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ACCESS TO JUSTICE IN EASTERN EUROPE

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ABOUT ISSUE 4 OF 2021

This is the last issue of *Access to Justice in Eastern Europe* in 2021, a year of great expectations and challenges. A hybrid form of existence – online and offline – occupies our lives, and we face a completely new reality. At the same time, this year is a year of great achievements, which I am delighted to share. The Lithuanian-Polish-Ukrainian team won the project 'Impact of the COVID-19 Pandemic on the Justice System. Case Study and Suggested Solutions', co-financed by the Polish National Agency for Academic Exchange within the Urgency Grants programme, which will be implemented next year. The main idea and focus of this project are to observe standards of access to court and implementation of the right to a fair trial in the period of the pandemic, transforming the main principles of civil procedure in the face of this challenge. Our excellent team consists of Katarzyna Gajda-Roszczynialska from the University of Silesia, Vigita Vebraite from Vilmius University, and me from Taras Shevchenko National University of Kyiv. We sincerely hope that together, we will contribute to current research and propose useful recommendations for possible future obstacles.

For me, it is also a great honour and delight to present this issue's contributions and briefly sketch an outline to draw attention to the themes. The issue opens with the article of *Remco Van Rhee*, who has played an important role in Ukrainian justice development in recent years through his participation in various projects and activities. This time, he turned his attention to mandatory mediation before litigation and the kaleidoscope of European best practices, providing a deep understanding of what mediation is and why it should be mandatory.

A fresh and interesting perspective on Polish-Ukrainian legal services was prepared by *Stanisław Lipiec*, a young researcher, who raised incredibly important issues of interrelations between Ukrainian and Polish legal advisers and made a prognosis regarding requests for legal services in both our states in the coming years.

The uncommon but important and interesting topic of *Inna Boyko's* research article is related to precedent in international adjudication. A deep analysis of international court decisions combined with theoretical approaches makes this study worth the attention of our readers.

The last research article, written by *Olga Donets*, concerned issues of natural resources and human rights. The pandemic has made us more aware of our relationship with the environment, and this article is a witness to the increasing interest of the scholarly community in issues of environmental rights protection in their entirety.

A few notes have also been included in this issue due to their interesting insights and importance for further research.

Finally, let me share some of our latest accomplishments. Please welcome the new managing editors in our team – **Dr. Oksana Uhrynovska**, PhD in Law, Assoc. Prof. of the Department of Civil Law and Procedure, Ivan Franko National University of Lviv, Ukraine, and **Dr. Olena Terekh**, PhD in Law, Assoc. Prof. of the Department of Civil Procedure, Law School, Taras Shevchenko National University of Kyiv, Ukraine. Managing editors are those who bear the burden of ensuring high-quality content. I am extremely proud of our team – the managing

editors, the helpful Editorial Board members, the professional reviewers, and the kind language editors – who helped all of us share the authors' research with an international audience and attract more attention to the legal science of Eastern Europe and our reform, case-law, achievements, and problems.

The essence of the rule of law and equal access to justice should not be limited by any borders, and sharing results and best practices helps us to make our world sustainable, peaceful, and strong.

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Research Article

MANDATORY MEDIATION BEFORE LITIGATION IN CIVIL AND COMMERCIAL MATTERS: A EUROPEAN PERSPECTIVE

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Summary: 1. Introduction. – 2. England and Wales. – 3. Italy. – 4. Germany. – 5. Austria. – 6. France. – 7. Spain. – 8. Norway. – 9. The Netherlands. – 10. Conclusions.

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CONFLICTS OF INTEREST

The author declares there is no conflict of interest. Although the author serves in the AJEE Editorial Board, which may cause a potential conflict of interest or the perception of bias, the final decisions for the publication of this article, including the choice of peer reviewers, were handled by the editors and the other editorial board members.

DISCLAIMER

The author declares that he is involved in the project Pravo-Justice, Kiev, Ukraine. However, the opinions and views expressed in this article are his own.

CONTRIBUTORSHIP

The author is solely responsible for this study and the findings expressed in it.

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MANDATORY MEDIATION BEFORE LITIGATION IN CIVIL AND COMMERCIAL MATTERS: A EUROPEAN PERSPECTIVE

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Abstract *Nowhere in Europe are disputants forced to settle their civil or commercial disputes by way of mediation or any other form of alternative dispute resolution. Settlement is also completely voluntary in light of the fundamental right of access to court of Art. 6 of the European Convention of Human Rights. This does not, however, mean that potential disputants may not be requested to attempt to settle their case before going to court, for example, by way of mediation, especially if strict time limits are observed for such procedure. In some European jurisdictions, attempting mediation or other forms of alternative dispute resolution before court action is initiated is mandatory, at least in certain cases. The present contribution will focus on such preliminary mandatory mediation attempts in a selection of jurisdictions.*

Keywords*: mediation; mandatory mediation; alternative dispute resolution; civil litigation*

1 INTRODUCTION

Nowhere in Europe are disputants forced to settle their civil or commercial disputes by way of mediation or any other form of alternative dispute resolution (also referred to as 'ADR' hereafter). Settlement is completely voluntary, also in light of the fundamental right of access to court of Art. 6 of the European Convention of Human Rights. This does not, however, mean that potential disputants may not be requested to attempt to settle their case before going to court, for example, by way of mediation, especially if strict time limits are observed for such procedure. In some European jurisdictions, attempting mediation or other forms of alternative dispute resolution before court action is initiated is mandatory, at least in certain cases. The present contribution will mainly focus on such preliminary mandatory mediation attempts.

Mediation attempts may occur before or after litigation has started. After litigation has started, courts in most European jurisdictions may stay the hearing of the case for a certain period of time to allow the parties to attempt alternative dispute resolution, including mediation. Most courts in Europe have this power since they have the duty to facilitate the settlement of cases throughout the proceedings.[1] This duty originates in medieval procedure and is part of our common European legal heritage.[2]

1 See, e.g., Rule 10 of the ELI/UNIDROIT Model European Rules of Civil Procedure (2020).

2 See CH van Rhee, 'Case Management in Europe: A Modern Approach to Civil Litigation' (2018) 8 (1) International Journal of Procedural Law 65-84.

For obvious reasons, mediation or other types of ADR *before* court litigation is started are the preferred routes to settlement. Avoiding litigation is cost-effective and prevents courts from being burdened with too many cases. Additionally, mediation before litigation is started means that relationships between disputants remain as good as possible, therefore increasing the chances of an amicable settlement. Litigation in a court of law, on the contrary, will usually cause relationships to deteriorate due to its adversarial character. It may therefore not contribute to a settlement.

In various European jurisdictions, attempts have been made to increase the use of mediation and other types of alternative dispute resolution. One of the major impediments encountered in countries where mediation is promoted is that disputants are often unaware of the benefits and usefulness of alternative dispute resolution, including mediation. Most parties contact a lawyer when they encounter a legal problem, and this lawyer will, in most jurisdictions, habitually suggest that the parties initiate court action. This is unfortunate given the benefits of mediation and other types of alternative dispute resolution for the parties and for society at large. Various jurisdictions have, therefore, sought to introduce measures to increase the awareness of parties of alternative forms of dispute resolution and encourage them to explore the possibilities of mediation. In several of these jurisdictions, mediation attempts have been made mandatory before a case can be brought before a court of law. This may be done on the basis that certain types of disputes are suitable for mediation because of their specific features, as is the case in England and Wales. In that situation, the list of cases is usually short and often limited to family matters or neighbourhood disputes. In other jurisdictions, mandatory mediation attempts are introduced to combat case overloads, as is the case in Italy, and in this situation, the list of disputes submitted to mandatory mediation attempts is usually long.

In the first section below, the role and statutory framework as regards preliminary mandatory mediation attempts – or, more precisely, a Mediation Information and Assessment Meeting (also referred to as MIAM hereafter) – in England and Wales will be discussed. In subsequent sections, comparable initiatives in a selection of European Union member states will be studied (Italy, Germany, Austria, France, Spain, Norway, and the Netherlands).

2 ENGLAND AND WALES

In England and Wales, Mediation Information and Assessment Meetings are mandatory (with some exceptions) in family matters following separation when working out arrangements for the children and finances.[3] Although MIAMs are only mandatory in family disputes, one should note that the so-called 'Practice Direction on Pre-action Conduct' (i.e., the practice direction regulating the conduct of the parties before they go to court)[4] encourages the potential claimant to inform the potential defendant which form (if any) of alternative dispute resolution, including mediation, the potential claimant thinks to be most suitable. The potential defendant then has to state whether he or she agrees to the potential claimant's proposal for ADR. If the defendant does not agree, an explanation should be provided and

3 Relevant legislation: Children and Families Act 2014, Chapter 6, Part 2, Section 10 <https://www.legislation.gov.uk/ukpga/2014/6/section/10/enacted> accessed 5 September 2021; Family Procedure Rules, Part 3 – Non-Court Dispute Resolution <http://www.justice.gov.uk/courts/procedure-rules/family/parts/part_03> accessed 5 September 2021; Family Procedure Rules, Practice Direction 3a – Family Mediation Information and Assessment Meetings (MIAMS) <http://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_03a#para8> accessed 5 September 2021.

4 This 'Practice Direction on Pre-action Conduct' can be found at <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct> accessed 30 August 2021.

another form of alternative dispute resolution should be suggested, unless no other form is considered suitable.

The relevant part of the Practice Direction reads as follows:

> 8. Litigation should be a last resort. As part of a relevant pre-action protocol or this Practice Direction, the parties should consider whether negotiation or some other form of ADR might enable them to settle their dispute without commencing proceedings.

If an action is brought in court nevertheless, the parties must prove that the pre-action obligations in this respect have been met, and sanctions may be imposed by the court if this is not the case. A possible sanction is that the party at fault may be ordered to pay (part of) the costs of the opponent party.

The relevant part of the Practice Direction reads as follows:

> 11. If proceedings are issued, the parties may be required by the court to provide evidence that ADR has been considered. A party's silence in response to an invitation to participate or a refusal to participate in ADR might be considered unreasonable by the court and could lead to the court ordering that party to pay additional court costs.

The lawyers of the parties should inform them of ADR (including mediation), and this is reinforced through the so-called 'Directions Questionnaire (Fast Track and Multi-Track)', which aims at allocating the case to the relevant procedural track. In this questionnaire, the lawyer confirms 'that I have explained to my client the need to try to settle; the options available; and the possibility of costs sanctions if they refuse to try to settle'.[5] The 'Directions Questionnaire (Small Claims Track)' is also very explicit about the benefits of mediation or other forms of ADR.[6]

But let us now focus on mandatory Meditation Information and Assessment Meetings. As stated, in England and Wales, a MIAM is compulsory if a party wants to take a case to court concerning children and finances following separation. In these cases, both parties need to attend a Meditation Information and Assessment Meeting. Usually, spouses prefer to attend separate MIAMs since it is often felt that for emotional reasons, it is difficult to attend the same meeting. However, even when the parties attend the same meeting, at some stage, the mediator communicates with the parties separately since this is important to make the parties feel comfortable with the process and also in order to check whether there are any issues of harm or abuse.[7]

MIAMS are considered necessary in family matters because other than purely legal matters are involved, and since the continuing relationship between the parties is central.

A MIAM is a meeting in which the options are explored for settling the case without court action. This meeting takes place in the presence of a qualified mediator. Mediation is not the only form of alternative dispute resolution discussed during MIAM. The mediator informs the parties how they can settle their case without going to court and provides the

5 The 'Directions Questionnaire (Fast Track and Multi-Track)' can be found at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/953456/n181-eng.pdf> accessed 30 August 2021.

6 The 'Directions Questionnaire (Small Claims Track)' can be found at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/954476/n180-eng.pdf> accessed 30 August 2021.

7 See the website of 'Resolution' (a community of family justice professionals who work with families and individuals to resolve issues in a constructive way) at <https://resolution.org.uk/looking-for-help/splitting-up/your-process-options-for-divorce-and-dissolution/mediation-information-and-assessment-meetings-miams/> accessed 30 August 2021.

parties with information on the pros and cons of the alternatives to court action. A MIAM is confidential.[8]

Accreditation of the mediator is necessary, and such accreditation is provided by the Family Mediation Council (FMC).[9] Accredited mediators can be found online.[10]

A MIAM can take place in different places: in the mediator's office or in another place. The parties and the mediator have to agree on this place. A MIAM can also be held online.[11]

A MIAM is obligatory and has to take place before the parties take their case to the family court. Exemptions to this rule include:

- Domestic Violence;
- Child protection concerns;
- Urgency;
- Previous attendance at ADR in the last four months;
- Dishonesty and lack of disclosure (disclosure can be defined as providing a list of documents that are relevant for the matter at stake);
- The party has contacted at least 3 mediators (or all of them if there are fewer than three) within 15 miles of his or her home, and no mediator is available within the next 15 working days.[12]

Information about MIAMs is provided by the Family Mediation Council, and this same body provides information on situations where it is sufficiently difficult for parties to attend a MIAM that this cannot be asked of them.

At the MIAM, the mediator will:

- Inform the parties about mediation and other forms of ADR;
- Evaluate whether mediation is suitable for resolving the dispute between the parties;
- Consider a risk or previous risk of harm to children or domestic violence;
- Provide information related to matters arising on separation.[13]

After the MIAM, the parties may try mediation. If so, they have to make an appointment for a first session. However, if they do not want to continue, the applicable court form is signed by the mediator, and this is proof of the fact that the parties have thought about mediation. The form is needed to bring court action.[14]

Attendance at a MIAM is free for parties who are entitled to legal aid. This should be mentioned to the parties by the mediator. A party that is not entitled to legal aid has to pay a price that is determined by the mediator. At the moment, the average price is 120 British Pounds (ca. 5000 Ukrainian Grivna) per person.[15]

It was expected that MIAMs would be very popular among potential litigants, but this is not the case even though a MIAM is compulsory before commencing court action.

8 See the website of 'Resolution' (n 7).

9 The website of the Family Mediation Council can be found at <https://www.familymediationcouncil.org.uk/> accessed 30 August 2021.

10 See <https://resolution.org.uk/find-a-law-professional/> accessed 30 August 2021.

11 See the website of 'Resolution' (n 7).

12 See for a list of exemptions the website of 'Mediate UK' at <https://www.mediateuk.co.uk/15-exemptions-to-attending-a-miam/> accessed 31 August 2021.

13 See the website of 'Resolution' (n 7).

14 The form can be found at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/688194/fm1-eng.pdf> accessed 30 August 2021.

15 See for the costs of mediation <https://www.familymediationcouncil.org.uk/family-mediation/cost/> accessed 30 August 2021.

Nevertheless, 6 out of 10 couples just ignore the obligation to have a MIAM and go to court right away. Since its introduction, the number of cases where MIAMs are held has decreased by 60%. One reason is that legal aid for advice in family matters has been abolished in England and Wales (this is due to the Legal Aid, Sentencing and Punishing of Offenders Act or LASPO 2012).[16]

The following improvements to the existing situation are suggested by Moore and Brooks in England and Wales:[17]

- Litigants should be given access to legal aid for legal advice and representation by a lawyer in the early stages of their family dispute, i.e., at the time when mediation should be considered. Currently, legal aid is not available in these stages (only when there is domestic violence), and therefore there is no one who may inform the parties about MIAMs. Such early legal aid is especially justified since financial aid is available in subsequent mediation.
- Clients should be referred to a MIAM by their lawyers. Lawyers should not encourage clients to exempt themselves from mediation. However, lawyers may have an interest in avoiding mediation since they may want to continue to handle the case, allowing them to charge their clients. It is also problematic that family lawyers have little exposure to non-court dispute resolution and may not be informed about its benefits. Some lawyers may even be of the opinion that the chances of success in mediation are not high and that it mainly causes delay.
- It is also stated that the name MIAM is relatively unknown and that it does not express the idea that the meeting is not only meant to explore mediation but also other forms of ADR. A better name should be chosen.
- The exemptions which allow the parties to avoid a MIAM are felt to be too broad. For example, a MIAM may be avoided based on an attempt to negotiate between the parties or between their solicitors. This should be changed.
- The court is not required to investigate whether the parties have invoked valid reasons to avoid a MIAM. In actual fact, in practice courts often do not investigate this. A solution may be to remove all exemptions to participate in a MIAM unless speed is essential.
- Attendance of both parties at a single MIAM needs to be encouraged: the conversion rate of MIAMs to full mediation increased from 73% to 93% when MIAMs were conducted in the presence of both parties.
- The availability of appropriate mediators should be increased; a lack of timely availability of a suitable mediator is one of the reasons for exemption from attending a MIAM.
- Contact between mediators and clients should be facilitated. This may be effected by allowing MIAMs to take place by way of electronic means. Mediators should also be more flexible by meeting litigants at a location that is easily accessible or convenient. An example is a MIAM in the solicitor's office.
- Although in every stage of the proceedings, the court should consider whether out of court dispute resolution is possible, courts are permitting a wholesale avoidance of MIAMs. Instead, courts should adjourn the proceedings if appropriate, allowing parties to make use of ADR.

16 A Moore, S Brookes, 'MIAMs: A Worthy Idea, Failing in Delivery' (*Family Law Week*, 31 October 2017) <https://www.familylawweek.co.uk/site.aspx?i=ed182325> accessed 30 August 2021.

17 Ibid.

- Judges should investigate more strictly whether the parties have claimed a valid exemption from holding a MIAM, and if this is not the case, they should postpone the hearing until a MIAM has been convened.
- Mediators should be present in the court building for holding MIAMs.

3 ITALY

In 2012, the Italian Constitutional Court decided that it would annul the requirement of mandatory mediation in Legislative Decree no. 28/2010. It had found that the Government had gone beyond the scope of the European Mediation Directive and Italian Law 69/2009 allowing the Government to introduce a decree on civil and commercial mediation.[18]

In 2013, mandatory mediation attempts were reintroduced, this time based on Decree 69/13 on Urgent Dispositions to Relaunch the Economy (the decree was converted into Law No. 98 of 2013).[19] As the title of this Decree indicates, these attempts were reintroduced for the benefit of the Italian economy by relieving the overburdened Italian courts. Access to justice was and is under threat in Italy.

In Italy, mandatory mediation must be conducted by one of the ADR providers accredited by the Ministry of Justice. Parties must participate in mandatory mediation with the assistance of a lawyer. The lawyer must inform the client in writing about mandatory mediation, as well as about the tax benefits that result from participating in mediation. An omission to do so makes the power of attorney voidable.[20]

The mandatory mediation session has to be held within 30 days of filing the request for mediation. During this session, the mediator, the parties, and their lawyers must consider whether mediation is feasible.[21]

If the parties decide not to continue with mediation, they may initiate court action. In this case, they do not have to pay the mediator except for the initial fees (currently €40 plus VAT, i.e., ca. 1350 Ukrainian Grivna plus VAT).[22]

If the parties decide to continue with mediation, this can be done directly at the initial exploratory mediation session or later. Two different possibilities may be distinguished:

- if a mediated settlement is reached, the mediator drafts a document containing the settlement. That document must be signed by the parties, their lawyers, and the mediator. The document is directly enforceable;
- if no settlement is reached, the mediator makes a non-binding proposal about how the dispute may be solved. The parties are free to accept or refuse this proposal. In

18 E Silvestri, R Jagtenberg, 'Tweeluik – Diptych: Juggling a Red Hot Potato: Italy, the EU, and Mandatory Mediation' (2013) 17 (1) Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement 33.

19 E Silvestri, 'Too Much of a Good Thing: Alternative Dispute Resolution in Italy' (2017) 21 (4) Nederlands-Vlaams Tijdschrift voor Mediation en Conflictmanagement 77-90.

20 See Art. 4(3) of Legislative Decree No. 28 of 2010 in the text presently in force, after the amendments of 2013. See also Art. 27(3) of the Code of Conduct for Italian Lawyers.

21 See Art. 8(1) of Legislative Decree No. 28 of 2010. See also L d'Urso, 'Italy's "Required Initial Mediation Session": Bridging the Gap between Mandatory and Voluntary Mediation' (2018) 36 (4) Alternatives to the High Cost of Litigation. The Newsletter of the International Institute for Conflict Prevention & Resolution 49, 57-58, <https://www.adrcenterfordevelopment.com/wp-content/uploads/2020/04/Italys-Required-Initial-Mediation-Session-by-Leonardo-DUrso-5.pdf> accessed 31 August 2021.

22 F Maiorana, 'Mediation in Italy: How does it Differ?' <https://www.londonschoolofmediation.com/story/2019/02/06/mediation-in-italy-how-does-it-differ-/107/> accessed 31 August 2021.

> case of refusal, mediation is considered to have failed, and court action may be brought. However, if the subsequent judgment of the court is identical to the mediator's proposal, this may affect the liability for judicial expenses. The court will refuse to award all the costs and the expenses to the winning party if that party has previously rejected the mediator's proposal. Instead, the court will order the winning party to pay the costs and court fees of the losing party. Even if the judge's decision is not completely identical to the proposal of the mediator, this may still be done by the court.[23]

Mediation is promoted in Italy because the civil courts are overburdened. It is considered beneficial for civil disputes about rights and duties over which the parties can freely dispose. It seems that the current list of cases subject to mandatory exploratory mediation sessions is mainly the result of political bargaining and lobbying. Heavy pressure exerted by lawyers on the members of Parliament (many of whom are lawyers themselves) led, for example, to changes as regards mandatory mediation: civil liability for damage caused by vehicles or ships, which was originally included in the list, was later exempted. Civil liability for medical malpractice, on the contrary, was extended to include all forms of health care malpractice.

Among the disputes in which mandatory mediation attempts are prescribed in Italy are:[24]

- Landlord and tenant matters;
- Condominium;
- Joint ownership of land;
- Rights in rem (property);
- Partition;
- Hereditary succession;
- Family agreements;
- Loans;
- Lease;
- Damages arising from medical and healthcare liability;
- Defamation through the press or by other means of advertising;
- Insurance;
- Banking contracts;
- Financial contracts;
- Neighbour-disputes;
- Trusts and real estate;
- Family-owned business.

Since 2020, if a defaulting debtor can prove that its behaviour was justified due to compliance with the health and safety rules issued for infection prevention and control (Covid), contract disputes cannot be brought to court unless the parties have previously attempted a settlement agreement through out-of-court mediation.[25]

If a case is brought before the court without the parties having participated in a mandatory mediation attempt, the judge will suspend the hearing of the case and order the claimant to explore mediation. Failure to comply with this order has the same consequences as those resulting from commencing court action directly while skipping mediation (see below).[26]

Participation in mandatory mediation attempts or the absence of a party or parties in mandatory mediation will appear from a document signed by the mediator and the parties

23 A Bruni, 'Mediation in Italy' *Lexology*, 9 September 2019 <https://www.lexology.com/library/detail.aspx?g=d0faf894-e442-46f9-9fee-dfb1f78ddd4a> accessed 31 August 2021.

24 See Art. 5(1-bis) of Legislative Decree No. 28 of 2010.

25 See E Silvestri, 'Covid-19 and Civil Justice: News from the Italian Front' in B Krans, A Nylund (eds), *Civil Courts Coping with Covid-19* (Eleven International Publishing 2021) 103-11.

26 See Art. 5(1-bis) of Legislative Decree No. 28 of 2010.

that were present at the initial mediation session and their lawyers. If no party attended, no such document can be submitted, and there will not be proof of participation in mandatory mediation attempts.[27]

Unjustified failure of a party to appear at mandatory mediation will trigger negative inferences in subsequent court proceedings. Additionally, legislation provides that a party who does not make an appearance is obliged to pay the state an amount that equals the amount a party pays when that party would participate in court proceedings.[28]

In Italy, the use of civil and commercial mediation has increased due to the fact that lawyers have, at least to a certain extent, embraced mediation, also as a result of the successful lobbying for their interests (mentioned above).

The Italian Ministry of Justice regularly publishes statistics regarding civil and commercial mediation. The data for 2020 are as follows:[29]

A total of 28.7 per cent of mediated cases were successful in that a settlement was reached. When the parties agreed to continue with mediation after the initial exploratory mediation session, a settlement was reached in 46.7 per cent of cases. However, this figure differs per type of case. The percentage of proceedings that ended with a settlement after the parties agreed to continue with mediation is as follows for the topics stated:

- insurance: 67 per cent;
- rights in rem (property): 58 per cent;
- family agreements: 57 per cent;
- lease: 49 per cent;
- partition: 45 per cent;
- condominium: 37 per cent;
- financial contracts: 27 per cent;
- banking contracts: 20 per cent.

The average duration of successful mediation was 175 days.

4 GERMANY

Section 15a of the Introductory Act to the German Civil Procedure Code (*Gesetz betreffend die Einführung der Zivilprozessordnung* or EGZPO) allows the federal states (*Länder*) to experiment with preliminary ADR, including mediation.[30] Individual federal states may introduce (and have introduced) legislation on mandatory ADR schemes requiring participation before court proceedings can be started. The individual federal states may themselves decide on the modalities of their mandatory ADR schemes. In this way, different approaches can be tested.

Section 15a EGZPO mentions the following disputes as being suitable for experiments with preliminary ADR: small claims, i.e., claims up to €750 (ca. 25,000 Ukrainian Grivna),

27 See Art. 11(4) of Legislative Decree No. 28 of 2010.

28 See Art. 8(4-bis) of Legislative Decree No. 28 of 2010.

29 Available at <https://webstat.giustizia.it/Analisi%20e%20ricerche/Civil%20mediation%20in%20Italy%20-%20Year%202020%20(ENG).pdf> accessed 31 August 2021.

30 § 15a(1) EGZPO: Durch Landesgesetz kann bestimmt werden, dass die Erhebung der Klage erst zulässig ist, nachdem von einer durch die Landesjustizverwaltung eingerichteten oder anerkannten Gütestelle versucht worden ist, die Streitigkeit einvernehmlich beizulegen (…).

disputes between neighbours, defamation that has not occurred through the media, and disputes under the General Equal Treatment Act.[31]

Various German *Länder* have indeed experimented with mandatory preliminary ADR, especially in small claims litigation. Amongst these are Bavaria, Brandenburg, Hessen, Saarland, Schleswig-Holstein, North Rhine-Westphalia, Lower Saxony, Saxony-Anhalt, and Baden-Württemberg. Most experiments have not been successful, and legislation on the topic has been amended or withdrawn. The opposition against the introduction of mandatory preliminary ADR in Germany was considerable, and attempts were made to circumvent the requirement.[32]

It has not proved possible to identify relevant statistics on the functioning of mandatory preliminary ADR in Germany.[33]

5 AUSTRIA

In 2004, Austria introduced a mandatory attempt at out-of-court settlement as a prerequisite for filing court action in the area of certain neighbourhood disputes. Under Austrian law, a party can obtain injunctive relief in case of deprivation of light or air by trees and other plants situated on its neighbour's property. Before bringing proceedings in court, a neighbour must either (i) refer the matter to a recognised reconciliation centre, (ii) apply for a praetoric settlement agreement, i.e., a settlement by way of judicial conciliation, or (iii) have the matter referred to mediation with the consent of the opponent party. Cases in which this is not done will be dismissed when brought to court. If the parties agree to mediation, such mediation must be conducted by a registered mediator. Three months after attempted settlement, the claim can be brought before the court.[34] The claimant must attach to its statement of claim confirmation by the reconciliation board, the court, or the mediator of the fact that no amicable settlement could be reached. It is noteworthy in this context that, according to the Austrian Supreme Court's case law, it is irrelevant whether the defendant became aware of settlement attempts before the action was brought. The claimant only has to show that he or she attempted to reach an amicable settlement and that no agreement could be reached within 3 months.[35]

A second group of cases where initial mandatory mediation plays a role in Austria concerns the dismissal of apprentices. New rules on the dismissal of apprentices were introduced in 2008. If an employer dismisses an apprentice extraordinarily for reasons other than the ones

31 § 15a(1) EGZPO:
(…) vermögensrechtlichen Streitigkeiten vor dem Amtsgericht über Ansprüche, deren Gegenstand an Geld oder Geldeswert die Summe von 750 Euro nicht übersteigt,
(…) Streitigkeiten über Ansprüche aus dem Nachbarrecht nach den §§ 910, 911, 923 des Bürgerlichen Gesetzbuchs und nach § 906 des Bürgerlichen Gesetzbuchs sowie nach den landesgesetzlichen Vorschriften im Sinne des Artikels 124 des Einführungsgesetzes zum Bürgerlichen Gesetzbuche, sofern es sich nicht um Einwirkungen von einem gewerblichen Betrieb handelt,
(…) Streitigkeiten über Ansprüche wegen Verletzung der persönlichen Ehre, die nicht in Presse oder Rundfunk begangen worden sind,
(…) Streitigkeiten über Ansprüche nach Abschnitt 3 des Allgemeinen Gleichbehandlungsgesetzes.

32 See, e.g., Landtag von Baden-Württemberg, Gesetz zur Aufhebung des Schlichtungsgesetzes <https://www.landtag-bw.de/files/live/sites/LTBW/files/dokumente/WP15/Drucksachen/3000/15_3024_D.pdf> accessed 1 September 2021.

33 Such information is, for example, not included in *Statistisches Bundesamt: Rechtspflege Zivilgerichte (Fachserie 10 Reihe 2.1)*.

34 M Roth, D Gherdane, 'Mediation in Austria: The European Pioneer in Mediation Law and Practice' in KJ Hopt, F Steffek, *Mediation: Principles and Regulation in Comparative Perspective* (OUP 2012) 293.

35 Ris-Justiz RS0122901; OGH 24.02.2015, 10 Ob 58/14y; OGH 11.12.2007, 4 Ob 196/07y.

mentioned in the Austrian Vocational Training Act (*Berufsausbildungsgesetz* or BAG), the employer has to initiate mediation, provided the apprentice does not refuse.[36] The new rules seek to balance the interests of the employers to dismiss apprentices and the interest of the public in continued training.[37] Mandatory mediation can only be omitted if the apprentice refuses to participate in writing and does not revoke this refusal within 14 days. The employer has to suggest a mediator, using the list of § 8 *Zivilrechts-Mediations-Gesetz* (ZivMediatG). If the apprentice agrees to the person of the mediator, the mediator is deemed to be appointed. Otherwise, the employer has to suggest two further mediators. In accordance with § 15a (6) of the BAG, the mediation process is deemed to have ended when the employer is willing to continue the apprenticeship, or the apprentice declares that he or she will no longer insist on continuation. In addition, the mediation process is deemed to have ended when this is decided by the mediator.

Mandatory mediation also plays a role in Austria in matters concerning child custody and access rights. Section 107 (3) of the *Ausserstreitgesetz* (AusStrG) stipulates that the court must order the measures necessary to safeguard the child's best interests. In accordance with Section 107 (3) (2) AusStrG, such measures may include participation in an initial discussion about mediation (a mediation information session) or another type of ADR. The competent court may order such a mediation information session if it is of the opinion that this is in the child's best interests. An obligation to participate in a subsequent mediation procedure cannot, however, be based on this. The procedure in court can be paused for the time needed for the information session.[38] Appropriate documentary evidence of participation has to be submitted to the court. This documentation must confirm that meditation was explained as an alternative means of conflict resolution. Sanctions are available if parties do not participate.

For certain claims related to discrimination under the Austrian Federal Employment of People with Disabilities Act and the Federal Equal Opportunities for Disabled Persons Act,[39] an out-of-court settlement attempt, for example, mediation, is mandatory before a claim can be brought in court. Litigation can only be brought if an amicable settlement has not been reached, usually within a period of three months. The claimant should submit a confirmation from the mediator that no amicable agreement could be reached.

Apart from the cases mentioned above, there is no obligation in Austria to attempt mediation or other types of ADR.

It is known from practice that mandatory mediation is not used very often in Austria and that alternative methods of dispute resolution are preferred. Statistics are not available.

6 FRANCE

In France, the Law of 18 November 2016 on the Modernization of Justice for the Twenty-First Century introduces experiments with mandatory mediation and other types of ADR.[40] Art. 750-1 of the Code of Civil Procedure contains an obligation to attempt mediation or another type of ADR before starting court proceedings for small claims

36 § 15a BAG.

37 M Roth, D Gherdane (n 34) 295.

38 § 107 (4) AusStrG.

39 See § 10 *Bundes-Behindertengleichstellungs-Gesetz* (BGStG) and § 7k *Bundes-Behinderteneinstellungs-Gesetz* (BEinstG).

40 Available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000033418805/> accessed 5 September 2021.

(i.e., claims of up to 5,000 euros or ca. 170,000 Ukrainian Grivna) or claims concerning neighbourhood disputes.

Claimants who have to pursue mandatory ADR need to take two steps:

Step 1: The parties must choose a specific type of ADR as a prerequisite for introducing proceedings in a court of law. If this is not done, the case will be dismissed when brought before the court.[41] Art. 750-1 is not applicable in the following cases:

- if at least one of the parties is pursuing the court's approval of an earlier agreement;
- if ADR is required by the decision that the claimant wants to contest;
- if there is a legitimate reason not to attempt ADR, for example, in the case of emergency, or where it is impossible to attempt ADR, where a speedy decision is needed, or where judicial conciliators are not available within a reasonable period of time; or
- if a judge or an administrative authority should *ex officio* attempt conciliation when applying a specific legal rule.[42]

Step 2: When drafting the statement of claim, the claimant must provide the necessary information about attempted mandatory out-of-court settlement. If the claimant does not do so, the statement of claim is null and void.[43] However, if the claimant only fails to mention settlement attempts even though these have taken place, the statement of claim may be amended. Given the consequences of not attempting mandatory ADR, a good record of such an attempt should be kept.

Relevant statistics could not be identified.

7 SPAIN

In Spain, Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters resulted in Law 5/2012 of 6 July 2012 on civil and commercial mediation. This legislation and Royal Decree 980/2013 that followed did not, however, introduce mandatory mediation in Spain. There is nevertheless an exception: since November 2020, three kinds of matters are subject to mandatory mediation in Catalonia (so not in the whole of Spain):

- Matters where the parties previously and expressly agreed on submission to mediation;
- Matters related to custody of minors or disabled persons;

41 Art. 750-1: A peine d'irrecevabilité que le juge peut prononcer d'office, la demande en justice doit être précédée, au choix des parties, d'une tentative de conciliation menée par un conciliateur de justice, d'une tentative de médiation ou d'une tentative de procédure participative, lorsqu'elle tend au paiement d'une somme n'excédant pas 5 000 euros ou lorsqu'elle est relative à l'une des actions mentionnées aux articles R. 211-3-4 et R. 211-3-8 du code de l'organisation judiciaire. …

42 Art. 750-1: … Les parties sont dispensées de l'obligation mentionnée au premier alinéa dans les cas suivants:
1° Si l'une des parties au moins sollicite l'homologation d'un accord;
2° Lorsque l'exercice d'un recours préalable est imposé auprès de l'auteur de la décision;
3° Si l'absence de recours à l'un des modes de résolution amiable mentionnés au premier alinéa est justifiée par un motif légitime tenant soit à l'urgence manifeste soit aux circonstances de l'espèce rendant impossible une telle tentative ou nécessitant qu'une décision soit rendue non contradictoirement soit à l'indisponibilité de conciliateurs de justice entraînant l'organisation de la première réunion de conciliation dans un délai manifestement excessif au regard de la nature et des enjeux du litige;
4° Si le juge ou l'autorité administrative doit, en application d'une disposition particulière, procéder à une tentative préalable de conciliation.

43 Art. 54 of the French Code of Civil Procedure.

- Matters related to (other) family issues when the judge orders the parties to attempt mediation.[44]

In addition, the Law allows judges in all kinds of civil and commercial matters to encourage parties to attempt mediation whenever this is believed convenient or suitable to the case. The judge may suspend the hearing of the matter for this reason.[45] As a result, some judges consider such encouragement not only as an invitation but as a (compulsory) order so that the parties are obliged to participate in the mediation attempt. This position is, however, a minority position within the Spanish judiciary. Spanish civil judges generally do not use mediation attempts beyond family matters.[46]

Some special procedures may require the use of specific initial ADR methods different from mediation in order to validly start the respective judicial action.

There have been several attempts to introduce mandatory mediation in Spain at a national level. One attempt failed in 2019. Another attempt started in 2020 and is still ongoing.

The 2019 Project foresaw preliminary mandatory mediation for matters such as family, inheritance, professional negligence, tort, construction defects, shareholder disputes, neighbourhood conflicts, commercial collaborative agreements (supply, distribution, franchise, agency), and some controversies as regards lease. Moreover, claims between individuals up to €2,000 and claims due to the violation of some personality rights (e.g., honour and privacy) were also to be subject to mandatory mediation. The 2019 Project was, however, abandoned.

The ongoing 2020 Project seeks to introduce the concept of 'adequate means of controversy resolution' (*MASC* is the Spanish acronym), which is intended to be a step beyond the 'traditional' ADR concept. This project was announced by the Ministry of Justice in June 2020, and its first text was published back in December 2020. After Public Consultation, the Ministry is now working on a second version. The Project aims at establishing the mandatory use of an ADR method, to be chosen by the parties from a list, in order to validly file a civil or commercial claim. One of the main problems of the Project is a lack of order regarding the classification of the ADR methods. Said methods include mediation, conciliation, direct negotiation, early neutral evaluation, expert determination, or offers of settlement. When parties choose mediation either before or after the dispute arises, at least one mediation session must take place.[47]

The Project establishes the need for documentary evidence of ADR, distinguishing between two different situations:

- If the ADR method implies the intervention of a third person (i.e., a 'neutral'), this neutral should issue a certificate;
- If the chosen ADR method does not involve a 'neutral', documentary evidence can be provided by:

44 J Izaguirre Fernández, 'Hoy entra en vigor en Cataluña la Ley 9/2020, de 31 de julio: nuevas obligaciones en materia de familia y mediación' (*Economist & Jurist*, 4 November 2020) <https://www.economistjurist.es/noticias-juridicas/hoy-entra-en-vigor-en-cataluna-la-ley-9-2020-de-31-de-julio-nuevas-obligaciones-en-materia-de-familia-y-mediacion/> accessed 4 September 2021.

45 S Durán Alonso, 'Mediación intrajudicial o por derivación judicial. Novedades introducidas por el Anteproyecto de Ley de Medidas de Eficiencia Procesal' (*Diario La Ley*, 12 July 2021)_<https://diariolaley.laleynext.es/dll/2021/07/26/mediacion-intrajudicial-o-por-derivacion-judicial-novedades-introducidas-por-el-anteproyecto-de-ley-de-medidas-de-eficiencia-procesal> accessed 4 September 2021.

46 G Murciano Álvarez, 'Una de cal y otra de arena: lo que dicen los Jueces sobre la obligatoriedad de la sesión informativa de mediación' (blog *Sepín*, 25 April 2018) <https://blog.sepin.es/2018/04/obligatoriedad-sesion-informativa-mediacion/> accessed 4 September 2021.

47 B Piñar Guzmán, 'Medios adecuados de solución de controversias (MASC)' (*Almacén de Derecho*, 29 December 2020) <https://almacendederecho.org/medios-adecuados-de-solucion-de-controversias-masc> accessed 4 September 2021.

- Any document signed by the parties, proving their identity, the date, and the dispute;
- Any document proving that the addressee has received the request to use ADR, indicating its date and content.

Complementary rules suggested within the context of the 2020 Project include:

- The ADR request suspends prescription (statute of limitation) for the entire ADR process or, alternatively, for one month if the addressee does not respond, or the first meeting does not take place;
- If ADR fails, the subsequent court action needs to be filed within three months;
- In the case of further litigation, the judge may consider the parties' attitude towards attempted ADR to decide on the costs of litigation;
- There are three exceptions to the compulsory use of an ADR method:
  - Proceedings initiated for the civil protection of fundamental rights;
  - Measures for the protection of minors;
  - Judicial authorization for forced confinement in the case of psychiatric disorders.

Relevant statistics could not be identified.

8 NORWAY

In Norway, most disputes concerning matters with a monetary or economic value must be brought before a conciliation board as a prerequisite for litigation in the first instance court. The conciliation board may apply different methods of dispute resolution, often mediation or negotiation, although it may also issue formal verdicts in specific cases. The parties themselves decide whether or not to continue with ADR. The applicable rules can be found in the Norwegian Dispute Act (Code of Civil Procedure), Section 6-2.[48]

Furthermore, preliminary mandatory mediation is a feature of family cases for separating couples with children under the age of 16, and where it concerns custody and visitation rights. The relevant statutes for mediation in family matters are the Marriage Law (*Ekteskapsloven*) and the Children Act (*Barnelova*). The aim is a written agreement on custody, residence, and contact, whereas the parents should also be informed of the financial consequences of the agreement.[49] This type of mediation is often conducted by so-called Family Counselling Offices (*Familievernkontorene*) or by specially accredited mediators. Only one hour of attempted mediation is mandatory,[50] although an additional three hours may be added when a successful outcome seems likely. The mediator may even decide to add a further three hours, meaning that a total of seven hours for mediation becomes available. It should be remembered, however, that a mediation certificate is issued to the parents after just the first hour. The certificate is valid for six months and allows the parents to instigate court proceedings, apply for separation, and receive benefits for single parents.[51] After the expiry of the 6-month validity of the mediation certificate, parents are again subject to preliminary mandatory mediation when they want to bring court action to address further conflicts.

It seems that in Norway, amicable settlements are often not reached. Most parents decide to terminate mediation after the mandatory first hour.

48 Available in English at <https://lovdata.no/dokument/NLE/lov/2005-06-17-90> accessed 8 September 2021.

49 Children Act, Section 52.

50 In 2007, the minimum number of hours for mandatory mediation was reduced from three to one.

51 See Children Act, Sections 51 and 54.

Several law reforms are currently being planned in Norway. In 2019, an expert committee issued its opinion that s.54 of the Children Act should be changed.[52] It suggested six hours of obligatory mediation for parents who plan to go to court unless such mediation is regarded as unsuitable in the particular case. A later committee supported the suggested reform.[53] Furthermore, two expert committees have suggested that the current one hour of mandatory mediation should be changed to one hour of 'mandatory parent's conversation'.[54]

The situation in Norway is different from that in the other Nordic countries. Although Denmark has a system of mandatory pre-trial counselling or mediation, which differs from the Norwegian one, Finland and Sweden only have voluntary mediation.[55]

9 NETHERLANDS

In the Netherlands, no statutory obligation exists for disputants to try mediation; nor are courts allowed to order disputants to try mediation. There are no exceptions to this rule, not for any case category. In a 2006 landmark judgment, the Netherlands Supreme Court laid down that mediation is by its very nature a consensual process, which needs the prior and ongoing consent of all the disputants involved.[56]

There is widespread awareness, though, that in high conflict divorce cases involving minor children, courts should encourage the parents to attempt mediation; experiments are running in several regions with on-the-spot mediation facilities in the court building (*piket-mediation*), but then still, parents are at liberty to turn down the suggestion made by the court.[57]

Furthermore, the Covid-19 crisis has inspired legislation (*Wet Homologatie Onderhands Akkoord* or WHOA)[58] designated to avert bankruptcies by allowing the joint creditors of a company facing serious liquidity problems to decide by weighted majority to accept a plan on restructuring and repayment of outstanding debts. Provided the plan is reasonable, the court can now endorse such plans, thus overruling those creditors who did not agree. This is not mediation strictly speaking, rather negotiation, but indirectly involving an element of compulsion.

There is a local experiment running in one court with parental plans (*ouderschapsplannen*), which may but do not necessarily involve mediation.[59] Spouses with minor children who seek to be divorced are statutorily obliged to draw up such a plan detailing, e.g., allocation of care arrangements, costs, choice of education for the children, etc. Children ought to be involved in drawing up such a plan, but the actual involvement of children has not been

52 NOU 2019:20 endringer i de obligatoriske elementene av meklingsordningen.

53 NOU 2020: 14. Ny barnelov – til barnets beste, punkt 14.6.2.

54 NOU 2019: 20 punkt 12.9.1 and NOU 2020: 14 punkt 15.3.2.1.

55 For a comprehensive overview of mediation in Norway, see A Nylund, 'A Dispute Systems Design Perspective on Norwegian Child Custody Mediation' in A Nylund et al (eds), *Nordic Mediation Research* (Springer 2018) 9-26; C Bernt, 'Mediation of Legal Disputes in Norway. Institutionalized, Pragmatic and Increasingly Popular' in C Esplugues, L Marquis (eds), *New Developments in Civil and Commercial Mediation* (Ius Comparatum - Global Studies in Comparative Law 6, Springer 2015) 511-545. Much of the information in this chapter is based on these two publications.

56 HR 20 January 2006, LJN:AU3724.

57 E de Jong, D Brouwer, *Rapport Landelijke Evaluatie Piketmediation* (2018) <https://a-lab.vu.nl/nl/Images/Rapport-Landelijke-evaluatie-piketmediation_tcm205-903519.pdf> accessed 4 September 2021.

58 Available at <https://zoek.officielebekendmakingen.nl/stb-2020-414.html> accessed 4 September 2021.

59 Rechtbank Overijssel, zittingplaats Zwolle. See <www.rechtspraak.nl> 'bruggesprek', accessed 6 September 2021.

checked since the introduction of the relevant legislation (2009).[60] In this experiment, the court requires spouses in a divorce procedure to explain exactly how the children were involved (*bruggesprek*). Since this is merely an experiment, sanctions are unclear.

A recent survey on divorce mediation in the Netherlands revealed that, in 2018 and 2019, courts were substantially involved in deciding controversies in only 5% of all divorces. At the other extreme, 34% of the spouses had made arrangements themselves (with the court merely rubber-stamping the divorce decree). In between these extremes, it is interesting to observe the popularity of mediation in this area; in 41% of all divorces, the spouses had jointly engaged a mediator. In 10% of cases, they were assisted by other professionals (notably each side engaging their own lawyer).[61]

10 CONCLUSIONS

- Mandatory mediation should only be prescribed if the relevant prescriptive period (statute of limitations) is halted by the initiation of mediation attempts.
- Mandatory Mediation Information and Assessment Meetings (MIAMs) are a specific feature of litigation in family matters in England and Wales. Such meetings have not been found elsewhere in Europe. However, what can be found elsewhere in Europe are preliminary mandatory mediation attempts. These mediation attempts serve a similar goal to a MIAM: i.e., exploring whether a settlement through mediation is possible and can be attempted.
- Mediation is usually not the only form of ADR that may be explored before bringing a case to the attention of the court. In most jurisdictions, it is better to use the terminology 'preliminary mandatory ADR'. It is often left to the parties what type of ADR will be chosen. Mediation as a form of preliminary mandatory ADR is just one of the possible approaches.
- Mandatory mediation aims at a mandatory attempt to settle cases through mediation. Such mediation may be prescribed before bringing court action according to Art. 6 of the European Convention of Human Rights since it does not prevent access to justice if certain time limits are observed. This is different for mandatory settlement, which is forbidden under Art. 6.
- When mandatory mediation is a prerequisite for court action, proof of attendance of a mandatory mediation attempt is needed. Such proof could be provided by way of a standard form available on the Internet, such as in England & Wales, but other, sometimes less formal methods to demonstrate that mediation has taken place may also be used.
- The parties should be obliged to mention participation in a preliminary mandatory mediation attempt in the statement of case. This may serve as proof that the parties and their lawyers have seriously discussed this option. Courts should address this matter, where possible, directly with the parties themselves and not only with their lawyers. Courts should not accept statements of case where such mention is omitted. Where such mention is omitted, the court should allow the parties to correct their statements. Where mention of preliminary mandatory mediation is omitted since such mediation has not taken place, the court should postpone the hearing for a standard period of time to allow mandatory mediation to take place. If courts do not act in this particular manner, there should be incentives for courts to act accordingly.

60 The relevant legislation is available at <https://wetten.overheid.nl/BWBR0024844/2009-03-01> accessed 4 September 2021.

61 S Hooijmans, J Fastenau, 'Hoe zien scheidingen er vandaag de dag uit?' (*Rapport Kantar Research*, 7 August 2020) <https://www.verenigingfas.nl> accessed 6 September 2021.

One incentive may be that the caseload of the court is reduced where mediation is successful and, where not successful, cases reach the court better prepared than without preliminary mandatory mediation since parties have focused on the matters that keep them divided (although, of course, mediation is a confidential process and the results of a failed attempt to mediate may not be used in a subsequent court case).

- Theoretically, all civil and commercial cases in which the parties can freely dispose of their rights and duties are suitable for mandatory mediation. In practice, the list of cases subject to mandatory mediation depends on the aims the legislature wants to achieve with its introduction. Where mandatory mediation is introduced in order to reduce the caseload of overburdened courts, the list of cases is long (e.g., Italy). Where mandatory mediation is chosen because of its inherent qualities in addressing non-legal matters as well as legal issues, the list is usually shorter and often limited to family and neighbour matters and small claims.
- Even though mediation is mandatory, disputants are often unaware of this requirement. This may be due to the fact that they lack the relevant legal knowledge. Legal aid should be available for parties in the initial stages of their dispute to be informed about mandatory mediation and its benefits. However, even if legal aid is available, lawyers may not inform parties well enough. In order to make sure that lawyers inform their clients well, it seems that they should have an interest in mediation. Involvement in mediation and the possibility of charging a fee for their services may help lawyers to have a positive attitude towards mediation. In Italy, for example, the attitude of lawyers towards mandatory mediation changed dramatically when it was provided by law that mediation without the assistance of a lawyer is not allowed.
- Mediation needs to take place before a qualified and accredited mediator to increase the chances of success (i.e., a settlement). A sufficient number of accredited mediators should be available. Such mediators should be present in the court building in order to be directly available when mandatory mediation is prescribed.
- Exemptions to mandatory mediation in the particular types of cases in which it is prescribed should be few, and courts should actively test whether such exemptions exist when parties or lawyers claim they do. Courts should not assist litigants in avoiding mandatory mediation and, therefore, they should be convinced of its benefits and possess adequate knowledge on mediation. Courts should suspend the hearing of cases in order to allow mandatory mediation to take place if it appears that the parties have invoked an exemption without sufficient grounds for it.
- Modern technology should make mediation more accessible. Here one could think of mediation through Skype, by way of Zoom, etc.
- Parties who do not participate seriously in mandatory mediation should be sanctioned in subsequent court proceedings, for example, by way of adverse costs orders.

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POLISH-UKRAINIAN LEGAL SERVICES: A SOCIOLOGICAL AND LEGAL STUDY

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Abstract *The rapid development of contemporary Polish-Ukrainian relations and the emigration of Ukrainians to Poland and EU countries require more and more lawyers to provide cross-border legal services. However, the emerging barriers between the countries effectively limit the possibilities for cooperation. It is particularly important to determine the extent of involvement of Polish lawyers in Ukraine and Ukrainians in Poland and to explain the reasons for their lack of involvement. It is also important to determine the consequences of the observed problem and the development strategy for the future.*

The present research is part of a larger study on the internationalisation of the Polish justice system and the provision of cross-border legal services. Methodologically, the study has been performed through structured interviews among representatives of Polish lawyers and questionnaires among all Polish lawyers. It was supplemented by non-reactive methods: an analysis of statistical data, an anthropomastic analysis, a content analysis of websites, and a functional analysis of legal acts.

The results of the study show that Polish lawyers do not practice in Ukraine at all, and no more than 20 Ukrainian jurists work in Poland. The reasons are the border barriers and the lack of demand for mutual legal services, as well as cultural differences. The low level of involvement of the Polish and Ukrainian Bar Associations also contributes to the low level of provision of cross-border legal services. Nevertheless, Ukrainian immigrants to Poland are increasingly becoming Polish lawyers. Currently, the involvement of Ukrainian lawyers in the Polish legal services market is slowly increasing. This confused situation will likely change later this decade.

Keywords: *cross-border legal services, lawyers, legal advisers, Poland, Ukraine, sociology of law, bar associations, Ukraine's accession to the European Union, legal professions, globalisation of law, Polish law, Ukrainian law*

1 INTRODUCTION

For several years, we have been observing a significant increase in the number of Ukrainian citizens in Poland. Researchers and official statistics estimate that about one million Ukrainians are living in Poland permanently or temporarily, although their number is uncertain during of the COVID-19 epidemic (according to Polish public statistics, in 2021, it was about 300,000 people).[1] Their stay in Poland and the increasingly active Polish-

1 'Statystyki 2021' (*Migracje*) <https://migracje.gov.pl/statystyki/zakres/polska/typ/dokumenty/widok/wykresy/rok/2021/kraj/UA/> accessed 19 June 2021. The number of Ukrainians in Poland changes very quickly and is fluid. Recently, this is mainly due to the pandemic crisis. Studies show different numbers of Ukrainians in Poland and in the EU – from about 500,000 to 2,000,000. Qualitative studies show larger numbers, while public statistics show smaller numbers..

Ukrainian relations have resulted in the intensification of mutual economic initiatives, as well as the growth of various types of cross-border relations. An increasing number of Ukrainian citizens have set up businesses in Poland, and Poles are starting firms in Ukraine. Immigrants are settling down, starting families, working, and learning in Poland. The interest of Poles in their eastern neighbours is also growing. Along with this interconnectedness, advanced social needs arise. People running their own businesses face legal difficulties on a daily basis, and individuals often have to deal with the complexity of Polish and Ukrainian law. Nowadays, it is very difficult for individuals to overcome legal barriers on their own and to navigate the legal world. A particular problem arises when dealing with the laws of different countries.[2]

Companies and individuals are assisted by attorneys, legal advisers, foreign lawyers, and other legal specialists who provide legal services to citizens and enterprises. Thanks to their involvement, it is much easier to live and work with the multitude of laws and procedures. Polish legal specialists provide legal services to Ukrainians in Poland, while Ukrainians serve Poles in Ukraine. Usually, lawyers work in their country of origin and residence; however, it is increasingly common for Polish or Ukrainian lawyers to work cross-border in two countries. As part of this service, he or she works independently or in a foreign partnership. With the growth in international ties, there are initiatives by lawyers from both sides of the border aimed at providing international legal services. These are services provided across countries, relating to large economic or public initiatives (company law, maritime law, treaties). The rising number of Ukrainians in Poland and Poles in Ukraine is expanding the scope of legal assistance as lawyers adapt to new clients and cases. This has led an increasing number of experts from various legal specialties to enter the field of Polish-Ukrainian matters.[3]

Lawyers are a specific professional group because they are closely related to their country of origin or practice. It is particularly difficult for them to migrate between Poland and Ukraine because of social, cultural, and legal barriers. Due to cultural differences and the border regime (Ukraine is not a member of the European Union), difficulties in providing legal services in both countries are significant. In addition, lawyers stand out from other professional groups, as they play a dual role as legal service providers and judicial actors. The first role is related to the provision of private services (business activity), while the second concerns providing legal aid in the context of the administration of justice. The specificity of the provision of legal services in several countries is not without significance because, in each of them, a jurist must have a license to provide services (e.g., be entered on the list of advocates or legal advisers). If they operate in Poland and Ukraine, lawyers must hold separate licenses in both countries.[4]

2 M Chłopaś, 'Ilu Ukraińców jest w Polsce? Ilu wyjechało w pandemii? Mamy wiarygodne dane' (*Newsweek.pl,* 2021) <https://www.newsweek.pl/polska/spoleczenstwo/ilu-ukraincow-jest-w-polsce-ilu-ukraincow-wyjechalo-z-polski-w-pandemii/9b0gcx6> accessed 5 April 2021; M Kursa, 'Już 10 Procent Krakowian to Cudzoziemcy. Wśród Nich: Ukraińcy, Białorusini, Włosi i Inni' (*wyborcza.pl Kraków*, 8 April 2020) <https://krakow.wyborcza.pl/krakow/7,44425,24626716,juz-10-procent-krakowian-to-cudzoziemcy-wsrod-nich-ukraincy.html> accessed 11 April 2020; M Lubicz-Miszewski, *Imigranci z Ukrainy w Polsce: potrzeby i oczekiwania, reakcje społeczne, wyzwania dla bezpieczeństwa* (AWL Wydawnictwo 2018) <https://depot.ceon.pl/handle/123456789/16668>; 'Mapa migracji' (*Urząd do spraw Cudzoziemców*, 2021) <https://migracje.gov.pl/statystyki/zakres/polska/typ/dokumenty/widok/mapa/rok/2020/> accessed 6 April 2020; K Pędziwiatr, M Stonawski, J Brzozowski, *Imigranci w Krakowie w Świetle Danych Rejestrowych* (Uniwersytet Ekonomiczny w Krakowie 2019) 6-63 <https://www.academia.edu/41818133/Imigranci_w_Krakowie_w_%C5%9Bwietle_danych_rejestrowych?auto=download> accessed 29 April 2020.

3 M Baranowska (ed), *Świadczenie pomocy prawnej w państwach europejskich. 2, Niemcy, Ukraina, Węgry, Irlandia*, vols 2, Niemcy, Ukraina, Węgry, Irlandia (Ośrodek Badań, Studiów i Legislacji Krajowej Rady Radców Prawnych 2012) 34-42; S Lipiec, 'Świadczenie Międzynarodowych Usług Prawniczych. Studium Socjologiczno-Prawne Polskich Prawników' (PhD thesis, 2020) 418-424, 532-535.

4 A Kosylo, *Dostęp do zawodu adwokata w prawie polskim, ukraińskim, białoruskim i rosyjskim* (Wydawnictwo Adam Marszałek 2010) 34-87, 156-193.

Problems related to Polish-Ukrainian legal cooperation increase in proportion to the number of Ukrainians in Poland and Poles in Ukraine and with the degree of mutual economic ties. The different types of cases involving lawyers of both nationalities also change according to the extent of migration, economic development, and mutual integration. Also, the number of lawyers and their law firms specialising in the cases of Poles in Ukraine and Ukrainians in Poland increases with the migration of people and capital. However, it seems that the involvement of lawyers from both sides of the border is not consistent. More Polish lawyers deal with the cases of Ukrainians in Poland than their Ukrainian colleagues deal with those of Poles in Ukraine. Thus, the number of foreign Ukrainian lawyers in Poland and Polish foreign lawyers in Ukraine is small and growing very slowly. Ukrainian citizens in Poland avoid getting involved in legal disputes, which results in a limited need to engage lawyers in Ukrainian matters. As a consequence, there is an uneven distribution of cases of clients from Ukraine in Poland and of lawyers in Poland who specialise in Ukrainian cases. Customers from Poland appear in Ukraine only sporadically, mainly in western Ukraine. There are no significant legal business initiatives between Poland and Ukraine, and the cross-border cooperation of Polish and Ukrainian lawyers is extremely rare. In addition, there is a lack of large corporate legal initiatives dealing with international affairs between Poland and Ukraine. We observe a number of serious barriers to the provision of cross-border and international legal services, which make it very difficult to provide effective legal aid.

The present research report has been prepared on the basis of larger studies on the internationalisation of the Polish justice system and the provision of legal services and has been supplemented with specific research elements.[5] We divide the report into several parts, presenting all aspects of the study: the methodology, Ukrainian lawyers in Poland, Polish legal matters in Ukraine, and institutional cooperation of bar associations, and conclusions.

2 METHODOLOGY

The study was conducted from 7 August 2017 to 22 January 2019 and then supplemented from November 2020 to March 2021. Several research methods were used. Through triangulation, the obtained results were mutually checked, supplemented, and extended. The following research methods were used:

1. Questionnaire method: A survey conducted via the Internet with a correspondence survey technique. The research population consisted of all active Polish attorneys (*adwokaci*) and legal advisers (*radcowie prawni*) during the research period. The population was established at the level of 54,176 people, and the research sample was selected as 148 people, with an 80% confidence level. In a two-stage process, the first was the selection of district bar association councils, followed by selecting specific elements of the sample through simple sampling without returning. Out of the 148 advocates (*adwokaci*) and legal advisers (*radcowie prawni*), 87 people returned the questionnaire; the sample is representative of the population of Polish advocates and legal advisers. The purposes of this method were, among others, to define the basic characteristics of Ukrainian-origin lawyers in Poland and lawyers of Polish origin in Ukraine; to define mutual connections; and to discover the exact connections between Polish and Ukrainian bar associations.[6]

5 Lipiec (n 3).

6 R Mącik, 'Ankiety internetowe w percepcji osób korzystających i niekorzystających z nich w pracy zawodowej' [2014] Metody ilościowe w badaniach marketingowych 125, 125-139; P Siuda, 'Ankieta Internetowa: Zalety i Wady – Rekapitulacja', *Metody badań online* (Wydawnictwo Naukowe Katedra 2016) 28-81 <https://www.researchgate.net/publication/308556918_Ankieta_internetowa_zalety_i_wady_-_rekapitulacja>.

2. Semi-structured in-depth interviews (SSI) were conducted with a group of 43 representatives of district councils of bar associations (*Okręgowa Rada Adwokacka*, ORA) and councils of district chambers of legal advisers (*Okręgowa Izba Radców Prawnych*, OIRP). The interviews were conducted in person, with one researcher and participant; conversations were recorded, then transcribed, coded, and categorised, using the Skrybot and Atlas.ti software.[7] The research was strictly qualitative in nature,[8] and the interpretation of the results was meaning-oriented. The aims of this research method were to deepen the results obtained from the survey, emphasise the issue of Polish-Ukrainian institutional cooperation, and reveal an external and formal perspective on the activities of Polish and Ukrainian lawyers.
3. Study of non-reactive materials: This consisted of the analysis of Polish and Ukrainian lists of advocates, legal advisers, and foreign lawyers; analysis of the websites of Polish lawyers participating in the survey (148 websites); analysis of national and regional websites of Polish and Ukrainian bar associations; analysis of official lists and search engines of lawyers dealing with Polish-Ukrainian matters; and functional analysis of legal acts and in addition an anthropomastic analysis.[9] The aim of the non-reactive research was to deepen the results of the first two research methods and to resolve any ambiguities that were not explained in the empirical research.

Detailed methodological considerations are available in the research report prepared for the entire study. Source data were stored for further use.[10]

The conducted research concerns law and lawyers, but it is a sociological study and fits the paradigm of the sociology of law and legal anthropology; more precisely, the sociology (anthropology) of the legal profession. The research works of Richard Abel and Adam Podgórecki greatly influenced the construction and conduct of the study.[11] Contemporary studies by Arkadiusz Bereza were also important.[12] The general theoretical assumptions were based on the principles of grounded theory, as interpreted by Kathy Charmaz.[13] The guide for the interviews was Steiner Kvale.[14] In the case of non-reactive research, the scientific

7 'ATLAS.ti' (ATLAS.ti, 2021) <https://atlasti.com/> accessed 5 April 2021; 'SkryBot' (*Skrybot,* 2021) <https://skrybot.pl> accessed 6 March 2019.

8 J Horton, R Macve, G Struyven, 'Qualitative Research: Experiences in Using Semi-Structured Interviews' in C H, B Lee (eds), *The Real Life Guide to Accounting Research* (Elsevier 2004) <http://www.sciencedirect.com/science/article/pii/B9780080439723500220> accessed 20 May 2020; MJ McIntosh, JM Morse, 'Situating and Constructing Diversity in Semi-Structured Interviews' [2015] Global Qualitative Nursing Research 1; M Nicpoń, R Marzęcki, 'Pogłębiony wywiad indywidualny w badaniach politologicznych', *Przeszłość, teraźniejszość, przyszłość : problemy badawcze młodych politologów* (Libron 2010) 246-251 <http://przemek.wammoda.com/polis/ksmp/book/IIIKSMPmarzecki.pdf> accessed 6 March 2019; I Przybyłowska, 'Wywiad swobodny ze standaryzowaną listą poszukiwanych informacji i możliwości jego zastosowania w badaniach socjologicznych' [1978] Przegląd Socjologiczny 62, 62-64; SQ Qu, J Dumay, 'The Qualitative Research Interview' (2011) 8 Qualitative Research in Accounting & Management 238, 238-61; S Kvale, S Brinkmann, *InterViews: Learning the Craft of Qualitative Research Interviewing* (SAGE 2009) 97-219.

9 ER Babbie, *Podstawy Badań Społecznych* (W Betkiewicz tr, Wydawnictwo Naukowe PWN 2008) 342-360; C Frankfort-Nachmias, D Nachmias, *Metody Badawcze w Naukach Społecznych* (Zysk i S-ka 2001); D Kędzierski, 'Metodologia i Paradygmat Polskich Szczegółowych Nauk Prawnych' [2018] Transformacje Prawa Prywatnego 5, 34-46.

10 Lipiec (n 3).

11 RL Abel, *Lawyers and the Power to Change* (Blackwell 1985); A Podgórecki, J Kurczewski, *Zarys socjologii prawa* (Państwowe Wydawnictwo Naukowe 1971).

12 A Bereza, *Zawód radcy prawnego: historia zawodu i zasady jego wykonywania* (Ośrodek Badań, Studiów i Legislacji Krajowej Rady Radców Prawnych 2017) <http://kirp.pl/wp-content/uploads/2016/02/Zaw%C3%B3d-radcy-prawnego_wyd.5_592_.pdf>.

13 K Charmaz, *Constructing Grounded Theory* (SAGE 2014) 1-341.

14 Kvale and Brinkmann (n 8).

activity of Bernard Barelson, as interpreted by Walery Pisarek, had a great influence on their shape.[15]

The exact characterisation of the population and the sample is presented in the main research report of the comprehensive study. Here only the essential features are highlighted. The empirical research involved in Poland:

1. 148 advocates (*adwokaci*) and legal advisers (*radcowie prawni*) entered on the list of advocates and legal adviser, who were professionally active during the study; 87 people returned the survey;
2. 43 advocates and legal advisers who are members of councils (boards) of District Bar Chambers (ORA) and District Chambers of Legal Advisers (OIRP).

The characteristics of the research group are examined jointly for both types of empirical research due to the similarity of their essential features. The profession of legal advisor and advocate is the same as that of a licensed professional lawyer, although, in Polish legislation, there is a strong division into two professional groups. Due to the lack of major differences, both professional groups are treated jointly.

An equal number of legal advisers and advocates took part in the study (21 advocates and 22 legal advisers). The geographical distribution of participants in Poland was even. Lawyers represent all bar associations in Poland, and the supreme bodies of bar chambers (*Naczelna Rada Adwokacka* and *Krajowa Rada Radców Prawnych*).[16] Men are still dominant in the population of Polish lawyers. This is particularly visible among members of the OIRP and ORA boards, and indeed this characteristic is reflected in the research sample. Nevertheless, there is a noticeably strong trend of women's increasing participation in the legal professions. The most active group of lawyers in Poland are people aged 30 to 50, in which men dominate (74%). This is a typical phenomenon related to the cycles of human life and professional activity, as well as a decline in the professional activity of women related to raising children. Importantly, within the authorities of bar associations, there are people over 50 years old. It seems that the research carried out is based on the opinions of the most professionally active lawyers. The study, conducted using the questionnaire interview method, also includes lawyers in the pre-retirement age. Due to the participation of younger and older lawyers, men and women, advocates, and legal advisers (*radcowie prawni*), the survey is representative of the entire population of Polish jurists. The deficiencies are supplemented by qualitative interviews with the most experienced jurists in individual bar associations.

In the observed population, all lawyers speak at least one foreign language. English is the dominant language (62%), followed by Russian (29%), with the latter being the prevalent language in the 50+ age group. Knowledge of foreign languages is strongly correlated with birth in the period of the Polish People's Republic (Russian) or the Third Polish Republic (English). Despite the declarative knowledge of foreign languages, only 2% of respondents indicated that they speak at least one foreign language at a level that allows them to appear before foreign courts (C1 level or higher). A characteristic feature of the surveyed population of lawyers is the complete lack of knowledge of the Ukrainian language. This suggests that no Ukrainian or a person of Ukrainian origin is a licensed Polish lawyer or that the number of such people is so small that they are 'hiding' within a statistical error. The lack of knowledge of the language of Poland's eastern neighbours also indicates a low need for Polish lawyers to establish relationships with Ukrainian

15 B Berelson, *Content Analysis in Communication Research* (Hafner 1971) 26-154; W Pisarek, *Analiza Zawartości Prasy* (Ośrodek Badań Prasoznawczych 1983).

16 'Krajowa Izba Radców Prawnych' (*Krajowa Izba Radców Prawnych*, 2021) <http://kirp.pl> accessed 3 March 2019; 'Naczelna Rada Adwokacka' (2021) <http://www.nra.pl> accessed 3 March 2019.

clients or lawyers or to work in Ukraine. Poor knowledge of Russian, which is the second language of the population in this country, confirms the lack of Polish involvement in Ukrainian affairs.[17]

3 UKRAINIAN LAWYERS IN POLAND

Lawyers from abroad (including Ukrainians) have several opportunities to practice in Poland. First, they can apply for the status of a foreign lawyer on the basis of the Polish Act on the Provision of Legal Aid by Foreign Lawyers.[18] Such jurists have their headquarters in another country, e.g., in Ukraine, while in Poland, they provide only part of their practice. However, they are not entitled to provide all types of legal services. Especially in the case of lawyers from outside the European Union, the scope and possibilities of working in Poland are limited.

The second possibility that allows persons from other countries to provide legal services in Poland is obtaining the status of a legal advisor (*radca prawny*) or advocate (*adwokat*). This is the fully-fledged status of a Polish lawyer, obtained on the basis of the Act on the Bar (*ustawa Prawo o Adwokaturze*) or the Act on Legal Advisers (*ustawa o radcach prawnych*).[19] Among the numerous access criteria, it is necessary to have a legal education obtained in Poland or recognised in Poland, or the requirement to use the Polish language. These two criteria are a particularly difficult barrier for people from outside the European Union, especially Ukraine.[20]

> The third possibility for providing legal services in Poland is activity alongside the law, i.e., providing legal services as an unlicensed lawyer. Most often, people working in this way are called 'law masters', and provide services within larger enterprises, freedom of business within associations, and work in diplomatic missions or otherwise. This practice is not illegal in Poland, but such persons usually cannot represent clients in courts. There is a small group of foreigners among the unlicensed lawyers. Their number and scope of activity are unknown, and it is very difficult to establish and define the framework of activity. Another possibility is to practice paralegal professions, such as a receiver (*doradca restrukturyzacyjny*), tax advisor (*doradca podatkowy*), or patent attorney (*rzecznik patentowy*). No foreigner works in this diverse professional group. Additionally, in Poland, there is a relatively large group of people preparing to practice

17 J Cholewa, 'Jak język polski i francuski odzwierciedla wzajemne postrzeganie Polaków i Francuzów?' in P Guzowski, M Kamecka (eds), *Anglosasi, Francuzi i Polacy: wzajemny wizerunek dawniej i dziś* (Wydawnictwo Uniwersytetu w Białymstoku 2005) <https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/4650/1/Joanna_Cholewa_Jak_jezyk_polski_i_francuski_odzwierciedla_wzajemne_postrzeganie_Polakow_i_Francuzow.pdf>; K Kloc, 'Język obcy a praca w zawodzie prawnika' (*Goldenline.pl,* 2020) <https://www.goldenline.pl/grupy/Przedsiebiorcy_biznesmeni/prawo/jezyk-obcy-a-praca-w-zawodzie-prawnika,1770622/> accessed 16 April 2020; I Wysmułek, O Oleksiyenko, *Strukturalne zróżnicowanie znajomości języków obcych: wybrane wyniki Polskiego Badania Panelowego POLPAN 1988-2013* (Zespół Porównawczych Analiz Nierówności Społecznych, Instytut Filozofii i Socjologii Polskiej Akademii Nauk 2015) 1-10 <http://polpan.org/wp-content/uploads/2014/05/POLPAN_raport_Znajomosc-jezykow.pdf>.

18 Ustawa z dnia 5 lipca 2002 r. o świadczeniu przez prawników zagranicznych pomocy prawnej w Rzeczypospolitej Polskiej (Dz. U. z 2020 r. poz. 823) <http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20021261069> accessed 5 April 2021.

19 Ustawa z dnia 6 lipca 1982 r. o radcach prawnych (Dz. U. z 2020 r. poz. 75 z późn. zm.) <http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19820190145> accessed 5 April 2021; Ustawa z dnia 26 maja 1982 r. Prawo o adwokaturze (Dz. U. z 2020 r. poz. 1651 z późn. zm.) <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19820160124> accessed 5 April 2021.

20 K Kłaczyńska, M Kłaczyński, *Świadczenie przez prawników zagranicznych pomocy prawnej w Polsce: komentarz* (Lexis Nexis 2004) 12-124.

the profession of a lawyer, i.e., law students, trainees, or interns. Among them, there is a large percentage of foreigners, especially from Ukraine.[21]

The databases of the bar associations indicate that in January 2021, over 57,000 professionally active legal advisers, attorneys, and foreign lawyers (37,845 legal advisers, 19,932 advocates, and 172 foreign lawyers) practiced in Poland. These data are reliable, although some of the jurists entered on the lists do not actually practice (these are mainly foreign lawyers).[22]

An analysis of the registers of foreign lawyers working in Poland shows that only two foreign lawyers from Ukraine officially practice in Poland. It is important to establish whether persons of Ukrainian origin operate in Poland as advocates or legal advisers (*radcowie prawni*) entered on the basic professional lists. The bodies of the bar and legal advisers do not disclose the origin of their members. Therefore, an anthroponomic analysis was used to approximate the origin of Polish lawyers.[23] The conducted analysis of the names and surnames of advocates and legal advisers showed that only seven lawyers entered on the list of advocates and legal advisers undoubtedly have Ukrainian surnames and first names. In the case of another 12 people, it can be suspected that they are Ukrainians, but the same surnames and first names also appear in Belarus and Russia. However, it seems that according to the official data of Polish bar associations, the total number of advocates, legal advisers, and foreign lawyers practicing in Poland is close to 20 people.

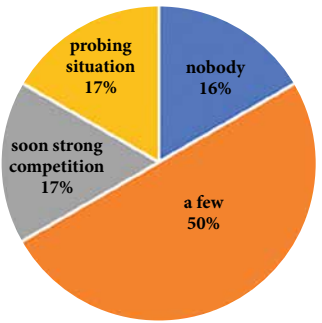

Figure 1 Ukrainian lawyers in Poland according to the opinion of Polish lawyers

Due to the limitation of data on lawyers of Ukrainian origin in Poland, private (commercial) records, registers, and lawyers' search engines were also used. They are not a fully authoritative source for learning about the situation of lawyers in Poland, but they do allow supplementary information to be obtained from other sources. After analysing the data from the four largest commercial lawyers' search engines, we note that the number of lawyers of

21 'Przybywa adwokatów, radców prawnych i doradców podatkowych. Eksperci: to nie jest dobra wiadomość' (*www.money.pl*, 23 February 2020) <https://www.money.pl/gospodarka/przybywa-adwokatow-radcow-prawnych-i-doradcow-podatkowych-eksperci-to-nie-jest-dobra-wiadomosc-6481063823005825a.html> accessed 10 April 2020; RK Tabaszewski, 'Aplikanci jako uczestnicy profesjonalnego obrotu prawnego w Polsce' in U Czyżewska and T Siewierski (eds), *Multum, non multa. Młodzi badacze w poszukiwaniu prawdy* (Wydawnitwo KUL 2012) 295-308 <https://depot.ceon.pl/bitstream/handle/123456789/864/Robert%20K.%20Tabaszewski,%20Aplikanci%20jako%20uczestnicy%20profesjonalnego%20obrotu%20prawnego%20w%20Polsce?sequence=1> accessed 23 February 2019.

22 'Krajowy Rejestr Adwokatów i Aplikantów Adwokackich' (*Naczelna Rada Adwokacka*, 2021) <https://rejestradwokatow.pl/adwokat/ewidencja> accessed 10 March 2019; 'Rejestr Radców Prawnych' (*Krajowa Izba Radców Prawnych*, 2021) <https://rejestrradcow.pl> accessed 10 March 2019.

23 A Cieślikowa, 'Metody w onomastycznych badaniach różnych kategorii nazw własnych' [1996] Onomastica 5, 5-19.

Ukrainian origin is also very small. Only four people advertised in these search engines indicate their Ukrainian origin. Furthermore, three out of four business cards of Ukrainians coincide with the official data.[24]

On the basis of lawyers' registers and commercial databases, it was not possible to discover more lawyers of Ukrainian origin practicing in Poland. Therefore, the study was deepened by analysing the content of websites. The searches conducted using the Google search engine did not bring tangible results. Only eight websites were found that were run by individual law firms of Ukrainian lawyers or larger law firms employing Ukrainian jurists. Only in one case was a Ukrainian lawyer not entered on official lists or absent from commercial search engines.[25]

The characteristics of Ukrainian lawyers operating in Poland were investigated during the empirical study. It emerged that no participant in the survey or interviews was a lawyer of Ukrainian origin. Also, none of the study participants spoke Ukrainian. However, the interviewees emphasised more than once that the number of lawyers of Ukrainian origin is increasing. There was even a growing pressure and anxiety among the representatives of the Polish bar, caused by the potential increase in competition from the Ukrainians. Furthermore, the respondents highlighted that the increase in the number of Ukrainian lawyers is still in the future. Currently, Ukrainian specialists are only preparing to provide services and work in Poland. The interviewees emphasised that a small number of lawyers from Ukraine already practice in Poland, but most interviewees did not have any further information about these people. The Ukrainian lawyers also did not participate in the work of the bar associations. However, it seems that some Polish lawyers, especially from Wroclaw and Kraków, have some information about their Ukrainian colleagues. Hence, it should be concluded that in these cities, the number of Ukrainian legal specialists may be greater than in other regions. A representative of the bar council from Krakow described Ukrainian lawyers in Poland as follows:

> There are several Ukrainian lawyers already operating in Poland. I do not know on what scale, but I know that they are in such cities as Przemysl and Rzeszow. First of all, there are announcements that we speak Ukrainian and they are Ukrainians […]. There are many Ukrainian lawyers. In my opinion, this is the future of the legal market. Very soon, there will be a group of lawyers of Ukrainian origin or Poles from Ukraine. In my opinion, this will be a very significant group on the legal market. We are a border country. [...] We will have a market of legal services related to individual Ukrainian clients. [...] On the other hand, there will be a large group of small cases, that is, there will be lawyers or lawyers who will collect small cases, but in large numbers, Ukrainian will be here throughout southern Poland, or even further.[26]

24 'Adwokaci, Kancelarie Prawne. Adwokaci z Miasta Krakowa, Warszawy, Wrocławia, Gdańska i Innych' (*WyszukiwarkaPrawnikow.pl*, 2021) <http://wyszukiwarkaprawnikow.pl/> accessed 5 April 2021; 'Mecenasi - Adwokaci i Radcy Prawni w Polsce' (2021) <https://www.mecenasi.pl/> accessed 21 May 2020; 'SpecPrawnik.pl' (*Specprawnik*, 2021) <https://www.specprawnik.pl/prawnik/?q=Ukraina> accessed 5 April 2021; 'SzukajRadcy.pl - Znajdź radcę prawnego dla siebie' (2021) <https://szukajradcy.pl/search/?query=ukraina> accessed 5 April 2021.

25 'Adwokat Ukraiński w Warszawie, Dugil Olga' (2021) <http://dugilolga.eu/pl> accessed 5 April 2021; 'Iryna Myzyna Adwokat Rep. Ukrainy' (2021) <https://adwokatukrainski.pl/> accessed 17 June 2020; 'Kancelaria Adwokacka Adwokat Galina Gajda' (2021) <http://www.galinagajda.pl/> accessed 17 June 2020; 'Kancelaria Adwokacka Warszawa - Oxana Piątkowska' (2021) <https://www.adwokatpiatkowska.pl/> accessed 1 May 2020; 'Kancelaria Prawna Kosyło i Partnerzy' (2021) <http://kosylo.com/pl> accessed 1 May 2020; 'Kancelaria Radcy Prawnego Tatyana Koryakina' (*Virtus*, 2021) <https://virtuslegal.net/polski/> accessed 5 April 2021; 'Katarzyna Litwin - tłumacz przysięgły języka ukraińskiego' (2021) <http://www.litwin.rzeszow.pl/, http://www.litwin.rzeszow.pl/> accessed 5 April 2021.

26 All translations from Polish and Ukrainian into English are by the author of the present work.

> Although it has few fully qualified Ukrainian lawyers, Poland has a large number of law students and trainee lawyers of Ukrainian origin. It seems that young Ukrainians come to Poland and study law with the intention of becoming a Polish attorney or legal advisor. From the very beginning, they are educated according to Polish principles and in the scope of Polish law. As a result, they become standard Polish lawyers who are indistinguishable from other jurists. Nevertheless, they should have a competitive advantage over Poles due to their knowledge of the Ukrainian language, culture, and customs. This group is a serious competition for Polish law professionals. Their numbers and activity are noticed by representatives of Polish bar associations, as well as academic teachers from Krakow and Lublin:[27]
>
> I also work at the university. There are a lot of students from Ukraine at the Faculty of Law. They attend and enrol in subjects related to the provision of legal aid.
>
> They are very ambitious; they are eager to learn the Polish language. Legal, linguistic nuances are noticed very quickly. There are entire fields of law studies aimed at students from Ukraine. It's not like they'll return home later. They want to settle down here. Even in Krakow, there are universities that educate large numbers of Ukrainian law students. People want to go further in their careers, so they follow all formalities for attorney apprenticeship; after all, they can be attorney trainees, right? Or, for example, be entered on the lists of foreign attorneys in Poland.

Generally, Polish lawyers, including representatives of legal professional councils, have little knowledge of the practice of Ukrainian lawyers in Poland. Those who have dealt with Ukrainians emphasise that their colleagues' main form of foreign activity is running a legal practice 'behind the scenes', often known as 'in-house'. The majority of Ukrainian lawyers prepare documents and contracts for Ukrainian enterprises entering the Polish market, and they explain to Ukrainian entrepreneurs the legal and economic realities in Poland. They also make preparations for Ukrainian investments on the Vistula River. However, this form of activity is not clearly emphasised. A large number of cases involving lawyers of Ukrainian origin in Poland concern legalisation of the residence of citizens of Ukraine and other countries of the former USSR in Poland. There are also so-called border affairs (smuggling, customs), cases of Ukrainians employed in Poland, and interstate public affairs (public international law). However, Polish lawyers have only sparse and imprecise information on their activity in the country.

Based on data from empirical research, eight websites of law firms that include Ukrainian jurists were examined in detail. The information displayed on their websites cannot be considered as fully objective, as it is a marketing representation of the activities of individual lawyers. However, these data can be a guide for further research.[28]

Ukrainian lawyers who have websites indicate that they are licensed Polish lawyers or foreign lawyers; only one case is an exception. Consequently, they target their offer at both Polish and Ukrainian customers. What is significant for Polish lawyers is that almost all Ukrainians conduct general practice, i.e., they direct their services to every client in both criminal and civil cases. However, two Ukrainian lawyers are aiming their offer more toward Polish

27 A Kwiatkowska, 'Studenci prawa udzielają porad prawnych w języku ukraińskim. Skorzystać z nich mogą wszyscy chętni' (*gazetapl,* 21 November 2019) <https://poznan.wyborcza.pl/poznan/7,36001,25433301,studenci-prawa-udzialaja-porad-prawnych-w-jezyku-ukrainskim.html> accessed 5 April 2021; P Szewioła, 'Ukraińscy studenci wypełniają lukę po polskich żakach' (1 July 2019) <https://serwisy.gazetaprawna.pl/edukacja/artykuly/1419824,uczelnie-studenci-obcokrajowcy-ukraincy-studia-w-polsce.html> accessed 5 April 2021.

28 B Butryn, M Laska, 'Analiza porównawcza witryn e-sklepów w ujęciu branżowym: propozycja metody badań' [2014] Informatyka Ekonomiczna 340, 340-350.

businesses that would like to invest in Ukraine. Importantly, no Ukrainian lawyer addresses their offer exclusively to Ukrainians in Poland. With the exception of one law firm, they are run as small, one- or two-person law firms. Noteworthy is the law firm Kosyło and Partners, which almost exclusively deals with cross-border Polish-Ukrainian economic matters; it is a small law corporation that employs 12 Polish and Ukrainian lawyers, including half of the lawyers of Ukrainian origin in Poland.[29] Contrary to the popular opinion of Polish jurists, Ukrainian lawyers do not direct their offers at their compatriots and do not deal with migration issues, border issues, labour law, or petty crimes. Nor do they have their professional headquarters only in the east of the country. Rather, their professional offices are located in Kraków, Poznan, Wroclaw, Warsaw and Rzeszow. Commonly, Ukrainian economic specialists also have second offices in Ukrainian cities.

Some of them present their professional experience on websites. We can see that everyone first studied in Ukraine and then migrated to Poland for supplementary training in Polish law. It is a common phenomenon, but at the same time very burdensome for the lawyers. Ukrainians are also trying to translate their websites into Polish, Ukrainian, and Russian; this demonstrates their potential readiness to deal with the affairs of clients from various countries, especially the Commonwealth of Independent States (CIS). In this context, lawyers often emphasise that they deal not only with Polish and Ukrainian matters but also with cases in other CIS countries. They aspire to become a significant intermediary in contacts between Poles and eastern Europe, including Russia, Belarus, etc. Furthermore, all lawyers of Ukrainian origin in Poland are young people under 45 years of age.

> In addition to law firms run by Ukrainians, there are also international corporate law firms operating in Poland; in these companies, no individual lawyer stands out because tasks are carried out in a collective manner. Such corporations provide legal, accounting, and HR services to many markets, including Poland and Ukraine. They employ lawyers from all over the world, including Ukraine. However, it is not possible to precisely determine who works in such companies. Also, the work style of international law corporations does not recognise or emphasise national differences. Thus, although Polish-Ukrainian affairs are undoubtedly conducted within the framework of supranational initiatives, it is difficult to establish the details.[30]

As about one million Ukrainians live and work in Poland, it would seem that their presence requires the support of native lawyers who know their problems best: migration, border, cross-border family law, labour law, or minor criminal matters. Such issues might appear to be a potential area of cooperation between Ukrainian citizens and Ukrainian lawyers. The reality is different. Despite the increased population of Ukrainians in Poland, the number of Ukrainian jurists has not increased. Interestingly, a small proportion of them usually do not serve their compatriots. We have to accept the popular opinion of Polish lawyers that Ukrainians avoid getting involved in court and legal relations; they do not want to enter into any relations with state structures but prefer to work and transfer their earnings to their homeland. The necessity to get involved in legal matters is most often caused by their leaving Poland. Apparently, serious cases involving Ukrainian citizens in Poland are handled by Polish legal specialists who do not emphasise this activity.

29 'Kancelaria Prawna Kosyło i Partnerzy' (n 25).

30 'Dudkowiak Kopeć Putyra' (2021) <https://www.dudkowiak.pl/> accessed 1 May 2020; 'Law Firm Contacts. Lawyer's Office. Lawyer Abroad. Law Firm Abroad' (*Rubicon*, 2021) <https://tcg.net.ua/en/contacts-abroad> accessed 5 April 2021; 'Ranking Kancelarii Prawniczych' (2021) <https://rankingkancelarii.rp.pl/> accessed 5 April 2021; 'PLP Law Group' (*PLP Law Group*, 2021) <http://plp.kiev.ua/pl/> accessed 5 April 2021.

The small number of Ukrainian lawyers practicing in Poland testifies to weak Polish-Ukrainian ties. The barrier of the European Union's external border is so strong that there are still no increased cross-border relations. Consequently, there is little need for lawyers to operate on both sides of the border to look after businesses or individuals. It can be concluded that Polish entrepreneurs are afraid of moving their economic initiatives to the east, and such individuals avoid contact with Ukraine. Only 20 active Ukrainian lawyers in Poland testify to the natural movement between the two countries, and no dynamic changes can be observed.[31]

It seems that the situation will change over time. Ukrainians who have completed their legal education in Poland are slowly entering the legal services market in Poland. Already today, Polish lawyers are afraid of potential competition from them. Young Ukrainian lawyers are a consequence of economic migration, but it is only in the second or third generation that they will find their home in Poland and want to practice law. Probably, more and more people from the east will benefit from legal aid in Poland. It can be predicted that within five years, the number of lawyers of Ukrainian origin in Poland will increase significantly. Currently, there are few of them, but by 2025 the number of legal specialists from the east may even increase tenfold. Undoubtedly, Polish lawyers and legal associations will also notice a greater presence of Ukrainian colleagues in the bar.

4 POLISH LEGAL MATTERS IN UKRAINE

The very small number of lawyers from Ukraine who practice in Poland, and the Polish jurists' limited expertise in Ukrainian matters, demonstrate the restricted cross-border Polish-Ukrainian relations. Apparently, the number of cases of entrepreneurs and individual clients occurring at the junction of two countries is so small that they do not require the involvement of many legal specialists. Thus, the current practices fully meet the needs of both parties. The common border and permanent relationships require ongoing legal services, although to a very limited extent. It seems that in Ukraine, similarly to Poland, there should be dozens of Polish lawyers or lawyers specialising in Polish-Ukrainian matters, as only in this way can cross-border legal problems be properly addressed.

The system of providing legal services in Ukraine is similar to the Polish system. However, in this country, there is a unified legal profession, that of the advocate. They are compulsorily associated with the regional bar associations, which together form the Ukrainian bar. Essentially, there is an obligation to obtain a state legal license. The most important requirement is to have a legal education and a minimum two-year internship (attorney apprenticeship). The bar system in Ukraine is uniformly regulated by the Ukrainian law on the Bar and Practice of Law.[32]

Currently, approximately 130,000 lawyers practice in Ukraine; this is a very significant number.[33] Specifically, Ukrainian law does not prohibit legal practice by persons who are not

31 B Pankowska-Lier, 'Jaka jest Ukraina dla polskich przedsiębiorców' (*Rzeczpospolita,* 25 May 2018) <https://www.rp.pl/Firma/305249956-Jaka-jest-Ukraina-dla-polskich-przedsiebiorcow.html> accessed 5 April 2021; O Vysochan, K Vlodek, *Raport: Analiza relacji polsko-ukraińskich za prezydentury Wołodymyra Zełeńskiego* (Fundacja Instytut Studiów Wschodnich 2020) 10-32 <https://www.forum-ekonomiczne.pl/raport-analiza-relacji-polsko-ukrainskich-za-prezydentury-wolodymyra-zelenskiego/> accessed 5 April 2021.

32 *Zakon Uikrayiny Pro advokaturu ta advokat·s'ku diyal'nist'* <https://zakon.rada.gov.ua/go/5076-17> accessed 5 April 2021.

33 'Ministerstvo yustytsiyi prezentuye statystychne doslidzhennya «Stan yurydychnoyi osvity»' (18 March 2019) <https://minjust.gov.ua/news/ministry/ministerstvo-yustitsii-prezentue-statistichne-doslidjennya-stan-yuridichnoi-osviti> accessed 5 April 2021; 'Min"yust vyklav zvit pro stan yurydychnoyi osvity v Ukrayini. Spoyler: yurystiv nadto bahato' (20 March 2019) <https://happymonday.ua/minjust-vyklav-zvit-pro-stan-jurydychnoi-osvity> accessed 5 April 2021.

licensed lawyers. As in Poland, this action is alongside the law, but it is not illegal. Therefore, the exact number of all persons providing legal services in Ukraine is unknown. It is also possible for foreign lawyers to obtain a Ukrainian legal license, and they have the same competences as their Ukrainian colleagues. Thus, there are 26 licensed foreign lawyers in Ukraine. Both Ukrainian and foreign lawyers are compulsorily entered in the Single Register of Advocates of Ukraine (ERAU).[34]

We divide legal specialists in Polish matters in Ukraine into two groups. The first are Poles and people of Polish origin working in that country or cross-border; the second are Ukrainians dealing with Polish and Polish-Ukrainian matters. The Ukrainian register of foreign lawyers, out of a total of 26, includes no Poles.

In order to analyse the register of Ukrainian lawyers, we must use the anthroponomic method because the Ukrainian bar does not reveal the nationality or origin of the lawyers. However, using this method poses particular difficulties because the Ukrainian replaces the original sound of Polish surnames with the Ukrainian version. Hence, it is difficult to unequivocally establish whether a particular person has a Polish name and surname, and thus, this research method is not completely reliable. However, when carrying out the analyses, it was found that 24 Ukrainian lawyers have Polish names and surnames. Almost all (20/24) are members of the bar in the district chambers in L'viv, Lutsk, Chernivtsi, and Ivano-Frankivsk. This means that they have their professional headquarters in western Ukraine, which is a border area. However, it seems that these are not immigrants from Poland who provide cross-border services. Most likely, they are representatives of the Polish diaspora: Poles who have lived in Ukraine since World War II.[35]

An in-depth search for Polish lawyers in Ukraine was also conducted, given the high level of distrust related to the use of the anthroponomic method. Polish diplomatic missions tend to publish details of local lawyers who provide legal services to Poles. This information is also uncertain, as there is no rule of thumb for specific lawyers to be included in these publications. Nevertheless, the consular information is another indicator that makes it possible to evaluate Polish legal involvement in Ukraine.[36]

Information on lawyers of Polish origin in Ukraine and Ukrainian lawyers dealing with Polish affairs was prepared by Polish consulates in L'viv, Kharkov, Odessa, Kiev, and Lutsk. These data indicate lawyers practicing in all districts of Ukraine, including those occupied by Russia: Luhansk, Donetsk, Crimea, and the city of Sevastopol. The number of lawyers is illustrated in the table below:

Consulate	Lawyers of Polish origin	Ukrainians specialising in Polish affairs	Other recommended Ukrainians
Lutsk	1		18
L'viv	1	5	
Kiev	3		3
Kharkov	1	2	22
Odessa	1		4

Figure 2 Number of lawyers recommended by Polish consulates in Ukraine

As in the case of data obtained from the register of Ukrainian lawyers, Polish diplomatic missions also do not notice many lawyers of Polish origin. According to them, there are

34 'Yedynyy Reyestr Advokativ Ukrayiny' (2021) <https://erau.unba.org.ua/> accessed 2 April 2021.

35 H Krasowska, *Mniejszość polska na południowo-wschodniej Ukrainie* (Slawistyczny Ośrodek Wydawniczy 2012) 25-71, 247-305.

36 'List of attorneys, notaries and translators - Poland in Ukraine' (*Ambasada RP w Kijowie*, 2021) <https://www.gov.pl/web/ukraina/lista-adwokatow-notariuszy-tlumaczy> accessed 9 June 2020.

only seven jurists of Polish origin practicing in all of Ukraine. All persons recommended by consulates are the same persons listed in the ERAU register. It seems that in Ukraine, there are practically no Polish immigrant lawyers, lawyers representing the Polish community abroad, or other Polish-speaking lawyers. Their number is similar to that of Ukrainian jurists in Poland.

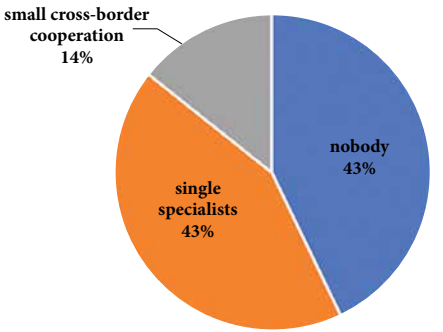

Figure 3 Lawyers specializing in Polish-Ukrainian cases in Ukraine according to Polish jurists

The data presented by consulates also show that there are only seven Ukrainian lawyers in Ukraine who declare that they deal with Polish cases or Polish-Ukrainian cross-border cases. Importantly, most of them practice in L'viv. This is understandable because L'viv is traditionally associated with Polish tourism and is the city closest to the Polish border. Despite the ties between western Ukraine and Poland, the number of Ukrainian lawyers specialising in cross-border cases is negligible. The lack of Ukrainian lawyers dealing with international affairs is also confirmed by the ERAU register, which indicates that no Ukrainian lawyer specialises in such areas as public international law, international economic law, private international law, international arbitration, human rights, maritime law, and cross-border cases. The scarcity of specialists shows that the Ukrainian bar is closed to international affairs and cross-border relations, including with Poland.

An exception to this statement arises from the existence of several larger law firms with headquarters in both Poland and Ukraine, which deal exclusively with cross-border business cases. These law firms are not noticeable in Ukraine due to their negligible number among all 130,000 lawyers. Some of them were mentioned during the analysis of Ukrainian initiatives in Poland. Four Polish and Ukrainian-led law firms dealing with Polish-Ukrainian cases were identified, which have their headquarters or branches in L'viv and in Jaslo, Wroclaw, Kraków, and Warsaw.[37]

In Ukraine, apart from identified Ukrainian lawyers who run smaller or larger law firms, there are also large law corporations dealing with international affairs. Most of them are based in Kiev and also deal with Polish-Ukrainian issues. These companies work collectively, often managing matters in Ukraine and Poland from outside the territories of both countries. The scope and forms of their handling of Polish-Ukrainian affairs are not fully known. However, such initiatives usually deal with big economic cases involving companies, mergers, acquisitions, maritime law, and affairs between the state and private property. This is not a daily practice of Ukrainian lawyers, but something completely different from typical

37 'First Chair Legal' (2021) <https://www.firstchair.legal> accessed 5 April 2021; 'Kancelaria Prawna Kosyło i Partnerzy' (n 25); 'Kancelaria Prawnicza Andrzej Gotfryd' (2021) <https://www.gotfryd.pl/> accessed 5 April 2021; 'Law Firm Contacts. Lawyer's Office. Lawyer Abroad. Law Firm Abroad' (n 30).

legal work. It is largely alienated from domestic and cross-border affairs and does not divide people into particular nationalities.

Polish advocates and legal advisers (*radcowie prawni*) cautiously speak about the work of Polish lawyers in Ukraine and possible cooperation with Polish-Ukrainian specialists who have professional offices in a neighbouring country. Essentially, Polish jurists do not know much about Ukrainian and Polish lawyers who specialise in Poland and Poles in Ukraine. None of the survey participants indicated cooperation with lawyers in Ukraine, nor did they mention that they planned to move eastwards personally to set up a branch in Ukraine. Also, during their free speech, no participant stated any connections with or knowledge about the lawyers residing in Ukraine.

Among those interviewed in the study, Polish lawyers who are members of district councils of bar associations also have limited experience in this area. Almost half of them have never heard of this type of legal practice. However, there is a certain group of representatives of barristers' councils who sometimes meet with lawyers of Polish origin who constantly practice in Ukraine. So far, no one has met Ukrainians, i.e., specialists in Polish-Ukrainian affairs operating in Ukraine. Lawyers with knowledge of lawyers of Polish origin in Ukraine are mainly represented by bar associations based in Kraków, Lublin, Kielce, Rzeszow, Wroclaw, Gdansk, and Poznan. This means that they are appreciated by customers, and knowledge of this is widespread. There are also a limited number of Polish jurists who notice Poles and Ukrainians initiating small cross-border initiatives. It seems that the knowledge of the Kosyło and Partners law firm is relatively widespread also among senior advocates (*dziekani*) and members of local councils. Despite some interest in the affairs of the Polish community in Ukraine, these cases are still of a niche nature: they do not play a role in the practice of Polish lawyers or in the activities of bar associations.

The conducted study shows that there are few lawyers of Polish origin or Ukrainian lawyers dealing with Polish-Ukrainian cross-border cases who practice in Ukraine. As in Poland, their number is less than 20 people. As expected, most of them are grouped in western Ukraine, mainly in L'viv. This is due to the traditional ties between Poland and western Ukraine and the borderland nature of this region. The increase in the number of Ukrainians in Poland and the tourist migrations of Poles to L'viv do not result in an increased need for legal protection from Ukrainian lawyers. It seems that Polish business is not moving to Ukraine collectively; consequently, lawyers are not asked to provide legal services to entrepreneurs and individuals. The current number of lawyers of Polish origin and Ukrainian specialists is therefore sufficient to satisfy mutual cross-border and international relations. Certainly, the increasing integration of both countries and the education of young Ukrainian lawyers in Poland will result in an increased number of legal specialists in Ukraine in the future; this can be expected in the next few years.

5 ORGANISATIONAL COOPERATION

One of the emanations of cross-border legal activity is the institutional cooperation of bar associations. Essentially, the need to provide cross-border legal services forces them to become more involved in facilitating the transnational work of lawyers. Sometimes the regional lawyers' between corporations results in individual lawyers increasing the provision of cross-border services. In both cases, the quality and scope of the bar associations' activities indicate the existence of closer relationships between lawyers from different countries.

The organisation of Polish bar associations (both advocates and legal advisers) and the Ukrainian bar association is similar. In both cases, there are regional lawyers' associations that bring together all regional licensed lawyers, facilitate the organisation of their work,

fulfil various legal obligations, and conduct their own international activities. Additionally, at the central level, there are supreme organisations and other self-governing bodies whose task is to supervise, support, and coordinate regional organisations. Nevertheless, it is the regions that carry out most of the tasks and responsibilities. In both Poland and Ukraine, lawyers and legal advisers are obliged to become members of the bar association. Regional and supreme corporate bodies conduct activities of an international nature, which result from the provisions of national or international law (e.g., maintaining lists of foreign lawyers, cross-border disciplinary proceedings), or the ambitions of members of boards of directors (councils) of regional associations (e.g., organisation of international training, conferences, internships, representation in international organisations, promotion of cross-national issues, or international social events).[38]

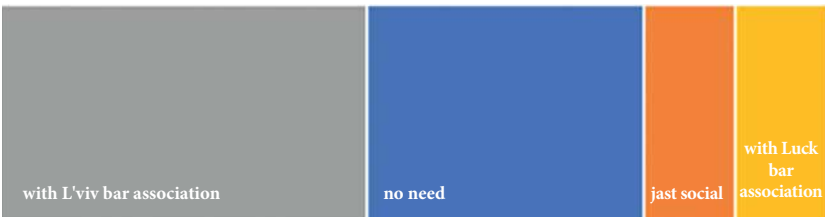

Figure 4 Cooperation of Polish-Ukrainian bar associations

The most accurate information on the institutional cooperation of Polish and Ukrainian bar associations is provided by members of the management bodies (councils) of supreme and regional bar associations. Heads and other members of Polish councils of legal associations emphasise that there is no special bond between the two countries' bar associations. In only 8 out of 43 cases, lawyers emphasised that the Polish bar had established or currently maintains some contacts with the regional professional self-governments of Ukrainian lawyers. Only deans from Wroclaw, Poznan, Kraków, Rzeszow, Lublin, Opole, and Kielce indicated that their chambers currently maintain or have maintained contacts with the Ukrainian bar association or regional bar councils. Usually, these are bar associations from the eastern regions of Poland, bordering with Ukraine. In the case of Wroclaw, the motivation for maintaining cooperation are old reminiscences, and in Poznan, the personal involvement of one of the Ukrainian lawyers.[39]

All representatives of Polish bar associations emphasise that cooperation with colleagues from Ukraine is ephemeral. Usually, it starts and ends with the signing of the cooperation agreement; specific actions are no longer taken. If there are any joint activities, they are usually of a social nature (e.g., meetings, sports events, trips). Indeed, specific collaborative activities are so rare that they tend to be 'apocryphal'. Working together is usually one-sided and very limited; in fact, only Poles direct their professional and social interests towards Ukraine. Institutional contacts are established exclusively with the regional legal associations in L'viv and Lutsk. Activists of Polish professional organisations from Rzeszow, Kielce, and Lublin characterise their contacts with Ukrainian counterparts as follows:

38 A Kosyło, 'Nowa ustawa o adwokaturze na Ukrainie' (2013) 58 Palestra 162, 164-167; W Bujko, 'Zawód radcy prawnego i samorząd zawodowy radców prawnych w orzecznictwie Trybunału Konstytucyjnego' in A Bereza (ed), *Zawód radcy prawnego: historia zawodu i zasady jego wykonywania* (Ośrodek Badań, Studiów i Legislacji Krajowej Rady Radców Prawnych 2017) 539-575 <http://kirp.pl/wp-content/uploads/2016/02/Zaw%C3%B3d-radcy-prawnego_wyd.5_592_.pdf>; A Kosyło, 'Ustrój adwokatury i zasady dostępu do zawodu adwokata na Ukrainie' [2004] Studia Iuridica Lublinensia 143, 143-150; 'Ukrainian National Bar Association' (2021) <https://en.unba.org.ua/> accessed 5 April 2021.

39 A Górny, *Nowe obszary docelowe w migracji z Ukrainy do Polski przypadek Bydgoszczy i Wrocławia na tle innych miast* (Ośrodek Badań nad Migracjami Uniwersytetu Warszawskiego 2019) 6-59 <http://www.migracje.uw.edu.pl/wp-content/uploads/2019/11/WP118176.pdf> accessed 5 April 2021.

> There is no necessary cooperation. Because if it were, they would have entrusted us with some matters. And there aren't any. My office is in Jaroslaw, so close to the border, and I receive news. There are no such situations; there aren't. A situation where we need help.
>
> We once tried to establish cooperation with the L'viv Bar Association, but there was no special response there. There is a difficult situation in general because the advocacy is a bit strange there. They are a bit on the same level of development that we used to be under communism. This level is completely different.
>
> Former contacts with the Luck Bar Association, Ukraine. And it was probably the kind of contact I noticed when I was with the dean because he was coming here and there was a visit. But that's it. But it was very informal, more like a neighbourly contact than a legal agreement or full cooperation. As for other bar associations, I am not aware of any such cooperation.

Verification of the accounts by representatives of Polish bar associations is provided by information on the cooperation of local governments, obtained from the websites of regional and supreme Polish and Ukrainian professional associations. After analysing the content of materials published on the websites of Polish bar associations (all together), we note that out of 791 announcements for 2017-2019, only two concerned cooperation between Polish and Ukrainian bar associations (one in Lodz and one in Warsaw). Similarly, in the case of supreme bodies of advocates and legal advisers (in total), out of 255 advertisements, only four concerned such cooperation (for advocates).[40] The websites of all Ukrainian local bar associations and the Supreme Bar Association were analysed in a similar way. In this case, all entries (news, invitations, etc.) published between 2017 and the end of March 2021 were examined. Only one piece of information on Polish-Ukrainian cooperation was found from the spring of 2021. Even in L'viv, Lutsk (Volhynia), Kharkov, and the Supreme Bar Association, no information was found regarding institutional cooperation between Polish and Ukrainian legal councils.[41]

Therefore, we must conclude that Polish-Ukrainian cooperation between bar associations is practically non-existent. Information about working together is rudimentary and accidental. Despite several attempts to establish cooperation by western Ukrainian and eastern Polish law corporations, it was not possible to maintain permanent partnerships. Both sides have made no efforts to inform, promote, and propagate mutual relations. Apparently, lawyers from both countries also do not urge their fellow activists to establish mutual relations. The borderland nature of the L'viv bar association and the bar chambers of Lublin and Rzeszow are not appropriate motivators for maintaining closer relations. Most likely, it is the lack of the need to provide cross-border services that results in the reluctance to maintain institutional contacts. Polish and Ukrainian associations of lawyers do not see any benefits from conducting common affairs, even in the form of social contacts; therefore, they cease. We will notice a change in relations between the bar associations only if the number and importance of cross-border cases, clients, and the group of interested lawyers increases. Then, the members of the bar will put pressure on the authorities of professional self-governments in order to facilitate, improve, and expand mutual professional relations.

40 'Krajowa Izba Radców Prawnych' (n 16); 'Naczelna Rada Adwokacka' (n 16).

41 'Natsional'na Asotsiatsiya Advokativ Ukrayiny' (2021) <https://unba.org.ua/rada-advokativ-regionu> accessed 5 April 2021.

6 CONCLUSIONS

Centuries-old relationships between Poland and Ukraine and the new social and economic reality should make Polish and Ukrainian lawyers actively participate in mutual development. With about a million Ukrainian citizens present in Poland, Poles like to visit western Ukraine, and historical memories consolidate the relations between the two countries; thus, lawyers and legal advisers should develop their cross-border business relations. In fact, jurists from both sides of the border do not work in the neighbouring country, do not deal with their neighbours, and do not specialise in interstate matters. It seems that the existing relationships are so weak that they do not translate into cooperation between lawyers.

It might seem that the million Ukrainians in Poland would require legal protection. Statistically, in such a large group of people, at least a small percentage will require assistance. Immigrants to Poland might also be expected to maintain close relations with their compatriots. However, the reality is different: the multitude of Ukrainians in Poland does not result in the influx of Ukrainian lawyers, nor in the Poles' specialisation in Ukrainian matters. Ukrainians still avoid contact with legal institutions and lawyers; hence, there is no increased need for jurists to get involved in Ukrainian affairs. In addition, difficulties in acquiring Polish professional qualifications effectively make it difficult for Ukrainians to become Polish lawyers and practice in another country. The high level of competition from Polish advocates and legal advisers is also an important factor.[42]

A similar situation applies to Poles who emigrate to Ukraine, with the proviso that Ukraine still is not regarded by Poles as an attractive country to invest in and migrate to. Currently, there are no legal specialists in Polish matters in Ukraine. Ukrainian citizens of Polish origin, living in L'viv, Podolia, or Volhynia, have partially forgotten their origins, and young lawyers do not see the need to specialise in Polish matters. Poles are simply absent from Ukraine, and therefore do not need legal assistance. For Poles, emigration in that direction is very limited.[43]

In most cases, entrepreneurs excel in going abroad and launching business ventures there. In the case of Polish-Ukrainian relations, it is not apparent that large companies are willing to move from west to east, or vice versa. As a consequence, there are relatively few commercial cases that would require legal assistance. Furthermore, the Ukrainian market is perceived by many European entrepreneurs as unstable, while the serious barriers to entering the EU market are difficult for Ukrainians to overcome. In addition, both Polish and Ukrainian entrepreneurs mainly believe that they can handle business on their own without the assistance of a lawyer. The result of such thinking is the lack of lawyers' involvement.[44]

Of course, there is a group of lawyers who deal with Polish-Ukrainian matters, but their number is very small on both sides of the border. Their activity is natural, not related to the actual market and migrations. Although there are always cases to be dealt with, such a small number of specialists would be able to serve very few migrants. Therefore, specialists mainly deal with large economic initiatives or the most serious Polish-Ukrainian criminal cases.

42 P Rojek-Socha, 'Specjalizacja sposobem na konkurencję - prawnicy widzą konieczność zmian' (Prawo.pl, 30 January 2020) <https://www.prawo.pl/prawnicy-sady/czy-prawnik-moze-tytulowac-sie-jako-specjalista-w-danej,497553.html> accessed 16 April 2020.

43 K Dwornik, 'Polacy wśród mniejszości narodowych współczesnej Ukrainy' in K Bortnowska. A Chyckowska (eds), *Wschód oczami młodych. Rosja. Ukraina. Białoruś* (Uniwersytet Warszawski 2010) 169-173 <https://depot.ceon.pl/handle/123456789/16719> accessed 5 April 2021.

44 R Harasym, *Bariery polsko-ukraińskiej współpracy gospodarczej oraz perspektywy płynące z utworzenia strefy wolnego handlu między Unią Europejską a Ukraina* (Wyższa Szkoła Informatyki i Zarządzania w Rzeszowie 2014) 37-102 <http://workingpapers.wsiz.pl/pliki/working-papers/Raport_Ukraina_raport.pdf>.

The activity of Polish and Ukrainian bar associations is part of this picture. Due to the lack of active cross-border corporations, lawyers do not motivate the legal professional structures to maintain relations at the individual or institutional level; and the legal societies do not see any benefits in doing so. The lack of legal compulsion for establishing relationships also dissuades corporations from specialising in international work. Professional self-governing bodies have thus become uninterested and powerless with regard to bilateral relations.

The current state of Polish-Ukrainian legal cooperation does not seem very encouraging. However, it will undoubtedly change. We can already see that large numbers of Ukrainian law students in Poland are entering the domestic services market and are starting to compete with Poles. Thus, in a few years, we will see a flood of young specialists in Ukrainian law in Poland. Many of them will return to Ukraine and conduct their legal practice there as well, and some will take the risk of creating Polish-Ukrainian law corporations dealing with cross-border cases. Furthermore, the large number of Ukrainians in Poland will force Polish and Ukrainian lawyers to deal with cross-border family law. In particular, childcare issues may be the specialty in family law that will legally connect the two countries. It is difficult to ignore family matters, and not necessarily all practitioners want to avoid them. The consequence of this will be the specialisation of lawyers on both sides of the border; they might then also look for niches in other areas and legal specialties.

The future of legal involvement in economic matters depends on the state and supra-state policy. As long as Ukraine is an unstable country with major structural problems, European business will not increase its involvement; consequently, there will be no need for greater participation of Polish and EU jurists. The situation will change when Ukraine becomes more integrated with the European Union, mainly through proper implementation of the already existing association agreement. Then, the gradual reduction of barriers to the cross-border provision of services will result in Ukrainian lawyers finding professional niches in Poland. Indeed, it must be remembered that on both sides of the border, the number of lawyers significantly exceeds the market needs. The changes will take place quite quickly, and perhaps by 2025, we will not be writing about only around 20 Polish-Ukrainian legal specialists, but a number maybe 20 times greater.

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Research Article

THE THEORY AND PRACTICE OF PRECEDENT IN INTERNATIONAL ADJUDICATION: A VIEW FROM UKRAINE

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Summary: 1. Introduction. – 2. A Modern Approach of the Nature and Classification of Precedents of International Adjudicative Bodies. – 3. Horizontal Interaction of Institutions of International Adjudication as a Type of Precedent. – 4. Concluding Remarks.

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CONFLICTS OF INTEREST

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

DISCLAIMER

The author declares that she was not involved in any state bodies, courts, or any other organisations' activities related to the views and case-law discussed.

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THE THEORY AND PRACTICE OF PRECEDENT IN INTERNATIONAL ADJUDICATION: A VIEW FROM UKRAINE

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Abstract *This article argues that legal pragmatism and realism are the methodological basis for considering the law-making function of international courts. Classical scientific approaches, the representatives of which view courts only as applicators of the law, do not allow research into the nature and role of international adjudicative bodies. Since there are several positions on the nature, content, and legal force of the precedent decisions of international adjudicative bodies (the are both diametrically opposed and, to some extent, similar), the author takes a position that considers the characteristics of modern international relations. The author proposes to classify international judicial precedents by considering the construction of judicial institutions and the legal force of decisions because these criteria reflect the nature and significance of such decisions. The classification divides precedents into vertical and horizontal (persuasive). The author argues that vertical precedent set by a particular body of international justice can be absolute, i.e., a structurally lower judicial body can, under no circumstances and exceptions, make a decision without taking into account the legal conclusions made by the higher judicial body. Vertical international judicial precedent may also be relative, i.e., in certain circumstances, a higher judicial body may make a different decision in a similar case, which suggests no obligation to be bound by its own previous decisions. Analysis of the decisions of many international courts has led to the conclusion that international courts create judicial precedents of persuasive content. In particular, the author uses decisions of the European Court of Human Rights (ECtHR) that contain citations of the Court's own legal positions and the International Court of Justice's legal positions. It is proved that the so-called horizontal precedent is a persuasive precedent, the content of the legal provisions of which is based on the authority of the cited international court's decisions. Thus, international judicial precedent not only exists but must be recognised legally because only the formal enshrinement of the legal force of such decisions will lead to the recognition of judicial precedent as a formal source of international law.*

Keywords: *judicial law-making, international adjudicative bodies, international judicial precedent, source of international law, vertical precedent, persuasive precedent, case-law*

1 INTRODUCTION

At the turn of the 20th-21st centuries, international relations were characterised by significant changes compared to previous periods of recent history. Before this, strong states often reached beyond their obligations, violating fundamental human rights and freedoms, despite legal mechanisms built after World War II. In this regard, Jack L. Goldsmith and Eric A. Posner noted that international law 'is indeed a phenomenon, but

scholars exceed its significance and possibilities, and modern multilateral international treaties do not affect the behaviour of states'.[1]

The modern theory and practice of international law require qualitatively new or non-classical (neoclassical) approaches to basic concepts, categories, and processes, one of which is the law-making process and, in particular, the judicial law-making activities of international justice bodies. The defining characteristics of non-classical epistemology are relativism, plurality, nonlinearity, and alternativeness, which allow researchers to analyse complex dialectical relationships between necessary, rigidly determined legal events and processes on the one hand and atypical, nonlinear events on the other.

This approach intensifies the study by lawyers of problems that were previously on the periphery of legal research. In particular, the non-classical theory of international law offers answers to the problem of determining the legal force of decisions of international courts. Postmodern legal theory allows us to consider how legal systems, international law, etc. contain, among other elements, contain relevant sources: legal relations that have legal consequences and case-law, the results of which lead to the creation of new legal norms.[2]

Pragmatic jurisprudence tends to pursue legal understanding, which is critical of formalism and dogmatism, recognising the importance of practical activities, judicial activities, and so on. Representatives of legal pragmatism believe that judges create the law.[3] Experts are increasingly insisting that in recent decades, there has been a need for new methodological approaches that would make it possible to consider the activities of courts not only as applicators of the law but also as lawmakers.[4]

The definition of a 'source of international law', as well as the identification of specific types and structural series belonging to this category, remain debatable.[5] Likewise, n jurisprudence, the

1 JL Goldsmith, EA Posner, *The Limits of International Law* (1st ed Oxford University Press 2006) 225.

2 For more on this, see: T Murphy, 'Postmodernism: Legal theory, legal education and the future' (2000) 7 (3) International Journal of the Legal Profession 357-379. DOI: 10.1080/096959500750143188; J Penner, E Melissaris, 'Postmodern Legal Theory' in *McCoubrey & White's Textbook on Jurisprudence* (5th Oxford University Press 2014) DOI: 10.1093/he/9780199584345.003.0015; SM Feldman, 'The Return of the Self, or Whatever Happened to Postmodern Jurisprudence' (2017) 9 (2) Washington University Jurisprudence Review 267-294.

3 R Dworkin, *Justice in Robes* (Harvard University Press 2006); R Dworkin, *Taking Right Seriously* (Bloomsbury Academic 2013); CC Langdell, *A summary of the law of contracts* (2d ed Boston: Little, Brown and Company 2012) <http://www.greenbag.org/v22n4/v22n4_from_the_bag_langdell.pdf> accessed 5 May 2021; OW Holmes, 'The Path of the Law '(1897). 10 Harvard Law Review 457 <http://moglen.law.columbia.edu/LCS/palaw.pdf> accessed 5 March 2021

4 G Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 (1) Journal of International Dispute Settlement 5-23. DOI: 10.1093/jnlids/idq025; E Linaki, 'Judicial Decisions. What kind of Sources of International Law' (2013) 2 Lex-warrier 13-17; NA Guralenko, 'Judicial precedent in a system of legislative sources: Philosophical and legal aspects' (PhD (Law) thesis abstract, Lviv State University of Internal Affairs 2009) 13.

5 S Prylutsky, 'Judicial policy: Legal nature, place and role in the political system of the state' (2008) 1 Sudova apelyatsiya 26-33; SV Shevchuk *Judicial lawmaking: World experience and prospects in Ukraine* (Referat 2007); V Yamkovyy 'Introduction of judicial precedent as a necessary element of harmonization of Ukrainian legislation with European legal systems' (2009) 2 Comparative Legal Research 25-30; J Komárek 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedent' (2013) 61 The American Journal of Comparative Law 148-161; H Gao, 'Dictum on Dicta: Obiter Dicta in WTO Disputes' (2018) 17 (3) World Trade Review 509-533; N Ridi 'The Shape and Structure of the "Usable Past": An Empirical Analysis of the Use of Precedent in International Adjudication' (2019) 10 (2) Journal of International Dispute Settlement 200-247. doi.org/10.1093/jnlids/idz007; N Ridi 'Doing things with international precedents: The use and authority of previous decisions in international adjudication' (PhD (Law) thesis, King's College London 2019) <https://ethos.bl.uk/OrderDetails.do?uin=uk.bl.ethos.822281> accessed 5 March 2021; N Ridi '"Mirages of an Intellectual Dreamland"? Ratio, Obiter and the Textualization of International Precedent' (2019) 10 (3) Journal of International Dispute Settlement 361-395. doi.org/10.1093/jnlids/idz005.

provisions on the direction of judicial precedent remain uncertain. The question is whether a judicial precedent is binding in similar cases in general or only in subsequent similar cases. By combining scientific achievements on problematic issues, we offer a systematic version of the analysis of the modern theory on the nature and types of international court precedent.

2 A MODERN APPROACH TO THE NATURE AND CLASSIFICATION OF PRECEDENTS OF INTERNATIONAL ADJUDICATIVE BODIES

Current trends in the development and strengthening of judicial law-making are markedly different from the concept of *lex non scripta*, according to which court decisions were characterised as 'unwritten laws' or 'unwritten principles'. At the beginning of the 21st century, few people doubt that continental judicial precedent is more universal than judicial precedents created by courts of common law.[6]

The doctrine of *stare decisis* does not and cannot be applied to the administration of justice by international courts. It is well known among scholars that international law, as aphoristically formulated by Lord Alfred Denning, 'does not know *stare decisis*', and 'the role of judgments in such cases is similar to the role of judgments under the doctrine of jurisprudence constant'.[7]

As stated in the opinion of the Consultative Council of European Judges:

> precedents or established case law which establish clear, consistent and reliable rules [that] reinforce the close link between the unity and consistency of case law and the right of everyone to a fair trial, whether precedent is considered a source of law, or whether precedent is binding, references to previous judgments are an effective tool for courts in both the common and the continental law.[8]

There is a common type of precedent in the countries of civil law and common law, the so-called 'persuasive precedent'. Certain court decisions, which in themselves do not set a precedent, when given the authority of the court that adopted them, significantly affect the practice of other courts, although it is not binding on them. Convincing precedent can also be set by a foreign court decision and influence the practice of a national court, which is especially common in common law countries. It is difficult to overestimate the role of convincing precedent in the application of international treaties by international and national courts.

The content of judicial precedent is the basis for overcoming legal uncertainty in the process of dispute settlement. The basis for resolving such legal uncertainty is called various things in the legal literature: in Anglo-American countries, it is '*ratio decidendi*', and in Ukraine,[9]

6 J Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press 2011); BB Jia, 'Judicial decisions as a source of international law and the defence of duress in murder or other cases arising from armed conflict' in W Tieya, S Yee (eds) *International Law in the Post-Cold War World: Essays in memory of Li Haopei* (Taylor & Francis Group 2001) 99-119; A Boyle, C Chinkin, *The Making of International Law* (Oxford University Press 2007).

7 A Markel, 'American, English and Japanese warranty law compared: Should the U.S. reconsider her article 95 declaration to the CISG?' (2009) 21 Pace Int'l L. Rev 196 <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1037&context=pilr> accessed 4 March 2021.

8 'The role of courts with respect to the uniform application of the law' Opinion no 20 [2017] CCJE 4 2.3. <https://rm.coe.int/opinion-ccje-en-20/16809ccaa5> accessed 4 March 2021.

9 NV Stetsyk, 'Judicial lawmaking: General theoretical characteristics' (2010) 3 (8) Journal of the Academy of Advocacy of Ukraine; YM Romanyuk 'Judicial lawmaking in the context of justice reform: Problem statement' (2016) 10 Law of Ukraine 9-19; 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; T Didych 'Judicial Law-making and Its Regulation in Independent Ukraine: Its History and Development' 2021 3 (11) Access to Justice in Eastern Europe 82-100. DOI: 10.33327/AJEE-18-4.3-a000071.

'legal position', 'legal opinion', or 'legal argumentation' (similar to the terminology used in civil law systems). The content of legal positions as examples of solving complex court cases can be different depending on the nature of the problem to be solved in a complex court case. If a legal gap is overcome in a legal position, it can be normative-legal.

Given the classic theory of judicial law-making by W. Blackstone, who wrote that, 'depending on the nature of the use of case law, there are declarative and creative precedents',[10] these definitions are used quite often. Declarative court precedents are divided into confirmatory and interpretive. Confirmatory court precedents confirm the existence of legal norms. Interpretive precedents explain the meaning of a current legal norm. According to the normative element's content, there are creative precedents and precedents of interpretation. Creative precedents are precedents that create a new rule of law or change or repeal an existing one. Creative precedents are divided into those that supplement the law and those that abolish the law.

This classification reflects the structure and content of case-law of the Anglo-American legal system. We have already noted that the founding treaties of the EU do not bind the previous judgments of the European Court of Justice (hereinafter – CJEU) to the EU, but the CJEU case-law is evolving according to the principle of precedent.[11] O. Moskalenko argues that despite the significant similarity of the CJEU case-law to the common law system case-law, this court has a number of unique features:

a) its use of principles and procedures of continental law;
b) the presence of two stages of formation of the decision on the case (inductive and deductive);
c) formulation (interpretation) by the Court of the principles of law; d) orientation in decision-making for political purposes;
e) the unwillingness of the Court itself to recognise its decisions as precedents.[12]

In this regard, T. Komarova notes that 'in the hierarchy of competition law sources, decisions of the CJEU are not lower than primary law, because acts of interpretation of the CJEU are, in fact, an integral part of it (the judgements of the CJEU are one of the sources of the EU *acquis communautaire*)'.[13]

L. Alexander and E. Sherwin state that 'in quoting and borrowing process, relevant international bodies decisions are gradually becoming precedent-setting'.[14] Judicial precedents are understood by authors as:

> decisions which, due to the persuasiveness of their arguments, are perceived by the international legal community (first of all, by judges) as an authoritative statement of law. Precedent decisions, given the citation and borrowing of their conclusions, are not binding on future disputes, but they contribute to progress in the regulation of international relations. Precedent judgements form interdependent groups, which makes it possible to distinguish system-forming and consolidating court precedents. System-forming decisions include those that the international judicial community

10 W Blackstone, *Commentaries on the Laws of England* (Clarendon Press 1765, Good Press 2019) 73.

11 See I Boyko, 'The case law of the European Court of Justice and the problem of preventing pollution of the marine environment' (2018) 2 (10) Lex Portus 32.

12 OM Moskalenko, 'Sources of European Union law (international legal analysis)' (PhD (Law) thesis abstract, Legislation Institute of the Verkhovna Rada of Ukraine 2006) 11.

13 TV Komarova, *The Court of Justice of the European Union: The development of the judicial system and the practice of interpreting EU law* (Pravo 2018) 336.

14 LA Alexander, E Sherwin, 'Judges as Rulemakers' (2004) 15 University of San Diego Public Law and Legal Theory Research Paper Series 1. <https://digital.sandiego.edu/lwps_public/art15/> accessed 5 March 2021.

> considers to be the most authoritative and cited (or borrowed) in most disputes on similar issues. Consolidating judgments are decisions that justify their own conclusions by the provisions set out in the system-forming decisions.[15]

S. Markin classifies judicial precedents into unconditionally binding and conditionally binding. The author bases this division on the degree of influence of the precedent on the further activity of the courts: a decision, which the courts must abide by in any case, is unconditionally binding; a decision is considered conditionally binding if the courts may in some cases deviate and ignore it, i.e., reject the precedent. According to the author, rejection requires the following grounds: that the court decision is contrary to applicable law or is unreasonable.[16]

The horizontal binding nature of international judicial precedent is always relative, as the legal positions of previous judgments are cited and borrowed only in view of the authority of international judicial institutions.

Scholars consider binding judgments of the European Court of Justice (hereinafter – ECJ),[17] which were adopted as a result of a preliminary rulings procedure, as the ECJ clarifies EU law norms at the request of a national court and creates new rules that become mandatory. Judgments rendered in the framework of the preliminary norming procedure often formulate and generalise the concepts, approaches, and practice of the Court in resolving specific cases. The basic principles that determine the interaction of a special, independent legal system of the EU with the national legal systems of the member states and with international law are formulated. These decisions interpret, clarify, and develop the provisions of the founding treaties and adjust the powers of the institutions of the EU and the states. For example, the principles of the rule of law and the direct effect of EU law, the priority of human rights and freedoms, and the non-contractual liability of the Union and its states for infringements and many other provisions were first defined in preliminary acts.

International adjudicative bodies have internal structural subdivisions and, within them, the effect of vertical judicial precedent can be traced. In particular, there are Grand Chambers within the ECtHR and the ECJ, whose decisions in complex court cases are binding on other vertically-related bodies. The International Criminal Tribunals for the former Yugoslavia (hereinafter – ICTY) and Rwanda have binding chambers of appeal. E.g., in the decision on the case of Zlatko Aleksovski, the ICTY Appeals Chamber substantiates the possibility of applying the principle of *stare decisis* to ICTY decisions: '<…> the interpretation of the Statute <...> In particular, it should have the right to withdraw from them for compelling reasons in the interests of justice'.[18]

Deviation from the position set out in the previous decision is likely when such a decision was 'made through negligence' (*per incuriam*), i.e., the court decision was incorrect because the judge or judges did not have all the necessary information about the permissible rules of law. The Appeals Chamber clarified that what should be followed in previous decisions is the principle of *ratio decidendi*. There is no obligation to comply with previous decisions on cases, the circumstances of which may be different from this case.[19]

15 Ibid (n 14) 13.

16 SV Markin, 'Judicial precedent as a source of private international law' (PhD (Law) thesis abstract, Volgograd Academy of Internal Affairs 2005) 19.

17 TV Komarova (n 13); LA Heffernan, 'Discretionary Jurisdiction for the European Court of Justice?' (1999) 34 Irish Jurist 148-169; P Craig, C Harlow (eds), *Lawmaking in the European Union* (Kluwer Law International 1998).

18 Prosecutor v Zlatko Aleksovski, case no IT-95-14/1-AR77, Appeals Chamber, 24 March 2000, 39 <https://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf> accessed 4 March 2021.

19 Ibid.

The Appellate Body of the World Trade Organization (hereinafter – WTO AB) functions as the appeal institution towards decisions of the Dispute Settlement Body. An interesting example is the report of the WTO AB regarding the implementation by Mexico the Dispute Settlement Body's decision on the case of dolphin protection.[20] The dispute, initiated by Mexico in 2008, was based on measures taken by the US to protect dolphins, which traditionally swim near shoals of tuna and very often die when caught in fishing nets during fishing. The US government has demanded that its fishermen change the technology of tuna fishing to reduce dolphin mortality and imposed a ban on the import of tuna products from countries that had not taken such measures. Following consideration by the WTO Dispute Settlement, the ban was replaced by the introduction of a special 'dolphin-safe' label for tuna products, setting out the conditions under which tuna products sold on the US market could be labelled.[21]

However, this decision was challenged by Mexico with a request to declare the requirements for the labelling of tuna products unsatisfactory. In particular, Mexico requested the WTO AB to review the facts and conclusions of the expert group, which included representatives of Australia, Brazil, Canada, China, Ecuador, the EU, Guatemala, India, Japan, Korea, New Zealand, and Norway as third parties for the interpretation and application the Agreement on Technical Barriers to Trade (under Art. 2.1).[22] The WTO AB found no mistakes in the experts' assessment of the risks to dolphins arising from the use of different fishing methods in different parts of the ocean.[23] The WTO AB's decision of 14 December 2018 was that 'the interpretation of the eligibility criteria, certification requirements and calibration tracking and verification requirements for risks to dolphins arising from the use of different fishing methods in different areas of the ocean, provided by a group of experts, must be executed'.[24]

Under para. 6 of Art.17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2), the WTO AB did not have the competence to review the facts of the case.[25] This should be understood as WTO members appealing to the Appellate Body with a report from a group of experts. Under para. 13 of Art. 17 of the Agreement 'the Appellate Body may uphold, change or revoke the legal considerations and conclusions of the group of experts'.[26]

Given the suggestions of scholars on the classification of judicial precedents, we propose to divide the judicial precedents of international judicial bodies into mandatory (or vertical) and persuasive (or horizontal). For example, mandatory precedents include judgments of the ECJ adopted as a result of preliminary rulings procedure, as the Court, in clarifying norms of EU law upon request, creates new rules that become binding. The case-law of the

20 United States – Measures concerning the importation, marketing and sale of tuna products recourse to article 21.5 of the DSU by Mexico. Report of the Appellate Body (WT/DS381/AB/RW 20 November 2015) <https://www.wto.org/english/tratop_e/dispu_e/381abrw_e.pdf> accessed 4 March 2021.

21 US–TUNAII(MEXICO)1(DS381)<https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds381sum_e.pdf> accessed 4 March 2021.

22 Ibid.

23 Ibid.

24 United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products. Report of the Appellate Body (WT/DS381/AB/RW/USA; WT/DS381/AB/RW2 14 December 2018) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/381ABRWUSA.pdf&Open=True> accessed 4 March 2021.

25 Understanding on Rules and Procedures Governing the Settlement of Disputes (The Uruguay Round agreements. Annex 2 Dispute Settlement Understanding) <https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm#17> accessed 4 March 2021.

26 Ibid.

Grand Chambers of the ECtHR, the ECJ, and the criminal tribunals Appeal Chambers is binding on other vertically related bodies.[27]

Vertical precedent set by a particular body of international justice can be absolute, i.e., a structurally lower judicial body can, under no circumstances and exceptions, make a court decision without taking into account the legal conclusions made by the higher judicial body. Vertical international judicial precedent may also be relative, i.e., in certain circumstances, a higher judicial body may take a different decision in a similar case, which suggests there is no obligation for it to be bound by its own previous decisions.

Persuasive or horizontal judicial precedents are becoming quite common, as international adjudicative bodies actively refer to their own and other decisions, as well as borrow the legal positions of case-law decisions of other bodies of international justice.

3 HORIZONTAL INTERACTION OF INSTITUTIONS OF INTERNATIONAL ADJUDICATION AS A TYPE OF PRECEDENT

Scholars and judges of international courts (in particular, V. Butkevich, J. Guillaume, O. Kiyivets, J. Martinez, C. Romano, N. Khronovski, M. Shahabuddeen, S. Shevchuk, and M. Jacob) note that the decisions of international courts are increasingly based on the courts' own previously adopted decisions or other international courts decisions.[28] For example, Stanislav Shevchuk writes that 'such inter-judicial interaction, although not formally defined, is inherent in modern international jurisprudence ...'[29] Mohamed Shahabuddeen emphasises that 'the International Court of Justice actually carries out law-making in the sense of development, adaptation, modification of norms, filling of gaps, interpretation of norms'.[30]

Such activity is manifested in references to previous decisions of that court or those of other courts. The horizontal effect of precedent in their activities is recognised by the international judicial institutions — some of them even enshrine it in their statutes. In particular, under para. 2 of Art. 21 of the ICC Statute, 'The Court may apply principles and rules of law as interpreted in its previous decisions'.[31]

International courts have similar jurisdiction on some issues. As Jenny Martinez points out, 'their jurisdiction is intertwined <…> therefore, when making decisions, courts refer to

27 Armin von Bogdandy, Ingo Venzke, Jean d'Aspremont, Marjan Ajevski, Hugh Thirlway, and Karl Doehring write about international courts as lawmakers in R Wolfrum, I Gätzschmann (eds), *International Dispute Settlement: Room for Innovations?* (Springer 2013) panel IV 159-327.

28 For more on this, see: VG Butkevich (ed) *International law. Fundamentals of theory: a textbook* (Lybid 2002); O Kiyivets 'Methodology of international law in the context of the study of sources of international law: Some general reflections on the eternal' (2012) 1-2 Ukrayins'kyy chasopys mizhnarodnoho prava 42-46; N Khronovski 'Forming a single European standard of human rights: The accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms' (2013) 1 Yevropeys'ke pravo 14-27 <http://real.mtak.hu/16584/1/> accessed 6 March 2021; M Jacob, 'Precedents: Law-making Through International Adjudication' (2011) 12 (5) German Law Journal 1005-1032 <https://doi.org/10.1017/S207183220001720X>; C Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 New York University Journal of International Law and Policy 709-751 <https://biblioteca.cejamericas.org/handle/2015/1268> accessed 6 March 2021.

29 SV Shevchuk, *Judicial lawmaking: World experience and prospects in Ukraine* (Referat 2007) 473.

30 M Shahabuddeen, *Precedent in the World Court* (Cambridge University Press 1996) 90.

31 Rome Statute of the International Criminal Court (of 17 July 1998, entered into force 1 July 2002) <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf> accessed 5 March 2021.

decisions made by other courts <…>'.[32] Gilbert Guillaume[33] has a similar opinion noting that 'the expansion of international judicial and arbitration bodies already affects the functioning of international law'.[34]

This idea was developed by Sir Michael Wood, who emphasises:

> Although there is no hierarchy of international courts and tribunals, International Court of Justice decisions are often seen as authoritative precedents for other courts and tribunals <…>.[35]

Examples would be *Jones et al. v the United Kingdom*,[36] M/V "SAIGA" (No. 2),[37] and Japan – Taxes on Alcoholic Beverages.[38]

Examples that we believe are evidence of horizontal precedent are states' applications to the ICJ for the delimitation of maritime zones, which are quite numerous and constitute the most effective legal way of resolving disputes over the maritime boundary delimitation. The delimitation of the disputed areas is based on the principles of equidistance and justice, which are established in international jurisprudence on these issues. The horizontal precedent in this area begins with the judgment on the case *Germany v. Denmark and the Netherlands* (1969),[36] which proposed a new method of delimiting the exclusive economic zone and the continental shelf based on justice.

The Court referred to this principle in decisions on the cases of delimitation of the continental shelf between Tunisia and Libya (1982),[37] maritime delimitation between Canada and the US (1984),[38] delimitation of the continental shelf between Libya and Malta (1985),[39] on the territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (2007),[40] and the Black Sea delimitation (2009).[41] We have already emphasised that international relations and international law have needed new tools and mechanisms for more than 70 years.

Horizontal precedents can be considered one of the newest tools in the process of international law-making. In particular, the international legal concept of jurisdiction is gradually being formed as a norm-definition due to decisions of international judicial bodies, starting with the decision on the case *Nicaragua v. United States of America*,[42] which states that

32 J Martinez, 'Towards an International Judicial System' (2003) 56 Stan L Rev 441.

33 Gilbert Guillaume is former president of the International Court of Justice <https://www.iaiparis.com/profile/gilbert.guillaume> accessed 5 March 2021.

34 G Guillaume, 'The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order' Speech to the Sixth Committee of the General Assembly of the United Nations (27 October 2000) <http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresident&uscore;GuillaumeSixthCommittee20001027.htm> accessed 5 March 2021.

35 'Report of the 17th session (30 April -1 June and 2 July-10 August 2018)' General Assembly Official Records, Seventy-third Session, Supplement no 10 (Yearbook of the International Law Commission 2018) <https://undocs.org/en/A/73/10> accessed 5 March 2021.

36 North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, 3.

37 Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982, ICJ Reports 1982, 18.

38 Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment of 12 October 1984, ICJ Reports 1984, 246.

39 Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, ICJ Reports 1985, 13.

40 Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007, ICJ Reports 2007, 659.

41 Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, ICJ Reports 2009, 61.

42 Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*), Merits, Judgment of 27 June 1986, ICJ Reports 1986, 14.

> even if USA participation in financing, organizing, training, supplying and equipping contras, choosing their military or paramilitary targets, planning all their operations dominated or was decisive, this is not enough to accuse the USA of helping contras during their operations in Nicaragua, as it does not prove that the USA ruled or forced the contras to commit illegal acts. In order to bring the United States to justice, it is necessary to prove that this state exercised effective control over the military and paramilitary operations in which such violations were committed.[43]

The Court examined the extent of US control over the contras to determine whether the US was responsible for their actions (killings, abductions of civilians, etc.).[44]

The ICJ has found that the presence of 'effective control' in the Court's view can be confirmed either by the direct order to commit unlawful acts or by the coercion to commit them. That is, the Court linked the notion of jurisdiction to the notion of territory and to the notion of effective control. Thus, the judgment on the case *Nicaragua v. United States* gave the notion of 'jurisdiction in international law' an extraterritorial character. The ECtHR, referring to the decision of the ICJ, expanded the meaning of 'jurisdiction' in Order of 23 March 1995. The Court stated that

> a Party may be held liable if, as a result of a military operation, whether lawful or unlawful, it exercises effective control outside its national territory. The obligation to ensure the observance of rights and freedoms in this territory derives from the fact of such control, regardless of whether it is carried out directly, through the armed forces, or through a subordinate local administration.[45]

Subsequently, this legal position was borrowed and cited in decisions on cases: *Bankovic and others v. NATO countries*,[46] *Ilaşcu and others v. Moldova and Russia and others*, and *Al-Skeini and others v. the United Kingdom*.[47] In particular, in the judgment on the Ilaşcu case of 8 July 2004, the Court noted that the concept of 'exercise of jurisdiction' was key to determining the state's responsibility for certain actions. Jurisdiction is understood as the territorial legal capacity of the state, which is usually exercised throughout the state. But there may be exceptions. The presumption may be limited, as the Court ruled, 'when a state is unable to exercise its power in certain parts of its territory, as a result of military occupation by the armed forces of another state that actually control the occupied territory'.[48] The Court emphasises the primacy of the territorial principle in the application of the ECHR but recognises that the notion of 'jurisdiction' is not necessarily limited to the state territory. In exceptional circumstances, the actions of states were carried out outside the territory, as a result of which they can be regarded

43 Ibid, para 113.

44 Ibid, para 115.

45 *Loizidou v Turkey* App no 15318/89 (ECtHR, 23 March 1995, para 62) <https://hudoc.echr.coe.int/eng#{%22docname%22:[%22Loizidou%20v%20Turkey%22],%22itemid%22:[%22001-57920%22]}> accessed 6 March 2021.

46 *Bankovic and others v Beldium and others* App no 52207/99 (ECtHR, 12 December 2001) <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Bankovic%20and%20others%20v%20Belgium%20and%20others%22],%22itemid%22:[%22001-22099%22]}> accessed 6 March 2021.

47 *Ilaşcu and others v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004) <https://hudoc.echr.coe.int/eng#{%22docname%22:[%22Ila%C5%9Fcu%20and%20others%20v%20Moldova%20and%20Russia%22],%22itemid%22:[%22001-61886%22]}> accessed 6 March 2021; *Al-Skeini and others v the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-105606%22]}> accessed 6 March 2021.

48 *Ilaşcu and others v Moldova and Russia* (n 50) para 311.

as the exercise of their jurisdiction. In such cases, the state may be held internationally liable for failure to protect human rights and freedoms in the territory.[49]

International judicial institutions' established practice contains many references both to their own decisions and to the decisions of other international judicial bodies. The ECtHR actively refers to decisions of the ICJ and even borrows legal positions made by the Permanent Court of International Justice.

For example, in the decision on case *Lawless v. Ireland*, which was the first to interpret international human rights law against the state, the Court referred to a number of precedents from the case-law of the PCIJ and the ICJ. In particular, it was noted that 'the Commission [European Commission of Human Rights] referred to various precedents obtained from the advisory opinion procedure.[50] The ICJ, in turn, took into applications of individuals received through international organisations who applied for advisory opinions, although Statute of Court provides that 'only States may be represented in court'.[51]

The judgment on the case *Cabral v. the Netherlands*, which holds that there was a violation of paras. 1, 3 (d) of Art. 6 of the ECHR,[52] was adopted by considering previous decisions of the ECtHR itself: para. 32 states that the Court applies the principles already formulated in the decisions on cases *Paić v. Croatia*,[53] *Seton v. the United Kingdom*,[54] and *Bátěk and Others v. the Czech Republic*.[55]

The Inter-American Court of Human Rights (hereinafter – CorteIDH) also considers the ECtHR's case-law as an influential factor in settlement disputes. Thus, in the decision on the case of *The Last Temptation of Christ* (*Olmedo-Bustos et al. v. Chile*), the CorteIDH was guided by the established practice of the ECtHR in the field of freedom of expression.[56] The CorteIDH has established its own practice for resolving cases concerning the rights of indigenous peoples of Latin America,[57] and here, the practice of the ECtHR has also been borrowed as a model. In particular, in 2013-2014, the court heard the case *The indigenous peoples of Kuna de Madungandi and Amber de Bayano v. Republic of Panama*.[58] In the judgment of 14 October 2014, the Court referred

49 Ibid, paras 310-321.

50 *Lawless v Ireland* App no 332/57 (Report of the European Commission of Human Rights, adopted on 19 December 1959) <https://70.coe.int/pdf/lawless-v.-ireland.pdf> accessed 6 March 2021.

51 *Cruz Varas and others v Sweden* App no 15576/89 (ECtHR 20 March 1991) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57674%22]}> accessed 6 March 2021; *Papamichalopoulos and others v Greece* App no 14556/89 (ECtHR 24 June 1993) <https://hudoc.echr.coe.int/eng/#{%22itemid%22:[%22001-57836%22]}> accessed 6 March2021; *Loizidou v Turkey* App no 15318/89 (ECtHR 18 December1996) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58007%22]}> accessed 6 March 2021.

52 *Cabral v the Netherlands* App no 37617/10 (ECtHR 28 November 2018) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-185308%22]}> accessed 6 March 2021.

53 *Paić v Croatia* App no 47082/12 (ECtHR 29 June 2016, paras 29-31) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-161752%22]}> accessed 6 March 2021.

54 *Seton v the United Kingdom* App no 55287/10 (ECtHR 12 September 2016, paras 57-59) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-161738%22]}> accessed 6 March 2021.

55 *Bátěk and others v the Czech Republic* App no 54146/09 (ECtHR 12 April 2017, paras 37-39) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-170057%22]}> accessed 6 March 2021.

56 Case of 'Last Temptation of Christ' (Olmedo-Bustos et al) v Chile (CorteIDH, 5 February 2001) <http://corteidh.or.cr/docs/casos/articulos/seriec_73_ing.pdf> accessed 6 March 2021.

57 A Fodella, 'Indigenous Peoples, the Environment, and International Jurisprudence' in N Boschiero, T Scovazzi, C Pitea, C Ragni (eds) *International Courts and the Development of International Law* (TMC Asser Press 2013) 349-364 <https://doi.org/10.1007/978-90-6704-894-1_28> accessed 5 May 2021

58 Caso de los pueblos indigenas Kuna de Madungandi y Embera de Bayano y sus miembros v. Panama (CorteIDH, 14 de octubre de 2014) <http://www.corteidh.or.cr/docs/casos/articulos/seriec_284_esp.pdf> accessed 6 March 2021.

numerically to and used the ECtHR's case-law. In particular, in paras. 36, 40-46, and 77, the CorteIDH cites the ECtHR's decision.[59]

4 CONCLUDING REMARKS

This article has shown that international adjudicative bodies, in applying the law, quite successfully develop international law, creating new rules. Therefore, international case-law is a precedent practice. The study of the law-making function of international courts should be conducted through new approaches, namely pragmatism and realism, as classical theories no longer provide sufficient scientific tools.

The concepts belonging to the category of 'source (form) of international law', in our opinion, include: 'international treaty', 'international custom', 'judicial precedent', 'decisions and resolutions of international organisations', and 'acts of international conferences'. The analysis of specific forms must be carried out using a method of comparison between them.

A case-law decision contains two legal prescriptions: precedent and individual. The precedent prescription is accepted under conditions of normative and legal uncertainty (a gap, too abstract, ambiguous instructions, collisions, etc.) and is obligatory both for the parties in the case and for parties in similar cases.

Among the features of the case-law decisions of international judicial bodies are the conditionality of case-law with treaties and customary international law and courts' right to change and cancel its precedents.

Since there are several positions on the nature, content, and legal force of decisions of international judicial institutions of precedent (they are both diametrically opposed and, to some extent, similar), we consider it necessary to formulate our own position, which takes into account the characteristics of modern international relations. The judicial precedent of international judicial arbitration institutions is a decision that contains legal position(s) that either clarify the content of the current rule or formulate a new rule. Such decisions are taken into account by the court that made them or by other judicial-arbitration bodies when considering a similar case; they are binding for the dispute parties, as well as politically binding on third countries.

59 *Loizidou v Turkey* App no 15318/89, paras 40-51 (ECtHR, 18 December 1996) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58007%22]}> accessed 5 May 2021; *Posti and Rahko v Finland* App no 27824/95, para 39 (ECtHR 2002-VII, 24 September 2002) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60644%22]}> accessed 5 May 2021; *Ananyev and others v Russia* App no 42525/07 and 60800/08, para 75 (ECtHR, 10 January 2012) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-108465%22]}> accessed 5 May 2021; *Hadzhigeorgievi v Bulgaria* App no 41064/05, para 56 (ECtHR, 16 July 2013) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-122363%22]}> accessed 5 May 2021; *Almeida Garrett, Mascarenhas Falcão and others v Portugal* App no 29813/96 and 30229/96, para 43 (ECtHR, 11 January 2000) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58417%22]}> accessed 5 May 2021; *Blečić v Croatia*, GC App no 59532/00, para 86 (ECtHR, 8 March 2006) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-72688%22]}> accessed 5 May 2021 ; *Malhous v The Czech Republic*, GC App no 33071/96 (ECtHR, 13 December 2000) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-5837%22]}> accessed 5 May 2021; *Ostojić v Croatia* App no 16837/02 (ECtHR, 26 September 2009) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-22693%22]}> accessed 5 May 2021; *Papamichalopoulos and others v Greece* App no 14556/89 (ECtHR, 24 June 1993) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57836%22]}> accessed 5 May 2021; *Hutten-Czapska v Poland* App no 35014/97 [GC], paras 152-153 (ECtHR, 19 June 2006) <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Poland%22],%22itemid%22:[%22001-75882%22]}> accessed 5 May 2021.

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INSTITUTING PRINCIPLES FOR THE REPRODUCTION (RESTORATION) OF NATURAL RESOURCES AND COMPLEXES IN THE CONTEXT OF ENSURING AND PROTECTING FUNDAMENTAL HUMAN RIGHTS

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The author declares that she was not involved in any state bodies, courts, or any other organisation's activities related to the discussed views and case-law.

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INSTITUTING PRINCIPLES FOR THE REPRODUCTION (RESTORATION) OF NATURAL RESOURCES AND COMPLEXES IN THE CONTEXT OF ENSURING AND PROTECTING FUNDAMENTAL HUMAN RIGHTS

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Abstract *This article is devoted to the study of instituting principles for the reproduction (restoration) of natural resources and complexes in the context of ensuring and protecting fundamental human rights. The paper analyses these principles and proposes dividing them into four groups according to their functional purpose: system-forming, organisational, preventive, and that of economic direction. The principle of legal provision for the ecosystem approach to the reproduction (restoration) of natural resources and complexes and the 'net gain' principle are of particular interest in the system for the reproduction (restoration) of natural resources and complexes. These two principles should be considered the most important ones and be the basis for the following: organising and implementing measures for the reproduction (restoration) of natural resources and complexes; recovering and improving the quality of ecosystems; preventing and eliminating harmful economic impacts on the environment and human health; ensuring the sustainable functioning of ecosystems by indissolubly linking and balancing all environmental objects.*

It is established that instituting principles for the reproduction (restoration) of natural resources and complexes are universal regulations of positive law, generally influencing the formation of state environmental policy and law-making, as well as litigation in Ukraine that is concerns environmental law principles.

Keywords: *law principles, environmental law principles, principles of instituting the reproduction (restoration) of natural resources and complexes, principle of legal provision for the ecosystem approach to the reproduction (restoration) of natural resources and complexes, 'net gain' principle, 'environmental net gain' principle.*

1 INTRODUCTION

Humanity is now facing global environmental problems, primarily related to the imbalance of biosphere subsystems, resulting in a reduction or complete loss of natural object ability to self-regulate. The rate of the negative anthropogenic impact on the planet's natural objects has significantly accelerated, leading to the emergence of ozone holes, climate change, biodiversity reduction, environmental depletion (especially drinking water), environmental pollution, and waste accumulation. Over the past 50 years, humanity has changed ecosystems both more quickly and on a larger scale than in any other comparable period in human history. These changes have been dictated by the necessity of meeting all the growing needs of mankind for food, fresh water, wood, fibre, and fuel. They have caused significant, mostly

irreversible, losses of the diversity of life on Earth.[1] Humanity currently needs the resources of 1.6 planet Earths annually to produce goods and services at the modern level.[2] In addition, according to the UN, about 3 billion people will face a water shortage problem by 2025. At this point, 60% of EU waters are no longer healthy,[3] the number of animals living in forests has more than halved since 1970,[4] the world's vertebrate populations have shrunk by 60%,[5] half of the Alps' glaciers will have melted by 2050, and 90% may have disappeared by the end of the century.[6] Due to global warming in Ukraine, about 650,000 hectares of land will likely have been flooded. Thirty-four Ukrainian cities, including Odessa, Kherson, Mykolaiiv, Mariupol, Berdiansk, and Kerch, will have been partially flooded, and six cities and 62 villages will have been completely flooded by 2100.[7] Moreover, one of the most pressing issues today is the problem of the Earth's oversaturation with waste, especially plastic.[8] With the spread of COVID-19, AIDS, tuberculosis, and hepatitis B and C, medical waste is becoming especially relevant (to understand the scale of the problem, in Ukraine, each hospital bed generates an average of 2 to 10 kilograms of medical waste per day, which is more than three tons per year).[9] Thus, unless states join forces and take steps to recycle waste, the amount of waste on Earth will have increased by 70% by 2050,[10] which will cause an even greater impact on the degradation of ecosystems and ecosystem services, which could significantly increase in the first half of the current century and become a major obstacle to achieving the Millennium Development Goals.[11]

According to the Californian *Global Footprint Network,* the so-called 'Day of Exceeding the Permissible Level of Earth's Resources', 'World Ecological Debt Day' or 'Earth Overshoot Day' is the date when humanity's needs for biological resources exceeds the Earth's annual capacity to renew (theoretically speaking, humanity 'ticks' with nature and future generations from a relevant date to the end of the year). This happened on 29 July 2019 (the earliest date predicted since the beginning of the environmental crisis of the 70s), but the 2020 COVID-19 pandemic 'shifted' the Eco-Debt Day for three weeks. Thus, humanity returned to the 2013 level of resource

1 W Reid, 'Millennium ecosystem assessment: Survey of initial impacts' (*Millenniumassessment.org,* March 2006) <www.millenniumassessment.org> accessed 15 March 2021.

2 'Conference of the parties to the Convention on biological diversity – What is it and why is it important?' (*Wwf.ua,* 29 December 2016) <https://wwf.ua/?288810/cbd-2016> accessed 18 March 2021.

3 '#Protect water: Privacy statement' (*Living Rivers Europe,* 2021) <https://www.livingrivers.eu/> accessed 29 March 2021.

4 'Living planet report 2020' (*Wwf.ua,* 2020) <LivingPlanetReport 2020 | Publications | WWF (worldwildlife.org)> accessed 29 March 2021.

5 'The number of vertebrate populations in the world has decreased by 60% – WWF report' (*Wwf.ua,* 30 October 2018) <https://wwf.panda.org/?337451/lpr-2018> accessed 29 March 2021.

6 D Carrington, 'Two-thirds of glacier ice in the Alp's will have melt by 2100' (*The Guardian,* 9 April 2019). <https://www.theguardian.com/environment/2019/apr/09/two-thirds-glaciers-alps-alpine-doomed-climate-change-ice> accessed 18 March 2021.

7 O Viruk, 'Which cities of Ukraine may have been flooded due to climate change by 2100' (*The Village Ukraina,* 16 January 2019) <https://www.the-village.com.ua/village/city/city-news/280889-yaki-mista-ukrayini-mozhe-zatopiti-cherez-zminu-klimatu-do-2100-roku> accessed 18 March 2021.

8 According to the American agency 24/7 Wall Street, Ukraine with a population of 41,980,000, ranked the 9th in the rating of countries with the largest amount of waste per capita after the United States, with a population of 325,147,121. 'Ukraine is in the Top countries list with the largest amount of waste per capita' (*Ukrainska Pravda*, 15 July 2019) <https://www.pravda.com.ua/news/2019/07/15/7220956/> accessed 15 March 2021.

9 S Kutsevliak, 'Medical waste is a new environmental threat to the country' (*Informatsiine Ahenstvo Interfax-Ukraina,* 29 May 2020) <https://ua.interfax.com.ua/news/blog/665612.html> accessed 15 March 2021.

10 World Economic Forum (WEF), 'Annual Report 2019-2020' (*Weforum.org,* 23 November 2020) <https://www.weforum.org/reports/annual-report-2019-2020> accessed 15 March 2021.

11 W Reid, 'Millennium ecosystem assessment: Survey of initial impacts' (*Millenniumassessment.org,* March 2006) <www.millenniumassessment.org> accessed 15 March 2021.

use. The closure of borders and factories, together with the general decline in economic activity, has led to a reduction in the ecological footprint of humanity – in particular, carbon emissions (14.5% lower than in 2019) and deforestation consequences (8.4% lower than in 2019).[12] Such an 'improvement' is temporary, though. It is simply impossible to remedy the current state of the environment with the help of technical solutions alone, without changing anything else. According to Laurel Henscom, 'The current sudden ecological footprint reduction should not be taken for progress. This year, more than ever, Ecological Debt Day emphasizes the need for strategies to increase overall resilience to change'.[13] The total ecological debt of mankind is now equal to 18 Earth years; in other words, it will take 18 years to completely restore our planet to compensate for the damage caused by overusing natural resources.

First of all, there is the issue of biodiversity restoration. Biodiversity loss and ecosystem collapse are some of the most serious threats for humanity to face in the next decade; thus, protecting and restoring biodiversity and well-functioning ecosystems are key to increasing our resilience and preventing the emergence and spread of diseases in the future. Excessive, irrational, and inefficient use of natural resources by humans has brought impoverished natural ecosystems, disrupting natural connections. Therefore, humanity has faced the problem of increasing the Earth's temperatures by more than three degrees Celsius, which will lead to mass species extinction and make part of the planet uninhabitable and unsuitable for life.[14] Humanity has by now experienced the long-term effects of climate change. For instance, in 2020, Finland had increased monthly precipitation rates, causing the temperature to be one to two degrees colder than usual, while Portugal experienced the hottest July in 90 years of observations, and France, since 1959.[15] California's average temperature is increasing faster than the Earth's as a whole, and rainfall is still declining. In 2020, California broke its own temperature record: 54.4 degrees Celsius in Death Valley, which has resulted in wildfires increasing by 40% every ten years.[16] In 2019, a new temperature record was set in Britain (the temperature in Cambridge rose to 38.7 degrees Celsius). Moreover, according to experts, maintaining current atmospheric emissions, 40-degree heat will have hit Britain by 2100, increasing every three and a half years instead of 100-300 years.[17] According to the Australian office of the World Wildlife Fund, the largest wildfires in Australia caused by drought have killed about 1.25 billion animals. In addition, in June 2020, snow fell in the Republic of South Africa, Lesotho. It should be added that the recent COVID-19 pandemic exacerbates the need to protect and restore nature; it raises awareness about how our own health and that of ecosystems are closely connected.[18]

12 A Gavrilova, 'How and what we owe the planet: What you need to know about Eco-Debt Day' (*Buro 247.ua,* 1 September 2020) <https://www.buro247.ua/lifestyle/how-and-what-we-owe-the-planet.html> accessed 18 March 2021.

13 Global Footprint Network, 'Delayed Environmental Debt Day claims the opportunity to build a future in harmony with the planet' (*Earthovershootday.org,* August 2020) <https://www.overshootday.org/newsroom/press-release-august-2020-russian/> accessed 18 March 2021.

14 Geographic Distribution, 'Special report: Global warming of 1.5 ºC' (*Ipcc.ch,* 12 March 2020) <https://www.ipcc.ch/sr15/> accessed 10 May 2021.

15 Copernicus Climate Change Service, 'Climate bulletins' (*Climate.Copernicus.eu,* 7 June 2021) <https://climate.copernicus.eu/monthly-climate-bulletins> accessed 10 May 2021.

16 'Governor Gavin Newsom provides an update on the state's response to the West Coast heat wave and the #COVID19 pandemic' (*Facebook.com,* 17 August 2020) <https://www.facebook.com/282059655808032/videos/337529733942010?__tn__=F> accessed 03 June 2021.

17 N Christidis, M McCarthy, PA Stott, 'The increasing likelihood of temperatures above 30 to 40°C in the United Kingdom' (2020) 11 Nature Communicators 3093 (*Nature.com,* 30 June 2020) <https://www.nature.com/articles/s41467-020-16834-0> accessed 03 June 2021.

18 European Commission (EC), 'EU Biodiversity Strategy for 2030: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions' (*Eur-lex.europa.eu,* 20 May 2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1590574123338&uri=CELEX:52020DC0380> accessed 18 March 2021.

In the context of the above, it is advisable to take the issue of environmental safety and human rights ratio into consideration. The state of environmental safety provides for the rate of protecting and using such human rights as the right to life, safe environment, compensation for damages, etc. In 2001, Klaus Töpfer, in his statement to the fifty-seventh meeting of the Commission on Human Rights, emphasised that

human rights cannot be ensured in a degraded or contaminated environment. The fundamental right to life is endangered by deforestation and soil degradation, influence of polluted drinking water, hazardous waste and toxic chemicals. Environmental conditions apparently help to determine the extent to which people use their basic rights to life, health, adequate nutrition and housing, as well as conventional livelihoods and cultures. It is time to recognize that those who pollute or destroy the natural environment not only commit crimes against nature, but also violate human rights.[19]

The basis for combining human rights, health, and environmental protection was laid down in the first principle of the Stockholm Declaration on environmental issues,[20] declaring that

The man has the fundamental right to freedom, equality and favorable living conditions in the environment, the quality of which allows leading a decent and prosperous life, and bears the primary responsibility for improving and protecting the environment for the benefit of the present and further generations.

UN General Assembly Resolution 45/94 on the need to ensure a healthy environment for human well-being[21] continues the idea of combining human rights, health, and environmental protection, emphasising the fact that all people have the right to live in an environment sufficient for health and well-being. The resolution called for increased efforts to provide a better and healthier environment.

In Ukraine, the Action Program of the Cabinet of Ministers of Ukraine of 4 October 2019[22] defines the priority goals set by the government to make Ukrainians live longer, safer, more prosperous, and happier lives. This program is based on a human-centric approach, with the following goals: Goal 9.4. Ukrainians live in a favourable and clean environment; Goal 9.5. Ukrainians suffer less from waste accumulation; Goal 9.6. Ukrainians use natural resources more efficiently and economically; Goal 9.7. Ukrainians preserve natural ecosystems for descendants, Goal 9.8. Ukrainians are aware of the consequences of global climate change, take measures to prevent them whilst being ready to adapt to them; Goal 10.1. Ukrainians live in comfortable cities and villages; Goal 10.7. Ukrainians responsibly handle household waste and do not litter the surrounding living space, etc. Achieving these goals will be a solid foundation for implementing the state's strategic course towards gaining full membership in the European Union and the North Atlantic Treaty Organization. It should be added that the key postulate of Ukraine's environmental legislation and policy should be restoring (reproducing) natural resources and complexes to preserve the natural resource

19 UN General Assembly Resolution 35/8 'On Historical Responsibility of States for the Preservation of Nature for Present and Future Generations' [1980] UNGA 7; A/RES/35/8 (30 October 1980) <http://www.worldlii.org/int/other/UNGA/1980/7.pdf> accessed 10 May 2021.

20 Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment, UN Doc.A/CONF.48/14, at 2 and Corr.1 (1972) <https://www.ipcc.ch/apps/njlite/srex/njlite_download.php?id=6471> accessed 10 May 2021.

21 UN General Assembly Resolution 45/94 'On the Need to Ensure a Healthy Environment for the Well-being of Individuals' <https://undocs.org/ru/A/RES/45/94> accessed 10 May 2021.

22 Resolution of the Verkhovna Rada of Ukraine 'On the Action Program of the Cabinet of Ministers of Ukraine' [2019] Vidomosti of the Verkhovna Rada 1/2 <https://zakon.rada.gov.ua/laws/show/188-20#n2> accessed 10 May 2021.

potential and 'secure future of Ukraine',[23] since biodiversity loss and ecosystem depletion and destruction are the biggest threats to humanity in general and Ukrainian people in particular because they expose our country's economic foundations to danger.[24]

In this context, it should be emphasised that to restore biodiversity by 2030, it is essential to enhance the protection and restoration of nature, which in turn necessitates the development, adoption, and implementation of completely new approaches to the legal regulation of public relations aimed at reproducing (restoring) natural resources and complexes, based on which a system of relevant environmental principles will be formed to serve as a guideline for both law-making and law enforcement activities and justice development, as well as to ensure the uniformity of environmental and legal system development and functioning. In this regard, the development and legal consolidation for the reproduction (restoration) of natural resources and complexes principles are believed, on the one hand, to be a guarantee of achieving sustainable development goals, and, on the other hand, to be a basis not only for 'ensuring permanent economic development providing maximum conservation and reproduction of the environment and its components'[25] but also for forming the possibility of returning to a healthy and safe life and health environment. Taking this into consideration, the relevance of scientifically studying the formation of the system for the reproduction (restoration) of natural resources and complexes principles is increasing. In addition, these principles are a constituent of ensuring and protecting fundamental human rights, especially the rights to life and a safe environment for life and health. The Constitution of Ukraine defines the right to a safe environment for life and health and compensation for damages caused by violating the latter as one of the basic constitutional human rights (Art. 50).[26] 'In this context, judicial practice is a special form and system of actions among other types of legal and practical activities to protect and defend the rights, freedoms and legitimate interests of individuals, facing legal consequences, in the environmental sphere in particular'.[27] It should be emphasised that the right to protect the violated constitutional right to a safe environment belongs to everyone and can be exercised by citizens personally or jointly through associations (the relevant decision is contained in case no. 826/9432/17 para. 54).[28]

The question of the need to protect the environment to ensure and protect fundamental human rights first arose after the 1972 UN Conference on the Environment (Stockholm).[29]

23 HV Anisimova, 'The security future of Ukraine in the context of integrated processes: environmental and legal aspects' (International scientific-practical conference 'The third meeting of experts of related departments to discuss the strategy of evolution of agricultural, land, environmental and natural resource relations in the context of integration development of Ukraine', Odessa, 7-10 June 1018) 76-81.

24 HV Anisimova, OV Donets, 'Ecosystem approach to the restoration (reproduction) of natural resources and complexes as a basis for the modern concept of national environmental policy' (2020) 2 Environmental Law 7-13.

25 OH Koteniov, 'The principles of natural resources law' (PhD (Law) thesis abstract, Yaroslav Mudryi National Law University, 2017) 3-4 <http://nauka.nlu.edu.ua/download/diss/Kotenov/a_Kotenov.pdf> accessed 18 March 2021.

26 Constitution of Ukraine [1996] Vidomosti of the Verkhovna Rada 30/141 <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 10 May 2021.

27 'Whether Ukrainian legislation allows effective resolution of environmental disputes' (*Sud.ua*, 15 November 2019) <https://sud.ua/ru/news/publication/154700-chi-dozvolyaye-ukrayinske-zakonodavstvo-efektivno-virishuvati-ekologichni-spori> accessed 10 May 2021.

28 Resolution of the Supreme Court of Ukraine of 2 October 2019 in case no 826/9432/17 proceedings no K/9901/14908/19 on recognition of illegal actions and omissions, recognition of agreed limits on hunting animals, obligation of the defendants to take measures to eliminate violation of the plaintiff's rights and interests violation, invalidation of the Order no 482 of 19 December 2017 <https://reyestr.court.gov.ua/Review/848060041> accessed 10 May 2021.

29 Stockholm Declaration on the Human Environment, in Report of the United Nations Conference on the Human Environment, UN Doc.A/CONF.48/14, at 2 and Corr.1 (1972) <https://www.ipcc.ch/apps/njlite/srex/njlite_download.php?id=6471> accessed 10 May 2021.

Furthermore, the 1992 UN Conference on Environment and Development (Rio de Janeiro),[30] as well as the Stockholm Declaration, were strongly anthropocentric. Thus, Principle 1 of the Rio Declaration defines human concerns as a central link in providing for sustainable development. People have the right to live in good health and work productively in harmony with nature. Principle 1 of the Stockholm Declaration states that man has the fundamental right to freedom, equality, and favourable living conditions in the environment, the quality of which allows for a decent and prosperous life, and bears the primary responsibility for protecting and improving the latter for the benefit of present and further generations. Several documents adopted within the UN system also recognise the link between human rights and environmental protection. These include the 2005 Human Rights Commission Resolution on Negative Effects of the Illegal Movement and Disposal of Toxic and Hazardous Products and Wastes on Human Rights[31] and the 1990 UN General Assembly Resolution on the Need to Ensure a Healthy Environment for Human Well-being.[32] The relevant link can be considered in two aspects: first, environmental protection can be a means of achieving the goal of adhering to universal human rights standards (e.g., human rights to life, health, and nutrition); secondly, legal protection of human rights can become a means of accomplishing the goals of protecting and preserving the environment (for example, protecting the right to obtain environmental information or the right to access to justice).[33] Taking these aspects into account, the relevance of the scientific study of natural resources and complexes restoration (reproduction) principles is growing.

The aim of the present article is to determine the place of the reproduction (restoration) of natural resources and complexes principles as an institutional component of environmental law; to draw conclusions and make proposals for improving (modernising) the system of principles in this area; to define the role and importance of principles for developing justice in Ukraine; and improve the conceptual model of environmental law principles in the context of the doctrine and strategy of legal reform, taking into account the legal positions and case-law of the European Court of Human Rights (ECtHR).

2 BACKGROUND

Legal principles are the basis for regulating any social relations, which include relations arising between subjects concerning the protection, preservation, and reproduction (restoration) of natural objects and complexes. Developing, legally consolidating, and observing relevant principles are the basis for forming harmonious relations between society and nature, rational nature management, and sustainable development.

30 Rio Declaration on Environment and Development. Adopted by the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 <https://zakon.rada.gov.ua/laws/show/995_455#Text> accessed 22 March 2021.

31 UN Commission on Human Rights, Human Rights Resolution 2005/15: Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, 14 April 2005, E/CN.4/RES/2005/15 <https://www.refworld.org/docid/45377c32c.html> accessed 6 June 2021.

32 UN Commission on Human Rights, Human Rights and the Environment, 6 March 1990, E/CN.4/RES/1990/41 <https://www.refworld.org/docid/3b00f04030.html> accessed 6 June 2021.

33 VA Suchkova, 'On the issue of the classification of environmental human rights' (2006) 2 Moscow Journal of International Law 146-157; MO Medvedieva, 'The right to a favourable environment in the context of universal human rights standards' (2009) 83 (II) Actual Problems of International Relations 161-165, 162 <http://webcache.googleusercontent.com/search?q=cache:lQsQ9LPdCUAJ:journals.iir.kiev.ua/index.php/apmv/article/viewFile/419/386+&cd=1&hl=ru&ct=clnk&gl=ua> accessed 6 June 2021.

Environmental law principles have repeatedly been the subject of research by such scientists as V.I. Andreitsev,[34] H.V. Anisimova,[35] M.M. Brinchuk,[36] A.P. Hetman,[37] I.I. Karakash,[38] A.M. Kolodii,[39] V.V. Kostytskii,[40] O.G. Koteniov,[41] L.L. Chausovata,[42] etc. Issues of reproducing (restoring) certain natural resources have been the subject of research by N.S. Gavrysh,[43] E.H. Degodiuk,[44] O.B. Kyshko-Yerli,[45] T.V. Lisova,[46] O.V. Lukash,[47] etc. Meanwhile, special comprehensive scientific research devoted to instituting principles of natural resources and complexes restoration (reproduction) has not yet been carried out. In addition, their relations with the principles of international environmental law and that of Ukraine have not yet been identified.

In transforming H.V. Anisimova's[48] idea on instituting natural resources and complexes restoration (reproduction) principles, it should be emphasised that due to the study of these principles, it will be possible to: (a) clarify ways of developing environmental legislation and environmental and legal science in the field of the reproduction (restoration) of natural resources and complexes; (b) identify strategic priorities for developing environmental law systems; (c) regulate the expediency of the ratio of public and private environmental interests for reproducing (restoring) natural resources and complexes; (d) form the principles of natural resources and complexes restoration (reproduction), their function, development, and improvement prospects; (e) outline the main directions of the state environmental policy in the field of reproducing (restoring) natural resources and complexes, etc.

3 KEY INFORMATION

'The principles of natural environmental law are the reflection of information in it, subsequently in positive environmental law of the main relations that actually exist in the

34 VI Andreitsev, *Environmental law: course of lectures* (Ventyri 1996).

35 HV Anisimova, *Theoretical principles of environmental legislation development in the context of natural and legal doctrine* (Pravo 2019).

36 MM Brinchuk, *Environmental law principles* (Yurlitinform 2013).

37 AP Hetman, 'Methodological principles of establishing legal environmental protection foundations' (2011) 3 (4) Law of Ukraine 12-21.; AP Hetman, *Thirty years with environmental law* (Krossrod 2013) 158-161; AP Hetman, NA Orlov, 'Environmental audit and legal problems of improving environmental management based on the principles of sustainable development' (2008) 21 (60) Scientific Notes of Taurida National University. Legal Sciences 153-159.

38 II Karakash (ed), *Environmental law of Ukraine* (Feniks 2012).

39 AM Kolodii, *Principles of Ukrainian law* (Yurinkom Inter 1998).

40 VV Kostytslyi, *Environmental law* (Kolo 2012).

41 OH Koteniov, 'The principles of natural resources law' (PhD (Law) thesis, Yaroslav Mudryi National Law University 2017).

42 LL Chausova, 'Principles of environmental law of Ukraine' (PhD (Law) thesis abstract, Yaroslav the Wise National Law Academy of Ukraine 1998); LL Chausova, 'Principles of environmental law of Ukraine' (PhD (Law) thesis, Yaroslav the Wise National Law Academy of Ukraine 1998).

43 NS Havrysh, 'Legal regime of soils in Ukraine' (Dr.Sc. (Law) thesis, National University 'Odessa Law Academy' 2018).

44 EH Degodiuk, 'The current state of land resources in Ukraine and ways to restore land and nature use' (All-Ukrainian scientific and practical conference, Kharkiv, 29-30 September 2001) 37-42.

45 OB Kyshko-Yerli, 'Lands requiring restoration as a new category of lands of Ukraine' (2011) 4 Law Review of Kyiv University of Law 297-300.

46 TV Lisova, *Legal provision of land restoration: theoretical and practical problems* (CJSC 'Kharkiv drukarnia' 2020) 396.

47 OV Lukash, 'The importance of ecological networks for protecting and reproducing land resources of Ukraine' (All-Ukrainian scientific and practical conference, Kharkiv, 29-30 September 2001) 150-152.

48 HV Anisimova, 'Principles of environmental law: concepts and types' (International scientific and practical conference, Khakriv, 20-21 November 2020) 486 <https://dspace.nlu.edu.ua/bitstream/123456789/7204/1/Anisimova_485.pdf> accessed 22 March 2021.

system of law'.[49] Organising and implementing measures for the protection, conservation, and reproduction (restoration) of natural resources and complexes should be particularly based on the system of principles. In general, the system of environmental law principles is: (a) a multi-vector caused by the species diversity of social environmental relations, 'thorough differentiation of legal protection and use regulation'[50] and via the reproduction (restoration) of certain natural resources, and (b) dynamic, as it is constantly supplemented by new fundamentals and ideas formed as the ecological consciousness of mankind evolves. In terms of environmental, social, and economic significance, such principles are quite diverse, some of which are reflected in legal regulations (for example, Art. 50 of the Constitution of Ukraine, Art. 3 of the Law of Ukraine 'On Environmental Protection'[51]), whereas others are not. Consolidating the law principles of a particular industry in its sources can obviously be considered an ideal option, a model of a perfect legal system.[52] Moreover, an increasing number of legal regulations provide for separate articles establishing the principles of social institutions organisation, functioning, and ratio,[53] such as Art. 9 of the Law of Ukraine (hereinafter – LoU) 'On the Animal Kingdom',[54] Art. 23 of the LoU 'On the Plant Kingdom',[55] Art. 4 of the LoU 'On the Ecological Network of Ukraine',[56] and others.

The list of basic environmental protection principles is primarily reflected in Art. 3 of the LoU 'On Environmental Protection'. This article contains only one principle directly related to natural resources and complexes restoration (reproduction), namely, the principle of greening material production based on the complexity of decisions on the environmental protection, use, and reproduction of renewable natural resources and the broad implementation of new technologies. This principle 'emphasizes on closer integration of environmental factors into the fabric of material production'[57] and is largely correlated with Principle 8 of the Rio Declaration on Environment and Development.[58] In addition, in terms of the research issue, the 'complexity' of the approach to make decisions on reproducing renewable natural resources is of particular interest, at it ensures, on the one hand, comprehensiveness and completeness of the information needed for proper decision-making and analysis, and, on the other hand, systematic and planned implementation of necessary actions in the field of reproducing (restoring) natural resources (taking into account the sustainability of relationships between natural objects), the implementation of which should consider the information on causes and sources of natural resources state changes and consequences of implementing relevant activities. Thus, the complexity of the approach to making decisions on reproducing renewable natural resources should involve the relationship and succession

49 Ibid. 485-488.

50 OH Koteniov, 'The principles of natural resources law' (PhD (Law) thesis abstract, Yaroslav Mudryi National Law University, 2017) 23 <http://nauka.nlu.edu.ua/download/diss/Kotenov/a_Kotenov.pdf> accessed 22 March 2021.

51 Law of Ukraine 'On Environmental Protection' [1991] Vidomosti of the Verkhovna Rada 41/546 <https://zakon.rada.gov.ua/laws/show/1264-12#Text> accessed 22 March 2021.

52 PD Pylypenko, *Scientific works by Pylypenko Pylyp Danylovych. Selected* (Kolo 2013) 157.

53 AM Kolodii, *Principles of Ukrainian law* (Yurinkom Inter 1998) 24.

54 Law of Ukraine 'On Animal Kingdom' [2001] Vidomosti of the Verkhovna Rada 14/97 <https://zakon.rada.gov.ua/laws/show/2894-14#Text> accessed 22 March 2021.

55 Law of Ukraine 'On Plant Kingdom' [1999] Vidomosti of the Verkhovna Rada 22/198 <https://zakon.rada.gov.ua/laws/show/591-14#Text> accessed 12 March 2021.

56 Law of Ukraine 'On the Ecological Network of Ukraine' [2004] Vidomosti of the Verkhovna Rada 45/502 <https://zakon.rada.gov.ua/laws/show/1864-15#Text> accessed 22 March 2021.

57 NR Malysheva, *Scientific and practical commentary to the Law of Ukraine 'On Environmental Protection'* (Pravo 2017).

58 Rio Declaration on Environment and Development. Adopted by the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 <https://zakon.rada.gov.ua/laws/show/995_455#Text> accessed 22 March 2021.

of the following four components: 'collecting and processing information' – 'analysing information' – 'making decisions' – 'implementing planned activities'.

Regarding the analysis of Art. 3 of the LoU 'On Environmental Protection', it should be noted that most of the enshrined principles form the basis for legally regulating the reproduction (restoration) of natural resources and complexes with little correlation are accordingly included in the system of the relevant institution principles.[59] These principles are as follows: a) ensuring the environment is ecologically safe for human life and health; b) establishing the preventive nature of environmental protection measures; c) preservation of spatial and species diversity as well as natural object and complex integrity; d) scientifically substantiated ecological, economic and social interests of society based on a combination of interdisciplinary knowledge of ecological, social, natural, and technical sciences and forecasting the state of the environment; e) publicity and democracy in decision-making, the implementation of which affects the state of the environment and the formation of the population's environmental outlook; f) scientifically substantiated standardisation of economic and other activities impact on the environment; g) compensation for damage caused by violating environmental legislation; g) addressing issues of environmental protection and use of natural resources, taking into account the degree of anthropogenic change of territories and the cumulative effect of factors adversely affecting the environmental situation. The list is not exhaustive and can be expanded, clarified, and specified due to the principles derived from international and domestic experience in the field of the reproduction (restoration) of natural resources and complexes. Among such principles, the following should be of particular interest: the principle of legal provision for the ecosystem approach to the reproduction (restoration) of natural resources and complexes and the principle of 'net gain'/ 'environmental net gain', the introduction of which into the national legal field should become a reference for further law-making. This will ensure the impetus for creating an effective legal regulation mechanism in the field of environmental restoration.

3.1. The Principle of Legal Provision for the Ecosystem Approach to the Reproduction (Restoration) of Natural Resources and Complexes

Such 'new' environmental law principles, in our opinion, should, first of all, include the principle of legal provision for the ecosystem approach to reproducing (restoring) natural resources and complexes, the implementation of which will be an organic embodiment of Sustainable Development Goals, which is part of the Development Agenda for the period till 2030, as well as the EU Biodiversity Strategy till 2030: Returning Nature to Our Lives (hereinafter – the Biodiversity Strategy – *author's note)*. The formation of this principle is based on natural and legal principles, and it significantly affects the formation of state environmental policy and determines its general direction and development trends in the field of the reproduction (restoration) of natural resources and complexes. Thus, the goal of Ukraine's state environmental policy for the period till 2030[60] is to achieve a good environmental state by introducing an ecosystem approach to all areas of socio-economic development of Ukraine to provide for the constitutional right of every citizen to a clean and

59 A corresponding idea, but regarding legal regulation in the field of forming and preserving the national ecological network was expressed by MYa Vashchyshyn. See: MYa Vashchyshyn, 'Special principles of legal regulation in the field of national ecological network formation and preservation' (2015) 2 Scientific Bulletin of Lviv State University of Internal Affairs 78-88, 79.

60 Law of Ukraine 'On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the Period till 2030' [2019] Vidomosti of the Verkhovna Rada 16/70 <https://zakon.rada.gov.ua/laws/show/2697-19#Text> accessed 11 March 2021.

safe environment, to implement balanced nature management, and to conserve and restore natural ecosystems. It should be noted that the LoU 'On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the Period till 2020'[61] recognised

> the stabilization and improvement of Ukraine's environmental state by integrating environmental policy into the socio-economic development of Ukraine to ensure environmentally friendly for life and health of population environment, the introduction of an ecologically balanced system of nature use and natural ecosystems preservation

as the goal of the national environmental policy, without considering the issue of reproducing (restoring) natural resources and complexes, which is unacceptable in the context of accelerating environmental degradation processes in Ukraine.

Consequently, restoring biosphere functions of certain natural objects (for example, wetlands) should include the improvement of the whole complex, or rather, ecosystems, and be ensured by a number of measures such as reforestation, creation of water protection zones and biosphere reserves, etc. That is why it is essential to move away from a differentiated object-based approach to restoration. In addition, the international community is increasingly focusing on the concepts such as 'nature health', 'nature restoration', 'ecosystem restoration', or 'biodiversity restoration'. Thus, there is a move away from the idea of conserving and restoring certain natural objects (land, water objects, animal and plant kingdoms). Art. 1 of the Biodiversity Strategy is a great example of normatively consolidating the principle of legal provision for the ecosystem approach to restore the air quality. It emphasises that 'nature is a vital ally in the fight against climate change'.[62] Nature regulates the climate; thus, nature-based solutions,[63] such as protection and restoration of wetlands, peatlands, and coastal ecosystems or balanced management of marine areas, forests, pastures, and agricultural soils, will be significant for reducing emissions and adapting to climate change. Cultivating biomass on peatlands and lands with peat soil not only provides for their restoration but also prevents the emission of greenhouse gases into the environment and contributes to restoring meadow and aquatic ecosystems. Moreover, it creates an environment for the productive reintroduction of those flora and fauna species that are indicative of this ecosystem.[64]

It should be noted that there have recently been cases of the so-called 'natural resources restoration', the result of which is destructing or causing significant damage to other natural resources. Thus, the negative impacts on agriculture mainly occur after applying mineral fertilisers, unjustifiably overestimated their doses, which results not only in crop quality deterioration but also in a significant amount of chemicals entering the biosphere (soil, water objects, and atmosphere). Nitrate washing is particularly damaging from an environmental point of view. Another major problem for Ukraine is invasive species

> transforming entire ecosystems and making them poor in biodiversity, thus, displacing natural species. Some of them are species-transformers, which not only displace one or two natural competitors, but also change the environmental conditions by their vital activity (for example, some plants have the ability to modify soil chemical

61 Law of Ukraine 'On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the Period till 2020' [2010] Vidomosti of the Verkhovna Rada 26/218 <https://zakon.rada.gov.ua/laws/show/2818-17#Text> accessed 11 March 2021.

62 'Global assessment report on biodiversity and ecosystem services' (*Ipbes.net,* 2019) <https://ipbes.net/global-assessment> accessed 11 March 2021.

63 European Commission (EC), 'Nature-based solutions' (*Ec.europa.eu,* 2020) <https://ec.europa.eu/research/environment/index.cfm?pg=nbs> accessed 11 March 2021.

64 BO Sydoruk, 'Ensuring the balanced use of wetlands and peatlands on an ecosystem approach' (2016) 1 Balanced Nature Use 16-21 <http://nbuv.gov.ua/UJRN/Zp_2016_1_5> accessed 14 March 2021.

composition). New conditions attract other uncharacteristic species, resulting in changing the whole ecosystem etc.[65]

The possibility of the existence of such situations is mainly caused by the lack of an ecosystem approach to natural resources and complexes protection and reproduction (restoration).

Thus, the expediency of applying the ecosystem approach to the reproduction (restoration) of natural resources and complexes is primarily due to the objectively existing relations between natural objects and the interdependence of quantitative and qualitative indicators of natural objects on the ecosystem state as a whole. In this regard, measures for the reproduction (restoration) of natural resources and complexes, based on the ecosystem approach, should be made, considering the results of scientific research and development, as well as environmental impact assessment and strategic environmental assessment, which will 'ensure the restoration from 25% to 44% of primary ecosystem services along with the restoration of animal, plant and other biodiversity of the latter undamaged ecosystem'.[66] Moreover, the ecosystem approach to the reproduction (restoration) of natural resources and complexes provides an opportunity to form a comprehensive view of violating existing relations between natural objects in the relevant area, ensuring the development of the most effective balancing measures, taking into consideration the further optimisation of various types of nature management and simultaneously preserving and improving the environment for its future use. Thus, introducing the principle of legal provision for the ecosystem principle to the reproduction (restoration) of natural resources and complexes will be the basis for developing fundamentally new approaches to legally regulating this area, eliminating the rupture and disproportion of environmental relationships between land, water resources, objects of the animal and plant kingdoms, etc. The implementation of this principle will also be of great importance for the judiciary of Ukraine, especially when protecting fundamental human rights, such as the right to a safe environment for life and health, and when considering cases of compensation for damage caused by violating natural resource and environmental legislation.

It should be added that the given principle, while closely connected with other environmental law principles, also has a relatively independent meaning due to the specifics of a particular public relations area. Consequently, it forms the basis not only for the emergence and formation of other principles ensuring nature restoration, since it focuses on all natural objects inseparability but also a basis for combining certain regulations into a single environmental law institution for the reproduction (restoration) of natural resources and complexes.

3.2. The 'Net Gain' or 'Environmental Net Gain' Principle

This principle is most widespread and commonly implemented in terms of biodiversity restoration. Thus, the 2030 Biodiversity Strategy provides that 'the world must adhere to the "net gain" principle in order to return to nature more than it requires. It must undertake to prevent species from extinction owing to human fault, at least where this can be avoided'. Moreover,

65 'What are invasive species and how do they affect biodiversity?' (*Epl.org,* 9 November 2020) http://epl.org.ua/human-posts/shho-take-invazijni-vydy-i-yak-vony-vplyvayut-na-bioriznomanittya/#:~:text=%D0%92%D1%96%D0%B4%D0%BE%D0%BC%D0%B8%D0%BC%D0%B8%20%D0%BF%D1%80%D0%B8%D0%BA%D0%BB%D0%B0%D0%B4%D0%B0%D0%BC%D0%B8%20%D1%96%D0%BD%D0%B2%D0%B0%D0%B7%D1%96%D0%B9%D0%BD%D0%B8%D1%85%20%D1%80%D0%BE%D1%81%D0%BB%D0%B8%D0%BD%20%D0%B2,%D0%B0%D0%BA%D0%B0%D1%86%D1%96%D1%8F%20%D0%B1%D1%96%D0%BB%D0%B0%20(Robinia%20pseudoacacia)> accessed 14 March 2021.

66 W Reid, 'Millennium ecosystem assessment: Survey of initial impacts' (*Millenniumassessment.org,* March 2006) <www.millenniumassessment.org> accessed 15 March 2021.

introducing the biodiversity 'net gain' principle was launched earlier as part of a new approach to improve England's planning system to protect the environment and create places for living and working. The government's spring statement in 2019[67] stated that 'biodiversity net gain' was necessary for all of England's development. A later report on 23 July 2019[68] determined requirements aimed at achieving biodiversity net gains to be implemented in a two-year 'transitional period' after the new environmental law for England had entered into force. The introduction of a new planning activity permit to implement the biodiversity 'net gain' principle might be issued only if the new development project increases rather than reduces the level of biodiversity present on the site proposed by the Department of Environment, Food and Rural Affairs (hereinafter – DEFRA). It may thus be essential to conduct a basic assessment of what is currently present in the area and then assess how the proposed projects will increase this level and eventually achieve a 10% gain after the project has been implemented. Measuring biodiversity levels before and after constructing anything will be based on the Biodiversity Metric 2.0, providing a way to gauge and account for both biodiversity losses and benefits as a result of reconstruction or land use changes. It should be added that the biodiversity indicator 2.0 is also extended to aquatic ecosystems. *Natural England* is responsible for implementing the biodiversity 'net gain' principle. This involves measures to restore the ecosystem as a whole, which will result in biodiversity improvement (namely, before the recovery). The 'net gain' is thus obtained. *CIEEM, CIRIA,* and *IEMA* have developed 10 'constituent' principles-guidelines to ensure the highest quality 'net gain' principle implementation.[69]

Principle 1. Apply the Mitigation Hierarchy. The 'net gain' interpretation implies the 'compensation' option outside the relevant area to be an extreme measure. That is, if a 10% gain is not obtained in a certain area, the entity can invest in other areas determined by the local authorities or in national strategic habitats. Thus, this principle determines the priority direction to avoid negative impacts on biodiversity and – only in cases of its impossibility or extreme situations – directs particular activities to minimise perilous impacts. It should be added that this project implementation involves developing local strategies for nature conservation to determine the current biodiversity levels and identify opportunities for the reproduction (restoration) of natural resources and complexes.

Principle 2. Avoid losing biodiversity that cannot be offset by gains elsewhere. This principle mandates that 'permanent habitats', such as virgin and ancient forests, secular trees, wetlands, sand dunes, salt marshes, etc., be subject to the 'compensation' option in accordance with the National Planning Policy Framework[70] and the Conservation of Habitats and Species Regulations.[71] Thus, Section 175(c) of the NPPF[72] states that 'the construction, leading to indispensable habitats (such as ancient forests and secular trees) loss or deterioration, should be abandoned if there are no completely exceptional reasons and an appropriate compensation strategy'.

67 'RTPI response to the DEFRA consultation on Biodiversity Net Gain' (*Royal Town Planning Institute,* 1 Feb 2019) <https://www.rtpi.org.uk/consultations/2019/february/rtpi-response-to-the-defra-consultation-on-biodiversity-net-gain/> accessed 25 March 2021.

68 Department for Environment, Food & Rural Affairs (DEFRA) 'Biodiversity net gain: updating planning requirements' (*Gov.uk,* 15 October 2019) <https://www.gov.uk/government/consultations/biodiversity-net-gain-updating-planning-requirements> accessed 25 March 2021.

69 'Biodiversity net gain. Good practice principles for development. A practical guide' (*Cieem.net,* 2016) <Biodiversity-Net-Gain-Principles.pdf (cieem.net)> accessed 26 March 2021.

70 Ministry of Housing, Communities and Local Government (MHCLG), 'National Planning Policy Framework' (2019) 68-69 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/810197/NPPF_Feb_2019_revised.pdf> accessed 26 March 2021.

71 Conservation of Habitats and Species Regulations (2017) <https://www.legislation.gov.uk/uksi/2017/1012/contents/made> accessed 26 March 2021.

72 Ministry of Housing, Communities and Local Government (MHCLG), 'National Planning Policy Framework' (2019) 68-69 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/810197/NPPF_Feb_2019_revised.pdf> accessed 26 March 2021.

Principle 3. Be inclusive and equitable. This principle provides for stakeholders' engagement at all stages, including design, monitoring, control, etc.; partners can be involved in achieving the 'net gain' goal, as well as a fair benefit distribution between stakeholders.

Principle 4. Address risks. The principle is aimed at reducing hurdles, uncertainties, and other hazards when obtaining 'net gain', which involves the development and application of methods intended to forecast and 'add contingencies' while calculating biodiversity loss, gains, and compensation for the time between the losses incurred and the benefits obtained.

Principle 5. Make a measurable 'net gain' contribution. 'Net gain' is a measurable goal for development projects where the impact on biodiversity is outweighed by the mitigation hierarchy principle; namely, the primary task is to avoid negative impacts, and in case of the impossibility of this, to minimise them, in particular, by reproduction and/ or compensation. The 'notable contribution' principle involves receiving a certain overall benefit that can be calculated. Thus, DEFRA[73] determines a 10% gain in biodiversity and ecosystems services, which directly contributes to achieving nature conservation priorities.

Principle 6. Achieve the best outcomes for biodiversity. Obtaining the best results in the field of biodiversity restoration is impossible without making management decisions aimed at reducing the negative impact on ecosystems. These should be based on reliable, complete, and comprehensive information of the state of local ecosystems and relations between natural objects, as well as the impact of human activity on the environment. In general, implementing management activities in the field of the reproduction (restoration) of natural resources and complexes should consider the following: 1) ensuring environmental compensation is equivalent to the type, quantity, state, location, and duration of biodiversity loss/restoration; 2) providing compensation for the losses of one biodiversity type by restoring and/or increasing quantitative/qualitative indicators of another type that ensures greater benefits for nature conservation; 3) achieving 'net gain' at the local level should contribute to implementing nature conservation priorities at the local, regional, and national levels; 4) improving existing habitats or creating new ones should be the priority to get the best result for biodiversity gain; 5) strengthening environmental relations by creating larger integrated territories to enhance the natural resource potential, preserve landscape, biodiversity, and habitats, and increase valuable fauna and flora species, including genetic foundation, should be one of the priority directions.

Principle 7. Be additional. The essence of this principle is to establish and achieve the goals of conserving and reproducing (restoring) natural resources and complexes that would exceed existing obligations. That is, the idea is to implement ambitious projects with high standards, but not those that would undoubtedly come into force.

Principle 8. Create a 'net gain' legacy. Obtaining 'net gain' in the long run is possible in the case of: 1) stakeholder engagement and joint coordination of practical solutions aimed at implementing the 'net gain' principle; 2) adaptive management planning and special financing provision for long-term programs aimed at the reproduction (restoration) of natural resources and complexes; 3) development and implementation of the biodiversity 'net gain' projects that are resistant to external factors, especially to climate changes; 4) reduction of risks from other types of land use; 5) avoiding the displacement of harmful activities from one place to another; 6) management provision at the local level, aimed at implementing the 'net gain' principle.

Principle 9. Optimise sustainability. Implementing this principle provides for a certain prioritisation of biodiversity 'net gain' while forming state environmental policy, making

73 'RTPI response to the DEFRA consultation on Biodiversity Net Gain' (*Royal Town Planning Institute,* 1 Feb 2019) <https://www.rtpi.org.uk/consultations/2019/february/rtpi-response-to-the-defra-consultation-on-biodiversity-net-gain/> accessed 25 March 2021.

management decisions, etc., taking into account the optimisation of environmental benefits for sustainable social development and economic growth.

Principle 10. Be transparent. This principle provides for the timely provision for complete, comprehensive, and reliable information on actions aimed at implementing the 'net gain' principle to all stakeholders, as well as introducing educational activities.

In conclusion, it should be noted that the principle of 'net gain' or 'environmental net gain' has not yet been sufficiently regulated, in contrast to the 'biodiversity net gain' principle. Moreover, 'environmental net gain' includes the same constituents as the principle of 'biodiversity net gain' but requires a wider range of environmental benefits for the environment as a whole. It should be added that the 'net gain' principle has not yet been directly embodied in the field of national law. It can even be stated that there are no environmental and legal norms specifically aimed at obtaining environmental net gains in general or for biodiversity. The exception may be such regulations as the LoU 'On Environmental Impact Assessment'[74] and 'On Strategic Environmental Assessment',[75] the scope of which is to regulate the relations based on environmental impact assessment, including public health, environmental damage prevention, environmental safety, environmental protection, and rational use and reproduction of natural resources in the decision-making process of conducting economic activities, which can have a significant impact on the environment, taking into account public and private interests.

In this regard, it can be stated that the current environmental legislation of Ukraine is mostly focused on protection, ensuring environmental safety, environmental protection, and rational management of natural resources. The issue of legal provision for the reproduction (restoration) of natural resources and complexes is superficially regulated. Therefore, it requires significantly updating and improvement by introducing the 'net gain' principle in the national environmental legislation, which, in turn, can be the basis for developing a systematic approach to project analysis. The latter will include not only an assessment of the impact of planned activities on the environment but also the ratio of expected costs of each project with its economic, environmental, and social benefits. There is currently no relevant legislation on this topic. One of the most controversial bills in the field of ecological modernisation of industry (the LoU 'On Prevention, Reduction and Control of Industrial Pollution'[76]), developed and submitted to the Verkhovna Rada in order to fulfil Ukraine's obligations to the EU, the European Atomic Energy Community, and their member states within the framework of the Association Agreement, provides for introducing an 'integrated permit' in Ukraine. It establishes specific environmental standards for enterprises – in particular, the level of maximum acceptable emissions into the atmosphere, water use, and waste management measures. However, it does not require any percentage of 'net gain'.

3.3. The System of Instituting the Principles of Reproduction (Restoration) of Natural Resources and Complexes

To fully consider the essence of instituting the reproduction (restoration) of natural resources and complexes principles, it will also be expedient to explore their place and role in the

74 Law of Ukraine 'On Environmental Impact Assessment' [2017] Vidomosti of the Verkhovna Rada 29/315 <https://zakon.rada.gov.ua/laws/show/2059-19#Text> accessed 23 March 2021.

75 Law of Ukraine 'On Strategic Environmental Assessment' [2018] Vidomosti of the Verkhovna Rada 16/138 <https://zakon.rada.gov.ua/laws/show/2354-19#Text> accessed 23 March 2021.

76 Draft Law of Ukraine 'On Prevention, Reduction and Control of Pollution Occurring as a Result of Industrial Activity' [2020] the Verkhovna Rada of Ukraine 4167 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70077> accessed 26 March 2021.

system of environmental law principles, since the structure, content, and system of the latter is dynamic and cannot remain unchanged.

The law principles are classified in accordance with various grounds as follows: with the form of normative expression (namely, with the regulatory source in which they are enshrined in international and domestic declarations, the Constitution, and current environmental legislation); with the scope of validity (in one or more fields of law, and law as a whole); with the content (general social and special legal[77]), etc. In the science of environmental law, there are other divisions of principles according to their significance (based on two main features –scope and significance). It should be noted that in the thesis research 'Principles of Environmental Law', L.L. Chausova identified the following four groups of environmental law principles: fundamental, branch, sub-branch, and institutional principles,[78] along with the dominating and leading ones, which are in a certain co-subordination to the former and (b) according to types of natural objects,[79] etc. However, in 1995, A.P. Hetman, studying the environmental process principles, emphasised the law principles should be divided into those of common law, inter-branch, branch, and branch institutions, between which there are dialectical relations and interdependence. Common law principles, on which the whole legal system is based, are directly related to each of the fields of law, including the environmental one. Inter-branch and branch principles not only express the objective essence of these industries and groups but also provide for the existence of common law principles. There is a similar relationship between the principles of branch institutions, branch, and inter-branch law ones.[80]

The system of environmental law is believed to provide for a logical, consistent combination of principles, which are interdependent at the functional basis level, into a single whole. The mechanism of forming the system of environmental law principles can be represented as follows: each separate principle contributes to the process of regulating social, environmental relationships not autonomously but in combination with other ones, united by numerous interconnections. It is in the system that the mechanism of each principle's action, role, and importance for environmental law characteristics as an independent field of law is fully revealed. Thus, the question about the role and place of principles for the reproduction (restoration) of natural resources and complexes in the system of environmental law principles arises.

Determining the place of the reproduction (restoration) of natural resources and complexes principles in the system of environmental law principles provides for establishing objective relations between the former and the latter regarding interdependence and internal consistency. The first step will be ***to distinguish the macro level in the system of environmental law principles,*** including system-forming, universal, and integral ones on which the whole system of law is based. Such principles are those of democracy, the supremacy of law, legality, humanism, etc. The leading place is occupied by the supremacy of law principle, which has been studied by such scholars as: H.V. Anisimova,[81] A.P. Hetman,[82] S.P. Holovatyi,[83]

77 HV Anisimova, *Theoretical principles of environmental legislation development in the context of natural and legal doctrine* (Pravo 2019) 197.

78 LL Chausova, 'Principles of environmental law of Ukraine' (PhD (Law) thesis abstract, Yaroslav the Wise National Law Academy of Ukraine 1998) 3.

79 Ibid. 43-49.

80 AP Hetman, 'Principles in the ecological process. Regional environmental problems' (Conference of the VM Koretsky State and Law Institute NAS of Ukraine, Kyiv, 7 July 1995) 28-44; AP Hetman, *Thirty years with environmental law* (Krossrod 2013) 159.

81 HV Anisimova, *Theoretical principles of environmental legislation development in the context of natural and legal doctrine* (Pravo 2019) 207-220.

82 AP Hetman, 'The supremacy of law in the institution of nature management and environmental protection' (2017) 1-2 Environmental Law of Ukraine 2-8; AP Hetman, 'Understanding the supremacy of law in the system of environmental legislation of Ukraine' (2017) 5 Law of Ukraine 44-62.

83 SP Holovatyi, *Rule of law* (Feniks 2006).

S.I. Maksymov,[84] O.V. Petryshyn,[85] S.P. Pohrebniak,[86] P.M. Rabinovych,[87] etc. The supremacy of law is the rule of law in society, which requires the state to implement the latter in law-making and law enforcement activities, in particular, those laws that should include ideas of social justice, freedom, equality, etc. One of its manifestations is that the law is not only limited by the legislation as one of its forms but also includes other social regulators, including norms of morality, traditions, customs, etc. In the decision in *Klass v. Germany* (1978), the court noted that one of the fundamental principles of a democratic society is the law supremacy principle enshrined in the Preamble to the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, according to which the interference of public administration in the sphere of personal rights must be the object of effective monitoring, usually carried out by judges since judicial control is the best guarantee of independence, impartiality, and proper procedure.[88] The Constitutional Court of Ukraine considers the supremacy of law elements to be the principles of equality and justice, legal certainty, and the clarity and ambiguity of legal regulations since nothing else can ensure its equal application, preclude unlimited interpretation in law enforcement practice, and prevent arbitrariness.[89] Thus, considering the content of Art. 8 of the Constitution of Ukraine and the practice of the Constitutional Court of Ukraine, the supremacy of law should be particularly regarded as a mechanism for ensuring control over the use of state power and protecting individuals from arbitrary actions of state power.[90] In addition, A.P. Hetman regards the supremacy of law to be a 'chain', enabling the easy and correct reform of the national environmental law of vector direction since the declaration of Ukraine as a 'sovereign, independent, democratic, social, legal and environmental state', which will be an innovative model of its social and state development. Supporting this thesis, H.V. Anisimova adds that this principle will contribute to reforming environmental legislation in the context of European integration processes,[91] taking into account the obligations stated in the Political Principles of President von der Leyen and the European Green Course, as well as the Commitment to prevent the extinction of species through human fault provided for in the 2030 EU Biodiversity Conservation Strategy.[92]

Along with the macro-level environmental law principles, it is necessary to allocate a number of levels of different directions, such as organisational, preventive, protective, and those regarding economic stability, etc.

84 SI Maksymov, *Constitutional principle of the supremacy of law: general and special. Philosophy of law: modern interpretations: selected: articles, analyst. reviews, translations (2003-2011)* (Pravo 2012).

85 OV Petryshyn, 'The supremacy of law as a law principle' (2006) 1 (19) Ukrainian Law 49-57.

86 SP Pogrebnyak, 'The supremacy of law principle: some theoretical problems' (2006) 1 (19) Journal of the National Academy of Legal Sciences of Ukraine 210-220.

87 PM Rabinovich, *Human and citizen rights in the Constitution of Ukraine (before the integration of original constitutional provisions)* (Pravo 1997).

88 *Klass v Germany* (1978) 2 EHRR 214, 235 <http://eurocourt.in.ua/Article.asp?AIdx=416> accessed 6 June 2021.

89 Judgement of the Constitutional Court of Ukraine in the case on the constitutional petition of 51 People's Deputies of Ukraine on compliance with the Constitution of Ukraine (constitutionality) of the provisions of Art. 92, para. 6 Ch. X 'Transitional Provisions' of the Land Code of Ukraine (Case of permanent land use) of 22 September 2005 no 5-rp/2005. Case no 1-17/2005 <https://zakon.rada.gov.ua/laws/show/v005p710-05#Text> accessed 21 March 2021.

90 Catalogue of legal positions of the Constitutional Court of Ukraine (1997-2020) Ch. 3 Fundamentals of constitutional order. General Principles Subpara. 3.4. The supremacy of law. Constitutional Court of Ukraine <https://ccu.gov.ua/storinka-knygy/34-verhovenstvo-prava> accessed 21 March 2021.

91 HV Anisimova, *Theoretical principles of environmental legislation development in the context of natural and legal doctrine: monograph* (Pravo 2019) 214.

92 European Commission (EC), 'EU Biodiversity Strategy for 2030: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions' (*Eur-lex.europa.eu,* 20 May 2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1590574123338&uri=CELEX:52020DC0380> accessed 26 March 2021.

Organisational principles are aimed at choosing the optimal structure and management staff, distributing competencies between the subjects, and deciding on the most effective measure to reproduce (restore) natural resources and complexes. The 'idea of coordinating and streamlining certain elements of the system' is a functional basis for including this principle into those of organisational direction, which can ensure the high efficiency of public authorities and local self-government bodies. Within the principles of organisational direction, a special place is occupied by the environmental process principles. A.P. Hetman's works devoted to their study determine 'the procedure for the activities of state environmental protection authorities and other environmental law subjects to address individual cases in the field of rational nature management, natural environment reproduction and protection'.[93]

The principles of organisational direction include the following: the principle of legal provision for accessibility, reliability, and timeliness of environmental information, the principle of rational nature management; the principle of legal provision for managing targeted natural resources; the principle of scientifically justified coordination of ecological, economic, and social interests based on combining interdisciplinary environmental, social, natural, and technical sciences knowledge and forecasting the state of the environment; the principle of considering environmental impacts on the environment when making management decisions on implementing planned activities; the principle of greening material production on the basis of comprehensive decisions on environmental protection, use, and reproduction of renewable natural resources, and widespread introduction of new technologies; the principle of solving the issues of the reproduction (restoration) of natural resources and complexes regarding the degree of anthropogenic change of territories and the cumulative effect of factors that negatively affect the environmental situation; the principle of scientifically justified regulation of the economic and other activities impact on the environment, etc.

Preventive and protective principles contribute to developing the law as a regulator of public relations and include the following:

- the system of measures for the rational management of natural resources, natural resources reproduction (restoration), and the preservation of particularly valuable and unique natural complexes, as well as limiting the negative anthropogenic impact on the environment and protecting violated fundamental human rights;
- normatively established mechanisms for making perpetrators accountable in case of violating the legislation in the field of environmental protection;
- the legal influence on the individual and social consciousness, which consists in forming legal consciousness and legal culture and eradicating legal nihilism and antisocial behaviour (real or permissible) from individuals' consciousnesses.

Such principles, in our opinion, include the following: the 'net gain' principle; the principle of legal provision for an ecosystem approach to the reproduction (restoration) of natural resources and complexes; the principle of ensuring the environment is ecologically safe for human life and health; the principle of the preventive nature of environmental protection measures; the principle of the inevitable liability for violating the legislation on environmental protection; the principle of the legal provision for combining measures to stimulate environmental protection and the reproduction (restoration) of natural resources and complexes and responsibility for causing environmental damage; the principle of legal provision for sustaining natural systems; the principle of legal provision for preserving and reproducing (restoring) spatial and species diversity and integrity of natural objects and complexes, etc.

93 AP Hetman, *Procedural regulations and relations in environmental law* (Osnova 1994); AP Hetman, 'Principles in the ecological process. Regional environmental problems' (Conference of the VM Koretsky State and Law Institute NAS of Ukraine, Kyiv, 7 July 1995) 28-44; AP Hetman, *Thirty years with environmental law* (Krossrod 2013) 160.

Economic and stabilisation principles are the basis for forming the system of economic measures and incentives of a property nature, aimed at legally providing rational nature management, environmental protection, and the reproduction (restoration) of natural resources and complexes. Such principles include the following: the principle of compensation for damage caused by violating the environmental legislation; the principle of charging for environmental pollution and damage to the quality of natural resources; the principle of legal provision for greening material production based on comprehensive solutions in matters of environmental protection, renewable natural resource use and reproduction, the widespread introduction of new technologies, etc.

Particular attention should be paid to the principle of compensation for damages caused by violating environmental legislation or 'the polluter pays'. According to Art. 69 of LoU 'On Environmental Protection', damage caused by breaking environmental legislation is subject to full compensation. According to the general rules of civil proceedings (Part 1 of Art. 1166 and Art. 1192 of the Civil Code of Ukraine), compensation for damages is carried out by restitution in kind or reimbursement of losses in full. Individuals who have suffered such damage are entitled to compensation for unearned income for the time necessary to restore health, environmental quality, and the state of natural resources suitable for their target use. The peculiarity of reimbursing such damage is to use its assessment and calculate special methods and fees, such as the Cabinet of Ministers of Ukraine (hereinafter – CMU) Resolutions 'On approval of fees for calculating the amount of damage caused to forests',[94] 'On fees for calculating the amount of damage caused to green plantations within cities and other inhabited settlements',[95] 'On approval of fees for calculating the amount of compensation for damage caused by illegal extraction (collection) or destruction of valuable species of aquatic bioresources',[96] 'On approval of the methodology for determining the amount of damage caused by the unauthorized occupation of land plots, their use for non-target purposes, removal of soil cover (fertile soil layer) without special permission',[97] etc. Moreover, environmental and economic assessments of natural objects' value do not always coincide and are often differentiated by climatic, regional, and other conditions. It should be added that the system of methods developed in Ukraine to calculate the amount of damage caused by environmental offences does not consider the means necessary for carrying out restoration actions, and the liability for the damage caused by violating the environmental legislation is not limited to the type of natural resources. The purposes of the former are to punish the person found guilty of causing harm and compensate for the damage caused to the state in connection with environmental legislation violations.

Instead, in the EU, environmental liability in accordance with the Directive 2004/35/UN 'On environmental liability for preventing and eliminating consequences of environmental damage' (hereinafter – Directive 2004/35/UN)[98] implies the polluter's obligation to take

94 Cabinet of Ministers of Ukraine (CMU) Resolution 56/1868/30 'On approval of fees for calculating the amount of damage caused to forests' <https://zakon.rada.gov.ua/laws/show/665-2008-%D0%BF#Text> accessed 10 June 2021.

95 Cabinet of Ministers of Ukraine (CMU) Resolution 559/110/14 'On fees for calculating the amount of damage caused to green plantations within cities and other inhabited settlements' <https://zakon.rada.gov.ua/laws/show/559-99-%D0%BF#Text> accessed 10 June 2021.

96 Cabinet of Ministers of Ukraine (CMU) Resolution 1209/3342/35 'On approval of fees for calculating the amount of compensation for damage caused by illegal extraction (collection) or destruction of valuable species of aquatic bioresources' <https://zakon.rada.gov.ua/laws/show/1209-2011-%D0%BF#Text> accessed 10 June 2021.

97 Cabinet of Ministers of Ukraine (CMU) Resolution 55/2221/31 'On approval of the methodology for determining the amount of damage caused by unauthorized occupation of land plots, their use for non-target purposes, removal of soil cover (fertile soil layer) without special permission' <https://zakon.rada.gov.ua/laws/show/963-2007-%D0%BF#Text> accessed 10 June 2021.

98 Directive 2004/35/UN 'On environmental liability for preventing and eliminating consequences of environmental damage' <https://zakon.rada.gov.ua/laws/show/994_965#Text> accessed 10 June 2021.

measures to prevent environmental damage from happening or eliminate the consequences of environmental damage to restore natural resources to the state in which they were before its occurrence and cover the costs of the measures taken. Moreover, such restoration is carried out by the person who has caused the environmental damage within a specific plan to eliminate the consequences of such damage. Therefore, the Directive does not grant physical or legal entities the right to any reimbursement due to environmental damage or the imminent threat of its occurrence. In fact, Directive 2004/35/UN sets out the legal framework for a mechanism to prevent or eliminate environmental damage consequences, the result of which is to restore natural resources to their original state. However, member states are to independently establish their own methods for determining and calculating the scope of environmental damage, the assessment of which is usually based on the analysis of equivalent resources, determining the need and cost of natural resources or environmental services restoration.[99] Annex II to the Directive 2004/35/UN sets out recommended methods for analysing equivalent resources, namely: 1) 'resources for resources', in which lost resource restoration occurs by replacing with new ones, 2) 'services for services'/ 'environmental services', which are the functions performed by natural objects for ecosystems (e.g., water purification, biodiversity conservation) or the population itself (e.g., flood protection, recreational opportunities); the physical amount of remedial measures may be less or greater than the actual amount of damage, and 3) 'cost per cost'/ 'cost per expenses', which is used if the given methods cannot be implemented, in particular, when the proposed remedial measures create other natural resources or services or if, in certain cases, the damage caused cannot be accurately measured.

In view of the above, it is necessary to dramatically change the legal fundamentals of the compensation for damages in Ukraine. The first step in this direction should be the Directive 2004/35/UN ratification and the introduction into the national legal field of such concepts as 'direct environmental liability' (which is applied to three types of natural resources, protected species and habitats, water resources, soils; it occurs regardless of the subject's fault) and 'guilty environmental liability' (which is applied only to protected species and habitats). In addition, it is necessary to change the vector of environmental liability in Ukraine to punish the person found guilty of causing harm and compensate for the damage caused to the state in connection with environmental legislation violations to restore natural resources to their original state by taking preventive and remedial measures at the subject's own expense. Significant in this regard is the case against the Union of India,[100] in which the Supreme Court concluded that 'the "polluter pays" principle means that absolute liability for environmental damage extends not only to compensation for pollution to victims but also to the cost of restoring environmental degradation'.

It should be added that in recent years, the practice of creating and applying classical case-law has started to occur in Ukraine. In developing the law supremacy principle, the Verkhovna Rada of Ukraine has enshrined that all ECtHR decisions rendered against any of the member states of the European Council are binding on Ukrainian courts.[101] It should be noted that the issue of violating the right to life due to negative environmental factors was initiated by the ECtHR in *Guerra and others v. Italy* (Application no. 14967/89,

99 'Environmental liability: EU experience and opportunities for Ukraine' *(Society and environment portal,* September 2018) <https://webcache.googleusercontent.com/search?q=cache:-vCfP-871oMJ:https://www.civic-synergy.org.ua/wp-content/uploads/2018/04/webenvironmental-liabilityua2018.pdf+&cd=1&hl=ru&ct=clnk&gl=ua> accessed 10 June 2021.

100 AIR 1997 SC 734: (1997) 2 SCC 353 <https://www.legalbites.in/right-to-life-personal-liberty-article-21/> accessed 12 June 2021.

101 'Environmental issues in the practice of the European Court of Human Rights and their impact on judicial practice in Ukraine' (*Ecobusiness Group,* 24 July 2020) <https://ecolog-ua.com/news/pytannya-ohorony-dovkillya-v-praktyci-yespl-ta-yih-vplyv-na-sudovu-praktyku-v-ukrayini> accessed 12 June 2021.

Judgment of 19/02/1998).[102] Another interesting example of environmental human rights protection is *Hutton and Others v. the United Kingdom* (Application no. 36022/97, Judgment of 08/07/2003),[103] which concerned noise pollution in the immediate vicinity of London Heathrow Airport and, in particular, the adequacy of research conducted by the authorities to introduce a noise quota system. Nowadays, the ECtHR has considered several cases against Ukraine regarding environmental protection. There are few Judgments, but they are of special value. In particular, these are *Dubetskaya and Others v. Ukraine* (Application no. 30499/03, Judgment of 10/02/2011), *Grimkovska v. Ukraine* (Application no. 38182/03, Judgment of 21/07/2011), and *Dzemyuk v. Ukraine* (Application no. 42488/02, Judgment of 04/09/2014). Analysing the ECtHR practice in cases against Ukraine in which the environmental and legal component is present, H.V. Anisimova and Ie.M. Kopytsya[104] distinguish nine categories of cases: *the **first** one* concerns the violation of the environment safe for life and health right (interpretation of Art. 2, 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention);[105] the ***second*** is related to the violation of Art. 1 of the First Protocol of the ECHR, stipulating that 'every physical or legal entity is entitled to peacefully own his property. No one shall be deprived of his property other than in public interests and on the terms stipulated by law and general principles of international law'; the ***third*** implies the specifics of applying the doctrine of *ultravires* (outside the powers) in order to guarantee protection from mistakes of public authorities operating in environmental relations outside the powers (competences) granted to them by national legislation; the ***fourth*** provides for the access to justice (where the right is guaranteed by Art. 6 of the Convention) when protecting their valid or imaginary environmental rights, as well as cases regarding public participation; the ***fifth*** represents the interpretation of Art. 8 of the Convention on the Right to Respect for Private and Family Life, in particular, in terms of ensuring a fair balance between the interests of the individual and those of society in environmental relations; the ***sixth*** concerns the right to freedom of expression (Art. 10) 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); the ***eighth*** represents cases of wavering obligations while emergency (Art. 15); the ***ninth*** provides for climate cases (regarding the protection of climatic rights, living conditions, which are being actively formed)'. Nevertheless, despite positive developments in the field of ensuring and protecting fundamental rights in Ukraine, it should be noted that there is no legal consolidation of the priority to take preventive and remedial measures by people who have caused damage to the environment and cover the costs of carrying out appropriate measures, as well as determining the amount of environmental damage, considering the cost of measures necessary to restore natural resources to their original state.

102 *Case of Guerra and others v Italy* App no 14967/89 (ECtHR, Judgment 19 February 1998) <https://antifrau.cat/resources/sentencia_tribunal_europeu_drets_humans_guerra__i_altres_vs_italia.pdf> accessed 8 September 2021.

103 *Hatton and Others v the United Kingdom* App no 36022/97 (ECtHR, Judgment 8 July 2003) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61188%22]}> accessed 8 September 2021.

104 HV Anisimova, IeM Kopitsa, '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 <http://ajee-journal.com/the-role-of-courts-in-environmental-rights-protection-in-the-context-of-the-state-policy-of-ukraine> accessed 12 June 2021.

105 Convention for the Protection of Human Rights and Fundamental Freedoms 475/97-VR/270 <https://zakon.rada.gov.ua/laws/show/995_004#Text> accessed 12 June 2021.

4 CONCLUDING REMARKS

To conclude, it should be noted that the Ratification of the 1997 Convention for the Protection of Human Rights and Fundamental Freedoms was a crucial step towards forming legal protection of human rights and freedoms and their legitimate interests in Ukraine. However, national legislation does not contain a detailed legal mechanism on how to protect the environmental rights of citizens. It is merely stipulated that violated rights of citizens in the field of environmental protection can be restored, and their protection is considered in court in accordance with the legislation of Ukraine (Art. 11 of the Law of Ukraine 'On Environmental Protection'). Therefore, it is important for ensuring the supremacy of law and protecting the environmental rights of citizens to have an effective judicial system, which should be accessible to citizens so they can protect their violated environmental rights. Having recognised the practice of the ECtHR as a mandatory source of law in Ukraine, the Ukrainian legislator has incorporated European standards for protecting human rights into the national legal system. It is impossible not to consent with the opinion of Judge of the Supreme Court of Ukraine G. Vronskaya (formerly Acting Minister of Ecology and Natural Resources of Ukraine), who noted that solving problems of environmental human rights protection should be carried out, first, at the national level. This can be achieved both by improving national legislation and using the practice of the ECtHR as a source of law by national courts and applying the provisions of international agreements ratified by Ukraine in this area.[106] Concerning this context, there seems to be a significant disadvantage to leaving the issue of reproducing (restoring) natural resources and complexes in Ukraine out of the legislator's meticulous attention since it is the state of the environment the directly affects human life and health. Developing and consolidating the system of the reproduction (restoration) of natural resources and complexes principles at the legislative level will give a powerful impetus to the process of reforming environmental management, which requires fundamental changes in approaches to planning public policy, transforming environmental institutions, and preventing violation of environmental legislation and control based on risk-oriented indicators. In addition, Ukraine must take the next step towards environmental protection, namely, to change the security vector of our state from the program of exclusively preserving the environment to reproducing (restoring) the environment and ecosystems of our country[107] – a return to nature is needed to make environmental protection and climate change issues a priority on the country's agenda.

With this in mind, the issue of introducing the principles for the reproduction (restoration) of natural resources and complexes into the national legal field as universal normative principles of positive law influence the formation of state environmental policy and law-making in general, as well as litigation in Ukraine, and specialise the environmental law principles, specifying the latter. Of particular significance is the principle of legal provision for the ecosystem approach to the reproduction (restoration) of natural resources and complexes together with the 'net gain' principle. These two are the guiding principles on which we should base the organisation and implementation of measures for the reproduction (restoration) of natural resources and complexes; the recovery and improvement of the quality of ecosystems; the prevention and elimination of harmful economic impacts on the environment and human health; the sustainable functioning of environmental systems in which all environmental objects are indissolubly linked and balanced.

106 'Environmental issues in the practice of the European Court of Human Rights and their impact on judicial practice in Ukraine' (*Ecobusiness Group*, 24 July 2020) <https://ecolog-ua.com/news/pytannya-ohorony-dovkillya-v-praktyci-yespl-ta-yih-vplyv-na-sudovu-praktyku-v-ukrayini> accessed 8 September 2021.

107 Implementation of the Environmental Protection Program (vector of security) is one of the top priorities of reforms defined by the Sustainable Development Strategy 'Ukraine-2020', approved by Presidential Decree no 5 of January 12, 2015.

The question of relegating principles to a certain 'group' of principles in the system of environmental law can be debated and is the subject of further research. The presented material ensures that each level of the environmental law principles system contains the principles of legal regulation of social relations in the field of the reproduction (restoration) of natural resources and complexes. However, it is crucial to ascertain the low level of such regulation in this field, which raises the issue of the relevance of developing the concept of Ukraine's natural resource reproduction, preventive and recovery measures by business entities, and methods of equivalent resources for assessing recovery measures, etc.

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Note

LEGAL ANOMALIES WITHIN HUMAN RIGHTS IMPLEMENTATION IN COURT PROCEEDINGS: UKRAINIAN HERITAGE AND PERSPECTIVES

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LEGAL ANOMALIES WITHIN HUMAN RIGHTS IMPLEMENTATION IN COURT: UKRAINIAN HERITAGE AND PERSPECTIVES

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Abstract *The law is a regulator of relations based on an orderly, generally accepted system of ideas and norms for the behaviour of subjects in a particular relationship. A large number of regulations, which are an external reflection of the content of law, sets the boundaries of such behaviour, but under the influence of relevant factors that have a subjective and/or objective nature, there are cases of deviation from generally accepted regulations, the so-called legal anomalies that occur in the exercise of a person's rights in court.*

This article contains an analysis of current legal anomalies that may arise in the exercise of a person's procedural rights in the administration of justice, given the reasons that provoke their occurrence. Both legal anomalies related to the subject of realisation of rights in court and anomalies that indirectly affect the possibility and completeness of such realisation were subject to research. The authors assessed the phenomenon of abuse of law, legal nihilism of the participants in the process, inconsistencies of judicial practice, etc., in terms of classifying such phenomena as legal anomalies. The possibility of recognising a legal anomaly at the legislative level (abuse of law) and the transformation of a legal anomaly into a rule of procedural law (written proceedings) is investigated. Variants of vulnerabilities of the modern mechanism of administration of justice are offered, where there is a high probability of emergence of new legal anomalies in the sphere of realisation of the rights of the person at protection by a court of the broken, unrecognised, or disputed rights.

Keywords: *legal anomaly, deviation from the norm, abuse of law, legal nihilism, adversarial principle, unity of judicial practice*

1 INTRODUCTION

Human life is associated with a large number of rights and responsibilities that arise and are realised within the legal relationship, i.e., in interaction with the rights and responsibilities of other participants in such relationships. Therefore, there is a risk of violation, non-recognition, or challenge of those or other human rights. The existence of this risk corresponds to the right at the legislative level (both national and international law) to protect the rights and legitimate interests, in particular, that of the court. Thus, Part 1 of Art. 55 of the Constitution of Ukraine declares that human and civil rights and freedoms are protected by a court,[1] and Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 enshrines the right to a fair trial.[2]

It is worth noting that when a person applies to the court, he/she has an additional set of procedural rights and obligations that are directly related to the fact of applying to the court and the subsequent implementation of court proceedings. Given the peculiarities of the emergence and exercise of such rights, the manifestation of legal anomalies in the implementation of human rights in court is no exception in practice.

A legal anomaly is understood as a kind of obstacle in the legal regulation of social relations. A legal anomaly is a deviation from the general law and the normal formation and development of social relations due to various factors of objective and subjective order.[3]

Thus, a legal anomaly is beyond the content of law and the necessary connections of its elements and forms, which are generally random and unforced because the existence of such anomalies does not meet the main purpose of law and its objective logic and is not the result natural conceptual manifestations of law as a regulator of social relations. Anomalies that exist practically in law are called legal anomalies but have nothing to do with the implementation of the purpose and reflection of the content of the law itself.

When characterising the essence of legal anomalies, it should be noted that legal anomalies are an objective reality, but such a reality is a deviation from the substantive line of law, the goals of legal will, the mandatory sequences and structure of law, and the natural connections between legal phenomena and processes.

The consequences of such anomalies can be a violation of the rights and interests of the subjects of legal relations, violation of other legal norms, increasing distrust in the judiciary, distortion of the administration of justice, and so on. Given these possible consequences, it is important to identify and study legal anomalies in the implementation of individual rights in court, which are the most common and pose a real threat to the existing legal reality. That is why the research topic is relevant.

2 GENERAL SPECIFIC CAUSES OF LEGAL ANOMALIES IN THE INDIVIDUAL'S RIGHTS IMPLEMENTATION IN COURT

Legal anomalies, like any phenomenon in law, arise for certain reasons, which can theoretically be divided into external and internal. External grounds for anomalies arise in

1 Constitution of Ukraine 28 June 1996 no 254к/96-ВР <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 14 September 2021.

2 Convention for the Protection of Human Rights and Fundamental Freedoms Council of Europe 1950 <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 11 September 2021.

3 Yu Oborotov, V Zavalniuk, V Douduchenko, *Creativity of common law jurisprudence* (Phenix 2015).

the interaction of law as a special form of purposeful substantive activity with other forms of social life, which simultaneously act as catalysts for certain legal needs, generating and consolidating the rule of law itself and factors of preconditions for legal anomalies within this norm. Such factors are usually changes in the economic, political sphere, and so on.

For example, quarantine and restrictive anti-epidemic measures to prevent the spread of acute respiratory disease COVID-19 caused by the SARS-CoV-2 coronavirus in Ukraine have led to legal anomalies in the form of gaps in legal regulation related to direct involvement cases in court.[4] Even though the procedural legislation of Ukraine provides for the possibility to participate in court hearings by video conference, it is not an exception to violate the right of a party to participate in a court hearing due to lack of court opportunity to ensure such participation remotely.

The formation of such a deviation from the general obligation to ensure a person's right to be present at a court hearing is caused by the fact that the legislator provided that a court hearing by video conference can be held, provided the court has the appropriate technical capacity but did not specify what should be considered such a technical possibility. As a result, in practice, there is a situation in which the court, instead of postponing the date and time of the hearing, refuses a person to participate in the hearing by videoconference, and therefore holds such a hearing without his participation, only because the date and time of the trial meetings free technical devices to ensure its holding are absent. That is, the court has the technical possibility to hold a court hearing using video, but at the appointed date and time, there is no such possibility.

Thus, under the influence of the relevant external factor on the basis of existing gaps in the law (legal anomaly of rulemaking), there are legal anomalies of law enforcement in the form of defective legal facts – making a substantively incorrect decision. In turn, defective legal facts, as types of legal anomalies, should be understood as a fact of legal nature with existing shortcomings. A legal fact is defective in cases when its features do not correspond to the model enshrined in the hypothesis of a legal norm – a legal criterion. The defect of a legal fact should be considered the presence in it of such signs that indicate a significant change in its content – the social criterion.

Undoubtedly, as mentioned above, legal anomalies are related to law enforcement, i.e., they arise in the process of subjective interpretation of the relevant rule of law and its use. Thus, internal factors are important for the occurrence of a legal anomaly. Thus, all elements of the formation of the content of law are the products of consciousness and will of specific people, each of which has a certain level of knowledge about the world, including legal phenomena and processes, occupies a certain place in society and social relations, defends their own life interests, etc. Lack of understanding of the relevant processes and lack of certain skills to participate in them lead to the fact that activities in the protection of their rights in court by the person are chaotic, often by trial and error. Legal activity, in this case, generates a lot of legal anomalies, which are included in the legal mechanisms.

Thus, legal anomalies in some cases are related to the subjective vision and attitude to a particular legal phenomenon, which sometimes have the character of legal nihilism. Currently, there is no single approach to the interpretation of legal nihilism. Within the usual approach, which is prevalent, legal nihilism is seen as a destructive social phenomenon, the

4 See the special issue of AJEE related to the Covid-19 and its impact of judiciary in Ukraine: I Izarova 'About Special Double Issue 2-3/2020, Justice Under Covid-19 Pandemic' (2020) 2-3 (7) Access to Justice in Eastern Europe 4-5; O Rozhnov 'Towards Timely Justice in Civil Matters Amid the COVID-19 Pandemic' (2020) 2-3 (7) Access to Justice in Eastern Europe 100-114; 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 115-133 and others.

essence of which is a negative attitude towards law, lack of faith in its potential to solve existing problems, and ignoring the requirements established by law.

Representatives of another innovative approach try to explain the essence of legal nihilism through the imperfection and inefficiency of the law itself.[5] However, according to the authors of this study, it is not necessary to explain the distortion of the perception of law with the help of an innovative approach, as such an approach eliminates the need to fight and combat legal nihilism, as it is impossible to change the essence of law. In practice, the elimination of the emergence and formation of manifestations of legal nihilism is an important task, the solution of which can lead to effective counteraction to other manifestations of legal anomalies.

3 ABUSE OF PROCEDURAL RIGHTS AS A DISTORTION OF THE REALISATION OF RIGHTS

In the context of realisation of the rights of the person in court, it is necessary to examine a legal anomaly in the form of abuse of the procedural right,[6] through which the internal factor of the occurrence of an anomaly is clearly expressed.

EV Vaskovsky interprets the abuse of procedural law as an inadmissible exercise of a certain right, which opposes the correct, timely consideration of the case and the court's decision on it or leads to an unfair result for the other party.[7] AA Yudin understands the abuse of procedural rights as a special form of civil procedural offence, i.e., intentional dishonest actions of participants in civil proceedings, accompanied by violation of the conditions of subjective procedural rights and carried out only with the appearance of such rights associated with the deception of known circumstances of the case, in order to limit the possibility of realisation or violation of the rights of other persons involved in the case, as well as to prevent the court from proper and timely consideration and resolution of civil cases involving measures of civil coercion.[8]

However, it is difficult to agree with Yudin's opinion because the illegal nature of the abuse of rights is not always clearly expressed. At the same time, abuse of rights cannot be considered lawful behaviour, as the latter may harm the rights and interests of others. Thus, abuse of law is a phenomenon of either legal behaviour (here, the criterion of evaluation is the letter of the law) or illegal behaviour (here, the criterion of evaluation is the spirit of law).

The illegality of conduct in the case of abuse of rights is not so much a contradiction of the law as the rights and interests of individuals. Abuse of the right should be attributed to legal conduct, which may become illegal or become an offence, but not always.[9]

5 A Zriachkin, 'Nihilism in law: causes and ways of solution' (PhD thesis, Saratov 2007) 11.

6 SO Kravtsov, 'Some aspects of abuse of procedural rights in enforcement proceedings' (2019) 6 Legal scientific electronic journal 121-125; SA Kravtsov, 'Abuse of procedural rights by the parties to enforcement proceedings: Theoretical and practical aspects' (2018) 4 Bulletin of the civil process 174-206; K Gajda-Roszczynialska, 'Abuse of procedural rights in Polish and European civil procedure law and the notion of private and public interest' (2019) 2 (3) Access to Justice in Eastern Europe 53-85; I Izarova, T Korotenko, 'Prevention of Procedural Rights Abuse: A New Experience of Ukrainian Judges' Polski Proces Cywilny (Civil Procedure of Poland)' (2019) 1 Access to Justice in Eastern Europe 24-33.

7 E Vaskovsky, *Course of civil procedure*, Vol 1 (Izd. No. Bashmakov 1997) 432.

8 A Yudin, 'Abuse of rights in civil proceedings' (PhD dissertation, SPb. 2009) 49.

9 DO Tikhomirov, NP Kharchenko, 'Abuse of law as a deviation of lawful behavior' (2016) 1 Scientific Bulletin of Uzhhorod National University, series: Law 27-28.

Obviously, abuse of rights must be considered a complex legal phenomenon. On the one hand, the principle of prohibition of abuse of rights can be considered as one of the forms of manifestation of imperativeness in civil procedural law. The content of this prohibition is an indication of the legal inadmissibility of a certain course of conduct, which, however, is possible. According to Art. 44 of the CPC of Ukraine, this legal restriction is reflected in the form of the principle of the inadmissibility of abuse of rights, according to which litigants and their representatives must exercise procedural rights in good faith. Therefore, the abuse of their procedural rights consists of their unfair realisation. The term 'abuse of procedural law', in its literal sense, means the use of law for evil, in cases where the authorised entity has a subjective right, acts within it, but does any harm to the rights of other entities or society as a whole.[10]

In any case, the abuse of rights is a deviation from the normal behaviour of the subject of the proceedings and is contrary to the essence of the rights abused by the person, i.e., it is regarded as a legal anomaly. As a rule, abuse of law manifests itself in the form of defective legal facts, which were discussed above.

For example, a person has the right to seek the protection of his or her violated, disputed, or unrecognised rights in court. At the same time, the procedural legislation establishes the requirement that the plaintiff (the person who applied for protection) should not file another claim (claims) against the same defendant (defendants) with the same subject and on the same grounds. In practice, there are many situations when the plaintiff, having changed the qualification of the disputed legal relationship, files two or more lawsuits against the same defendant, with the same subject and grounds in courts of different jurisdictions, thus doubling the chance to achieve the desired result.

Examples of legal anomalies in the form of abuse of law are the submission by the parties of an excessive number of unnecessary applications and motions to be considered by a judge, the collection and presentation of inadequate evidence, and the involvement of persons who have no interest in resolving the case.

It is worth noting that abuse of law as a legal anomaly has long been known in legal practice and theory. However, quite recently, the legacy of these anomalies has been embodied in procedural law in the form of a direct ban on such actions. Thus, by amending the procedural legislation of Ukraine in 2017, the legislator established the basis for combating legal anomalies in the form of abuse of rights, providing the court with tools to combat abuse of rights.

This situation can be considered indicative because, as a rule, the existence and recognition at the legislative level of certain legal anomalies are rare, which in turn complicates the process of combating and further eradicating the legal anomaly as a legal phenomenon.

At present, procedural legislation, in addition to criminal procedure, provides for the right of the court to classify the relevant actions of the participants in the proceedings as an abuse of procedural rights and to take the necessary measures to prevent and further eliminate such actions. In particular, the list of such measures includes the exercise by the court of the right

10 I Lukina, 'Abuse of procedural rights in the civil process of Ukraine. Problems of civil law and process: materials of scientific practice' in conf. dedicated in memory of Prof. OA Pushkin (22 May 2010) (University of Internal Affairs 2010) 363; OD Korol, 'Prevention of abuse of procedural rights and encouragement of the parties to conscientious behavior' (2020) 19 (1) University scientific notes. Khmelnytsky 117–127. DOI: https://doi.org/10.37491/UNZ.73.10; S Kravtsov, 'Enforcement proceedings as a final part of the trial in the light of the case law of the European Court of Human Rights and counteraction to abuse of procedural rights of participants in enforcement proceedings' (2020) 112 Bulletin of Taras Shevchenko National University of Kyiv. Legal sciences 36-43. DOI: https: doi.org/10.17721/1728-2195/2020/1.112-7; DD Luspenyk, 'Abuse of procedural rights: legislation, methods of detection and ways to counteract' (2015) 6 Journal of Civil and Criminal Procedure 150-171.

to leave the relevant application or petition without consideration, to impose a fine, and to raise the issue of disciplinary liability of a lawyer or prosecutor.

However, at first glance, a successful resolution of the legal anomaly may result in other legal anomalies, as the court classifies the conduct of a party to the category of abuse of procedural law as quite subjective due to the lack of criteria for assessing such conduct. Thus, in the case of abuse of subjective law, the behaviour of the subject of law is to create a situation that only has the appearance of lawful, based on the provisions of the law, while proving the abuse of subjective law is a difficult task or simply impossible for several reasons.

First, the main feature of the abuse of procedural rights is that the acts that constitute the abuse are committed on a completely legal basis from the outside.

Secondly, the mechanism of abuse of procedural rights is related to a person's desire to obtain a certain legal result (for example, to suspend the proceedings, adjourn the hearing, etc.), in connection with which the latter commits procedural actions (inaction), externally very similar to the legal facts associated with the occurrence of the desired results.

And the third problem is that in essence and content, these actions are completely artificial, like a feigned agreement in civil law, which is committed only to cover another agreement. That is, from the point of view of functionality, such actions are simply an imitation.

Thus, it is almost impossible to immediately establish signs of abuse in the actions of a participant in the process. Therefore, a significant role in eliminating this legal anomaly is given to the inner conviction and experience of the judge.

According to the authors, another way to combat the abuse of procedural rights can be considered the establishment of the so-called lawyer's monopoly. Thus, part 4 of Art. 131-2 of the Constitution of Ukraine stipulates that only a lawyer represents another person in court, as well as protection from criminal charges. Indeed, the admission of persons with relevant legal education, knowledge, and experience to the state in obtaining the right to practice law to represent others in court should significantly increase the professionalism of the administration of justice, thereby minimising the possibility of legal anomalies, in particular in the form of abuse of rights. However, there is no good reason to consider such a trend successful.

As already mentioned, legal anomalies are formed as a result of law enforcement activities, in connection with which it is worth noting that of great importance for their formation is not only the legal culture of society as a whole but also professional legal culture – the level of legal development and understanding of those people who are tasked with identifying the legal needs of society, forming legal norms, ensuring the proper implementation of the rights and responsibilities of litigants, interpreting and applying the rule of law, ensuring their positive dynamics, etc. If the shortcomings of the general legal culture lead to anomalies of private order, the low level of professional legal culture will result in the emergence and spread of legal anomalies of a general systemic nature, which in turn can lead to the deformation of certain elements of law and its devaluation as a regulator of public relations. Thus, a set of legal anomalies in a professional legal culture can lead to a global legal nihilism of destructive action.

4 SIMPLIFIED ACTION (WRITTEN) PROCEEDINGS AS A LEGALLY ESTABLISHED ANOMALY

The differentiation of general claims and simplified claims should also be considered as legislative consolidation of a legal anomaly. In this case, the legal anomalies, which are enshrined in law and are thus not a deviation from the norm, should be considered the most simplified litigation without summoning the parties, i.e., written proceedings

in which the case is considered on the basis of written documents submitted by participants.[11]

The court's obligation to create conditions for the persons involved in the case to provide a comprehensive, fair, complete, and objective clarification of the circumstances of the case is carried out through specific procedural actions, one of which is to hold a court hearing. Even before the reform of procedural legislation in 2017,[12] consideration of the case in civil proceedings provided that the participants in the process had the opportunity to take part in such proceedings during the court hearings. This prescription provided the basic idea of further realisation by the person-participant of the process of the procedural rights, some of which can be realised in full only at personal (or through the representative) participation of the person at the consideration of the case. In this case, we are talking about full support of the adversarial principle, which is implemented through the opportunity to participate in court hearings, examination of evidence, asking questions to other participants, as well as witnesses, experts, and specialists, providing court explanations, presenting their arguments, considerations on issues that arise during the trial, and objections to the statements, motions, and arguments of others, etc. Thus, prior to the adoption of procedural codes of civil, commercial, and administrative proceedings, a person's right to participate in court hearings was not enshrined in law, as it was already the basis for consideration of the case. Currently, the above codes separately enshrine the right of a person to participate in court hearings unless otherwise provided by law.

According to the author, the establishment of the possibility of consideration of cases without the participation of the parties can be regarded as a deviation from one of the basic principles of justice – the principle of adversarial proceedings – influence the decision. It is the adversarial principles of the process that determine the motivation of the conduct of litigants, such as the parties in court because the outcome of the dispute depends entirely on their activity. There is no doubt that the party to the process will try to reach a positive solution to the dispute, using all the rights granted to it by current legislation. At the same time, the adversarial nature of the parties in the trial is a guarantee of the efficiency of the proceedings.

However, due to the consolidation of written proceedings at the legislative level, the perception of the role of participants in court hearings is likely to change over time, so there is a chance of overestimating written proceedings as a legal anomaly.

A legal anomaly that causes a lot of negative consequences is the lack of a unified approach of judges to address similar issues. In this context, it is not a question of making diametrically different decisions or the absence of the same case law but of making intermediate decisions that will further affect the administration of justice.

11 For more on changes of the general and simplified action procedure, see IO Izarova, YuD Prityka, 'Simplified litigation of civil proceedings of Ukraine: Challenges of the first year of application in judicial practice' (2019) 145 Problems of legality 51-67; A Lesko, 'Insignificance of cases of civil jurisdiction as a criterion for their consideration in simplified claim proceedings and refusal to open cassation proceedings' High Council of Justice, Kyiv, 30 November 2017, <http://www.vru.gov.ua/mass_media/998> DATE ACCESSED; OI Uhrynovska, 'Simplified claim proceedings: Features of legislative regulation' in *Minor disputes: European and Ukrainian experience of resolution:* coll. Science, etc., participants of the international scientific-practical conf., Kyiv, 23-24 November 2018 (Kyiv 2018) 187-192. For more on small claims procedure in other states, see I Izarova, R Fleiszar, V Vebraite, 'Access to Justice in Small Claims Procedure: Comparative Study of Civil Procedure in Lithuania' (2019) 9 (1) Poland and Ukraine International Journal of Procedural Law 97-117; DA Korol, 'Simplified civil proceedings in different European countries: a comparative description' (2020) 1 Journal of Kyiv University of Law 225-228. DOI: 10.36695 / 2219-5521.1.2020.45.

12 The Law of Ukraine 'On Amendments to the Commercial Procedure Code of Ukraine, Civil Procedure Code of Ukraine, Code of Administrative Procedure of Ukraine and other legislative acts' No 2147-VIII [2017] Vidomosti of the Verkhovna Rada 48/436 <

Due to changes in procedural legislation, in particular, administrative proceedings of Ukraine, a cassation appeal against a court decision is generally filed only in the case of consideration of the case by previous courts in the general claim procedure. According to para. 2 of part 5 of Art. 328 of the Code of Administrative Procedure of Ukraine, these proceedings are not subject to cassation court decisions in cases of minor complexity and other cases considered under the rules of summary proceedings (except for cases that under this Code are considered under the rules of general proceedings), except in cases where:

a) the cassation appeal concerns the issue of law, which is fundamental for the formation of a unified law enforcement practice;
b) a person who files a cassation appeal, in accordance with this Code and is deprived of the opportunity to refute the circumstances established by the appealed court decision when considering another case;
c) the case is of significant public interest or is of exceptional importance for the party to the case who files a cassation appeal;
d) the court of first instance erroneously assigned the case to the category of cases of insignificant complexity. [13]

Thus, the legislator gives the Court of Cassation within the Supreme Court in deciding the opening of proceedings in a case considered in summary proceedings the right at its discretion to consider the need to accept the complaint and open cassation proceedings given the merits of one or more cassation appeal for the reasons specified in the paragraph above.

At the same time, as practice shows, it is not uncommon to make different decisions on the opening of proceedings subject to cassation appeals with identical justification of the need for such opening in similar legal relations, which the courts of previous instances considered in summary proceedings. Refusal to initiate cassation proceedings cannot be considered illegal in this case, as the decision is based solely on the internal conviction of the judges of the respective panels, but in fact, creates a situation of unfounded denial of access to justice, i.e., there is a legal anomaly that prevents a person from procedural rights.

It is difficult to resolve this legal anomaly, as the procedural legislation does not allow to appeal the refusal to open proceedings by the Court of Cassation, which could show a different view of the situation by the panels of judges of the court and develop the same mechanism for resolving this issue.

5 THE LEGAL ANOMALY OF THE LACK OF UNITY OF JUDICIAL CASE-LAW

The legal anomaly in the form of contradictory and competing judicial practice has an even more destructive effect on the administration of justice, especially within the framework of the exercise of their procedural rights by individuals.[14] Although in Ukraine, judicial precedent is not an officially recognised source of law, the mechanism of justice is built partially on the basis of legal opinions adopted by the highest court in the judicial system of Ukraine, which ensures the stability and unity of judicial practice – the Supreme Court.

Adherence to the principle of unity of judicial practice should be understood as the beginning, the idea that ensures the courts in the judiciary uniform application of regulations and their

13 Кодекс адміністративного судочинства України: Закон України від 06.07.2005 № 2747-IV. <https://zakon.rada.gov.ua/laws/show/2747-15#Text> accessed 14 September 2021.

14 TA Tsuvina, 'Unity of judicial practice as an element of legal certainty: the approach of the European Court of Human Rights' (2019) 146 Problems of law 63-74. DOI: https://doi.org/10.21564/2414-990x.146.175598

interpretation, carried out by higher judicial bodies in resolving court cases. The principle of unity of judicial practice, which is supported by higher judicial bodies, reduces risks in the interpretation and application of legal norms, ensures the unity of judicial practice developed by higher judicial bodies, removes uncertainty, and creates consistency in the application of rules by lower courts.[15]

However, in practice, it is not uncommon for the Supreme Court to adopt completely opposite in content legal conclusions on the application of the same rule of law, which significantly complicates further decision-making in such legal relations. Such a legal anomaly is also observed regarding issues related to the exercise of a person's rights in court.

For example, consider the legal position of the Supreme Court on the application by courts of the provisions of Arts. 256, 261 of the Civil Code of Ukraine when determining the beginning of the statute of limitations in legal relations governed by Art. 388 of the Civil Code of Ukraine,[16] when the person learned/or could learn about the violation of his/her right, i.e., from the moment of disposal of property or use, or from the moment when the person learned/or could learn about the violation of his/her right by acquiring property by the person who has the property at the time filing a lawsuit.

Thus, the Commercial Court of Cassation of the Supreme Court in the decision of 21 May 2019 in case no. 911/2817/17 noted that the state's ownership of the disputed land was violated when the land was removed from state ownership to the possession of another person, not at the time of concluding the next transaction on the alienation of land and not from the entry into force of a court decision confirming the illegality of disposal of the disputed land and violation of state ownership, and the beginning of the statute of limitations coincides with the prosecutor's claim in such a case.[17]

Thus, there are contradictory positions in the case law of courts of cassation of different jurisdictions on the beginning of the statute of limitations, which significantly affects the direct ability of a person to seek protection in court, and thus affects the possibility of the further exercise of his/her procedural rights. The solution to this legal anomaly may be the presence in the court of the right to deviate from the previously stated positions of the Court of Cassation.

It is important that the court has the right to deviate from the legal position set out in the conclusions of the Supreme Court of Ukraine while citing the relevant reasons. That is, the Supreme Court of Ukraine, having previously made a decision or legal conclusion, may further depart from it. According to Ya. Romaniuk, the Supreme Court of Ukraine has the right and should depart from such a conclusion (decision) if it considers that it has previously made a mistake. However, the Supreme Court of Ukraine should not conceal the preliminary justification of its legal opinion. The judge must carefully explain changes in practice and motivation for moving in another direction.[18] Deviation of the Supreme Court

15 NM Parkhomenko, 'Unity of judicial practice as a component of legal regulation. Theory and history of state and law' (2020) Philosophy of law 26.

16 Civil Code of Ukraine: Law of Ukraine of 16 January 2003 no 435-IV <https://zakon.rada.gov.ua/laws/show/435-15#Text> accessed 14 September 2021.

17 Resolution of the Commercial Court of Cassation of the Supreme Court of 21 May 2019 in case no 911/2817/17 <https://reyestr.court.gov.ua/Review/82068102> accessed 14 September 2021; Resolution of the Civil Court of Cassation of the Supreme Court of 16 August 2018 in case no 711/802/17 <https://reyestr.court.gov.ua/Review/75975948> accessed 14 September 2021; Resolution of the Civil Court of Cassation of the Supreme Court on 06 June 2018 in case no 520/14722/16-ts <https://reyestr.court.gov.ua/Review/74927263> accessed 14 September 2021.

18 Ja Romanyuk, 'Ensuring the unity of judicial practice by the Supreme Court of Ukraine: the reform needs to be continued' (The newspaper of Ukrainian lawyers 'Legal practice' 15 March 2013) <https://www.viaduk.net/clients/vsu/vsu.nsf/6b6c1e2e6ad3e2fcc225745c0034f4cc/6d8ae15d52eb146dc2257b71003f884b/$FILE/5-9_str.pdf> accessed 14 September 2021.

from its own preliminary opinion will not eliminate the legal anomaly of differences in case-law but will reduce the number of such contradictory positions, which in turn will ensure the level of unity of case law at least at the average level.

Currently, the mechanism of judicial proceedings is undergoing many changes, which is reflected in the implementation of procedural rights of persons in court, in connection with which it is difficult to predict possible legal anomalies in these legal relations. At the same time, it can be assumed that in the future, a vulnerable field for the emergence of legal anomalies will be the introduction of various elements associated with the rapid development of digital technologies. Thus, the list of subjects for detailed study to prevent possible legal anomalies includes the Unified Judicial Information and Telecommunication System, namely, one of its modules, 'Electronic Court', through which subjects can sue and receive procedural documents. In addition, according to the author, the settlement of a dispute with the participation of a judge is also favourable for the occurrence of legal anomalies.

In fact, it is impossible to identify trends in the occurrence of legal anomalies in the future, as the nature of such anomalies is purely practical and does not have backed regulations. As noted above, there is currently no common vision of legal anomalies, so any phenomenon in the legal field can be considered an anomaly, depending on whether the entity analysing the phenomenon, the latter of which contains signs of deviation from the established perception of particular legal phenomena.

At the same time, the most effective counteraction to existing legal anomalies and prevention of their occurrence in the future in the field of realisation of individual rights in court is strict observance of procedural rights provided by law by all participants in the process of justice.

6 CONCLUSIONS

Legal anomalies in the exercise of a person's rights in court are not new to the legal reality, but the stage of reforming the administration of justice, which is gradually taking place over time, creates a favourable environment for new anomalies that were not known before, as well as strengthening known anomalies. Thus, for each stage of activity, in the process of which one or another element of the content of law is formed, it is possible to separate special anomalies caused by both external and internal factors.

The rapid development of modern society necessitates the improvement of existing legal regulations to correct the distortions that occur against the background of such development and to bring the legislation in line with the challenges and needs of society. The existence of legal anomalies makes it possible to identify weaknesses in the existing mechanism of exercising one's rights in court proceedings and analyse the nature of such anomalies and the reasons for their occurrence, thus enabling a mechanism to counteract existing anomalies and prevent others in the future.

The study showed a different attitude of the Ukrainian legislator to the problems of anomalies in the exercise of human rights in court, which in one case manifests itself in consolidating the mechanism to combat such anomalies (consequences of detection and establishment of abuse of procedural rights), and in another – the phenomenon that shows the presence of deviations from the essence of the rule of law and official consolidation, i.e., the transformation of a legal anomaly into a legally accepted rule of law (written proceedings). Such a policy of the legislator cannot be considered effective in combating negative manifestations in the implementation of procedural rights of the individual but can change the attitude to such legal anomalies and transform them into a common norm of behaviour by distorting the understanding of the content of the law.

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Note

THE CONTRIBUTION OF FORENSIC EXAMINATION TO ENSURING THE RIGHT TO A FAIR TRIAL WITHIN ECtHR CASE-LAW

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The authors declare no conflict of interest of relevance to this topic.

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The authors declare that their occupation in National Scientific Center Hon. Prof. M. S. Bokarius Forensic Science Institute does not impact the views and opinions discussed.

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The authors contributed jointly to this study and its results and take responsibility for the content of the paper. The content of the paper was translated with the participation of third parties under the authors' oversight.

THE CONTRIBUTION OF FORENSIC EXAMINATION TO ENSURING THE RIGHT TO A FAIR TRIAL WITHIN ECTHR CASE LAW

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Abstract *In this note, the authors study legal and procedural cases of the application of forensic research in the observance of the common European procedural guarantee ensuring the balance of justice during a trial: Art. 6 of the European Convention on Human Rights (right to a fair trial). Based on the current legislation of the European Union and Ukraine, peculiarities of legal regulation and application of forensic expert research during court proceedings are analysed. It is emphasised that established the approaches and practice of applying specific expertise in the countries of the European Union have some peculiarities. It is established that one of the ways to ensure the fairness of a court decision is using forensic science. While comparing the legal framework for providing justice in Ukraine and the European Union, the authors stressed the need to develop a separate policy guideline (strategy, concept, etc.), such as the Vision for European Forensic Science Area used in EU countries. Detailed analysis of the ECtHR case-law on the application of Art. 6 has made it possible to illustrate the specifics of applying forensic science by complying with the fair trial requirement. It is concluded that the adoption of a fair court decision becomes possible when: 1) the practice of law enforcement and legal provisions related to the dispute context are taken into account; 2) the circumstances of the case are established with the use of content and reference to evidence; 3) non-legal phenomena are taken into account, such as ethical, social, moral requirements accepted in society, etc.*

Keywords*: right to a fair trial, forensic science, forensic examination, European Forensic Science Area, European Court of Human Rights*

'Forensic science is but the handmaiden of the legal system'.[1]

1 INTRODUCTION

The field of forensic justice support covers various and dynamic fields of scholarship and uses advanced methods to solve complex legal issues. Thanks to new technological solutions, scientific developments, and methodological achievements, forensic science is in constant development. The outcome of a trial usually depends entirely on the conclusion set out in the forensic expert research that contributes to a successful trial – the acquittal of innocent people and conviction of criminals.

It is worth noting that the achievements of various branches of science in the field of forensic support for justice have influenced the development of forensic science and testified to its undeniable success in identifying criminals, especially through the use of DNA technology. However, the practice of law enforcement proves that in some cases, evidence obtained, for example, by forensic science institutions from law enforcement agencies in violation of their storage conditions, leads to errors in forensic research. This demonstrates the potential danger of inaccurate or erroneous expert testimony, which sometimes contributes to the recognition of misleading evidence by courts.

At various stages of the trial, an assessment of the probative value of scientific opinions or forensic interpretation, as it is called, is a very important topic in terms of ensuring the right to a fair trial. In general, we share the approach of A. Biedermann, C. Champod, and S. Willis, who emphasise that the evaluation challenges that are an integral part of practical proceedings relate primarily to specific case circumstances, but it is necessary to adhere to organisational and educational dimensions for a more complete and detailed review of the subject.[2]

In the conventional protection of the right to a fair trial (Art. 6 of the European Convention on Human Rights, hereafter ECHR), issues of the application of expert opinions are considered by the European Court of Human Rights (hereafter, ECtHR) as one of the tools to establish the truth in cases.[3]

The present research aims to establish the value of forensic research through the prism of the implementation of the convention right to a fair trial.

2 ISSUES OF REGULATING THE LEGAL APPLICATION OF EXPERT OPINION IN THE CONVENTIONAL PROTECTION OF THE RIGHT TO A FAIR TRIAL

Convention protection of the right to a fair trial enshrined in Art. 6 of the ECHR[4] is guaranteed

1 DL Faigman, MJ Saks, J Sanders, EK Cheng, *Modern Scientific Evidence: The Law and Science of Expert Testimony* (West Publishing 2017) 6.

2 A Biedermann, C Champod, S Willis, 'Development of European standards for evaluative reporting in forensic science: The gap between intentions and perceptions' (2017) The International Journal of Evidence & Proof, Special issue on Proof in Modern Litigation: Selected Essays of the 5th International Conference on Evidence Law and Forensic Science 14-29.

3 European Court of Human Rights, 'Guide on Article 6 of the European Convention on Human Rights' (2021) 77 <https://www.echr.coe.int/documents/guide_art_6_eng.pdf> accessed 27 September 2021.

4 Convention for the Protection of Human Rights and Fundamental Freedoms dated 17 July 1997 (as amended of 2 October 2013) <https://zakon.rada.gov.ua/laws/show/995_004#Text> accessed 27 September 2021.

by the countries through national judicial and law enforcement institutions, thus facilitating the observance by states of their obligations as contracting parties. V. Komarov and T. Tsuvina emphasised that the right to a fair trial is guaranteed in national law, so is guaranteed in the well-established case-law of the ECtHR and the decisions of the Supreme Court, which contain practical guidelines for the application of certain provisions of Art. 6 para. 1 of the ECHR.[5]

Fair trial is a unique ability to prevent miscarriages of justice that is an integral part of ensuring justice balance in society. Guilt or innocence should be determined in a fair, independent, and efficient trial. It is even difficult to imagine a trial without the use of specific expertise, the results of which depend on the final conclusion of the court and fairness of such a decision, respectively. It is important to note that judges and lawyers do not have sufficient relevant knowledge in the field of forensic science and methodology used in forensic research and therefore cannot assess evidence at an appropriate level during the trial.[6]

There is no doubt that the field of forensic support for justice is covered by a fairly extensive system of regulations, both at the national and international levels. In Ukraine, the appointment of forensic examinations to forensic experts, their duties, rights and responsibilities, the management of forensic examinations, and the registration of their results are carried out in the manner prescribed by the Law of Ukraine no. 4038-XII 'On Judicial Examination', dated 25 February 1994,[7] the Law of Ukraine no. 1404-VIII 'On Enforcement Proceedings', dated 2 June 2016,[8] the Criminal Procedural Code of Ukraine, the Civil Procedural Code of Ukraine,[9] the Commercial and Procedural Code of Ukraine,[10] the Code of Administrative Proceedings of Ukraine,[11] the Code of Ukraine on Administrative Offenses,[12] the Customs Code of Ukraine,[13] the Order of the Ministry of Justice of Ukraine no. 3505/5 'On approval of the Instruction on the peculiarities of forensic activities by certified forensic experts who do not work in state specialized forensic science institutions', dated 12 December 2011,[14] the Order of the Ministry of Justice of Ukraine no. 53/5 'On approval of the Instruction on appointment and conduct forensic examinations and expert research and Scientific and methodological recommendations on

5 V Komarov, T Tsuvina 'The Impact of the ECHR and the Case law of the ECtHR on Civil Procedure in Ukraine' 2021 1 (9) Access to Justice in Eastern Europe 88-89. DOI: 10.33327/AJEE-18-4.1-a000047 accessed 25 September 2021.

6 'Strengthening Forensic Science in the United States: A Path Forward: summary' Committee on Identifying the Needs of the Forensic Science Community, Committee on Science, Technology, and Law Policy and Global Affairs, Committee on Applied and Theoretical Statistics, Division on Engineering and Physical Sciences (2009) 27 <https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf> accessed 25 September 2021.

7 Law of Ukraine dated 25 February 1994 no 4038-XII 'On Judicial Examination' (as amended of 1 January 2021) <https://zakon.rada.gov.ua/laws/show/4038-12#Text > accessed 25 September 2021.

8 The Code of Ukraine dated 13 April 2012 no 4651-VI 'Criminal Procedure Code of Ukraine' (as amended of 21 July 2020) <https://zakon.rada.gov.ua/laws/show/4651-17> accessed 25 September 2021.

9 The Civil Procedural Code of Ukraine dated 18 March 2004 no 1618-IV (as amended of 5 August 2021) <https://zakon.rada.gov.ua/laws/show/1618-15> accessed 25 September 2021.

10 Commercial and Procedural Code of Ukraine dated 6 November 2021 no 1798-XII (as amended of 5 August 2021) <https://zakon.rada.gov.ua/laws/show/1798-12> accessed 25 September 2021.

11 The Code of Administrative Proceedings of Ukraine dated 6 July 2005 no 2747-IV (as amended of 5 August 2021) <https://zakon.rada.gov.ua/laws/show/2747-15> accessed 25 September 2021.

12 The Administrative Offences Code of Ukraine dated 7 December 1984 no 80731-X (as amended of 8 August 2021) <https://zakon.rada.gov.ua/laws/show/80731-10> accessed 25 September 2021.

13 The Customs Code of Ukraine dated 13 March 2012 no 4495-VI (as amended of 21 July 2021) <https://zakon.rada.gov.ua/laws/show/4495-17> accessed 25 September 2021.

14 The Order of the Ministry of Justice of Ukraine dated 12 December 2011 no 3505/05 'On Approving the Regulations about licensed non-state forensic science practitioners' (as amended of 18 June 2021) <http://zakon2.rada.gov.ua/laws/show/z1431-11> accessed 25 September 2021.

appointment preparing and forensic examinations and expert research', dated 8 October 1998,[15] etc.

The guarantee of the right to a fair trial is reflected in national regulations. Thus, the Law of Ukraine no. 1402-VIII 'On the Judiciary and the Status of Judge', dated 2 June 2016, defines the judiciary's management and administration of justice in Ukraine, which operates on the basis of the rule of law in accordance with European standards and ensures the right of everyone to a fair trial.[16] It should be noted that while administering justice, judges are obliged to increase the authority of the judiciary, ensure the binding nature of court decisions through fair, impartial, and timely consideration and resolution of court cases, observe the judge's oath, provide and a proper legal response to the facts of pressure on them, interference in judicial activities, and other unlawful encroachments on justice.[17]

One way to ensure the fairness of a court decision is to use a tool such as forensic examination. As a general rule, a forensic examination is appointed only in the case of a real need for specific expertise to establish factual data that are part of the evidence subject, i.e., when the expert opinion cannot be replaced by other means of proof.[18]

A broader approach to the need to appoint forensic examinations and recognise their degree of probative value is supported in European and American legal thought. The National Academy of Sciences has prepared a report entitled 'Strengthening Forensic Science in the United States: A Path Forward', in which they identified questions that could be considered legitimate in criminal cases and ensure that they can be referred to during the evidentiary process. The first question establishes the extent to which a particular type of forensic examination corresponds to scientific methodology, which allows someone to accurately carry out an expert opinion on evidence obtained and properly report the results. The second question establishes whether a practicing expert can, while forming an expert opinion, make a mistake due to human fallibility that can threaten the impartiality and validity of the opinion.[19] It should be noted that these important issues are not always reflected in court decisions concerning the admissibility of forensic evidence.

Ensuring the efficiency of justice is one of the main activities of the Council of Europe. This is why it is reflected in relevant legal documents, such as conventions, resolutions, and recommendations adopted under the auspices of the Council of Europe in the field of improving access to justice. Even so, there is no doubt that the European legal approach to regulating the field of forensic support for justice has its peculiarities. These are caused primarily by well-established approaches and practices of applying specific expertise in the countries of the EU.

Among the main documents governing the development of the field of forensic support for justice in the EU are: 'Guidelines on the role of court-appointed experts

15 The Order of the Ministry of Justice of Ukraine dated 8 October 1998 no 53/5 'On Approving the Regulations about appointing and conducting forensic examinations' <http://zakon2.rada.gov.ua/laws/show/z0705-98> accessed 27 September 2021.

16 The Law of Ukraine dated 2 June 2016 no 1402-VIII 'About Judicature and Judges' Legal Status' (as amended of 5 August 2021) <https://zakon.rada.gov.ua/laws/show/1402-19> accessed 25 September 2021.

17 The Supreme Court of Ukraine plenum resolution dated 13 June 2007 no 8 'About the Independence of Judicial Authority' (not amended) <https://zakon.rada.gov.ua/laws/show/v0008700> accessed 25 September 2021.

18 The Superior Commercial Court of Ukraine plenum resolution dated 23 March 2012 no 4 (as amended of 10 July 2014) 'About Some Practice Matters for Appointing a Forensic Examination' <https://zakon.rada.gov.ua/laws/show/v0004600-12> accessed 25 September 2021.

19 Strengthening Forensic Science in the United States, (n 7).

in judicial proceedings of Council of Europe's Member States',[20] approved by the European Commission for justice efficiency at the 24th Plenary Session (Strasbourg, 11-12 December 2014) and 'Council conclusions on the vision for European Forensic Science 2020 including the creation of a European Forensic Science Area and the development of forensic science infrastructure in Europe', approved by the Council of the European Union at the 3135th meeting of the Council of Justice and Domestic Policy (Brussels, 13-14 December 2011,[21] etc.

Special attention should be paid to European documents of a strategic nature, in particular, the 'Vision for European Forensic Science Area by 2020 (EFSA)' and the 'Vision of the European Forensic Science Area 2030 – Improving the Reliability and Validity of Forensic Science and Fostering the Implementation of Emerging Technologies'.

The member states of the EU recognising the importance of the EFSA have developed and proposed the following set of actions for consistent application: 1) ensure the accreditation of forensic laboratories; 2) develop unified best practice guides for their application by experts during the preparation of expert opinions in laboratories; 3) implement a set of measures aimed at professional development, joint exercises, and exercises on certain types of expert research at the European and international levels; 4) determine the optimal means for the creation, dissemination, updating, and use of forensic databases.[22]

The European Network of Forensic Science Institutes (hereafter ENFSI)[23] was appointed as the main coordinator for the implementation of the provisions of the EFSA. According to decision of the ENFSI Council and at the request of the ENFSI Law Enforcement Working Group, the EFSA project was completed at the end of 2020. Given the importance to society of the development of justice in Europe and in accordance with the provisions of the concept paper on the functioning of EFSA, ENFSI has prepared a new strategic document based on experience: the 'Vision of the European Forensic Science Area 2030 – Improving the Reliability and Validity of Forensic Science and Fostering the Implementation of Emerging Technologies'.[24]

The Vision of the European Forensic Science Area 2030 took into account the conclusions of the Serious and Organized Crime Threat Assessment (SOCTA) 2021[25] and Council conclusions setting the EU's priorities for the fight against serious and organised crime for EMPACT 2022-2025.[26] The purpose of the Vision is to support the harmonised and balanced

20 European Commission for the Efficiency of Justice, 'Guidelines on the role of court-appointed experts in judicial proceedings of Council of Europe's Member States' (2014) <https://rm.coe.int/168074827a> accessed 25 September 2021.

21 Council of the European Union, 'Council conclusions on the vision for European Forensic Science 2020 including the creation of a European Forensic Science Area and the development of forensic science infrastructure in Europe' (2011) <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/126875.pdf> accessed 25 September 2021.

22 Council of the European Union, 'Council conclusions on the vision for European Forensic Science 2020 including the creation of a European Forensic Science Area and the development of forensic science infrastructure in Europe' (2011) <http://efic.pl/pliki/dokumenty/EU_Vision.pdf> accessed 27 September 2021.

23 European Network of Forensic Science Institutions. Official Website <https://enfsi.eu> accessed 25 September 2021.

24 'Vision of the European Forensic Science Area 2030 – 'Improving the Reliability and Validity of Forensic Science and Fostering the Implementation of Emerging Technologies' (2021).

25 SOCTA – Serious and Organised Crime Threat Assessment (published 12 April 2021) <https://www.europol.europa.eu/sites/default/files/documents/socta2021_1.pdf Serious and Organised Crime Threat Assessment> accessed 27 September 2021.

26 Council of the European Union, 'Council conclusions setting the EU's priorities for the fight against serious and organised crime for EMPACT 2022 – 2025' (2021) <https://data.consilium.europa.eu/doc/document/ST-8665-2021-INIT/en/pdf> accessed 27 September 2021.

development of forensic science and its role, which significantly contributes to making law enforcement in Europe more efficient and effective.[27]

However, the issues of the development of forensic science activity in Ukraine have not been reflected in a separate guiding document of state policy. At the same time, certain functioning aspects of the field of forensic support for justice are either outlined in various acts of a program nature or regulated in the guiding documents of the state policy of law enforcement agencies and state borders of other bodies under which there are forensic science institutions (Development Strategy, Expert Services of the Ministry of Internal Affairs of Ukraine, Development Strategy of the State Border Guard Service, etc.). We are confident that development in the field of forensic support for justice will allow us to solve urgent issues in the current state of activity of forensic institutions of Ukraine and determine prospective directions of future development in accordance with European and international standards.[28]

Detailed analysis of legal issues revealed that ENFSI is a powerful association that influences the development of justice in Europe and its legal and organisational support. We are convinced that the development of forensic science both in Ukraine and in Europe will contribute to the completion of three important tasks. Firstly, it will help law enforcement officials in investigations to identify criminals more quickly. Secondly, further improving the practice of forensic science will reduce the number of convictions by courts that increase the risk that real offenders continue to commit crimes and innocent people serve sentences improperly. Thirdly, any improvements in the field of expertise will undoubtedly strengthen the ability of individual states to address national security.

3 ISSUES OF LAW ENFORCEMENT WITHIN ECtHR CASE-LAW

Motivation and reasonableness are basic requirements for court decisions and an important element of the right to a fair trial. For example, Art. 6 of the ECHR guarantees the obligation of states to promote efficient judicial procedures by ensuring the functioning of an independent and impartial national judicial system. The fulfilment of this duty becomes real when judges are given an effective opportunity to administer justice fairly and appropriately on the basis of their factual opinions and with respect for the rights of citizens.

The application peculiarity of Art. 6 is that it does not apply in proceedings where there is no dispute between the parties, in unilateral proceedings where there are not two parties to the dispute, and in cases of a lack of rights as the subject matter of the dispute[29] (*Alaverdyan v. Armenia*[30]). The dispute should indicate signs of authenticity and seriousness (*Sporrong and Lonnroth v. Sweden)*.

We share the views of V. D. Yurchyshyn, who emphasised that the ECtHR has developed certain generally accepted approaches (European legal standards) to the procedure for appointing and conducting forensic examinations in criminal proceedings and assessing the reliability and validity of expert opinions that comply with the Convention. The ECtHR, when

27 'Vision of the European Forensic Science Area 2030' (n 25).''

28 O Agapova, 'In Regard to Need for Working Out the Concept of Development of Expert Ensuring of Justice in Ukraine', *The Journal of VN Karazin Kharkiv National University* (Pravo 2020) 14-29 <https://periodicals.karazin.ua/law/article/view/15602/14930> accessed 25 September 2021.

29 European Court of Human Rights, 'Guide on Article 6" (n 4).

30 *Tigran Alaverdyan v Armenia* App no 4523/04 (ECtHR, 24 August 2010) <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100411> accessed 27 September 2021

considering complaints, pays attention to observance of human rights when appointing and conducting forensic examinations. In our opinion, this is because the ECtHR provides for compliance with the relevant rules on the involvement of forensic experts in the complaints of individuals and legal entities.[31]

The 'Opinion of the Advisory Council of European Judges to the Committee of Ministers of the Council of Europe on the efficiency of judgments' no. 11, dated 18 December 2008, states that a high-quality judgment is a decision that achieves the correct result, as far as content provided by judges in a fair, fast, clear, and unambiguous way.[32]

As a rule, the achievement of the correct result and the adoption of a fair court decision becomes possible by taking into account the following requirements: 1) to take into account the practice of law enforcement and legal provisions that directly relate to the dispute context; 2) the establish all case circumstances with reference to the evidence obtained during proceedings; 3) while making a decision, to focus on non-legal phenomena, such as ethical, social, and moral requirements adopted in society, etc.

Regardless of whether the proceedings are criminal or civil, the national court's primary task is to assess general justice. The requirement of a fair trial means that the courts are obliged to conduct a trial, not on the basis of an examination of a particular aspect or a specific incident but by taking into account all the circumstances of the proceedings as a whole. The general requirements of justice contained in Art. 6 of the ECHR apply in both civil and criminal proceedings, regardless of the type of offence or crime in question. However, the main factor for determining the proceedings to be fair is the provision of public interest in decision-making.[33]

Thus, establishing stage of case circumstances with the use of content and reference to evidence cannot bypass the use of such a tool as forensic science.

The case-law of the ECtHR on the criminal procedure aspect of Art. 6 of the ECHR clarifies the specifics of applying forensic science through compliance with a fair trial requirement. It should be noted that the requirement of a fair trial does not require the court of the original jurisdiction to request an expert opinion or conduct any other investigative action or measure through a specific expert if the party has made a request. If the defence insists that the court hear a witness or accept other evidence (such as an expert opinion), national courts must decide whether it is necessary or appropriate to accept that evidence for consideration at the hearing. In this case, the national court is free, subject to the terms of the Convention, to refuse to call witnesses proposed by the defence.[34] The importance of the compliance of forensic science with the requirement of a fair trial demonstrated in *Huseyn and Others v. Azerbaijan,* § 196,[35] *Khodorkovskiy and Lebedev v. Russia*, §§ 718 and 721,[36] and *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia,* § 95.[37]

31 VD Yurchyshyn, 'Forensic Examination in the Activities of the European Court of Human Rights: Issues of Theory and Practice' (2021) *Pravo i suspilstvo* 240-245 <http://www.pravoisuspilstvo.org.ua/archive/2021/2_2021/35.pdf> accessed 27 September 2021.

32 Consultative Council of the European Judges, 'Opinion no. 11 (2008) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the quality of judicial decisions' (2008) <https://www.courtexcellence.com/__data/assets/pdf_file/0023/4919/ccje.pdf> accessed 27 September 2021.

33 European Court of Human Rights, 'Guide on Article 6' (n 4) '7-8.

34 ''Ibid (n 4) '35.

35 *Huseyn and others v Azerbaijan* App nos 35485/05, 45553/05, 35680/05 and 36085/05 (ECtHR, 26 July 2011) <http://hudoc.echr.coe.int/eng?i=001-105823> accessed 27 September 2021.

36 *Khodorkovskiy and Lebedev v Russia* App nos 11082/06 and 13772/05 (ECtHR, 25 July 2013) <http://hudoc.echr.coe.int/eng?i=001-122697> accessed 27 September 2021.

37 *Poletan and Azirovik v the Former Yugoslav Republic of Macedonia* App nos 26711/07, 32786/10 and 34278/10 (ECtHR, 12 May 2016) <http://hudoc.echr.coe.int/eng?i=001-162704> accessed 27 September 2021.

The application peculiarity of Art. 6 is also that the role of the ECtHR, as a rule, is not to determine whether a certain expert opinion obtained by a national court was reliable or not. A national court judge usually has a wide range of powers to choose between conflicting expert opinions and select those he or she deems most credible. However, this does not mean that the defence is deprived of the right to appeal the expert opinion by providing an alternative expert opinion. As long-term practice demonstrates, only in certain circumstances can a refusal to accept an alternative examination as evidence be regarded as a violation of Art. 6 § 1. As an example, we can mention such cases as *Stoimenov v. the former Yugoslav Republic of Macedonia,* § 38,[38] *Matytsina v. Russia,* § 169,[39] and *Khodorkovskiy and Lebedev v. Russia,* § 187,[40] indicating that it can be difficult to challenge an expert opinion without the assistance of another expert in the relevant field.

Equally important is the appointment of experts in the proceedings in terms of compliance with the principle of equality of arms. There are cases when one of the parties considers the proceedings unfair= when relevant experts are hired by the other party. The ECtHR has clarified that although this may raise concerns about the neutrality of experts, such concerns are not decisive. However, the position of the experts throughout the proceedings, how they perform their functions, and how the judges assess the expert opinion are crucial. In determining the procedural position of experts and their role in the proceedings, the ECtHR considers whether the opinion given by any expert appointed by the court is of great importance in the court assessment of issues within the expert's competence,[41] as in *Shulepova v. Russia,* § 62,[42] and *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia, § 94.*[43]

It should be noted that establishing all the circumstances of the case through the prism of the conventional protection of the right to a fair trial belongs exclusively to the judge's competence, and expert evidence often avoids the adoption of unfair court decisions.

The US Supreme Court approach to evaluating expert opinions is noteworthy. In order to assist judges in the preliminary assessment of expert opinions and help them to understand whether the methodology or theory underlying forensic expert testimony is scientifically sound and in which case it is appropriate to apply expert opinions to the impugned facts, the Supreme Court has identified the following five conditions: 1) that the scientific methodology or theory used by the expert in forming the expert opinion be tested; 2) that whether the expert correctly applies the scientific methodology (methods and methodical recommendations, scientific articles, etc.) has been tested and reviewed; 3) that the probability of error while choosing a specific methodology or theory as an expert is clear; 4) that there are standards that control the application of the methodology or theory used by the forensic expert; 5) that the chosen methodology and theory is generally accepted in a particular expert or scientific community.[44]

38 *Stoimenov v the Former Yugoslav Republic of Macedonia* App nos 17995/02 (ECtHR, 05 April 2007) <http://hudoc.echr.coe.int/eng?i=001-80035> accessed 27 September 2021.

39 *Katytsina v Russia* App no 58428/10 (ECtHR, 27 March 2014) <http://hudoc.echr.coe.int/eng?i=001-141950> accessed 27 September 2021.

40 *Khodorkovskiy and Lebedev v Russia* App nos 11082/06 and 13772/05 (ECtHR, 25 July 2013) <http://hudoc.echr.coe.int/eng?i=001-122697> accessed 27 September 2021.

41 European Court of Human Rights, 'Guide on Article 6' (n 4) '35.

42 *Shulepova v Russia* App no 34449/03 (ECtHR, 11 December 2008) < http://hudoc.echr.coe.int/eng?i=001-90093> accessed 27 September 2021.

43 *Poletan and Azirovik v the Former Yugoslav Republic of Macedonia* App nos 26711/07, 32786/10 and 34278/10 (ECtHR, 12 May 2016) <http://hudoc.echr.coe.int/eng?i=001-162704> accessed 27 September 2021.

44 *Daubert v Merrell Dow Pharmaceuticals* no 92-102 (SCOTUS, 28 June 1993) <https://supreme.justia.com/cases/federal/us/509/579/case.pdf> accessed 28 September 2021.

We consider this approach to the evaluation of expert evidence to be rational and suggest it could be applied in Ukrainian judicial practice.

4 CONCLUSIONS

Given research results, it should be noted that the Ukrainian and European practice of applying expert research in court cases is an important condition for ensuring the right to a fair trial. Thus, the case-law of the ECtHR has been substantiated with the help of expert evidence. Expert research in the context of the conventional protection of the right to a fair trial in the case-law of the ECtHR plays a leading role in providing it with comprehensive, complete, objective research and takes into account the principle of equality of arms. Direct analysis of the case-law of the ECtHR indicated that there are specifics of applying forensic science through the observance of the right to a fair trial enshrined in Art. 6 of the ECHR (cases of the right of the court to choose alternative expert opinions, etc.). At the same time, it was found that the conceptual issues of forensic development in Ukraine have not been reflected in a separate guiding document of state policy (strategy, concept), a situation that negatively affects the process of the harmonisation of legislation and standards of Ukraine with the norms EU legislation and standards in the field of forensic support for justice, as well as the formation of common approaches to the use of expert evidence. Research on the case-law of the ECtHR allows us to testify to the fact of the influence of forensic science on making fair decisions and to note the common approach of Ukrainian experts to the resolution of expert opinions with the European forensic expert community.

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Case Note

THE VALIDITY, EFFECTIVENESS, AND ENFORCEABILITY OF ARBITRATION AGREEMENTS: ISSUES AND SOLUTIONS

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THE VALIDITY, EFFECTIVENESS, AND ENFORCEABILITY OF AN ARBITRATION AGREEMENT: ISSUES AND SOLUTIONS

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Abstract *The main reason for dispute in international commercial arbitration is the existence of an arbitration agreement concluded between the parties to a foreign trade agreement. The procedure of dispute resolution in international commercial arbitration will depend on the extent to which this arbitration agreement is concluded correctly in accordance with the norms of international and national law. Quite often, in the law enforcement activities of both national courts and arbitrations, there are questions about the validity, effectiveness, and enforceability of an arbitration agreement. In different countries, this issue is addressed ambiguously. In one case, national law takes precedence, and, accordingly, national courts are empowered to consider the validity, effectiveness, and enforceability of an arbitration agreement. In other cases, however, the autonomy of the arbitration agreement is a priority aspect of the consideration of any procedural issues by international commercial arbitration as the only and indisputable body authorised by the parties to the foreign trade agreement to consider a particular dispute. The article analyses doctrinal and legislative approaches to this issue, in which the authors come to the logical conclusion that national courts do not consider the validity, effectiveness, and enforceability of an arbitration agreement.*

Keywords: *international commercial arbitration, arbitration agreement, autonomy of arbitration agreement.*

1 INTRODUCTION

The arbitration agreement is the cornerstone of any arbitration proceedings. It is the legal basis for application to international commercial arbitration, and recognition of its competence determines all subsequent arbitration proceedings and, ultimately, the fate of the arbitral decision. These are its positive (prorogation) and negative (derogation) effects, as the consequence of the arbitration agreement is the removal of the dispute from the jurisdiction of state courts.

An arbitration agreement may be included in the text of the foreign trade contract ('arbitration clause') or concluded as a separate agreement ('arbitration agreement'), thus separated from the main contract.

The concept of an arbitration agreement is contained in Art. 7 of the Law of Ukraine 'On International Commercial Arbitration'. It states that an arbitration agreement is an agreement between the parties to submit to arbitration all or certain disputes that have arisen or may arise between them in connection with any specific legal relationship, regardless of whether they are contractual or not.

In some countries (Belarus, Great Britain, Denmark, Canada, Norway, Russia, the USA, Ukraine, China, France, Germany), there is the same approach to the legal definition of the arbitration clause and the arbitration agreement. In some European countries, such as Spain, Portugal, Lebanon, and a number of Latin American countries (Argentina, Brazil, Venezuela, El Salvador, Ecuador), there is a special relationship with the arbitration agreement. According to Art. 5 of the Venezuelan Commercial Arbitration Act, an 'arbitration agreement' is an agreement by which the parties submit to arbitration all or certain disputes that have arisen or may arise between them concerning a particular legal relationship. In addition, the arbitration agreement is possible in the form of an arbitration clause in the contract or in the form of a separate agreement. Art. 6 of this Act stipulates that the arbitration agreement must be established when writing any document or set of documents that are confirmed by the will of the parties to link themselves to the arbitration. The reference made in the agreement to the document containing the arbitration clause shall be set out in the arbitration agreement, provided that such agreement is established in writing.[1]

In accordance with the law and based on the legislative practice of the second group of these states, an arbitration agreement is not a sufficient basis for arbitration. Parties wishing to submit a civil dispute to international commercial arbitration are obliged, even if there is an arbitration agreement in the foreign trade agreement, to enter into a written agreement aimed at resolving the dispute that arose in arbitration, which must be notarised in some countries. Such legislative requirements, as noted by A.I. Minakov, lead to failure to comply with this condition, which entails the invalidity of the arbitration agreement, and the case may be considered by a national court. The arbitration agreement is considered in this case exclusively as a contractual condition, as a result of which the parties, in the event of a dispute, are obliged to enter into an arbitration agreement.[2]

The legal regime of the arbitration agreement is enshrined in various fundamental regulations of international commercial arbitration.[3] As noted, the first multilateral international legal act to regulate arbitration agreements in the field of international commercial relations was the Geneva Protocol of 1923. It enshrined the right of the parties to conclude agreements on the transfer to arbitration both in relation to existing disputes and to disputes that may arise in the future. The provisions of the 1923 Protocol applied to those arbitration agreements, the parties of which belonged to different states-parties of the Protocol.[4]

In international law, the basic provisions of the arbitration agreement, its concept, form, basic requirements, and consequences of its violation are contained in the New York

1 Kuro Unofficial Translation of the new Venezuelan Commercial Arbitration Act <http://www.zur2.com/fcjp/articulos/arbitraje.htm> accessed 20 August 2021.

2 AI Minakov, 'Arbitration agreements and the practice of resolving foreign economic disputes' in idem, *Law literature* (Yurkniga 1985).

3 IO Izarova, *Theory of the EU civil procedure* (VD Dakor 2015).

4 Protocol on arbitration clauses signed at a meeting of the assembly of the league of nations held on the twenty-fourth day of September, nineteen hundred and twenty-three <http://interarb.com/vl/g_pr1923> accessed 20 August 2021.

Convention of 1958 (Arts. II, V), as well as in the European Convention of 1961 (Arts. I, V, IX), the UNISTRAL Model Law. According to Art. II of the New York Convention of 1958, an arbitration agreement is a written agreement under which the parties undertake to arbitrate all or certain disputes that arise or may arise between them in connection with a specific contractual or other legal relationship, the objects of which may be the subject of arbitration.[5] The European Convention of 1961 interprets the concept of an arbitration agreement somewhat differently, stating that an arbitration agreement is an agreement in the contract itself or a separate arbitration agreement signed by the parties or contained in an exchange of letters, telegrams, or teletype messages, and in relations between states none of the laws requires a written form for an arbitration agreement, any agreement is set out in a form permitted by those laws (Art. 1).[6]

2 GENERAL REQUIREMENTS FOR THE VALIDITY OF AN ARBITRATION AGREEMENT IN THE CONTEXT OF CONVENTION REGULATION

Requirements for the validity of an arbitration agreement formulated in para. 3 of Art. II of the New York Convention of 1958 are quite generalised, which has both advantages and disadvantages. The advantage can be found in the ability to cover the maximum possible number of cases in the application of this rule. On the other hand, the lack of specificity makes the application of this rule in practice unclear. The lack of reference to the law applicable to the validity of the arbitration agreement, as well as the question of who should decide the dispute – the ICA or the state court – remain acute issues.

The answer to these questions depends on the stage of the dispute and in what body it is considered. However, from a legal point of view, it seems more important to consider who actually has the authority to decide on the validity of an arbitration agreement

According to the New York Convention of 1958, the state court decides on the validity of the arbitration agreement only if it considers the claim on the merits and finds the existence of an arbitration agreement (para. 3 of Art. II). The role of the court, in this case, is to implement a valid arbitration agreement. Only when the arbitration agreement is invalid for some reason can the court continue the proceedings on the merits. If the court does not make such a conclusion, it shall refer the parties to arbitration.

The situation is more complicated when the question of the validity of the arbitration agreement arises during the arbitration proceedings. In these cases, the arbitral tribunal decides these issues independently.

There are two points of view in Western doctrine. The first was formed under the influence of the concept of autonomy of the arbitration agreement and the concept of *competence – competence*.[7] Its logic is as follows: the arbitration agreement is autonomous from the contract in which it is contained. In this case, the arbitral tribunal is empowered to decide on its own competence independently. To establish their own competence, arbitrators need to assess the issue of arbitrability of the dispute, as well as all issues of validity and conclusion of the arbitration agreement.

5 Convention on the Recognition and Enforcement of Foreign Arbitral Awards <http://www.uncitral.org/pdf/07-87406_Ebook_ALL.pdf> accessed 20 August 2021.

6 European Convention on Foreign Trade Arbitration <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=995_069> accessed 20 August 2021.

7 A Redfern, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004) 667.

According to the second point of view, which, in general, does not dispute the effect of the concept of *competence – competence*, in determining the validity of the arbitration agreement from among the issues to be considered, the question of the very existence of such an agreement is excluded. Such an issue should be referred to the jurisdiction of the state court.[8] The idea of such an approach is quite simple: if the parties have not concluded an agreement on the transfer of the dispute to arbitration, the arbitrators do not have the opportunity to decide on their own competence. As stated in one of the court decisions, the question of the very existence of the contract containing an arbitration agreement is covered by the concept of 'conclusion of an arbitration agreement' and requires consideration by a state court.[9]

In this aspect, the questions of forgery of the signature of the person on whose behalf the arbitration agreement was signed and whether the parent company that did not sign the agreement can be liable for the obligations of the subsidiary can be considered.

The French experience seems interesting here. The courts of this country are generally deprived of the opportunity to decide the validity of the arbitration agreement until the arbitral tribunal decides on the same issue.[10]

The study of the validity of the arbitration agreement is the starting point for refuting the existence of international commercial arbitration jurisdiction to consider the dispute and, accordingly, attempts to refer the dispute to a state court. Both the arbitrators themselves and the state court to which one of the parties refers at the initiation of the arbitration proceedings or in the course of such proceedings must decide whether the arbitration agreement really exists and remains in force.

Despite the importance of this issue, in Art. II of the New York Convention of 1958, which sets out the requirements for the form of the arbitration agreement, there are no mandatory requirements on the basis of which rules should be decided on the validity, maintenance, and enforceability of an arbitration agreement. At the same time, the New York Convention of 1958 contains a rule according to which the recognition and enforcement of an arbitral decision may be denied if the arbitration agreement is invalid in accordance with the law to which the parties subject the agreement, and under the law of the country where the decision was made in the absence of such an instruction (subpara. 'a' of para. 1 of Art. V). In the absence of a similar rule in Art. II of the New York Convention of 1958, the question is raised of the possibility of applying the provisions of Art. V of the Convention on the basis of which arbitrators or a state court must conclude on the validity of the arbitration agreement to resolve the issues enshrined in Art. II of the New York Convention of 1958. Different views have been expressed on this issue at different times, but recently, there has been a trend according to which the state courts of the states-parties to the New York Convention Art. II of the New York Convention of 1958 must use the conflict rules of subpara. 'a' of para. 1 of Art. V of the New York Convention of 1958. Although this trend is dominant, in some countries (for example, in the USA), state courts apply national law to address this issue.[11]

For countries that are parties to the European Convention in addition to the New York Convention of 1958, a solution to this issue is facilitated: para. 2 of Art. VI of the European Convention of 1961 not only proposes to apply the question of the validity, maintenance, and enforceability of the arbitration agreement rules similar to the rules of subpara. 'a' of para. 1 of Art. V of the New York Convention of 1958, but also the rules that provide that when ruling on the existence or

8 E Mezger, *Competence des arbitre et independence de la convention arbitrale dans la Conven tion dite Europeene sur Larbitrage Commercial International, Arbitrage Commercial Eugenio Minoli* (Milan 1974).

9 JG Frick, *Arbitration and complex international contracts* (Kluwer Law International 2001).

10 II Dore, *Arbitration and conciliation under the UNCITRAL rules: a textual analysis* (Martinus Nijhoff Publisher 1986).

11 J Stalev, *Law on International Commercial Arbitration* (Sofia 1991).

validity of the said arbitration agreement, the state courts of the contracting states in which the issue is raised shall be governed by the law applicable to them, and, on other issues:

a) the law to which the parties subjected the arbitration agreement;
b) in the absence of instructions in this regard – the law of the state in which the decision must be made;
c) in the absence of references to the law to which the parties subjected the arbitration agreement, and if at the time when the matter arose before the state court, it is impossible to determine in which state the arbitral decision should be made – the law applicable by a conflict of law the court in which the case was initiated.

Cited provisions of the European Convention of 1961 in no way contradict the New York Convention of 1958. They only enshrine the tendency to apply the rules of subpara. 'a' of para. 1 of Art. V of the New York Convention to address the issues of Art. II of the New York Convention and specify which law should be applied if the arbitration agreement does not specify in which country the decision should be made.

3 THE RATIO OF 'AUTONOMY OF WILL' AND THE VALIDITY OF AN ARBITRATION AGREEMENT

The practice of establishing the rules used to resolve the issue of the validity of an arbitration agreement is based on the general recognition of the principle of autonomy of the arbitration agreement. In fact, although the New York Convention of 1958 does not explicitly enshrine this principle, it would not be possible to speak separately of the validity of the arbitration agreement and the law applicable to the settlement of the issue without its recognition. Then the question of the validity of the arbitration agreement would be decided together with the question of the validity of the contract in which it is included and in accordance with the rules of law governing the 'basic' contract.

F. Fushar, E. Gaillard, and B. Goldman argue that the principle of autonomy of the arbitration agreement is, without a doubt, the first stage of the process, as a result of which arbitrators can decide on their own competence. It is through the autonomy of the arbitration agreement that any argument against the validity of the main agreement will not have a direct impact on the arbitration agreement and, consequently, on the jurisdiction of the arbitration. Such autonomy allows arbitrators to consider jurisdictional objections based on the assertion of the invalidity of the disputed contract. In such a situation, the autonomy of the arbitration agreement and the rule of *competence – competence* are mutually supportive.[12]

However, despite the almost universal recognition of the principle of autonomy of the arbitration agreement, which implies the possibility of applying to the validity of the arbitration agreement legal rules other than substantive law applicable to the substance of the dispute, in practice, there are almost no agreements in arbitration agreements in which the law applicable to the arbitration agreement would be specifically addressed.[13] As a rule, the parties enshrine in the contract the choice of substantive law applicable to the relationship between them, refer to one or another arbitration rule, and establish the place of arbitration, but remain silent about the law that should govern the validity, effectiveness, and enforceability of the arbitration agreement, although the choice of such a right by the parties is expressly provided for in both the 1958 New York Convention and the 1961 European Convention.

12 F Fouchard, E Gaillard, B Goldman, *International Commercial Arbitration* (Kluwer Law International 1999).

13 SN Lebedev, *International cooperation in the field of commercial arbitration. International conventions, agreements and other documents on arbitration* (Torg-prom, Chamber of the USSR 1979).

Moreover, none of the recommended arbitration agreements included in the rules of known institutional arbitrations or in the UNCITRAL Arbitration Rules, not surprisingly, provides for a separate choice of law applicable to the validity, maintenance, and enforceability of the arbitration agreement, although some arbitration regulations explicitly enshrine the principle of autonomy of the arbitration agreement. Thus, the ICC Arbitration Rules of Arbitration Court provide that where one party makes one or more claims as to the existence or validity of an arbitration agreement and the International Court of Arbitration is assured that such an agreement exists, the court may, without deciding whether the claim (claims) is admissible or valid, to take the case to arbitration.

Thus, if the agreement does not specify to which national law the parties have subordinated the arbitration agreement included in the treaty, then, to resolve the question of the validity of the arbitration agreement, as a rule, the law of the country where the arbitration decision is applied (*lex arbitri*).[14] In practice, arbitrators, when hearing a case in which, in addition to the actual dispute over the right, there are also jurisdictional objections, first have to study the laws of the country where the arbitral decision will be made (to determine the validity, effectiveness, and enforceability of the arbitration agreement), and then norms of the substantive law chosen by the parties to be applied (to resolve the issue of the validity of the contract in which the arbitration agreement was included). At the same time, the automatic extension of substantive law chosen by the parties to resolve the issue of the validity, effectiveness, and enforceability of the arbitration agreement is unacceptable due to the principle of autonomy of the arbitration agreement. Only if the contract signed by the parties explicitly states that the substantive law chosen by the parties is applicable to matters relating to the validity, maintenance, and enforceability of the arbitration agreement may the arbitrators assess both the validity of the agreement itself and the validity, effectiveness, and enforceability of the arbitration agreement under the same rules.[15]

However, some authors believe that the substantive law chosen by the parties to regulate the rights and obligations under the contract may automatically apply to the regulation of the arbitration agreement included in this contract. We believe that this position contradicts the New York and European conventions, as well as the principle of autonomy of the arbitration agreement because if both the contract and the arbitration agreement are subject to the same law, it is unlikely to maintain the validity of the arbitration agreement with invalid 'basic' agreement. To confirm the correctness of the statement, Art. 48 of the Swedish Law on Arbitration of 1999 can be referred to, which distinguishes between the law chosen by the parties to regulate the rights and obligations under the contract and the law governing the arbitration agreement.[16] It should be noted that Sweden is not a party to the 1961 European Convention, so the inclusion in Swedish law of rules similar to those set out in the 1961 European Convention cannot be considered a duplication of Sweden's international obligations in its domestic law.

4 THE CHOICE OF LAW WHEN CONCLUDING AN ARBITRATION AGREEMENT

In connection with the above, it seems appropriate to include in the arbitration agreement instructions on the choice of law, which is used in resolving the issue of validity, effectiveness,

14 J Lew, 'The law applicable to the form and substance of the arbitration clause' (1998) 14 ICCA Congress Series 130.

15 YD Prityka, AV Amborsky, 'On the concept and components of arbitrability: A theoretical analysis' (2016) 2 (1) Scientific Bulletin of Kherson State University. Legal Sciences Series 10-13.

16 Swedish Arbitration Act <http://www.chamber.se/arbitration/english/laws/skiljedomslagen_eng.html> accessed 20 August 2021.

and enforceability of the arbitration agreement. This will avoid a situation where state courts examining the validity, effectiveness, and enforceability of a particular arbitration agreement will be able to determine the law on the basis of which the issue is resolved, i.e., when an arbitration agreement can be resolved differently in state courts of different countries. Moreover, if the state courts of any country are faced with the need to adhere to the choice of law chosen by the parties, then the possibility of applying the issue of validity, effectiveness, and enforceability of the arbitration agreement *lex fori* of the relevant court will be excluded, which will increase the predictability of the arbitration agreement by state courts of different countries.

It should be noted that in addition to establishing the law to which the arbitration agreement is subject and on the basis of which the validity of this agreement should be assessed, the arbitrators or the state court in accordance with subpara. 'a' of para. 1 of Art. V of the New York Convention of 1958 are obliged to decide on the 'capacity' of the parties to the arbitration agreement, and by the law to which the parties are subject to this agreement, and in the absence of such instructions, by the law of the country where the decision was made. A similar idea is included in para. 2 of Art. VI of the European Convention, according to which the state court must decide on the legal capacity of the parties to the arbitration agreement 'under the law applicable to them', i.e., under their personal law (*lex societatis*) and not under the law to which the arbitration agreement is subject.

Despite some terminological differences, these rules require the same thing: arbitrators or state courts must clarify the legality of signing an arbitration agreement based on the personal law of the party, which cannot be changed on the basis of its will. However, such clarification should be made taking into account the specifics of the principle of autonomy of the arbitration agreement, which distinguishes between the legal fate and analysis of the validity of the contract as a whole and the arbitration agreement that is part of it. For example, if an arbitral tribunal or a state court concludes that a 'basic' agreement is invalid due to the party's representative not having the authority to sign the agreement (if the 'basic' agreement is such an agreement), the arbitration agreement will still remain valid because the obligation to the transfer of a dispute to arbitration cannot be considered an agreement at all.

The issue of the law governing the arbitration agreement has been repeatedly reflected in the practice of courts of different states. It can be noted that in the countries of the continental legal system, it is decided in the same way: if the parties themselves have not chosen separately the law governing this arbitration agreement, it is considered subject to the law of the place of arbitration. The most liberal courts also point out that due to the principle of autonomy of the arbitration agreement, there is no need to refer to the national law of any state when deciding on its validity. In England, however, it is likely that the court will take into account the substantive law to which the contract is subject unless the parties establish that it is governed by the law of the place of arbitration.[17]

A.Y. Van den Berg, in his commentary on the 1958 New York Convention, acknowledged that although there are other decisions in practice, the right to a place of arbitration is clearly the most appropriate for resolving the validity of an arbitration agreement.[18]

The question of the validity of the arbitration agreement is not regulated in detail in the Ukrainian legislation. This distinguishes the Law of Ukraine 'On International Commercial

17 K Hober. 'Arbitration reform in Sweden' (2004) 1 International Commercial Arbitration 60-61; S Heger, *Commentary on the new Austrian arbitration legislation* (Walters Cloover 2006.

18 Consolidated Commentary Cases Reported in Volumes XXII (1997) – XXVII (2002); A-J Van den Berg, *The New York Arbitration Convention of 1958: Towards a uniform judicial interpretation* (Kluwer Law and Taxation 1981.

Arbitration', for example, from similar acts in Swiss law or from the Restatement (Second) of Conflict of Laws of the USA,[19] where this issue is regulated in detail. The only thing that establishes the Ukrainian law regarding the validity of the arbitration agreement is the provisions on its form, which are contained in Art. 7 of the Law of Ukraine 'On International Commercial Arbitration'.

The explanation for this feature is quite simple. The Law of Ukraine 'On International Commercial Arbitration' is completely based on the UNCITRAL Model Law, which did not contain detailed regulation of the validity of the arbitration agreement. The lack of detailed regulation, in turn, is due to the compromising nature of the UNCITRAL Model Law. Based on the content of preparatory materials (*travaux preparatoires*) for the UNCITRAL project, during the discussion of Art. 7, the idea of transferring the decision on the validity of the arbitration agreement, including its proper form, to the national legislator has been repeatedly expressed. In addition, in the course of the same discussion, the idea was expressed to abandon the use of the term 'agreement in writing' to exclude possible conflicts with the provisions of para. 2 of Art. II of the New York Convention, which also defines the scope of this concept.[20]

Interestingly, the new version of the UNCITRAL Model Law of 2006 already offers two versions of the wording of Art. 7. One of them is a further development of the original version and clarifies the list of requirements for the form of the arbitration agreement. Thus, taking into account the remark that in some cases in international trade, a written fixation of the arbitration agreement is not possible, the developers of the new version of the UNCITRAL Model Law decided to equate the content of such an agreement expressed in any way to the arbitration agreement ('an arbitration agreement is in writing if its content is recorded in any forms'). At the same time, the explanatory note emphasises that such an approach removes the requirement that each of the parties must agree to accept the arbitration agreement in one form or another. Art. 7 of the UNCITRAL Model Law also takes into account the development of modern electronic means of communication, finally equating the messages received with them to the messages received in writing.[21]

The second option is based on the fact that the need to regulate the validity of the arbitration agreement has disappeared in connection with the development of legislation and law enforcement practices of individual countries. According to the developers, each country should evaluate its own practice and make a choice in favour of more detailed regulation of the formal validity of the arbitration agreement at the level of national law on international commercial arbitration.

Thus, the general direction of international regulation is to ensure that each state independently determines the rules applicable to the decision on the validity of the arbitration agreement. At the same time, this does not mean that national courts should not take into account international practice when applying their own national law.

This conclusion is based on the following. The legal basis of international commercial arbitration is largely formed by international treaties, the main of which today is the New York Convention of 1958. This Convention is an international treaty of Ukraine, and by virtue of Part 1 of Art. 9 of the Constitution of Ukraine, the rules of this Convention take precedence over the norms of domestic law.

19 Restatement (Second) of Conflict of Laws §187-188, 218.

20 Convention on the Recognition and Enforcement of Foreign Arbitral Awards <http://www.uncitral.org/pdf/07-87406_Ebook_ALL.pdf> accessed 20 August 2021.

21 Explanatory Note by the UNCITRAL secretariat <http://www. uncitral.org/pdf/english /texts/ arbitration/ mlarb /07-86998_Ebook .pdf> accessed 20 August 2021.

It should be emphasised that the subject of the New York Convention of 1958 includes two basic elements:

1) recognition of arbitration agreements (Art. II of the New York Convention of 1958);
2) recognition and enforcement of foreign arbitral decisions (Art. III of the New York Convention of 1958).

5 THE STAGED NATURE OF REGULATION OF THE VALIDITY OF AN ARBITRATION AGREEMENT

According to these elements, the New York Convention of 1958 regulates the validity of an arbitration agreement in two stages:

Stage 1: assessment of the arbitration agreement by the state court when the parties apply to it to resolve the dispute, to consider which the parties agreed in arbitration (para. 3 of Art. II of the New York Convention of 1958);

Stage 2: assessment of the arbitration agreement by the competent authority of the state in the execution of the arbitral decision (subpara. 'a' of para. 1 of Art. V of the New York Convention of 1958).

As for the law applicable in the first stage, i.e., in the assessment of the arbitration agreement by the state court before the arbitral decision, in this case, there is a clear gap in the Convention. The Convention stipulates that the court must refer the parties to the arbitration agreement to arbitration court if it does not find that the agreement is invalid, has lapsed, or cannot be enforced. The Convention does not specify what the court should be guided by when deciding on the validity of an arbitration agreement.

The range of rules to be applied in the second stage is clearly defined in the Convention. Such rules include the rules of law to which the parties have submitted an arbitration agreement (which in practice is rare) or the rules of law of the state where the arbitral decision was made.

This gap is not accidental. An analysis of the draft New York Convention of 1958 shows that the representatives of the participating states expressed different ideas as to how the issue of the law applicable to the arbitration agreement under para. 3 of Art. II of the Convention should be resolved.[22] The idea was expressed to subordinate the arbitration agreement to the law of the court itself, the law of the place of arbitration, or to extend to it the rules of conflict of law. However, none of them was accepted.[23]

Therefore, the control over arbitration proceedings on the basis of a valid arbitration agreement is multi-stage. When initiating court or arbitration proceedings, the validity of the arbitration agreement may be verified by both the ICA and the state court. It is possible to apply different laws at different stages of verification of the validity of the arbitration agreement. That is, the parties must consider the risk that even if the arbitral tribunal finds the arbitration agreement valid and the state court of the place of arbitration does not

22 BR Karabelnikov, 'New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Decisions: Problems of Theory and Practice of Application' (PhD Thesis Abstract, candidate of law, University of Saratov 2001); BR Karabelnikov, *Execution and contestation of decisions of international commercial arbitrations. Commentary on the New York Convention of 1958 and Chapters 30 and 31 of the APC of the Russian Federation in 2002* (3rd ed, Statute 2008).

23 Summary record of the thirteenth meeting <http://www. uncitral.org/pdf/ english/ travaux/ arbitration/ NY-conv/e-conf-26-sr/13-N5814372.pdf> accessed 20 August 2021.

revoke the arbitral decision made under such agreement and thereby confirm the validity of the arbitration agreement, the court of the country of the recognition and enforcement of the arbitral decision may recognise, by applying another right, that the arbitration agreement is invalid.

In the scientific literature, as well as in the practice of the ICA, attempts have been repeatedly made to justify one or another approach to the validity of the arbitration agreement.[24] The most interesting and also final version is set out in the decision of the Court of Appeal of the 3rd District of the United States in the case of *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazione v. Achille Lauro*. In this decision, the Court concluded that the arbitration agreement in the context of para. 3 of Art. II of the New York Convention of 1958 will be invalid only if it meets the grounds for invalidity of the agreement, such as coercion, error, deception, or a previously stated waiver, or if such an agreement is contrary to the fundamental principles of the state where the arbitration takes place. In addition, the Court of Appeal noted that one of the purposes of the New York Convention of 1958 was to unify the rules under which arbitration agreements must be complied with. According to the court, the parties to the Convention jointly expressed the presumption of the enforceability of arbitration agreements, regardless of the formal features of national law.[25]

On the one hand, this presumption can be considered as confirmation of the specifics of arbitration of American courts, the pro-arbitration orientation of which has been known since the decision of the Supreme Court in the case of *Prima Paint*. Then, it could be concluded that the mentioned interpretation of the norms of the New York Convention of 1958 in the Ukrainian realities should be perceived as a phenomenon rather than as a reference point for practice.[26] On the other hand, it must be acknowledged that the approach of the American court is fully consistent with the principles of interpretation of international treaties enshrined in the Vienna Convention on the Law of Treaties of 1969.[27] According to Art. 31 of this Convention, the interpretation of the treaty, together with the context, must take into account the object and purpose of the international treaty, as well as the practice of applying international norms.

In this case, if these means of interpretation leave the provisions of the international agreement ambiguous and unclear, it is possible to refer to the preparatory materials and the circumstances of the conclusion of such an international agreement (Art. 32 of the Convention).

24 F Bortolotti, *International arbitration. In Drafting and negotiating international commercial contracts* (ICC 2008); XCB Vásconez, 'The mediated settlement agreement: The Ecuadorian experience' (2011) Journal of international arbitration 315; D Campbell, *International dispute resolution: the comparative law yearbook of international business, special issue* (Kluwer 2010).

25 *Rhone Mediterranee Compagnia Francese Di Assicurazioni Eriassicurazoni, Appellant, v Achille Lauro, D/b/a Achille Lauro Armatore, A/k/a Achillelauro, D/b/a Flotta Lauro, A/k/a Achille Lauro, d/b/a Lauro Lines, X Company and Antonioscotto Di Carlo*: United States Court of Appeals, Third Circuit – 712 F.2d 50 Argued April 27, 1983 <http://cases.justia.com/us-court-of-appeals/F2/712/50/415183> accessed 20 August 2021.

26 *PrimaPaintCorp. v Flood&ConklinMFG. Co.* 388 US 395 (1967) <http:// supreme. justia.com/ us/388/395/case.html> accessed 20 August 2021.

27 IM Sinclair, *The Vienna Convention on the Law of Treaties, cmg, Second Legal Adviser to HM Foreign and Commonwealth Office* (The Melland Schill Lectures) (Oceana Publications Inc 1973).

6 THE UKRAINIAN EXPERIENCE OF THE VALIDITY OF THE ARBITRATION AGREEMENT

In interpreting the provisions of para. 3 of Art. II of the New York Convention of 1958 on the invalidity of the arbitration, agreement should not be based on local law and take into account the object and purpose of the Convention, as well as international practice. This approach is the only true approach by virtue of the international treaties of Ukraine, which are part of its legal system.

In this regard, it is necessary to note two important features of Ukrainian procedural law. The first feature is that the New York Convention of 1958 extends its effect to two types of arbitral decisions: 1) to decisions rendered in the territory of the state, where recognition and enforcement of such decisions are not required; 2) to decisions rendered in the territory of the same state where their recognition and enforcement are required but which are not considered to be domestic decisions in that state (para. 1 of Art. I of the Convention). That is why it is extremely important to determine whether there is a second type of arbitration decision in Ukraine. This is relevant, in particular, for the decisions of the ICAC at the CCI of Ukraine in the event that these decisions are made outside of Ukraine. They will be fully subject to the New York Convention of 1958, and therefore the above regarding the rules for determining the validity of arbitration agreements must also be valid for them.

The Law of Ukraine 'On International Commercial Arbitration' does not provide an answer to this question. It is unclear whether the decisions taken by the ICAC at the CCI of Ukraine should be considered as decisions taken outside Ukraine in accordance with the New York Convention. In accordance with Art. 35 of the Law of Ukraine 'On International Commercial Arbitration', an arbitration decision, regardless of the country in which it was made, is binding, and when submitting a written request to the competent court, it is executed in accordance with this article and Art. 36, thus not giving a clear answer to issues of implementation of decisions made by the ICAC at the CCI of Ukraine.

The second feature is that the problem of the validity of the arbitration agreement inevitably necessitates an analysis of the extent of the intervention of state courts in assessing this reality in different circumstances. There are two situations: 1) the party has already applied to arbitration, and the case is pending arbitration, but the other party filed a lawsuit in state court, despite the arbitration agreement; 2) the arbitration proceedings have not yet been initiated, and one of the parties, despite the existence of an arbitration agreement, applies to the state court.

Both of these situations are quite common in practice. Based only on the provisions of the New York Convention of 1958, in both cases, the state court must verify the validity and enforceability of the arbitration agreement, and, depending on the request of the other party and the outcome of the review, refer the parties to arbitration or accept the claim.

7 CONCLUSIONS

The question of the validity of the arbitration agreement is multifaceted. It concerns not only the assessment of an arbitration agreement itself in terms of its compliance with the formal criteria and applicable law but also the definition of the powers of state courts and arbitration to assess the arbitration agreement. National legislation and practice on these issues are constantly changing, so each analytical material on this topic only captures the current situation. Its formation, as well as the formation of the practice of international

commercial arbitration, has always been influenced by two opposite trends: pro-arbitration, aimed at strengthening the position of arbitration and liberalisation of its use by economic entities, and conservative, whose supporters are in favour of limiting private dispute resolution, which is the international commercial arbitration.[28] The level of legal culture in a given state determines which of the positions is dominant. It is important to note that the basic normative act in the field of international commercial arbitration, the New York Convention, fully takes this dynamic into account, giving the state court the opportunity to recognise and enforce the arbitral decision, even if there are grounds for refusing such recognition and enforcement.

Summarising the above, we can conclude that there is a steady trend according to which state courts do not prevent arbitrations from ruling on the nature of the arbitration agreement, reserving the right to reconsider this issue in the case of arbitration, which will be presented for execution in accordance with the New York Convention. At the stage of application of Art. II of the Convention, state courts, as a rule, interpret all doubts about the arbitration agreement in favour of its validity, preservation of force, and enforceability.

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28 AF Volkov, 'Arbitration courts and their significance in trade turnover' (1999)1 Arbitration Court 38-52.

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Case Note

LEGAL GROUNDS FOR RESTRICTIONS OF HUMAN RIGHTS IN THE EUROPEAN COURT OF HUMAN RIGHTS CASE-LAW

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LEGAL GROUNDS FOR RESTRICTIONS OF HUMAN RIGHTS IN THE EUROPEAN COURT OF HUMAN RIGHTS CASE-LAW

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A***bstract*** *This article is devoted to the study of the legal grounds for restrictions of human rights in the ECtHR's case-law. The study stipulates that the concept of generations of human rights, based on the historical progress of ensuring human rights and fundamental freedoms, is a set of rights that require the proper protection and will constantly shift towards large-scale expansion, taking into account changes in society and the achievements of humanity.*

The study notes that even though at the end of the 20th century, the idea of human rights' division into three generations (civil and political; social, economic and cultural; collective rights) was proposed in the science of international law, nowadays, it is difficult to clearly attribute certain rights to these categories.

The research states that the division of rights into generations is convenient, but it should be noted that the concept of three generations of human rights is based on the historical progress of ensuring human rights and fundamental freedoms. Therefore, the set of rights that require protection will constantly change.

The article highlights a few restrictions on human rights and freedoms, mainly concerning the first and second generations. The study determines that the specifics of restrictions of fundamental human rights are directly related to the difference between absolute and relative rights.

The ECtHR explains that the objectives of human rights restrictions are substantially expanded and introduced in order to: maintain the state and public safety or economic well-being of the country; prevent riots or crimes; protect health or morals; ensure the rights and freedoms of others; protect the national security, territorial integrity; prevent of disclosure of confidential information; maintain the authority and impartiality of judicial authorities.

Keywords: *human rights, constitutional restrictions, fundamental freedoms, European Court of Human Rights, case-law, judicial authorities, European values, economic rights, civil rights, generations of rights*

1 INTRODUCTION

Nowadays, human rights have become one of the main value benchmarks of social development in a democratic society. Human rights have had a great influence on the character of the state, as they have become the key restrictions of its power. Moreover, they contribute to the establishment of democratic interaction between the state authorities and the individual, thereby releasing a person from the will and interests of these authorities. The formation of a legal state would not be possible without the establishment of freedoms and human rights in public consciousness and practice.

The idea of 'human rights has become widespread in recent decades. Various legal schools, scientists, politicians, and lawyers interpret this concept. Some scientists believe that human rights are certain opportunities that are necessary to meet the needs of its existence and development in specific historical conditions,[1] objectively conditioned by the level of development achieved in society, and should be common and equal to all people.[2] According to others, human rights ensure the dignity and human worth of every man, woman, and child. Human rights are universal and inalienable rights to express, act, grow, learn, and live according to one's own ideas.[3]

Since the advent of the idea of human rights, various classifications of them have been proposed. Depending on the chosen criteria, the peculiarities of the human rights vision, and the level of scientific development of this issue, there has been a historical sequence of the development of human rights classification – from a simple division into arbitrarily separated components to proposals for complex systems of interrelated human rights. The classification of fundamental rights is attaining the key practical importance, particularly in the development and creation of constitutions and other laws of any state, since it can contribute to ensuring the completeness and validity of the sequence of such rights in the legislation, as well as the differentiated definition of the legal means of their protection and guarantee.

Obviously, the division of human rights in society should be approached from a historical perspective. After all, the existing catalogue of human rights, which is currently recorded in most international legal documents and constitutions of legal states, was the result of the historical formation of human rights standards. Ukrainian researchers note that initially, human rights were imagined as specific rights of the state, which concerned only its subjects or foreigners.[4] Subsequently, the supporters of natural law proposed the idea that in addition to the rights of the state, there are also certain natural human rights. Later, with the increasing role of positivism in law, human rights began to be explained not only by their natural but also by their positive origins. Therefore, in the history of international relations, the first attempt to distribute human rights was their classification into natural and positive.[5]

1 S Domaradzki, M Khvostova, D Pupovac, 'Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse' (2019) 20 Hum Rights Rev 423-443 < https://doi.org/10.1007/s12142-019-00565-x> (accessed 11 September 2021).

2 P Łuków, 'A Difficult Legacy: Human Dignity as the Founding Value of Human Rights' (2018) 19 Hum Rights Rev 313-329 < https://doi.org/10.1007/s12142-018-0500-z> (accessed 11 September 2021).

3 E Shyshkina, 'Some Aspects of the Legal Nature of Decisions of the European Court of Human Rights' (2005) 4 Law of Ukraine 102-104.

4 S Shevchuk, *The Judicial Protection of Human Rights: The Practice of the European Court of Human Rights in the Context of the Western Legal Tradition* (2nd edn, ammend., cor. Referat 2007).

5 N Fennelly, 'Human Rights and the National Judge: His Constitution; The European Union; The European Convention' (2011) 12 ERA Forum 87 < https://doi.org/10.1007/s12027-011-0195-y> (accessed 11 September 2021).

2 THE GENESIS OF THE CONCEPT OF HUMAN RIGHTS GENERATIONS

At the end of the 20th century, in 1977, the French lawyer Karel Vasak proposed for the first time in the science of international law the idea of dividing human rights into three levels or generations. This idea was highlighted in his scientific work, called 'Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give the Force of Law to the Universal Declaration of Human Rights'.[6]

The fundamental principles of the division of human rights were certain core values – freedom, equality, fraternal relations, etc. All the above-mentioned principles were proclaimed during the Great French Revolution of 1789-1799. In particular, the civil and political rights, which correspond to the first principle of the French Revolution – freedom belonged to the first generation of human rights. Among these rights are the right to a fair trial, the right to freedom of speech, religion, etc. In other words, those rights that were primarily considered as an integral part of a person. The aforementioned rights were reflected at the legislative level for the first time in the Universal Declaration of Human Rights of 1948 (Articles 3-21)[7] and later in the International Covenant on Civil and Political Rights of 1966.[8]

The second generation of human rights covers economic, social, and cultural rights. They correspond to the second principle – equality – formed during the Great French Revolution of 1789-1799. These include the right to work, the right to social protection, the right to property, etc. Along with civil and political rights, this block of rights was originally reflected in the Universal Declaration of Human Rights of 1948 (Articles 22-27) and later in the International Covenant on Economic, Social and Cultural Rights of 1966.[9]

The third generation of rights were the rights of the community or the so-called collective. However, from the very beginning, it was quite difficult to establish what rights belonged to this category. While the rights of the first and second generations were addressed to each person in particular, the solidarity rights were addressed to a group of people, a certain community, etc. For instance, the right to self-determination, development, the environment, etc. The main problem that appeared in regard to the allocation of the third generation of rights was the correlation between human rights and the human rights of peoples. In the absence of a clear definition of such rights, there is still no official regulatory consolidation.

The civil and political rights – the rights of the first generation – were constituted and formulated in the process of many bourgeois revolutions. Later, they found their specification and legalisation in the social and legislative practice of many democracies. These rights primarily include: the right to life, the right to freedom of thought, the right to conscience and religion, the right of every citizen to participate in state affairs, the right to equality before the law, the right to life, the right to freedom and security of the individual, the right to freedom from arbitrary arrest, delay or expulsion, the right to public and in compliance with all the requirements of justice, the consideration of the case by an independent court, etc.[10]

6 V Lenhart, K Savolainen, 'Human Rights Education as a Field of Practice and of Theoretical Reflection' (2002) 48 International Review of Education 145–158 (2002) < https://doi.org/10.1023/A:1020382115902> (accessed 11 September 2021).

7 The Universal Declaration of Human Rights 1948 <https://www.un.org/en/universal-declaration-human-rights/> (accessed 11 September 2021).

8 International Covenant on Civil and Political Rights 1966 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (accessed 11 September 2021).

9 International Covenant on Economic, Social and Cultural Rights 1966 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (accessed 11 September 2021).

10 M Medvedeva, M Vols, M Wieling, 'Using machine learning to predict decisions of the European Court of Human Rights' (2020) 28 Artif Intell Law 237-266<https://doi.org/10.1007/s10506-019-09255-y> (accessed 11 September 2021).

It is worth noting that civil and political rights within the circle of fundamental human rights are often called subjective rights, as indicated in both the foreign and domestic doctrine of international law. To support this circumstance, it is possible to stipulate that, firstly, the fundamental rights are subjective and, secondly, are negative. This means that the state should not interfere in the sphere of the personal freedom of citizens but, on the contrary, create conditions for citizens' participation in political life.

We would like to underline that the first generation of rights is recognised by international and national documents as inalienable and subject to restriction under no circumstances. Very often, these rights are referred to as 'human rights', since the rights of the second and third generations are not so much rights as privileges aimed at the protection of the socially weaker population.[11]

The second generation of human rights constitutes social, economic, and cultural rights. It should be noted that this generation appears as a separate category only at the turn of the 19th and 20th centuries, reflecting the results of the enormous social struggle that took place in the capitalist societies of that time. Mainly the socialists with new liberals were the main 'ideological embodiers' of this generation of rights who played an important role in the genesis of the human rights generations concept. The main idea was the necessity to revise the negative concept of freedom.[12] The new liberalism, assessing the unfavourable situation associated with the sharp polarisation of the bourgeois society, put forward the idea of its innovative restoration. Its main goal was to soften the confrontation between the rich and poor in society through a set of social reforms.

The second generation of human rights covers more positive than negative rights, which require state participation for their implementation. They record only the specific conditions of existence that are designed to ensure the self-reproduction of a person with worthy qualities of being.[13] Social and economic human rights are characterised by two important features. Firstly, they serve as a form of realisation of social justice but not a simple set of specific benefits. Social justice, as the fair application of national wealth and opportunities by society's participants regardless of their social status, is possible under the conditions of significantly different levels of material benefits. It is directly dependent on the poverty or wealth of any society.

Secondly, the dignity of a person, ensured by social rights, is directly related to the general sense of the idea of inalienable human rights. A decent life is an expression of the basic right to self-preservation and property. It also creates a necessary condition for the realisation of human freedom. Antiquity stated the provision that only a person who owns land could be free. Similarly, social rights provide for the real autonomy of the individual and are a kind of social guarantee of human dignity. The content and structure of the rights of a decent life become a clear expression of the degree of true freedom that exists in a democratic society. The rights of a decent life are the conditions of existence that can ensure the productive development of society for an individual. They are followed by the

11 M Picchi, 'Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Some Remarks on the Operative Solutions at the European Level and their Effects on the Member States. The Case of Italy' (2017) 28 Crim Law Forum 749-776 <https://doi.org/10.1007/s10609-017-9306-y> (accessed 11 September 2021).

12 S Benhabib, 'The End of the 1951 Refugee Convention? Dilemmas of Sovereignty, Territoriality, and Human Rights' (2020) 2 Jus Cogens 75-100 <https://doi.org/10.1007/s42439-020-00022-1> (accessed 11 September 2021).

13 V Muraviov, N Mushak, *Judicial Control of Public Power as Legal Instrument for Protection of Human Rights and Fundamental Freedoms in Ukraine. Rule of Law, Human Rights and Judicial Control of Power* (Springer 2017).

recognition of everyone's right to fair application of all the opportunities that create the life of society as a whole.[14]

While international human rights documents emphasise the equal significance of political and civil rights, as well as economic, social, and cultural issues, constitutional law scholars often hesitate to make such an equivalent. Furthermore, there is no clear approach to the definition of social and economic rights. Very often, such rights are not considered universal but are mainly associated with the social status of a person.

In particular, the legal scholar E. Kużelewska believes that social and economic rights should include all the social services and financial support provided by the state to its citizens in accordance with their social status: age and disability pensions, sickness benefits, free healthcare systems, etc.[15]

3 THE CLASSIFICATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS RESTRICTIONS

At the same time, there is another classification of human rights based on the establishment of the content of human rights and the possibility of their restrictions. The theory of constitutional law defines the specifics of restrictions on fundamental rights that are directly linked to the difference between absolute and relative rights. Absolute rights are primarily considered to be natural rights, independent of the state, unconditional and unchanging, which under no circumstances can be infringed upon by the authorities. Such rights include rights enshrined in the constitutions of the European countries, in particular, the right to life, the right to dignity, the right to freedom of conscience, etc.

According to C. Briere, even though constitutional rights and freedoms are endowed with the highest legal force, most of them are not absolute because law may limit their implementation. Such restriction is allowed in the interests of the protection of the health and morality of the population, national security, territorial integrity of the state, and the rights and freedoms of other citizens, as well as for the protection of public order, prevention of crime, and clarification of the truth during the investigation of a criminal case, if it is impossible to obtain information by other means, to prevent disclosure of information obtained confidentially, or to maintain the authority and impartiality of justice.[16]

All other human rights, except the absolute, are called relative. Relative rights include such rights as those that belong to a person in relation to a second obliged person (persons).[17]

The doctrine of constitutional law determines another kind of classification of the restrictions on human rights and freedoms. Thus, the national scientist S Shevchuk believes that the

14 C Brière, 'Conditionality in defining the future cooperation in criminal matters between the United Kingdom and the European Union' (2020) 21 ERA Forum 515-531 <https://doi.org/10.1007/s12027-020-00641-7> (accessed 11 September 2021).

15 E Kużelewska, M Tomaszuk, 'European Human Rights Dimension of the Online Access to Cultural Heritage in Times of the COVID-19 Outbreak' (2020) Int J Semiot Law <https://doi.org/10.1007/s11196-020-09712-x> (accessed 11 September 2021).

16 R Khosla, J Banerjee, D Chou, et al., 'Gender equality and human rights approaches to female genital mutilation: A review of international human rights norms and standards' (2017) 14 Reprod Health 59 <https://doi.org/10.1186/s12978-017-0322-5> (accessed 11 September 2021).

17 RA Edwards, 'Police Powers and Article 5 ECHR: Time for a New Approach to the Interpretation of the Right to Liberty' (2020) 41 Liverpool Law Rev 331-356<https://doi.org/10.1007/s10991-020-09255-y> (accessed 11 September 2021).

ontological essence of the phenomenon, which is a factor of restriction on natural (health of the population) and social rights, which are divided into further categories as social (public order, economic prosperity) and social in a broad sense (national security, territorial integrity, sovereignty of the state, morality of the population). We agree with these views and consider that both the scope and content of human and citizen rights and freedoms can limit them.[18]

For instance, Art. 29 of the Universal Declaration of Human Rights contains a set of permanent restrictions necessary for the existence of society, those that the state can impose 'to meet the fair demands of morality, social order and social welfare'.[19] Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - ECHR) contains a similar concept 'in the interests of state security and territorial integrity'.[20] Such restrictions can be established only by laws and to the legal extent specified by law.

4 RESTRICTIONS OF HUMAN RIGHTS IN THE ECtHR's CASE-LAW

Art. 16 of the ECHR allows for a number of restrictions on human rights and freedoms.[21] Such restrictions can take various forms. However, it should be borne in mind that this article concerns only a certain type of activity (political), a certain category of the population (foreigners), and certain rights and freedoms (freedom of expression, freedom of assembly and association). In addition, certain restrictions on the right to freedom of expression are allowed. This means that this right is not absolute. It is confirmed by para. 2 of Art. 10 of the ECHR. In conformity with this article, the exercise of such freedoms may be subject to such formalities, conditions, restrictions, or sanctions.

If we carefully analyse the specified para. of Art. 10 of the ECHR, three criteria for intervention should be indicated. Firstly, the legality of interventions and, secondly, their democracy – formalities, restrictions, or penalties – must be established by law and are necessary for a democratic society. Secondly, these are exhaustively defined grounds for permissible interference with the exercise of the right under Art. 10 of the ECHR. All these restrictions should be implemented in the interests of national security, territorial integrity, or public safety, to prevent riots or crimes, for the protection of health or morals, to protect the reputation of other people, to prevent the disclosure of confidential information, or to maintain the authority and impartiality of the court.[22]

In regard to the first ECtHR cases concerning the consideration of restrictions to protect the reputation or rights of others, the ECtHR formulated several important principles related to the protection of the reputation of politically exposed persons and different categories of expressed views.[23] Regarding the protection of the reputation of politically exposed persons, the ECtHR formulated an approach – the limits of permissible criticism against a politician are wider than the limits of criticism against a private person. Unlike the latter, a public person inevitably and consciously puts himself in a position in which every word that he or she pronounces and each

18 S Shevchuk, (n 4).

19 The Universal Declaration of Human Rights 1948 <https://www.un.org/en/universal-declaration-human-rights/> (accessed 11 September 2021).

20 Convention for the Protection of Human Rights and Fundamental Freedoms Council of Europe 1950 <https://www.echr.coe.int/documents/convention_eng.pdf> (accessed 11 September 2021).

21 Convention for the Protection of Human Rights and Fundamental Freedoms Council of Europe 1950 <https://www.echr.coe.int/documents/convention_eng.pdf> (accessed 11 September 2021).

22 V Lenhart, K Savolainen, (n 6).

23 D Owen, 'On the Right to Have Nationality Rights: Statelessness, Citizenship and Human Rights' (2018) 65 Neth Int Law Rev 299-317 <https://doi.org/10.1007/s40802-018-0116-7> (accessed 11 September 2021).

action becomes the subject of the most thorough and detailed study by both journalists and the general public. The ECtHR continued to adhere to this position consistently.

In the decision in *Castells v. Spain*, the ECtHR also adopted this approach regarding criticism of the government.[24] At the same time, the ECtHR noted that the limits of permissible criticism against the government are even wider than in relation to a politician. In the decision in the Oberslyk case, the ECtHR further touched upon the problem of public discussion of the privacy of politicians and formulated the following principle: undoubtedly, a politician has the right to protect his or her reputation, including when acting as a private person, but in this case, the need for such protection should be balanced by the interests of free discussion on political topics.[25]

In the interpretation of opinions as views and assessments, the case *Lingens v. Austria* is of primary importance.[26] The essence of the case was that the Austrian Chancellor in a television interview defended the Chairman of the Liberal Party, about whom it had become known that he served in the armed forces. On this occasion, a journalist, Lingens, suggested in two articles that the Chancellor defended this gentleman for political reasons and accused the Chancellor of tactlessness, immorality, and subbing out former Nazis. The Chancellor sued Lingens, accusing him of defamation. In an Austrian court, the journalist was unable to prove the veracity of his judgments, and the claims were satisfied.

In addition, one of the significant rights protected by the ECHR is the right to liberty and security. This right is provided in Art. 5 and clarified by Art. 1 of Protocol No. 4.[27] This right is guaranteed to everyone, that is, to any individual, regardless of citizenship, age, or gender and regardless of whether the person is free or imprisoned. The main goal of Art. 5 of the ECHR is to protect a person from unlawful acts by the state, unlawful arrest, detention, etc. Thus, this article defines a clear framework for the state's actions. In order to minimise the risk of arbitrariness on the part of the authorities, this article provides for a set of rights and guarantees for their protection. In addition, in accordance with the legal positions of the ECtHR, deprivation of liberty must be under independent judicial control and be accompanied by the responsibility of individual officials for their actions.[28]

The concept of freedom and personal immunity is interpreted by the ECtHR. According to the legal positions of the ECtHR, this right applies only to the individual's physical freedom, and therefore it does not protect the spiritual (moral) freedom or other manifestations of freedom. Regarding the differences between the categories of 'freedom' and 'personal immunity', the former Commission noted in one of its decisions that freedom and personal integrity should be perceived as one notion, thus personal immunity is considered in the context of freedom. The deprivation of liberty has two mandatory elements. The objective element involves keeping a person in a confined space for a certain period. The subjective element assumes that a person legally does not consent to such deprivation of liberty.

24 Castells v Spain App no 11798/85 (ECtHR, 23 April 1992) <https://www.hraction.org/wp-content/uploads/castells_v_spain.pdf> (accessed 11 September 2021).

25 D Beyleveld, 'The Principle of Generic Consistency as the Supreme Principle of Human Rights' (2012) 13 Hum Rights Rev 1-18 <https://doi.org/10.1007/s12142-011-0210-2 > (accessed 11 September 2021).

26 Lingens v Austria App no 9815/82 (ECtHR, 08 July 1986) <https://opil.ouplaw.com/view/10.1093/law:ihrl/58echr86.case.1/law-ihrl-58echr86> (accessed 11 September 2021).

27 Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto [1963] <https://www.echr.coe.int/Documents/Library_Collection_P4postP11_ETS046E_ENG.pdf> (accessed 11 September 2021).

28 Convention for the Protection of Human Rights and Fundamental Freedoms Council of Europe 1950 <https://www.echr.coe.int/documents/convention_eng.pdf> (accessed 11 September 2021).

In order to determine the violation of Art. 5 of the ECHR, the ECtHR does not consider itself bound by the legal opinions of national authorities as to whether imprisonment took place. It carries out an autonomous assessment of the circumstances of the case and takes into account the specific situation and such significant factors as the ability to leave the limited territory, the degree of supervision and control over the movement of persons, the degree of isolation and the availability of social contacts. This provision is reflected in the decision *Stork v. Germany* of 16 June 16 2005.[29]

It should also be noted that deprivation of liberty might take various forms – arrest, imprisonment, placement in psychiatric or social institutions, detention in transit zones of airports, interrogation at the police station, detention and search by the police, counteracting mass disorder by the police in order to protect public order, house arrest, etc. At the same time, Art. 5 does not provide protection for less serious forms of interference with personal freedom – in case of taking measures to ensure the implementation of traffic rules, mandatory registration of foreigners or citizens, and different types of control that do not significantly limit the freedom of movement of a person within the territory of residence.[30]

The main difference, in our opinion, between the restriction of freedom of movement, which is serious enough to qualify as imprisonment under para. 1 Art. 51 and the usual restrictions on freedom of movement regulated by Art. 2 of Protocol No. 4 lies in the degree or intensity of manifestation and not in nature or essence. This provision was implemented due to the decision of the ECtHR in the case of *Guzzardi v. Italy* of 6 November 1980.[31]

It is important to understand the essence of the right to liberty and security. This right belongs to the category of relative rights. This is due to the fact that Art. 5(1) of the ECtHR defines six cases in which this right may legitimately be limited. Such cases include: 1) the legal imprisonment of a person after his or her conviction by the competent court; 2) the lawful arrest or detention of a person for failure to comply with the lawful order of the court or to ensure the fulfilment of any duty established by law; 3) the lawful arrest or apprehension of a person made in order to introduce them to a competent judicial authority in the presence of a reasonable suspicion of committing an offence or if it is reasonably deemed necessary to prevent the offence or escape after its fulfilment; 4) apprehension of a minor on the basis of a lawful decision in order to apply supervisory measures of an educational nature or the lawful detention of a minor in order to bring him or her to the competent authority; 5) the lawful detention of persons to prevent the spread of infectious diseases, the lawful detention of mentally ill people, alcoholics, or drug addicts; 6) the lawful arrest or detention of a person in order to prevent him/her from entering the country or the person for whom the deportation or extradition procedure is carried out.[32]

It should be emphasised that the above list is exhaustive. This means that member states do not have the discretionary powers to expand it. However, even in these cases, the ECtHR provides a rather narrow interpretation, emphasising that only this approach meets the goals of this article. This provision was established by the ECtHR in *Khayredinov v. Ukraine* of 14 October 2010, *Lutsenko v. Ukraine* of 3 July 2012, and others. In addition, Art. 1 of

29 *Storck v Germany* App no 61603/00 (ECtHR, 16 June 2005) <https://www.globalhealthrights.org/wp-content/uploads/2013/10/ECtHR-2005-Storck-v-Germany.pdf> (accessed 11 September 2021).

30 K Kovács, 'Parliamentary Democracy by Default: Applying the European Convention on Human Rights to Presidential Elections and Referendums' (2020) 2 Jus Cogens 237-258<https://doi.org/10.1007/s42439-020-00028-9> (accessed 11 September 2021).

31 *Guzzardi v Italy* App no 7367/76 (ECtHR, 6 November 1980) <https://ihrda.uwazi.io/api/files/16123724136607p14ac09sbr.pdf> (accessed 11 September 2021).

32 M Stachowiak-Kudła, 'Academic freedom as a source of rights' violations: A European perspective' (2021) High Educ <https://doi.org/10.1007/s10734-021-00718-3> (accessed 11 September 2021).

Protocol No. 4 emphasises that no one can be deprived of his or her liberty only on the basis of his or her inability to fulfil a contractual obligation.[33]

If we analyse the content of the concept of the right to liberty and personal inviolability, we may define two key types of state responsibilities. They are called the negative and positive. Firstly, the negative duties provide for the abstaining from actions that lead to the violation of Art. 5 of the ECHR. Secondly, the positive responsibilities are aimed at the protection of the freedom of persons and taking measures to prevent violations of this article. In case of interference of state authorities in the freedom and security of persons, it is necessary to know the place of residence of a person, if he or she was taken into custody by public authorities; to provide information about that person's location, and to take effective measures to ensure that no people are at risk. These provisions are enshrined in *Cyprus v. Turke*y of 10 May 2001.[34]

In addition, the case-law of the ECtHR has formed the basic requirements for deprivation of liberty and personal inviolability, in particular with relation to the requirements of legality and legitimacy. For example, in order to meet the requirements of legality, deprivation of liberty must be carried out in accordance with the procedure provided by law. The term 'law' in this case is widely interpreted by the ECtHR as any current mandatory norm of national law. This means that the detention must comply with the material and procedural norms of national law. It is also important that the provisions of national legislation comply with the ECtHR case-law. This decision was made in *Medvedev and others v. France* of 29 March 2010.[35]

In situations of imprisonment, it is especially important to adhere to the general principle of legal certainty. It is very important that the conditions of imprisonment are clearly defined in the domestic legislation and that the law itself is accurate enough and allows a person to reasonably and in certain circumstances anticipate the consequences that may be the result of specific actions. This provision is reflected in *Medvedev and others v. France* as well.[36]

In turn, the requirement of the legality of the deprivation of liberty means the absence of arbitrariness of such deprivation and its compliance with the purpose provided in an exhaustive list under Art. 5 of the ECHR. At the same time, in many decisions, the ECtHR noted that the national legislation that regulates human incarceration should be in line with the ECHR. Otherwise, the imprisonment would be lawful from the standpoint of national law but unlawful from the ECtHR's point of view. In other words, when restrictions are carried out based on the norms of national law contrary to the relevant norms of the ECHR, there will be a violation of Art. 5 of the ECHR.

5 LIMITATIONS OF SOCIAL AND ECONOMIC HUMAN RIGHTS

In addition to the political and civil rights that belong to the first generation of human rights, there are also a number of restrictions in the implementation of economic and social rights that constitute the so-called second generation of human rights. In particular, the right to protection of property is set forth in Art. 1 of Protocol 1 to the ECHR. According to the document, each individual or legal entity has the right to own his or her property peacefully. No one may be deprived of his or her property other than in the interests of society and

33 Protocol 4 (n 28).

34 *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001) <https://www.globalhealthrights.org/wp-content/uploads/2013/02/ECtHR-2001-Cyprus-v-Turkey.pdf> (accessed 11 September 2021).

35 *Medvedev and others v France* App no 3394/03 (ECtHR, 29 March 2010). https://www.hr-dp.org/contents/436> (accessed 11 September 2021).

36 Ibid.

on the terms stipulated by law and general principles of international law. However, the previous provisions in no way limit the state's right to enact laws that it considers necessary to exercise control over the use of property in accordance with the general interests or to ensure the payment of taxes or other fees or fines.[37] Despite the fact that Art. 1 establishes the possibility of a person peacefully owning his or her property, it also has a number of restrictions and features. These features include the protection of their property, the right of any person to unhindered disposal of his or her property, etc.

In general, Art. 1 of Protocol 1 consists of three parts. Part 1 of Art. 1 of Protocol 1 ensures the right to own property peacefully. The interpretation of this provision as a protection of property rights was carried out by the ECtHR in *Marck v. Belgium*, statement no. 6833/74 of 13 July 1979. The ECtHR noted that taking into consideration the right to property, Art. 1 essentially ensures ownership. Part 2 of Art. 1 is the prohibition of deprivation of property that is not in the general public interest and on the terms stipulated by law. This part establishes the grounds and limitations of possible deprivation of property rights. Finally, Part 3 of Art. 1 recognises the right of the state to control the exercise of property rights and impose restrictions on such rights in accordance with the general public interest and payment of taxes or fines.

In accordance with the provisions of the ECHR, the ECtHR considers all issues of interpretation and application of the Convention and its protocols only after all national remedies have been exhausted. In order to consider allegations of violations of Art. 1 of Protocol 1, the ECtHR examined not only cases in which applicants were effectively deprived of property by expropriation and/or nationalisation but also cases in which such deprivation was deemed *de facto*. One such case is *Sporrong and Lönnroth v. Sweden*, statements no. 7151/75, no. 7152/75, decision of 23 September 1982, decision of 18 December 1984 (fair satisfaction).[38]

In this case, the ECtHR concluded that although the actual expropriation did take place, the applicants were not deprived of property. Moreover, all the restrictions imposed on their property by the state, namely the permits issued by the state for expropriation on the Sporrong estate for a period of 23 years and on Ms. Lönnroth's property for a period of eight years, as well as prohibitions on construction for periods of 23 and 12 years, respectively, actually led to the fact that the right of the applicants to property was revoked and could be abolished.[39] According to the ECtHR, all the consequences of the measures arose from the limited ability of the owners dispose of their property. These consequences were caused by restrictions imposed on the right of ownership, which affected the value of this property.[40] The ECtHR found a violation of Art. 1 of Protoccol 1 and awarded fair compensation to applicants in its decision of 18 December 1984.

The same violation took place in *Krivenko v. Ukraine*, application no. 43768/07, court decision of 16 February 2017.[41] Mr. Krivenko appealed to the ECtHR with a statement on the illegal deprivation of land ownership. Having examined all the circumstances, the ECtHR noted that the expropriation of property was carried out by the parliament in the public interest and for a legitimate purpose. The ECtHR noted that the prerequisite for such deprivation is to maintain a balance between the general interest and the requirements for the protection of individual fundamental rights. Taking this into account, the Court

37 V Lenhart, K Savolainen, (n 6).

38 *Sporrong and Lönnroth v Sweden* App no 7151/75, 7152/75 (ECtHR, 23 September 1982, 18 December 1984) <https://blog.uclm.es/cienciaspenales/files/2016/10/21sporrong-proteccion-de-la-propiedad.-titularidad-y-alcance.-privacion-legal-de-la-propiedad.-in.pdf> (accessed 11 September 2021).

39 Ibid.

40 RA Edwards, (n 17).

41 *Krivenko v Ukraine* App no 43768/07, (ECtHR, 16 February 2017) < https://www.bailii.org/indices/eu-cases-0128.html> (accessed 11 September 2021).

indicated that deprivation of property without compensation for its real value is a violation of such balance and imposes an excessive burden on the applicant (see *Rysovskyi v. Ukraine*, statement no. 29979/04, §71, decision of 20 October 2011). In such circumstances, having established that the applicant was the actual owner of the land, the ECtHR considers the existing fact of deprivation in 2006 of the applicant of his land without any compensation or any other type of appropriate compensation sufficient to recognise the applicant as the victim of a disproportionate burden associated with the deprivation of land.[42] The ECtHR unanimously delivered the decision. In conformity with the court decision, Art. 1 of Protocol 1 was violated, and the ECtHR appointed to reimburse the material and moral damages to the amount of 10,000 EUR.

6 CONCLUSION

After analysing the concept of human rights, we concluded that regardless of political, cultural, or religious beliefs, each person is a member of the same world community. Everyone has the right to life, respect for his or her honour, dignity, protection, and support. That is why human rights are endowed with universality and a general character so that a person anywhere in the world has a certain guaranteed range of rights and freedoms. In other words, human rights are a model of guarantees necessary for a decent life in the modern world. They perform an integration function and contribute to the formation of a global humanitarian order.

Despite the fact that at the end of the 20th century, the idea of human rights' division into three generations (civil and political; social, economic, and cultural; collective rights) was proposed in the science of international law, nowadays, it is difficult to clearly attribute certain rights to these categories.

We believe that the classification we gave regarding the restrictions on the rights and freedoms of a person and a citizen is still not sustainable. The classification tends to expand, taking into account the emergence of new restrictions and the transformation of traditional restrictions of fundamental rights in the context of the development of modern democratic society.

The ECtHR is an effective mechanism for protecting violated rights and interests, which is confirmed by the fact of implementation of all decisions rendered by it without exception. The ECtHR case-law regarding the restrictions provides the division of human rights into absolute and relative.

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Case Note

THE PROTECTION OF THE RIGHTS OF NATIONAL MINORITIES AND INDIGENOUS PEOPLES IN UKRAINE: THEORY AND PRACTICE

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The authors contributed jointly to this study and the results; *Yevhenii Tkachenko* is responsible for the source exploration and writing; *Iryna Dakhova and Zoriana Zazuliak* are both responsible for the data collection, analysis, and interpretation; all the co-authors take responsibility for the content of the paper. The content of the note was translated with the participation of third parties under the authors' oversight.

THE PROTECTION OF THE RIGHTS OF NATIONAL MINORITIES AND INDIGENOUS PEOPLES IN UKRAINE: THEORY AND PRACTICE

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Abstract *This note is focused on the problems of ensuring the rights of national minorities and indigenous peoples in Ukraine. These issues are considered in accordance with theoretical approaches in the social sciences, as well as the practice of protecting the rights of national minorities and indigenous peoples in Ukraine. Court decisions on discrimination against the rights of these vulnerable groups are analysed. The research is aimed at the scientific search for ways to improve the legal regulation of national-ethnic relations to ensure the rights of national minorities and groups. In accordance with a comprehensive theoretical and practical approach, an analysis of Ukrainian legislation and case-law on the protection of the rights of national minorities and indigenous people is given. Problems of ensuring the rights of national minorities and indigenous peoples are revealed. Some promising legislative improvements are proposed to eliminate violations and ensure the rights of these groups.*

Keywords*: national-ethnic relations, national minorities, indigenous peoples, citizenship, judicial protection of rights*

1 INTRODUCTION

Having declared itself a democratic and legal state at the constitutional level, Ukraine seeks to create conditions for equal development and full, active participation of all nationalities in the social, economic, political, spiritual, and cultural life of citizens of Ukraine. A democratic state must not only respect the ethnic, linguistic, and religious identity[1] of any person

1 E Clark, D Vovk, 'Legal Reform in Uzbekistan: Prospects for Freedom of Religion or Belief and Covenantal Pluralism (The Review of Faith & International Affairs Volume 18, 2020 - Issue 4: Beyond Tolerance: Exploring Possibilities for Covenantal Pluralism) Pages: 35-48 <https://www.tandfonline.com/doi/abs/10.1080/15570274.2020.1834976> (accessed 10 September 2021)

belonging to a national minority but also create conditions that allow for the expression and preservation of such identity.

Since Ukraine is a multinational country in the process of state formation, it is important for national authorities not only to ensure the rights of the titular nation but also to guarantee the rights of all national groups of Ukraine, which is an important prerequisite for social harmony. At present, the problem of finding a legislative balance between ensuring the need for consolidation and development of the Ukrainian nation, its historical consciousness, traditions, and culture, as well as the development of the ethnic, cultural, linguistic, and religious identity of all indigenous peoples and national minorities of Ukraine is still relevant.

The article is aimed at the scientific search for ways to improve the legal regulation of language relations in the field of education in Ukraine. In accordance with the comprehensive theoretical and practical approaches, the analysis of the language situation and language legislation of Ukraine is carried out.

2 THE LEGAL STATUS OF NATIONAL MINORITIES IN UKRAINE

Our state is a multinational and multilingual country that is at the stage of state formation; thus, it is important for state power not only to consolidate and ensure the rights of the titular nation but also to guarantee the rights of all national minorities in Ukraine. Each state should be a common home for all ethnic, religious, and linguistic minorities living in it so that they will be truly equal to other members of society, and none of them will be in the position of 'second class' citizens. However, the solution to the problem of minorities cannot and should not be the creation of a mono-ethnic country or semi-state for each ethnic group. The state cannot be the 'exclusive property' of any national or linguistic group, neither a majority group nor a minority one. The state's recognition of national minorities gives it certain responsibilities, in particular, the obligation to enshrine in law the rights of national minorities and guarantee them accordingly.

According to the last Ukrainian census of 2001, the largest national minorities of Ukraine include Russians at 8,334.1 thousand people (17.3% of the population), Belarusians at 275.8 thousand people (0.6% of the population), Moldovans at 258.6 thousand (0.5% of the population), Crimean Tatars at 248.2 thousand people (0.5% of the population), Bulgarians at 204.6 thousand people (0.4% of the population), Hungarians at 156.6 thousand people (0.3% of the population), Romanians at 151.0 thousand people (0.3% of the population), Poles at 144.1 thousand people (0.3% of the population), Jews at 103.6 thousand people (0.2% of the population) , Armenians at 99.9 thousand people (0.2% of the population), Greeks at 91.5 thousand people (0.2 population), Tatars at 73.3 thousand people (0.2% of the population), Roma at 47.6 thousand (0.1% of the population), Azerbaijanis at 45.2 thousand people (0.1% of the population), Georgians at 34.2 thousand people (0.1% of the population), Germans at 33.3 thousand people (0, 1% of the population), Gagauz at 31.9 thousand people (0.1% of the population), and others. The smallest ethnic groups are the Karaites (according to the results of the Ukrainian census of 2001, 1,196 Karaites lived in Ukraine) and the Krymchaks (according to the 2001 census, 406 Krymchaks lived in Ukraine)[2].

Legal regulation of the status of national minorities in Ukraine is carried out by the Constitution of Ukraine, the Law of Ukraine 'On National Minorities' of 25 June 1992, as well as the following international documents to which our state is a party: the Framework

2 Ukrainian census of 2001 p. http://2001.ukrcensus.gov.ua/results/general/nationality/ (accessed 10 September 2021)

Convention for the Protection of National Minorities of 1 February 1995 and the European Charter for Regional or Minority Languages of 5 November 1992.

According to Art. 3 of the Law of Ukraine 'On National Minorities' of 25 June 1992, national minorities are groups of citizens of Ukraine who are not Ukrainians by nationality and show a sense of national self-awareness and community among themselves. That is, the definition of 'national minority' by the legislator includes the criterion of citizenship, the criterion of origin, the criterion of cultural characteristics, as well as the subjective criterion – the manifestation of feelings of national self-awareness and community.

The definition of 'national minorities' should be based on a comprehensive approach aimed at comprehensive coverage of the concept of minorities, which includes all types of diversity of ethnic minorities. This is: 1) the quantitative criterion, i.e., ethnic minorities include groups that are smaller in number compared to the rest of the population of the country, i.e., the titular nation; 2) the criterion of non-dominance, i.e., in public and state-power relations, this group does not occupy a dominant position; 3) the criterion of discrimination – this criterion is optional and means that in the state there is a well-founded threat to members of this group, sufficient to consider it possible for them to become or that they have become victims of discriminatory policies or forced assimilation by public authorities; 4) the criterion of citizenship, i.e., national minorities include citizens of this state. In some European countries, including Ukraine, national minorities should also include stateless persons. For example, national minorities should include members of the Roma ethnic group who are stateless and permanently resident in a particular state; 5) the qualitative criterion – this group is characterised by certain cultural characteristics, primarily language, historical origin, and cultural traditions; 6) the subjective criterion, the so-called 'individual attitude (self-identification)', which means the manifestation of feelings of national self-awareness and community with each other.[3]

The legislation of Ukraine recognises the following specific rights for citizens belonging to national minorities: the right to choose and restore nationality; the right to preserve national and ethnic identity by national surname, name, and patronymic; the right to preserve the living environment in places of their historical and actual settlement; the right to the creation of national public organisations, such as national-cultural societies, cultural centres, fellowships, and other organisations; the right to use and study in their native language or to learn their native language in state and municipal educational institutions or through national cultural societies; the right to the development of national cultural traditions; for the use of national symbols; to celebrate national holidays; the right to profess their religion; the right to meet the needs of literature, art, and media; the right to establish national cultural and educational institutions; the right to be elected or appointed on an equal basis to any position; the right to freely establish and maintain contacts with persons of their nationality and their associations outside Ukraine; the right to any activity that does not contradict the law. At the same time, the Constitution of Ukraine does not provide for the right of a separate part of the citizens of Ukraine (including national minorities) to unilateral self-determination, as a result of which the territory of Ukraine as a unitary state will change. The issue of changing the borders of Ukraine must be decided in an all-Ukrainian referendum appointed by the Verkhovna Rada of Ukraine in accordance with Art. 73, para. 2 of part one of Art. 85 of the Basic Law of Ukraine (see CCU Decision of 20 March 2014 no. 3 – rp).

The language rights of national minorities can be singled out: the right to use the language in the sphere of activity of local self-government bodies in places of compact ethnic residence; the right to disseminate information and ideas in the native language; the right to create and use mass media; the right to use the language of their minority freely and unhindered,

3 Ye Tkachenko, *Legal protection of ethnic and linguistic minority rights* (FOP Golembovska OO 2018) 71-72.

privately and publicly, orally and in writing; the right to use one's mother tongue in court; the right to learn and study in their native language.[4]

Ukrainian constitutional law guarantees that the right of citizens belonging to national minorities to study in their mother tongue or to learn their mother tongue in state and municipal educational institutions or through national cultural societies may be exercised through the establishment of appropriate educational institutions in which the language is taught in a national minority or by ensuring the study of the national language as a separate discipline. At the same time, the educational policy on strengthening the state language and its proficiency by all citizens violated these constitutional guarantees of the linguistic rights of national minorities, as the new rules of the educational law seriously reduce the opportunities for persons belonging to national minorities to learn their languages. The analysis of domestic language legislation shows that Ukraine has adopted only a law regulating the use and protection of the state language. At the same time, the procedure in Ukraine is not regulated for the use of national minority languages, the development, use, and protection of which are guaranteed by the state and enshrined in the Constitution of Ukraine. In addition, Ukraine has committed itself to complying with the provisions of such international instruments on the legal status of ethnic and national minorities. That is, at present, in Ukraine, there is an urgent need to develop and adopt a separate law that would establish the procedure for the use of national minority languages in public spheres of public life and guarantee their language rights.[5]

The problems of protection of Roma rights in Ukraine should be discussed separately. According to various data, between 40,000 and 400,000 Roma live in Ukraine. The peculiarity of their situation in Ukraine is a certain social isolation from the local population, low level of education, miserable living conditions, extreme poverty, poor health, a sceptical attitude of the population towards members of the Roma national minorities, lack of representatives in public authorities, violence against Roma, and lack of protection by law enforcement agencies. In addition, a significant number of Roma in Ukraine are generally stateless. All these factors highlight the need for special attention from the state authorities to create conditions for the socialisation and protection of Roma rights in Ukraine.

The need for greater attention on the part of the Ukrainian state to the protection of Roma rights is evidenced by the decisions of the European Court of Human Rights (ECtHR) on the violation of their rights. Thus, the first such decision is the decision of the Court in *Fedorchenko and Lozenko v. Ukraine*, adopted on 20 September 2012. It concerns an attack on a Roma family on 28 October 2001. Their homes were burned down, and four of the family members were killed, including two six-year-old children. The ECtHR found that the violations by the authorities were limited to basic procedural steps. In addition, the ECtHR noted that none of the six suspects (except N.) had been found. Given the widespread acts of violence and discrimination against Roma in Ukraine, the Court did not rule out that the decision to set houses on fire was further reinforced by ethnic hatred. However, there is no evidence that the authorities examined xenophobic motives for the attack. The ECtHR found it unacceptable that in these circumstances, no significant steps had been taken in the course of the investigation, which had lasted for more than 11 years, to identify and convict the perpetrators. Ukraine was ordered to pay the applicant EUR 20,000 in respect of non-pecuniary damage.[6]

4 Ye Tkachenko, *Constitutional and legal regulation of language relations* (FINN 2010).

5 Ye Tkachenko, T Slin'ko, 'Ensuring Person's Language Rights in the Educational Sphere in Ukraine' (Papers of the participants of the International Conference on Economics, Law and Education Research (ELER 2021) Advances in Economics, Business and Management Research, volume 170 p. 99-105 <https://www.atlantis-press.com/proceedings/eler-21/125954391> (accessed 10 September 2021)

6 *Fedorchenko and Lozenko v Ukraine*, Decision no 387/03 (ECtHR, 20 September 2012, App date 10 September 2020) <https://zakon.rada.gov.ua/laws/show/974_933#Text> (accessed 10 September 2021).

There also is the decision of the ECtHR in *Burlya and Others v. Ukraine*, adopted on 6 November 2018. The events took place in September 2002 in the village of Petrivka, Odessa region. The Court concluded that there had been a violation of the right to respect for private and family life, housing, and correspondence (Art. 8 of the European Convention on Human Rights) and the prohibition of discrimination (Art. 14), as well as the prohibition of torture and degrading treatment (Art. 3). According to the ECtHR, the damage caused to the applicants' homes amounted to serious and unjustified interference with the applicants' right to respect for their private and family life and home. The ECtHR has ordered Ukraine to pay 5 million hryvnias in compensation to the victims in the Roma camp in the Odessa region.[7]

In 2021, another decision of the ECtHR was adopted, which established the violation of Roma rights by the state of Ukraine, namely, the decision in *Pastrama v. Ukraine* of 1 April 2021 concerning an attack on a Roma settlement. On 30 May 2012, at about 12:00 noon, police officers in civilian clothes arrived at a Roma tent settlement where 73 Roma lived. Among them was a district police officer whom the Roma knew personally, as he had often visited them before. Police began removing Roma from tents and setting fire to tents. Eventually, the tents burned down completely, with the things, documents, and money that were there. One of the policemen shot a dog belonging to the Roma and fired six shots into the air. The children were crying, and the Roma were running in different directions and shouting. The police told them to go away because it was Euro 2012, and they had an order to remove them all. The precinct officer told them that if they did not leave immediately, they would be 'taken away'. The burning of Rita Pastra's Roma home in Kyiv before Euro 2012 was assessed by the ECtHR as a violation of the right to privacy (Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms).[8]

3 RIGHTS OF NATIONAL MINORITIES AND ISSUES OF CITIZENSHIP

One of the problems with the legal status of national minorities who are the citizens of Ukraine is the inability to legally have both Ukrainian citizenship and citizenship of the state of their ethnic origin. The legislation of Ukraine enshrines the principle of unified citizenship (Art. 4 of the Constitution of Ukraine, Art. 2 of the Law 'On Citizenship of Ukraine' of 18 January 2001). One of the aspects of this principle is due to the unitary nature of the state, namely, that the possibility of the existence of citizenship of administrative-territorial units of Ukraine is excluded. A second is related to the position of the state on multiple citizenships. And in this case, we should not talk about the ban but about the non-recognition of dual citizenship. As noted by Yu. Boyars, the quite legitimate enshrinement in the legislation of many states of the so-called principle of non-recognition of dual citizenship means only non-recognition of the legal consequences of bipatrism.[9] The principle under consideration is formulated by the Ukrainian legislator as follows:

> If a citizen of Ukraine has acquired the citizenship (citizenship) of another state (states), then in legal relations with Ukraine he is recognized only as a citizen of Ukraine. If a foreigner has acquired the citizenship of Ukraine, then in legal relations with Ukraine he is recognized only as a citizen of Ukraine.

This means that the state does not take into account the existence of such a person's citizenship of another state and treats the person only as its own citizen, giving him or her all the rights

7 *Burlya and others v Ukraine* App no 3289/10 (ECtHR, 6 November 2018, final 6 February 2019) <https://zakon.rada.gov.ua/laws/show/974_d65#Text> (accessed 10 September 2021).

8 *Pastrama v Ukraine* App no 54476/14 (ECtHR, 1 April 2021) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-208889%22]> (accessed 10 September 2021).

9 Yu Boyars, *Citizenship issues in international law.* (International Relations 1986) 19.

of a citizen and imposing on him or her all the relevant responsibilities. However, one of the conditions for losing the citizenship of Ukraine is the Law (para. 1, part 1 of Art. 19) concerning the voluntary acquisition of citizenship of another state by a citizen of Ukraine after reaching the age of majority. Thus, a citizen of Ukraine may lose Ukrainian citizenship on the condition of voluntary acquisition of citizenship of another state (states). And despite the practical absence in Ukraine of a mechanism for a person to lose citizenship under the condition of multiple citizenships, such precedents exist.

It is believed that bipatrism promotes the development of international culture and international relations and helps individuals to realise their separate ethnicity and national identity. That is, dual citizenship is seen as a factor in the integration of foreigners living in the state into the state's social and political life,[10] aimed at ensuring the protection of national minorities in the state of their citizenship. Moreover, it is noted that multiple citizenships is more advantageous for bipatrides than for states,[11] as the presence of citizenship of two states can facilitate business, allow visa-free entry to the country of their ethnic origin, provide the right to reside in two states, etc.

Today in European countries, there is a tendency to change the approach to multiple citizenships from its complete denial to official recognition. Thus, according to Part 1 of Art. 3 of the Law of the Republic of Poland 'On Polish Citizenship', a Polish citizen who simultaneously has the citizenship of another country, has the same rights and obligations in relation to the Republic of Poland as a person who has only Polish citizenship (unlike the previous version of the Law, in which dual citizenship was prohibited). Most of Ukraine's neighbours allow multiple citizenships at the legislative level. In particular, in Poland (which previously enshrined the principle of single citizenship) on 15 August 2012, a new law on citizenship came into force, according to which a Polish citizen may have the citizenship of another state. In addition, a voivode (similar to the head of the regional state administration in Ukraine) can recognise a Polish citizen as a person who has been in the country legally for at least three years, has a permanent income and housing, and speaks Polish without requiring renunciation of previous citizenship. Also, one of the most important points of the new law is that the head of state can now grant Polish citizenship to all foreigners regardless of their period of residence in the country, whereas previously, the president granted citizenship only in exceptional cases. These innovations may also affect the status of citizens of Ukraine permanently residing in Poland, who may in fact become bipatrides wishing to obtain citizenship of the country of residence. According to the Polish Administration for Foreigners (UDSC), at the beginning of 2019, 196,000 citizens of Ukraine were issued 196,000 residence permits in Poland. Moreover, the head of state can now grant Polish citizenship under a simplified procedure to foreigners of Polish origin. Thus, according to paragraph 7 of Part 1 of Art. 30 of the Law on Polish Citizenship,[12] a foreigner who has been permanently residing in the territory of the Republic of Poland for at least two years on the basis of a settlement permit obtained in connection with Polish origin may be admitted to Polish citizenship (whereas, as a general rule, residence should be 10 years). At the same time, the absence of a requirement to terminate a person's previous citizenship should be considered a positive of the new version of the law. It is expedient to raise the issue of enshrining similar provisions in the legislation of Ukraine on citizenship, which currently provides for the need to renounce previous citizenship after acquiring Ukrainian citizenship.

10 R Bedriy, *Constitutional and legal bases of citizenship of Ukraine* (Lviv State University of Internal Affairs 2006) 124.

11 K Santayan, 'Problems of dual citizenship in international law and practical ways to eliminate them' (Abstract on PhD dissertation, NAN of Ukraine, Institute of State and Law, 1996) 10.

12 USTAWA z dnia 2 kwietnia 2009 r. o obywatelstwie polskim <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20120000161/T/D20120161L.pdf> (accessed 10 September 2021).

It should also be borne in mind the requirement of Art. 16 of the European Convention on Nationality, which states that a state may not make the acquisition or retention of its nationality a waiver of another nationality or its loss if such renunciation or loss is impossible or reasonably required.

In addition, since 2008, Poland has been issuing the so-called 'Polish card', primarily to citizens of the former Soviet Union. The card can be claimed by a person who has direct ascending kinship with a Pole (father, mother, grandmother, grandfather, or two great-grandparents), or provide a written certificate from a Polish organisation confirming active participation in the Polish language and culture or Polish national minority for at least the last three years. Persons holding a Polish card have the following additional rights: to obtain a long-term national visa free of charge, which entitles them to cross the Polish border multiple times without providing additional documents (invitations, work permits, etc.); to work legally in the territory of Poland without obtaining a special work permit; to engage in entrepreneurial activity in the territory of Poland on the same grounds as Polish citizens; in emergencies, to seek free emergency medical care on the same terms as Polish citizens; to enjoy a free education system on the territory of Poland on the same grounds as Polish citizens. As we can see, although those who have a Polish card do not have the benefits of obtaining Polish citizenship, they receive favourable conditions from the state for the earliest possible integration into Polish society.

The Hungarian Citizenship Act 2011 stipulates that any person who was a Hungarian citizen before 1920 and during 1941-1945 or is a descendant of such a person and speaks Hungarian may apply for Hungarian citizenship, even if such the person permanently resides outside its territory. As of 2019, all residents of Transcarpathia, which from 1939 to 1945 was under Hungarian jurisdiction, had the opportunity to acquire Hungarian citizenship under a simplified procedure and receive scholarships to study in Hungary, social benefits, pensions, and more. As of the beginning of 2019, there were more than 100 thousand citizens of Ukraine in Transcarpathia who received a passport as a resident of Hungary. The 'map' of Transcarpathia has periodically been played out in the political 'games' of Eastern Europe and 'speculations' about the acquisition of a special status in this region for the last 25 years. For example, in late March 2017, during the European People's Party congress in Malta, incumbent Hungarian Prime Minister Viktor Orban invited Ukraine to discuss signing a dual citizenship agreement for those ethnic Hungarians living in Ukraine (the issue remained 'open' and during 2018 because, according to the Ukrainian authorities, it was not so much about the protection of national minorities but about the promotion of 'latent separatism', which threatens the national security of Ukraine).[13]

The Law of the Czech Republic 'On Citizenship' of 1 January 2014 also abolishes the provision on the loss of Czech citizenship in the case of obtaining the citizenship of another state of one's own volition, as well as the requirement to renounce previous citizenship in the case of acquiring Czech citizenship.

The European Convention on Nationality of 6 November 1997 states that each state can decide for itself what consequences the fact of acquiring another citizenship or belonging to another citizenship will have in its domestic law. According to Art. 15 of the Convention, its provisions do not limit the right of each state to establish in its domestic law: a) its nationals who acquire or possess the nationality of another state shall retain or lose their nationality; b) whether the acquisition or retention of his or her nationality is linked to the renunciation or loss of another nationality. Thus, the European Convention on Nationality in Art. 15 (a) gives states parties the right to determine for themselves the admissibility of multiple nationalities.[14]

13 I Sofinska, *Philosophical and legal doctrine of citizenship* (Thesis, Doctor of Sciences, philosophy of law, Lviv Polytechnic National University, 2019).

14 I Dakhova, 'The principle of unified citizenship in the legislation and practice of Ukraine and foreign countries' (2013) 26 State Building and Local Self-Government 95-110.

It can be argued that today in Ukraine, certain steps are being taken to introduce the institution of dual citizenship. Thus, according to the Decree of the President of Ukraine no. 594/2019,[15] persons who are citizens of the Russian Federation and are persecuted due to political convictions in the country of their citizenship and apply for Ukrainian citizenship are exempted from the obligation to terminate foreign citizenship. In this case, individuals are required to submit a declaration of renunciation of foreign citizenship. The same applies to persons who serve in the Armed Forces of Ukraine and who have outstanding merits before Ukraine or whose acquisition of Ukrainian citizenship is in the state interest (who took or are participating in the implementation of measures to ensure national security and defence or repulse and deter armed aggression of the Russian Federation in Donetsk and Luhansk regions) and apply for Ukrainian citizenship.

In addition, the Verkhovna Rada of Ukraine registered Bill no. 2590 dated 12 December 2019, which provides for amendments to the Law of Ukraine 'On Citizenship of Ukraine', including on issues related to the presence of dual citizenship. Thus, the law revises the grounds for loss of citizenship of Ukraine, namely, it excluded from the grounds for loss of citizenship of Ukraine voluntary acquisition of citizenship of another state by an adult citizen of Ukraine.

On the other hand, the existence of dual citizenship can cause many conflicts and difficulties both for persons with two nationalities and for the states of which they are nationals, as each state may require a person to perform his or her duties. For example, a person may be obliged to serve in the military in two states, even at the same time, or to pay taxes to two states, etc., which is natural from the standpoint of international law. Art. 3 of the Convention for the Regulation of Certain Matters Relating to the Conflict of Nationality Laws of 12 April 1930 stipulates that 'a person who holds one or two nationalities may be considered a citizen by any State of which he is a national'. However, it should be noted that today, the issue of military service is regulated by Art. 5 of the Convention on the Reduction of Multiple Nationality and Conscription in Cases of Multiple Nationality, which states that persons possessing the nationality of two or more states are required to perform their military duty in respect of only one of those states, and forms the application of this provision may be established by special agreements between any states.[16]

The criterion for determining the citizenship of bipatrides is domicile. The legal doctrine of most states is based on the concept of the stability of citizenship and the actual connection of a person with the state. Regarding the issue of 'communication with the state', international courts have made a number of decisions, the most famous of which was the decision in the Canevaro case. The latter acquired Italian citizenship by 'blood law' and Peruvian citizenship by 'soil law'. The Permanent Chamber of International Justice ruled in 1912 that Canevaro was a Peruvian citizen and had been appointed consul general in the Netherlands. The court thus established the concept of so-called 'active, or effective, state affiliation'. Criteria for effective citizenship are permanent residence or the most frequent stay; place of work, military or civil service; a place where a person actually enjoys his or her civil and political rights; sometimes, the location of real estate.[17]

In our opinion, citizens in Ukraine should be allowed to have dual ('multiple') citizenship for the following reasons.

15 Issues of simplification of acquisition of Ukrainian citizenship by foreigners and stateless persons who took part in the implementation of measures to ensure national security and defense of Ukraine, and citizens of the Russian Federation who were persecuted for political beliefs: Decree of the President of Ukraine no 594/2019 of 13 August 2019 <https://www.president.gov.ua/documents/5942019-29065> (accessed 10 September 2021).

16 Convention on the Reduction of Multiple Nationality and Conscription in Multiple Nationality, 6 May 1963 <http://uapravo.net/akty/postanowa-main/akt8phnq9g.htm> (accessed 10 September 2021).

17 Yu Boyars (n 8) 19.

First, as we have pointed out in our study, the purpose of enshrining the principle of single citizenship in Art. 4 of the Constitution of Ukraine was primarily to prevent the introduction of so-called regional passports, i.e., citizenship of individual administrative-territorial units, as well as ensuring a single equal treatment by the state to all citizens of Ukraine, regardless of whether they have foreign citizenship. This understanding of the principle of single citizenship is indicated in Art. 2 of the Law of Ukraine 'On Citizenship of Ukraine'. If a citizen of Ukraine has acquired citizenship (citizenship) of another state or states, then in legal relations with Ukraine, he or she is recognised only as a citizen of Ukraine. If a foreigner has acquired the citizenship of Ukraine, then in legal relations with Ukraine, he or she is recognised only as a citizen of Ukraine. The current legislation of Ukraine, although formally prohibiting this, does not in fact limit the possibility of Ukrainian citizens obtaining foreign citizenship. The legislation provides only for the possibility of losing Ukrainian citizenship in the case of voluntary acquisition of foreign citizenship, which is very difficult to apply in practice.

Incidentally, in 1978, the Constitution of the USSR separately enshrined the principle of single citizenship (Part 1 of Ar. 31), but citizens of Ukraine were given the opportunity to have dual citizenship if it was provided by interstate agreements (Part 3 of Art. 31). The draft Constitution of Ukraine of 1992 separately enshrined the principle of unified citizenship (Part 1 of Article 15), and certain provisions prohibited citizens of Ukraine from simultaneously having the citizenship of another state.

At present, a significant number of Ukrainian citizens have foreign citizenship. According to A. Haidutsky, in 2017, more than 100 thousand Ukrainians became citizens of other countries. So, 85,000 received citizenship in Russia, 19,000 in the EU, and 7,000 in the United States. In 2017, Ukrainians in the United States received almost 11% of all citizenships issued to Europeans and 1% among immigrants from around the world.

In the EU, Ukrainians are also gradually rising in the ranking of donor countries for new EU citizens. In 2017, the greatest number of citizenships were granted to Ukrainians, in particular, Germany (18%), Italy (14%), Romania (13%), and Poland (12%). In 13 of the 28 EU member states, Ukrainians are already in the top five in terms of the number of people who have received EU citizenship.[18]

Secondly, the processes of globalisation, the development of trade and economic relations between countries, cross-border cooperation, and intercultural relations between people have significantly strengthened modern migration processes in countries.[19] This has led to fundamental changes in the content of the institution of citizenship, which is primarily manifested in the differences between the borders of the state and the borders of citizenship. And since citizenship characterises not only legal affiliation but also socio-cultural affiliation, i.e., membership of an individual in a particular community, it should be noted that today these two dimensions of citizenship are increasingly divergent. Citizenship, which is characterised as 'membership', ceases to coincide with the territory of the states in which citizens live. This fact is discussed in political theories and philosophies in terms such as 'transnationalism', 'economic citizenship', 'corporate citizenship', 'cultural citizenship', and so on.

That is why the Ukrainian authorities cannot but react to the current migration processes taking place in the world and introduce multiple citizenships, which will significantly improve the legal status of citizens with multiple citizenships. Also, the liberalisation of citizenship policy will allow millions of Ukrainian citizens who, due to various circumstances, left Ukraine and received citizenship from another country but still want to keep in touch with their homeland, to be kept in the national space.

18 V Kravchenko, 'Is bipatride so terrible as it is painted?' <https://dt.ua/internal/ne-takiy-strashniy-bipatrid-yak-yogo-malyuyut-327407_.html> (accessed 10 September 2021).

19 R Sharma, *The rise and fall of countries. Who will win and lose on the world stage* (Our format 2018).

Thirdly, we should agree with the former Deputy Prime Minister for European and Euro-Atlantic Integration D. Kuleba that the state's tolerant attitude to the second citizenship will solve the issue of tens of thousands of Ukrainians having Polish, Hungarian, and Romanian passports, which most received only in order to move peacefully in the EU. By and large, this should remove one of the acute problems in Ukraine's relations with neighbouring countries.[20]

But this rule should not apply to the right of dual citizenship with the Russian Federation as long as it has the status of an aggressor country. Restrictions on positions in public authorities should also be introduced for citizens of Ukraine who have Russian citizenship. This prohibition should also apply to citizens who have foreign citizenship if they apply for positions in public authorities related to state secrets.

Also, the rule of multiple citizenships will allow successful foreign Ukrainians to be involved in work for the benefit of the state as representatives of Ukrainian diasporas in the world.

4 PROBLEMS OF THE LEGAL STATUS OF INDIGENOUS PEOPLES AND SUB-ETHNIC GROUPS

A separate issue that deserves scientific research is the issue of the legal status of indigenous peoples and sub-ethnic groups in Ukraine. Thus, if we turn to the analysis of the legal status of indigenous peoples in foreign countries, we must first consider the legislation of South America. Their peculiarity is that their population includes representatives of indigenous (aboriginal) peoples, but their fate is different: in Bolivia and Guatemala, indigenous peoples make up two-thirds of the total population, in Peru and Ecuador – about 40%, in most other countries – from 5 to 20%, in Brazil – less than 1%. Influenced by Indian movements and international law, the constitutions of these countries have included rules on the rights of these indigenous peoples, including rules on the status of their languages. The Constitution of Panama (1972), the first of the Latin American constitutions, enshrined the provision of regional autonomy for several groups of Indians and recognised their right to study in two languages. Later, Argentina and Peru developed laws at the subregional level, which also recognised the right of Indians to territory, language, and culture.[21] Thus, in Peru, Quechua, Aymara, and other Aboriginal languages are official in the areas where they predominate (Art. 44 of the Constitution). In the constitutions of Colombia, Ecuador, and Venezuela, the languages and dialects of ethnic groups are recognised as official in their territory.

The Constitution of the Federative Republic of Brazil of 1988 declares Portuguese to be the official language of the country (Art. 13). In addition, the constitutional level stipulates that the state undertakes to promote the manifestations of folk Indian, Afro-Brazilian, and other cultures that participate in the national cultural process (Art. 215). A separate chapter (VIII) of the Brazilian Constitution is specifically devoted to the legal status of Indians. It includes two articles. Indians are recognised for their social organisation, customs, languages, beliefs, and traditions, as well as their original rights to the land they traditionally occupy. Indigenous rights legislation also exists in Canada, Australia, Malaysia, and other countries. Separately

20 D Kuleba, 'Ukrainians from the diaspora can get dual citizenship' (Dzerkalo tuzhnya October, 25, 2018) <https://dt.ua/POLITICS/ukrayinci-z-diaspori-mozhut-otrimuvati-podviyne-gromadyanstvo-kuleba-327351_.html> (accessed 10 September 2021).

21 A Abashidze, F Ananidze, *Legal status of minorities and indigenous peoples* (Publishing House of the Russian University of Friendship of Peoples 1997) 154.

in Finland, Sweden,[22] and Norway, rights in the field of culture, language, education of such indigenous peoples as the Sámi are enshrined at the constitutional and legislative level.[23] Thus, according to the Constitution of Finland, the Sami, as the oldest inhabitants of the country (as well as Roma and other groups), have the right to preserve and develop their language and culture. The right of Sami to use their language in public bodies is regulated by law. In 1991, the Sámi Language Act was adopted in Finland, according to which Sámi living in the province of Lapland may use their mother tongue in central government bodies and institutions, in courts, in contacts with ombudsmen when considering issues affecting their interests. According to the Children's Institutions Act (1978), municipalities must ensure that children have the opportunity to attend children's institutions where they speak their mother tongue - Finnish, Swedish, and Sámi.[24] For example, in the Russian Federation, in accordance with the Law 'On Guarantees of the Rights of Indigenous Peoples of the Russian Federation' of 16 April 1999, indigenous peoples are peoples living in the territories of the traditional settlement of their ancestors, preserving the traditional way of life (the number of which in Russia is less 50,000 people), and those who are aware of themselves as independent ethnic communities.[25]

The UN Declaration on the Rights of Indigenous Peoples of 13 September 2007, although it does not contain a definition of 'indigenous peoples', declares their collective and individual rights separately: the right to self-determination; the right to autonomy or self-government in matters relating to their internal and local affairs; the right to preserve and strengthen their distinctive political, legal, economic, social, and cultural institutions; the right to citizenship; the right to life, physical and mental integrity, liberty, and security of person; the right not to be subjected to forced assimilation or destruction of their culture – indigenous peoples may not be forcibly evicted from their lands or territories; the right to observe and revive their cultural traditions and customs; the right to discover, practice, develop, and transmit their spiritual and religious traditions, customs and rites; the right to revive, use, develop, and pass on to future generations their stories, languages, oral folk traditions, philosophies, writing systems, and works of literature; the right to establish and exercise control over their educational systems and educational institutions with their mother tongue in a manner consistent with their cultural tradition of teaching and learning; the right to start their own media in their own language and have access to all types of media that do not belong to indigenous peoples, without any form of discrimination; the right, without any form of discrimination, to improve their economic and social living conditions, including, *inter alia*, areas such as education, employment, vocational training and retraining, housing and a safe environment, health and social security, and others.[26]

The Constitution of Ukraine also mentions the rights of indigenous peoples. Art. 11 establishes that the state promotes the development of the ethnic, cultural, linguistic, and religious identity of all indigenous peoples of Ukraine. But the current legislation does not establish the definition, status, or rights of the indigenous peoples of Ukraine. There is also no consensus among scholars as to which peoples and nationalities should be considered indigenous. Some researchers even argue that Crimean Tatars are not an indigenous people in Crimea.[27] Other authors, on the contrary, propose to refer to the indigenous peoples

22 M Isaev, Basics of constitutional order of Sweden (Moscow State University of International Relations of the Ministry of Foreign Affairs of Russia, Department of Constitutional Rights 2008) 187-189.

23 T Vasilieva, 'Legal status of ethnic minorities in Western Europe' (1992) 8 State and Law 140.

24 I Peshperova, *Rights of national minorities and their protection within the Organization for Security and Co-operation in Europe (OSCE)* (Publishing and Trading House 'Summer Garden' 2001) 79.

25 On guarantees of the rights of indigenous peoples of the Russian Federation <http://duma.consultant.ru/doc.asp?ID=60305> (accessed 10 September 2021).

26 United Nations Declaration on the Rights of Indigenous Peoples 13 September 2007 <http://www.golos.com.ua/article/260484> (accessed 10 September 2021).

27 V Alekseev, V Terekhov, 'Crimean Tatars - aborigines or aliens' (1997) 44 Journalist 4.

as Russians, Belarusians, Hungarians, Slovaks, Moldovans, Crimean Tatars, Karaites, and Krymchaks, as well as those who moved to uninhabited areas of southern Ukraine in the 18th-19th centuries and live on the lands where they have settled, i.e., Bulgarians, Greeks, Albanians, Serbs, and Gagauz.[28] The most common point of view among experts is that the indigenous peoples of Ukraine should include the Crimean Tatar (according to the All-Ukrainian census of 2001, there are about 250 thousand people), Karaite (according to the All-Ukrainian census of 2001, 1,196 Karaites lived in Ukraine) and Krymchaks (according to the 2001 census, 406 Krymchak people lived in Ukraine).

During independence, only in the difficult period of 2014 (March 20) did the Verkhovna Rada of Ukraine adopt Resolution no. 1140-VII 'On the Statement of the Verkhovna Rada of Ukraine on guarantees of the rights of the Crimean Tatar people within the Ukrainian state', which guaranteed the preservation and development of the ethnic, cultural, linguistic, and religious identity of the Crimean Tatar people as an indigenous people. At present (1 July 2021), the Verkhovna Rada of Ukraine, in the second reading, adopted the bill 'On Indigenous Peoples of Ukraine',[29] which establishes the features of the legal status of these subjects of public relations. In particular, the document defines the category of 'indigenous peoples' – an indigenous ethnic community formed in Ukraine, a carrier of original language and culture, a group that has traditional, social, cultural, or representative bodies, or self-aware indigenous people of Ukraine that is an ethnic minority in the composition of its population and does not have its own state formation outside Ukraine (Art. 1 of the draft). The project also identifies the indigenous peoples of the Crimean Peninsula – Crimean Tatars, Karaites, and Krymchaks. Of course, numerous criminal cases against members of the Crimean Tatar people in Crimea show significant violations by the Russian Federation of the fundamental rights and freedoms of Ukrainian citizens, including indigenous peoples living in the Autonomous Republic of Crimea and the city of Sevastopol. However, in our opinion, the law should have singled out not only the indigenous peoples of the Crimean Peninsula but also named which ethnic groups in all of Ukraine belong to indigenous peoples because the project does not understand the criteria and mechanism for defining a particular ethnicity as 'indigenous people of Ukraine'. In addition, such legal categories as 'autochthonous ethnic community' (Art. 1 of the draft), 'forced assimilation or forced integration in any form', 'ethnic identity', and 'original peoples' (Art. 3 of the draft) need additional legal certainty, as did 'Original ethnic communities' (Art. 6 of the draft). The law also guarantees the right to legal protection from any actions aimed at: 1) deprivation of signs of ethnicity and integrity as original peoples or deprivation of cultural values; 2) eviction or forcible transfer from places of compact residence in any form; 3) forced assimilation or forced integration in any form; 4) encouraging or inciting racial, ethnic, or religious hatred against them (Art. 3 of the draft). However, the disadvantage of the project is the lack of a mechanism to ensure these provisions (forms of preventive control, legal liability, etc.). In addition, the document establishes cultural rights (Art. 4 of the draft), educational and linguistic rights (Art. 5 of the draft), information rights (Art. 6 of the draft) of the indigenous peoples of Ukraine, and their right to sustainable development (Art. 7 of the draft), which provides for the activities of their representative bodies to represent their interests in cooperation with state and local authorities. But the analysis of the bill shows that the authors of the documents did not define the legal nature of the representative bodies of indigenous peoples, their competence, and legal characteristics. Thus, in connection with the above, we believe that the legislative regulation of the rights of the indigenous peoples of Ukraine is very important, but the above proposals should be taken into account when preparing the bill.

28 V Petkov, S Petkov, 'Issues of scientific development of the problem of the legal status of national minorities in Ukraine' (1998) 2 Bulletin of the Luhansk Institute of Internal Affairs 56.

29 Draft Law 'On Indigenous Peoples of Ukraine' <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71931> (accessed 10 September 2021).

A specific problem is the determination of the legal status of some sub-ethnic Ukrainian groups.[30] At present, such groups include the Boyks, Hutsuls, Lemkos, and Ruthenians. Thus, the Ruthenians, according to their leaders, do not agree with the definition of them as a sub-ethnic group and demand the status of an official ethnic group. At a congress held in Uzhhorod in 1999, representatives of Ruthenian communities demanded schools with Ruthenian language of instruction and a department of Ruthenian language at Uzhhorod University.[31]

At present, Ruthenians, or Carpatho-Ruthenians, live in the adjacent territory within the borders of four states: Poland, Slovakia, Ukraine, and Romania. The fact that the Ruthenians are a non-state people has raised and still raises the question of sceptics as to whether the Ruthenians really exist or whether they are some imaginary community, a product of intellectuals.[32]

It is known that the first serious scientific research of the Ruthenians, dating from the second half of the 19th century, identified three groups that differ from each other in terms of dialectal speech, material culture, and cultural values. These groups include in the direction from west to east Lemkos, Krainyaks (Kraynyans), Dolynians (Dolyshnyans), and Verkhovyna. Interestingly, with one exception, these terms were not used by representatives of these ethnographic groups as self-identifiers but were given to them by residents of neighbouring territories. The East Slavic population of Carpathian Russia defined their ethnicity as Ruthenians, Rusnaks, or simply people of the Russian faith.

Today, Ruthenians exist in the southern Carpathians and are dispersed in 20 other countries. Therefore, in our opinion, it is legitimate to recognise that there is a Ruthenian people in the world. To confirm this conclusion, we present several arguments.

According to researchers of Ruthenian culture, it is necessary to recognise a separate Ruthenian people who live in the southern Carpathians from those who are dispersed. To support this conclusion, they present the following arguments. Distinctive national features of Ruthenians are: a) historical territory; b) historical memory; c) mass folk culture, traditions, customs, rich folklore, language, clothing, architecture, housing, religious beliefs, life, cuisine, etc.; d) deep legal self-awareness and culture, tolerant attitude to other nationalities; e) national awareness of ethnic community; f) compactness of living (on the southern slopes of the Carpathians; g) state-building traditions: autonomy within Czechoslovakia (1920s–1930s) and Transcarpathian Ukraine (1944–1945) – the lack of statehood outside Ukraine makes Ruthenians, after Ukrainians, an indigenous nation-building people (as well as Crimean Tatars); g) the separate residence of Ruthenians in their enclave historical territory significantly influenced the formation of the Ruthenian mentality; h) intra-ethnic, cultural, spiritual, linguistic and cultural differentiation of Ruthenians.[33]

The Ruthenians are considered by the state authorities as a sub-ethnic group of the Ukrainian nation.

The second president of Ukraine, L. Kuchma, in his work *Ukraine is not Russia*, when mentioning the autonomy in Transcarpathia, points out that there are also those in Ukraine who seek to play the 'Ruthenian card' to make a conflict-prone region a peaceful

30 M Pollack, *To Galicia. About Hasids, Hutsuls, Poles and Ruthenians. An imaginary journey through the vanished world of Eastern Galicia and Bukovina* (Books 2017).

31 Report 'Problems of discrimination and inequality in Ukraine: A review' in a collection of materials 'Protection of the rights of national minorities in Europe' prepared for international seminar 'The future role of the European Charter for Regional or Minority Languages' with the support of the Council of Europe and the State Committee for National Migration (2002) 88.

32 P-R Magochiy, *Encyclopedia of the history and culture of the Carpathian Ruthenians* (V Padyak Publishing House 2010) VII-X.

33 Yvan Mygovych, 'Ruthenians in Ukraine: Status, problems and prospects' (2009) 7 Veche <http://veche.kiev.ua/journal/1391/> (accessed 10 September 2021).

Transcarpathian region. Leaders of a very small part of the population, which tends to identify themselves as Ruthenians, first demanded that Transcarpathia be granted the status of an autonomous republic in 1990. In June 1992, the Transcarpathian Regional Council approved a resolution on the right of the population to 'restore and change their nationality' and asked the Verkhovna Rada of Ukraine to grant the region the status of a special administrative territory with self-government and a free economic zone.

According to Kuchma, although Slovakia does not support the Ruthenian movement, it still brings dissonance to Ukrainian-Slovak relations. The test of autonomy could be conceived as the beginning of a complex series of repercussions. It is possible that the 'Subcarpathian Republican Party' also emerged within the framework of the same plan – only a few people, but with the requirement to 'create an independent, neutral Republic of Subcarpathian Russia like Switzerland'.[34]

5 CONCLUSION

Ukrainian constitutional law guarantees the rights of national minorities and indigenous peoples in Ukraine. At the same time, the decisions in the sphere of ECtHR show that many problems remain in this area. In particular, there is the problem of legislative determination of the legal status of indigenous peoples and sub-ethnic groups. In addition, Ukraine pays special attention to the creation of conditions for socialisation and protection of the rights of some vulnerable ethnic groups (e.g., Roma). Also, the national educational policy on strengthening the state language and its proficiency by all citizens violated the constitutional guarantees of language rights of national minorities, as the new rules of the educational law seriously reduce the opportunities provided to persons belonging to national minorities to learn their languages. The analysis of domestic language legislation shows that Ukraine has adopted only one law regulating the use and protection of the state language. At the same time, the procedure for the use of national minority languages in Ukraine is not regulated, the development, use, and protection of which are guaranteed by the state and enshrined in the Constitution of Ukraine. In addition, another problem with the legal status of national minorities who are the citizens of Ukraine is the inability to legally have both Ukrainian citizenship and citizenship of a state of their ethnic origin. All this points to the need to update legislation on national minorities and indigenous peoples.

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Case Note

E-EVIDENCE AND E-COURT IN THE CONTEXT OF THE COVID-19 PANDEMIC: A STUDY FROM UKRAINE

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Summary: 1. Introduction. – 2. Electronic Evidence in Ukraine. – 3. Using the 'Electronic Court' Subsystem for the Submission of Electronic Evidence. – 4. Access to Justice in the Context of the COVID-19 Pandemic. – 5. Analysis of Judicial Practice Concerning the Examination of Electronic Evidence in the Context of the COVID-19 Pandemic. – 6. Conclusions.

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E-EVIDENCE AND E-COURT IN THE CONTEXT OF THE COVID-19 PANDEMIC: A STUDY FROM UKRAINE

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bstract *The possibility of using information technology in courts can be called a novelty and a progressive innovation in Ukraine. This is is an important factor in improving the efficiency of the openness and transparency of justice and simplifies judicial procedure, shortens court proceedings and procedural time limits, reduces operating costs, and saves time for all the participants of the process while cases are under consideration.*

Due to the rapid spread of COVID-19, rapid judicial reforms have taken place around the world to ensure access to justice in this new environment.

Insufficient levels of information and technical support for the courts in Ukraine, the lack of a single format for data exchange between automated document management systems of various instances and specialisations, imperfect information protection systems, and insufficient regulation of the information legislation remain problematic issues in the functioning of e-justice systems, all of which require further study. Addressing these issues will help justice in Ukraine to reach a new level in the coming years.

Since the e-justice system is aimed at optimising the work of courts through the informatisation of processes, and electronic means of proof are designed to ensure the rights of litigants to use electronic information, the interaction of the notion of electronic evidence with the e-justice system is quite possible. This interaction will increase the efficiency of the judiciary and the quality of justice.

This article examines the development of information technology in the courts of Ukraine, including during the COVID-19 pandemic, analyses court decisions rendered in the context of the pandemic, and reflects on the real state of the judicial system in the adoption and examination of electronic evidence. It should be noted that the procedure for processing, submitting, and examining electronic evidence is currently not fully regulated, so the use of electronic evidence in litigation is not always effective.

All of the above indicates the need to refine the current procedural codes in terms of introducing clear rules for the collection, execution, submission, and examination of electronic evidence.

Keywords: *e-justice, electronic evidence, the Unified Judicial Information and Telecommunication System*

1 INTRODUCTION

The constant development of information technology has an impact on all spheres of public life, and the justice system is no exception. For a long time, practicing lawyers have had many

questions about the possibility and admissibility of using information created by electronic means as evidence in court proceedings.

For years, the judicial system of Ukraine did not consider this type of evidence an appropriate or admissible method of proof. Only after the legislative adoption in 2017 of the institution of electronic evidence as a separate type of evidence was a little progress made in their implementation and research.

However, at present, electronic evidence for the court remains an institution that is not fully regulated, as there is no algorithm at the legislative level for the presentation, examination, and evaluation of electronic evidence.

Today, e-justice is actively used in many countries around the world. Ukraine has also introduced an e-justice system because, in the era of rapid development of information technology, the issue of e-justice is a necessity rather than merely a desire to improve oneself.

2 THE ELECTRONIC EVIDENCE IN UKRAINE

In 2017, during the harmonisation of the legislation on ensuring the proper functioning of the Unified Judicial Information and Telecommunication System, the legislators also enshrined in the procedural codes a new, unified concept of electronic evidence and stated that it is information in an electronic (digital) form containing data on circumstances relevant to the case, in particular, electronic documents (including text documents, graphics, plans, photographs, video and audio recordings, etc.), websites (pages), text, multimedia and voice messages, metadata, databases, and other data in electronic form (Part 1 of Art. 96 of the Code of Commercial Procedure of Ukraine,[1] Part 1 of Art. 100 of the Code of Civil Procedure of Ukraine,[2] and Part 1 of Art. 99 of the Code of Administrative Proceedings of Ukraine[3]).

Art. 5 of the Law of Ukraine 'On Electronic Documents and Electronic Document Circulation' stipulates that the information contained in an electronic document shall include the obligatory details of the document.[4]

The analysis of regulation shows that the key role in the creation of an electronic document is played by the successful verification of a qualified electronic signature (hereinafter referred to as QES) of the person certifying the electronic copy of the document. This procedure allows the court to establish the origin of the document, its authorship, and integrity (the fact of not making any changes to the document after signing).

It should be noted that an electronic certificate of signature on electronic documents certifies not only the signature of the owner of the signature key certificate but also the absence of distortions in electronic documents. Confirmation of the authenticity of an electronic digital signature in an electronic document is a condition for using this document as evidence. However, the current legislation addresses this issue quite controversially.

1 The Code of Commercial Procedure of Ukraine of 6 November 1991 <zakon3.rada.gov.ua/laws/show/1798-12> accessed 5 September 2021.

2 The Code of Civil Procedure of Ukraine of 18 March 2004 <zakon.rada.gov.ua/laws/show/1618-15#Text> accessed 5 September 2021.

3 The Code of Administrative Proceedings of Ukraine of 6 July 2005 <zakon.rada.gov.ua/laws/show/2747-15#Text> accessed 5 September 2021.

4 Law of Ukraine 'On Electronic Documents and Electronic Document Circulation' of 22 May 2003 <zakon0.rada.gov.ua/laws/show/851-15> accessed 5 September 2021.

If a person submits an electronic copy of evidence, the court may demand the original of the evidence provided. In case of failure to provide the original of the required evidence, this evidence is not taken into account by the court if the court has doubts about its authenticity.

After analysing the legal requirements for the institution of electronic evidence, we can identify the following main features:

- an intangible form;
- the availability of obligatory special details;
- the possibility of the existence of the original electronic evidence in several places simultaneously;
- the ability, without loss of the characteristics, to be copied to different devices;
- appropriate technical means must be used for reproduction.

The legislators do not stipulate mandatory features that electronic evidence must have in order for a court to recognise it as proper and admissible evidence and attach it to the case file.

However, in practice, there is a situation when electronic evidence is not examined by the court as direct evidence due to the technical unpreparedness of the court. Courts evaluate as direct evidence either a copy of an electronic document on paper (when the electronic document contains textual or graphic information) or an expert opinion.

Thus, since electronic evidence is in electronic form, it does not require conversion and can be immediately attached to the electronic court file, and evidence that cannot be converted into an electronic form will be stored as an appendix to the case (for example, a hard drive with log files on it, in case of a dispute about the authenticity of the submitted electronic evidence).

Thus, according to the Law of Ukraine 'On Electronic Documents and Electronic Document Circulation,' an electronic document is a document in which the information is recorded in the form of electronic data, including obligatory details of the document. Part 2 of Art. 8 of the aforementioned Law clearly establishes the norm according to which the admissibility of an electronic document as evidence cannot be refuted only on the grounds that it has an electronic form.[5]

Given the above, we can identify the following specific features of electronic documents:

1) they require mandatory use of special obligatory details;
2) they are recorded on special electronic media;
3) the existence of a separate, electronic document circulation recognised by the participants or approved by the competent authorities, and procedure for converting digital data into a traditional mode document;
4) the impossibility of direct perception without the help of special hardware and software;
5) in their content, as a rule, electronic documents are juristic acts.

The largest type of electronic evidence in terms of the amount of information that can be used as evidence is information obtained from global information systems (in particular, the Internet). An example is the use by judges of information from Internet sites in case files, such as information posted on the official websites of public authorities, etc.

Another type of information is text, multimedia, and voice messages. These include, in particular, e-mail correspondence, SMS/MMS messages, etc. Singling out electronic messages as a separate type of electronic evidence is due to the following features:

5 Ibid.

1) as a rule, they do not use digital signatures, which complicates the identification of the sender and recipient;
2) there are significant difficulties in the actual separation of an e-mail as a set of digital information from its carrier for presentation in court;
3) for the most part, there is quite a distance between the place of conversion of digital information into a form suitable for human perception and the place where the carrier that stores such information is situated.

Multimedia evidence is messages with multimedia content (images, sound, etc.) that are sent between mobile devices.

Metadata as a type of information characterises or explains certain information (for example, the author, date, index, subject and keywords, resource type, format, source, language, scope, description, barcode, etc.).

The lack of clear legal regulation at the legislative level of the procedure for obtaining, evaluating, and examining electronic evidence complicates the process of application of the above electronic evidence in court proceedings.

No less problematic is the lack of legal regulation of the interaction between the institution of electronic evidence and the e-justice system.

According to Art. 76 of the Civil Procedure Code of Ukraine and Art. 73 of the Code of Commercial Procedure of Ukraine (hereinafter referred to as 'the Code'), evidence is any data on the basis of which the court establishes the presence or absence of circumstances (facts) justifying the claims and objections of the parties and other circumstances relevant to the case (part one).[6]

The admissibility of evidence is of either a general or special nature. The general nature is that, regardless of the category of cases, the requirement to obtain information from the statutory means of proof in accordance with the procedure for collecting, presenting, and examining evidence should be complied with. The special character consists in the necessity of certain means of proof for certain categories of cases or the prohibition of using some of them to confirm the specific circumstances of a case.

The judgment of the European Court of Human Rights in *Shabelnyk v. Ukraine* (application no. 16404/03) of 19 February 2009 states that, although Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the right to a fair trial, it does not establish any rules on the admissibility of evidence as such, as this is primarily a matter governed by national law[7] (see the judgment in *Schenk v. Switzerland*, 12 July 1998[8] and *Teixeira di Castro v. Portugal*, 9 June 1998[9]).

Evidence on the basis of which it is possible to establish the circumstances that are the subject of proof is appropriate. The court does not consider evidence that does not relate to the subject of proof. The subject of proof is the circumstances that confirm the stated requirements or objections or have other significance for the case and shall be subject to establishment when making a court decision (Art. 76 of the Code).[10]

6 The Civil Procedure Code of Ukraine of 18 March 2004 <zakon.rada.gov.ua/laws/show/1618-15#Text> accessed 5 September 2021; the Code of Commercial Procedure of Ukraine of 6 November 1991 <zakon3.rada.gov.ua/laws/show/1798-12> accessed 5 September 2021.

7 Shabelnyk v Ukraine App no 16404/03 (ECtHR, 19 February 2009) accessed 5 September 2021.

8 Schenk v Switzerland Series A no 140 (ECtHR, 12 July 1998) accessed 5 September 2021.

9 Teixeira di Castro v Portugal App no 44/1997/828/1034 (ECtHR, 9 June 1998) accessed 5 September 2021.

10 The Code of Commercial Procedure of Ukraine of 6 November 1991 <zakon3.rada.gov.ua/laws/

The principle of admissibility of evidence is that the court accepts for consideration only those pieces of evidence that are relevant to the case. The Supreme Court notes in its rulings that the rule of admissibility of evidence is mandatory not only for the court but also for persons who are the subjects of evidence (the parties and third parties) and submit evidence to the court. The question of whether the evidence is admissible is finally decided by the court.[11]

Taking into account the described requirements of the procedural legislation and analysing some provisions of the legislation, in particular, Arts. 73, 77, 91, and 96 of the Code, I found that courts in addressing cases conclude that the parties to the cases have the right to submit electronic evidence in the following forms to substantiate their claims and objections:

1) the original;
2) an electronic copy certified by an electronic digital signature;
3) a paper copy certified in the manner prescribed by law. A paper copy of electronic evidence is not considered written evidence but is one of the forms in which a party has the right to submit electronic evidence (part three of Art. 96 of the CCP of Ukraine). This, in turn, is a means of establishing data, based on which the court establishes the presence or the absence of circumstances (facts) substantiating the claims and objections of the parties to the case and other circumstances that are relevant to the solution of the case (paragraph 1 of part 2 of Art. 73 of the Code).[12]

Thus, the submission of electronic evidence in a paper copy does not in itself make such evidence inadmissible.

3 USING THE 'ELECTRONIC COURT' SUBSYSTEM FOR THE SUBMISSION OF ELECTRONIC EVIDENCE

Currently, the main means of information support for the judicial system of Ukraine is the Automated Court Records System, i.e., a set of separate local databases of courts, bodies, and institutions of the justice system. The existing system only supports the exchange of record-keeping data by exchanging data packages between disparate database management systems installed in courts, bodies, and institutions of the justice system.

It should be noted that such an inefficient principle of building an automated system does not provide sufficient productivity of information interaction between the local systems and the central one, as well as the relevance and reliability of information in the central system.

There is no single software in the courts that automates record keeping. The most common computer programs are 'D-3' (for general courts) and 'Records of a Specialized Court' (for administrative and commercial courts), which are administered by the State Enterprise 'Information Judicial Systems'.

The author of this article works in court and can confirm through personal experience that some courts use other software products, in particular, the Kyiv Court of Appeal uses the Automated Electronic Document Management System 'Appeal' developed by the Kyiv Court of Appeal; the Criminal Court of Cassation of the Supreme Court and the Civil Court

show/1798-12> accessed 5 September 2021.

11 Ruling in case no 922/51/20 [2021] The Supreme Court. United state register of court decisions <https://reyestr.court.gov.ua/Review/94517830> accessed 5 September 2021.

12 The Code of Commercial Procedure of Ukraine of 06 November 1991 <zakon3.rada.gov.ua/laws/show/1798-12> accessed 5 September 2021.

of Cassation of the Supreme Court – the Automated Record Keeping System of a High Specialized Court of Ukraine, developed by the High Specialized Court of Ukraine for Civil and Criminal Cases; the Supreme Court uses the Unified Automated Record Keeping System of the Supreme Court, developed by the Supreme Court.[13]

The use by courts of various software products that are poorly integrated with each other does not ensure the integrity of information on the activities of courts, bodies, and institutions of the justice system, complicates its generalisation, processing, and use.

Currently, the operation of software products for automation of court records ('D-3', 'Records of a Specialized Court') is carried out using outdated software of the database management system Firebird 2.5. As a result, the system does not have high enough performance when performing certain tasks.

To ensure the logging of court sessions by technical means, local software and hardware systems of different types are used in the courts, which have different formats for recording the results of the logging, complicating the interaction with other software. Files containing the results of the logging are stored on optical disks in each separate court; remote access to them is unavailable.

The existing software and software and hardware complexes used in the courts cannot ensure the accomplishment of a number of functional tasks, in particular:

- the available resources of data warehouses, due to their limitations and obsolescence, do not allow for reliable storage and productive processing of procedural and other documents in courts, data exchange between courts and the central system, and storage of court cases and other documents in a centralised electronic archive;
- the existing functionality of the Automated Court Document Management System does not allow for joint work with documents;
- the developed subsystem 'Electronic Court' needs to be finalised and integrated with other subsystems of the Unified Judicial Information and Telecommunication System (UJITS), including taking into account the need to register official e-mail addresses, to delimit access rights to view court documents;
- the existing video conferencing subsystem is limited by the number of specially equipped premises (workplaces) and does not ensure the mobility of video conferencing;
- the software for video broadcasting of court hearings and organising of video conferencing does not use a consolidated centre for processing, storage, and reproduction of multimedia information;
- the organisation of user registration and the distribution of rights of access to the subsystem does not allow it to be used effectively;
- remote access of users of the UJITS to any information stored in electronic form in accordance with differentiated access rights is not possible without the introduction of centralised user account management policies, which are currently absent in the system (being implemented at the application level for each subsystem);
- the existing Unified State Register of Judgments does not support the possibility of differentiated access rights of its users, the possibility of integration with other modules and subsystems, in particular, to ensure interaction with the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Associations, as well as does not provide an appropriate level and quality of depersonalisation of information;
- the interaction of automation systems of courts, bodies, and institutions of the justice system with other automated, information, and telecommunication systems of law enforcement agencies, the Ministry of Justice of Ukraine, and its subordinate bodies

13 Judicial information systems <https://ics.gov.ua/ics/about/acts> accessed 5 September 2021.

and institutions is carried out by using a large number of separate modules instead of a consolidated information node;
- the existing systems of automation of courts, bodies, and institutions of the justice system do not meet the requirements of technical protection of information for information and telecommunication systems where information with restricted access is processed, in particular, personal data, investigation secrecy, medical secrets, adoption secrets, official information, etc., and are vulnerable to information threats.

No less problematic is the lack of legal regulation of the interaction between the institution of electronic evidence and the subsystem 'Electronic Court'.

According to the provisions of the legislation of Ukraine, the court is obliged to ensure procedural equality of the parties. In this case, the court must not allow procedural advantages of one party over the other, must equally require the parties to perform their procedural duties, and apply the same measures of procedural responsibility to the parties.

An integral principle of the right to an adversarial trial is to give each party to the proceedings the opportunity to consider and challenge any evidence or allegations put forward in order to influence the judgment (item 87 of the judgment of the European Court of Human Rights in *Salov v. Ukraine* (Application no. 65518/01 of 6 September 2005)).[14]

It is worth noting that the 'Electronic Court' is only one of the modules of the UJITS through which the parties and the court have to communicate with each other. This should happen through the electronic offices of users and judges. However, at present, the functioning of electronic offices of judges is not provided by the developers, which makes full-fledged work of the 'Electronic Court' virtually impossible.

It is assumed that, with the help of this subsystem, the users will also be able to access information that is accumulated, stored, and processed in other parts (subsystems) of the UJITS, in particular, in the programs of automated systems of court record keeping ('Records of a Specialized Court', D-3, etc.).

It should be noted that any document transmitted through a chain or system of devices undergoes repeated copying (this is due to the functionality of networks), so when evaluating such evidence, the judge must be sure that the file did not change during transporting, through, for example, the subsystem 'Electronic Court'.

For an electronic document, this issue is resolved through the use of a qualified electronic signature. At the beginning of the movement of the document, the person fixes it with his/her QES (thus immobilising its structure), and the recipient, having checked the QES, can be sure that the document really has the form in which it was sent.

As for other types of electronic evidence, it should be noted that they are quite mobile and easy to change. Therefore, for example, an analogue audio recording (on film) should be properly turned into electronic evidence (digitised). However, it should be understood that not every audio or video file automatically becomes electronic evidence; it must be preserved in such a way that the court has no doubts about its integrity.

Given that electronic evidence in the case of receipt through the subsystem 'Electronic Court' does not require translation, as it has an electronic form, the latter will be immediately attached to the materials of the electronic court case.

14 *Salov v Ukraine* App no 65518/01 (ECtHR, 6 September 2005) accessed 5 September 2021.

4 JUSTICE IN THE CONTEXT OF THE COVID-19 PANDEMIC: A STUDY FROM UKRAINE

According to Arts. 3, 8, 9, 21, and 55 of the Constitution of Ukraine,[15] the right to judicial protection and access to justice refers to inalienable human rights and freedoms and at the same time guarantees the protection of all other rights and freedoms recognised and guaranteed in accordance with generally accepted principles and norms of international law.

From the aforementioned constitutional provisions, it follows that justice as such must ensure the effective restoration of rights and meet the requirements of equity.

Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as 'the Convention') guarantees everyone the right to a fair trial, including, but not limited to, the right to consideration of his/her case.[16]

The right to a fair trial covers an extremely wide field of various categories – it concerns both institutional and organisational aspects and the peculiarities of the implementation of particular court procedures. A peculiar mechanism that allows us to understand, interpret, and apply the Convention is the practice of the European Court of Human Rights, which it sets out in its decisions. The scientific literature suggests that the right to the hearing of a case means the right of a person to seek protection in court and the right to have his/her case considered and decided by the court. A prerequisite for the observance of this right is that the person must be able to exercise these rights without any restrictions, obstacles, or complications.

As is well known, in 2019, a new infectious disease caused by the detected SARS-CoV-2 virus – COVID-19 – appeared and spread around the world. Thus, throughout Ukraine, the Cabinet of Ministers of Ukraine, from 12 March 2020 to today, instituted a quarantine related to the prevention of the spread of the acute respiratory disease COVID-19. In a letter of 16 March 2020 no. 9-rs-186/20, the Council of Judges of Ukraine recommended that the courts introduce a special regime for the period of quarantine measures. On 19 March 2020, the Supreme Council (Verkhovna Rada) Committee on Legal Policy adopted an appeal to the citizens of Ukraine on the functioning of the judiciary during the quarantine period, emphasising that the recommendations proposed by the Council of Judges of Ukraine were aimed at ensuring epidemiological safety in courts. The State Judicial Administration of Ukraine in a letter of 20 March 2020 no. 14-5711/20 noted that the institutions of the justice system could be classified as institutions at risk of the COVID-19 infection spread.

The independence and inviolability of judges are guaranteed by Arts. 126 and 129 of the Constitution of Ukraine stipulate that judges shall be independent in the administration of justice and shall be subject only to the law. Art. 3 of the Constitution of Ukraine stipulates that a person, his/her life and health, honour and dignity, inviolability, and security are recognised in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the content and direction of the activities of the state. The establishment and protection of human rights and freedoms is the main duty of the state.[17]

The above gives grounds to believe that the administration of justice by judges in open court hearings with the direct participation of the parties to the proceedings in the context of the emergency and quarantine regime declared by the Cabinet of Ministers of Ukraine to prevent

15 Law of Ukraine 'The Constitution of Ukraine' of 28 June 1996 <zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 5 September 2021.

16 The Convention for the Protection of Human Rights and Fundamental Freedoms, ratified on 2 October 2013 <zakon.rada.gov.ua/laws/show/995_004#Text> accessed 5 September 2021.

17 The Constitution of Ukraine was adopted at the fifth session of the Verkhovna Rada of Ukraine on 28 June 1996 <zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 5 September 2021.

the spread of COVID-19 poses a threat to the life and health of judges, participants in court hearings, court staff. At the same time, in accordance with Art. 8 of the Constitution of Ukraine, the principle of the rule of law is recognised and operates in Ukraine. The Constitution emphasises that the right to a fair trial cannot be restricted in a state of war or emergency.[18]

Thus, the right to a fair trial cannot be restricted either. However, in determining a fair balance between a person's right to a safe environment for life and health and the right to a fair trial, the priority is a person's natural right to life and a safe environment recognised as such by all civilised peoples and nations and being a common heritage of the European legal tradition, a positive obligation, which in Ukraine is imposed on the state. Thus, the establishment and protection of human rights and freedoms is the main duty of the state (Art. 1 of the Constitution of Ukraine).

In view of the above, on 26 March 2020, the High Council of Justice issued recommendations to the courts on access to justice in the context of the pandemic COVID-19, which recommended, in particular, to the courts:

- to continuously conduct proceedings in urgent cases, which are determined by procedural codes and courts (judges), ensuring a balance between the right to a safe environment for judges, parties to cases, and the right of access to justice;
- if possible, to hold court hearings in real-time via the Internet;
- for the duration of the quarantine, to organise a flexible work schedule of judges and court staff;
- to recommend to meetings of judges to resolve the issue of rotation of judges to resolve urgent procedural issues and urgent cases in special types of proceedings;
- to restrict access to court hearings to persons who are not participants in the proceedings;
- to hold court hearings with the use of personal protective equipment by judges and parties;
- to recommend that courts switch over to the processing of electronic correspondence;
- to provide court staff with the opportunity to perform their official duties remotely, if technically possible;
- to inform the participants of court proceedings of the possibility to postpone the consideration of cases in connection with quarantine measures.

It is worth noting that the spread of COVID-19 has given impetus to the introduction of long-awaited remote litigation. And while there have been many reasons not to do so for a decade – technical and mental unpreparedness, identification problems, and so on – these obstacles now appear to be less serious amid threats to the health of nations.

It is important that the judiciaries of democracies while showing openness to these changes, take due care to ensure that trials are public, even if they take place remotely. Due to these changes, e-litigation is rapidly becoming a practice in many countries.

5 ANALYSIS OF JUDICIAL PRACTICE IN THE STUDY OF ELECTRONIC EVIDENCE IN THE CONDITIONS OF THE COVID-19 PANDEMIC

Part 1 of Art. 2 of the Law of Ukraine 'On Access to Judicial Decisions' provides that a court decision shall be pronounced in public, except in cases where the case was heard in closed session. Everyone shall have the right of access to judicial decisions in the manner prescribed

18 Ibid.

by this Law. The provisions of Part 1 of Art. 3 of the above law stipulate that, for access to court decisions of courts of general jurisdiction, the State Judicial Administration of Ukraine shall ensure keeping the Unified State Register of Court Decisions.[19]

After analysing the existing summary of court rulings in the Unified State Register of Court Decisions ruled in the context of the COVID-19 pandemic on the examination and acceptance of electronic evidence, ambiguity was found in the attribution of a certain type of evidence to the electronic category. That is, while courts in Ukraine do accept electronic evidence for consideration, each court, or even each judge, interprets electronic evidence differently.

Thus, in case no. 923/566/19, which was considered by the Supreme Court on 17 March 2021, commercial courts accepted screenshots of e-mail correspondence as appropriate and admissible evidence.[20]

The Supreme Court ruling of 14 May 2020 in case no. 820/10538/15 provides an example of an assessment by a court of a screenshot of an enterprise's specialised software in a dispute with a supervisory authority over tax invoices.[21]

This suggests that courts are increasingly dealing with electronic evidence.

Even though courts accept evidence in electronic form, the attitude of courts toward their assessment is quite meticulous. In particular, courts pay special attention to confirming the authenticity of electronic documents that a party submits as evidence in the case.

Thus, for example, in case no. 910/1162/19, the Supreme Court agreed with the assessment of the courts of previous instances that there was no evidence that copies of the contract, invoice, and e-mails, screenshots of which were available in the case file and had been signed by the authorised person's QES. Such circumstances, in the opinion of courts, make it impossible to identify the sender of the notice, and the content of such a document is not protected from amendments (Supreme Court Order of 16 March 2020).[22]

In case no. 753/10840/19, the Supreme Court agreed with the court of first instance and the court of appeal, where the latter considered screenshots of telephone and tablet messages and Viber printouts provided by a party to the case appropriate and admissible evidence, which was examined by the courts as a whole and which was properly assessed (Supreme Court ruling of 13 July 2020).[23]

The Commercial Court of Odesa Oblast in the decision of 2 December 2020 in case no. 916/2323/20, given the failure of a party in the case to prove the signing of a contract of carriage with a qualified electronic signature, concluded that the contract of carriage of goods by road in international traffic no. 21/02/2020 of 21 February 2020 was not concluded between the parties.

For these reasons, the Commercial Court rejected the plaintiff's application no. LD-038 of 21 February 2020, as evidence of the signing of the latter with a qualified electronic signature by the authorised representative of the plaintiff, was missing in the case file.

19 Law of Ukraine 'On Access to Judicial Decisions' of 22 December 2005 <https://zakon.rada.gov.ua/laws/show/3262-15#Text> accessed 5 September 2021.

20 Ruling in case no 923/566/19 [2021] The Supreme Court. United state register of court decisions <https://reyestr.court.gov.ua/Review/88244923> accessed 5 September 2021.

21 Ruling in case no 820/10538/15 [2020] The Supreme Court. United state register of court decisions <https://reyestr.court.gov.ua/Review/89217590> accessed 5 September 2021.

22 Ruling in case no 910/1162/19 [2020] The Supreme Court. United state register of court decisions <https://reyestr.court.gov.ua/Review/88244984> accessed 5 September 2021.

23 Ruling in case no 753/10840/19 [2020] The Supreme Court. United state register of court decisions <https://reyestr.court.gov.ua/Review/90385050> accessed 5 September 2021.

The Commercial Court also rejected the plaintiff's arguments about the specifics of conducting business activities concerning transportation and concluding contracts with customers by sending them to the counterparty's e-mail, as these arguments do not refute the Court's findings that the plaintiff had an obligation to prove to the court the circumstances relevant to the resolution of the dispute, namely the conclusion of a contract in compliance with current legislation.

In addition, the Commercial Court rejected the arguments of the plaintiff, who in the course of the case emphasised that the fact of providing the defendant with transportation services was confirmed by electronic correspondence, screenshots of correspondence between the director of the company and the driver on Viber, since the said evidence is neither written nor electronic evidence, i.e., it does not belong to the list of means of proof.[24]

In the Supreme Court's ruling of 17 February 2021, in case no. 9901/977/18, the Court noted that the information on a decision taken, posted on the official website of the High Council of Justice, was appropriate and admissible evidence.[25]

Also, the Supreme Court, in its decision of 29 January 2021 in case no. 922/51/20 indicates that if the original electronic evidence is not submitted, and the party or the court questions the conformity of the submitted copy (paper copy) to the original, such evidence is not taken by the court to note. Given that the electronic correspondence attached to the claim had not been sealed with an electronic digital signature, such correspondence was not admissible evidence in the case (as written evidence).

However, in violation of the above procedural law provisions, the local commercial court had not demanded from the plaintiff the original electronic evidence, in connection with which it was premature for the court to disregard the evidence in its paper copy and to conclude that the plaintiff had not proven the circumstances (facts) of the conclusion of a loan agreement.[26]

The Northern Commercial Court of Appeal in the decision of 29 March 2021, in case no. 910/7151/20, rejected the plaintiff's application for demanding from the defendant the originals of electronic evidence because the plaintiff, in accordance with Part 11 of Art. 80 of the Code of Commercial Procedure of Ukraine, did not provide any substantiated confirmation that the evidence provided together with the appeal was unreliable or forged.

In addition, the Court of Appeal noted that the defendant provided paper copies of electronic evidence certified by the defendant in accordance with the requirements of clause 5.27 of National Standard NSU 4163-2003, and therefore, the panel of judges concluded that there were no grounds to demand the plaintiff's original electronic evidence.[27]

In case 911/2498/18 (911/2822/20), the Northern Commercial Court of Appeal, in its decision of 9 March 2021, stated that a bank statement received in the form of an electronic document with the relevant electronic digital signatures of bank officials and its seal (if any) has the same legal force as a bank statement drawn up in paper form.[28]

24 Decision in case no 916/2323/20 [2020] The Commercial Court of Odesa Oblast. United state register of court decisions <https://reyestr.court.gov.ua/Review/93436978> accessed 5 September 2021.

25 Ruling in case no 9901/977/18 [2021] The Supreme Court. United state register of court decisions <https://reyestr.court.gov.ua/Review/95382820> accessed 5 September 2021.

26 Ruling in case no 922/51/20 [2021] The Supreme Court. United state register of court decisions <https://reyestr.court.gov.ua/Review/94517830> accessed 5 September 2021.

27 Ruling in case no 910/7151/20 [2021] The Northern Commercial Court of Appeal. United state register of court decisions <https://reyestr.court.gov.ua/Review/95902020> accessed 5 September 2021.

28 Ruling in case no 911/2498/18 (911/2822/20) [2021] The Northern Commercial Court of Appeal. United state register of court decisions <https://reyestr.court.gov.ua/Review/95467663> accessed 5 September 2021.

The decision of the Commercial Court of Odesa Oblast of 9 November 2020, in case no. 916/1890/20 states that during the trial, the examination of electronic evidence established the circumstances of concluding a contract or an application and of signing acts of providing services by the parties by e-mail. In this case, all the above documents have prints of the seal and signature of the defendant. In this case, the court, by reviewing the electronic evidence in the courtroom, found that on 23 March 2020, from the e-mail address of the plaintiff to the e-mail address of the defendant, scanned copies of the constituent documents of the plaintiff had been sent. On the same day, from the e-mail address of the defendant to the e-mail address of the plaintiff, a sample contract for the provision of services for the carriage of goods by road had been sent with accompanying documents, which had been sealed with the signatures of the director and the seal of the company.[29]

In its decision of 25 March 2020, in case no. 414/317/20, Kreminna Raion Court of Luhansk Oblast concluded that a video disc provided by a subject of authority at the request of the court was electronic evidence, and therefore, the said evidence was proper and admissible. The court examined the video, which completely refuted the plaintiff's allegations about the circumstances of drawing up a report. The video showed that the driver admitted that he had violated traffic rules in an interview with a police officer and tried to put pressure on the inspector using his certificate of membership in a public organisation to avoid responsibility. The video showed that his guilt was obvious.[30]

As for Cherkasy District Administrative Court, it, in the decision of 28 September 2020, in case no. 580/4136/20, noted that to confirm the circumstances of the defendant's rejection of the application of 24 September 2020, a CD-media with an electronic version of the autobiography and a photo of the plaintiff, an electronic media with two files in video format, had been added to the statement of claim. Since the above electronic evidence is not certified by an electronic digital signature of the plaintiff, the court concluded that it does not meet the criteria of admissibility of evidence.[31]

Also, the Putyvl Raion Court of Sumy Oblast, in the decision of 1 October 2020, in case no. 584/991/20, indicates that the court reviewed the contents of a DVD and found that the video did not have a digital signature of both its author and the person authorised to make a copy of the video. Thus, the video provided to the court was not admissible evidence within the meaning of Art. 74 of the Code of Administrative Legal Proceedings of Ukraine.[32]

In the decision of the Kherson City Court of Kherson Oblast of 12 February 2021, in case no. 766/19559/20, the court noted that there are no grounds to claim that a video is an electronic document to which the provisions of the Law of Ukraine 'On Electronic Documents and Electronic Document Circulation' apply. Based on the above, the court concluded that a video recording of a TruCAM device was proper and admissible evidence of an offence by the plaintiff within the meaning of Arts. 73, 74 of the Code of Administrative Legal Proceedings of Ukraine.[33]

The decision of the Seventh Administrative Court of Appeal of 1 February 2021, in case no. 127/19854/20, established that an electronic document – a video from the body camera of

29 Decision in case no 916/1890/20 [2020] The Commercial Court of Odesa Oblast. United state register of court decisions <https://reyestr.court.gov.ua/Review/92886943> accessed 5 September 2021.

30 Decision in case no 414/317/20 [2020] The Kreminna Raion Court of Luhansk Oblast. United state register of court decisions <https://reyestr.court.gov.ua/Review/88440254> accessed 5 September 2021.

31 Decision in case no 580/4136/20 [2020] The Cherkasy District Administrative Court. United state register of court decisions <https://reyestr.court.gov.ua/Review/91845219> accessed 5 September 2021.

32 Decision in case no 584/991/20 [2020] The Putyvl Raion Court of Sumy Oblast. United state register of court decisions <https://reyestr.court.gov.ua/Review/91965468> accessed 5 September 2021.

33 Decision in case no 766/19559/20 [2021] The Kherson City Court of Kherson Oblast. United state register of court decisions <https://reyestr.court.gov.ua/Review/94853426> accessed 5 September 2021.

a patrol police inspector – was a document that, in accordance with Art. 251 of the Code of Ukraine on Administrative Offenses, could contain factual data established by such a document, and therefore was appropriate evidence in the case.[34]

The Commercial Court of Kharkiv Oblast in the decision of 19 May 2020, in case no. 922/49/20, did not accept as proper and admissible electronic evidence a printout of the relevant text messages from the messenger Viber because a printout of electronic correspondence without an EDS cannot be used as evidence in a case since it does not meet the requirements of the Law of Ukraine 'On Electronic Documents and Electronic Document Circulation'. It does not contain an electronic signature, which is a mandatory element of an electronic document and prevents the identification of the sender. The content of such a document is not protected from editing and distortion (a similar legal position was expressed by the Supreme Court in decisions of 28 December 2019 in case no. 922/788/19 and of 24 September 2019 in case no. 922/1151/18).[35]

In the decision of the Commercial Court of Zaporizhzhya Oblast of 2 December 2020, in case no. 908/1639/20, the court did not accept electronic evidence because when submitting screenshots of e-mails on paper, the defendant had not followed the procedure for submitting electronic evidence established by Art. 96 of the Code of Commercial Procedure of Ukraine, namely, he had not submitted either electronic evidence proper or its electronic copy, or a paper copy of an electronic document certified by an electronic digital signature. The court also stated that the defendant had not proved that the e-mail addresses using which the correspondence was carried out belonged to the plaintiff.[36]

The Central Commercial Court of Appeal is of the same opinion: in the decision of 23 October 2020, in case no. 904/5656/19, it noted that, when submitting screenshots of e-mails on paper, the plaintiff had not followed the procedure for submitting electronic evidence established by Art. 96 of the Code of Commercial Procedure of Ukraine, namely, he had not submitted either electronic evidence proper or its electronic copy, or a paper copy of an electronic document certified by an electronic digital signature.[37]

The Commercial Court of Zaporizhzhya Oblast, in the decision of 26 October 2020, in case no. 908/1296/20, taking into account the aforementioned rules of law and the circumstances of the case, given that an electronic digital signature by legal status is equated to a handwritten signature (seal), concluded that paper copies of electronic evidence submitted to the court indicate that the parties, by applying on 2 November 2018 EDSs (seals) of the plaintiff and his client on the document 'Application for Services "Credit Limit on the Current Account of the Natural Person-Entrepreneur "Entrepreneur"', had concluded in writing a loan agreement dated 2 November 2018 no. B/N.[38]

The Supreme Court, in its decision of 16 March 2020, in case no. 910/1162/19, found that the courts of previous instances, having assessed all the evidence in the case file, had concluded that the printouts of electronic correspondence provided by the plaintiff could not be considered electronic documents (copies of electronic documents), as they did not

34 Ruling in case no 127/19854/20 [2021] The Seventh Administrative Court of Appeal. United state register of court decisions <https://reyestr.court.gov.ua/Review/94601364> accessed 5 September 2021.

35 Decision in case no 922/49/20 [2020] The Commercial Court of Kharkiv Oblast. United state register of court decisions <https://reyestr.court.gov.ua/Review/89429009> accessed 5 September 2021.

36 Decision in case no 908/1639/20 [2020] The Commercial Court of Zaporizhzhya Oblast. United state register of court decisions <https://reyestr.court.gov.ua/Review/93532917> accessed 5 September 2021.

37 Ruling in case no 904/5656/19 [2020] The Central Commercial Court of Appeal. United state register of court decisions < https://reyestr.court.gov.ua/Review/92383245> accessed 5 September 2021.

38 Decision in case no 908/1296/20 [2020] The Commercial Court of Zaporizhzhya Oblast. United state register of court decisions <https://reyestr.court.gov.ua/Review/92526133> accessed 5 September 2021.

meet the requirements of Arts. 5 and 7 of the Law of Ukraine 'On Electronic Documents and Electronic Document Circulation' and were not appropriate evidence in the case. In this case, the courts found no evidence that the copies of the contract and the invoice and the e-mails, screenshots of which were available in the case file, had been created in the manner prescribed by the Law of Ukraine 'On Electronic Documents and Electronic Document Circulation' and that they had been signed by the electronic digital signature of an authorised person (with the ability to identify the signatories of the contract), which is a mandatory element of an electronic document. Such circumstances make it impossible to identify the sender of the message, and the content of such a document is not protected from making changes and distortions. Therefore, since the contract of 10 September 2018 no. 10/09/18 did not have the features of an electronic document and was not signed by electronic digital signatures of the parties, the courts of previous instances came to a reasonable conclusion, with which the Supreme Court agreed, that such a transaction could enter into force only after its physical signing by the parties and affixing seals in paper form.[39]

After analysing the summary of court rulings in Ukraine in the context of the COVID-19 pandemic, it was found that the courts pay attention to the authenticity of the person who is the author of such documents and is a party to the case.

It should be noted that a separate category of electronic evidence is those items that can be permanently removed. For example, a post on Facebook can be deleted by the author at any time, and messages on Messenger, Telegram, Viber, or WhatsApp can be deleted by one of the interlocutors, which will result in their deletion for all chat participants. In this case, recovering deleted messages will be impossible or extremely difficult. For example, the messenger Telegram permanently deletes both the content of messages and the traces of their sending; WhatsApp deletes only the content, but also permanently. A similar technology is used by Viber, and the technical support of the service can provide information only about the fact of sending messages or making calls with the date and time, but not their content.

In addition, such a service will be provided only after the account owner verification procedure.

Since the Law stipulates that in case of doubt on the part of another party to the case or the court about the authenticity of electronic evidence, the court must demand the original evidence and, in its absence, refuse to accept the evidence, the removal of messages as originals will mean their complete destruction as evidence. For these reasons, courts often, at the request of one of the parties, take steps to provide such evidence by viewing them in court using interested parties' portable devices (for example, viewing evidence by the court via an Internet link; viewing user posts on Facebook and LinkedIn; or viewing messages in Viber Messenger).

To avoid any doubt on the part of the court of originality, to prevent interference with the content of electronic documents, and to protect electronic files from unwanted changes, one needs to use EDS, which will act as an additional guarantee of personalisation of the author of an electronic document.

In resolving a dispute, the court must thoroughly, fully, and directly examine the evidence presented. The judge, in the process of evaluating the evidence, including an electronic one, carries out mental activity, which determines the relevance and admissibility of the evidence, its reliability, sufficiency, and interconnection in general. This activity is carried out in accordance with the laws of logic and in the conditions established by legal norms.

39 Ruling in case no 910/1162/19 [2020] The Supreme Court. United state register of court decisions <https://reyestr.court.gov.ua/Review/88244984> accessed 5 September 2021.

In the third part of Art. 2 of the Code, one of the main principles of commercial litigation is the principle of adversarial proceedings, the essence of which is explained in Art. 13 of this Code. In accordance with parts three and four of Art. 13 of the Code, each party must prove the circumstances that are relevant to the case and to which it refers as the basis of its claims or objections, except as provided by law; each party shall bear the risk of consequences related to the commission or non-commission of procedural actions.[40]

The Supreme Court has repeatedly stressed the need to apply the categories of standards of evidence and noted that the adversarial principle ensures the completeness of the investigation of the circumstances of a case. In particular, this principle provides for the burden of proof to be placed on the parties.

At the same time, this principle does not imply the obligation of the court to consider a circumstance alleged by a party as proven and established. Such a circumstance must be proved in such a way as to satisfy, as a rule, the standard of precedence of more compelling evidence, i.e., when the conclusion of the existence of an alleged circumstance in the light of the evidence submitted appears more plausible than the opposite (the Supreme Court rulings of 2 October 2018 in case no. 910/18036/17, of 23 October 2019 in case no. 917/1307/18, of 18 November 2019 in case no. 902/761/18, of 4 December 2019 in case no. 917/2101/17).

A similar standard of proof was expressed by the Grand Chamber of the Supreme Court in its decision of 18 March 2020 in case no. 129/1033/13-ts (proceedings no. 14-400tss19).

The implementation of the principle of adversarial proceedings in a process and proving before the court the validity of one's claims is a constitutional guarantee provided for in Art. 129 of the Constitution of Ukraine.

The fairness of a trial must be realised, including in the administration of justice by the court, without a formal approach to the consideration of each particular case.

Adherence to the principle of a fair trial is extremely important in resolving court cases, as its implementation ensures that a party, regardless of its level of professional training and understanding of certain requirements of civil proceedings, is able to protect his/her interests.

In addition, the Supreme Court emphasises that on 17 October 2019, the Law of Ukraine of 20 September 2019 no. 132-IX 'On Amendments to Certain Legislative Acts of Ukraine Concerning the Promotion of Investment Activity in Ukraine' entered into force. The Law, in particular, amended the Code of Commercial Procedure of Ukraine and changed the title of Art. 79 of the Code of Commercial Procedure of Ukraine from 'Sufficiency of Evidence' to a new one – 'Probability of Evidence' – and set it out in a new wording with the actual introduction of the standard of proof 'probability of evidence' in the commercial process. The standard of proof, 'probability of evidence', as opposed to 'sufficiency of evidence', emphasises the need for the court to compare the evidence provided by the plaintiff and the defendant.

The difficulties that currently exist in the examination of electronic evidence due to the specificity of individual acts of judicial examination give us reason to believe that the evaluation of evidence will be carried out for a long time by the inner conviction of the judge. This is confirmed by the conducted analysis of court decisions on different requirements and interpretations by courts of the same type of evidence.

In addition, the study of the summary of court rulings of Ukraine in the context of the COVID-19 pandemic did not reveal any electronic evidence received by the court by e-mail or through the electronic office of the subsystem 'Electronic Court'. In our opinion,

40 Ibid.

this is because the subsystem 'Electronic court' currently operates in a test mode, and the participants in the process do not have all the opportunities provided by this system to exercise their rights to submit electronic evidence in electronic form.

6 CONCLUSIONS

In court proceedings, the necessary conditions for the correct assessment of evidence by the court are establishing the connection of evidence with the circumstances of the case, submitting evidence, and collecting and seizing evidence.

To use electronic data as evidence in court, it must be obtained in accordance with the procedural rules of evidence collection. However, procedural codes do not contain procedural rules for the collection and seizure of electronic evidence, such that the latter could be declared admissible and used as evidence. The lack of legal regulation on the collection, seizure, and submission of electronic evidence should not be a barrier to the protection of legal rights and legally protected interests of citizens and businesses. On the contrary, this regulation should correspond to the relations that it is designed to regulate.

Currently, the legal practice for deciding which electronic evidence, in what form, and on what media are admissible means of proof is ambiguous. The legislators have not specified how to distinguish genuine electronic evidence from forgery. The presence of an electronic signature on electronic evidence is provided for in the procedural codes only if the document is submitted as an electronic copy. At the same time, the relevant law states that an EDS is mandatory on the original electronic document. Due to this, there are different applications of the same rules of law.

It should be noted that the legislators have not defined the procedure for certifying paper copies of electronic evidence. In addition, there are no criteria for which electronic evidence is the original and which one is a copy (this is especially important for electronic evidence such as websites, multimedia, etc.).

Another issue is that, by the time the court considers the case, such information can easily be deleted, which significantly reduces the chances of proving its existence. The information may also be changed by the author, custodian, or user.

The legislators have not defined the criteria for which electronic evidence is the original and which one is a copy because the originals of such evidence, as well as copies, will often be placed on external devices such as memory cards, disks, floppy disks, etc. There are some difficulties in proving the date and time of creation of the original electronic evidence. As the original electronic evidence is the original source, and this is what differentiates it from a copy that is created later, it must contain the date and time of its creation.

The legislators also need to make it clear that the originals of electronic evidence are seized only in exceptional cases. It is equally important to provide a detailed procedure and form of attachment, registration, and storage of evidence in the case file with the definition of the range of responsible persons.

Another significant problem that needs to be addressed by the legislators is the lack of a unified form of digital evidence and proper technical support. When examining electronic evidence, judges sometimes face the problem of not being able to view certain files during a trial due to lack of technical means, or when the files have a format that cannot be reproduced without having special keys or involving a specialist, which, in turn, delays the proceedings.

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ANNOUNCEMENT NOTE

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Announcement Note

ABOUT THE JOINT UKRAINIAN-LITHUANIAN R&D PROJECT 'STRENGTHENING OF ALTERNATIVE DISPUTE RESOLUTION IN LITHUANIA AND UKRAINE: FINDING THE CROSS-BORDER SOLUTION' AND ITS RESULTS FOR THE PERIOD OF 2020-2021

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ABSTRACT

The Joint Ukrainian-Lithuanian R&D Project 'Strengthening of Alternative Dispute Resolution in Lithuania and Ukraine: Finding the Cross-Border Solution' was undertaken during the period of 2020-2021 by teams of scholars from the Taras Shevchenko National University of Kyiv and Vilnius University. The main aim, process, and results (achievements) are discussed in this note.

Keywords: *scholar projects, legal research, alternative dispute resolution, Lithuania, Ukraine*

1 INTRODUCTION AND BACKGROUND

Lithuania and Ukraine have a large amount of history in common, and the population from both states are close in their traditions and views on various issues. Today, Ukrainian society is faced with a new vision of rule of law and interpersonal relationships due to the ongoing integration into the EU, and the state is becoming a genuinely European area of justice. Comprehensive approximation to the EU's idea of justice requires the separation of judicial

and extra-judicial jurisdiction over dispute resolution and comprehensive support for the development of out-of-court dispute resolution. In such a situation, Ukraine needs models of cases and best practices that it can adopt and adapt, and Lithuania may provide some examples of alternative dispute resolution (ADR).

The Ukrainian society's low level of trust in the judicial system as a mechanism for resolving legal disputes is confirmed by sociological research (less than 20% of the population trust the courts[1]). This distrust is the basis for the introduction of ADR in Ukraine. The motivation for developing ADR in Ukraine was its wide acceptance by European society as an efficient way of resolving disputes. With this in mind, it seemed relevant to conduct a comprehensive interdisciplinary dialogue and debate to find the most effective models for both internal disputes and cross-border disputes.

The background and rationale of the proposal for the project are the Association Agreement between Ukraine and the EU of 2014 and the establishment of the DCFTA. Based on this agreement, the migration processes between the EU and Ukraine are increasing, as are the number of social relations between various traders, public organisations, state institutions, and individuals. This, in turn, increases the number of potential conflicts. This necessitates a truly effective implementation of the right to legal protection for citizens of Ukraine and the EU member states, as well as an increased level of trust in the judicial systems between them.

The participation of the two best institutions of higher education – Taras Shevchenko National University and Vilnius University – in this project allowed it to provide large-scale support to the ADR development program in Ukraine and in Lithuania as well.

In light of this goal, among the proposals of this project were the following: 1) gathering information on schemes accumulated by the EU in the field of ADR, in particular, the Lithuanian experience, which is one the best, and worth implementing; 2) the exchange of Ukrainian and Lithuanian practices, especially concerning relevant optimal models for resolving cross-border disputes that arise due to social relations within the DCFTA, as judicial protection of the rights of their participants will be complicated significantly; 3) building a basis of knowledge within the proposed project that supports active dialogue between he scholarly community, higher education centres, young researchers, and practitioners from Ukraine and Lithuania in order to exchange best practices and share knowledge with the wide-scale audience, civil servants, and policy-makers.

The objectives of the project were: 1) to establish an effective partnership among the leading higher educational centres of Ukraine and Lithuania in the field of ADR implementation and development; 2) to collect, analyse, summarise, and prepare materials on the best Ukrainian and Lithuanian practices for preserving, disseminating, and discussing this knowledge; 3) to promote the rational application of the European experience of ADR in Ukraine and generate an acquaintance with the most effective models for certain categories of disputes for a wider scale of interested entities; 4) to promote innovation in research-based teaching, support the modernisation, accessibility, and internationalisation of ADR experience relevant to students and their academic and professional lives and enhance their civic skills; 5) to discuss widely effective European models of ADR that are applicable to Ukraine with the representatives of key stakeholders for the promotion, communication, dissemination, and publication of the project outcomes.

The teams from the Ukrainian and Lithuanian universities consisted of leading scholars from both states in the areas of civil justice and ADR. The co-heads of this project were Professor

1 See M Stefanchuk, O Hladun, R Stefanchuk, 'Establishing Trust in the Court in Ukraine as a Strategic Task for Judicial Reform' 2021 3 (11) Access to Justice in Eastern Europe 101-116. DOI: 10.33327/AJEE-18-4.3-n000073

Iryna Izarova from the Law School of Taras Shevchenko National University and Professor Vytautas Nekrošius from Vilnius University. Among the Ukrainian team members were Yurii Prytyka, Dr. of Science in Law, professor, head of the Civil Procedure Department, Oleh Zaiarnyi, Dr. of Science in Law, associate professor of the Department of Intellectual Property law, and Olena Terekh, Cand. of Science in Law, associate professor of the Civil Procedure Department. Among the Lithuanian team members were Dr Vigita Vėbraitė and Dr Jurgita Paužaite-Kulvinskienė, professors of the Vilnius University Faculty of Law, and Miglė Žukauskaitė, PhD candidate of Vilnius University Faculty of Law (who defended her thesis during the period of this project).

2 PROCESS AND CHALLENGES

The beginning of this project occurred at the start of the COVID-19 pandemic, and this became the most challenging aspect of implementing this project.

The project plan included study visits, covered by the budget, to facilitate study and strengthen the relations between the team members, stimulate discussion, and disseminate the results. Nevertheless, during the first year of this project, these visits could not be carried out due to the pandemic.

The only one study visit of the Ukrainian team to Lithuania was implemented at the end of the second year of this project. Yet even this single visit helped the team member to share the best ADR practices from Lithuania, thoroughly discuss their experience, and suggest future development among team members.

Regardless of these challenges, students and teachers interested in ADR were able to join this discussion through a seminar, which was organised on Zoom at the end of the first year of the project. More than 30 persons from both states were engaged in this seminar, 12 presentations were given, and the collection of papers was published in Ukraine for the wide dissemination of the project results.[2]

The final conference was held in Lithuania at the end of the second year of this project, with substantial participation from the representatives of the judiciary, students, and academics from both states.

During the Ukrainian team's visit to Lithuania, meetings were organised with the representatives of the Lithuanian Supreme Administrative Court, with the enforcement officer Donatas Kisielius, with the representatives of Vilnius Commercial Court of Arbitration (the chairman of this arbitration court is Professor Nekrošius, and the secretary is Vitalija Baranovienė). The discussion allowed all the participants to look deeply into the practical issues, to exchange opinions, and to look for the best solutions for the ADR methods together.

Lithuanian team members gave two lectures for the Ukrainian representatives of students and academics: 'Arbitrary Development in Lithuania' by Professor Vytautas Nekrošius and 'Novels of the Service of Documents and Taking of Evidence in the EU Civil Procedure' by Dr Vigita Vėbraitė. These helped to share new experiences in arbitrary development and shed light on the EU tools of inter-state cooperation in judicial and extra-judicial matters.

Project team members announced the results of this project at their own project events and more broadly. We should underline the success of the participation in and sharing of the

2 Collection of papers of the international webinar 'Sharing Lithuanian best practice of alternative dispute resolution in Ukraine', Iryna Izarova and Vytautas Nekrošius (eds) (VD Dakor 2020) (In Ukrainian).

results of this project at the International Congress of Civil Procedural Law, 'The Challenges of Global and Digital Sustainable Development", hosted by Universidade Portucalense and its Research Center – Instituto Jurídico Portucalense and IJP IPLeiria, in collaboration with the University of Vigo, the University of Malaga, the University of Salamanca, the University of Granada, and the Federal University of Rio de Janeiro, held 20-21 May 2021. Dr Olena Terekh and Dr Miglė Žukauskaitė gave a presentation about ADR experience in labour cases in Ukraine and in Lithuania.

Despite the limitations imposed by the pandemic, the project outputs benefited the target groups, a process that was aided by the fact that the lead applicant is a representative of civil society in Ukraine and in Lithuania. The outcomes are the result of deep engagement from the universities from Ukraine and Lithuania, which will bring further stable and fruitful cooperation.

3 FINAL RESULTS, RECOMMENDATIONS, AND FUTURE PERSPECTIVES

Engagement in joint research helped to strengthen relations and facilitated cooperation between both states.

The dissemination of the project results was done in a few ways. Throughout the project, a Facebook page was maintained that included all the information. This helped engage a broad audience interested in the project results and discussion. Publications of the project results are fully open access, including the collection of papers from the seminar[3] and the articles.[4] The final studies were published in a collection of articles in Ukrainian at the end of the second year of this project.[5]

The following main outputs were achieved during the implementation of this project: 1) an effective international EU-Lithuania Project on ADR development; 2) the selection of the most effective models of ADR for resolving disputes that arise at the national (Ukraine or Lithuania), cross-border (Ukraine and Lithuania) and pan-European (Ukraine and EU Member States) levels; 3) deepening of knowledge about effective models of Lithuanian ADR and their applicability in Ukraine.

As another outcome of the project, we may highlight creating a real discussion and sharing ADR with the use of modern information and communication technologies, which will ensure the efficient collection and dissemination of information on ADRs in Ukraine and in the EU, as well as quick and easy access to required ADR information. This will allow others to make substantiated proposals on the interaction and integration of the ADR system of Ukraine and the EU.

The following impacts were achieved: 1) raising awareness about the ADR of the target audience (number of beneficiaries involved in the network communication and dissemination

3 Collection of papers of the international webinar 'Sharing Lithuanian best practice of alternative dispute resolution in Ukraine', Iryna Izarova and Vytautas Nekrošius (eds) (VD Dakor 2020) (In Ukrainian).

4 Iryna Izarova, Vytautas Nekrošius, Vigita Vėbraitė, Yurii Prytyka 'Legal, Social and Cultural Prerequisites for the Development of ADR Forms in Lithuania and Ukraine' (2020) 116 Teise (Law) 8-23. https://doi.org/10.15388/Teise.2020.116.1; O Terekh Alternative Resolution of Labor Disputes: Practice of Ukraine and the EU in Bulletin of Taras Shevchenko National University of Kyiv . Legal Studies, №2 (113), 2020, Pp. 61-66. https:doi.org/10.17721/1728-2195/2020/2.113-12

5 *Access to Justice Within Sustainable Development: on the occasion of 30 years of Ukraine' Independence*, Yurii Prytyka and Iryna Izarova (eds) (VD Dakor 2021) (In Ukrainian). See part 3 *Vytautas Nekrošius, Vebraite Vigita*, Modern Civil Procedure of the Lithuania Evolution, part 4 *Terekh Olena, Migle Zukauskaite-Tatore*, Alternative Resolution of Labor Disputes in Ukraine and Lithuania.

activities); 2) the development of tolerance, the increase of self-regulation of subjects of interaction, the reduction of social tension, and intensity of social and interpersonal conflicts (according to the results of sociological research); 3) increasing the mutual trust in Ukrainian and member states rights protection as an added value of the development of the network at an international level.

The project helped to enhance the visibility of scientific resources and academic work in the field of ADR development through a variety of activities (lectures, seminars, conferences, information campaigns, etc.), publications (in scientific open access journals, on the websites of the both of the universities, and in social networks, such as on the Facebook page of the project), and public debates at the conference (with the participation of the international scholarly community and practitioners).

We should say something about results and conclusions, proposals, for instance:

- Researchers concluded that ADR methods in both countries have much in common and many similarities can be traditionally found.
- Courts of arbitration have even more cases in Ukraine in comparison with Lithuania.
- Mediation must be advertised more in both countries and online dispute resolution methods can be included and developed during mediation services;
- Electronic systems for ADR are much more developed in Lithuania and Ukraine can take example how to develop such systems.

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