrative or disciplinary punishment on minors, arrest was replaced by another method of punishment.

During the new economic policy, new codes were adopted, which also enshrined the rights of children. With the transition to legal construction on the basis of the new economic policy, it was necessary to make changes in the legislation on children, in particular, to soften its declarativeness and to bring the possibility of implementation in practice to the forefront.[43] According to the Criminal Code of 1922,[44] punishments were not applied to minors under 14 years of age or to minors from 14 to 16 years of age in respect of whom it was deemed possible to limit to measures of medical and pedagogical influence. Moreover, the highest measure of criminal repression (execution) could not be applied to persons who had not reached the age of 18 at the time of the crime. With regard to the participation of children in

40 PI Lublinskii, 'Crime Fighting in Juvenile Age (Social and Legal Aspects)' (1923) YuI PCJ 84, 179-181.

41 NM Krestovska, *Juvenile Law in Ukraine: Historical and Legal Research* (Feniks 2008).

42 Decree of All-Ukrainian Central Executive Committee 'On the Impossibility to Apply Arrest as Means of Disciplinary and Administrative Punishment to Minors' of 4 January 1922 in Collection of Laws and Decrees of Workers' and Peasants' Government of Ukraine (1922) 1, Art 9.

43 PI Lublinskii, 'Protection of Childhood and Fight against Homelessness during the period of 10 Years' (1927) Pravo i zhizn 8, 31.

44 Decree of All-Ukrainian Central Executive Committee 'On Introduction of the Criminal Code of the Ukrainian SSR of 23 August 1922 in Collection of Laws and Decrees of Workers' and Peasants' Government of Ukraine (1922) 36, Art 553.

court, the CrPC of the USSR of 1922[45] prohibited the admission of a person under 14 years of age to the courtroom. The Code of Public Education of 1922[46] introduced certain changes in the composition of juvenile commissions. Thus, from then on, the commission consisted of a chairman (an educator) and two members (a doctor and a lawyer). However, who exactly this lawyer was – a professional lawyer or just a person who was aware of the law – remains a question.

Poland gained its independence in 1918, and the country's economic situation in the post-war period was as difficult as in Ukraine. According to P. Swianiewicz, the division of Polish territory between Russia, Prussia (later Germany), and the Austrian Habsburg Empire in the 19th century posed a challenge to the country's unification after Poland's independence proclamation in 1918.[47] The juvenile justice system, which was separate from the adult criminal justice system, was established in Poland in the 1920-30s. At the time, the debate on the need to remove juveniles from the adult criminal justice system was influenced by the Youth Movement of Courts, which emerged in some European countries in the early 20th century and relied on the North American 'Child-Saver' movement. Polish scholars and practitioners who made efforts to create a juvenile justice system identified juvenile offenders as different from adults who are still developing.[48]

After the restoration of Poland's independence, the unification of both criminal and civil legislation became a matter of extreme necessity. In the process of drafting the criminal code, it was decided that young people who violated the law should not be treated as 'young adults', so they should not receive the same punishments as adult offenders.[49] In the first years of Poland's independence, acts of the occupying states were in force, and new legal acts were adopted to regulate issues related to juvenile delinquency. Thus, on 7 February 1919, the decree of the Provisional President Józef Pilsudski facilitated the establishment of courts for minors and the establishment of offices of permanent guardians. On 26 July 1919, the Minister of Justice of the Republic of Poland issued a decree on the establishment of juvenile courts. Three such courts were established on the basis of the above provisions and were located in Warsaw, Lodz, and Lublin.[50] Later, such a court was opened in Lviv.[51] Their competence included the consideration of all criminal cases of minors under the age of seventeen. The decree of 26 July 1919 also regulated the issue of so-called social guardians, who can be considered the first probation officers in Poland. Social guardians were appointed by a judge. Their tasks included collecting information on juveniles (as directed by the judge), supervising juveniles who had been suspended, and caring for juveniles who remained under parental supervision or in cases where supervision was improper and required additional

45 Resolution of All-Ukrainian Central Executive Committee 'On Introduction of the Criminal Procedural Code of the Ukrainian SSR of 13 September 1922 in Collection of Laws and Decrees of Workers' and Peasants' Government of Ukraine (1922) 41, Art 598.

46 Resolution of All-Ukrainian Central Executive Committee 'On Coming into Force of Laws on Public Education' of 22 November 1922 in Collection of Laws and Decrees of Workers' and Peasants' Government of Ukraine (1922) 49, Art 729.

47 P Swianiewicz, 'Poland: Europeanization of Subnational Governments' in F Hendriks, A Lidström, J Loughlin (eds), *The Oxford Handbook of Local and Regional Democracy in Europe* (Oxford Press 2010) 480.

48 B Stando-Kawecka, 'Poland' in SH Decker, N Marteache (eds), *International Handbook of Juvenile Justice* (Springer 2017) 345.

49 B Stando-Kawecka, 'Continuity in the Welfare Approach: Juvenile Justice in Poland' in J Junger-Tas, SH Decker (eds), *International Handbook of Juvenile Justice* (Springer 2006).

50 Ł Wirkus, 'The Role of the Family Court in Poland in the Prevention of Demoralization and Juvenile Delinquency on the example of Prophylactic and Rehabilitation Activity of robation Officers' (2018) 4 (1) Polish Journal of Criminology 72.

51 O Lypytchuk, 'Legal State of Minors in Polish Judiciary in Interwar Period of Poland' (2006) Bulletin of Lviv Institute. Series: Law 58.

assistance from a guardian.[52] It was further decided that a comprehensive regulation on juvenile offenders would be developed together with a new Polish codification of criminal law,[53] which took place later, namely, the Criminal Procedural Code, which was adopted in 1928, and the Criminal Code, which was adopted in 1932.

Thus, interpreting the results obtained above, it should be noted that Ukraine and Poland gained their independence after the First World War, and both republics had the experience of juvenile policy in their territories. In the early years of Soviet Ukraine, the authorities enshrined certain rights of children and tried to combat the most common problem – homelessness. However, as rightly noted by O.I. Anatolieva, at the first stage of the fight against homelessness, neglect, and juvenile delinquency, which began in 1920 and continued in the first half of 1921, achieving real results was prevented by the socio-economic and political crisis in the country. There were not enough funds for the maintenance of children's institutions. The development of patronage was hampered by the poverty of the majority of the population. A significant problem was the high unemployment rate.[54] Most of the norms in the legislation on children were declarative in nature and could not be complied with in reality. Even official sources of the People's Education Commissariat of the Ukrainian SSR contained information about the failed experience in combating child homelessness. Thus, institutions that provided only shelter and food for children during the famine, which was meant to fight against child homelessness, often contributed to its spread. The children only came to spend the night and eat and then returned to a homeless lifestyle.[55] In Poland, by contrast, juvenile policy was evolving, and juvenile courts and probation officers were established. However, the situation in Poland also had its shortcomings. Thus, a strict criterion of awareness of wrongdoing or lack thereof forced a juvenile court judge to make a decision based on the presumption of intellectual capacity at the time of the crime, while the child protection system provided that only a diagnosis of a young person's personality, needs, and rehabilitation opportunities directed the judge's decision to the choice of measures to be applied. Thus, it is clear that these regulations have been the subject of constant controversy and criticism. The second point of dissatisfaction was the small choice of measures of education and protection, as well as the unsatisfactory state of the structure of juvenile justice. Specialised juvenile courts operated only in large cities, and juvenile probation workers were mostly volunteers, of whom there were only a few professionals; the network of educational and correctional institutions was insufficient. Thus, the case-law often ranged between forcibly suspending proceedings or, in serious cases, the need to place some older juveniles in prison.[56] B. Stando-Kawecka critically notes that there were only a few juvenile courts in Poland before the Second World War. It was not until the 1960s that the number of individual juvenile courts began to grow significantly.[57]

4 EVALUATION OF RESULTS AND POSSIBILITY OF FORECASTING

Interestingly, some experts in the field of historical and legal comparative studies do not limit the stage of systematisation and evaluation of the results of comparative historical and legal analysis only to the explanation of the research findings but also include forecasting. According to A.O.

52 Wirkus (n 51) 72.

53 A Marek, 'Juvenile Justice in Poland: Its History and Current Development' (1988) 4 Review of Socialist Law 308.

54 OI Anatolieva, 'Legal Regulation of Combating Homelessness, Neglect and Crime in the USSR in the 20s of the XX century' (Master's thesis, National Academy of Internal Affairs, 2003).

55 Circular Note of People's Education Commissariat of the USSR 'On the Main Issues Concerning Fight against Homelessness of Minors' of 19 November 1924 Bulletin of People`s Education Commissariat (1924) 3-4, 131-132.

56 Marek (n 54) 309-310.

57 Stando-Kawecka (n 50).

Tille, historical-comparative analysis is the basis of any forecasting, which is not an expression of assumptions about the future, but a systematic study of prospects for democracy, governance, law, or their individual institutions, processes, and phenomena using modern methodologies, tools, and techniques of modern scientific knowledge. A forecast is a special type of scientific prediction based on the analysis of deep trends in the development of the object, the nature of the whole system of current factors (permanent and temporary, internal and external, etc.), a reasonable assessment of future development and their possible consequences.[58]

V.Ye. Chirkin, along with descriptive, critical, and heuristic elements of comparison of state, institutions also singles out a forecasting element. A descriptive element of comparisons is necessary for an objective understanding of the factual side of the case. Scientific criticism reveals the pros and cons of objects of comparison. The heuristic element is related to the evaluation of an object in specific conditions. The prognostic element of the comparison indicates the possible development and results of events. According to Chirkin, it not only can but also should contain suggestions and recommendations in order to increase the practical effectiveness of comparative research.[59]

Schematically, the forecast can be represented as follows: by establishing via observation that the appearance of phenomenon A entails, as a rule, the appearance of phenomenon B, with the secondary appearance of phenomenon A, it is possible with some probability to predict the appearance of phenomenon B. Or, by establishing a trend or change of phenomenon A according to the series B - C - D, we can, again, with some probability, predict that the phenomenon will take the form D. To strengthen the conclusions associated with the prediction of historical and legal phenomena, it is appropriate for a comparative historian to use meta-analysis as a scientific method, which increases the number of indicators-observations by attracting the results of similar studies conducted by different authors at different times in order to form a representative statistical-homogeneous complex, which is a prerequisite for increasing the reliability of research results to confirm or refute the proposed scientific hypothesis.[60]

It is quite clear, notes A.O. Tille, that forecasting is simpler for natural phenomena and much more difficult for social phenomena, including historical and legal ones. In addition, when forecasting, it is necessary to take into account all the social factors that influenced the formation and change of historical and legal objects.[61] For example, forecasting based on the results of a comparison of juvenile justice bodies of Ukraine and Poland in the 1920s becomes possible only after taking into account all the differences that existed in the countries under consideration and were due to both the existing state regimes and the social essence of the state because they were the reason for the existence of different models of juvenile justice. Thus, in Poland, it was a judicial-centric model of juvenile justice that worked closely with elements of civil society, and in Ukraine, it was an administrative-centric model that was characteristic of the authoritarian Soviet regime. The formation of different models of juvenile justice in Ukraine and Poland was due to the fact that these countries faced different challenges. In addition, Poland did not have the scale of homelessness and resettlement that existed in Ukraine. That is why in Poland, there was a humane response to crimes committed by minors, and in Ukraine, the priority was to eliminate the social danger of mass homelessness of minors.

It should be noted that forecasting at the stage of evaluating the results of comparative historical and legal research can take place, but it should be based on a solid methodological

58 AA Tille, *Socialistic Comparative Legal studies* (Yuridicheskaia Literatura 1975).

59 VE Chirkin, 'Comparative Constitutional Law: Methods of Research, Branch of Science, Subject of Study' (1990) 3 Sovetskoe gosudarstvo i parvo 31.

60 VK Savchuk, PK Haki, 'Meta-Analysis as a Way to Increase the Evidentiality of Research Results' (2018) Scientific Bulletin of NUBiP of Ukraine. Series: Economics, Agriculture Management, Business 290, 239.

61 Tille (n 59).

foundation – in particular, the method of modelling. In itself, modelling is a powerful tool for social forecasting based on the construction of various models. Characteristically, in the context of forecasting, it will be most appropriate to use simulation-forecasting models that not only reflect the basic properties of the modelling object but also allow to simulate possible states of the object, different from its actual being. The scope of simulation and forecasting models includes the reflection of the possible, permissible, or desirable in the object (objects) under research. Thus, imitation should establish the most optimum, from the point of view of the set tasks, options of development of historical and legal phenomena and processes.

However, despite some optimism of some representatives of historical and legal science regarding its prognostic function, 'predictions are not always confirmed, especially if they relate to complex phenomena and processes of social development. The current level of construction of complex prognostic models gives satisfactory results only for smoothly flowing processes.'[62] As N. Krake notes, the actual consequences often differ from those predicted; nonlinear causal relationships play an important role in erroneous predictions.[63] In addition, theoretical and methodological problems of the application of simulation and prognostic models have not been developed yet, and there are different opinions about the possible use of simulation and prognostic models in historical and legal science. The difficulty of using simulation models is due to the fact that they must take into account possible changes in the object (objects) and replicate them correctly. This significantly complicates the construction of models, requires increasing their sensitivity to possible trends in the development and operation of modelling objects.[64]

5 CONCLUSIONS

The evaluation of the results of historical and legal comparison is of paramount importance for all comparative work. First, it provides an opportunity to correlate the data obtained with the objectives set at the beginning of the study and, if necessary, to adjust its further direction.[65] Secondly, the explanation of the results of the comparative analysis also allows us to assess the quality of the work done by the comparative historian, which may include several aspects.[66] At the same time, despite the possibility of using the method of expert assessments at this stage,[67] its significance will be somewhat limited, given the specifics of comparative historical and legal research. Thirdly, as illustrated by the example of a comparative analysis of juvenile justice in Ukraine and Poland in the 1920s, assessment of the results of comparative work allows us to qualitatively deepen and expand knowledge about the state and legal phenomena that have become the subject of attention of comparative historians.

It is noteworthy that despite the fact that big data promises to revolutionise the field of scientific knowledge by providing new, highly effective ways of planning, conducting,

62 Kovalchenko (n 11) 381.

63 AN Craik, 'Environmental Assessment: A Comparative Legal Analysis. Forthcoming' in J Vinuales, E Lees (eds), *Oxford Handbook of Comparative Environmental Law* 21. <https://ssrn.com/abstract=3013292> accessed 29 March 2021.

64 S Leonelli, 'Scientific Research and Big Data' in *The Stanford Encyclopedia of Philosophy* (2020) <https://plato.stanford.edu/archives/sum2020/entries/science-big-data> accessed 29 March 2021.

65 A Biloshchytskyi, A Kuchansky, Yu Andrashko et al, 'Evaluation Methods of the Results of Scientific Research Activity of Scientists Based on the Analysis of Publication Citations' (2017) 3, 2 (87) Eastern-European Journal of Enterprise Technologies 5. DOI: 10.15587/1729-4061.2017.103651.

66 P Martensson, U Fors, SB Wallin et al, 'Evaluating Research: A Multidisciplinary Approach to Assessing Research Practice and Quality' (2016) 45 (3) Research Policy 594. DOI: https://doi.org/10.1016/j.respol.2015.11.009.

67 PA Kalachikhin, 'A Methodology for the Scientometric Expert Evaluation of Research Results' (2017) 51 Automatic Documentation and Mathematical Linguistics 53.

disseminating, and evaluating research, the role of a comparativist, who provides a comprehensive explanation of comparative historical and legal research, will still remain extremely important and relevant. This is primarily because mathematical and computational tools designed for big data analysis are often opaque in their operation and assumptions, which can lead to results, the scientific content and reliability of which are difficult to assess. Another key challenge may be to find mechanisms for sharing responsibilities in the big data management system to avoid erroneous, unethical, discriminatory, and unreasonable decisions. Finally, none of the elements of scientific research can be fully controlled, streamlined, or even considered through formal tools because the processes of obtaining and processing data are often so chaotic that they cannot be systematically analysed.[68]

The significance of the researcher's direct contact with historical and legal material is clearly traced through the example of a comparative analysis of juvenile justice bodies of Ukraine and Poland in the 1920s. Assessing the results, we can identify both common and distinctive features of juvenile policy in these states. A common feature was the difficult post-war situation in which Ukraine and Poland found themselves. The differences were in the social conditions, the difficulties faced by these two countries, as well as in the ideology of overcoming these difficulties. Thus, in Ukraine, the ideology of the Soviet regime was based on the need to eradicate socially dangerous elements of society, in this case, minors, and in Poland, it was a humane model of responding to juvenile delinquency, based on the formation of juvenile courts and subsidiary bodies.

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68 S Leonelli (n 65).

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RESEARCH ARTICLE

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)

Journal homepage http://ajee-journal.com

THE VALUE OF JUSTICE IN CZECHOSLOVAK CRIMINAL LAW NORMS IN THE 20TH CENTURY

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To cite this article: *A Letková, A Schneiderová* 'The Value of Justice in Czechoslovak Criminal Law Norms in the 20th Century' 2021 2(10) *Access to Justice in Eastern Europe 86–103. DOI: 10.33327/AJEE-18-4.2-a000062*

To link to this article: https://doi.org/10.33327/AJEE-18-4.2-a000062

Submitted on 28 Jan 2021 / Revised 10 Apr 2021 / Approved 30 Apr 2021 / Published online: 03 May 2021 View data

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ACKOWLEDGMENTS

Authors would like to express their gratitude to the reviewers for their help and for the English editor, Sarah White.

CONFLICT OF INTEREST

The authors have declared that no conflict of interest or competing interests exist.

CONTRIBUTORS

All the co-authors have read, approved the final version and agreed to be accountable for all aspects of this article.

THE VALUE OF JUSTICE IN CZECHOSLOVAK CRIMINAL LAW NORMS IN THE 20TH CENTURY

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Abstract *The authors focus on the legal regulation of criminal substantive law rules and its development in the 20th century in the territory of Czechoslovakia. Specifically, the paper focuses on finding the value of justice in the substantive law provisions and looking for its value in judicial practice. In the conclusion of the paper, the authors consider the meaning of justice in criminal law rules and compare its value in historical and current criminal codes. Justice is not legally defined as an institution or a principle, and therefore, it is very difficult to seek the value of justice in legal branches. The authors present a new hypothesis that works with all kinds of sources of law, which, in their interconnection and agreement, should provide a test to show the value of justice. The authors work with a specific type of criminal law – post-war retribution criminal law. However, the humanities are not exact as science, so subjective evaluations are always present. The second stage of verification of correctness is identical or very similar to the textual and contextual interpretation of the sources of law. The value of justice is not determined by a numerical scale, so only a comparison of specific cases can give us answers as to whether criminal law has been applied more or less fairly in individual trial proceedings.*

Keywords: *justice, criminal law, functions of law, functions of criminal law, methodology of legal research*

1 INTRODUCTION

Justitia non novit patrem nec matrem,
solum veritatem spectat justitia.[1]

We begin this article with a quote that will be key in our argument, but we do not perceive this quote as a fact – we subject it to analysis and then answer the question of whether the law, particularly criminal law, has sought the truth throughout the last century and therefore, whether it was fair. Justice is a philosophical rather than a legal concept, and it will therefore first be necessary to clarify our approach to the concept of justice and to the content of that concept. The title of the article suggests a bit misleadingly that we will seek justice directly in

1 'Justice knows neither father nor mother, because it sees only the truth' in J Bouvier,' *A Law Dictionary, Adapted to the Constitution and Laws of the United States* (Childs & Peterson 1856) <https://legal-dictionary.thefreedictionary.com/Justitia+non+novit+patrem+nec+matrem> accessed 10 April 2021.

the texts of criminal law regulations in force in the territory of Czechoslovakia. The authors will primarily work with the material sources of law through which they will try to clarify the intention of the legislator. It is the material sources of law that tell us about the functions of criminal law in individual periods, which directly connects us to justice or to the perception of what was and was not fair at a particular time.

Formal sources of law themselves – criminal law regulations – will show us the possibilities of achieving the functions of law, but gnoseological sources of law – primarily the indictments and judgments – confirm or refute hypotheses based on material and formal sources of the formation of criminal law. However, the issue is very extensive, and it will not be possible to grasp it in its entirety in this article. Therefore, we decided that in the first part of the article, we will focus on the theoretical-philosophical and methodological basis of the article, which relates to the concept of justice, and in the second part of the article, we will point out a specific criminal law regulation, to which we apply our chosen methodological procedure. It is precisely this cyclical relationship between the sources of law and the functions of law that allows us to approach the knowledge of the value of justice in criminal law.

2 LAW VERSUS JUSTICE

Justice has always been a very popular concept, especially since the end of World War II. It is used in heterogeneous contexts and in various scientific disciplines (law, philosophy, sociology, economics, history, etc.), but it is also being adopted by the general public. The various social science disciplines overlap when examining justice, and so, the scientific conclusions of one discipline may be applicable in another discipline.[2] Evidence of the widespread use of the term justice is also found in its application with specific, identical attributes: ethical, political, economic, social, legal, environmental, historical, gender, etc. From another point of view, there is the use of the adjectives 'just' and 'unjust', which in themselves deliver a verdict (at least an ethical one).[3] However, the optics of the evaluator from the point of view of different criteria are not the main focus of this article. We will primarily think about the essentials of the content of the concept of justice and subsequently about the specifics of justice in (criminal) law.

First of all, it should be noted that justice is not only a question of rationality but also a problem of emotionality. In the words of Otto Weinberger: 'The pursuit of justice is a task of search, a task for reason and heart'.[4] However, in the same breath, we must present a follow-up, law-related statement: 'Ius appellatur non quia iustum est, sed quia iubetur', i.e., law is not called law because it is just (*iustum*) but because it is commanded (*iubetur*).[5] We are convinced of the correctness of both statements, even if they are not in clear harmony. While the first relies on the existence of a dual justice, consisting of the intellectual and logical side (*logos*) and the emotional side (*pathos*), the second statement places law in another position or fails to seek and point to the overlap between law and justice – it

2 An example is Hayek's critique of social justice, which also has implications for the legal sphere. Cf: L Krivošík, 'Sociálna spravodlivosť podľa Hayeka' (*Prave Spektrum,* 19 February 2004) <https://www.prave-spektrum.sk/article.php?148> accessed 10 April 2021; AF Hayek, *Právo, zákonodárství a svoboda. Nový výklad liberálních principů spravedlnosti a politické ekonomie* (2nd ed, Academia 1998).

3 Excessive use of the given term directly affects the process of law enforcement and the application of law, but not always in the positive sense of the word. For more details, see: M Hájek et al, *Praktiky ne/spravedlnosti: pojmy, slova, diskurzy* (1st ed, Matfyzpress 2007).

4 O Weinberger, *Inštitucionalizmus: nová teória konania, práva a demokracie* (1st ed, Kalligram 2010) 364.

5 K Rebro, *Latinské právnické výrazy a výroky.* (Iura Edition, 1995) 165.

explicitly relies on the regulatory and thus the intellectual side. But can law, as a creation of man, exist without emotionality? And if there is an emotional side to law, can we speak of proof of the existence of justice in it?

According to Ronald Dworkin, we can think of justice in terms of the theory of law-making, judicial decision-making, and in terms of the Compliance with Law Theory.[6] These three aspects can be perceived through the eyes of the legislator, judge, or citizen. Of course, all aspects are relevant, but we believe that the approach of the legislator and judge are most beneficial in assessing justice in the historical context – especially in criminal law, which we believe brings to the creation and later the application of law the most emotional side of all branches of law. As mentioned above, the legislator first explains the material sources when adopting a specific criminal law rule (or we could talk about the teleological and historical interpretation of the legal norm), then the content of the legal norm itself (grammatical, systematic, logical interpretation), and then the application of law by the judge is itself a kind of test of correctness (in our case, a test of justice).

2.1 How to Search for Justice in Law

We must understand legal justice in a broader context as part of justice in law. Justice in law thus contains two subsets: justice in the creation of law and justice in the application of law, or justice in law can be differentiated into: justice of law (the justice of one's own law) and legal justice (justice according to law).[7]

According to legal theory, there are several criteria by which justice can be sought in law.[8] We will not analyse the individual criteria in-depth, as this is a philosophical rather than a legal issue. To grasp justice in criminal law, it is enough for us to know only the basic requirements of each criterion. However, it is not easy to describe the basic problem in one or two sentences, so we decided to characterise the individual criteria with the following questions:

1. Absoluteness vs relativity – does time variability relativise the concept of justice and its understanding?[9]
2. Objectivity vs subjectivity – do we presume the objectivity or subjectivity of justice in law?[10]
3. Binarity vs graduality – what is the difference between the just, the less just, the unjust, and the very unjust?[11]

6 R Dworkin, *Když se práva berou vážně.* (1st ed, OIKOYMENH 2001) 8 or R Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 10.

7 The term 'legal justice' is also understood as justice in the judicial application of law. We understand the application of law as the process of identifying the process of justice. However, justice has a much wider impact. As Miloš Večeřa points out, legal justice is related to the motivation of human behaviour *secundum legem*, but especially to the application of law itself. However, the justice of one's own law is also a question of the justice of norm-making, in which the concepts of change, restitutive, retributive, distributive, and procedural justice are also applied. For more details, see: M Večeřa, *Spravedlnost v právu* (Masarykova univerzita 1997) 9, 174-175; R Procházka, *Dobrá vôľa, spravodlivý rozum. Hodnoty a princípy v súdnej praxi.* (1st ed, Kalligram 2005) 137.

8 On the topic legal theory and legal and philosophical criteria, see: A Sen, *The Idea of Justice* (Harvard University Press 2009) 40-43; LL Fuller, *Morálka práva* (1st ed, OIKOYMENH 1998) 182-183; Z Kühn, *Aplikace práva* ve *složitých případech: k úloze právních principů v judikatuře* (1st ed, Karolinum 2002) 45.

9 Weinberger (n 4) 360.

10 On the topic in question, see: Sen (n 8) 41.

11 An example of graduality is, e.g., the Radbruch formula. J Chovancová, T Valent, *Filozofia pre právnikov* (Právnická fakulta UK v Bratislave 2012) 46.

4. Discursivity (universality of the concept and subjectivity) – how is it possible that both parties to a dispute can refer to justice?[12]
5. Non-autarky – is justice an autonomous and self-sufficient concept?
6. Cognitivist and non-cognitivist approaches – is justice definable?[13]

2.2 Functions of Criminal Law as a Reflection of Justice in Law

Even if we do not agree on whether it is necessary (or even possible) to define the concept of justice strictly, at the start of this article, we can at least point to some definitions of the term: 'Justice is a basic normative principle of human coexistence. It is an entrenched ideal in the social consciousness of the right, balanced and justified distribution of social values and burdens, rights and obligations, good and evil' (Aristotle)[14]; 'Justice is a constant and unceasing will to give to everyone everything that belongs to him/her' (Justinian)[15]; '… we consider justice to be the ideal standard, while law is an observable social phenomenon' (Nigel E. Simmonds)[16]; 'Starting from the areas of social life in which justice is applied, it can be said that justice refers to the distribution (or assignment, allocation) of certain values in social relations, whether they are positive or negative values' (Miloš Večeřa).[17] We do not present these quotes because we would like to evaluate them – quite the opposite. They all have one common defining element, and that is that justice does not exist in a vacuum. Thus, we can say that justice is not a self-sufficient and autonomous concept, the meaning of which is independent of the context and use of individual criteria. Justice is a relational concept, dependent on the relationship to the evaluated object (the non-autarky criterion[18]).

12 According to Pavel Holländer, the generality of the application of linguistic expressions that are not aimed at individualised entities is associated with a blur in defining the scope and content of concepts. The manifestation of the discursivity of the concept of justice is thus also the tension between the abstractness of the legal norm and the individuality of the case. This tension is a conflict between depersonalised, harsh justice and perfect, but not impartial, justice that seeks to capture the boundaries of the private world. However, in cases, due to inconsistent argumentation, there is often a *petitio principii* (author's note: it is a requirement of foundation or a logical error in the proof consisting in the fact that the conclusion is made from an assertion that has yet to be proved). P Holländer, *Ústavněprávní argumentace: ohlédnutí po deseti letech Ústavního soudu* (LINDE nakladatelství, s.r.o. 2003) 13.

13 On the topic in question, see: Aristoteles, *Etika Nikomachova* (Kalligram 2011) 130-133; D Hume, *O práve a politike* (Kalligram 2008), 62-63, 102, 123.

14 Aristoteles (n 13) 305.

15 D Miller et al, *Blackwellova encyklopedie politického myšlení* (CDK 1995) 494.

16 E Bárány, 'Spravodlivosť ako vzťahový pojem' (2015) 9 *Filozofia* 845-895, at 846.

17 Večeřa (n 7) 16.

18 The use of justice as a legal value in lawmaking is characterised by variable contexts that depend on the particular legal sector. Justice as a legal value has such a different meaning in criminal law and other meanings, e.g., in the commercial sector (e.g., in bankruptcy law). In criminal law, it has the most frequent character of restorative justice and goes in commercial law mainly for exchange justice, the manifestation of which is *cum grano salis*, e.g., the principle of fair trade. Justice as a legal principle that is applicable, e.g., when solving complex cases cannot be applied in isolation and independently of a specific type of proceedings.

3 JUSTICE AND THE FUNCTION OF LAW19

In our view, justice is followed by (or follows) other factors, which are the primary state establishment, regime, politics, economy, etc. Therefore, if we want to seek justice in criminal law, in our view, it will be best reflected in the functions of criminal law (we will discuss the connection between justice and the functions of law at the end of the subchapter). The functions of criminal law accurately reflect the specific time, interests of the state, and the protection of the state or society – in the end, it is precisely the functions of law that have changed most often depending on the historical period. The basic functions of criminal law are as follows:[20]

1. *Protective* – We can look at this in two ways –1) criminal law is characterised as an extreme means of protecting society and occurs when other legal remedies have proved ineffective, or 2) it stands above all other functions of criminal law, although depending on the specific time, it may protect various interests, as indicated by the system of individual crimes arranged in the headings (e.g., in the current Criminal Code No. 300/2005 Coll., it is life and health, and in the past, for example, in the Criminal Code No. 140/1961 Coll., it was the protection of the state and, until 1989, also of the socialist establishment);

2. *Regulatory* – criminal law regulates social relations by establishing the conditions of criminal liability and impunity, enshrines the conditions for the imposition of punishments and protective measures, and establishes the conditions for the termination of criminality and punishment;

3. *Preventive* – the role of criminal law is to prevent and deter the commission of crimes and criminal activity in various forms. Today, these are mainly discussions, lectures, mass media, and possible public participation in court hearings; in the past, the preventive function was closely linked to the deterring or intimidating (what can be described as a re-education function) a potential perpetrator (e.g., the trial of war criminals after World War II) and then, it was directly associated with a repressive function (e.g., political 'monster trials' in the 1950s);

4. *Repressive* – criminal law aims to protect interests exclusively and individually by affecting the perpetrator of the crime by imposing a sentence or protective measure. In the past, it was mainly the imposition of very strict, sometimes even draconian punishments (the sinusoid of the repressive function is best observed when imposing punishments for crimes against the state). The repressive function is associated primarily with a protective function in relation to the state, without a democratic establishment (in addition to totalitarian regimes, which are obvious, we can also mention the trial of Slovak nationalists from the end of the 19th century to the beginning of the 20th century, i.e., the protective function

19 In Czechoslovak history, we can seek justice expressed by the functions of law in the following norms:
1. Criminal Code no. 117/1852 Coll.
2. Statutory art. V/1878 (The Crimes and Offences Act)
3. Act no. 50/1923 Coll. for the Protection of Republic)
4. Retribution Regulation č. 33/1945 Coll. of the Slovak National Council (SNR)
5. Retribution Decrees of the President of the Republic no. č. 16/1945 Sb. and no. 17/1945 Sb. Coll.
6. Act no. 231/1948 Coll. for the Protection of the People's Democratic Republic
7. Criminal Code no. č. 86/1950 Coll.
8. Criminal Code no. č. 140/1961 Coll.

20 K Malý, LSoukup, *Vývoj práva v Československu v letech 1945–1989* (Karolinum 2004) 54; A Milota, *Učebnice obojího práva trestního, platného v Československé republice: Právo hmotné* (Kroměříž 1926) 6.

in relation to Hungary, which was directly proportional to the repressive function against the nationalists, who endangered Hungarian integrity by their actions[21]).

5. *Retributive* – the role of criminal law is to redress guilt committed in retaliation, either in accordance with proportionality and legal principles (trial of war criminals after World War II) or without proper proportionality, where we can speak of revenge rather than retribution (political 'monster trials' in the 1950s[22]).[23]

The functions of criminal law in specific periods of the 20th century are very well mapped in the professional literature. To an independent observer, some of the functions may evoke either positive (protective function) or negative (repressive function) emotions. The importance of criminal law functions is not fixed. Over history, the functions changed – they developed in relation to the social establishment. Justice is sought differently in criminal law today, when the primary function of criminal law is protective, compared to post-war criminal law when the retributive function was the primary one.

In our opinion, however, it is not necessary to look emotionally at the functions of criminal law; rather, it is an obstacle. (Of course, the emotional element, in terms of a subjective view, is inseparable in humanities. But the emotions of the participants or monuments can be and many times are distorted by, for example, propaganda. This is an undesirable element that must be removed in research and the search for justice). Individual legal institutes or instruments of law often do not fulfil only one function of law, but several. Depending on the period, the quantitative representation of the institutes that are to achieve that particular function of law changes – and depending on that, the law also changes qualitatively, i.e., justice has been achieved in various ways.

In the present article, we will try to analyse justice in connection with the functions of law in the Slovak retributive judiciary.

21 Slovak nationalists, as leading representatives of the cultural, social, political, and especially national life of Slovaks in the 19th century, faced many reprisals and oppression that had their roots in Hungarian state power. The most famous nationalist trial in the 20th century was that of Andrej Hlinka. However, court hearings in which he faced accusations of outrage, treason, subversion of the nation, etc., did not bring him to his knees; on the contrary, they created a halo of a national and fearless fighter for the rights of Slovaks. See also: PT Ivanov, *K černovsko-ružomberskému procesu* (Pápežské knihtiskárny benediktínu Rajhradských 1908) 13-14; SH Vajanský, *Ružomberský kriminálny proces* (Kníhtlačiarsko-účastinársky spolok 1906) 91-102.

22 Monster trials were large-scale processes that took place under the Law for the Protection of the People's Democratic Republic from the late 1940s to the mid-1950s. The mission of criminal law was also emphasised by President Klement Gottwald in his speech at the Congress of Lawyers, where he said that that the functions of criminal law are not based purely on understanding criminal law as a branch of law but pointed to it as a means of building a socialist society. He indicated that the path to socialism is a path of intensified class struggle, which was also fought by means of criminal law as a tool of repression. In general, it can be said that for criminal proceedings, especially in the 1950s, the provisions of the Criminal Procedure Code were often only dead letters and were not observed in practice, thus violating the fundamental rights and freedoms of the accused. Opponents of the communist regime in them were sentenced to long sentences or the death penalty according to pre-prepared scenarios. People were no longer considered living beings – they were just numbers, regardless of whether they were real opponents of the regime or fictitious ones.

23 Another is, e.g., a restorative function that perceives justice in criminal law as no longer merely a reaction of the state as a sovereign power to the commission of a crime in the form of acknowledging the guilt of the offender and imposing a sentence. The offence defined as harm caused to the state is increasingly understood as harm caused to an individual. Although the commission of a criminal offence leads to a violation of the law, restorative justice shows above all the disruption of relations in society. Restorative justice is fulfilled with the participation of the offender, the injured party, and society in trying to restore the broken relationships. However, as it is an answer to the world in the 21st century, there is no need to pay more attention to it in connection with this article.

4 THE FUNCTIONS OF LAW IN THE RETRIBUTIVE JUDICIARY IN SLOVAKIA

The post-war trial of war criminals from 1945 to 1948 in Slovakia[24] was a very specific process throughout Europe. The Czechoslovak Republic, like other countries, was based on international agreements concerning the prosecution of war criminals, as evidenced by the content of the Slovak retribution standard. Therefore, it was no coincidence that retribution regulations, not only in Czechoslovakia but also in other European countries, were based on the same legal pillars, which were: a) the use of false retroactivity in the form of stricter punishments for existing crimes; b) the use of true retroactivity in the form of the prosecution of crimes against humanity (genocide, forced labour); (c) the establishment of a people's judiciary; d) the imposition of the death penalty (for almost all retribution offences). Generally, the *ultima ratio* in criminal law was understood differently from the criminal law in force until World War II, when criminal law had primarily a protective, preventive, corrective, and ultimately repressive function. Retributive criminal law had primarily a retributive (retaliatory) function, which was accompanied by a repressive, protective, preventive, and corrective function. The retributive function was, of course, based mainly on the material sources of law,[25] which were later incorporated into Slovak legislation through specific legal instruments.

The primary source of retribution law in Slovakia was Retribution Regulation No. 33/1945 Coll. of the Slovak National Council on the punishment of fascist criminals, occupiers, traitors, and collaborators and on the establishment of a people's judiciary. In the following lines, we will focus only on those parts of the Retribution Regulation that contain retaliation or which reflected the primary, i.e., the retributive function of the Regulation. The specificity of the Regulation was as follows:

1. **Designation of offences** – expressed the goal and primary essence of retribution, which was already contained in the title of the Regulation, and thus cleansed the nation of fascist occupiers, domestic traitors, collaborators, traitors to the Uprising, and perpetrators of the regime. What was important was the 'extermination' of the 'Ľudák'[26] core not only from political life but especially from the mind of the population;
2. **Crime could be of commission or omission** – it is often stated that the crimes under the Retribution Regulation could only commit crimes of commission, and

24 The Third Czechoslovak Republic, which emerged as a sovereign state after the end of the war, was not only the result of the policies of the victorious Western allies, but also an indication of the strength of the Czechoslovak ideal embodied in the First Czechoslovak Republic (1918-1938). However, at the conclusion of World War II, Czechoslovakia fell within the Soviet sphere of influence, and this circumstance dominated any plans or strategies for post-war reconstruction. Consequently, the political and economic organisation of Czechoslovakia became largely a matter of negotiations between Edvard Beneš and Communist Party of Czechoslovakia (KSČ) exiles living in Moscow. In February 1948, the Communist Party of Czechoslovakia seized full power in a *coup d'état*. Despite the country's official name remaining the Czechoslovak Republic until 1960, when it was changed to the Czechoslovak Socialist Republic, February 1948 is considered the end of the Third Republic.

25 The punishment of war criminals and the prosecution of crimes committed during World War II are not categories separate from the rest of the law – they do not enjoy a privileged position. On the contrary, they fall within the framework of the historical development of mankind. The development and emergence of retribution legislation has been influenced by martial law, international law, and criminal law. On the Circumstances of the Origin of Retribution Legislation see: Moscow Declaration <http://avalon.law.yale.edu/wwii/moscow.asp> accessed 15 January 2021; St. James' Declaration <http://images.library.wisc.edu/FRUS/EFacs/1942v01/reference/frus.frus1942v01.i0006.pdf> accessed 15 January 2021; Morgenthau Plan <http://smsjm.vse.cz/wpcontent/uploads/2008/10/sp27.pdf> accessed 15 January 2021.

26 A 'Ľudák' is a member of Hlinka's Slovak People's Party (Slovak: Hlinkova slovenská ľudová strana), a far-right clerofascist political party with a strong Catholic fundamentalist and authoritarian ideology. The Ľudák regime combine elements from Nazi and fascist regimes.

therefore, the perpetrator's active action was necessary. This follows from the wording of the Regulation, which did not offer in its provisions such action that the perpetrator could commit crimes of omission. However, we know from the application practice of the National Court in Bratislava that, e.g., Jozef Tiso[27] was also convicted of failure to act, specifically for tolerating the Nazis' actions in the autumn of 1944, although he was aware from reports and private correspondence that the German occupying forces, with the help of the Hlinka Guard and Rodobrana,[28] were burning Slovak villages, thus committing offence of treason on the Uprising pursuant to section 4 letter b);

3. **Elasticity in subsuming actions under the facts of the offence** – especially in redefined crimes, i.e., those not regulated in pre-Munich criminal law. At first sight, it may seem that these were all the offences listed in the Regulation, but this is not the case. Actions considered criminal from the point of view of the Regulation could be divided into three categories: a) facts of the offence redefined in their entirety [e.g., betrayal of the Uprising pursuant to section 4 letter a)]; b) facts of the offence taken from pre-Munich legislation [e.g., the criminal offence of robbery and murder in the criminal offence of fascist occupation pursuant to section 1 letter b)]; c) facts of the offence redefined but similar in content to criminal offences in pre-Munich legislation [i.e., the action was not identical with the designation, but in terms of content and application practice, it was conspicuously similar to the previous legal regulation – e.g., the criminal offence of domestic treason pursuant to section 2 letter a) was identical in content with the criminal offence of a betrayal of the Republic (treason) pursuant to the first chapter (sections 1-3) of the Act on the Protection of the Republic No. 50/1923 Coll. as amended];
4. **The punishment of loss of civil honour and the punishment of confiscation of property were imposed whenever a person was convicted of any of the offences referred to in the Regulation;**
5. **Retroactivity** – the retroactive effect of the Regulation is closely related to points 1 and 4 and manifested itself as follows: a) actions which were not criminal at the time of their commission became criminal [betrayal of the Uprising under section 4, crimes against humanity under the offence of collaboration under section 3 (b)]; b) punishments for committing crimes known by pre-Munich legislation were increased [e.g., the criminal offence of collaboration under section 3 (a) was punished by death in aggravating circumstances, but under the Act for the Protection of the Republic, the same action, designated as military treason under section 6, was punished in aggravating circumstances by imprisonment for life];
6. **The inability of exculpation due to order-based action;**
7. **People's judiciary** – judges from the people in the panels (element of laicisation of the judiciary[29]), adaptation of the procedural aspect of retribution, so as to ensure the speed and efficiency of proceedings (under Part II of the Retribution Regulation and under the

27 Jozef Tiso (13 October 1887 – 18 April 1947) was a Slovak politician and Roman Catholic priest who was president of the war-time Slovak state, a client state of Nazi Germany during World War II.

28 Rodobrana (Nation's Defense) was a Slovak paramilitary organisation of the Slovak People's Party. The organisation existed officially from 1923 to 1927 in Czechoslovakia. It was a predecessor of the Hlinka Guard.

29 The Senate of the Court was presided over by a judge – a lawyer — and the remaining judges in the panels were from the people – without legal education. They were former partisans, communists, anti-fascist fighters, etc., so they represented the retributive aspect because they judged those who had oppressed them before.

implementing regulation of the Board of Ministers (*Zbor povereníkov*) No. 55/1945 Coll. of the Slovak National Council); the most challenged is, e.g., the absence of a proper remedy;[30]

8. **National Court in Bratislava** – was only a criminal court, designed so that the top personalities of Ľudák's party political life or domestic traitors were tried before it.

The winners' ideas about retribution justice and retribution in accordance with the law were thus formally fulfilled in Slovakia.[31] The retributive function of retributive legislation lay in the problem being treated even to this day –fulfilling post-war retaliation. This is because there is often a slight difference between the repressive and retributive functions (which is ultimately visible in the duality of opinions in the professional and popular science literature). It is only possible in judicial practice to verify whether the retributive judiciary truly fulfilled the notions of legal retribution and not the barbaric lynching that was typical of the Nazis. Ultimately, Edvard Beneš himself, in his second speech from London on 3 December 1939, entitled 'After the Student Massacres in Prague', spoke of legal retribution: '…We will have to correct and atone for everything again; it will not be about revenge, but about justice and redress.'[32]

Although the retribution function was dominant, it did not push the remaining functions into seclusion – quite the contrary. The interconnectedness of all these functions is clearly visible in retribution legislation and the judiciary:

a) The protective function was best defined by the legislature's efforts to protect society from the atrocities and relics of World War II, to seek the fastest possible retribution (specific modification in proceedings, proceedings in the absence of the defendant, lack of a proper remedy) and subsequent societal recovery. At the same time, however, the legislator protected the perpetrators from obvious injustice (the very existence of retribution courts, the defence);

b) The repressive function, which we have already mentioned, mainly consisted of increased and stricter punishments compared to the First Republic's criminal law, as well as confiscation of property and loss of civil honour as secondary punishments, but imposed on every convict. The repressive function also served as a corrective function for the perpetrators;

c) The preventive function followed the repressive one in the sense that the legislature (initially the Allies during the war) thought about the future and tried to arrange the legislative framework of retribution so as to deter potential perpetrators of the same or similar atrocities as those committed by the Nazis;

d) The satisfactory function has been linked to all the above functions. It was related to the protective one primarily in the form of redress for wrongs against the state (the break-up of Czechoslovakia, the domination of the totalitarian regime) but also against individuals or groups (genocide, Holocaust, looting, Aryanisation). The satisfaction of the victims was best seen through a repressive function – the combination of a satisfactory function (representing justice) and a repressive function (representing an instrument of law) that captures the function of retribution.

30 V Solnař, 'Sú prípustné tzv. mimoriadne opravné prostriedky proti rozsudkom mimoriadnych ľudových súdov a Národného súdu?' (1946) 3 *Právník* 158-161, at 159.

31 Compare with the text of the London Agreement <http://avalon.law.yale.edu/imt/imtchart.asp> accessed 15 January 2021.

32 E Beneš, *Šest let exilu a druhé světové války: Řeči, projevy a dokumenty z r. 1938– 1945* (Orbis 1946) 77.

4.1 The Judicial Practice of the National Court in Bratislava

We chose proceedings before the National Court in Bratislava as a sample. As mentioned above, retributive criminal law has linked all the functions of law, and therefore it is not always possible to clearly determine which instrument of law expresses a particular function. In this part of the article, we will look at the issue in a more comprehensive way, and thus we will look for legal and fair retribution in the judgments as part of the primary goal of judging war criminals.

After studying the judgments, we can conclude that, in contrast to the normative aspect of retribution expressed in the Regulation with a strong element of retaliation, the application practice of the National Court in Bratislava is marked mainly by finding the real guilt of the perpetrators. In addition to criminal liability, the judges also sought moral liability in the proceedings. In the judgments of the National Court in Bratislava, the following manifestations of justice can be found in the reasonings:

1. Reference to moral, religious, and national principles,
2. Historical and political context,
3. Strong elements of laicisation,
4. A combination of the sociological school of criminal law with the classical school of criminal law.

The reasonings of the judgments of the National Court in Bratislava were austere, almost purely legal, i.e., they relied mainly on the wording of the Retribution Regulation and related standards. Moral and religious aspects, which are particularly important in justifying retroactivity, were used only minimally in the reasonings, mostly as references to the Czechoslovak or Slavic history and national motifs. The Slovak Retribution Regulation defined crimes on the basis of a combination of a sociological school with a classical[33] one, especially due to the satellite position of the Slovak state and the Ľudák regime, which expanded into all areas of everyday life. Therefore, it was important to designate crimes and convict perpetrators as 'domestic traitors', as it sounded more striking to label a perpetrator as a domestic traitor than to convict him of, e.g., betrayal of the Republic. However, the intention of the legislator was fulfilled only in the operative part of judgments and, in our opinion, inconsistently, and in the reasonings, the panels/chambers of the National Court focused only on the ascertained state and evidence.

The biggest problem in the proceedings before the National Court was the phenomenon of denying one's own responsibility for the actions committed and imposing it on others. This phenomenon was characteristically expressed in one of the last trials before the National Court in Bratislava, in the trial with Štefan Tiso[34] et al.:

33 Criminal offences in the Slovak Retribution Regulation were defined by a sociological school of criminal law (naming of the facts of the offences, consideration of the offender's personality) and a classical school of criminal law (since the facts of the offences were defined by subject and subjective side, object and objective side). The use of the sociological school of criminal law in conjunction with the rather specific and secularised text of the Regulation caused problems in judicial practice, but it was was comprehensible to the general public (especially people's judges), pursuing the objectives of extraordinary people's courts. The offences defined in the Regulation were also challenged due to their vagueness, which ultimately resulted in their extensive interpretation, so that from the point of view of the opponents of retribution, Regulation no. 33/1945 Coll. of the Slovak National Council was draconian not only in its strict sanctions, but also in its extensive criminalisation. The discrepancy between the text of the Regulation and practice can be observed mainly from the decisions, where the court tried to get closer to the classical school of law (e.g., 'the offender committed the crime of domestic treason'). However, we by no means reject the sociological school of criminal law and even consider it to be a very important and immanent part of retribution.

34 Štefan Tiso (18 October 1897 – 28 March 1959) was a lawyer and president of the Supreme Court of the war-time Slovak state. He became Prime Minister (replacing Vojtech Tuka), Foreign Minister (also replacing Vojtech Tuka) and Minister of Justice (replacing Gejza Fritz) of the war-time Slovak state. He was a cousin of Josef Tiso.

> It is a characteristic phenomenon in the representatives of the former regime that the leader Jozef Tiso in the trial against him imposed all the blame on the subordinates and the subordinates again almost all – with rare exceptions – in their trials on the leader, and there is this absurdity that we have murdered but we have no murderers, we had a fascist regime, and now, after its defeat, we do not have its creators.[35]

The National Court's reasoning in seeking justice often began, especially with the 'guilt'. Denial of guilt is, of course, an immanent part of most criminal cases to this day, and the post-war retribution judiciary is no exception. From the point of view of examining the issue, however, much more important is the shifting of responsibility to, in the political and military hierarchy, the higher positioned ('they decided on the direction of the Slovak state') or the lower positioned ('they carried out orders'; 'they voted in the Parliament'). The mutual blaming among the top political leaders was characteristic of the Slovak retribution. The National Court dealt with this problem in a trial with Jozef Tiso et al. as follows:

> The blood shed by these criminals, this blood sticks to the hands of the accused and no matter how they wash it away, the traces of this blood and the smell from it, with which their conscience must be soaked, will never wash away. The blood shed, even though due to their subordinates and executors, and even without their direct orders and sometimes without their knowledge, falls on their heads, as they are primarily responsible for unleashing by their manifestations and conscious bearing of such methods the lowest instincts and passions in the bottom of human society that performed the terrorist and cruel work (of Katana).[36]

Most judgments refer in the reasonings to the so-called 'main trials' with Jozef Tiso, Alexander Mach,[37] Ferdinand Ďurčanský,[38] Vojtech Tuka,[39] and others. On the one hand, these judgments formed case-law in some parts, and on the other hand, they were to remain a memento of the time (see the preventive function of retribution law), which corresponds to their content but less to their type. Even though in the operative part of judgments *de facto* crimes against the state were listed first, we find few references to the historical and political legacy of the state – the interwar Czechoslovak Republic. It was very briefly mentioned in the judgment of Vojtech Tuka: 'The Czechoslovak Republic based on the principles of humanistic democracy and progress….'[40] The emphasis in the reasonings was mainly on the (Slovak) nation and actions against it, e.g., in the judgment of Alexander Mach:

35 Judgment in the criminal case of Š. Tiso et al. before the National Court in Bratislava, Slovak National Archive, the Fond Úrad predsedníctva SNR (The Fund of the Presidency of the Slovak National Council), Box no. 51, Tnľud 70/45.

36 Judgment in the criminal case of Š. Tiso et al. before the National Court in Bratislava, Slovak National Archive, Fond Úradu predsedníctva SNR (The Fund of the Presidency of the Slovak National Council), Box no. 438, Onľud 6/46, s. 228.

37 Alexander Mach (11 October 1902 – 15 October 1980) was a Slovak nationalist politician. Mach was associated with the far right wing of Slovak nationalism and became noted for his strong support of Nazism and Germany. Mach played a leading role in orchestrating the violence that followed the collapse of Czechoslovakia in March 1939 as head of the Slovak Office of Propaganda. He served initially as Propaganda Minister in the war-time Slovak state before holding the position of Interior Minister in the government of Tuka from 29 July 1940 until the state's collapse in 1944.

38 Ferdinand Ďurčanský (18 December 1906 – 15 March 1974) was a Slovak nationalist leader who served as a minister in the government of the Axis-aligned war-time Slovak state in 1939 and 1940. He was known for spreading virulent antisemitic propaganda, although he left the government before the Holocaust in Slovakia was fully implemented

39 Vojtech Tuka (4 July 1880 – 20 August 1946) was a Slovak politician who served as Prime Minister and Minister of Foreign Affairs of the war-time Slovak state. Tuka was one of the main forces behind the deportation of Slovak Jews to Nazi concentration camps in German occupied Poland. He was the leader of the radical wing of the Hlinka's Slovak People's Party.

40 Judgment in the criminal case of V. Tuka before the National Court in Bratislava, Slovak National Archive, Fond Úradu obžaloby Národného súdu (The Fund of the Prosecution Office of the Slovak National Court), Box no. 14, Tnľud 7/46.

> The accused and his accomplices betraying the nation, Slavism and the ideology of Christianity did not shy away from establishing contacts and relations with the age-old enemy of the Czechoslovak Republic and Slavism, with neo-pagan Germanism and its fifth colony, helping it to break the Czechoslovak Republic and thus make a new step into the world war.[41]

The Slovak legislator adopted its own retribution norms so that the Slovak nation could judge the representatives of the Ľudák regime. Therefore, it is natural that the interest of judges was primarily to proclaim treason, i.e., the betrayal of the Slovak nation and related matters. At the same time, they fulfilled the interest in punishing criminals 'on behalf of the Republic and the Slovak nation'.

In terms of content, the most emotional verdict was delivered regarding Ján Šmigovský,[42] who was sentenced to death for the crime of betrayal of the Uprising under section 4 letter a), b), c). In the introduction, it contained a reference to the recent 'independent' Slovak past – the judges' intention was probably to point out the seriousness of political and military reality after 14 March 1939 and during the Slovak National Uprising, which the convict was fully aware of, but nevertheless remained true to totalitarian ideology:

> A vassal of Germany, the Slovak state, frantically tried to maintain a semblance of independence and sovereignty, although it had to pay with blood, even by outrageous titles, and by both material and monetary values to its protector. Although the titled Slovak servants, enriching themselves in an unprecedented way at the expense of the nation as well as the protectors, tried to maintain the tinsel of independence and sovereignty, with the legend of a well-wishing great neighbour who selflessly and generously guarantees Slovakia's independence and inviolability … When the war film was made Back from the Caucasus to the Tatras and cannons thundered already in the Carpathians … the sclera fell off even from blind eyes and the face of a big neighbour lost the tinsel of nobleness, selflessness and loyalty even in the eyes of the blackest slaves, only servants remained loyal to the Germans, who thus identified with the regime, with their soul and interest that there was no way back for them.[43]

It may be said generally that all judgments in which the accused was found guilty of a crime of betrayal of the Uprising used emotionally coloured words and references to moral and national principles in the reasonings. Thus, increased attention of judges in the said offence can be observed, as participation in the Uprising under section 6 of the Retribution Regulation was mentioned as grounds for mitigating the sentence. We can talk about a kind of search for balance – i.e., if someone's sentence was commuted or forgiven on the basis of participation in the Uprising (e. g., Imrich Karvaš[44]), then the perpetrator had to be punished in an exemplary way for committing the crime of treason in the Uprising.

It is also worth mentioning the verdict delivered regarding Anton Vašek, who was sentenced to death for the crime of domestic treason under section 2 letter d) and the crime of collaboration under section 3 letter b), c). In the reasoning, the assessment of the 'Jewish problem', which was a burning issue in Slovakia for several decades, is especially important. The judges analysed the

41 Judgment in the criminal case of A. Mach before the National Court in Bratislava, Slovak National Archive, Fond Úradu predsedníctva SNR (The Fund of the Presidency of the Slovak National Council), Box no. 436, Tnľud 6/45.

42 Ján Šmigovský (2 May 1903 – 9 October 1945) was a Slovak soldier. He was the commander of the Nitra's military garrison, which was the only one that did not join the Slovak National Uprising, although it still refused to let the German army into its barracks.

43 Judgment in the criminal case of J. Šmigovský before the National Court in Bratislava, Slovak National Archive, Fond Úradu obžaloby Národného súdu (The Fund of the Prosecution Office of the Slovak National Court), Box no. 3, Tnľud 2/45.

44 Imrich Karvaš (25 February 1903 – 22 February 1981) was a Slovak economist and professor at the Slovak University (Comenius University) in Bratislava. With the establishment of the war-time Slovak state in 1939, he was appointed Governor of the Slovak National Bank.

issue in order to point out a fair conviction, although this was not necessary due to the convict's involvement in Aryanisation and deportations. From today's point of view and especially from the point of view of history or the collective memory of the nation, however, it would be important, as anti-Semitism did not disappear from the thinking of Slovak or Czechoslovak citizens upon signing the peace. In Slovakia, Aryanisation measures were not only a reluctantly accepted phenomenon in society (ultimately, the provisions of the so-called Jewish Code were stricter than the Nuremberg Laws) but the action was elevated to the natural law of the Slovak nation. The National Court did not complete the answer to the question in any judgment, so we only learn about racist quotations from various speeches of Slovak public officials, in which there were typical phrases such as 'Jews killed Christ', 'Jews are not Christians', and 'Christians have been murdering Jews since time immemorial'.[45] However, the verdict delivered concerning Vašek also contains an explanation of their nonsense and lack of justification and the origin of anti-Semitic thinking:

> Racist theory stemming from Nazi selfishness in the name of which, being aware of its superiority – "Übermensch", Germanism embarked on a march to world domination with accompanying phenomena, lies, denial of principles, ruthlessness, cynicism and sadism, i.e., the complex of white disease of the twentieth century … The accused referred to Plachý, Štúr, Vajanský, Hlinka, who allegedly used in their programmes getting rid of the Jewish plague and therefore that (author's note: even during the war) the Slovak nation had to get rid of its time immemorial enemy and that it is an act of Christianity. They used the national pain felt vividly by the nation due to Slovakia being lopped by the Viennese Verdict, pointing out that the resigned territories were Hungarianized by the Jews, and this was said to be of great importance in setting borders…[46]

The excerpt from the verdict is not detailed or comprehensive, but points out that (according to the National Court) mass anti-Semitism in Slovakia did not begin to spread itself from the contemporary empirical experience of citizens – n the contrary, it was instilled from above at the right moment by the Ľudák representatives until it was generally accepted and adopted as the basis of totalitarian ideology.[47]

45 Judgment in the criminal case of A. Vašek before the National Court in Bratislava, Slovak National Archive, Fond Úradu obžaloby Národného súdu (The Fund of the Prosecution Office of the Slovak National Court), Box no. 18, Tnľud 17/46.

46 Judgment in the criminal case of A. Vašek before the National Court in Bratislava, Slovak National Archive, Fond Úradu obžaloby Národného súdu (The Fund of the Prosecution Office of the Slovak National Court), Box no. 18, Tnľud 17/46, s. 8.

47 However, it cannot be denied that anti-Semitism was widespread in Slovak society even before the war. Ľudovít Štúr and his whole generation considered the Jews to be the creators of the Slovaks' misery, alcoholism, and poverty: 'In order for the gentry to be able to better exploit its people, and thus to make the most of their poor skin, they took advantage of the Jews to whom they leased their property in this decline'. Ľ Štúr, *Slovanstvo a svet budúcnosti* (Nitrava 2015) 119. Although for this reason Štúr and his Štúrovci followers can be described as anti-Semitic, the difference between the nationalists' anti-Semitism and the Ľudáks' anti-Semitism was mainly in the motive and the manner of dealing with it – while nationalists wanted to achieve a better position for Slovaks through anti-Semitism (political rights and holding office were to be limited based on the Jewish faith), so the Nazi ideology and thus the Slovak Ľudáks only wanted general (albeit silent) consent to the adoption of anti-Jewish measures, the task of which was to massively deprive Jews of human rights and freedoms and later exterminate them. The two most important manifestations of Štúr's anti-Semitism are his two articles in the newspaper *Slovenskie národňie noviny*. For more details, see: P Demjanič, 'Židia v listoch a publicistike Ľudovíta Štúra' (2016) 10 *Historia Nova* 34-47, at 40-41 <https://fphil.uniba.sk/fileadmin/fif/katedry_pracoviska/ksd/h/Hino10d.pdf> accessed 30 January 2021. Hungarian political liberals preferred Jews (because they were Hungarianised) to Slovaks, which was unacceptable to the Slovak nationalists. To this day, however, historians differ on whether Štúr's anti-Semitism was a purely political issue or based on personal conviction. There are a number of personal Štúr's letters, in which he has a neutral attitude towards Jews and Judaism (a letter to Ľudovít Semjan) and even a positive attitude (the contribution of Jews to human history). In their speeches, his Štúrovci followers often connected Jews and gentry, which could also stem from the fact that gentry were perceived among the people as Hungarianised oppressors of the Slovak nation, and Jews were to be placed on the same level. It is probable that Štúr's anti-Semitism and that of his generation were based on political motives,and therefore not on racial and religious intolerance. For more details, see: ibid, 40-41.

In conclusion, it is very important to express an opinion on the most discussed case in Slovakia – the trial of Jozef Tiso. The basic thesis is often that Tiso was convicted as a symbol of Slovak independence, which did not correspond to the profile of the restored republic. Jozef Rydlo, Milan S. Ďurica, Róbert Letz, Emília Hrabovec,[48] and many other authors call his conviction problematic because, according to them, he was convicted for the regime and ideology, and no emphasis was placed on real crimes against persons, especially of Jewish origin (since they were mentioned only in the last part of the indictment). The betrayal of the Uprising is not considered by the authors to be a 'real' crime, given that if the Czechoslovak Republic had not been restored after World War II and Slovakia had continued the path of independence created by the declaration of a war-state on 14 March 1939, those crimes would not be justified. We consider the above statements to be very serious, violating legal certainty, credibility, and thus also the function and functionality of the Slovak retributive judiciary. As regards the organisation of the indictment charges, it is not surprising that crimes against the state (primarily domestic treason and betrayal/treason of the Uprising) were mentioned in the first indictment charges. Crimes against the state were protected in the first place in the territory during the periods of feudalism and capitalism, during the interwar republic, and even until the adoption of the new Criminal Act no. 300/2005 Coll. effective from 1 January 2006. Therefore, we do not consider this remorse relevant. The protection of the state was simply more important than the protection of human life and health, which must be accepted as a historical and legal fact. As for Ľudák ideology, it was, of course, assessed by the National Court – after all, we consider Nazism and fascism *de jure* to be totalitarian regimes, the promotion of which is forbidden and should be punished. Tiso was a symbol of the totalitarian regime in the territory of Slovakia, and no matter what we call the regime (Nazism, clericalism, Ľudák regime), what is important is the content, which is immutable – it was an undemocratic regime that suppressed basic human rights and freedoms of political opponents and of Jews, which was built on the principle of the leadership and covered all the evil committed during the war under the guise of Catholic traditions and values. Evaluating the imposition of the death penalty for Jozef Tiso itself is a more difficult question. He never pleaded guilty and did not regret his actions. In this context, it is important to emphasise that Tiso was not only a politician but a Catholic priest (as he called himself) and thus was primarily a moral authority (ultimately, he was also perceived as such by the Slovak society). From the beginning of the trial, it was known that one of the three – Tiso, Mach, and Ďurčanský – would receive the death penalty and, together with the convict, the Ľudák ideology would also be executed. Mach, as he himself stated in his memoirs, did not doubt that he would have been executed, as he belonged to the radical wing of the Ľudáks.[49] In addition, Tiso was a priest, and Ďurčanský was tried in absentia. In the end, however, Tiso was executed, and, in our view, it was an understandable decision in accordance with the retribution function of retribution law, taken primarily in view of his political position. Just as the state symbols of totalitarian regimes were destroyed after the war, so too were the halos of the representatives of these regimes, and thus it was understandable that those with the highest positions and the closest connection to Germany were executed (in connection with the satisfactory and repressive function).[50]

48 Statements of the mentioned authors in the discussion TV session (STV) Sféry dôverné (Confidential spheres) <https://www.youtube.com/watch?v=KFiZz8Ds4Yg&t=1496s> accessed 25 February 2021.

49 A Mach, *Z ďalekých ciest* (Matica slovenská 2009) 32.

50 At the same time, we are not talking about a kind of Slovak uniqueness; the highest officials of satellite or occupied states were sentenced to death throughout Europe. Rather, the situation in the Czech lands was unique because the highest representatives of the Protectorate either committed suicide or died before a verdict could be passed on them.

5 FINAL EVALUATION

In this paper, we have tried to find a connection between the functions of law and justice in the example of retributive legislation in Slovakia. The authors chose this period because they have been studying it for a long time, and in-depth analysis was necessary to find the value of justice. The primary goal was to point out the close relationship between the functions of criminal law and the understanding of justice in the given period of time and subsequently to confirm the existence of 'functional functions' of law in judicial practice. The true nature of criminal law is revealed only through an analysis of the implementation of the law. The trial of criminals before the National Court in Bratislava is a controversial issue to this day, so we are aware that our approach to the evaluation of retribution and the interconnection or perception of the retributive function of retribution is not in accordance with all the opinions in Slovak society.

This opinion may be influenced by several factors: a) the clerical background of the war-torn Slovak state in connection with the persisting strong Catholic tradition, b) the perception of the Slovak state's declaration as exercising the Slovak nation's right to self-determination, c) linking retribution to the crimes of communism, d) the fact that Ľudák traditions are still 'living' in today's Slovak society.[51] However, our task was not to evaluate the motives that lead part of society to find 'positive' features of the war-torn Slovak state. Through the analysis of material and formal sources of law and subsequent individual processes, we can describe the activity of the National Court in Bratislava as clearly retributive, with many formal shortcomings, but also fair.

Justice as a concept in criminal law cannot be defined. It is based on reason, knowledge, and experience. As we have already stated above, its value is specifically in the setting of adequate and reasonable limits by legislative activity and application practice, reflected in the functions of criminal law. The Retribution Regulation, as well as the decisions of the National Court in Bratislava, contained the value of retribution, justice, rights, and satisfaction, by which we can simply say that they fulfilled the mission of the Retribution judiciary legally and morally.[52]

51 These differences in the interpretation of history are related to the collective memory of the nation. According to H. Arendt, it is not possible to remove the collective memory from people in any way, because it is deeply engrained in them. The only way to come to terms with the history of the totalitarian regime and its representatives is to establish a new regime and remain silent. However, history is not connected primarily with law, but with psychology, sociology, culture, national consciousness, or the opinion of a group of people (crowd) – we call such a phenomenon collective (historical) memory. For example, if we asked people living in the Slovak Republic for their opinion of Jozef Tiso, it is certain that people from areas that fell to Hungary after the Vienna Arbitration would have perceived him differently from the people of Bratislava, etc. When young people listen to their grandparents talk about how 'it was good under Tiso' and say 'Tiso was a saint', they often take this view uncritically (not always due to a lack of knowledge of history or law) and even talk about Tiso as the first Slovak president (although he was not *de jure* president). However, the opposite is also true, when a grandfather who is a former partisan or a so-called white Jew talks about Tiso again to his grandchildren. Josef Tiso was a Catholic priest, which suggests that believers will stand on the side of Tiso the martyr rather than on the side of Tiso the criminal. For an objective assessment of the past, it is necessary to erase the collective memory and subsequently get rid of the nation's concealed guilt. For more details, see: G Schwanová, *Zamlčovaná vina* (Prostor 2004) 67-110.

52 In conclusion, we will borrow the words from the final speech of the Soviet Prosecutor Rudenko before the Nuremberg Tribunal: 'We know that civilization and humanity, democracy and humanity, peace and humanity are inseparable. But as fighters for civilization, democracy and peace, we strongly reject inhuman humanism, sensitive to executioners and indifferent to their victims'. In our opinion, he described the kind of retribution before the retribution courts. Judgment in criminal case of Š. Tiso et al. before the National Court in Bratislava, Slovak National Archive, Fond Úrad predsedníctva SNR (The Fund of the Presidency of the Slovak National Council), Box no. 51, Tnľud 70/45, s. 35.

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RESEARCH ARTICLE

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)

Journal homepage http://ajee-journal.com

JUSTICE IN THE DIGITAL AGE: TECHNOLOGICAL SOLUTIONS, HIDDEN THREATS AND ENTICING OPPORTUNITIES

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To cite this article: *Y Razmetaeva, S Razmetaev* 'Justice in the Digital Age: Technological Solutions, Hidden Threats and Enticing Opportunities' 2021 2(10) *Access to Justice in Eastern Europe 104–117. DOI: 10.33327/AJEE-18-4.2-a000061*

To link to this article: https://doi.org/10.33327/AJEE-18-4.2-a000061

Submitted on 20 Mar 2021 / Revised 12 Apr 2021 / Approved 30 Apr 2021 / Published online: 03 May 2021 View data

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ACKOWLEDGMENTS

Authors would like to express their gratitude to the reviewers for their help and for the English editor, Sarah White.

CONFLICT OF INTEREST

The authors have declared that no conflict of interest or competing interests exist.

CONTRIBUTORS

All the co-authors have read, approved the final version and agreed to be accountable for all aspects of this article.

JUSTICE IN THE DIGITAL AGE: TECHNOLOGICAL SOLUTIONS, HIDDEN THREATS AND ENTICING OPPORTUNITIES

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Abstract *This article focuses on and weighs the main benefits and risks of introducing and deploying technological instruments for justice, as well as their potential effect on fairness. The replacement with and complementary use of technological solutions in light of their application in the judicial system in the digital age are considered. The explicit and implicit risks that arise from the introduction and deployment of technology instruments are analysed. Taking an axiological approach that assumes the* a priori *value of human rights, justice, and the rule of law, we evaluate the main dangers that the use of technological solutions in the justice system entails.*

With the help of formal legal and comparative legal methods, as well as the analysis of scientific literature and contextual analysis of open sources on the capabilities of artificial intelligence and the bias of algorithms, the article fills in the gaps regarding the potential of technology to improve access to justice and the use of algorithms in decision-making. It is noted that some technological solutions, as well as the usual behaviour of all actors in the digital era, change the nature of interactions, including those in the justice system.

The question of the possibility of algorithmic justice is considered from the standpoint of fairness and non-discrimination. The article shows how the use of algorithms can improve procedural fairness but emphasises a careful and balanced approach to other elements of fairness.

Keywords*: algorithmic justice, digital age, discrimination, hidden threats, human rights, justice, rule of law.*

1 INTRODUCTION

The digital transformation of society and the widespread introduction of artificial intelligence technologies are significantly ahead of legal regulation and judicial practice on these issues. Moreover, in many areas, the legal response is slowed down to a great extent not only due to the lack of knowledge and experience of those who carry out law-making and law enforcement activities but also due to the real unpredictability of threats from technological solutions. These threats can range from direct breaches of security and privacy to nearly invisible undermining of the rule of law, fairness, and human rights.

On the one hand, technological solutions for justice are promising, at least from the point of view that they can improve access to justice, impartiality, and balanced court decisions, significantly speed up and simplify the consideration of simple cases, and provide platforms for mediation and online dispute resolution. On the other hand, such solutions give rise to problems both with their implementation and with some hidden threats in their use. Opacity and a lack of accountability in the case of algorithms used to make decisions can risk fairness and equity. It is argued that the results of well-trained neural networks can be trusted in court, and the fact that a specific basis of opinion cannot be demonstrated and formulated should not block its adoption since such a decision can be fundamentally reliable.[1] However, machine learning in artificial intelligence involves processing data derived from the previous work of the judicial system, which can lead to distortions. In addition, technological instruments of justice can repeat the prejudices of their creators or, due to various forms of inequality or the digital divide, completely exclude certain points of view and representation of interests of certain social groups.

Regardless of whether we support or do not support the use of such instruments, it is unlikely that the process of technological development will be hindered, both because it is virtually impossible to artificially stop progress and because innovations are now at the peak of popularity and are encouraged in every possible way. In particular, Sebastian Schulz, in relation to the EU Cohesion Policy, emphasises that it 'has been strongly promoting research and innovation as a means to enhance growth and productivity among EU regions through 'Research and Innovation Strategies for Smart Specialisation'.[2] According to Aleš Završnik, 'predictive policing and algorithmic justice are part of the larger shift towards algorithmic governance'.[3] Therefore, it is necessary to weigh the main benefits and risks of introducing and deploying technological instruments for justice, as well as assess their potential effect on fairness, which will be done in this article.

For this purpose, we consider replacement and complementary technological solutions in light of their application in the judicial system in the digital age. We then attempt to analyse some of the risks, explicit and implicit, that arise from the introduction and deployment of technology tools. Finally, we raise the question of the possibility of algorithmic justice from the standpoint of fairness and non-discrimination.

As a general methodological framework, we used an axiological approach that assumes the *a priori* value of human rights, justice, and the rule of law. Formal legal and comparative legal research methods were used in relation to judicial practice, as well as the analysis of scientific literature and contextual analysis of open sources on the capabilities of artificial intelligence and the bias of algorithms.

2 TECHNOLOGICAL SOLUTIONS FOR JUSTICE IN THE DIGITAL AGE

Electronic justice, decision-making software, online dispute resolution platforms, and even an automated workflow and case allocation system in courts are all examples of technological solutions for justice. Such solutions can be extremely helpful and, furthermore, promote equality in opportunities and access. For example, the COVID-19 pandemic made it impossible to physically attend certain trials or physically relocate parties to a case to another

1 CEA Karnow, 'The Opinion of Machines' (2017) 19 Columbia Science & Technology Law Review 182.

2 S Schulz, 'Ambitious or Ambiguous? The Implications of Smart Specialisation for Core-Periphery Relations in Estonia and Slovakia' (2019) 9 (4) Baltic Journal of European Studies 50.

3 A Završnik, 'Algorithmic Justice: Algorithms and Big Data in Criminal Justice Settings' (2019) European Journal of Criminology. doi: 10.1177/1477370819876762.

jurisdiction. Technology allows many people to still have their day in court. An individual can be present at a trial both when they are physically unable to do so due to old age, illness, disability or due to their being unable to travel. A perfect example would be Nigeria's decades-long disputes against Shell, one of which is pending in the United Kingdom,[4] which had reportedly undermined the ecological balance of certain Nigerian regions and contributed significantly to the deteriorating health of local residents.

E-justice is based on a range of technological solutions that make the entire process of administration of justice more transparent and accountable, as well as significantly increase efficiency, including adherence to a reasonable time. In addition, it contributes to the realisation of the right to a fair trial through improved access, both thanks to new opportunities for access through digital tools and the open, easy access of citizens to all information about the judicial system, the content of the process, and legal requirements for submitted documents and evidence, which can be filed in simple and visual forms of information.

The COVID-19 pandemic has accelerated the digital transition for all countries, including in the field of justice. In particular, in the European context, it 'has confirmed the need to invest in and make use of digital tools in judicial proceedings.'[5] Therefore, where possible and accessible to courts, 'the use of secure video and other remote links'[6] should be offered. For the purposes of taking of evidence, any appropriate modern communications technology should be used.[7] In the Ukrainian context, 'the right to participate in court hearings by video conference outside the court, using their own technical means'[8] was introduced by law. At the same time, the legislative changes did not affect the criminal justice; therefore, the judges 'had to overcome the problems and the lack of criminal procedural legislation'.[9] All of this is reflected in the quantity and quality of the corresponding technological solutions.

An important point in the deployment of technological solutions for justice is that the assessment of their success should not be based on statistical indicators alone. For example, if we take the ICT in judiciary index, for Ukraine, the indicator of the deployment rate in the civil procedure will be 4.9.[10] If we compare Ukraine on this indicator with four other countries with similar in many respects legal systems, two of which are also countries that were under the influence of a totalitarian regime, we see that the indicators do not differ critically. So,

4 See *Okpabi and others (Appellants) v Royal Dutch Shell Plc and another (Respondents)* [2021] UKSC 3.

5 Council of the European Union, 'Council Conclusions "Access to Justice – Seizing the Opportunities of Digitalisation"' Brussels, 8 October 2020 (OR. en) 11599/20 <https://data.consilium.europa.eu/doc/document/ST-11599-2020-INIT/en/pdf> accessed 12 April 2021.

6 ELI Principles for the COVID-19 Crisis, Consolidated Version of the 2020 ELI Principles for the COVID-19 Crisis and the 2021 Supplement, European Law Institute, 2021. <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Consolidated_ELI_Principles_for_the_COVID-19_Crisis.pdf> accessed 12 April 2021.

7 Position of the Council at first reading in view of the adoption of Regulation of The European Parliament and of The Council on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast), Council of the European Union, Brussels, 22 October 2020 (OR. en) 9889/20 <https://data.consilium.europa.eu/doc/document/ST-9889-2020-INIT/en/pdf> accessed 12 April 2021.

8 S Prylutskyi, O Strieltsova, 'The Ukrainian Judiciary under 21stCentury Challenges' (2020) 2/3 (7) Access to Justice in Eastern Europe 97.

9 O Kaplina, S Sharenko, 'Access to Justice in Ukrainian Criminal Proceedings During the COVID-19 Outbreak' (2020) 2/3 (7) Access to Justice in Eastern Europe 118.

10 Council of Europe, 'European judicial systems CEPEJ Evaluation Report. 2020 Evaluation cycle (2018 data), Part 2, Country profiles' September 2020, 94.

for France, this figure is 4.6,[11] for Germany, it equals 8.3,[12] for Poland, it equals 6.0,[13] and for the Czech Republic, it equals 6.4.[14] If, in addition, we take financial performance based on variation in the judicial system budget in 2016-2018, it is demonstrated that in the case of Ukraine, this budget has increase by 90% in Euros and 112% in Hryvnia,[15] which, among other things, provided for the allocation of funds for successful digital transformation and the introduction of technological tools of justice. However, despite the apparent increase in the movement towards improving the digital component of justice, in reality, Ukraine continues to be a country in which the basic problems with access to justice and effective remedies have not been resolved. This can be confirmed by the huge number of applications to the European Court of Human Rights against Ukraine, a significant part of which are related to gross violations of the right to a fair trial and absolute human rights, such as the prohibition of torture.

Technological solutions for justice in the digital age can be conditionally divided into replacement and complementary ones. Replacement solutions include those aimed at completely replacing traditional forms, procedures, and components of justice. Such decisions include, for example, 'robojudges',[16] artificial intelligence with a high level of development and self-learning – part of the Online Dispute Resolution family. Although the latter is usually referred to as alternative dispute resolution, which is not part of the justice system in the traditional sense, these methods of dispute resolution, nevertheless, must comply with the general legal principles of fair conflict resolution and can also be built into the system, for example, through the possibility of going to court in case of an unsatisfactory decision for one of the parties. In addition, online dispute resolution is aimed at relieving the judicial system from those conflicts that can be resolved in an alternative order, and at least in this sense, they are undoubtedly replacing technological solutions.

In particular, Victor Terekhov categorises the variety of relevant online mediation solutions into 'textual and dynamic (audio, video), and also immediate (synchronous) and asynchronous'.[17] It should be noted that no matter which of these instruments is used by the parties, they all have something in common: the nature of the interaction. In the digital age, interactions as such have undergone significant changes, many of which are not tracked by the participants themselves. These may include the habit of mediating communication with devices, equipping messages with short emotional reactions that are chosen at their discretion and do not necessarily reflect actual emotions (unlike most analogue non-verbal interactions), expectations for an immediate response, unclear separation of public and private space, etc. Such poorly tracked but at the same time, structural changes can influence interactions in the field of justice. For example, the external forms of the process, mediated by rituals (naming of judges, the order of placement of participants in the courtroom, gowns, the need to get up during the announcement of the decision, and so on), designed to add a certain solemnity and continuity, contribute to the conviction of the participants in a serious attitude to the establishment of fairness, are gradually losing their strength. At the same time, the ease and availability of substitute technological solutions for justice can positively

11 ibid 36.

12 ibid 40.

13 ibid 72.

14 ibid 28.

15 Council of Europe, 'European judicial systems CEPEJ Evaluation Report, 2020 Evaluation cycle (2018 data), Part 1, Tables, graphs and analyses' September 2020, 20.

16 See S Castell, 'The Future Decisions of RoboJudge HHJ Arthur Ian Blockchain: Dread, Delight or Derision?' (2018) 34 (4) Computer Law & Security Review 739. doi: 10.1016/j.clsr.2018.05.011.

17 V Terekhov, 'Online Mediation: A Game Changer or Much Ado About Nothing?' (2019) 3 (2) Access to Justice in Eastern Europe 39.

influence the authority of the judicial system and significantly increase the credibility of its components.

Technological solutions complementary to justice are primarily focused on support functions. For example, technological solutions complementary to justice today are automatic risk assessments – from programs that allow assessing a balanced choice of a preventive measure for a specific person to monitoring tools that show an overall picture of threats to the legal order and the rule of law. Megan Stevenson writes that 'there is a sore lack of research on the impacts of risk assessment in practice',[18] including providing compelling evidence on how the adoption of a risk assessment affects various elements of the justice process. She also points out that 'risk assessment tools may prove to be a highly beneficial input to criminal justice'.[19] It is indicated that such instruments 'may help balance public safety and offenders' liberty while presumably decreasing costs to the system'.[20]

These solutions have provoked heated debate over the past few years, primarily because their transparency and the equal treatment of all cases have been questioned. In 2016 in *State of Wisconsin v. Loomis*,[21] the plaintiff challenged in court the use of the well-known COMPAS tool. The basis he put forward in his claim was that the use of COMPAS violated his right to due process. The two reasons underlying the claim that identified a potential offence were (1) the proprietary nature of the instrument since the plaintiff could not find out how exactly a percentage estimate is created based on a number of characteristics and therefore could not challenge its scientific validity, and (2) the fact that gender was one characteristic for assessment. As a result, the court refused to admit the violation of the plaintiff's right to due process, even though the methodology used to conduct the assessment was not disclosed to either the court or the convicted person. One of the arguments of the court was that the assessment given by COMPAS is not the only basis for the decision, and the verdict would still be individualised because the courts have discretionary powers and the information necessary to disagree with the assessment when needed.[22] In fact, the court points here to the complementary nature of the technological solution in question, which allows the final decision by human judges.

Despite the justified doubts that the law can be accessible for interpretation and used not only by people but also by digital tools, even if they are high-level artificial intelligence, technological solutions for justice continue to multiply. In the digital era in which we find ourselves, the degree of application of (1) digital tools, (2) online interactions, and (3) data, including the accumulation, transmission, processing, and forecasting based on them, is significantly increasing. The involvement of all subjects of law in activities carried out in whole or in part in cyberspace is also significantly increasing.

Most international and national judicial institutions today have not only official websites but also social media accounts, especially with the media giants like Twitter and Facebook. The availability of remote access tools, electronic communications, and electronic registries has allowed, for example, the ECtHR to continue its main activities during the current pandemic. At the same time, it is a matter of concern that many digital technologies have become not only widespread but also there are sustainable practices of application outside the legal field or before any legal regulation. As a result, many conflict situations develop into

18 M Stevenson, 'Assessing Risk Assessment in Action' (2018) 103 Minnesota Law Review 341.

19 ibid 377.

20 JL Viljoen, MR Jonnson, DM Cochrane, LM Vargen, GM Vincent, 'Impact of Risk Assessment Instruments on Rates of Pretrial Detention, Postconviction Placements, and Release: A Systematic Review and Meta-analysis' (2019) 43 (5) Law and Human Behavior 411.

21 See *State v Loomis*, 881 N.W.2d 749 (2016).

22 ibid 764-765.

extremely intricate situations and require a complex balancing of the rights and interests of the participants.

The challenge of applying both replacement and complementary technological solutions for justice is exacerbated by legal uncertainty regarding digital technologies and cyberspace as such. The online component of the activities of all legal actors – individuals, organisations, businesses, governments – leads to jurisdictional problems, the scenarios for resolving which are currently poorly defined. Much remains at a rather abstract level of calls for joint coordinated action by governments, organisations, corporations, and civil society. It is proposed, for example, that there should be uniform international laws concerning the Internet, increased self-regulation of hosts and users, and better education for legislators on how the Internet and the World Wide Web function.[23] As the difficulties of managing the online space have become systemic and tensions continue to grow, it is rightly noted that the following tools should continue to be used: multilateral efforts; bilateral agreements; informal interactions between public and private actors across borders.[24] All of this applies to justice to the same extent, given the global nature of some of the threats, cross-border crime, corporate disputes involving parent and subsidiary companies, and digital traces of individuals' activities, distributed throughout many jurisdictions.

3 RISKS OF USING DIGITAL INSTRUMENTS IN THE JUSTICE SYSTEM

Such risks or threats can be divided into two groups: explicit and implicit. Explicit risks primarily include threats to security and privacy, as well as direct violations of human rights. For example, it would be a violation of the right to a fair trial if a person who is unable to connect to an online process is not given an alternative way to attend. Implicit, hidden risks include undermining the rule of law, fairness, and human rights. For example, the manipulation of the independence of the court, which is carried out using subtle digital tools to create the impression in the information space that some opinions and positions have already outweighed others, also leads to a violation of the right to a fair trial. However, in this case, the path between the action and the violation of a specific right is more indirect and tortuous, so that it becomes rather difficult to prove a direct connection. Algorithmic discrimination occupies a special place in the list of threats since it can be both a consequence of intentional and unintentional interference in the work of the justice system.

Explicit risks imply security breaches due to hacking of devices and cloud data storage, installation of malicious software, and gaining unauthorised access to systems and data. Indeed, even if powerful tech corporations and governments, which spend significant resources on security, are subject to cyberattacks, can we expect the data stored on the servers of courts or transmitted by e-mail by the participants of the processes to be safe? Direct and explicit security risks are exacerbated in legal systems that lack due diligence in digital adoption. They also increase when there are a large number of legislative collisions, conflicting administrative and judicial practice, and a significant corruption component of public law activities.

Threats to confidentiality and, more broadly, to privacy are based not only on direct intrusions but also on the accumulation of a variety of data, the amount and storage time of which has grown incredibly in the digital age. The starting point for data storage concerns and their possible consequences could be *S. and Marper v. the United Kingdom*, a case concerning

23 M Gilden, 'Jurisdiction and the Internet: the "Real World" Meets Cyberspace' (2000) 7 ILSA Journal of International & Comparative Law 160.

24 B de La Chapelle, P Fehlinger, 'Jurisdiction on the Internet: How to Move Beyond the Legal Arms Race' (2016) Observer Research Foundation and Global Policy Journal series, 3 Digital Debates. CyFy Journal 10.

indefinite storage in the database of applicants' fingerprints, cell samples, and DNA profiles.[25] In this case, the ECtHR held that there had been a violation of Art. 8 of the European Convention on Human Rights, as the use of modern scientific methods in the criminal justice system cannot be permitted at any cost and without carefully balancing potential benefits with important interests. This balancing act applies to many new technology and data handling cases.

Direct and explicit risks for privacy also come from tying disparate data together, both automatically and manually. In today's environment, profiling a fairly accurate portrait of any user of digital tools has become possible not only by complex systems but also with the help of a relatively modest search through open sources. This, as rightly noted, undoubtedly affects the fact 'how easily and readily organizations can collect data and perform "data-driven" decisions across institutional contexts',[26] and the judicial system may be subject to such institutional changes.

Numerous lawsuits related to privacy in the digital age only confirm the seriousness of the risks. In *Benedik v. Slovenia*,[27] the court confirmed some of the expectations regarding digital communication privacy and secondary data. The court also stressed that the law on which the impugned measure was based and the way it was applied by the domestic courts were not clear enough and did not offer sufficient guarantees against arbitrary interference. Legislation ambiguity regarding the protection of personal data and other data affecting privacy is quite common in the digital age in many jurisdictions. Legislation simply does not have time to develop at the same rate as technology.

Other examples include privacy erosion from tracking, recognition, and synchronisation technologies. For example, mass surveillance contested in *Szabó and Vissy v. Hungary* case[28] raises questions about the legitimacy of governments' actions using new technologies to conduct such large-scale surveillance of their citizens in the name of national security. The court recognised that such measures were a natural consequence of the modern technologies used. At the same time, the court stressed that the legislation in this field should be clearer.

On the whole, the general formula followed by international and national courts, especially the ECtHR, expresses a balanced and cautious approach to such situations of erosion of fundamental rights. The problem is that this approach may not be enough. Many technological solutions have hidden implications that are difficult to calculate even for the technology inventors themselves, let alone users. These consequences can change the landscape of justice in unpredictable ways, like if you tried to apply various systems for gardening, including the most fantastic, and woke up one morning to find that the leaves of all the trees turned blue, and the aircraft of an extra-terrestrial civilisation with aliens was in front of the house. And even more surprising, you are no longer sure if the leaves were green before and, if so, how long ago they changed colour.

The implicit, hidden risks of the implementation and deployment of technological solutions for justice include the possibility of influencing the judicial system, as well as structural changes in the approach to understanding and protecting human rights, fairness, and the rule of law. In particular, the management of public opinion through widespread and poorly regulated social media platforms can influence the independence of court decisions. Identifying someone as a 'criminal' before a corresponding court decision came into force,

25 *S and Marper v the United Kingdom* App no 30562/04 and 30566/04 (ECtHR, 4 December 2008) 1581.

26 BA Williams, CF Brooks, Y Shmargad, 'How Algorithms Discriminate Based on Data They Lack: Challenges, Solutions, and Policy Implications' (2018) 8 Journal of Information Policy 79.

27 See *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) 363.

28 See *Szabó and Vissy v Hungary* App no 37138/14 (Court (Fourth Section)) (ECtHR, 12 January 2016) 579.

supported by screenshots or photographs of documents that provide an incomplete picture of the proceedings and spread across the digital space by thousands of posts, not only violates the rights of individuals and the rules that ensure the legal process but perhaps normalises the situation in society when conclusions are drawn on the basis of hasty impressions and prejudices. In the long run, this undermines the rule of law, especially if a reasoned court decision differs from the assessment promoted by opinion leaders.

Undoubtedly, the effect of media coverage of trials can, of course, be positive. For example, Claire S.H. Lim suggests that the presence of active media coverage may enhance consistency in the civil justice system.[29] Likewise, it could be helpful to use social media to confirm or disprove certain facts that are important to the litigation. For example, in *Zimmerman v. Weis Markets, Inc.,* which was a lawsuit for harm, the court granted the defendant's motion to disclose the passwords and usernames of social media users.[30] Since the public records of the plaintiff's posting on social media included conflicting discussions of his injury, the court considered that the non-public recordings might also be relevant to the lawsuit. As a result, it was established that the plaintiff actually had a motorcycle accident and not a forklift accident at work, which led to the refutation of the claim. However, the alliance of social media and manipulative technologies of influence can be dangerous, primarily due to a lack of control over how this influence is exerted and a lack of understanding of how serious it can be.

One of the implicit, hidden risks to justice can be the dependence of the public sector on private actors who create, modify, adjust, and maintain technological tools and solutions. For example, companies that offer algorithms for processing data may refuse to disclose the source code, citing trade secrets, thereby depriving users, including government organisations and institutions, of a real opportunity to check both potential vulnerabilities of the algorithm and technical errors. At the same time, the question of the responsibility of the developers and sellers of such digital tools remains open.

Another possible threat is the use of instruments not developed and produced within the national legal system. It is not economically viable to keep the entire production cycle within one country, just as it is for non-informational goods and services. But what the COVID-19 pandemic has once again emphasised is the importance of rebuilding our processes in such a way that, relatively speaking, we will not be left without medical masks because meltblown, which is part of the composition, is only purchased from outside the country. The analogy with digital tools suggests that technological sovereignty may be as important as a country's political or economic independence.

In addition, technological solutions and instruments applied to the judiciary do not always benefit justice. For example, one of the implicit threats is predicting court decisions. And this is not the kind of forecasting that fits into the framework of classical legal certainty. This is a fairly accurate prediction that can be used both to influence judges and to sell to interested parties. Particularly, a model designed to predict the behaviour of the Supreme Court of the United States showed 70.2% accuracy at the case outcome level and 71.9% at the justice vote level.[31] Decision prediction models for decisions made by the ECtHR showed that overall test accuracy, across the 12 Articles in the ECHR, was 68.83%, and heuristic achieved an overall test accuracy of 86.68%.[32]

It should be noted that any weakness of institutions, including an independent judiciary,

29 CSH Lim, 'Media Influence on Courts: Evidence from Civil Case Adjudication' (2015) 17 (1) American Law and Economics Review 87-126. doi:10.1093/aler/ahv005.

30 *Zimmerman v Weis Markets, Inc*, No CV-09-1535 [2011] WL 2065410.

31 DM Katz, MJ II Bommarito, J Blackman, 'A General Approach for Predicting the Behavior of the Supreme Court of the United States' (2017) 12 (4) PLoS ONE e0174698. doi:10.1371/journal.pone.0174698.

32 C O'Sullivan, J Beel, 'Predicting the Outcome of Judicial Decisions Made by the European Court of Human Rights' in the 27th AIAI Irish Conference on Artificial Intelligence and Cognitive Science (2019).

as well as the presence of grey areas free from certain legal regulation or subject to unclear legal practice can become such that it multiplies both overt and covert risks. In particular, the Ukrainian context, like a number of post-totalitarian legal systems, presupposes a certain weakness of democratic institutions and significant corruption problems, which can become a field for abuse. In Eastern Europe, in addition, there is a specificity of disrespect for private life, human rights, mistrust of the value of the rule of law and the law as such, which is largely due to the same general totalitarian past of being inside or under the influence of the Soviet regime.

The Ukrainian model of implementing digital technologies into the system of justice is primarily based on the European experience. At the same time, it has its own specifics, including not only the aforementioned legacy of the totalitarian regime but also the ongoing reform of the judicial system and the legal system as a whole. In particular, the last judicial reform 'has identified new priorities in this area',[33] which includes transparent, efficient, and independent justice. The reforms, as Iryna Izarova rightly notes, 'aim to rise to a level of trust of the judiciary inside and outside of Ukraine'.[34] Thus, the intercalation of digital tools into the national justice system may not be enough to achieve reform goals. In this case, the risks associated with mistrust and low authority of judicial institutions should be taken into account.

It is also worrying that, given the increasing prevalence of technological solutions for justice, better protection of human rights will require digital literacy. To some extent, those who have stable access to the Internet, their own devices, and the skills to search and filter the necessary information already have privileges. The digital divide between individual actors and even entire societies can deepen inequality. Therefore, legal and technological initiatives should be aimed at the inclusion of vulnerable groups and, in addition, should be based on appropriate statistics on the coverage of all regions and citizens with digital tools, as well as access to the digital environment.

But if the risks are so serious, should a cautious approach be taken in the implementation of technological solutions in the field of justice? What if we set aside those technological instruments that will allow us to take advantage of the rapid processing of large amounts of information but avoid threats? For example, one could imagine an artificial intelligence that helps a judge to find all legal positions that are suitable by keywords and sort them in a convenient way, but not to suggest a solution and not to generate it completely. The problem, however, is that even using 'semi-automatic' solutions changes people's perceptions. As Aleš Završnik writes, 'the decision-makers will be inclined to tweak their own estimates of risk to match the model's'.[35] So, people involved in the administration of justice may develop a habit of over-reliance on technological instruments in order to make decisions.

4 ALGORITHMIC JUSTICE: IS IT POSSIBLE?

Fairness as the central idea of justice and, in general, the basis of law is an extremely complex category. Therefore, in the theory of law, it is customary to evaluate its components, such as formal, substantive, and procedural fairness. Likewise, impartiality and objectivity are essential ingredients for making fair decisions.

33 See V Borysova et al, 'Judicial Protection of Civil Rights in Ukraine: National Experience through the Prism of European Standards' (2019) 10 (1) Journal of Advanced Research in Law and Economics 66. 10.14505//jarle.v10.1(39).09.

34 I Izarova, 'Sustainable Civil Justice through Open Enforcement: The Ukrainian Experience' (2020) 9 (5) Academic Journal of Interdisciplinary Studies 214.

35 See K Hartmann, G Wenzelburger, 'Uncertainty, Risk and the Use of Algorithms in Policy Decisions: A Case Study on Criminal Justice in the USA' (2021) Policy Sciences, doi:10.1007/s11077-020-09414-y; A Završnik, 'Algorithmic Justice: Algorithms and Big Data in Criminal Justice Settings' (2019) 00 (0) European Journal of Criminology 1. DOI 10.1177/1477370819876762.

Impartiality and objectivity are presented as the advantage of decisions made by algorithms, not people. Particularly because algorithmic decisions imply 'fact-based considerations'.[36] In addition, as Kathrin Hartmann and Georg Wenzelburger write, 'it seems that the main impetus for the use of algorithmic evidence indeed is the perceived reduction in uncertainty'.[37] The interpretation of the data, estimates, and solutions proposed by the algorithms could rely, in that case, on statistics and empirical indicators and not on intuition.

However, the algorithms can be flawed. Emily Keddell writes that algorithmic tools 'can produce ecological fallacies, leading to spurious variable selection and prediction that reflect system factors rather than actual incidence risk'.[38] Algorithms can also be biased. This may be an intentional bias that was incorporated into the sequence of decisions by the creators of the algorithm. It can also be an unintentional bias that echoes and repeats the biases existing in the analogue world. For example, if machine learning involves processing thousands of court decisions from digitised archives over the previous two hundred years of court work and deriving patterns based on them, then the algorithm could potentially consider those who were previously convicted with long terms of imprisonment as more dangerous criminals. The algorithm can also isolate some common features of such criminals. If, at the same time, the decisions of judges during one hundred and fifty years out of two hundred years were based on racial bias, then quantitatively, such sentences could more often be passed against people of a certain race. Based on statistics and lacking internal ethics, the algorithm can recreate this racial bias in its work.

Alternately, an algorithm can help identify bias. For example, when texts are loaded into the algorithm, and then it learns to recognise words, including bindings of words, we can find an unpleasant correlation when the word 'judge' is associated with the word 'he', and 'court clerk' with the word 'she'. This can show us where there are equity gaps and statistically reinforce the argument if we are going to advance the equality agenda in the judiciary. In particular, the automatic processing and algorithmic approach allowed identifying several consistent and stable patterns in the American system of misdemeanour justice; first of all, 'a large and persistent racial disparity in arrest rates across most offense types'.[39]

Moreover, there are some deeper sides to the problem of bias in the algorithms used in justice. The first is to create algorithms with the best possible intentions, but still, the ones that inadvertently bias the results. For example, facial recognition technologies have trained on celebrity photos, which has meant it is skewed in favour of white celebrities. As a result, face recognition accuracy is extremely high for whites and much lower for people of colour. The vicious circle may be that we need more diversity among those who create algorithms in order not to inadvertently create discriminatory solutions.

Second, these sides include the creation of algorithms by unscrupulous or ignorant developers. In the first case, the point is that considerations of benefits and the laws of the market, still poorly regulated by legal means, outweigh the possible dangers for those who seek to implement and deploy algorithms. In the second case, it is rather about the lack of expertise of the developers, which leads to an inadequate understanding that the principle of reasonableness or the natural law approach used by legal scholars in substantiating court decisions cannot be translated into a mathematical sequence for successful application in

36 W Groher, FW Rademacher, A Csillaghy, 'Leveraging AI-based Decision Support for Opportunity Analysis' (2019) 9 (12) Technology Innovation Management Review 29.

37 Hartmann, Wenzelburger (n 35).

38 E Keddell, 'Algorithmic Justice in Child Protection: Statistical Fairness, Social Justice and the Implications for Practice' (2019) 8 (10) Social Sciences, MDPI, Open Access Journal 17.

39 M Stevenson, SG Mayson, 'The Scale of Misdemeanor Justice' (2018) 98 Boston University Law Review 769.

the form of formulas. Algorithms can also be potentially discriminatory or unfair 'when practitioners do not properly audit their algorithm before and while it is deployed'.[40]

The undoubted advantage of algorithmic justice technologies is their effectiveness. Indeed, they can significantly speed up trial procedures, process a huge number of protocols on administrative offences automatically, correctly sort out many cases and assign them general features that allow them to accurately determine their categories. Ultimately, algorithmic technologies can significantly reduce the costs of the judicial system, as well as increase the accuracy, which can be the basis for some decision-making.

At the same time, a variable that increases the accuracy of the algorithm may be a sign that is 'protected' in the context of discrimination. Then the implementation of solutions based on artificial intelligence may be hindered by a legislative ban or a precedent decision that contains criteria for unacceptable activity. Given the unrelenting concern about the effectiveness of traditional remedies against discrimination, all of this, as rightly noted, 'makes it crucial to determine when algorithmic decisions are discriminatory',[41] as algorithms can exacerbate discrimination and injustice. It seems that three factors will influence such an increase: (1) the difficulty of tracking discrimination and applying an effective remedy, (2) the unpredictability of many consequences of the application of algorithms, primarily long-term, and (3) the growing prevalence of algorithmic solutions in all areas of private and public life.

Technological solutions in the field of justice, therefore, must be sustainable and accountable, have a high degree of transparency and thoughtfulness. Not all innovation is worth turning into reality, even if the technology initially appears incredibly promising and one that will solve many problems. At the same time, as Adam Harkens correctly points out, both algorithms and the law are tools for ordering and rationality.[42] This commonality of their nature gives hope that the union of law and algorithms can be a successful foundation for fairness and justice.

The most promising is the potential for procedural fairness when using algorithms since they can contain indestructible sequences that exclude an arbitrary violation of the procedure. With due provision for proper content, security, and *laissez-faire*, algorithmic tools can contribute to a fairer administration of justice.

However, in terms of substantive fairness, there are things that cause concern, namely a growing reliance on companies, systems, and instruments that do not rely on the rule of law and human rights and may not be subject to the traditional accountability of democratic institutions and have no intrinsic value (ethical) underpinning.

5 CONCLUSIONS

Thus, the changes taking place in the digital era cannot but affect the justice sector, including the emergence and deployment of technological solutions, both replacement and complementary, with varying degrees of legal support and social thoughtfulness. The consequences of such changes must be assessed in terms of the balance of threats and

40 M Sun, M Gerchick, 'The Scales of (Algorithmic) Justice: Tradeoffs and Remedies' (2019) 5 (2) AI Matters 35.

41 IN Cofone, 'Algorithmic Discrimination Is an Information Problem' (2019) 70 Hastings Law Journal 1392.

42 AHarkens, 'The Ghost in the Legal Machine: Algorithmic Governmentality, Economy, and the Practice of Law' (2018) 16 (1) Journal of Information, Communication and Ethics in Society 16.

opportunities offered by new technologies. Among the threats and risks, attention should be paid to explicit ones, such as outright breaches of security, invasions of confidentiality, and structural erosion of privacy. A large layer of threats is also hidden and implicit, primarily manipulative influences on the judicial system and specific processes, the invisible undermining of the rule of law and human rights, including their authority and values.

The question of the possibility of algorithmic justice arising in connection with the use of artificial intelligence of varying degrees of development and independence of decisions leads to potential problems for fairness. Widely stated impartiality and accuracy of algorithms conflict with detectable bias, whether intentional or unintentional, that can lead to systemic discrimination. At the same time, algorithms contain the potential to both identify such problems and improve at least procedural fairness. This could be the subject of further research in the field of technological solutions for justice.

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CASE NOTE

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)

Journal homepage http://ajee-journal.com

ACCESS TO JUSTICE FOR THE PROTECTION OF ENVIRONMENTAL RIGHTS IN UKRAINE

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To cite this note: *A Getman* 'Access to Justice for the Protection of Environmental Rights in Ukraine' 2021 2(10) *Access to Justice in Eastern Europe 118–127. DOI: 10.33327/AJEE-18-4.2-n000063*

To link to this note: https://doi.org/10.33327/AJEE-18-4.2-n000063

Submitted on 01 Feb 2020 / Revised 17 Apr 2021 / Approved 30 Apr 2021 / Published online: 03 May 2021 View data

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ACKNOWLEDGEMENTS

The author would like to express his endless gratitude to the reviewers of his contribution for their remarks and recommendations.

CONFLICT OF INTEREST

The author has declared that no conflicts of interest or competing interests exist. This article has undergone peer review and has been approved for publication without authors' participation as an editorial board member.

CONTRIBUTOR

The author contributes solely to the intellectual discussion underlying this note, literature exploration, writing, data collection, analysis, and interpretation, reviews, and editing, and take responsibility for the content of the paper. The content of the note was translated with the participation of third parties under the authors' responsibility.

ACCESS TO JUSTICE FOR THE PROTECTION OF ENVIRONMENTAL RIGHTS IN UKRAINE

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Abstract *The article deals with specific issues of access to justice relating to the protection of environmental rights. The harmonization and approximation of national legislation with international standards is an essential factor in the development of environmental rights. Particular attention is paid to public participation in the consideration of environmental protection by administrative authorities and in judicial proceedings.*

Keywords*: environmental justice, environmental disputes, environmental human rights*

1 INTRODUCTION

Access to justice is a fundamental element of the right to a fair trial and an indisputable condition for the exercise of the rule of law, as reflected in the Convention for the Protection of Human Rights and Fundamental Freedoms1 (hereinafter – ECHR). According to Art. 6, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law to dispute his/her civil rights and obligations of a type or to determine the validity of any criminal charge against him/her.

The case law of the European Court of Human Rights (hereinafter – ECtHR) is important in interpreting this international standard. Thus, according to the decision of the ECtHR, *Stanev v. Bulgaria*[2], the very design of the right to a fair trial would be ineffective if it did not protect the right for a case to be heard at all. Fair trial is thus a common generic concept and explicitly includes access to justice. The concept of accessibility can be understood as the possibility to go to court without special permission, to conduct pre-trial procedures, and so on. But the case law of the ECtHR has shown that access to justice and access to courts is not absolute. Rights may be restricted, but only in such a way and to such an extent that the content of those rights is not violated. In addition, restrictions should not be covered by the content of Art. 6 para 1 if it does not pursue a 'legitimate aim' and if there is no 'proportional relationship between the means employed and the aim pursued'. This position is reflected in the decision of the ECtHR *Fayed v. the United Kingdom*[3].

1 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] ETS 5.

2 *Stanev v Bulgaria* App no 32238/04 (ECtHR, 6 November 2012) <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-114259%22]}> accessed 17 April 2021.

3 *Fayed v The United Kingdom* App no 17101/9 (ECtHR, 21 September 1990) <http://hudoc.echr.coe.int/eng?i=001-164404> accessed 02 April 2021.

Although it is not possible to restrict access to the courts, the national laws of certain countries and the practice of the ECtHR itself may define such lawful limitations as statutory limitation periods, or the need to pay legal fees and representation in the case.

2 GENERAL APPROACHES TO ACCESS TO JUSTICE IN ENVIRONMENTAL DISPUTES

The right of access to justice is regulated not only in universal legal instruments, but also in the case law of the international and regional judicial bodies. The lack of implementation of the right to access to justice is one of the main obstacles to the protection of an individual against torture, the elimination of trafficking in human beings, the fight against environmental crimes, and respect for social and economic rights.

While providing access to justice, these international instruments did not address environmental protection at the outset. However, the need to regenerate the protection of the environment was inevitable in view of the essential public interest of the international community and international organizations. By 1972, at the time of the United Nations Conference, the Declaration on the Human Environment was adopted[4], which regulated the existence of two elements of the environment – the natural element and the element that a person him/herself had created. These elements are considered indispensable for the well-being of the individual and for the full enjoyment of his or her fundamental rights, including the right to life itself.

The thin line between human activities and environmental protection has been the subject not only of scientific research but also of normative expression within the framework of the protection of human rights in the ECHR.

To date, courts and competent authorities are dealing with an increasing number of cases related to environmental protection. This trend is associated with increased opportunities to access information on the environmental situation in a particular location or in a country as a whole. Using the judicial form of protection, with the possibility of administrative appeal or other mechanisms of access to justice, and in order to be able to apply substantive and procedural guarantees, the conditions under which *locus standi* can be obtained should be specified, in such terms as, which specific procedures and remedies should exist once the first issue has been resolved, or does the existence of judicial review through specific procedural mechanisms, also called review standards, ensure access to justice in environmental cases?

Such procedures and remedies are subject to many legal prerequisites, which vary considerably from one jurisdiction to another. Examples of such prerequisites include lengthy court proceedings and lack of information about access to justice. The effectiveness of access to justice procedures depends, to a large extent, on the availability of interim measures and on the avoidance of abuse of procedural and substantive rights during the trial. The existence of such measures may have a negative impact on the environment, even if the case in court is successful. However, the most serious obstacle to the handling of environmental disputes is specifically a financial one, including not only litigation costs, but also the existence of possible civil claims for damages that may arise if projects are stopped during the trial.

The modalities and scope of judicial review also differ from country to country. The scope of judicial review depends on two factors: first, which legal acts are taken into account by judges when resolving a dispute on the legality of the contested acts or omissions of public authorities or other commercial organizations in the observance of environmental rights;

4 United Nations, 'Report of the United Nations Conference on the Human Environment' (Stockholm, 5-16 June 1972) <https://undocs.org/en/A/CONF.48/14/Rev.1> accessed 22 April 2021.

and second, consideration of a judicial case in a clearly defined legal line, which should be more effective than the powers of administrative bodies, which are empowered to take specific decisions on the observance of environmental rights.

Access to environmental justice is a crucial issue at the international level[5]. A common understanding of the environment and development is not an entirely new concept, and the relationship between access to environmental justice and governance is a modern and unexplored issue. It is this issue that can be considered as confirming the specificities of international environmental law and the possibility of its application in both international and national law.

The trend of legislating environmental human rights began with the adoption of the Stockholm Declaration on the Environment in 1972. It would appear that for almost 45 years the concept of environmental human rights has moved around the world. Since then, the number of national constitutions with enshrined environmental rights has increased significantly. While in 1994 just over 60 countries adopted constitutional provisions on the protection of the environment, currently, out of 193 Member States of the United Nations, more than 160 States have incorporated some provisions on environmental human rights into their constitutions.

This trend is all the more important as the process of extending the scope of environmental rights has taken place in parallel, that is, both in international law and in national legal systems. Here, is a sublime example of the internationalization of constitutional law.

In general, the allocation of environmental rights is not only a means of meeting the individual environmental interests of their holder, but also, and importantly, a means of preserving and restoring a favourable environment as a public good.

The unique place of environmental human rights in a generally accepted classification is determined by the fact that they manifest themselves in all types and categories of human rights. Thus, personal rights define the protection of an individual, his/her health and property against unlawful interference (for example, from environmental hazards). Political rights include the right to a referendum on environmental protection and public participation in environmental decision-making. Cultural rights imply an increase in the level of human ecological culture and a specificity in the protection of human rights in the use of natural resources. Social and economic rights are designed to provide a decent standard of living, taking into account environmental specificities; the right to environmental education and the right to health also have an environmental component.

Moreover, environmental human rights are manifested both as individual rights and as collective rights of the so-called 'third generation'. In many countries, class actions have been legislated, and recourse to international bodies also involves individual and collective complaints.

Today it can be said that the world community has reached consensus on four types of environmental human rights: 1) the right to a favourable environment; 2) the right to access

5 See more about environmental access to justice in Directorate-General for Environment, *Access to justice in environmental matters* (EU publications 2017) DOI 10.2779/844077; 'Study on Access to Justice in Environmental Matters, in Compliance with Decision IV/9(F) of the Meeting of the Parties to the Aarhus Convention' <https://unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/Spain_A2J_Environment.pdf> accessed 21 April 2021; European Commission, 'Roadmap: Access to Justice in Environmental Matters' Ref Ares(2020)1406501 <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12165-Access-to-Justice-in-Environmental-matters> accessed 21 April 2021. See more about GSD in M He, 'Sustainable Development through the Right to Access to Justice in Environmental Matters in China' (2019) 11 Sustainability 900 DOI 10.3390/su11030900. More about general approach to the access to justice in environmental matters may be found here J Ebbesson, 'Access to Justice in Environmental Matters' in *Max Planck Encyclopedias of International Law* (2019) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1906> accessed 21 April 2021.

environmental information; 3) the right to public participation in decision-making concerning the environment; 4) the right to an access to justice in connection with environmental matters. The first is a substantive right and the next three are procedural human rights.

The proponents of substantive rights do not trust purely procedural rights for one simple reason: even if procedural rights are fully exercised and enjoyed by civil society as a whole, it is possible that democratic power will opt for immediate results instead of long-term environmental protection. Democracy may well be predisposed to excessive consumerism and as a result may destroy the environment, so procedural rights alone do not guarantee its protection[6].

Proponents of procedural rights propose to dispense with substantive rights altogether, believing that other environmental rights, such as the right to participation (consultation), may well serve to protect human environmental interests and the right of access to justice.

There are, of course, differences between states in the protection of environmental human rights. But the absence of legislative regulation of environmental rights or the possibility of protecting them at the national level enables citizens to turn to international bodies, ensuring that they are adequately protected.

3 PUBLIC PARTICIPATION IN ENVIRONMENTAL DISPUTES IN UKRAINE

The state of the environment directly affects our health and the quality of life in general. Not surprisingly, environmental disputes (environmental human rights and environment protecШчtion disputes) are becoming more relevant and more frequent. This requires new knowledge and skills from the judiciary. The relevance of the topic arises from the need to study problematic issues related to appeals by the public concerned with repeated violations of the requirements of the law in the field of environmental protection.

The fact that public participation plays a significant role not only in the administration of justice (part of the principle of openness and transparency) but also in the activities of public authorities raises the question of the role of the public in the implementation of environmental policy. In this connection, it should be emphasized that international treaties, by which the Verkhovna Rada of Ukraine has consented to be bound, are sources of law and that national courts apply in the adjudication of cases. At the same time, the rules of an international treaty have higher legal force than national legislation.

Questions of access to justice in the context of the possibility of environmental protection were addressed by both Ukrainian and foreign scientists of civil procedure and environmental law. Thus, the protection of the environment by an indeterminate circle of persons is an important issue which is dealt with in the doctrine of civil procedure[7].

However, despite a fairly broad regulatory framework for measures to ensure the implementation of environmental rights, according to the data on the state of the natural environment given in the Law of Ukraine 'On the Basic Principles (Strategy) of Ukraine's

6 See more here: International Center for Not-For-Profit Law and United Nations Development Programme, 'The Role of Legal Reform in Supporting Civil Society: An Introductory Primer' (2009) <https://www.undp.org/content/dam/undp/documents/partners/civil_society/publications/role_of_legal_reform_in_supporting_civil_society_november_2009.pdf> accessed 21 April 2021.

7 T Stepanenko, 'Starting an action in claims for protection of the rights and interests of an uncertain circle of persons' (2007) 3 Forum Prava 256. <http://dspace.univd.edu.ua/xmlui/handle/123456789/2933?locale-attribute=en> accessed 16 April 2021.

State Environmental Policy for the Period up to 2030'[8], the level of environmental pollution in Ukraine remains extremely high, making it impossible to adequately protect the most important environmental rights: the right to a natural environment that is safe for life and health.

The practice of poor environmental management at the state level has exacerbated climate change in the world and raised the issue of the need to incorporate the concept of climate rights into national policies.

Such transformations in the system of environmental rights oblige a new level of judicial protection of human and citizen's environmental rights. This means that Ukraine's modern judicial system must resolve how to incorporate a more rapid and efficient handling of environmental disputes, including reasonable (from the point of view of the possibility of establishing a causal link) deadlines for the consideration of cases, and the impact of judicial decisions on the further development of the state's environmental policy.

One of the greatest obstacles to the speedy and effective handling of environmental cases by the courts today is: 1) lack of a summary of case law on environmental disputes; 2) consideration of an environmental dispute on the basis of the principle of jurisdiction; 3) overburdening the courts with other categories of cases; 4) judges' lack of professional qualifications in environmental disputes; 5) lack of public participation in the protection of violated environmental rights; 6) the obligation to carry out various types of expert reports; and 7) evidence of causation[9].

The Aarhus Convention[10] is the fundamental international legal instrument that governs access to justice in the context of environmental protection. According to Art. 1 of the Aarhus Convention, the main objectives are to guarantee the right to access to information, public participation in decision-making and access to justice in environmental matters.

However, despite the fact that the Aarhus Convention has been part of national legislation for 20 years, Ukrainian courts, especially courts of first instance and appellate courts, do not apply or they misapply the provisions of the Aarhus Convention, especially its provisions on the rights of the public to challenge in court decisions, acts or omissions committed in violation of environmental law considering that the contested decisions do not affect the rights and interests of the plaintiffs.

This provision of the Aarhus Convention is based on preambular paragraphs 18 and 26 of the Sofia Guidelines[11] and is intended to provide the public with the procedural capacity to enforce environmental law, that is, to promote compliance directly, namely by bringing cases before the court. This active role of the public is extremely supportive of the public environmental authorities, who often suffer from a lack of funding or of human, technical or other resources, etc. It is also an effective mechanism for combating corruption in the administration. The

8 Law of Ukraine 'On the Basic Principles (Strategy) of the Ukraine`s State Environmental Policy for the Period up to 2030' <https://zakon.rada.gov.ua/laws/show/2697-19#Text> accessed 21 April 2021.

9 Yu Krasnova, 'Problems of ensuring the right to environmental safety in the national courts of Ukraine and ways to solve them' in International Judicial Forum: 'Judicial Protection of the Natural Environment and Environmental Rights' (Kyiv, 7 November 2019).

10 The United Nations Economic Commission for Europe (UNECE), Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, Denmark, 25 June 1998) <https://unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> accessed 18 April 2021.

11 ECE Working Group of Senior Governmental Officials 'Environment for Europe', 'Draft Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-Making (United Nations Economic Commission for Europe, Sofia, Bulgaria, 23–25 October 1995) <https://unece.org/DAM/env/documents/1995/cep/ece.cep.24e.pdf> accessed 18 April 2021.

Aarhus Convention makes it clear that enforcement of environmental law is not an exclusive responsibility of the state environmental authorities and prosecutors, but that the public plays an important role in it. A classic example of such cases is the application to a court of a non-governmental environmental organization requiring a private entity to cease activity, which is prohibited by law for environmental reasons (economic activity within the reserve) or is in violation of environmental regulations (without a permit, exceeding limits, without appropriate treatment equipment) or requiring a public authority to revoke an unlawful decision or to declare unlawful an omission in the context of a failure to comply with its environmental authority (to revoke an authorization illegally issued to a private entity, to develop a local waste management plan, to conduct an environmental compliance audit).

The provision under review obliges members of the public to have access to judicial procedures. This commitment is unconditional. However, the Aarhus Convention gives parties more discretion on how to implement this obligation. By referring to the 'criteria provided for in national legislation, if such established', the convention does not define these criteria, nor does it specify the criteria to be avoided. The Aarhus Convention does not oblige parties to grant the right to bring such actions to everyone, although this approach satisfies the requirements of the Convention. In the Netherlands, for example, since 1987, environmental non-governmental organizations have been recognized by all courts as having an interest in environmental protection[12]. This interest is considered also to be a general public interest, and it is not necessary to have a right of ownership or any other specific interest to apply to the court for the protection of the environment.

The Aarhus Convention allows parties to establish criteria for standing for members of the public in these cases, but such criteria should be consistent with the objectives of the Convention to ensure broad access to justice. In its conclusions and recommendations, the Aarhus Convention's Compliance Committee paid much attention to the compatibility of a criterion of national law with the objectives of the Convention[13].

In the case against Belgium, the Compliance Committee indicated that the parties were not obliged to provide in national law for a system providing for a right of action by any person (a people's action) so that everyone could appeal any decision, acts or omissions relating to the environment. Thus, it was determined that the wording of the Aarhus Convention on the existence of such criteria for the public should be understood as a mandatory rule and not as an exception. Parties to the Convention are required by law to define such criteria, otherwise the rule cannot be used.[14]

The Constitutional Court of Ukraine, in its decision [15], ruled that a public organization may only defend in court the personal non-property and property rights of its members and the rights and legally protected interests of other persons seeking such protection in cases when such power is provided for in its statutes and if the relevant law determines the right of a public organization to apply to a court for the protection of the rights and interests of other persons.

12 S Stec (ed), *Handbook on Access to Justice under Aarhus Convention* (The Regional Environmental Center for Central and Eastern Europe 2003).

13 United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide* (second edition, United Nations 2014). <https://www.unece.org/env/pp/implementation_guide.html> accessed 18 April 2021.

14 Belgium ACCC/2005/11; ECE/MPPP/C1/2006/4/Add2, 28 July 2006, para 26.

15 Decision of the Constitutional Court of Ukraine of 28 November 2013 in case No 12-rp/2013 <https://zakon.rada.gov.ua/laws/show/v012p710-13#Text> accessed 21 April 2021.

Besides, according to the Art. 1 of the Law of Ukraine 'On Public Associations', voluntary associations of natural and legal persons are directed, in addition, to the protection of environmental rights[16].

According to para. 3 Art. 21 of the Law of Ukraine 'On Environmental Protection'[17], public organizations in the field of environmental protection have the right to submit claims to the court for compensation of damage caused by violation of the law on environmental protection, including the health of citizens and the property of public organizations.

Systematic analysis of the Civil Procedure Code of Ukraine, leads to the conclusion that in cases specified by law, bodies and persons who are entitled by law to take legal action on behalf of other persons or in the public or public interest, may apply to the court[18].

In the case against Germany, the Compliance Committee noted that para. 3 Art. 9 does not distinguish between public and private interests and that this part is not limited to one of the above-mentioned categories of interests or rights. In addition, these provisions apply to violations of any requirements of national law relating to the environment. While different parties and legal systems may apply different definitions of public and personal interests or objective and subjective rights, all are obliged to ensure access to appeal procedures in case of any violation of national environmental protection legislation. In one case from Germany, the Committee explained that access to justice was based solely on the violation of subjective rights.

The Ukrainian legislature supports broad public access to appeal procedures, as no special standing criteria are provided for in national legislation. Judicial practice on this issue differs in Ukraine. Unlike the local and appellate courts, the (upper) court is taking the side of environmental protection, giving the public and non-governmental organizations broad access to justice in environmental law cases.

In their decisions, the Supreme Administrative Court of Ukraine and the Supreme Court of Ukraine[19], in the case concerning the International Charitable Organization (ICO) 'Ecology-Law-Man' lawsuit against the decision of the Cabinet of Ministers of Ukraine to the granting of land parcels to the National Atomic Energy Generating Company 'Energatom' on the basis of the violation of the requirements of the environmental protection legislation by the disputed act and the legitimate interest of the plaintiff, which consisted of the preservation of the environment, decided that in accordance with the Law of Ukraine 'On the Nature Reserve Fund of Ukraine', the disputed parcel of land is protected as a national treasure and is subject to a special protection regime. In view of the national social significance of the Nature Conservation Fund, the contentious legal relations relate to public law, so that an unlimited number of persons have the right to apply to the courts for their protection.

16 Law of Ukraine 'On Public Associations' of 22 March 2012 No 4572-VI <https://cis-legislation.com/document.fwx?rgn=51533> accessed 21 April 2021.

17 Law of Ukraine 'On Environmental Protection' of 25 June 1995 No 1264-XXII <http://www.vertic.org/media/National%20Legislation/Ukraine/UA_Law_Environmental_Protection.pdf> accessed 21 April 2021.

18 Civil Procedure Code of Ukraine, Art 56. See more in: I Izarova, 'Reform of civil proceedings in Ukraine: novelties of the lawsuit' (2017) 8 Ukrainian Law 33; V Komarov, *Civil procedural legislation in the dynamics and practice of the Supreme Court of Ukraine* [Tsyvilne protsesualne zakonodavstvo u dynamitsi rozvytku ta praktytsi Verkhovnoho Sudu Ukrainy] (Law 2012) 45.

19 Decision of the Supreme Court of Ukraine of 29 May 2012 in case No 21-6a12 <http://reyestr.court.gov.ua/Review/25128506> accessed 21 April 2021.

The issue of the right of a public organization to be a plaintiff in a dispute on environmental protection was decided by the Grand Chamber of the Supreme Court in the case of ICO 'Ecology-Law-Man' to LLC 'Aquadelf' on the prohibition of dolphinaria activities[20].

In the decision of 11 December 2018, the Grand Chamber noted that the plaintiff is an environmental protection organization in accordance with the provisions of the Aarhus Convention and the Laws of Ukraine 'On Environmental Protection', 'On Public Associations', 'On Charitable Activities and Charitable Organizations', and in accordance with its statute, it has the right to represent in court the environmental interests of society and its individual members for the purpose of protecting violated environmental rights of individuals and citizens or for the purpose of eliminating violations of the requirements of environmental legislation. The Grand Chamber accepted the plaintiff's arguments that, when dismissing the case, the courts had applied a limited interpretation of the existing legislation, of which the Aarhus Convention was a part, and had failed to acknowledge that the right to the protection of the violated constitutional right to a safe environment belongs to everyone and that this right can be realized both personally and through the participation of a member of the public, which in this case is the ICO 'Ecology-Right-Man'[21].

In addressing a seemingly legal issue in case No826/3820/18[22], the Supreme Court found that the right to appeal a regulation related to the constitutional right to environmental security belongs to everyone and can be exercised by citizens individually or jointly: through citizens' associations, and also that, given the importance of real environmental protection, it is inadmissible to restrict the interpretation of the current legislation of Ukraine, of which the Aarhus Convention is a part, with regard to the right to apply to the courts for the protection of a legally protected interest in the field of environmental safety[23].

Considering that the legislator has not established specific criteria for the standing of public organizations to challenge acts and omissions of citizens and public authorities that violate national environmental legislation, the Supreme Court adopted a permanent legal position with regard to the State's duty to ensure unhindered public access to justice in this category of cases, to comply with international obligations under part 3, Art. 9 of the Aarhus Convention and Art. 6 of the ECHR in the context of legal certainty. It is recommended that courts of first instance and appellate courts provide access to justice in a context of weakened state environmental control and low compliance with environmental legislation to provide the public with ample opportunities to ensure compliance with environmental legislation. Preserving the environment and strengthening the rule of law in the state would be in the public interest.

4 CONCLUDING REMARKS

Ukrainian legislation does not establish clear criteria for members of the public to participate in judicial or administrative environmental protection procedures. In such circumstances, in order to comply with its international obligations under Art. 2 of the Aarhus Convention,

20 Resolution of the Grand Chamber of the Supreme Court in case No 910/8122/17, proceeding No 12-186h18 of 11 December 2018 <https://verdictum.ligazakon.net/document/78977479> accessed 19 April 2021.

21 Resolution of the Grand Chamber of the Supreme Court of 11 December 2018 in case No 910/8122/17 <http://reyestr.court.gov.ua/Review/78977479> accessed 19 April 2021.

22 Resolution of the Supreme Court in case No 826/3820/18 of 21 October 2019 <https://zakononline.com.ua/court-decisions/show/85086982> accessed 19 April 2021.

23 Resolution of the Supreme Court of 21 October 2019 in case No 826/3820/18 <http://www.reyestr.court.gov.ua/Review/85087717> accessed 19 April 2021.

Ukraine should ensure access for members of the public to justice in such categories of cases, especially for environmental non-governmental organizations. This is necessary, in view of the current unsatisfactory level of environmental legislation, to give the public ample opportunity to enforce compliance with environmental legislation.

Analysis of the experience of foreign countries leads to the conclusion that the courts recognize the interest of all persons in the protection of the environment on the basis of their right to a safe environment for life and health, and of their duty to protect it. In view of the above, it should be considered appropriate and necessary in Ukraine to develop and adopt the practice of considering cases in court on public claims, to aim to protect the legitimate interest of the preservation of the environment.

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CASE NOTE

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)

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SOME ISSUES OF CONSTITUTIONAL JUSTICE IN UKRAINE

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To cite this note: *H Berchenko, A Maryniv, S Fedchyshyn* 'Some Issues of Constitutional Justice in Ukraine' 2021 2(10) *Access to Justice in Eastern Europe 128–145. DOI: 10.33327/AJEE-18-4.2-n000064*

To link to this note: https://doi.org/10.33327/AJEE-18-4.2-n000064

Submitted on 02 Feb 2021 / Revised 14 Apr 2021 / Approved 30 Apr 2021 / Published online: 01 May 2021 View data

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ACKOWLEDGMENTS

Authors would like to express their gratitude to the interpreter and reviewers for their help and for the English editor.

CONFLICT OF INTEREST

The authors have declared that no conflict of interest or competing interests exist.

CONTRIBUTORS

All the co-authors read, approved the final version and agreed to be accountable for all aspects of this note. The content of the note was translated with the participation of third parties under the authors' responsibility.

SOME ISSUES OF CONSTITUTIONAL JUSTICE IN UKRAINE

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Abstract *The article identifies trends in the development of and access to constitutional justice in Ukraine at the current stage. It is alleged that on the one hand, there are attacks on the judicial status of the Constitutional Court of Ukraine, which intensified after the 2016 constitutional reform and the position of the Supreme Court. On the other hand, the effectiveness of a constitutional complaint as a human rights mechanism, i.e. for the formulation of the rights and responsibilities of the individual, is still insignificant. This is due both to the model of the constitutional complaint itself (being exclusively normative) and to the practice that is being formed. The reason for inefficiency can also be called doctrinal unpreparedness for the implementation of a constitutional complaint, because, in fact, despite the large number of studies on the subject, the practical aspect was not well thought out. Both the institutional component and the regulatory framework of the Constitutional Court of Ukraine itself need to be significantly improved. We refer specifically to the Law 'On the Constitutional Court of Ukraine' in terms of the interim provisional and protective measure, the implementation of decisions of the Constitutional Court of Ukraine, their actions in time, and specific mechanisms for the restoration of individual rights. In pursuance of the Constitution of Ukraine, a legislative mechanism for compensation for damage caused by unconstitutional acts of public authorities needs to be developed. The provisions of procedural law regarding the review of court decisions in exceptional circumstances as a result of declaring laws unconstitutional need to be adjusted.*

Key words: *constitutional proceedings, constitutional complaint, legitimacy, right to a fair trial, exceptional circumstances*

1 INTRODUCTION

From time to time in the scientific literature we may come across opinions denying the Constitutional Court of Ukraine (hereinafter - the CCU) of its judicial status. This

discussion became especially relevant after the amendments to the Constitution of Ukraine of 2016, according to which the CCU is no longer mentioned in the relevant section of the Constitution of Ukraine, 'Justice'[1]. In addition, the judicial nature of the legal nature of the CCU was questioned by the Supreme Court in the decision of the Grand Chamber of 14 March 2018 in case № P/800/120/14[2].

Issues related to the status of the CCU directly affect its 'integration' into the mechanism of protection of individual rights and consideration of the appeal to the CCU as an effective means of protection of rights from the standpoint of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). To date, the constitutional complaint, after the reform of 2016, is directly inscribed in Part 4 of Art. 55 of the Constitution of Ukraine as a separate right of a person[3].

In addition, the question of the legitimacy of the constitutional judiciary and its connection with the constituent authorities needs special attention, as non-compliance and ignoring the decisions of the CCU means encroaching on the constitution itself. Today, the theory of democratic legitimacy of constitutional courts[4], which emphasizes their special role due to the legitimacy of impartiality, is becoming relevant. In this case, the attempt to make the CCU a political body, rather than a judicial one, cannot avoid raising concern.

Given the special hopes and expectations placed on the introduction of the institution of an individual constitutional complaint, it is necessary to analyse the practical problems associated with the functioning of such a complaint. First of all, we refer to a large percentage of decisions with a refusal to initiate proceedings related to constitutional complaints, as well as to the problems of reviewing court decisions in exceptional circumstances on the basis of declaring a law (its provision) unconstitutional.

2 JUDICIAL STATUS OF THE CCU AS A BODY OF CONSTITUTIONAL JURISDICTION

In 2016, the provision of Part 1 of Art. 147 (in the old version) with the words 'the Constitutional Court of Ukraine is the only body of constitutional jurisdiction in Ukraine' was excluded from the text of the constitution. The same happened to Part 3 of Art. 124 (in the old edition): 'Judicial proceedings are carried out by the Constitutional Court of Ukraine and courts of general jurisdiction.'

The explanatory note to the draft law on amendments to the Constitution of Ukraine contains the following thesis:

> In accordance with the recommendations of the Venice Commission and given the legal nature of the Constitutional Court of Ukraine, the draft law distinguishes the Constitutional Court of Ukraine as an independent institution.[5]

1 Konstytutsiia Ukraiiny [Constitution of Ukraine]: pryiniata na piatii ses. Verkhovn. Rady Ukraiiny 28.06.1996, Vidomosti Verkhovnoii Rady Ukraiiny (1996) № 30, St. 141 <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text> accessed 9 April 2021.

2 Decision of the Supreme Court of Ukraine, 14 March 2018, No П/800/120/14 <https://zakononline.com.ua/court-decisions/show/73195164> accessed 9 April 2021.

3 Constitution of Ukraine, see Part 4 of Art. 55.

4 P Rosanvalon, Democratic legitimacy. Impartiality, reflexivity, closeness (Kyiv-Mohyla Academy Publishing House 2009).

5 Explanatory note to the draft Law of Ukraine 'On Amendments to the Constitution of Ukraine (regarding justice)' (Verkhovna Rada Ukrainy, 25 November 2015) <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57209> accessed 9 April 2021.

At the same time, neither in the preliminary opinion (document CDL-PI (2015)016) of 24 July 2015[6], nor in the final opinion (CDL-AD (2015)027) of 23 October 2015[7], we will find the relevant opinions of the Venice Commission.

Instead, in the opinion on the draft Constitution of Ukraine of 21 May 1996 (CDL-INF (96)6) on the text approved by the Constitutional Commission on 11 March 1996, the Venice Commission approved the provisions of the Constitutional Court. It noted that the existence of a permanent Constitutional Court 'is fully consistent with the common practice in new democracies to protect the constitutionality of their own legal order through a special, permanent and independent *judicial body*' (italics added by the author).[8]

As we can see, the judicial status of the Constitutional Court of Ukraine was not denied at all by the Venice Commission. On the contrary, it was approved. In the same way, the Venice Commission spoke about other European constitutional courts. And even the very name 'court' should not leave any doubts – the Constitutional Court of Ukraine is referred to as a judicial body endowed with a special constitutional jurisdiction.

The Constitutional Court of Ukraine and the relevant Law of Ukraine 'On the Constitutional Court of Ukraine' of 13 July 2017 № 2136-VIII (Art. 1), adopted after amendments to the Constitution of Ukraine, recognize the Constitutional Court as the body of constitutional jurisdiction, although compared to the previous constitutional wording, which was enshrined in the Constitution of Ukraine, the adjective 'single' disappeared. Here it is appropriate to use the definition of 'jurisdiction' provided by the authors of the draft law to amend the Constitution of Ukraine: jurisdiction should be understood as the competence and authority of the court to consider and resolve any legal disputes, as well as other statutory issues about which there was an appeal to the court of the subject.[9]

One can to some extent agree with M. V. Savchin, that the changes in 2016 did not significantly affect the real legal status of the CCU.[10] Similarly, M. V. Shepitko confers the CCU, along with other courts, with the judiciary in Ukraine. In his opinion, the CCU is a body of the judiciary, and this opinion is also in accordance with Art. 6 of the Constitution of Ukraine.[11] S. V. Riznyk notes that the amendments to the Constitution of Ukraine in 2016 do not mean that the CCU has ceased to be a court, although it argues that its legal nature is 'not limited to one branch of government' and that it has a position 'outside the "traditional" judicial system of authorities'.[12]

The status of the CCU as a body of the judiciary and a body of constitutional jurisdiction is evidenced by the practice of the CCU since 2016. In its decision, the CCU defined itself as a body of constitutional jurisdiction, which occupies a special place in the system of public authorities, performing a specific function – exercising constitutional control to ensure the

6 Venice Commission Preliminary Opinion CDL-PI (2015) 016 of 24 July 2015 <https://supreme.court.gov.ua/userfiles/CDL_PI_2015_016_2015_07_24.pdf> accessed 9 April 2021.

7 Venice Commission Final Opinion CDL-AD (2015) 027 of 23 October 2015 <https://vkksu.gov.ua/userfiles/doc/visnovok%2026.pdf> accessed 9 April 2021.

8 'Venice Commission. Opinion on the draft Constitution of Ukraine of 21 May 1996 CDL-INF (96) 6 on the text approved by the Constitutional Commission on 11 March 1996' in The Constitution of Independent Ukraine. Vol 2, Part 1 (Ukrainska Pravnycha Fundatsiia 1997).

9 Explanatory note (n 1).

10 Y Zalesny (ed), Constitutional justice in the camps of Eastern Europe: problems of theory and practice (Norm 2020).

11 MV Shepitko, Crimes in the field of justice: evolution of views and scientific approaches to the formation of countermeasures (Pravo 2018).

12 SV Riznyk, Constitutionality of normative acts: essence, evaluation methodology and support system in Ukraine (Ivan Franko Lviv National University 2020).

supremacy of the Constitution of Ukraine[13]. In other decision, the CCU, distinguishing 'judges of the judiciary and judges of the Constitutional Court of Ukraine', still mentions them side by side, appealing to the institutional independence of the judiciary[14].

At the same time, it is possible that the relevant fluctuations in the theory and practice of constitutional reform regarding the status of the Constitutional Court of Ukraine influenced the approach of the Supreme Court used in one of the decisions to appeal the dismissal of a judge of the Constitutional Court. The Supreme Court called the Constitutional Court of Ukraine 'more political than a judicial body' (Grand Chamber ruling of 14 March 2018 in case P/800/120/14) and refused to recognize it as a court within the meaning of Art. 6 of the ECHR.

The Supreme Court did not find it possible to use the decision of the European Court of Human Rights in the case of *Oleksandr Volkov v. Ukraine* of 9 January 2013 due to 'significant differences between the circumstances', stating the political nature of the formation of a constitutional jurisdiction[15]. In addition, in the opinion of the Supreme Court, the Constitutional Court of Ukraine does not consider specific legal cases in disputes between certain subjects of law, but may declare regulations unconstitutional (i.e. act as a negative legislator) and make binding interpretations of the Basic Law and interpretation of laws under the current version of the Constitution of Ukraine (i.e. act as a positive legislator)[16].

According to the Supreme Court, the fact that the Constitutional Court of Ukraine is not a court within the meaning of Art. 6 of the ECHR also follows from the decisions of the ECtHR in *Fischer v. Austria* and *Zumtobel v. Austria*, so let us turn to these decisions.

In the judgment in *Fischer v. Austria* of 26 April 1995, paras. 28–30[17], the ECtHR recalls that in accordance with Art. 6, paragraph 1 of the Convention, it is necessary that in determining 'civil rights and obligations' decisions taken by administrative bodies which do not themselves meet the requirements of this article (art. 6, para. 1) are subject to further review by a 'judicial authority with full jurisdiction'. The Austrian Constitutional Court does not have the necessary jurisdiction. Its revision is reduced to establishing the conformity of the administrative decision to the constitution. It may even refuse to consider the merits of a complaint when 'the decision cannot be expected to clarify the issue of constitutional law'. A similar thesis is voiced in the decision of 21 September 1993 *Zumtobel v. Austria*, para. 30: 'The Constitutional Court did not therefore have the power required under Art. 6 para. 1'.[18]

It would be appropriate for the Supreme Court to clarify that it is within the competence of the CCU, in its view, to allow, when relevant, *mutatis mutandis* to apply the above-mentioned ECtHR judgments in the cases against Austria to the Ukrainian case and therefore not to consider the CCU a court in the meaning of Art. 6 of the ECHR. After all, the ECtHR has repeatedly recognized national constitutional courts as a 'court established by law' within

13 Decision CCU, 2 December 2019, No 11-r/2019 paragraph 2, item 2.1 <https://zakon.rada.gov.ua/laws/show/v011p710-19#Text> accessed 9 April 2021.

14 Decision CCU, 27 October 2020, no 13-p/2020, paragraph 5 <https://ccu.gov.ua/sites/default/files/docs/13_p_2020.pdf> accessed 9 April 2021.

15 Oleksandr Volkov v. Ukraine no. 21722/11 (ECtHR, 27 May 2013) <http://hudoc.echr.coe.int/fre?i=001-115871> accessed 14 April 2021. See more in OZ Khotynska-Nor, Theory and Practice of Judicial Reform (Alerta 2016), P. 180 etc and I Izarova Independent judiciary: experience of current reforms in Ukraine as regards appointment of judges in Judicial Management Versus Independence of Judiciary ed. by K Gajda-Rosczynialska and D Szumilo-Kulczycka (Walters Kluwer, 2018) 242–263.

16 Decision of the Supreme Court of Ukraine, 14 March 2018, No П/800/120/14 <https://zakononline.com.ua/court-decisions/show/73195164> accessed 14 April 2021.

17 Fischer v Austria App no 16922/90 (ECtHR, 26 April 1995) paras 28-30 <http://hudoc.echr.coe.int/eng?i=001-57916> accessed 14 April 2021.

18 Zumtobel v Austria App no 12235/86 (ECtHR, 21 September 1993) para 30 <http://hudoc.echr.coe.int/eng?i=001-57847> accessed 14 April 2021.

the meaning of the relevant Art. 6 of the ECHR. It is obvious that the appropriate approach in a particular decision of the ECtHR may be due to the national specifics of the powers of a particular constitutional court. Moreover, the ECtHR uses its own, autonomous interpretation of the term 'court'.

In addition, with the case of Oleksandr Volkov, the Ukrainian parliament violated art. 6 of the Convention not because it dismissed the judge, but because the parliament that carried out the dismissal did not meet the criteria relating to the court in art. 6 of the ECHR. In other words, by dismissing a judge, the parliament actually performed the function of a court, if we again remind ourselves of the autonomous interpretation of the ECHR, while violating the standards of art. 6 of the ECHR.

The Supreme Court tried to explain why the CCU is not a court, referring only to part of the case law of the ECtHR, and ignoring the other decisions, as well as the principle of the autonomous interpretation of the ECHR itself. Instead, based on the circumstances of the case, the Supreme Court would have to explain why the parliament, having dismissed the judges of the CCU, and when acting as a court, did not violate art. 6 of the convention. It is unlikely that the 'political' nature of the CCU, as alleged by the Supreme Court, is an indisputable fact that removes the issue of the dismissal of CCU judges from the right to a fair trial, which is enshrined in art 6 of the ECHR.

It is also worth mentioning the opposite practice of the ECtHR, in which it recognized national constitutional courts as courts within the meaning of Art. 6 of the ECHR.[19]

The most common violations found by the ECtHR were delays by constitutional courts in dealing with individuals' complaints or violations of judicial standards. In these cases, it is important that, in accordance with the autonomous interpretation of the ECHR's provisions, the dispute concerns 'civil rights and obligations' or the establishment by a court of the merits of 'any criminal charges' against a person. The first option is, of course, more likely, as constitutional courts are generally not involved in assessing a particular criminal charge.

At the same time, there is the practice of the ECtHR, which recognizes the appeal to national constitutional courts as an effective mechanism of national legal protection[20], which should be used before applying to the ECtHR in accordance with Part 1 of Art. 35 of the ECHR.

Non-recognition of the action of Art. 6 of the ECHR on the Constitutional Court of Ukraine

19 *Ruiz-Mateos v Spain* App no 12952/87 (ECtHR, 23 June 1993) <http://hudoc.echr.coe.int/eng?i=001-57838> accessed 14 April 2021; *Süßmann v Germany* 20024/92 (ECtHR, 16 September 1996) <http://hudoc.echr.coe.int/eng?i=001-57999> accessed 14 April 2021; *Pauger v Austria* App no 16717/90 (ECtHR, 28 May 1997) <http://hudoc.echr.coe.int/eng?i=001-58047> accessed 14 April 2021; *Pammel v Germany* App no 17820/91 (ECtHR, 1 July 1997) <http://hudoc.echr.coe.int/eng?i=001-58045> accessed 14 April 2021; *Trippel v Germany* App no 68103/01 (ECtHR, 4 December 2003) < http://hudoc.echr.coe.int/eng?i=001-61509> accessed 14 April 2021; *Voggenreiter v Germany* App no 47169/99 (ECtHR, 8 January 2004) <http://hudoc.echr.coe.int/eng?i=001-61564> accessed 14 April 2021; *Mežnarić v Croatia* App no 71615/01 (ECtHR, 15 July 2005) <http://hudoc.echr.coe.int/eng?i=001-69726> accessed 14 April 2021; *Milatova v the Czech Republic* App no 61811/00 (ECtHR, 21 June 2005) < http://hudoc.echr.coe.int/eng?i=001-69426> accessed 14 April 2021; *Švarc and Kavnik v Slovenia* App no 75617/01 (ECtHR, 8 February 2007) < http://hudoc.echr.coe.int/eng?i=001-79375> accessed 14 April 2021; *Oršuš and Others v Croatia* App no 15766/03 (ECtHR, 16 March 2010) < http://hudoc.echr.coe.int/eng?i=001-97689> accessed 14 April 2021; *Kübler v Germany* App no 32715/06 (ECtHR, 13 January 2011) <http://hudoc.echr.coe.int/eng?i=001-102811> accessed 14 April 2021; *Juričić v Croatia* App no 58222/09 (ECtHR, 26 July 2011) http://hudoc.echr.coe.int/eng?i=001-105754 accessed 14 April 2021; *AK v Liechtenstein* App no 38191/12 (ECtHR, 9 July 2015) < http://hudoc.echr.coe.int/eng?i=001-155824> accessed 14 April 2021.

20 AL Derkach, *Relevant Questions of Human Rights Protection in the Constitutional Process in the Context of Global Challenges* (Feniks 2018) 146–148; V. Pleskach, 'The effectiveness of the constitutional complaint as a national remedy in the case law of the European Court of Human Rights' (2020) 1 Ukrainian Journal of Constitutional Law 38.

is a rather far-reaching position, as it concerns the access of citizens to the CCU and the standards of complaint handling. After all, according to this logic, if the Constitutional Court is considered to be not a judicial body but a political one, then it cannot be accused of violating the right to judicial protection and fair trial, in particular, in case of a delay by the Constitutional Court of Ukraine of considering complaints or violation of the standards of judicial review.

In fact, the political nature attributed to the Constitutional Court of Ukraine by the Supreme Court as something obvious is opposed in international practice to the independence of the judiciary. National practice in Europe is also moving towards denying the politics of constitutional courts. Thus, the German doctrine is based on the fact that the decisions of the Federal Constitutional Court are not political, and the Federal Constitutional Court is recognized as a body of justice.[21] The argument regarding the political nature of the CCU, which allegedly gives grounds to consider the dismissal of a CCU judge as an act of political responsibility (the position of the Supreme Court), does not stand up to any criticism in this regard. After all, the Supreme Court indirectly denies any independence and impartiality of CCU judges and puts them directly at the service of politicians, allowing politically motivated dismissals. Instead, the influence of CCU judges has always been prohibited in any way in all versions of the relevant provisions of the Constitution of Ukraine.

Political influence on CCU judges should be unequivocally assessed negatively. The political motivation for making decisions on the appointment of CCU judges (which, for example, is described by S. V. Riznyk[22]) should also go down in history as an unacceptable practice. Instead, the competitive principles of appointing CCU judges should be introduced. The need to improve the procedure for appointing CCU judges is particularly emphasized by the Venice Commission (paras. 71–81 of the Opinion of 10 December 2020 No. 1012/2020 CDL-AD (2020)039).[23]

As for the competence of the CCU, its characterization as a 'negative legislator' or even a 'positive legislator' should not mean the political nature of the court, but only demonstrate a special, constitutional jurisdiction. Moreover, the corresponding positioning (positive and negative legislator) is rather a legal metaphor, which is also not generally accepted. Thus, G. O. Khrystova claims that the decisions of the CCU on the constitutionality of legal acts cannot be recognized by normative legal acts, and the legal interpretative provisions contained in the decisions of the CCU have a supporting role.[24]

It is our deep conviction that the recognition of the out-of-court status of the Constitutional Court of Ukraine, as well as its political rather than legal nature, degrades the role of the CCU and does not contribute to the smooth functioning of the judicial mechanism for human rights protection. The way to create a separate constitutional court, which was chosen in Europe as a result of the victory of Hans Kelzen's arguments[25] over arguments by Karl Schmitt[26], is hardly worth revising. Such a revision calls into question the very

21 N Akhtenberg et al., *State law of Germany: a shortened translation of the German seven-volume edition. Vol 1* (Institute of State and the law of the Russian Academy of Sciences 1994).

22 See: Riznyk (n 9) 133.

23 Venice Commission, CDL-AD (2020)039-e. Ukraine - Urgent opinion on the Reform of the Constitutional Court, endorsed by the Venice Commission on 11 December 2020 at its 125th online Plenary Session (11–12 December 2020)<https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)039-e> accessed 9 April 2021.

24 GO Khrystova, 'Legal nature of acts of the Constitutional Court of Ukraine' (PhD (Law) thesis, Kharkiv 2004).

25 G Kelzen, 'Who should be the guarantor of the constitution' in K Schmitt, *The state: law and politics* (Publishing House 'Territoriia Buduschego' 2013).

26 K Schmitt, 'Guarantor of the Constitution' in K Schmitt, *The state: law and politics* (Publishing House 'Territoriia Buduschego' 2013).

existence, authority and role of the Constitutional Court in the mechanism of the protection of human rights, as well as the legal force of its decisions, its own jurisdiction, its institutional independence, which is ensured by judicial status (according to Kelzen), creating uncertainty regarding its place in the judicial system by potential competition with the Supreme Court as the 'highest court in the judicial system of Ukraine' (Part 3 of Art. 125 of the Constitution in its current version).[27]

3 LEGITIMACY OF CONSTITUTIONAL COURTS AND CONSTITUENT POWER

According to P. Rosanvalon, the constituent power as a direct existence of the sovereignty of the people cannot be taken as the norm of democratic life.[28] At the same time, the scientist distinguishes the electoral people, the social people and the people as a principle. Constitutional courts guarantee the identity of democracy as a temporary institution. The need for such a pluralization of the temporal dimensions of democracy is only increasing in modern societies, which are increasingly threatened by short-lived dictatorships. The function of representation of principles thus acquires the strengthened value.[29]

The Venice Commission in paragraph 40 of the opinion CDL-AD (2016) 001 of 11–12 March 2016 concerning Poland stated: '...It is the constituent power, not the ordinary legislator, that entrusts the Constitutional Tribunal with the competence to ensure the supremacy of the Constitution.' A simple piece of legislation that threatens to make constitutional review impossible must itself be assessed for constitutionality before it can be applied by a court. Otherwise, an ordinary law that simply states that 'this abolishes constitutional control, enters into force immediately' could be the sad end of constitutional justice. The very idea of the supremacy of the constitution presupposes that such a law, which potentially threatens constitutional justice, must be controlled and, if necessary, annulled by the Constitutional Tribunal before it enters into force (paragraph 41 of the opinion).[30]

According to the Venice Commission, 'Ignoring the decision of the Constitutional Court is tantamount to ignoring the Constitution and the constituent authority, which gave the Constitutional Court the power to ensure this supremacy'.[31] Thus, according to the appropriate approach, it is the constituent power that manifests itself through the mouths of the constitutional courts, which determines a high degree of their legitimacy.[32]

S. V. Riznyk expresses the opinion that it is necessary to check the law on amendments to the Constitution of Ukraine on its own initiative during the first application of the Basic Law in the new wording within the meaning of Arts. 155 and 157 of the Constitution, as it is its 'natural duty arising from the very essence of constitutional jurisdiction'.[33] At the same time,

27 See details: OV Kuzmenko, HV Berchenko, 'Status of the Constitutional Court of Ukraine as a judicial body' (2020) 4 Prykarpattia Legal Bulletin 6.

28 P Rosanvalon, *Democratic legitimacy. Impartiality, reflexivity, closeness* (Kyiv-Mohyla Academy Publishing House 2009).

29 ibid, 170-171.

30 Venice Commission, Opinion On Amendments To The Act Of 25 June 2015 On The Constitutional Tribunal Of Poland 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)001-e> accessed 9 April 2021.

31 Venice Commission, CDL-AD (2017)003, Spain - Opinion on the law of 16 October 2015 amending the Organic Law No. 2/1979 on the Constitutional Court, para 69 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)003-e> accessed 9 April 20201.

32 See more: HV Berchenko, 'Development of the constitution through its judicial interpretation and constituent power' (2020) 8 Actual problems of the state and law 18.

33 Riznyk (n 9) 355.

the non-application of the law on amendments to the Constitution by the CCU should take place in exceptional cases.[34]

The issue of legitimacy of the CCU was especially relevant in connection with the adoption of the decision of 27 October 2020 № 13-r/2020 (on the powers of the National Agency for Prevention of Corruption). In particular, the issue concerned how the Constitutional Court went beyond the constitutional submission.

As noted by the Venice Commission in its Opinion on the Draft Constitutional Court of Montenegro, CDL-AD (2008)030, para. 50[35]:

> …a general power of the Court to start proceedings on its own initiative would make the Court a political actor and the Court could loose its independent position. Each decision to take up a case or not to do so could be criticised as a political choice. Consequently, the Court should be limited to act on its own initiative only in cases when it has to apply a norm of which it doubts the constitutionality

Earlier, Part 3 of Art. 62 of the Law 'On the Constitutional Court of Ukraine' of 16 October 1996 № 422/96-BP (the Law lost its power on the basis of Law № 2136-VIII of 13 July 2017) directly established the possibility for the CCU to declare other legal acts unconstitutional 'affecting making a decision or giving an opinion on the case.' At the same time, the current Law of Ukraine 'On the Constitutional Court of Ukraine' of 2017 does not directly regulate the issue of going beyond the constitutional submission by the Constitutional Court of Ukraine.

The problem of going beyond the submission is considered in detail in paragraphs 25–29 of the conclusion of the Venice Commission of 10 December 2020.[36] Analysing the abolition in the current Law of the right of the Constitutional Court of Ukraine to go beyond the submission, the Venice Commission concludes: 'There is an assumption that the repeal of a provision indicates that the legislator made a conscious choice and that it was not made "recklessly"'. If this is the case, then the decision of the Court, apparently, exceeded the proper powers in Decision 13-r / 2020. To overcome any uncertainty in future proceedings, the parliament must specify this in the Law on the Constitutional Court.

Thus, based on the conclusion of P. Rosanvalon and the position of the Venice Commission, the constitutional courts have a separate legitimacy and in certain cases have the right to act independently on behalf of the constituent power, defending the constitution. At the same time, of course, in each case, going beyond the constitutional representation must be justified.

4 PROBLEMS OF REALIZATION OF THE INSTITUTE OF CONSTITUTIONAL COMPLAINT IN UKRAINE

Amendments to the Constitution of 2016 were characterized, in particular, by granting the Constitutional Court of Ukraine the right to consider constitutional complaints of individuals and to declare laws unconstitutional based on the results of the review. We agree

34 S Riznyk, 'Problems of assessing the constitutionality of laws amending the Constitution of Ukraine' (2019) 4 Ukrainian Journal of Constitutional Law 12.

35 https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2008)030-e

36 Venice Commission, Opinion No 1012/2020. Ukraine – Urgent Opinion On the Reform of the Constitutional Court Issued pursuant to Article 14a of the Venice Commission's Rules of Procedure (10 December 2020) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2020)019-e> accessed 9 April 2021.

with S. V. Riznyk on the impossibility of overestimating the potential of a constitutional complaint in Ukraine.[37] Today, several circumstances hinder the effective implementation of the institute of constitutional complaint in practice.

First of all, this is a significant percentage of refusals to initiate proceedings on constitutional complaints. The court often refuses to open constitutional proceedings in cases on the grounds given in paragraph 4 of Part 1 of Art. 62 of the Law 'On the Constitutional Court of Ukraine', i.e. inadmissibility of the constitutional complaint. Moreover, the most common reason for refusing to open proceedings in the case is the inadmissibility of the constitutional complaint in connection with non-compliance with paragraph 6 of Part 2 of Art.55 of the Law on 'substantiation' of the complaint.[38]

At the same time, paradoxically, the ineffectiveness of a constitutional complaint as a means of protecting the rights of the individual is most evident in cases where the law or certain provisions of the law will be declared unconstitutional based on the results of the complaint. The review of the decision in a specific case of a person who appealed to the CCU does not take place for formal reasons.[39]

One of the first decisions based on the results of consideration of the constitutional complaint was the decision of the Second Senate of the CCU № 4-r(II)/2019 of 5 June 2019. The CCU declared the right of the National Anti-Corruption Bureau of Ukraine (NABU) to file lawsuits regarding the invalidity of agreements unconstitutional, as only the prosecutor's office has the right to file such lawsuits in accordance with the Constitution on behalf of the state.

Part 3 of Art. 320 of the Commercial Procedural Code of Ukraine (similar rules are in other procedural codes) provides for the possibility of reviewing the court decision in connection with exceptional circumstances. This provision replaced the old version of the procedural codes, which allowed for a review of court decisions on newly discovered circumstances as a result of the CCU's recognition of laws as unconstitutional.[40]

As for the invalidity of agreements on NABU lawsuits, the current position of commercial courts up to the Commercial Court of Cassation within the Supreme Court is not to review court decisions, as there are no grounds for this. That is, all agreements that were declared invalid will remain so, because, in the opinion of the courts, the decision of the CCU has no retroactive effect (decision of the Commercial Court of Cassation of the Supreme Court in case № 910/24263/16 of 27 August 2019[41], decision of the Central Commercial Court of Appeal of 13 June 2019 in case № 904/8354/16[42]). The obstacle to the review of court decisions

37 Riznyk (n 9) 407.

38 For more details, see: H Berchenko, E Tkachenko, 'The right to appeal with an individual constitutional complaint in Ukraine: theoretical and practical aspects' (2018) 12 Ukrianian Law. 92; D Terletsky, A Ezerov, 'Exercise of the right to a constitutional complaint: analysis of the practice of the Constitutional Court of Ukraine' (2018) 5 Bulletin of the Constitutional Court of Ukraine 74.

39 See: H Berchenko, 'The right of NABU to go to court with claims for invalidation of transactions is unconstitutional: is it possible to reconsider a court decision?' (2019) 47 Accountant 14; HV Berchenko, 'The effectiveness of the constitutional complaint through the prism of review of court decisions in exceptional circumstances' in *Current challenges and current issues of judicial reform in Ukraine: Proceedings of the IV International scientific-practical conference* (Chernivtsi National University 2020) 178–180.

40 See more: Y Barabash, "Means of protection of rights vs legal certainty" as a dilemma of the domestic official constitutional doctrine in the context of the functioning of the institution of individual complaint' (2020) 4 Ukrainian Journal of Constitutional Law 48.

41 Decision of the Commercial Court of Cassation of the Supreme Court in case № 910/24263/16 of 27 August 2019 <http://reyestr.court.gov.ua/Review/84008715> accessed 9 April 2021.

42 Decision of the Central Commercial Court of Appeal of 13 June 2019 in case № 904/8354/16 <http://reyestr.court.gov.ua/Review/82400552> accessed 9 April 2021.

was the reference to the presumption of the constitutionality of the provisions of the law, which means that the law is valid until it is declared unconstitutional. This, according to the logic of the courts, follows from the text of Part 2 of Art. 152 of the Constitution of Ukraine. That is, the decision of the CCU has no retroactive effect and is valid only for the future.

The Northern Commercial Court of Appeal used another argument, clearly feeling the weakness of the above-mentioned argument against the retroactive effect. In the decision of 2 October 2019, in case № 910/131/17[43], it stated that the decision to declare the contracts invalid is executed from the moment it enters into force. That is, all decisions to declare the contract invalid are executed at the time of entry into force of the decision. It is the fact of enforcement that directly precludes the review of a court decision in accordance with a direct instruction of the Commercial Procedure Code. S. Shevchuk also proposed to create a mechanism at the legislative level to restore the rights to already executed court decisions.[44] Instead, D. Terletsky believes that the reservation on the execution of a court decision provides 'reasonable safeguards to maintain the necessary balance between public and private interest'.[45]

Let us also turn to the practice of administrative courts, where we will also see obstacles to reviewing court decisions in exceptional circumstances. For example, the Supreme Court, composed of a panel of judges of the Administrative Court of Cassation, considers that 'a decision that has entered into force, which denied the claim, does not provide for enforcement' (decision of 3 June 2019, administrative proceedings №K/9901/13822/19[46]), therefore, it turns out that it is impossible to review it at all in exceptional circumstances after the law is declared an unconstitutional decision by the decision of the CCU. The same position was confirmed by the Supreme Court composed of the Joint Chamber of the Administrative Court of Cassation in the decision of 19 February 2021.[47]

The review provision could hypothetically be involved if the CCU directly gave retroactive effect to its decision. However, this is literally impossible, as in accordance with Part 2 of Art. 152 of the Constitution of Ukraine and Art. 91 of the Law 'On the Constitutional Court of Ukraine', the CCU has no right to establish the unconstitutionality of the law and its invalidity from an earlier date than the date of the decision of the CCU.

If the court applied an unconstitutional law, and the decision of the CCU on the unconstitutionality of the law already existed at the time of the court's decision, then the option of reviewing it in exceptional circumstances is absurd. In this case, the court simply ignored the decision of the CCU, violating the law. A judge cannot (and does not have the right to) fail to know about the position of the CCU *a priori* and its decision that ignores such a position of the CCU will be illegal, the observance of which must be checked by the appellate and cassation instances.

43 Decision of the Northern Commercial Court of Appeal in case № 910/131/17 of 2 October 2019 <http://reyestr.court.gov.ua/Review/84846085> accessed 9 April 2021.

44 'Speech of the Chairman of the Constitutional Court of Ukraine S Shevchuk at the scientific-practical conference "Constitutional rights of man and citizen and guarantees of their provision"' (2018) 5 Bulletin of the Constitutional Court of Ukraine 95.

45 D Terletsky, 'Legally significant consequences of decisions of the Constitutional Court of Ukraine in criminal proceedings' (2020) 4 Ukrainian Journal of Constitutional Law 109.

46 Decision of the Supreme Court, composed of a panel of judges of the Administrative Court of Cassation of 3 June 2019 in administrative proceedings №K/9901/13822/19 <http://reyestr.court.gov.ua/Review/82194237> accessed 9 April 2021.

47 Resolution of the Supreme Court composed of the Joint Chamber of the Administrative Court of Cassation of 19 February 2021 in administrative proceedings № K/9901/29652/19 <https://reyestr.court.gov.ua/Review/95010526> accessed 9 April 2021.

Taking the position, as claimed by the courts, that the decision of the CCU is not retroactive, the question arises: why is the relevant provision for review of the court decision in connection with the unconstitutionality (constitutionality) of the law enshrined in the procedural codes, what is its meaning? Maybe it is not necessary at all?

According to V. Pleskach, the review of court decisions is carried out 'in order to terminate the execution of the decision of the court of general jurisdiction, which was adopted on the basis of unconstitutional law'.[48] At the same time, obviously, some differentiation is needed in this matter depending on the specifics of procedural proceedings.

Y. G. Barabash proposes to differentiate the approaches to be applied in civil and commercial proceedings, as well as in the framework of the application of the Code of Administrative Procedure. If restrictions on review are appropriate in the first two cases, the administrative rights of the complainant should be restored in administrative proceedings, regardless of the enforcement of the judgment (unless the rights are not subject to restoration). As for the criminal process, the decisions of the CCU on the principle of *ex tunc* should occur in almost every case.[49]

Thus, we have a rather systematic and serious problem of reviewing court decisions as a result of declaring the provisions of laws unconstitutional. This nullifies the efforts of the subjects of the constitutional complaint, as they can be satisfied only with the contribution to the development of the legal system for the future. As rightly noted by Y. G. Barabash, a person has almost no chance to return to their case in general court.[50] V. Pleskach, however, emphasizes that the effect will be present in cases of ongoing violations.[51]

We must also mention the institution of an interim provisional and protective measure, which is an executive document that is directly recognized in the Law 'On the Constitutional Court of Ukraine' (Art. 78). The interim measure was applied only once on 16 April 2019 on the constitutional complaint of a citizen Dermenzha. Also, this case has been criticized. O. Vodyannikov believes that this institution was borrowed from Rule 39 of the Rules of Procedure of the European Court of Human Rights, and therefore the CCU was used incorrectly.[52]

Currently, the Constitutional Court itself is considering a constitutional complaint regarding the compliance of the Constitution of Ukraine (constitutionality) with the provisions of paragraph 1 of part three of Art. 320 of the Commercial Procedural Code of Ukraine.[53] This complaint is about the unconstitutionality of procedural legislation, making it impossible to review court decisions. However, there is a possibility that the courts simply misinterpret the provisions of procedural law and the CCU is sufficient to provide the relevant provisions of a conformal (in accordance with the Constitution) interpretation (this is directly allowed by Part 3 of Art. 89 of the Law 'On the Constitutional Court of Ukraine') and not recognize the provisions themselves as unconstitutional.

48 Pleskach (n 10) 46.

49 Barabash (n 30) 57.

50 YG Barabash, 'The role of academic thought in the formation of the official constitutional doctrine' in *Mutual achievements of the European Commission "For Democracy through Law" and constitutional justice and the problem of interpretation in constitutional proceedings*: a collection of materials and abstracts of the International Online Conference (Kyiv, Vaite, 2020) 44.

51 Pleskach (n 10) 46.

52 O Vodyannikov, 'Interim provisional and protective measure of the CCU: something went wrong' (LB.ua, 19 April 2019) <https://lb.ua/blog/oleksandr_vodennikov/424996_zabezpechuvalniy_nakaz_ksu_shchos.html> accessed 9 April 2021.

53 All the complaints to the CCU are placed on its website, see <http://www.ccu.gov.ua/sites/default/files/16_195_2020.pdf> accessed 19 April 2021.

In our opinion, the review of court decisions, as a result of the satisfaction of constitutional complaints, needs to be improved at the legislative level. It is necessary to form an adequate approach to the 'non-enforcement' of court decisions and to outline the range of cases covered by the provision on review of court decisions in exceptional circumstances in connection with the recognition of the law as unconstitutional. Thus, D. Terletsky sees a conflict between the provisions of Part 2 of Art. 152 of the Constitution of Ukraine and the provisions of procedural laws, advocating for its resolution by a single legislative body.[54] A. Ezerov insists on the need for a legislative solution to the problem, in order to, despite the long-term effect of the decisions of the CCU, guarantee the person the right to a fair resolution of the dispute.[55]

By the way, it is possible that given the current practice of the Supreme Court, questions will have to be asked about amendments to Part 2 of Art. 152 of the Constitution of Ukraine, in order to directly allow such a review for a person who has filed a constitutional complaint. However, there is a debate about the range of subjects to which the reverse action should apply.

In connection with the need to recognize the admissibility of the retroactive effect of the decisions of the CCU, E. V. Chernyak proposes to supplement Art. 152 of the Constitution of Ukraine with part 3 of the following content: 'Judicial acts based on the norms of laws that are declared unconstitutional are reviewed by the court in each case at the request of citizens whose rights and freedoms have been violated.'[56]

By the way, it is worth mentioning the 'prejudicial' decisions of the CCU, the right to indicate which in the CCU was provided by Art. 74 of the Law 'On the Constitutional Court of Ukraine' of 6 October 1996 № 422/96-VR (already expired) and which in practice meant the retroactive effect of the CCU decision in time[57], i.e. acts declared unconstitutional shall cease to be valid from the moment of the adoption of these acts[58]. The CCU itself did not see any obstacles in the text of the constitution during the operation of the relevant provision of the CCU in terms of such a retroactive effect and from time to time used the relevant right. The same part 2 of Art. 152 of the Constitution before the amendments in 2016, as now, did not directly indicate the possibility of reverse decisions of the CCU (the novelty of 2016, in fact, was only to give the CCU the right to postpone the entry into force of its decisions in time 'for the future'). Nevertheless, the retroactive effect of decisions until 2016, despite the lack of direct permission in the Constitution of Ukraine, was formalized by the already mentioned 'prejudicial' nature.

In addition, Part 3 of Art. 152 of the Constitution of Ukraine remains 'dead'. The Law on Compensation for Damage Caused by the Application of an Unconstitutional Law, which requires the adoption of Part 3 of Art. 152 of the Constitution of Ukraine, still does not

54 D Terletsky, 'Execution of decisions of the Constitutional Court of Ukraine on unconstitutionality of legal acts or their provisions' in *Mutual achievements of the European Commission 'For Democracy through Law' and constitutional justice bodies and problems of interpretation in constitutional proceedings:* collection of materials and abstracts of the International Online Conference (Kyiv, Vaite, 2020) 83.

55 A Ezerov, 'Constitutional complaint and exceptional circumstances for review of cases' <https://supreme.court.gov.ua/supreme/pres-centr/zmi/811129/> accessed 9 April 2021.

56 EV Chernyak, *Protection of the Constitution of Ukraine and the constitutions of foreign countries: a constitutional and comparative analysis* (Lira-K Publishing House 2020); E Chernyak, 'Application by courts of the provisions of the Constitution of Ukraine as norms of direct action and the right to review a court decision as a result of establishing the constitutionality of a law, other legal act or their individual provisions as a means of protecting fundamental rights and freedoms' (2020) 4 Ukrainian Journal of Constitutional Law 123.

57 See: Y Barabash, 'Prejudicial decisions of the Constitutional Court of Ukraine: problematic issues of theory and practice' (2020) 6 Pravo Ukrainy 45; A Savchak, 'Prejudicial decisions of the Constitutional Court of Ukraine: theoretical and legal aspect' (2011) 2 Public law 27.

58 Khrystova (n 14) 125.

exist.[59] At the same time, even in the absence of a law, there are already examples in judicial practice of compensation for such damage (see, for example, the decision of the Third Administrative Court of Appeal of 3 March 2021 in case № 340/4092/20[60]). According to Y. G. Barabash, it is necessary to provide a compensatory mechanism in case it is impossible to reconsider the person's decision. As an option, it is proposed that the amount of money allocated to damages should be determined by the court, which is authorized to consider the application for review of the decision in exceptional circumstances.[61] A. Ezerov also supports the legislative regulation of the relevant procedure.[62] D. Terletsky, supporting the adoption of a special law, does not exclude the application of the provisions of the Civil Code of Ukraine to the relevant legal relations.[63]

Note that Part 3 of Art. 152 of the Constitution implicitly allows the decision of the CCU *ex tunc* in terms of compensation for damage, because by the opposite interpretation (the effect of the decision only 'for the future') it completely loses its meaning (unconstitutional law simply ceases to apply and cannot cause any harm). Thus, the general conclusion about the complete and absolute constitutional prohibition of the retroactive effect of the decisions of the CCU in time seems superficial and unconvincing.

From these positions, of course, the Law 'On the Constitutional Court of Ukraine' needs to be improved in terms of the mechanism of the execution of CCU decisions. After all, today this mechanism consists of three short sentences contained in Arts. 97–98 of Chapter 14 of the Law, which do not explain the effect of CCU decisions in time, and do not specify the procedure for the execution of CCU decisions, etc.

5. CONCLUDING REMARKS

It can be concluded that the constitutional judiciary in Ukraine is at a difficult stage of its development. This is due both to the model of the constitutional complaint itself (it is exclusively normative) and to the practice that is being formed. The reason for inefficiency can also be called doctrinal unpreparedness for the implementation of a constitutional complaint, because, in fact, despite the large number of works on this issue, the practical aspect was insufficiently thought out.

Both the institutional component and the regulatory framework of the CCU itself need to be significantly improved. We are referring specifically to the Law 'On the Constitutional Court of Ukraine' in terms of the interim provisional and protective measure, the implementation of the decisions of the CCU, their actions in time, and specific mechanisms for the restoration of individual rights. In pursuance of the Constitution of Ukraine, a legislative mechanism for compensation for damage caused by unconstitutional acts of public authorities needs to be developed. The provisions of procedural law, regarding the review of court decisions in exceptional circumstances as a result of declaring laws unconstitutional, need to be adjusted.

59 See more in Barabash (n 30) 55.

60 The decision of the Third Administrative Court of Appeal of 3 March 2021 in case № 340/4092/20 <https://reyestr.court.gov.ua/Review/95276261> accessed 9 April 2021.

61 Barabash (n 30) 56.

62 Ezerov (n 46).

63 Terletsky (n 45) 84.

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CASE NOTE

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)

Journal homepage http://ajee-journal.com

THE LEGAL REGULATION OF THE USE OF NATURAL HEALING RESOURCES: THE THEORY AND PRACTICE OF DISPUTES RESOLUTION

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To cite this note: *Sokolova A, Cherkashyna M* 'The Legal Regulation of the Use of Natural Healing Resources: The Theory and Practice of Disputes Resolution' 2021 2(10) *Access to Justice in Eastern Europe 144–163. DOI: 10.33327/AJEE-18-4.2-n000065*

To link to this note: https://doi.org/10.33327/AJEE-18-4.2-n000065

Submitted on 28 Febr 2021 / Revised 21 Mar 2021 / Approved 30 Apr 2021 / Published online: 03 May 2021 View data

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ACKNOWLEDGEMENTS

The authors would like to express their gratitude to the reviewers for their help and to the English editor.

CONFLICT OF INTEREST

The authors have declared that no conflicts of interest or competing interests exist.

CONTRIBUTORS

All the co-authors read and approved the final version and agreed to be accountable for all aspects of this contribution.

THE LEGAL REGULATION OF THE USE OF NATURAL HEALING RESOURCES: THE THEORY AND PRACTICE OF DISPUTES RESOLUTION

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Abstract *The article is devoted to the issue of regulating the use of natural healing resources in Ukraine, the European Union, and other countries. Natural resources have been found to have many functions, but one of the most important is the ability to use them as a means of preserving or maintaining human health. For this reason, natural healing resources are subject to a special legal regime. Public relations arising from the use and protection of natural healing resources are subjected to legal regulation and devoted to the identification and accounting of natural healing resources, ensuring their rational extraction, use, and protection in order to create favourable conditions for treatment, disease prevention, and recreation.*

Despite the wide range of healing properties in various natural objects, the environmental legislation of Ukraine contains only a small number of rules on their use. This problem is most fully disclosed in the Water Code of Ukraine, which not only enshrines the procedure for assigning certain water resources to the category of healing but also provides for the adoption of special law statutes and regulations regarding the list of existing water bodies in Ukraine and their inherent healing functions.

These regulations highlight the fact that most of the natural healing resources specified in the list belong to the sphere of subsoil use. However, there are no norms in the Subsoil Code of Ukraine that would regulate the use and protection of such objects. Instead, the Subsoil Code of Ukraine contains general rules on basic requirements in the field of subsoil protection, as well as a special article on the protection of subsoil areas of special scientific or cultural value. Healing resources are not mentioned, which is a glaring omission.

Situation analysis of the national legal system regarding the use of natural healing resources has shown the need to restructure the legislation, with the primary task of protecting and preserving the healing properties of such sources. For this purpose, the existing practice of public relations among developed European countries, as well as the positive experience in this area, should be taken into account to achieve effective improvement of the legislation system of Ukraine.

Studying the issue of prosecution for violation of the rules on the use of natural healing resources or causing damage to them suggests that the national legal system is based on economic interests, without prioritising the preservation of the healing value of such sources. As a result,

Ukraine's policy to preserve the healing properties of natural objects is not characterised by effective methods, significantly reducing the number of such unique and useful resources.

The analysis of court cases is evidence that the practice of effective protection and restoration of healing resources is not common. The number of such cases is currently too small when compared with those regarding damages to such natural resources caused by legal entities and individuals.

Keywords: *the right to use natural resources, the use of natural resources for health and recreational purposes, natural healing resources, the use and protection of natural healing resources, climate as a healing resource*

1 INTRODUCTION: THE LEGAL REGIME FOR USING NATURAL HEALING RESOURCES IN UKRAINE

According to the level of legal regulation, environmental rights are divided into two categories: fundamental and other rights in the field of environmental protection. Thus, the basic constitutional rights are the right to private property and the right of everyone to a favourable environment, reliable information about its condition, and compensation for damage caused to one's health or property through an environmental offence. In addition, everyone has the right to health care and medical assistance. The rights of everyone to a safe environment for life and health and to compensation for damage caused by the violation of this right are enshrined in the Constitution of Ukraine, based on the provisions of such international human rights instruments as the Universal Declaration of Human Rights (1948),[1] the Convention on Human Rights and Fundamental Freedoms (1950),[2] the European Social Charter (1961),[3] etc. Significant attention is paid to human rights and environmental rights protection at the international level. This is evidenced by the works of such scholars as Stephen J. Turner, Sumudu Atapattu, etc., on the history of environmental rights, the relevance of environmental rights standards, and international human rights covenants.[4]

The right to use natural resources (natural healing resources and natural resources for health and recreation purposes) defined in the system of environmental rights is a prerequisite for the realisation of the right of a person and citizen to health care and directly affects its implementation. Natural resources have many functions, but one of the most important is the ability to use them as a means of preserving or maintaining human health. When carrying out economic and other activities, primarily related to the use of natural resources and complexes, the requirements of environmental protection should be observed, and the environmental rights of others should not be violated.

The aim of the research paper is to conduct a comparative study of environmental and legal aspects of using natural healing resources in Ukraine, other countries, and the European Union, as well as to provide grounds for making suggestions to improve the national

1 United Nations General Assembly Resolution 217 A (III) of 10 December 1948 Universal Declaration of Human Rights [1948] UN Docs A/810/71 <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 21 March 2021.

2 Council of Europe, *European Convention on Human Rights: As amended by Protocols Nos 11 and 14, supplemented by Protocols Nos 1, 4, 6, 7, 12, 13 and 16* (ECHR 2010) <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 21 March 2021.

3 Council of Europe Treaty No 035 of 18 October 1961 European Social Charter (*Council of Europe*) <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/035> accessed 21 March 2021.

4 SJ Turner et al (eds), *Environmental Rights: The Development of Standards* (Cambridge University Press 2019) 1-40 <https://doi.org/10.1017/9781108612500> accessed 21 March 2021.

legislation on natural healing resources. The legal basis for the implementation of such rights in Ukraine is the codes, i.e., Land Code,[5] Water Code,[6] Forest Code,[7] and Subsoil Code,[8] and laws 'On Flora',[9] 'On Fauna',[10] 'On Nature Reserves',[11] and others. A separate kind of right to use natural resources is the right to use healing natural resources.

There are no special laws and regulations in the ecological legislation of Ukraine devoted to the legal regulation of protection, preservation, and use of the whole complex of natural healing resources. The Law of Ukraine 'On Resorts' (Art. 6) provides an exclusive list of natural resources that can be classified as healing ones: 'natural healing resources include mineral and thermal waters, therapeutic mud and ozokerite, brine of estuaries and lakes, seawater, natural resources objects and complexes with favourable climatic conditions for treatment, medical rehabilitation, and prevention of diseases'.[12] Therefore, in our opinion, public relations arising from the use and protection of natural healing resources must be properly regulated. Only certain aspects of identification and accounting of natural healing resources, ensuring their rational extraction, use, and protection in order to create favourable conditions for treatment, disease prevention, and recreation, are subject to legal regulation (Art. 2 of the Law 'On Resorts').

The Law of Ukraine 'On Environmental Protection'[13] classifies healing and recreational, natural resources as objects subject to special protection. This is because these natural objects have great ecological value as unique and typical natural complexes that maintain a favourable ecological environment and prevent and stabilise negative natural processes and phenomena (section 1 of Art. 60). Legal protection consists of certain restrictions, and they can be applied without exception to all individuals and legal entities without violating the principle of general use of nature. Therefore, within resort and health-improving zones, activities that contradict their purpose or can negatively influence the healing qualities and sanitary condition of the territory subject to special protection are forbidden (section 3 Art. 62). In the territory of recreational zones, the following is forbidden: a) economic and other activities that adversely affect the environment or may prevent their use as intended; b) changes in the natural landscape and other actions that contradict the use of these areas as intended (section 2 Art. 63).

According to section 1 Art. 62 of the Law of Ukraine 'On Environmental Protection', resorts and health zones are areas that have natural healing factors: mineral springs or climatic and other conditions conducive to the treatment and rehabilitation of people. Recreational areas, in turn, are areas of land and water space designed for organised mass recreation and

5 Code of Ukraine No 2768-III of 25 October 2001 Land Code of Ukraine [2002] VVR 3-4/27 <https://zakon.rada.gov.ua/laws/show/2768-14> accessed 21 March 2021.

6 Code of Ukraine No 213/95-BP of 6 June 1995 Water Code of Ukraine [1995] VVR 24/189 <https://zakon.rada.gov.ua/laws/show/213/95-%D0%B2%D1%80> accessed 21 March 2021.

7 Code of Ukraine No 3852-XII of 21 January 1994 Forest Code of Ukraine [1994] VVR 17/99 <https://zakon.rada.gov.ua/laws/show/3852-12> accessed 21 March 2021.

8 Code of Ukraine No 132/94-BP of 27 July 1994 Code of Ukraine On Subsoil [1994] VVR 36/340 <https://zakon.rada.gov.ua/laws/show/132/94-%D0%B2%D1%80> accessed 21 March 2021.

9 Law of Ukraine No 2026-III of 5 October 2000 On Flora [2000] VVR 50/435 <https://zakon.rada.gov.ua/laws/show/591-14> accessed 21 March 2021.

10 Law of Ukraine No 2894-III of 12 December 2001 On Fauna [2001] VVR 14/97 <https://zakon.rada.gov.ua/laws/show/2894-14> accessed 21 March 2021.

11 Law of Ukraine No 2456-XII of 16 June 1992 On Natural and Reserved Fund of Ukraine [1992] VVR 34/502 <https://zakon.rada.gov.ua/laws/show/2456-12> accessed 21 March 2021.

12 Law of Ukraine No 2026-III of 5 October 2000 On Resorts [2000] VVR 50/435 <https://zakon.rada.gov.ua/laws/show/2026-14> accessed 21 March 2021.

13 Law of Ukraine No 1264-XII of 25 June 1991 On Environmental Protection [1991] VVR 41/546 <https://zakon.rada.gov.ua/laws/show/1264-12> accessed 21 March 2021.

tourism. The criterion for delimitation may also be the subject composition authorised to establish the nature management regime for such resources.

In particular, the Verkhovna Rada of Ukraine and the Verkhovna Rada of the Autonomous Republic of Crimea declare natural territories as resorts and health-improving zones, and the environmental regime is determined by the Cabinet of Ministers of Ukraine and the Council of Ministers of the Autonomous Republic of Crimea according to Ukrainian legislation. At the same time, the regime of using recreational areas is determined by the Verkhovna Rada of the Autonomous Republic of Crimea and local councils in accordance with the legislation of Ukraine (section 3 Art. 63). Thus, the legal regulation of recreational activities, as a set of measures covering health, recreation, tourism, and sports, is provided at the legislative level, and the establishment of the regime of using recreational areas is the responsibility of local governments.[14]

As for the last provision, it should be considered justified because, given the diversity of natural and climatic conditions of our country, local governments can determine the features of the legal regulation of using such areas. In our opinion, due to the importance of these areas, it is appropriate that the statutory authorities should make the decisions.

The area of health and wellness is also related to this concept, as it is defined as a natural area with mineral and thermal waters, therapeutic mud, ozokerite, brine from estuaries and lakes, and climatic and other natural conditions conducive to treatment, medical rehabilitation, and disease prevention.

According to Art. 47 of the Land Code of Ukraine, health-improving lands include lands that have natural healing properties, which are used or can be used for disease prevention and people treatment.[15] However, in this case, there is a certain conflict in terminology because, firstly, in the legislation and legal literature, it is noted that the healing properties are not the land itself but its natural healing resources listed above.[16] Secondly, the legislator, distinguishing between the categories of 'healing' and 'health' goals, does not provide substantive disclosure of the criteria for their differences but often combines these properties within a single legal regime of one natural resource. Therefore, given the scientific views on a clear distinction between the purpose of rehabilitation, recreation, and treatment, it is advisable to take them into account at the legislative level. This way, the legal protection of relevant natural resources will be more effective and targeted.

It is noted that:

> natural healing resources by their physical and ecological nature are not some separate type of natural resources – they are the same resources of subsoil, land, water bodies, which differ from other similar natural resources by only one essential feature – natural healing quality, namely the suitability of natural resources for treatment, medical rehabilitation and disease prevention.

O.O. Pohribny also indicates that the legal regime of natural healing resources takes precedence over the legal regime of natural recreational resources. Not all natural recreational resources have healing qualities, but most natural healing resources have recreational qualities. This view is also supported by V.Z. Kholyavka et al., who consider this issue through the prism of international tourism. According to them, health tourism (wellness tourism) is a fundamentally new trend, designed for physically and

14 II Karakash, 'Legal regulation of the use and protection of recreational and tourist areas and facilities' (2017) 1/2 Environmental law of Ukraine 23.

15 Land Code of Ukraine (n 5).

16 AS Novosad, AI Momot, 'Legal Regulation of Lands of Curative Purpose' (2018) 4 Legal Novels 145-6.

mentally healthy people and aimed at maintaining general health and social well-being. This is how it differs from medical tourism (spa-tourism), which aims at overcoming specific diseases, rehabilitation, or body correction.[17]

For instance, in the Czech Republic and Slovakia, recreational and health activities are considered separate phenomena. In particular, health activities fall entirely under the category of healing purposes, are the responsibility of the Ministry of Health, and are regulated by health legislation. Thus, the Czech resorts of Karlovy Vary and Marianske Lazne are based mainly on natural healing resources, which consist of mineral and thermal waters, peloids (humus, peat, and mud), natural gases, and climate. Most Slovak resorts also operate on the basis of natural healing resources (mineral, thermal, and radon waters, peloids, and gases). Currently, Slovakia has about 1,500 natural sources of mineral water (springs, wells) with healing properties.[18] Thus, these countries have a large complex of natural resources like these and use them actively.

The Bulgarian law 'On Tourism' states that a tourist area is a natural and social system with a stable spatial infrastructure and a high degree of natural resources concentration within which a competitive and effective tourism policy is implemented. In addition, the law contains a definition of 'medical services', which means services that involve using natural healing resources – mineral waters or therapeutic mud, procedures that promote human body recovery, etc.[19] Thus, Bulgarian legislation does not explicitly define natural or healing resources, but this country is an example in which the legal regulation regarding the use of such natural objects is covered by tourism.

An example of a sector-specific regulation devoted to this sphere of public relations is the Resolution of the Council of Ministers of the Republic of Belarus 'On approval of the concept of sanatorium treatment and rehabilitation of the population of the Republic of Belarus and repeal of certain resolutions of the Council of Ministers'. This regulation contains a definition of 'rehabilitation', which means a set of measures aimed at increasing resilience to physical, biological, psychological, and social factors of the environment in order to promote the health of citizens. In addition, Chapter 3 sets priorities in the field of state regulation of the resort system, including the development and implementation of measures aimed at rational, efficient use of natural healing resources and tourist resources and the creation and development of resorts in the Republic of Belarus.[20]

Therefore, some authors provide their own classification of natural healing resources and divide them into three categories: 1) particularly valuable; 2) unique; 3) common. Valuable and unique natural healing resources are resources that are not common in Ukraine, have limited distribution or small reserves in deposits, and are particularly favourable and effective for treatment, medical rehabilitation of patients, and disease prevention. Common natural healing resources are resources that are found in different regions of Ukraine, have

17 VZ Kholyavka et al, 'Modern Aspects of Influence Factors and Prospects of Development of Medical and Health-Improvement Tourism in Ukraine' (2019) 1 Bulletin of Social Hygiene and Health Protection Organization of Ukraine 25.

18 *Health and Wellness Tourism: A Focus on the Global Spa Experience* (Routledge 2014) 113-22 <https://www.routledge.com/rsc/downloads/Health_Wellness_Tourism_FB_final.pdf> accessed 21 March 2021.

19 Law of the Republic of Bulgaria of 12 March 2013 'On Tourism' [2013] DV 30 <https://www.tourism.government.bg/bg/kategorii/zakoni/zakon-za-turizma> accessed 21 March 2021.

20 Resolution of the Council of Ministers of the Republic of Belarus No 1478 of 4 November 2006 The concept of sanatorium treatment and health improvement of the population of the Republic of Belarus [1006] National Register of Legal Acts of the Republic of Belarus 5/24175 <https://www.pravo.by/document/?guid=2012&oldDoc=2006-186/2006-186(018-036).pdf&oldDocPage=14> accessed 21 March 2021.

significant reserves, and are suitable for treatment, medical rehabilitation of patients, and disease prevention.[21]

Given these characteristics, namely, the fact that valuable and unique resources are particularly favourable and effective in the first case, and common ones are suitable, as rightly pointed out by experts in the field of balneology, it would be justified to establish different legal regimes of use and protection for these groups of healing resources. The introduction of these legal regimes should take into account the special value and quantitative limitations of these resources and establish mandatory legal rules of conduct for public relations entities. Their legal regulation features must be reflected in a special legal act.

Thus, if we consider the environmental legislation of Ukraine, then, despite the wide range of medicinal properties in various natural objects, a small number of rules are devoted to this area of their use. The lack of appropriate regulations in this area can have negative consequences for the interaction of society and nature. This problematic issue is disclosed to some extent in the Water Code of Ukraine, which not only establishes the procedure for classifying certain water resources as healing but also provides the adoption of a special law with a list of existing water bodies in Ukraine and their inherent healing functions. The Water Code of Ukraine has established that places with water used for health, recreation, and sports purposes are determined by the relevant councils in the manner prescribed by the law and may be prohibited or restricted in accordance with the law.[22] Water bodies that have natural healing properties belong to the category of healing if they are included in a special list and are used exclusively for healing and health purposes. The list of water bodies classified as healing, indicating the water reserves and their medicinal properties, as well as other favourable conditions for treatment and disease prevention, is approved by the Cabinet of Ministers of Ukraine at the request of relevant state bodies specified in the legislation (Arts. 62, 63 of the CrPC).

It is worth emphasising that most of the list of natural healing resources provided by the legislator belongs to the subsoil sphere. In addition, some authors note that attention is usually paid to mineral waters and therapeutic muds.[23] However, the Subsoil Code of Ukraine currently does not contain rules that would regulate the use and protection of such facilities for healing purposes. Instead, the Code[24] contains general rules on the basic requirements in the field of subsoil protection (Section VI), as well as a special article on the protection of subsoil areas of special scientific or cultural value (Art. 59), where resources are not mentioned, which cannot be considered correct. However, issuing permits for development and extraction, including natural healing resources, are covered in the procedure for issuing special permits for subsoil use, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 165. In accordance with this regulation, such permits are granted by the State Service of Geology and Subsoil of Ukraine to the winners of auctions for their sale and without holding auctions in the cases provided (para. 2).[25]

This situation requires an update of the current national environmental legislation in order to improve the legal regulation on the use and protection of various types of healing natural resources. In particular, as noted by O.A. Hrytsan, the necessary measures for regulation

21 SM Malakhova, OO Cherepok, NG Volokh (eds), *Balneology and Resorts of Ukraine: Textbook* (Zaporizhzhia State Medical University 2019) 9.

22 Water Code of Ukraine (n 6).

23 LI Fisenko, VV Kovaljsjka, 'Natural Healing Resources of Ukraine and Their Use in Sanatorium Practice' (2005) 3 (3) Medical Hydrology and Rehabilitation 55.

24 Subsoil Code of Ukraine (n 8)

25 Resolution of the Cabinet of Ministers of Ukraine No 615 of May 30, 2011 'On Approval of the Procedure for Granting Special Permits for Subsoil Use' [2011] Official Gazette of Ukraine 45/1832 <https://zakon.rada.gov.ua/laws/show/615-2011-%D0%BF> accessed 21 March 2021.

are the consolidation of regulatory requirements for the use and protection of healing resources of the geological environment (healing geological microclimate); provision in post-resource laws of its own provisions, and instructions on other regulations with the use and protection of appropriate medical resources; introduction of a special protection regime for those healing and health-improving areas where deposits with healing resources have been discovered, but a resort has not been organised.[26]

According to the author, the key problem of current environmental legislation that needs to be addressed is the issue of healing microclimate. The need to dedicate certain norms to the use and protection of such resources is explained by the fact that like other natural healing objects, underground salt mines, and karst caves have long been used to treat various diseases, especially respiratory diseases. However, there are no requirements for the protection of such subsoil areas, leading to their deterioration and even complete destruction due to harmful activities using their healing properties and to irresponsible use of nature (flooding by groundwater, salt extraction, etc.).[27] Taking into account the need to address the problems of improving legal regulation regarding the use and protection of these resources, there is the question of defining and implementing improvements in existing legislation in this area.

Therefore, a positive aspect of the legal regulation regarding the use of water for health, recreational, and healing purposes in Ukraine recognises them as natural resources that require special legal protection, which, of course, contributes to the preservation of their useful properties. However, a number of issues remain unclear, in particular, the legal regime for the use and protection of groundwater. Firstly, water and subsoil legislation have different approaches to the very understanding of this natural resource. The Water Code of Ukraine considers groundwater as water bodies of national or local importance, and therefore, in accordance with Art. 48, water abstraction is a kind of special water use and must be carried out on the basis of a water use permit,[28] Alternately, the Subsoil Code of Ukraine includes mineral (including healing, therapeutic-table) waters in the list of minerals of national importance, and it is necessary to get special subsoil use permit for their extraction.[29] Secondly, according to the norms of national environmental law, the extraction of groundwater resources requires two special permits at a time (for water use and subsoil use), which not only creates a number of difficulties for groundwater extraction entities but also significantly complicates the legal protection mechanism of such objects. According to the decision of the Administrative Court of Cassation in the Supreme Court, fresh groundwater is recognised as a natural resource with a dual legal regime, and therefore, using groundwater should be guided by both water legislation and subsoil legislation.[30] For these reasons, it is advisable to enshrine in national legislation the provision recognising groundwater as a natural resource with a dual legal regime while harmonising the rules of water legislation and subsoil legislation.

Also, in our opinion, one of the main problems of legal regulation of water use is the insufficient attention paid to the objects that have healing or health properties. The main theoretical and practical issues of the use and protection of these objects are determined

26 OO Hrytsan, 'Separate Questions of Legal Regulation of Subsoil Healing Resources Use and Protection' (2017) 45 Actual Problems of Improving of Current Legislation of Ukraine 41.

27 OO Hrytsan, 'The Legal Regime of Subsoil Healing Resources: Some Aspects' (2011) Current Issues of Legal Science: The Tenth Autumn Legal Readings (Khmelnytskyi, 18-19 November) 57.

28 Water Code of Ukraine (n 6).

29 Subsoil Code of Ukraine (n 8).

30 Decision of the Administrative Court of Cassation in the Supreme Court in Case No 815 / 5254/16 (proceedings No K/ 9901/18965/18) of 9 April 2019, in *Judicial Practice Digest of the Supreme Court in Disputes Regarding Environmental Protection and Environmental Rights* (Supreme Court 2019) 114 <https://supreme.court.gov.ua/userfiles/media/Daidjest_Ekologia.pdf> accessed 21 March 2021.

primarily by their actual condition. In this case, we are not talking about a system of such resources that together meet the needs of the population but about specific species, types, and categories of phenomena and objects that are elements of nature and directly have their own useful features.

Regarding the latter, it should be emphasised that the territory of Ukraine is rich in estuaries, which provide for the vital needs of the population regarding treatment, recreation, and health. Thus, the most famous estuaries (Kuialnyk, Khajibey, and Tylihul) have rare and unique flora and fauna, as well as exceptional medicinal properties. However, their status has not yet been determined at the state level. In particular, as noted by I.I. Karakash, the Kuialnyk estuary was significantly affected by the uncertainty of the legal regime of the Kuialnyk resort and the legal regime of the Kuialnyk estuary and surrounding areas is even less certain, without which this resort cannot exist.[31] The legal regulation of the protection of these water bodies is either defined only in certain specific issues at the level or decisions of the local regulation or in general environmental laws, which cannot be considered correct.

Referring to the practice of European countries regarding the legal regulation of water use for health, recreational, and healing purposes, thermal water centres in Europe are very popular. As mentioned above, according to the legislation of Ukraine, thermal waters belong to natural healing resources, and, as a rule, the regulation of their use is determined by the legal regime of the resorts within which they are located. Examining the legislation of European countries in terms of thermal water use, we can highlight as a positive point a normatively defined concept or criteria for classifying water as thermal. Thus, the Slovenian Law 'On Water' Art. 7 stipulates that groundwater from a well, spring, or catchment that is heated due to geothermal processes in the earth's crust is thermal, and the temperature in the source must be at least 20°C.[32] In the Hungarian Law on Water Resources Management, thermal water is all groundwater (from the aquifer) with an outlet temperature (surface) of 30°C or higher.[33] In Hungary, in addition, the law emphasises the features of healing thermal waters. Thus, the main difference between mineral and healing water is that healing water is a type of mineral water with medically proven therapeutic healing effects. Thermal water is any water that comes from a natural source at a temperature above 30°C. According to experts, medical tourism in the country relies mainly on the use of thermal waters, as most of them do not meet modern health standards recognising their healing effects.[34]

A thorough study on the legal regulation considering the use of thermal waters under the laws of the European Union and Ukraine was conducted by N.M. Obijykh. The author concludes that in EU countries such as Slovenia, Austria, and Hungary, the right to extract thermal water is mostly exercised through the subsoil use rights. Permission for thermal water extraction is determined by the type of geological works and the depth of the field. In some cases, such a right requires an appropriate permit for water use, for example, by concession, when the use of thermal water involves the abstraction of water from a well. Thus, thermal water extraction is a special type of subsoil use, which is closely related to water use, as thermal waters are not only a component of the subsoil but also a water body that is protected by water legislation. It is also quite appropriate to propose ways to extract

31 II Karakash, 'On Establishing the Legal Regime of the Kuialnyk Estuary and the Resort of Kuialnyk' (2015) Natural Resource Potential of the Kuialnyk and Khajibey Estuaries, Inter-estuary Territories: Current State, Development Prospects (Odesa, 11-12 November) 56.

32 Zakon Republika Slovenija (ZV-1-NPB7) sprejetja 12.07.2002 Zakon o Vodah [2002] Uradni list RS 67/02 <https://zakonodaja.com/zakon/zv-1/> accessed 21 March 2021.

33 Magyarország törvény 1995. évi LVII Törvény a vízgazdálkodásról (Nemzeti Jogszabálytár) <http://njt.hu/cgi_bin/njt_doc.cgi?docid=23855.417346> accessed 21 March 2021.

34 K Medvene, Dr. Szabad, 'Wellness and Spa Tourism in Hungary Now and in the Future 2009-2011' (2010) 1 (69) Herald of Kyiv National University of Trade and Economics 17.

thermal groundwater and the conditions for granting permission to use such deposits and to determine the deposit depth to understand when thermal water can be extracted and add this information to the Subsoil Code of Ukraine. It is necessary to provide separate legal norms regulating the establishment of restrictions on the use of thermal waters among the districts of mining and sanitary protection and also to establish limits on their extraction depending on the purpose of use.[35]

The Order of the Ministry of Health of Ukraine (hereinafter, the Ministry of Health) 'On approval of the procedure for medical-biological evaluation of the quality and value of natural healing resources, determining methods of their use' is of great importance in the study. This regulation not only provides a definition and characterisation of the material composition of such natural healing resources as mineral waters, mud, ozokerite, brine, bischofite, seawater, etc., but also regulates the research of such objects to identify the level of their healing properties, clinical tests, control of their structure stability, and the entities authorised to carry out these activities. Therefore, the organisation and implementation of complex medical-biological, climatological, geological-hydrological, balneological, and other research papers of natural healing resources, providing a medical (balneological) opinion on the medical-biological evaluation of quality and value of natural healing resources on behalf of the Ministry of Health are performed by the Ukrainian Research Institute of Medical Rehabilitation and Balneology of the Ministry of Health of Ukraine, which is certified and accredited in the prescribed manner for the right to conduct research on natural healing resources and preformed drugs (para. 3.1).[36]

Thus, the legal regulation considering the use of natural healing resources in Ukraine is currently reduced in two directions: 1) resorts management as natural areas on health-improving lands that have natural healing resources and are used for treatment, medical rehabilitation, and recreation; 2) procedure regulation for assigning subsoil resources and water bodies to the category of healing and the procedure for issuing permits for their extraction and use.

Situation analysis characterises the national legal system in terms of regulating the use of natural healing resources, showing the need to restructure the legislation to protect and preserve the healing properties of such sources. The study of existing practice in the public relations area of advanced European countries and their positive experience in this area will bring effective results in improving the legislation of Ukraine.

The issue of integrating Ukrainian legislation with the legislation of the European Union (EU Water Framework Directive),[37] in particular, the harmonisation of quality standards of drinking water used by the population, has become of great importance.[38] In addition, it should be noted that the EU has adopted a Directive on the water quality intended for bathing.[39] This document provides a concept formulation for these waters and standards for pollutants and other substances that cannot be exceeded.

35 NM Obijukh, 'Legal Regulation of Use of Thermal Waters by Legislation of European Union Countries and Ukraine' (2015) 35 (2/2) Scientific Bulletin of Uzhhorod National University Law Series 53.

36 Order of the Ministry of Health of Ukraine No 243 of 2 June 2003 'On approval of the procedure for medical-biological evaluation of the quality and value of natural healing resources, determining methods of their use' [2003] Official Gazette of Ukraine 36/1970 <https://zakon.rada.gov.ua/laws/show/z0752-03> accessed 21 March 2021.

37 C Hatton et al, '"Prevention of Water Deterioration" Duties under the European Community Water Framework Directive (2000/60/EC): Position Paper' (WWF 2003) <https://elaw.org/es/system/files/WWF%20position%20WFD%20no-deterioration%20FINAL.pdf> accessed 21 March 2021.

38 Yu Vystavna, M Cherkashyna, MR van der Valk, 'Water Laws of Georgia, Moldova and Ukraine: Current Problems and Integration with EU Legislation' (2018) 43 (3) Water International 424 <https://doi.org/10.1080/02508060.2018.1447897> accessed 21 March 2021.

39 European Parliament and Council Directive 2006/7/EC of 15 February 2006 Concerning the Management of Bathing Water Quality and Repealing Directive 76/160/ EEC [2006] OJ L 64/37 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006L0007> accessed 21 March 2021.

As stated above, in European countries, natural healing resources are used mainly for health and medical tourism. For example, healing resources in Romania consist of climate resources (relief, hydrology, and vegetation), including salt mines, caves, and microclimates; mineral and thermal waters; mud, peat, and gases. The competent authorities in the medical sphere are the Ministry of Health and its decentralised services, the National House of Health Insurance (CNAS) and the district health centres, and the College of Physicians of Romania (CMR). The main subjects of tourist medical activity are the Ministry of Regional Development and Tourism (MDRT), the Organization of Resort Owners in Romania (OPTBR), and the National Association of Travel Agencies (ANAT).[40]

Many European countries regulate the use and protection of water resources regarding health, healing, and recreational purposes, based on the level of special regulations and often through the criteria for their assignment to a particular resort. For example, the Law of the Czech Republic 'On Natural Healing Sources, Natural Mineral Water Sources, Natural Resorts and Spas, as well as Amendments to Certain Relevant Laws (SPA Laws)' of 13 April 2001 deals with the requirements for the authorisation of natural healing resources, their protection, and conditions creating resorts. Under a natural healing source, the law means natural mineral waters, natural gas, and peloids, which have properties intended for healing use and are certified in accordance with this law. It is important that Czech law does not consider natural healing springs as a part of the land or territory on which they are located but as an independent ecological and legal object with unique specific features.

It is significant that in accordance with section 5 of the law, the fact of obtaining the status of a natural source or source of mineral water by a natural source is confirmed by a relevant certificate containing information on its location, composition, properties, and use. This certificate is issued by the Ministry of Health of the Czech Republic on its own initiative, at the request of the owner of the land where the natural object is located or at the request of the municipality of the territory. The ground for obtaining a certificate is the assessment of the source for its useful properties, the composition of internal components, and suitability for use, as well as the availability of conditions for its protection and defence.[41]

According to the Romanian Technical Regulations, natural healing resources are mineral water sources, healing lakes, rocks, beaches and sea, coastal and lake waters, therapeutic muds, natural gases, and climatic conditions, including salt mines.[42] Qualitative assessment and study of the healing properties of natural healing resources are carried out based on the comprehensive research to determine medical indications and contraindications to use (performed by the National Institute of Medical Sparehabilitation, Physical Medicine and Balneoclimatology).[43]

40 O Surdu et al, 'Current State of Balneotherapy/Thermalisme in Romania: Main Actors, Reglementation and Problems to Solve' (2012) 5 (2) Anales de Hidrologia Medica 137.

41 Zákon České Republiky č 164/2001 ze dne 13 dubna 2001 O přírodních léčivých zdrojích, zdrojích přírodních minerálních vod, přírodních léčebných lázních a lázeňských místech a o změně některých souvisejících zákonů (lázeňský zákon) [2001] Sb 437 <https://www.zakonyprolidi.cz/cs/2001-164> accessed 21 March 2021.

42 Hotarare Guvernul României Nr 1154 din 23 iulie 2004 Normelor tehnice unitare pentru realizarea documentatiilor complexe de atestare a functionarii statiunilor balneare, climatice si balneoclimatice si de organizare a întregii activitati de utilizare a factorilor naturali [2004] Monitorul oficial 752 <http://www.namr.ro/wp-content/uploads/2013/02/hotararea1154din04.pdf> accessed 21 March 2021.

43 Hotarare Guvernul României Nr 1154 din 23 iulie 2004 Normelor tehnice unitare pentru realizarea documentatiilor complexe de atestare a functionarii statiunilor balneare, climatice si balneoclimatice si de organizare a întregii activitati de utilizare a factorilor naturali [2004] Monitorul oficial 752 <http://www.namr.ro/wp-content/uploads/2013/02/hotararea1154din04.pdf> accessed 21 March 2021.

The provisions of the Hungarian Law on Natural Climatic Sources can be useful for the national law, as they emphasise medical caves as objects of cave therapy.[44] Under this specific resource, the law means a properly organised and equipped natural cave formation or other underground formation (mine, reservoir) with identified and tested health and healing properties and special atmospheric and climatic conditions, which is used for disease prevention and treatment. A special approach has been developed in Hungary to the procedure for granting certain territories the status of a sanatorium-resort zone and to their further protection. In particular, a certain area may be recognised as a sanatorium if it includes natural healing springs that have been recognised as such in the prescribed manner, characterised by environmental conditions that guarantee the peace and well-being of visitors (clean air, proper noise, green planting). Within its limits, the provision of medical services related to the use of healing resources is organised, and the recreational infrastructure (utilities, transport, communications, supply services, etc.) is established. In the presence of all the above criteria, the relevant area is recognised as a sanatorium and is therefore subject to special legal protection. Thus, the resort areas of Hungary are characterised by high quality and organisation, and the state of natural healing springs in their territories is effectively protected by the state and interested private entities.

State supervision and monitoring of compliance with the rules and regulations of using natural healing resources in Ukraine is carried out by central executive bodies implementing state policy in the field of health care and state supervision (monitoring) in terms of labour, geological study, and rational use of subsoil, environment, and other executive bodies in accordance with the law. The State Cadastre of Natural Medical Resources of Ukraine is a system of information on quantity, quality, and other important characteristics of all natural healing resources identified and calculated in Ukraine with regard to the treatment and prevention of human diseases, as well as possible volumes, methods, and modes of their use. The State Cadastre of Natural Medical Resources of Ukraine is created and maintained in accordance with the procedure established by the central executive body, which ensures the formation of state healthcare policy.[45] Cadastral data are used, among other things, to create favourable conditions for the treatment and prevention of diseases and for recreation.[46]

The right to use nature for health and recreational purposes may be exercised based on the common right to use: 1) objects of fauna to meet vital needs: health and recreational; 2) flora resources for health and recreational purposes; 3) useful properties of forests regarding their cultural and health purposes, etc.; 4) water for health and recreational purposes, etc. For example, water use for health, recreational, and sports purposes is carried out according to general and special water use. Places with water used for health, recreational, and sports purposes are set by the relevant councils specified by the law and may be prohibited or restricted in accordance with Art. 45 of this Code (Art. 64 of the Criminal Code of Ukraine).[47]

Thus, according to the legislation of Ukraine, citizens can use natural resources for health and recreational purposes, as well as use natural healing resources, which with other natural resources are one of the components of the natural environment. This follows from the legal norm of Art. 5 of the Law 'On Environmental Protection',[48] which stipulates that:

44 EüM rendelete 74/1999. (XII 25.) A természetes gyógytényezőkről [1999] Magyar Közlöny 122/8352 <http://njt.hu/cgi_bin/njt_doc.cgi?docid=41039.360014> accessed 21 March 2021.

45 Law of Ukraine 'On Resorts' (n 12).

46 Order of the Ministry of Health of Ukraine No 687 of 23 September 2009 'On approving instructions for creating and maintaining the State Cadastre of natural healing resources' [2009] Official Gazette of Ukraine 12/586 <https://zakon.rada.gov.ua/laws/show/z0154-10> accessed 21 March 2021.

47 Code of Ukraine No 2341-III of 5 April 2001 Criminal Code of Ukraine [2001] VVR 25-26/131 <https://zakon.rada.gov.ua/laws/show/2341-14> accessed 21 March 2021.

48 Law of Ukraine 'On Environmental Protection' (n 13).

> the environment as a set of natural and natural-social conditions and processes, natural resources, both involved in economic circulation and unused in the economy in this period (land, subsoil, water, air, forest and other vegetation, wildlife), landscapes and other natural complexes are subject to the state protection and regulation of use in Ukraine.

As a result, natural healing resources have a special legal regime due to their natural properties, namely the ability to improve human health. The law must ensure the preservation and maintenance of a safe state of the environment for human life and health.

In this regard, there is a need to identify areas for improvement of national environmental legislation on the right to use natural healing resources and formulate appropriate proposals. It should be taken into account that the current codes of Ukraine – Subsoil,[49] Water,[50] and Forest[51] – as well as the Laws of Ukraine, contain certain provisions that can be used in implementing this right, subject to their improvement. It would be expedient to develop and adopt the Law of Ukraine 'On Protection, Conservation and Use of Natural Healing Resources' and also to propose the creation of a separate Department within the Ministry of Environmental Protection and Natural Resources of Ukraine or a department in the Department of Nature Reserves of Ukraine, responsible for monitoring the effective and efficient use of natural healing resources and natural resources for health and recreation.

2 CLIMATE AS A HEALING RESOURCE

In recent years, the policies of many European countries have been actively aimed at solving the main global problem – climate change. In general, the condition of natural objects depends entirely on the environmental conditions of their location. This issue is especially important for natural resources used for health and medical purposes, as any impact on their specific properties can significantly reduce their value and ability to perform their functions. The negative effects of climate change on natural resources have already been proven and studied by scientists around the world. Prominent examples of climate change that are already actively occurring around the world are the massive drying of stands, increasing fire risk, reducing the amount of usable surface and groundwater resources, reducing surface runoff and infiltration of groundwater, and so on. For example, as a result of increasing concentrations of pollutants during dehydration periods, the quality of therapeutic waters deteriorates, and extreme weather conditions can cause water pollution as a result of storm water flows and flooding of contaminated areas or lead to undesirable fluctuations in water temperature, which can be too high for use in thermal power equipment with water cooling or too low for specific ecosystems.[52]

As a result of prolonged rains and a warm climate, water runoff contaminates water used for recreation, which accumulates bacteria and increases the risk of human disease.[53] Most often, this situation can be seen within the beach areas along the rivers, so this problem is relevant for many countries whose economies are based on resort and recreational activities.

49 Code of Ukraine 'On Subsoil' (n 8).

50 Water Code of Ukraine (n 6).

51 Forest Code of Ukraine (n 7).

52 United Nations Economic Commission for Europe and International Network of Basin Organizations, *Water and Climate Change Adaptation in Transboundary Basins: Lessons Learned and Good Practices* (UN 2015) 36 <https://www.riob.org/sites/default/files/HB-Climate_Change_RU.pdf> accessed 21 March 2021.

53 B Bates et al (eds), 'Climate Change and Water: IPCC Technical Paper VI' (IPCC 2008) <https://www.ipcc.ch/site/assets/uploads/2018/03/climate-change-water-en.pdf> accessed 21 March 2021.

This situation forces states to focus their policies on solving problems in terms of adapting natural medical, health, and recreational resources to climate change, as this direction will further ensure the right of citizens to healthcare through using proper nature. Therefore, the current legal system of many European countries is characterised by active attempts to resolve this issue, as evidenced not only by special national regulations but also by the number of organisations created to address climate issues.

Finland can serve as a good example of an approach to tackling climate change, namely, in the context of its impact on natural recreational and health resources. In 2004, the government launched the national research program 'Assessing the adaptive capacity of the Finnish environment and society under a changing climate, FINADAPT'. This program, coordinated by the Finnish Ministry of the Environment, was implemented by 11 institutions, including universities, government agencies (hydrometeorology, forestry, environmental protection), and research centres studying the best way to adapt to the potential effects of climate change.[54] One of the main institutions carrying out the tasks of this program is the Finnish Institute of the Environment (SYKE), which deals with the most important issues related to the interaction of society and nature in the context of existing climate problems. Thus, one of the activities of the Institute is the development of methods for restoration and rational use of natural resources considering research and knowledge about the impact of adverse weather changes.[55] As a result of such activities, as well as active partnership and social dialogue with citizens, Finnish policy effectively implements the ecosystem approach to solving the global climate problem, combining the principles of conservation and reproduction of natural objects and ensuring the right to healthcare.

A considerable number of regulations of European countries recognise climate as an important healing resource, as evidenced by the rules on its useful properties and their protection. Thus, the Polish Law on Sanatorium Treatment, Sanatoriums and Health Zones, as well as Spa Communes under Natural Healing Resources, specifies medicinal gases and minerals, including mineral waters and peloids, the medicinal properties of which are confirmed in the manner prescribed by this law. This document defines the category of healing properties of climate – atmospheric factors that contribute to the maintenance of health and the treatment or reduction of the consequences or symptoms of diseases (para. 9 of Art. 2).[56]

The Slovak Law 'On natural healing waters, natural healing baths, spas and natural mineral waters and on amendments to certain laws' defines climatic conditions suitable for treatment, meaning external climatic indicators, air quality, and microclimatic conditions of natural underground spaces, which cause favourable changes in reactivity or other physiological and biological functions of the human body, recognised by the law (Art. 2). An interesting example for Ukraine is another provision of this law, which regulates the procedure for monitoring the state of natural healing resources. Thus, the monitoring system for natural healing resources and natural mineral resources is a system that carries out the monitoring regime of hydrogeological, chemical, physical, microbiological, and biological indicators of natural healing resources, natural mineral resources, wells, other objects of observation, and meteorological indicators of the territory in the amount specified in the permit for the use of a natural healing resource or a natural mineral resource. The monitoring system for natural

54 SP Ivanjuta et al, 'Climate Change: Consequences and Adaptation Measures: Analytical Report' (NISS 2020) 52-3 <https://niss.gov.ua/sites/default/files/2020-10/dop-climate-final-5_sait.pdf> accessed 21 March 2021.

55 P Ahlroth, E Furman, 'Reliable Information on Nature and Ecosystem Services' (SYKE) <https://www.syke.fi/en-US/Research__Development/Nature> accessed 21 March 2021.

56 Ustawa Rzeczypospolitej Polskiej z dnia 28 lipca 2005 r. O lecznictwie uzdrowiskowym, uzdrowiskach i obszarach ochrony uzdrowiskowej oraz o gminach uzdrowiskowych [2005] DzU 167/1399 <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20051671399> accessed 21 March 2021.

healing resources and natural mineral resources is a separate unit of the environmental monitoring system.[57]

As an independent component that has a therapeutic effect on human health within the sanatorium areas, the Law of the Czech Republic 'On natural healing springs, natural mineral water springs, natural resorts and spas, as well as amendments to some relevant laws (SPA Law)' considers climatic conditions. Art. 27 of the law states that responsible persons who provide medical services within the sanatorium treatment must periodically (every five years) submit a report based on measurements and indicators of climatic conditions within the area of natural health resorts, as well as an assessment of further use these conditions for climatic spa treatment.[58]

The Hungarian Law 'On natural climatic sources' deals separately with the concept of a climatic sanatorium – an institution which location corresponds to specific climatic factors (air quality, temperature, humidity, sunlight, etc.) that contribute to healing and rehabilitation treatment (section 5 of Art. 24). In addition, the law establishes the criteria for recognising the climate as healing: a conclusion of experts on climate made on the basis of climate station measurements and a medical opinion based on observations of the climate therapeutic effect (section 4 of Art. 24).[59]

The practice of the above countries is a good example for Ukraine regarding the legal regulation of climate impact as a separate object on human health. In our opinion, such a point should be added to the legislative list of natural healing resources of Ukraine, as national law considers climatic conditions as an element of their healing properties, but it does not take into account the independence of this phenomenon in the possible therapeutic effect. This view has long been prevalent in doctrine. Thus, healing climates are considered one of the main natural resources that are directly used in balneotherapy for non-drug treatment at resorts and in out-of-resort conditions and determine a location's spa specialisation and profiling.[60]

In addition, many Ukrainian research papers are devoted to the so-called climatotherapy – the use of various climatic factors and features of a particular climate for therapeutic purposes. A striking example is the Carpathian region of Ukraine, which has all kinds of natural healing resources: huge reserves of almost all known types of mineral waters, deposits of more than 800 springs and wells, freshwater and low-mineralised peat mud, the only deposits in Ukraine ozokerite and salt with unique microclimatic conditions, and also a mild climate with mountain features that allows or the creation of climatic resorts in various landscape conditions. Thus, the therapeutic and prophylactic effects of climate on the body are due to a number of natural factors, the most important of which are: the location above sea level, atmospheric pressure, temperature, circulation, and humidity, and intensity of solar radiation, including ultraviolet.[61]

In general, the influence of natural and climatic conditions on the condition and properties of healing resources is substantial. Thus, OH Shevchenko notes that climatic conditions are

57 Zákon Slovenskej Republiky č 538/2005 27 októbra 2005 O prírodných liečivých vodách, prírodných liečebných kúpeľoch, kúpeľných miestach a prírodných minerálnych vodách a o zmene a doplnení niektorých zákonov [2005] ZZ 219 <https://www.zakonypreludi.sk/zz/2005-538> accessed 21 March 2021.

58 Lázeňský zákon (n 40).

59 EüM rendelete a természetes gyógytényezőkről (n 42).

60 OYe Gharbera, Lecture notes on the discipline Organization of Recreational Services (Ternopil National Economic University 2013) 26 <http://dspace.wunu.edu.ua/retrieve/17883> accessed 21 March 2021.

61 VS Kravciv (ed), 'Carpathian Region: Current Problems and Prospects for Development. Ecological Safety and Natural Resource Potential' (2013) 1 (89) Institute of Regional Research of NAS of Ukraine 106 <http://ird.gov.ua/irdp/p20130001.pdf> accessed 21 March 2021.

one of the determining factors for health tourism, primarily for its emergence and development in a particular region. Other types of tourism depend on the climate of a particular area to a lesser extent but are still significantly dependent on specific weather conditions observed 'here and now'.[62] This statement suggests that it is important to understand and distinguish between a specific object affected by weather and climate. Climate plays an important role regarding the use of healing resources as a part or basis of a certain resort or tourist complex, but it cannot influence the healing properties of any resources. This is because the resource itself has therapeutic features with many interdependent factors, among which climate conditions play an important role. This is reflected in the national environmental legislation, and therefore, following systematisation principles, it is necessary to study the climate and natural resources inseparably within the complex natural object used for therapeutic purposes.

Comparing the level of climatotherapy in Ukraine and Central Europe, it should be noted that the natural conditions and resources of the country are not inferior to those of the studied countries and should be used rationally for the development of resorts and tourist infrastructure. In addition, the largest percentage of climatotherapy regions in Central Europe is mountainous rather than plains and coastal. In turn, the orographic diversity of Ukraine, namely, the favourable temperate continental climate of forests, forest-steppe and steppe, mountainous, and coastal areas and the unique microclimate of salt mines create more ideal conditions for climatotherapy.[63]

3 LEGAL RESPONSIBILITY AND JUDICIAL PRACTICE FOR USING NATURAL HEALING RESOURCES

The issue of criminal responsibility for deterioration or other damage to natural healing resources is considered in the national legal system through the prism of general environmental responsibility. An exception can be considered by the legislator regarding incurring property costs by violators of the legal regime for using therapeutic waters since such situations are directly reflected in the criminal law. Thus, Art. 242 of the Criminal Code of Ukraine states that violation of legal regulation on water (water objects) protection causing pollution of surface or underground waters and aquifers, sources of drinking, or therapeutic waters, change of their natural properties, or depletion of water sources and creating danger to life, health, or environment, is liable to a fine, deprivation of the right to hold certain positions or engage in certain activities, or restriction of freedoms.[64]

In addition, the methodology for determining the amount of compensation for damages caused to the state as a result of unauthorised subsoil use is in force, which sets the base rate of losses as a share of the minimum wage in cases of unauthorised use of mineral resources, including therapeutic mud.[65] The methodology for calculating the amount of compensation for damages caused to the state as a result of law violation on protection and rational use

62 OH Shevchenko, 'Influence of Weather and Climatic Factors on the Tourism Industry' (2012) 23 Geography and Tourism 20.

63 AYu Parfinenko, II Volkova, VI Sherbyna, 'Problems and Prospects of Spa Tourism Development in Ukraine (in Comparison with Central European Countries)' (2018) 7 The Journal of VN Karazin Kharkiv National University Series International Relations Economics Country Studies Tourism 132.

64 Code of Ukraine No 2341-III of 5 April 2001 Criminal Code of Ukraine [2001] VVR 25-26/131 <https://zakon.rada.gov.ua/laws/show/2341-14> accessed 21 March 2021.

65 Order of the Ministry of Ecology and Natural Resources of Ukraine No 303 of 29 August 2011 'On approving the Methodology for determining the amounts of compensation for damages caused as a result of unauthorized subsoil use' [2011] Official Gazette of Ukraine 73/2766 <https://zakon.rada.gov.ua/laws/show/z1097-11> accessed 21 March 2021.

of water resources[66] enshrines that one must pay compensation for damages caused by surface and ground waters without allocating therapeutic waters separately. Therefore, it is expedient to include appropriate norms in this methodology that would establish the amount of compensation for damages caused to therapeutic waters. The increase also requires legal liability (in particular, civil liability) for legislation violations regarding the use and protection of natural healing resources and defining fees to calculate the amount of damage caused to such natural resources.

Analysing the issue of prosecution for violating the rules on the use of natural healing resources or causing damage to them allows us to conclude that at present, the national legal system is based on economic interests, without prioritising the preservation of the healing value of such sources. As a result, Ukraine's policy to preserve the healing properties of natural objects is not characterised by effective methods, which significantly reduces the number of such unique and beneficial resources for public health.

The non-prevalence of effective protection and restoration of healing resources is evidenced by the analysis of court cases, as their number is currently very small when compared with the actual number of instances of damage to such natural resources by legal entities and individuals. In particular, most cases concern violations of the procedure for special use of nature established by the law. An example is Case No. 1-433/11 of 19 March 2012, according to which the entity illegally, without obtaining permits, used the subsoil and carried out special water use by water intake from an artesian well, which was subsequently used to provide utilities, thereby violating the established rules of subsoil protection, which led to the illegal extraction of minerals of national importance (fresh groundwater).[67] As a result, the offender illegally supplied water to the population, thereby endangering their health due to non-compliance with the requirements for assessing the quality of such water established by the law.

In another case, when making a decision in favour of the defendant, thus leaving the refusal to grant permission standing, the court gave the following argument. According to the provisions of Art. 48 of the Land Code districts and zones of sanitary (mining and sanitary) protection are established in the territories of recreational and health areas and resorts. Within the district of sanitary (mining and sanitary) protection, the transfer of land ownership and provision for use by enterprises, institutions, organisations, and citizens for activities incompatible with the protection of natural healing properties and recreation of the population is prohibited. On the basis of the documents submitted to the court, it was established that the disputed land plot was located in the first zone of sanitary protection regarding mineral springs of mineral waters. Therefore, the court took into account the defendant's arguments that the activities of the plaintiff, by definition, were not related to the protection of natural healing properties. In addition, at the time of the contested decision, the plaintiff carried out construction work in the first zone of sanitary protection of mineral springs of mineral waters without any permits and approvals. In these circumstances, the court concluded that the defendant had a statutory legal basis for the decision to refuse permission to develop a land-use plan allocating land for the maintenance of an apartment building.[68]

66 Order of the Ministry of Environmental Protection of Ukraine No 389 of 20 July 2009 'On approving the Methodology for calculating the amount of compensation for damages caused to the state as a result of law violation on protection and rational use of water resources' [2009] Official Gazette of Ukraine 63/2242 <https://zakon.rada.gov.ua/laws/show/z0767-09> accessed 21 March 2021.

67 Case No 1-433/1 Sentence of the Vinnytskyi Raion Court of Vinnytsia Oblast of 19 March 2012 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/21948471> accessed 21 March 2021.

68 Case No 813/2140/18 Judgment of the Lviv Circuit Administrative Court of 18 December 2018 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/78920892> accessed 21 March 2021.

4 CONCLUDING REMARKS

As a result of a study of regulations regarding the use of natural healing resources, we conclude that there is an urgent need to restructure the legislation system prioritising protection and preservation of healing properties of such natural resources. Given the scientific views on the need to clearly delineate the purpose of rehabilitation, recreation, and treatment, they should also be taken into account at the legislative level, as this way, the legal protection of relevant natural resources will be more effective and targeted. It is appropriate to provide the laws on their own provisions and instructions considering the norms of other regulations related to the use and protection of relevant natural healing resources in terms of the right to use nature.

It has been determined that using certain natural resources for recreational or health purposes does not mean that natural objects have special properties. In regulating this area of public relations, the legislator only establishes the possibility of using natural objects for appropriate purposes, which further changes, to some extent, the details of the legal regime of their use. This conclusion clearly illustrates the difference between such legal regulations for recreational or health resources from the legal regime for using natural healing resources, as the latter are clearly defined by the legislator as having special properties. Given the work of specialists in the field of balneology and analysis of current legislation, it would be justified to establish appropriate legal regimes for certain categories of natural healing resources. Features of legal regulation in relation to certain categories must be reflected in a special legal act. Legislative recognition, consolidation, and concretisation of natural healing resources are theoretically justified and practically necessary.

It was proposed to adopt such a normative act in science,[69] but some authors noted the following definition as the task of legislation in this area, namely: lists of particularly valuable, unique, and common natural healing resources, mechanisms for collecting fees for deterioration of natural healing resources related to their ownership or use (this norm has become invalid), development of the statistical reporting for the account of deposits of natural healing resources which are operated, and the recording of the enterprises and the organisations who use them. However, in our opinion, in the current conditions of increased anthropogenic pressure on natural health facilities, we should first of all talk about the proper legal provision regarding protection, conservation, and use of these resources, providing for appropriate legislation norms.

Thus, we propose to develop and adopt the Law of Ukraine 'On Protection, Conservation And Use Of Natural Healing Resources'. It clearly defines the concepts, signs, healing properties, and lists of natural healing resources, as well as specific species, types, categories of phenomena, and objects that are elements of nature and directly have their own healing properties, to establish a special legal regime for them, to be manifested in a special legal regime regarding their use and protection, in particular, defining special measures for their protection and enhanced legal liability for offences in this area. We propose to include climate as a natural healing resource, establishing criteria for recognising it as a healing resource.

It is also expedient to create a separate department in the Department of Nature Reserve Fund of Ukraine within the Ministry of Environment and Natural Resources of Ukraine, which is responsible for monitoring the efficient and rational use of natural healing resources and natural resources for health and recreation.

69 OP Savosta, 'Improvement Mechanisms of State Regulation for Resort Development in Ukraine' (2017) 1 Theory and Practice of Public Administration 158.

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CASE NOTE

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)

Journal homepage http://ajee-journal.com

THE ROLE OF COURTS IN ENVIRONMENTAL RIGHTS PROTECTION IN THE CONTEXT OF THE STATE POLICY OF UKRAINE

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Summary: – 1. Introduction. – 2. State Policy of Ukraine for Ensuring Environmental Rights. – 3. Environmental State Policy of Ukraine and Environmental Rights Protection. – 4. ECtHR Case-Law in Environmental Matters: Cases v. Ukraine. – 5. National Case-Law on Access to Justice on Environmental Issues. – 6. Concluding Remarks.

To cite this note: *H Anisimova, I Kopytsia* 'The Role of Courts in Environmental Rights Protection in the Context of the State Policy of Ukraine' 2021 2(10) *Access to Justice in Eastern Europe 164–176. DOI: 10.33327/AJEE-18-4.2-n000066*

To link to this note: https://doi.org/10.33327/AJEE-18-4.2-n000066

Submitted on 01 Nov 2020 / Revised 26 Mar 2021 / Approved 30 Apr 2021 / Published online: 03 May 2021 View data

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ACKNOWLEDGEMENTS

The authors would like to express their gratitude to the reviewers of the article for their remarks and recommendations.

CONFLICT OF INTEREST

The authors have declared that no conflicts of interest or competing interests exist.

CONTRIBUTORS

Both authors contributed equally to the intellectual discussion underlying this paper, literature exploration, writing, data collection, analysis, and interpretation, reviews, and editing, and take responsibility for the content of the paper.

THE ROLE OF COURTS IN ENVIRONMENTAL RIGHTS PROTECTION IN THE CONTEXT OF THE STATE POLICY OF UKRAINE

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Abstract *The protection of the environmental rights of citizens is an important issue for the domestic and foreign state policy of Ukraine. Although environmental rights are formally recognised and enshrined in law, they fail to be implemented in practice. This indicates the imbalance and lack of effective political and legal mechanisms for an appropriate system of measures to create conditions for exercising environmental rights and interests, their protection, and restoration, as well as to assure environmental awareness and culture.*

In light of these general considerations, this research article aims to examine the current issues concerning access to justice for protecting environmental rights through the lens of the state policy of Ukraine and its real application to ensuring such protection. Accordingly, the underlying tasks of the article are: to analyse how meaningful and comprehensive the provisions of approved strategic documents are; to analyse the cases of the ECtHR against Ukraine in environmental matters; to study the national case-law concerning access to justice on environmental rights protection and whether they correspond with the state policy areas of ensuring environmental human rights; to analyse how efficient the mechanism of their protection in Ukraine is and whether conditions for equal access to court in environmental cases are created; to find and illuminate the current state policy gaps that might threaten the effective observance and enforcement of environmental human rights; to formulate theoretical and practical suggestions for their further improvement.

Keywords: *access to justice, human rights, environmental rights protection, ECtHR, state policy, environmental state policy, climate change litigation.*

1 INTRODUCTION

The Fundamental Law of Ukraine proclaims human rights and freedoms to be of the highest value, a proclamation that obliges the state to perform the functions of a primary duty bearer in affirming and ensuring human rights and freedoms. Judicial protection for environmental rights and interests is a constitutional guarantee, and it is the state that has a constitutional duty to ensure environmental safety and maintain ecological balance (Art. 16 of the Constitution of Ukraine).

Unfortunately, though, two-thirds of the population in Ukraine currently lives in areas where the quality of the air does not meet hygienic standards, which affects the overall morbidity; water pollution leads to various diseases; general deterioration of health of the population leads to an increase in the overall incidence, in particular, of infectious and oncological diseases; the effects of climate change (flooding, increasing frequency and intensity of extreme weather events), together with the high level of vulnerability of certain segments of the population, are leading to social and economic costs today and in the future.[1]

Therefore, the protection of the environmental rights of citizens is an important issue of the state policy of Ukraine. Existing approaches show a clear difference between theory and practice in the protection of environmental rights. Formally, they are recognised and enshrined in law, but in reality, they are not implemented, which indicates an imbalance and lack of effective political and legal mechanisms for an appropriate system of measures to create conditions for exercising environmental rights and interests, their protection, defence, restoration of violated rights, and raising environmental awareness and culture of the population. It is an indisputable fact that every human right is valuable only when it receives proper protection and defence. The current tendency of non-compliance with the requirements of environmental legislation leads to legal nihilism, destruction of the law enforcement system, reduction of the state's authority, the formation of corruption, abuse of office, etc. It is obvious that the current mechanism of legal regulation of environmental rights protection in Ukraine is far from perfect. Government institutions do not perform their specified functions, which prevents the sustainable development of society and the realisation and protection of environmental rights and leads to systemic distortions in the field of environmental law.

Meanwhile, in response to the issues outlined above, national courts are developing case-law concerning the protection of environmental rights and private and public environmental interests.

If the main goal of the current national state environmental policy of Ukraine is to ensure compliance with the environmental rights of citizens and public access to justice on environmental issues and natural resource use, state policy should be considered a fundamental basis for the establishment of an objective and effective legal mechanism in order to create the necessary conditions for every citizen to exercise and protect his or her environmental rights and ensure the fair access to justice in environmental matters.

The aim of this article is to examine the current state policy of Ukraine as regards its ability to ensure the protection of environmental rights. The underlying tasks of the article are the following: to analyse how meaningful and comprehensive the provisions of approved strategic documents are; to study the national case-law concerning access to justice on environmental issues and whether they correspond with the state policy in the areas of ensuring environmental human rights; to analyse how efficient the mechanism of their protection is in Ukraine and whether conditions for equal access to justice in the stated sphere are created; to find and illuminate the current state policy gaps that might threaten the effective observance and enforcement of environmental human rights; to formulate scientific suggestions for their further improvement.

1 Law of Ukraine 'On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the period up to 2030' (2019) <https://zakon.rada.gov.ua/laws/show/2697-19> accessed 25 March 2021.

2 STATE POLICY OF UKRAINE FOR ENSURING ENVIRONMENTAL RIGHTS

The fundamental legal act in the area of ensuring human and citizens' rights and freedoms is the Resolution of Ukrainian Parliament 'On the Principles of State Policy of Ukraine in the Field of Human Rights', which establishes the principles and key spheres of state policy in the area of human rights.[2] In 2015, the Resolution was complemented by the National Human Rights Strategy approved. It was the first comprehensive national strategic document that was aimed at improving the system of observance and enforcement of human and citizens' rights and freedoms in Ukraine.[3] Further, the 'Action Plan for the implementation of the National Human Rights Strategy until 2020' was approved by the order of the Government of Ukraine on 23 November 2015[4]. All of these documents were seen as major tools for enforcing the state's constitutional and international obligations on the protection of human rights but had absolutely no provisions ensuring environmental rights as a separate category or type of human rights. As a result of this legal and strategic gap, it is possible to assume that the absence of identification of the field of environmental rights as a priority area at the national strategic level directly affects the level of observance of environmental human rights, making the mechanism for guaranteeing and ensuring them more complicated.

It is important to note that on 24 March 2021, the updated National Human Rights Strategy was approved by Presidential Decree No. 119/2021 to serve as a basis for further coordinated activities of state bodies, local governments, and civil society institutions in ensuring human rights in Ukraine[5]. Among the 27 strategic areas, which cover a wide range of issues in the field of human rights and determine the priorities of the state in the relevant areas, a new strategic area, 'Ensuring environmental rights' (para. 15 of the Strategy), was introduced. The Strategy underlines that in order to overcome the economic and environmental crisis, the main responsibility of the state shall be the reformation of public administration to ensure human rights and freedoms.

It should be emphasised that this is the first time that issues of environmental rights protection have been acknowledged and declared at the level of national human rights policy. The strategic area devoted to ensuring environmental rights is aimed at solving the problems of anthropogenic impact on the environment threatening human health and the low level of control over compliance with the legislation in the field of environmental protection, as well as the problem of public ignorance about environmental rights and mechanisms for their implementation and protection.

The strategic goal of the area presupposes the development of measures to guarantee the possibility of receiving compensation in case of violations of environmental legislation resulting in a deterioration of a person's health and property. Expected outcomes include effective mechanisms for compensating for damage caused by violations of environmental legislation. Thus, key indicators of the successful achievement of the expected results are outlined as the following: an increased level of public awareness of environmental rights and mechanisms for their implementation and protection; an

2 Resolution of the Verkhovna Rada of Ukraine No 757-XIV 'On the Principles of State Policy of Ukraine in the Field of Human Rights' (1999) <https://zakon.rada.gov.ua/laws/show/757-14#Text> accessed 26 March 2021.

3 Decree of the President of Ukraine No 501/2015 'On Approval of National Human Rights Strategy' (2015) <https://zakon.rada.gov.ua/laws/show/501/2015#Text> accessed 26 March 2021.

4 Order of the Government of Ukraine on 23 November 2015 'Action Plan for the implementation of the National Human Rights Strategy until 2020' <https://zakon.rada.gov.ua/laws/show/1393-2015-p#Text> accessed 26 March 2021.

5 Decree of the President of Ukraine No 119/2021 'On Approval of National Human Rights Strategy of Ukraine' (2021) <https://zakon.rada.gov.ua/laws/show/119/2021#Text> accessed 26 March 2021.

increased number of appeals by the members of the public to the relevant national and local government bodies, courts, etc.

The development of the adapted National Strategy took into account the recommendations provided to Ukraine at the sixth session of the Human Rights Dialogue between Ukraine and the EU, as well as the results of the Third Cycle of the Universal Periodic Review, and may be considered an important step that will contribute to the fulfilment of Ukraine's international human rights obligations.

However, the Strategy appears to be incomplete and is definitely insufficient to combat the present challenges. The rights of climate refugees are not recognised and enshrined in either the environmental area of the Strategy or the areas concerning the rights of refugees (para. 19) and the rights of internally displaced persons (para. 19). It is our conviction that this is a great drawback of the current state policy, as we strongly believe that climate rights should be considered as an independent human rights institution in the process of formation, closely interconnected and correlated with a comprehensive intersectoral institute of environmental rights. Additionally, it is reasonable to adapt not only the concept of rights of refugees (as climate refugees' rights) but as climate rights in general.

3 ENVIRONMENTAL STATE POLICY OF UKRAINE AND ENVIRONMENTAL RIGHTS PROTECTION

Current state environmental policy, as an activity of the authorities, is aimed at ensuring the constitutional right of everyone to a safe environment and to compensation for damage caused by the violation of this right. Environmental policy at the national level is formed and implemented by the Ministry of Environmental Protection and Natural Resources of Ukraine.[6] It is worth noting that its institutional capacity for establishing state policy concerning environmental safety and protection of the environment will be strengthened by reforming and improving public administration and approximation of environmental legislation to the environmental law of the European Union.

Because the main goal of the modern national state environmental policy is to ensure compliance with environmental rights and responsibilities of citizens and public access to justice in environmental matters and nature management, it seems reasonable that it is the Strategy for the state environmental policy of Ukraine that has to be the reference point for further development and legislative support of the ecological and legal status of subjects, the foundation of their legal guarantees and effectiveness.

The Strategy is defined by the Law of Ukraine 'On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the period up to 2030', (hereinafter, the Strategy)[7] and proclaims the achievement of strategic goals, which are aimed at ensuring: the ecological values and principles of sustainable consumption and production; the sustainable development of the country's natural resource potential; the integration of environmental policy into decision-making processes regarding the state's socio-economic development; minimising environmental risks; and an effective environmental management system.

6 Resolution of the Cabinet of Ministers of Ukraine No 614 'On regulation of Ministry of Environmental Protection and Natural Resources of Ukraine' (2020) <https://zakon.rada.gov.ua/laws/show/614-2020-%D0%BF#n13> accessed 26 March 2021.

7 Law of Ukraine 'On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the period up to 2030' (2019) <https://zakon.rada.gov.ua/laws/show/2697-19> accessed 25 March 202.

However, an analysis of the provisions of the Strategy highlights the following drawbacks. The legislative use of terms in the document to denote long-term state planning is inconsistent, ambiguous, declarative, and illogical. This statement is grounded on the following observations. Firstly, there is the goal of the state environmental policy, which recognises the achievement of 'good environmental status' by introducing an ecosystem approach to all areas of socio-economic development of Ukraine to ensure the constitutional right of every citizen of Ukraine to 'clean and safe environment' and the introduction of sustainable nature and restoration of applied ecosystems. The legal constructions can be seen as misleading, especially in the logic of their construction laid down in outlining the basic principles of state environmental policy, such as '(sustainable) development', and a declarative strategic goal of 'the formation of environmental values in society'.

It is worth emphasising that today's conditions for the formation of the theoretical knowledge of environmental law and further systematisation of environmental legislation require a balanced approach and rethinking the highest social values, such as: a) human rights (including natural, fundamental, priority environmental); b) public security as a whole and environmental security as a component; c) sovereignty of the state (not only the supremacy, independence, completeness, and indivisibility of power within the territory of the state and independence and equality in foreign relations, but also as the protection of human rights, freedoms, and interests); d) the rule of law, etc. The aggregation of goals and redistribution in the direction of reducing the strategic objectives of the Strategy, unfortunately, did not improve this situation. In addition, there are also some problems with the indicators listed in the annexe to the current Strategy.

The point to note is that the current Strategy has achieved the goals of the state environmental policy to ensure environmental safety and regulatory protection of the environment and replaced them with new ones ensuring sustainable development and reducing environmental risks. Ensuring environmental safety and maintaining ecological balance on the territory of Ukraine, and increasing the level of environmental safety in the exclusion zone are now proclaimed in the Strategy as the main principles of the state environmental policy. However, back in 1996, this was already established in the Constitution of Ukraine, which means that at the constitutional level, ensuring environmental safety and maintaining ecological balance on the territory of Ukraine is the duty of the state (Art. 16). It is important to note that according to Ukrainian legislation, environmental safety is considered as both subjective and objective. In the objective sense, it is the state of the natural environment that ensures the prevention of the aggravation of the environmental situation and the emergence of danger to human health, while health and human life are subject to state protection against the negative impact of adverse environmental conditions, and the state is responsible for ensuring environmental safety through authorised bodies. In the subjective sense, environmental safety is also guaranteed as a certain legal possibility, a subjective environmental right that correlates with the constitutional right of citizens to an environment that is safe for life and health.[8]

It is reasonable to support the opinion of A. Demydenko that the first conceptual step towards a new understanding of the concept of 'environmental safety' was made by formulating environmental risk reduction as goal 4 of the updated Strategy, but the situation regarding the understanding of environmental risks by the public, government and the Verkhovna Rada, particularly regarding natural or anthropogenic threats, remains complex. The researcher emphasises that it is legislatively stated that safety is the absence of danger. The elimination of environmental risk is possible only by eliminating its cause – greenhouse gas emissions – not by reducing the impact of climate change by limiting exposure or vulnerability. For

8 Law of Ukraine 'On Environmental Protection' (as amended of 01 January 2021) <http://zakon0.rada.gov.ua/laws/show/1264-12> accessed 25 March 2021.

comparison, consider the understanding of environmental risk proposed at the Davos Forum as the product of the probability of danger on its outcome/impact. This definition can be compared with the one proposed by the Intergovernmental Panel on Climate Change, which considers risk to be the product of three factors – hazard, exposure, and vulnerability – where the impact is the product of exposure and vulnerability.[9]

Particular attention should be paid to the fact that among the priorities defined by the National Security Strategy of Ukraine,[10] there is the provision of environmental security on creating safe living conditions, in particular, in areas affected by hostilities, and creating an effective system of civil protection. The National Security Strategy of Ukraine emphasises that the living environment, air quality, drinking water, and food are deteriorating, which, in turn, affects people's lives and health. In addition, the Strategy points out that there is the irrational use of natural resources and degradation of forests, water basins, and agricultural lands, while the system of household and industrial waste management, as well as the ability to adapt the economy, livelihoods, and civil protection to climate change, are considered inefficient.

It is important to note that the National Security Strategy is considered the basis for the development of the Strategy for Environmental Security and Climate Change Adaptation (which was expected to be developed within six months after the adoption of the National Security Strategy, i.e., in the spring of 2021, but so far nothing has been proposed for public discussion). We strongly believe that Strategy for Environmental Safety and Adaptation to Climate Change should be elaborated with regards to the requirements on ecosystem restoration (reproduction) of natural resources and complexes and the preservation of natural resource potential, which will contribute to the formation of an effective legal mechanism to ensure, *inter alia*, the efficient protection of environmental (and climate) rights.

4 ECtHR CASE-LAW IN ENVIRONMENTAL MATTERS: CASES V. UKRAINE

According to Art. 17 of the Law of Ukraine 'On the execution of judgments and application of the case-law of the European Court of Human Rights',[11] the ECHR and the practice of the ECtHR are recognised as a source of law[12], which makes them applicable in environmental proceedings.

It is worth clarifying that no environmental right (e.g., to a safe/healthy environment) is expressly embodied in the ECHR. However, the ECtHR considers that harmful environmental conditions, as well as exposure to environmental risks, may threaten the exercise of the

9 A Demydenko, 'How to understand environmental safety after the adoption of the updated Environmental Strategy in February 2019?' (*ECOBUSINESS Ecology of the Enterprise,* 17 June 2020) <https://ecolog-ua.com/news/yak-rozumity-ekologichnu-bezpeku-pislya-pryynyattya-onovlenoyi-ekologichnoyi-strategiyi-v> accessed 19 April 2021.

10 Decree of the President of Ukraine 'On the National Security Strategy of Ukraine' (2020) <https://zakon.rada.gov.ua/laws/show/392/2020#Text> accessed 28 March 2021.

11 Law of Ukraine 'On the execution of judgments and application of the case-law of the European Court of Human Rights' (2006) <http://zakon2.rada.gov.ua/laws/show/3477–15> accessed 26 March 2021.

12 More about the impact of the ECtHR case impact on the Ukrainian legal doctrine in the special issue of Access to Justice in Eastern Europe (2021) <http://ajee-journal.com/upload/attaches/att_1614587521.pdf> accessed 26 March 2021. In particular, 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, 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, N Sakara 'The Applicability of the Right to a Fair Trial in Civil Proceedings: the Experience in Ukraine' 2021 1(9) Access to Justice in Eastern Europe 199–222 and others.

human rights stated in ECHR and thus has developed its case-law on environmental issues.[13] Therefore, the case-law of ECtHR on the protection of environmental rights is grounded in the application of such concepts as the right to life (Art. 1 of the ECHR), the prohibition of inhuman or degrading treatment (Art. 3), the right to liberty and security (Art. 5), the right to a fair trial (Art. 6), and the right to respect for private and family life and home (Art. 8).

As of February 2021, the ECtHR has delivered 1,520 judgements stating that Ukraine has violated the provisions of the ECHR and its Protocols.[14] Among them, the number of judgments on environmental issues is small, but they are very valuable, especially the so-called 'pilot' cases, such as *Dubetska and others v. Ukraine, Grimkovskaya v. Ukraine, Dzemyuk v. Ukraine,* etc.

In the well-known case of *Dubetska and others v. Ukraine*, the ECtHR concluded that adverse effects of the industrial pollution violated the rights guaranteed by Art. 8, the application of which is substantiated when the environmental hazard reaches such a serious level that it significantly impairs the applicant's ability to use his or her home and have a private or family life. It was noted that the assessment of such a minimum level is relative and depends on the circumstances of the case, such as the intensity and duration of the adverse effects and their physical or psychological effects on the health or quality of life of the individual. Particular attention was paid to the fact that the claim under Art. 8 cannot be substantiated if the hazard is insignificant in comparison with the environmental risks that are common for life in every modern city. Additionally, Ukraine was found unable to comply with ensuring a fair balance between the competing interests of the applicants and the community as a whole, as required by para. 2 of Art. 8 of ECHR.[15]

Therefore, it can be stated that an important precondition for a fair trial in the sphere of access to justice on environmental issues is a balance maintained between the interests of the state, society, and individuals. As proclaimed by Art. 16 of the Constitution of Ukraine, it is the responsibility of the state to ensure environmental safety and maintain ecological balance in the territory of Ukraine. The prevention of environmental risks is a fundamental goal of modern state environmental policy, which is associated with a system of preventive measures, *inter alia*, in the sphere of environmental protection.

With regard to a fair balance between private and public interests (the applicant's interests and the interests of society) and compliance with the minimum guarantees of such by Ukraine, the case of *Grimkovskaya v. Ukraine* is of great significance for understanding how environmental rights are ensured on both international and national levels. In this case, violation of the applicant's rights to respect for private and family life and home was considered to be the result of the destructive impact of the environment (in particular, noise, vibration, air and soil pollution), which caused damage to the home and deterioration of health. When assessing the case, the court noted that the negative impact of environmental pollution, which deteriorates the quality of private and family life, is estimated by a certain minimum level that is relative and has to be assessed in every single case, taking into account all of its circumstances. Additionally, the understanding of the category of 'deterioration of health' was seen as questionable because of the obvious difficulties to distinguish the impact of anthropogenic factors and environmental risks from other factors, such as physiological characteristics, lifestyle, occupational deformities, etc.[16]

13 *Factsheet – Environment and the ECHR* (Press Unit of ECtHR 2021) <https://www.echr.coe.int/Documents/FS_Environment_ENG.pdf> accessed 26 March 2021.

14 *Press Country Profile – Ukraine* (Press Unit of ECtHR 2021) <https://www.echr.coe.int/Documents/CP_Ukraine_ENG.pdf> accessed 26 March 2021.

15 *Dubetska and others v Ukraine* App no 30499/03 (ECtHR, 10 February 2011) <https://hudoc.echr.coe.int/fre/#{"itemid":["001-103273"]}> accessed 26 March 2021.

16 *Grimkovskaya v Ukraine* App no 38182/03 (ECtHR, 21 July 2011) <http://hudoc.echr.coe.int/eng?i=001-105746> accessed 26 March 2021.

For this reason, we have considered the interpretation of this concept under the Ukrainian doctrine of environmental law. However, despite the number of studies of the constitutional right to a safe environment for life and health, its 'uncertainty' remains relevant because of: a) insufficient theoretical development of the concept; b) a limited system of legal regulations to determine the quality of the environment; c) gaps in the reflection of this right in land, water, forest legislation, subsoil legislation, protection of ambient air, and protection and use of wildlife; d) shortcomings in the development of the system of guarantees in the sphere of environmental protection.[17] It is also worth noting that 'quality of life', as well as other legal categories of 'safe environment', 'favourable conditions', etc., are evaluative concepts that have subjective characteristics. Accordingly, in each case, national courts must establish in detail the facts of the case and determine whether the state is liable under Art. 8 of the ECHR, whether the situation was the result of a sudden and unexpected turn of events or whether it existed for a long time and was well known to the state authorities; whether the state was or should have been aware that the danger or harmful influence had affected the applicant's private life and to what extent the applicant had contributed to this situation for him/herself and was able to remedy it without undue expense. The court should also assess whether the authorities have conducted sufficient preliminary research to assess the risk of planned potentially hazardous activity and whether they have developed an adequate policy on polluting enterprises on the basis of available information, and whether this policy has been implemented in a timely manner.

It is also worth pointing out the judgment in *Antonenko and Others v. Ukraine*,[18] in which the ECtHR, in view of its previous case-law in *Zelenchuk and Tsitsyura v. Ukraine*, recognised the violation of Art. 1 of the First Protocol to the ECHR (protection of property rights) in connection with the general prohibition at the legislative level of the sale or any other form of alienation of agricultural land. Although these cases are directly aimed at ensuring the right of citizens to the protection of land ownership, they also contain important provisions concerning the judicial protection of environmental rights and should be taken into account by Ukrainian courts in cases of this category.

In *Dzemyuk v. Ukraine*, the application of Art. 8 was substantiated by the fact that the appropriate state of the environment directly impacted the applicant's 'quality of life' and reached a sufficient level of severity. Thus, the Court stated that the interference with the applicant's right to respect for his home and private and family life had not been 'in accordance with the law'.[19]

However, from our point of view, the most interesting case in the context of such an urgent and challenging environmental problem of the present as climate change is *Duarte Agostinho and Others v. Portugal and Others* (pending Application No. 39371/20 of 7 September 2020),[20] in which Ukraine is one of the 33 countries the case was brought against. On 13 November 2020, the notice of the application was given by the ECtHR to the defending governments. The case concerns the contribution to global greenhouse gas emissions by each of the defending countries, which are considered equally responsible for the harms affecting living conditions and health of the applicants caused by global warming and

17 Yu Shemshuchenko, *Legal Problems of Ecology* (Naukova Dumka 1989) <http://library.nlu.edu.ua/POLN_TEXT/MONOGRAFII_2010/SHEMSHUCHENKO_1989.pdf> accessed 31 March 2021.

18 *Antonenko and Others v Ukraine* App nos 45009/13 and 53 others (ECtHR, 20 February 2020) <https://www.stradalex.com/en/sl_src_publ_jur_int/document/echr_561cfc7226b50d347f3f2624df9f2c487fd6466b693fb70a1d95e6072591a409> accessed 27 March 2021.

19 *Dzemyuk v Ukraine* App no 42488/02 (ECtHR, 4 September 2014) <https://hudoc.echr.coe.int/fre/#{"itemid":["001-146357"]}> accessed 26 March 2021.

20 *Duarte Agostinho and Others v Portugal and Others* App no 39371/20 (ECtHR, 7 September 2020) <http://hudoc.echr.coe.int/eng?i=001-206535> accessed 26 March 2021.

climate change. Additionally, the argument is based on extraterritorial jurisdiction for significant transboundary environmental harm and calls on the Court to determine whether the respondent states are doing their 'fair share' towards mitigation efforts. It should be noted that the uniqueness of this case is in its attempt to connect the issues of climate change with human rights, underlining the need for interaction not only between human rights law and environmental law but also climate change law.

Only the most important (from a doctrinal point of view) ECtHR judgements have been mentioned, although the authors have conducted analyses of a number of ECtHR cases against Ukraine in environmental matters, based on which they suggest dividing such cases into nine categories:

- the first concerns the violation of the rights to a safe and healthy environment (interpretation of Art. 2 and 8);
- the second deals with protection of private property rights according to Art. 1 of the First Protocol of the ECtHR;
- the third comprises the specifics of the application of the doctrine of *ultra vires* (outside the powers) to ensure protection against errors of public authorities operating in environmental relations outside the powers (competences) granted to them by national law;
- the fourth includes access to justice (guaranteed by Art. 6 of the ECHR) for the protection of their real or eligible environmental rights, as well as cases of public participation;
- the fifth concerns the interpretation of Art. 8 of the ECHR on the right to respect for private and family life, in particular, as regards ensuring a fair balance between the interests of the individual and the interests of society in environmental relations;
- the sixth covers the right to freedom of expression (Art. 10 of the ECHR) regarding access to environmental information (information on the state of the environment); the seventh is related to the right to a fair remedy (Art. 13 of the ECHR);
- the eighth includes cases of waiver of obligations during an emergency (Art. 15 of the ECHR);
- the ninth is new and includes climate cases (concerning protection of living conditions deteriorated by the consequences of climate change and ensuring climate rights as a new group of human rights, which is in the process of active formation), etc.

Thus, we conclude that there is a certain scope of issues concerning ensuring environmental rights and access to justice for their protection in Ukraine; hence national courts must take into account the case-law of the ECtHR to address environmental rights at the national level.

5 NATIONAL CASE-LAW ON ACCESS TO JUSTICE ON ENVIRONMENTAL ISSUES

As stated in the Law of Ukraine 'On Environmental Protection', the state guarantees its citizens the realisation of environmental rights granted to them by law (part 1 of Art. 11). In cases of violation, citizens' rights in the sphere of environmental protection shall be restored, and their protection is carried out in court with regard to the legislation of Ukraine (part 3 of Art. 11). The forms of access to justice in environmental matters include: 1) appealing against decisions, actions (inaction) of public authorities and other entities, which break national environmental law; 2) lawsuit as a legal remedy, which is enforced by means of filing claims to halt environmentally hazardous activities, compensate for damages, etc.

Therefore, we suggest that an analysis should be conducted on the number of cases concerning public access to justice for the protection of environmental rights and rights to a safe environment reviewed by the Supreme Court of Ukraine (hereinafter SCU) during the period of 2018-2020. In the Courts of Cassation, 23 cases involving public participation in decision-making and access to justice in the environment were reviewed. Of these, the Grand Chamber of the SCU reviewed one case, the Supreme Court of Cassation, two cases, the Commercial Cassation Court within the SCU, three cases, and the Administrative Court of Cassation within the SCU, 17 cases.[21]

Applicants most often applied to the court as members of the public (individually or in the form of an association of citizens) under Art. 50 of the Constitution of Ukraine, which guarantees everyone the right to the environment that is safe for life and health and consequential right to compensation for damages caused by violation of this right. Additionally, Art. 2 and Art. 9 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter, the Aarhus Convention) were cited as legal grounds for applying to the court for protection of environmental rights and interests. In this context, it is noteworthy that since this Convention was ratified by Ukraine,[22] its provisions are the norms of direct action and an integral part of the national legislation of Ukraine, while the provisions of national legislation on procedures and mechanisms of judicial protection of violated environmental rights and interests can specify them.

According to Art. 9 para. 3 of the Aarhus Convention, it is the duty of the state to ensure access to procedures for appealing against actions and omissions of state bodies and individuals who violate the requirements of national environmental legislation to the public members.[23] Additionally, they are guaranteed the right to challenge violations of national environmental legislation, regardless of whether such violations concern access to information and public participation in decision-making guaranteed by the Convention or not.[24] It should be pointed out that cases filed under Art. 9 of the Aarhus Convention mainly concerned: a) appeals against decisions of local governments on the provision of land plots, which were taken with violation of their purposeful designation and placement on them of objects that could harm the environment; b) violation of land and water legislation on the allocation of land plots within the nature protection zones of rivers and inland seas; c) cruel treatment of animals and birds, in particular, those listed in the Red Data Book of Ukraine; d) emissions of pollutants into the air.

It is worth mentioning that the Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-Making (the Sofia Principles) are also a priority for national legislation and environmental law doctrine. There, it is stipulated that the public should have access to administrative and judicial proceedings, which should be aimed at challenging the actions or omissions of individuals and public authorities that violate the provisions of national environmental law as set out in Art. 9 para. 3 of the Aarhus Convention.[25] Therefore, it can be stated that access to justice in Ukraine is provided on the

21 'Judgements of the Supreme Court' (*Ukrainian Judiciary*, 2021) <https://supreme.court.gov.ua/supreme/gromadyanam/reyestr-vs/> accessed 25 March 2021.

22 Law of Ukraine 'On ratification of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters' (1999) <https://zakon.rada.gov.ua/laws/show/475/97-вр#Text> accessed 25 March 2021.

23 'Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) (1998) 2161 UNTS 447 <http://www.unece.org/env/pp/treatytext.html> accessed 25 March 2021.

24 UN ECE, *The Aarhus Convention: An Implementation Guide* (2nd edn, 2014) 278.

25 UN ECE, Draft Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making submitted by the ECE Working Group of Senior Governmental Officials 'Environment for Europe' (UN 1995) 6 <https://unece.org/DAM/env/documents/1995/cep/ece.cep.24e.pdf> accessed 25 March 2021.

basis of the provisions of the abovementioned Convention, as well as national environmental legislation.

The above is approved by the court practice, namely, by the Grand Chamber of the Supreme Court in the following cases: the claim of the ICO 'Ecology-Law-Human' against LLC 'Akvadelf' on the ban of dolphinarium's activity (Case No 910/8122/17)[26] and the action seeking a declaration of invalidity of the Methodology for calculating the amount of compensation for damages caused to the state as a result of excessive emissions of pollutants into the atmosphere (Case No 826/3820/18).[27] In both cases, the SCU concluded that the right to appeal a legal action is related to the constitutional right to a safe environment, which belongs to everyone and can be exercised individually or collectively via associations of citizens (community). It should be pointed out that in these judgements, the SCU finally determined that the right of a citizen or non-governmental organisation to go to court in order to protect the constitutional right to a safe environment cannot be restricted in any way.

In the judgment of the SCU in Case No 826/9432/17 on the claim of Volodymyr Rashko concerning the recognition of unlawful actions, inactivity, recognition of established limits for animals hunting, cancellation of the order, and the obligation to take certain actions, it was also found inadmissible to restrict the interpretation of the current legislation of Ukraine regarding the right to go to court for the protection of the legally guaranteed interest in the sphere of environmental safety.[28]

Therefore, one can see that the SCU is developing its legal position concerning the judicial protection of environmental rights and the duty of the state to ensure public access to justice in this category of cases. It can be stated that public participation in the protection of environmental rights is seen as a legal guarantee of their protection. For instance, the judgement of the SCU in Case No 373/239/18 confirmed the applicant's right to apply to the court under part 2 of Art. 9 of the Aarhus Convention. The case concerned an appeal against conclusions of an environmental inspection during the construction of a biomass power plant. The courts found an infringement of environmental law and of the rights of the applicant, but in view of incorrect application of substantive law as to the methods of judicial protection and a violation of the rules of procedural law, it came to the early conclusion to dismiss the claim due to the applicant's choice of ineffective legal remedy.[29]

Taking into account the cases above and having analysed the judgements of the SCU, it can be concluded that a relatively effective national judicial practice is currently being formed in the sphere of ensuring the right of the public to go directly to court for the protection of the violated environmental rights, as well as the mechanism of judicial protection of citizens' constitutional right to a safe and healthy environment.

However, the number of lawsuits filed by citizens or environmental non-governmental organisations to protect environmental rights (including constitutional ones) and the environment is comparatively low. Moreover, when such lawsuits are filed, they are considered for a long time, without taking into account the irreversible consequences for humans and the environment as a whole. This situation can be directly caused by the relatively low level of public awareness and legal education of citizens concerning opportunities for taking legal

26 Case No 910/8122/17 [2018] Supreme Court of Ukraine <http://reyestr.court.gov.ua/Review/78977479> accessed 25 March 2021.

27 Case No 826/3820/18 [2019] Supreme Court of Ukraine <http://www.reyestr.court.gov.ua/Review/85087717> accessed 26 March 2021.

28 Case No 826/9432/17 [2019] Supreme Court of Ukraine <http://www.reyestr.court.gov.ua/Review/85087717> accessed 26 March 2021.

29 Case No 373/239/18 [2020] Supreme Court of Ukraine <http://www.reyestr.court.gov.ua/Review/85087717> accessed 26 March 2021.

action if environmental legislation or environmental interests and rights are violated. And this, respectively, can be considered as the result of insufficient state policy, which fails to ensure the effective mechanism for realising environmental human rights.

6 CONCLUDING REMARKS

State policy is considered the basis for improving state activities on the observance and enforcement of environmental human rights, establishing an efficient mechanism of their protection, and creating conditions for equal access to justice on environmental issues. Thus, the low number of lawsuits filed by citizens or public environmental organisations to protect environmental rights in Ukraine can be interpreted as the indicator of insufficient state policy, which does not ensure the effective mechanism of environmental human rights realisation.

On the grounds of the analyses conducted on the case-law of national courts on environmental matters, a restructuring of the modern judicial system of Ukraine is suggested in order to achieve the fast and effective consideration of environmental cases, which should include: reasonable (in terms of the possibility of proving a causal link) time limits for the processing of cases and clear impact of court decisions on further improvement of environmental state policy.

The National Human Rights Strategy is considered the main strategic document aimed at forming and establishing a systematic approach to solving problems in the sphere of guaranteeing, ensuring, realising, and protecting human rights and fundamental freedoms. Despite this, it does not fully cover all the urgent issues in the realm of environmental protection. Thus, the absence of provisions that prioritise the sphere of climate change mitigation demonstrates that the current state policy of Ukraine is behind the curve and unable to respond to the present challenges. The authors drew attention to the expediency of making appropriate changes to this policy, as well as to the other strategic documents and national legislation. Having taken into account both the domestic experience and the principles developed and tested by the international community, these changes, based on suggestions outlined in the present article, can create the grounds for improving the system of ensuring and protecting environmental human rights.

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Typeset by Iryna Roina, Dakor.

Cover-list by Alona Hrytsyk

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

Email: vd_dakor@ukr.net. www.dakor.kiev.ua. Tel: +38 (044) 461-85-06

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