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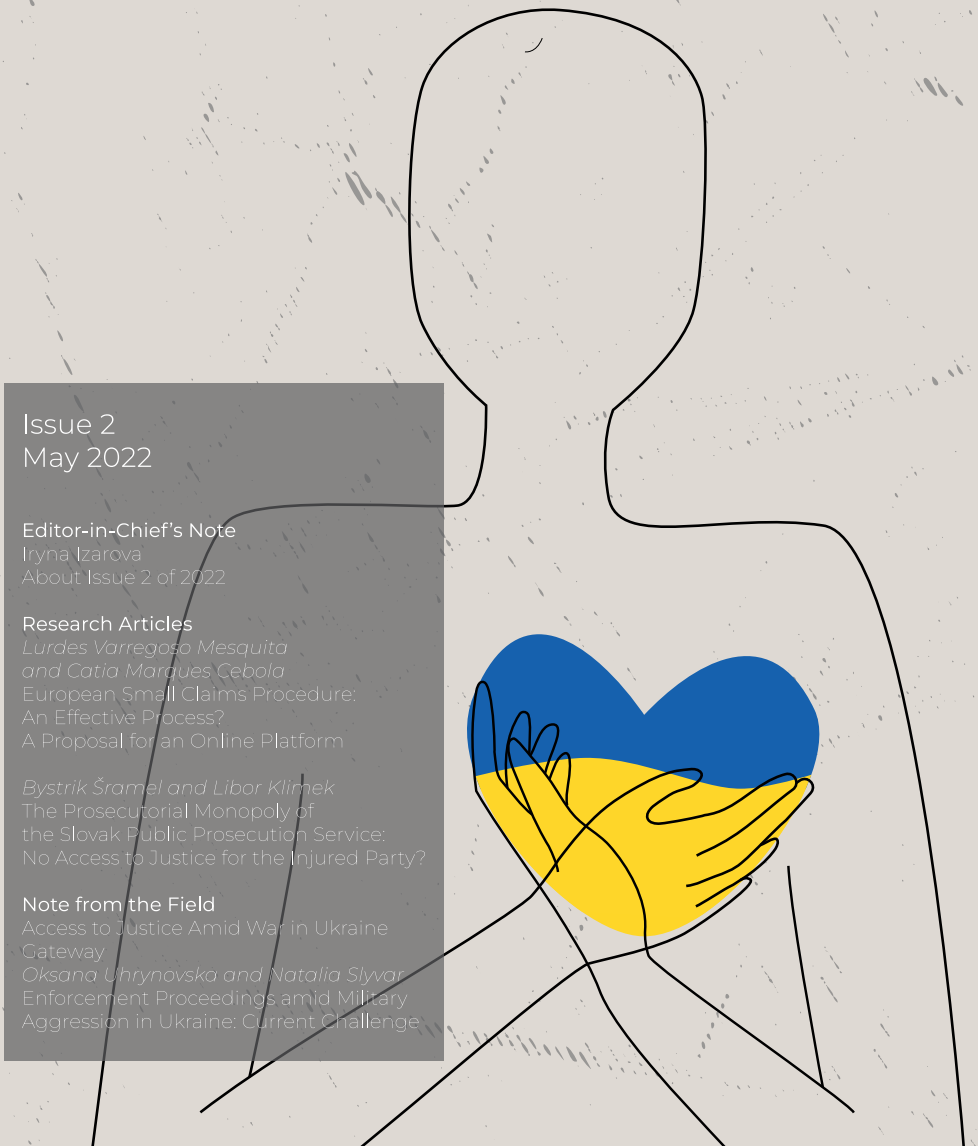
ACCESS TO JUSTICE IN EASTERN EUROPE



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ACCESS TO JUSTICE IN EASTERN EUROPE

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AJEE is an English-language journal which covers issues related to access to justice and the right to a fair and impartial trial. AJEE focuses specifically on law in eastern European countries, such as Ukraine, Poland, Lithuania, and other countries of the region, sharing in the evolution of their legal traditions. While preserving the high academic standards of scholarly research, AJEE allows its contributing authors, especially young legal professionals, and practitioners, to present their articles on the most current issues.

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Editor-in-Chief's Note

ABOUT ISSUE 2 OF 2022

This issue was undoubtedly the most challenging in my life due to events that I would never have believed could happen in my lifetime or afterward. The heredity of WW2 seemed to me so remarkable and obvious, contemporary human rights values looked so strong and indisputable, that any such open and destructive violations of these rights could hardly be imagined by even the most sceptical people in Europe. Despite many reasonable grounds for this scepticism appearing since 2014, I preferred to believe that these were only politicians' games and that nobody could ever cross this Rubicon. Yet, during these last months, the whole world has been faced with unprecedented acts against the independent and democratic state in Europe, the ancient nation, and the whole idea of the rule of law.

The war in Ukraine has become an event of worldwide relevance: the effects of this war will be borne by future generations of Europeans who are suffering now because of it. Millions of Ukrainians moved to the EU member states and abroad, leaving their homes and property. Many individuals have become victims of war crimes. All this should be the basis for rethinking access to justice as a concept, as well as our system of preventing such a conflict in the future.

Even though this war is not the first war in Europe, we must learn lessons from the current events and take the next steps to uphold the rule of law and human rights protection, as was done after WW2. The necessity of an effective conflict resolution system is clear if we are to prevent overcrowded courts and resolve the uncertainties in European society at large.

With this in mind, in AJEE, gateways were created for regular publications from scholarly societies, institutions, and science communities, as well as for individuals who are studying relevant issues. Published materials within this remit are collected through related research outputs, enabling thematic research, conference proceedings, and community projects. As such, we would like to announce the first three AJEE Gateways, the most important of which, for me, is Access to Justice Amid War, managed by *Dr. Oksana Uhrynovska* and *Prof. Yurii Prytyka*, who are the main editors. Each gateway gives authors and readers a wide range of materials and current results for further research, including Notes from the Field, Reports, Interim Results of Data Collection and Generalising, and, of course, Reform Forum Notes.

On behalf of our team, I urge authors to join us and answer the call for materials related to the war in Ukraine. For the current notes, we are seeking research on the generalisation of case law, results of interviews, and overviews of legal reform in the period of war in Ukraine. We gladly welcome contributions related to the development of justice in ex-war territories.

I would like to thank both of my colleagues who are responsible for this area, and I am happy to include the first such Note from the Field to this issue – the focus is on the enforcement of judicial decisions amid war.

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Enforcement itself has for a long time been considered one of the great challenges of the Ukrainian legal system. Therefore, martial law and the war make it even more challenging. Essential issues of the enforcement of judicial decisions during the military aggression against Ukraine were studied in the note of *Oksana Uhrynovska and Slyvar Natalia*. Solutions to these issues were suggested in proposals for proper and comprehensive solutions based on law enforcement practice and specific changes to current legislation.

Among other contributions in this issue, I would like to draw special attention to the research article of *Lurdes Varregoso Mesquita and Catia Marques Cebola* related to the European Small Claims Procedure and proposals for an online platform. As both a citizen and a scholar, I strongly support the idea of simplification and accessibility for small claims litigation. I was particularly happy to receive the positive feedback on the article and to make the decision to publish it to share the proposals of the authors regarding an online platform incorporating alternative dispute resolution mechanisms as the best option to promote access to justice. You can read more about this article in this issue and on our Online First platform.

The next article, which also deserves the attention of our audience, is *Bystrík Šrame and Libor Klimek*'s research on the prosecutorial monopoly of the Slovak public prosecution service. Justice is a complex phenomenon that includes not only a judge – the most well-known participant – but a prosecutor and an advocate. Only a balance of power can give us the result we seek– a fair trial according to the standards of the rule of law. Otherwise, imbalance or worse – a monopoly of one person's power – may pervert the very essence of justice as a common human value. This article raises the important issues of the expansion and significant strengthening of the discretion of the public prosecutor in criminal proceedings in the Slovak Republic, accompanied by the authors' answers to the question of how to improve the current possibilities of controlling the prosecutor's discretionary powers directly through an independent and impartial court.

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

Finally, let me share my endless thanks to those who are supporting the AJEE during this undoubtedly difficult period. First of all, I would like to sincerely thank our Editorial Board Members, who uphold our statement against the russian invasion of Ukraine. Among our Editorial Board Members, there are prominent scholars in the areas of civil procedural law and the judiciary from Poland, Lithuania, Croatia, Italy, Germany, Austria, the Netherlands, Spain, Greece, and Luxemburg.

In my note, I would reiterate that in the area of law, there is no room for compromise when we are talking about human rights and freedoms. As a journal, we have always strongly condemned sharing fake practices and ideas, especially those that harm people's rights. We firmly represent the very idea of law and justice, equality, and freedom. We would like to encourage the scholarly world to unify against the completely unjust attack on Ukraine and our worldwide values and to suspend any participation in international projects, bases, editions, etc. for those who do not share these values and try to destroy the freedom and justice we have all worked so hard to create during the decades after the last world war.

Let's be true and stand for what we believe!

Slava Ukraini!

Editor-in-Chief
Prof. Iryna Izarova
Law School, Taras Shevchenko National University of Kyiv,
Ukraine

RESEARCH ARTICLE

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Research Article

EUROPEAN SMALL CLAIMS PROCEDURE: AN EFFECTIVE PROCESS? A PROPOSAL FOR AN ONLINE PLATFORM

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ABSTRACT

Background: *Statistics concerning the use of the European Small Claims Procedure implemented by Regulation 861/2007 (as amended by Regulation 2015/2421) show that this mechanism has not been as successful as expected. When choosing between a domestic and a European instrument, the creditor most often opts for the domestic procedure. They avoid an instrument that is less well known, that they do not fully manage, and that has limited integration in domestic law.*

Methods: *This article starts with the legislative analysis of the European Regulation 861/2007, using analytical and hermeneutic approaches. Empirical methodologies will also be applied since the practical application of the rules established by the European Regulation will be analysed in order to build the proposal of an online platform for the small claims procedure.*

Results and Conclusions: *Bearing in mind the weaknesses of the European Small Claims Procedure, we conclude that an online platform incorporating alternative dispute resolution mechanisms is the best option to promote access to justice. A list of arbitrators or judges designated by each member state to decide the cases submitted on the platform could be a solution to overcome lengthy court processes. The decision shall be standardised for all proceedings according to a model incorporated into the platform. Thus, the enforceability will be facilitated, and the process will be more accessible to the parties, ensuring the right of access to justice in this context.*

Keywords: *small claims procedure, effectiveness, obstacles, online platform, civil procedure*

1 INTRODUCTION

Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007,[3] as amended by Reg. 2015/2421 (hereinafter Regulation 861/2007), established a European Small Claims Procedure in cross-border litigation, aiming to create a fast and inexpensive process to obtain judgments in specific cross-border cases and, consequently, to facilitate access to justice. As expressly declared in this Regulation:

> the distortion of competition within the internal market due to imbalances with regard to the functioning of the procedural means afforded to creditors in different Member States entails the need for Community legislation that guarantees a level playing-field for creditors and debtors throughout the European Union.

Bearing in mind this goal, the recognition and enforcement of a judgment within the European Small Claims Procedure in any member state was also established. Despite the European nature of this procedure, each member state should incorporate the processual formalities internally for obtaining the final judgment, and some issues still require internal legislation to be applied.

The EU has tried to create a European procedure, but it still has a very national implementation, and there are obstacles to the effective participation of European citizens. It is still difficult to use a procedure that may take place in a court other than that of one's home state. In fact, the European Commission study done in 2017 on this and other means concluded that 'in a number of Member States these instruments are

3 OJ L 199, 31 July 2007, 1-22.

not well-implemented into national legislation, creating uncertainties in legal practice'.[4] So, the intended goals have been partially defeated. Therefore, considering these results and given the globalisation of the economy and the current context of crisis in the post-pandemic scenario, it is necessary to make this mechanism more effective.

In this paper, we intend to analyse the possible implementation of an online platform that incorporates at a European level the European Small Claims Procedure as a solution to the current problems faced by this instrument. Thus, we propose that the procedure that is carried out so far in the national courts of member states should be entirely integrated into this online platform. The platform implementation will be developed in this article as a proposal to promote the use of the European Small Claims Procedure and to improve access to justice in the EU, incorporating the technologies that already exist, for instance, the European ODR Platform for consumers complaints.[5] This solution could also overcome the imbalance that exists in member states regarding electronic processes since ICT has different levels of maturity in the European space. Before that, we will analyse the main obstacles that the European Small Claims Procedure established by Regulation 861/2007 faces in practice to understand what the features and possibilities of the proposed online platform should be.

2 EUROPEAN SMALL CLAIMS PROCEDURE

2.1 Civil court proceedings and small claims in the Portuguese environment

The usefulness and necessity of effective procedure in civil matters are undeniable. In Portugal, for example, civil justice accounts for 66% of cases initiated in judicial courts.[6]

The Portuguese statistics on justice[7] show that in 2019,[8] there were 53,208 claims in civil matters before the courts of first instance, of which 27,989 were proceedings for the performance of contracts and other obligations. In 2018 and 2017, the ratios were 25,221 out of 51,006 and 24,842 out of 52,507, respectively. In other words, proceedings to comply with contracts and other obligations accounted for around 50% (47% in 2017, 44% in 2018, and 52% in 2019) of the declaratory actions. On the other hand, actions of lower monetary value remain common in terms of percentage of GDP (Gross Domestic Product), as they represent 76.5%.[9]

Regarding European recovery procedures, in Portugal, the number of cases is still low but has grown. Statistics from 2011 to 2019 show that there were 220 small claims judged,

4 European Commission, 'An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law' (2017) <https://op.europa.eu/pt/publication-detail/-/publication/531ef49a-9768-11e7-b92d-01aa75ed71a1/language-en> accessed 7 January 2022.

5 Available at <https://ec.europa.eu/consumers/odr/main/?event=main.trader.register> accessed 7 January 2022. To analyse this Platform, consult Fernando Esteban de La Rosa, Cátia Marques Cebola, 'The Spanish and Portuguese Systems: two examples calling for a further reform. Uncovering the architecture underlying the new consumer ADR/ODR European framework' (2019) 27(6) European Review of Private Law 1251–1278.

6 Statistics of Justice of the Portuguese Ministry of Justice are available at the following website <https://estatisticas.justica.gov.pt/sites/siej/pt-pt> accessed 7 January 2022.

7 Statistics of Justice of the Portuguese Ministry of Justice, ibidem.

8 We excluded 2020 and 2021 because these periods were atypical.

9 Note from the Portuguese government to the report of the European Commission for the Efficiency of Justice (CEPEJ) <https://www.portugal.gov.pt/pt/gc22/comunicacao/noticia?i=portugal-entre-os-paises-com-mais-eficiencia-da-justica> accessed 7 January 2022.

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which means an average of 24.4 per year, which is a small number. However, growth has been positive since, from 2011 to 2019, it increased from 4 to 71, corresponding to an increase of 1,800%.[10]

For all these reasons, it is very important for states to try to establish effective procedures.

2.2 Some unresolved procedural issues in small claims – the role of internal systems and their different solutions

2.2.1 The general terms and conditions of the proceeding

The importance of Regulation 861/2007 is undoubted. It is an advantage to have a procedure with a uniform central structure, accessible to citizens, in which the decision is enforceable in the European area.

This procedure is characterised by being simple, written, supported by standard forms, and based on judicial cooperation with the parties and an active stance of the court. It is used as an alternative to domestic proceedings by the creditor of a civil or commercial obligation (pecuniary or non-pecuniary) up to EUR 5,000 (excluding interest, costs, and other expenses), provided that it is a cross-border case. A cross-border case is one in which at least one of the parties is domiciled or habitually resident in a member state other than the member state of the court or tribunal seized, on the date on which the claim form is received by the court or tribunal with the jurisdiction (Art. 3).

The procedure has these stages,[11] as provided for in Arts. 4 to 9: i) the creditor submits the case using Form A; ii) the court has an initial intervention (preliminary injunction) to assess the correct applicability of this procedure to the application, the correct filling in of the form, and the regularity of the proceedings; iii) after this intervention, the court may: a) decide that the procedure is not applicable, applying the consequence provided for in the internal procedural rules for such failure; b) request corrections to form A (using form B) if the information provided by the claimant is inadequate or insufficiently clear or if the claim form is not filled in properly; c) reject (reject out of hand) in case the claim appears to be clearly unfounded or the application inadmissible; d) order the continuation. Then, if the proceedings continue: iv) the defendant is 'summoned to answer' and given a copy of Form A (application), the documents, and Form B with Part I (details of the court and of the proceedings) completed by the court.

The defendant has 30 days to respond, so he or she should submit a defence and make a claim against the applicant (counterclaim) using Form A. If there is a counterclaim, the claimant has 30 days to answer.

At the end of the pleadings, if the judge has sufficient information, he or she shall give a decision. If the judge is unable to give a judgment, he or she may: i) request further clarification; ii) order the production of undocumented evidence; iii) arrange a final hearing, which is exceptional.

When an oral hearing is considered necessary in accordance with Art. 5(1a), it shall be held by making use of any appropriate distance communication technology, such as

10 See the Statistics of Justice of the Portuguese Ministry of Justice as well.

11 On the characteristics, structure, and procedures of small claims, see Xandra Kramer, 'Small claim, simple recovery? The European Small Claims Procedure and Its Implementation in the Member States' (2011) 12 ERA Forum - Journal of European Law 119-133.

videoconference or teleconference, available to the court or tribunal, unless the use of such technology, on account of the circumstances of the case, is not appropriate for the fair conduct of the proceedings. Nevertheless, the Regulation does not mention in what language the oral hearing should be made. The Council Recommendations on cross-border videoconferencing of 15 and 16 June 2015, as well as the work carried out in the framework of the European e-Justice Strategy and Action Plan adopted for the 2019-2023 period,[12] warn that videoconferencing services should be available in all languages of the member states, but their implementation is still difficult.

Once the procedure has been decided, the applicant may request a certificate (Form D) which would serve as an enforcement order. This enforcement order may provide an enforceable application in any member state (Art. 20).

2.2.2 Some other aspects of the proceeding

We will now consider some situations that may cause difficulty in a uniform approach, bearing in mind that domestic legal systems are called upon to respond.

The Regulation provides that the applicant's claim may be a monetary obligation or a nonmonetary obligation (Art. 2.1). For a non-monetary obligation (e.g., to deliver something), the applicant assigns the case value taking into account the value of the thing. However, if that value is discussed by the defendant, who argues that it is higher than the value allowed for this proceeding (EUR 5,000), the Regulation is not exhaustive in the solution. Art. 5(5) states that:

> if, in his response, the defendant claims that the value of a nonmonetary claim exceeds the limit set out in Article 2(1), the court or tribunal shall decide within 30 days of dispatching the response to the claimant, whether the claim is within the scope of this Regulation. Such decision may not be contested separately.

This is a preliminary issue to be resolved, which is left to the judge to decide with the help of the internal rules adapted to the purpose and ratio of this proceeding. So, the judge's intervention will always depend on the procedural paradigm adopted in the respective legal system and will lead to inequalities in the solution applied in different member states.

Another aspect that may have an impact on the proceedings is the existence of a counterclaim. Although the Regulation allows counterclaims, which is an advantage for the efficiency of the procedure, there will certainly be differences in each member state regarding admissibility and procedural rules. So, this will create unequal treatment, at least between national and cross-border disputes.

It is acceptable that the Regulation does not deal exhaustively with the whole procedure, but this brings some disadvantages, especially if member states do not create specific legislation for adaptation. In the absence of such legislation, as in Portugal,[13] the solution will be found by the judge, in accordance with his or her powers, and that will bring uncertainty. In fact, this is often insufficient and has weakened the harmonisation of procedures.

As the study carried out by Elena Otanu concluded:

12 OJ C 96/9, 13 March 2019.

13 In a different way, Spain, for example, approved the Law 4/2011 of 24 March, amending Law 1/2000 of 7 January, on Civil Procedure, to facilitate the application in Spain of European order for payment and small claims procedures (BOE – Spanish Official Bulletin – No 72 of 25 March 2011 31831-31838).

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The empirical research carried out with practitioners did not seek to examine the link between the handling practices and legislative actions undertaken by the national legislator to implement the EOP and the ESCP within the national system. However, there seems to be some connection with regard to the extent of the phenomenon. In the jurisdictions where the national legislator did not adopt any legislative action and/or specific guidelines for the implementation and application of the EOP and ESCP, courts and practitioners are more inclined to submit the European procedures to requests and handling that is similar, if not identical, to national procedures having a similar purpose. This is the case in Italy and Romania.[14]

2.2.3 Some issues reserved for internal systems and divergent solutions

The Regulation provides for a procedure that is directly applicable in the internal legal systems and has indirectly influenced the internal legal systems as well as encouraged a movement towards harmonisation of civil procedure.15 Nevertheless, member states were required to communicate certain elements necessary for the operation and implementation of the procedure in the internal legal system (Art. 25),16 namely: i) the means of communication accepted for the purposes of the European Small Claims Procedure and available to the courts or tribunals in accordance with Art. 4(1); ii) the court fees of the European Small Claims Procedure or how they are calculated, as well as the methods of payment accepted for the payment of court fees in accordance with Art. 15a; iii) any appeal available under their procedural law in accordance with Art. 17, the time period within which such an appeal is to be lodged, and the court or tribunal with which such an appeal may be lodged; iv) the procedures for applying for a review as provided for in Art. 18 and the competent courts or tribunals for such a review; v) the languages they accept pursuant to Art. 21a(1).

The decision to apply domestic law in certain matters is well justified. On the one hand, these are issues where the EU must respect the principle of subsidiarity. On the other hand, some of these issues depend on resources and the ability to make the instruments of justice operational. However, the implementation of individual member state solutions creates asymmetries that should not exist. We found different solutions for the same situation, placing European citizens on an unequal footing despite using the same procedure. For example:

- Some countries accept more flexible languages, while others only accept their own national or official minority language. In France, the languages accepted pursuant to Art. 21a(1) are: French, English, German, Italian, and Spanish; in Spain, English and Spanish; in Portugal, English, French, and Spanish. But Germany, Italy, and Poland, for example, only accept their own languages.

- Regarding the means of communication, Portugal accepts the use of registered post, fax, and electronic data transmission; Poland only accepts written pleadings in paper form. In Italy, post and online submissions are accepted only for proceedings before the ordinary courts but must be done by a defence lawyer; Germany accepts post including private courier, fax, delivery by hand, or lodging the claim at the court's claims filing office

14 Elena Alina Ontanu, 'Incorporating European Uniform Procedures into National Procedural Systems and Practice: Best Practices a Solution for Harmonious Application' in Burkhard Hess, Xandra E Kramer (eds), *From common rules to best practices in European Civil Procedure* (Auflage 2017) 459-480.

15 On this topic, see Gascón Inchausti, 'Have the EU Regulations on Judicial Cooperation Fostered Harmonisation of National Procedures?' in Fernando Gascón Inchausti (ed), T*he Future of the European Law of Civil Procedure* (Burkhard Hess Intersentia 2020) 91-110.

16 This information is available on the European e-Justice Portal.

(Rechtsantragstelle); in France, legal proceedings can be submitted to the court by post; in Spain, in addition to submissions in person before the competent court and submissions by post, Spanish courts also permit the submission of claims via the Electronic Courthouses (sedes judiciales electrónicas) of the authorities responsible for the administration of justice.

2.3 The weak points of small claims

In 2017, there were two studies published relating to consumer affairs and consumer protection to make proposals for measures to improve the European legal framework in this area and the effectiveness of procedures. These are:

> i. An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law: Strand 1 – Mutual Trust and Free Circulation of Judgments;
> ii. Strand 2 – Procedural Protection of Consumers.[17]

The first report examined how national legislation and procedural practices have contributed to the free movement and recognition of decisions, as well as to the effectiveness of consumer protection, including access to justice, under EU consumer law, and in particular, the impact of the European Enforcement Order and the European Small Claims Procedure. Some of the points made are positive, but there are some aspects to be improved that cannot be controlled by the states because they depend on the behaviour and will of those who use them (be they citizens or legal practitioners). This means that potential users of this procedure should be motivated to use it. Therefore, the necessary steps to make this procedure more attractive should be taken.

These were some of the conclusions: i) it is true that European procedures usually work well within national legal systems, despite the differences in their implementation. However, the practice is that not all instruments are used, and the practitioners are not particularly familiar with the instruments, in particular, in the case of the European Order for Payment and Small Claims; ii) in several member states, the instruments have not been adapted to national legislation, for example in the Civil Procedure Code or in separate legal acts, leaving uncertainties in legal practice; iii) the revision procedure, as it exists under the instruments, should be aligned, and possibly reconsidered; iv) a well-functioning and efficient cross-border document system is needed to implement the instruments; v) the biggest obstacle to the use of these procedures is the lack of mastery and knowledge of them compared to internal instruments, and also the language and technical specificities of legal terminology in the various languages.[18]

The following has already been concluded:

> According to the ECC-NL, the most common difficulties that consumers experience in using the ESCP are related to (1) the need for translation, which often results in an increase in costs;43 (2) the means of determining the interest rate for the amount for

17 Report prepared by a Consortium of European Universities (Hess, Requejo Isidro, Gascón Inchausti, Oberhammer, Storskrubb, Cuniberti, Kern, Weitz, Kramer) led by the Max Planck Institute Luxembourg for Procedural Law as commissioned by the European Commission [JUST/2014/RCON/PR/CIVI/0082] (Publications Office of the European Union 2017).

18 On the obstacles to the implementation of the Regulation, see Elena Alina Ontanu, Ekaterina Pannebakker, 'Tackling Language Obstacles in Cross-Border Litigation: The European Order for Payment and the European Small Claims Procedure Approach' (2012) 5(3) Erasmus Law Review 169-186.

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> which they claim reimbursement and/or payment; (3) the competent court according to the Brussels I Regulation (Regulation (EC) No. 44/2001) [currently Regulation 1215/2012]; and (4) enforcement problems. In the event that the losing party refuses to comply with the court decision, enforcement needs to be carried out by an enforcement officer or bailiff. This adds to the costs incurred for obtaining judgment and may even exceed the amount awarded. The status of enforcement costs and their recovery is not clear within the ESCP Regulation, and questions arise as to how to have these reimbursed.[19]

Moreover, as exequatur was abolished by the Brussels I Regulation (recast),[20] this reduced the interest in small claims, especially if the reason for using this procedure was to obtain a certified judgment enforceable throughout the European area.

In addition to the above, the obstacles are even greater when the citizen wishes to use this procedure. For one thing, consulting and using the European electronic portal or the websites of the national institutions is not easy or intuitive. They have too much information and are not always well organised. Thus, one might reasonably conclude that the ordinary citizen would quickly give up on this type of procedure; the professional, on the other hand, would prefer to use a national procedure that is simpler and can be technically mastered.

3 AN ONLINE PLATFORM FOR SMALL CLAIMS PROCEDURE – A PROPOSAL

Bearing in mind the reasons why the European Small Claims Procedure has less use than expected, we intend to present our proposal for implementing an electronic platform for small claims in the European space. Currently, the existing system allows the filling in of the forms inherent to the claim and the defendant's answer to be done electronically by the available means, which each member state accepts and has communicated to the Commission.[21] Besides, the procedure takes place before the member State court with jurisdiction for the case in accordance with the applicable national rules, which may cause constraints on parties who are unfamiliar with the internal procedural system or who may be territorially distant.

This type of thinking in the justice system needs to change. Concerns in the justice sector should move from promoting access to justice to delivering justice.[22] In fact, there is no point in implementing procedures that are not used or that are considered inaccessible or difficult to use. Today, the focus in justice reforms is on valuing the participation of citizens and on choosing conciliatory means for parties to avoid future conflicts on the same issue. This is why, in global terms, there is a growing commitment to mechanisms such as mediation and ombudsman schemes.

On the other hand, technology is increasingly present in the justice sector. National systems make an effort to modernise the existing procedures. In European terms, there is a growing trend to put technology at the service of justice. That is why we are proposing here to integrate trends regarding the modernisation of justice in technological and conceptual terms, advocating the creation of an online platform for small claims that bases its procedure on alternative mechanisms such as mediation and arbitration.

19 Xandra Kramer, Elena Alina Ontanu, 'The functioning of the European Small Claims Procedure in the Netherlands: normative and empirical reflections' (2013) 3 Nederlands Internationaal Privaatrecht 323.

20 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [OJ L 351, 20 December 2012, 1-32].

21 See <https://e-justice.europa.eu/content_small_claims_forms-177-en.do> accessed 7 January 2022.

22 In this regard, see Christopher Hodges, *Delivering Dispute Resolution. A Holistic Review of Models in England and Wales* (Beck/Hart Publishing 2019).

The use of technology in the justice sector could have additional advantages if the technological resources are well enhanced. The implementation of an online platform for all member states concerning small claims would allow us to collect information about the cases and produce automatic statistics. In this way, the system could aggregate data on the type of problems submitted by parties or on who the parties are, and this information could be used in the future to promote legislative changes that prevent and reduce conflict or change cultural behaviour.[23]

Justice should thus incorporate a holistic analysis of the legal system in structural and practical-procedural terms, based on three essential pillars: i) information should be provided to citizens regarding their rights in order to prevent disputes; ii) if a conflict emerges, consensual mechanisms for dispute resolution should be accessible to promote settled outcomes; iii) and if an agreement is not reached, procedural systems should be simple, without forgetting procedural guarantees, accessible to all and incorporating technological tools that would allow the aggregation of data necessary to justify legislative changes and avoid future lawsuits. In this way, the system would allow for its continuous and circular legal perfection.

3.1 Management and administration of the European Online Platform for Small Claims and national entities

The first question to be determined is the body responsible for managing the platform and where it would be allocated. As is already the case with the ODR Platform for consumer conflicts,[24] we propose that the European Commission should be responsible for administering and making the small claims platform available through the Europe Portal.

This platform should be a single point for parties and national dispute resolution entities to conduct the small claims procedure. Each member state must choose or create a national service that would be responsible for managing the small claims procedure internally through the online platform.

Each national authority must incorporate three essential services:

1) Information service and procedural management

2) Mediation

3) Arbitration/ Small Claims Court

Internally, each member state may assign these functions to entities that already exist and would become part of the online platform for small claims. In Portugal, for example, peace courts could manage the small claims cases placed on the future European platform proposed here, since they already include a service for attending, mediating, and judging small claims (even if this solution requires some legislative changes in terms of the territorial competence of these bodies).[25]

23 On advocating this role to technology in justice sector, see Hodges (n 23).

24 See Art. 5(2) of Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes (hereinafter referred to as Regulation ODR).

25 In fact, there are no peace courts in the entire national territory, and each peace court has its territorial competence limited to a certain area of jurisdiction (Art. 4 of Law 78/2001 of 13 July). So, the Portuguese State would have to decide whether only two main peace courts – Lisbon and Oporto – would have competence within the future online platform or whether all peace courts would judge this type of process randomly.

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Another option would be to assign the procedural management functions to a department of the Ministry of Justice and to create a list of mediators and arbitrators for the resolution of small claims through mediation and arbitration, respectively. Consequently, the responsible Ministry of Justice department would receive the claim and analyse its feasibility, quoting the defendant to reply. After this phase, the platform would be asked to appoint a mediator/ombudsman from a previously organised list to try to reach a negotiated solution. If this attempt to reach an agreement is frustrated, the process would be assigned to one of the arbitrators for a final decision.

Regardless of the institutional solution chosen in each member state, it will be essential for the national body to have an information service on the procedure so that any citizen can clarify his or her doubts.

All stages of the process would be managed through the European Online Platform for Small Claims. The national service or the entity designated by each member state would be integrated into the platform so that the management of the whole process would be carried out electronically, and the parties could follow the process by the minute.

The platform would also have the translation functions of all documents and forms entered electronically to make the information accessible to all parties. The translation functions of the platform would have to be extended to the mediation phase to allow negotiation between the parties when they are nationals from different member states.

The proposed model is similar to the ODR Platform for consumer disputes. However, this small claims platform would incorporate domestic dispute resolution mechanisms in each state, either extrajudicial (such as mediation or arbitration) or judicial (with member states being able to choose the competent court for these disputes and incorporate it into the Platform to manage the process).[26]

In this way, the parties would not have to choose which entity is competent since it would be the platform that would refer the case to the entity that each member state designated. In the eyes of the user/party, the whole process would take place through the platform, which would be the point of contact and connection between parties and competent entities.

3.2 Procedure: Stages and Platform Functions

So far, the claimant in a European Small Claims Procedure must complete the online form available on the European Commission's portal and submit it to the competent court of the member state determined according to the rules laid down in the Brussels I Regulation (recast).

With the implementation of a European Online Platform for Small Claims, the forms would become available electronically on the website and be sent directly by the platform's software to the competent national authority.

The claim form would have the necessary fields for determining which member state is competent to examine the case, and the rules of competence of each state are electronically incorporated so that this determination would be automatic. In this way, the fundamental

26 Pointing out as a disadvantage of the ODR Platform for consumer disputes the lack of its own dispute resolution mechanisms, see Fernando Esteban de La Rosa, Cátia Marques Cebola, 'The Spanish and Portuguese Systems: two examples calling for a further reform. Uncovering the architecture underlying the new consumer ADR/ODR European framework' (2019) 27(6) European Review of Private Law 1251-1278.

right of access to justice would be promoted because under Regulation 861/2007, 'the parties should not be obliged to be represented by a lawyer or other legal professional' (Whereas 15 and Art. 10).

In terms of the value of the case, this should be maintained by the rules already laid down by Regulation 861/2007, according to which 'all interest, expenses and disbursements should be disregarded. This should affect neither the power of the court or tribunal to award these in its judgment nor the national rules on the calculation of interest' (Whereas 10). In this context, the platform could incorporate an interest calculator in accordance with the rules in force in each member state.

Regulation 861/2007 considers that 'the court or tribunal must include a person qualified to serve as a judge in accordance with national law' (Whereas 27). It therefore removes the possibility for member states to confer jurisdiction on extrajudicial bodies such as arbitrators or mediators. However, given the type of disputes covered by Regulation 861/2007 (of low value and low complexity) and the new concept of delivery justice referred to above, extrajudicial means should be part of the small claims procedure on the future European Online Platform.

We will now analyse the stages of the procedure to be developed in this platform, proposing, as said above, that the process to be adopted should include three essential phases:

- Information and management of the procedure (complaint and response);

- Mediation;

- Arbitration or specialised judicial courts.[27]

3.2.1 Information and Procedure Management

The first stage would be assigned to the service/entity designated by each member state, whose task would be to provide all the information requested by parties or by any European citizen with regard to the small claims procedure.28 However, this service would manage the process. It would receive the claim through the platform, analyse its feasibility, and open the corresponding process in the platform. It would then send the claim form through the platform to the defendant, giving this party the opportunity to reply and, after receiving the response, the process would proceed to the mediation stage.

Many administrative tasks for managing the process would be assigned to the platform itself. Thus, the sending of the claim to the defendant and the notifications to the parties regarding different procedures would be automatic. The timeframes of the process would be controlled by the platform itself so that the processing would be as automatic as possible. The platform would therefore incorporate many of the regular tasks of a judicial court office, and all notifications would be translated into the official languages of each member state.

27 This depends on the choice of each country. Portugal, for example, taking into account its internal system, may assign these functions to peace courts or create a list of arbitrators for this purpose, as noted above.

28 Equivalent to the functions of ODR Platform Advisors or the contact points of the European Consumer Centres Network (ECC-Net) as established in Art. 7 of the Regulation ODR. For the ECC-net, see its website <https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint/european-consumer-centres-network-ecc-net_en> accessed 7 January 2022. For how it works, see, among others, Cátia Marques Cebola, 'Mediação e Arbitragem de Conflitos de Consumo: panorama português' (2012) 6 Revista Luso-Brasileira de Direito do Consumo 11-46.

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3.2.2. Mediation

If each national body has a list of mediators, the platform itself could randomly appoint the mediator as soon as the procedural management service has processed the process for this phase. The appointed mediator contacts the parties to schedule the pre-mediation session and, if the parties agree to proceed, the necessary mediation sessions are carried out.

The introduction of mediation and its success depends on the fulfilment of two conditions.[29] On the one hand, the parties accept mediation. As a non-adversarial mechanism, even if pre-mediation is mandatory (as is the case in Italy for certain matters),[30] the parties could never be obliged to continue mediation against their will. It is therefore essential that mediation be accepted by the parties or at least that the continuation of this process is dependent on their will.[31]

On the other hand, since the parties may belong to different member states, it is essential that the platform allows not only online sessions but also the simultaneous translation of what is said by the parties and mediator. The integration of the latter function could be considered utopian. However, current technological systems are beginning to allow the mediator to be replaced by an interface or algorithm; that is, there are already some experiments carried out by virtual mediators.[32] Thus, the evolution of technology has improved electronic tools, and simultaneous translation systems have also proven to be quite efficient today.

In terms of mediation, having in mind a holistic view of the European justice system, the agreement reached by the parties would have to be enforceable in all member states. In light of Directive 2008/52/EC, the conditions for enforceability have been established in national terms by each member state. However, these conditions may differ from one state to another. The implementation of a single platform for the small claims procedure would require that the mediation agreement reached at this stage be made enforceable in all member states in the same way.[33]

29 The introduction of mediation in the small claims procedure is not intended to add an additional stage and thereby delay the process, but rather to enable the resolution of the case to be achieved effectively and more quickly. Regarding the advantages of mediation, see, among others, Nadja Alexander, *Global Trends in Mediation* (Kluwer Law International 2006) or Cátia Marques Cebola, *Mediación* (Marcial Pons 2013).

30 Art. 5(1) of Legislative Decree No 28 of 4 March 2010, following the amendments introduced by Legislative Decree No 69 of 21 June 2013 and Legislative Decree No 130 of 6 August 2015. On the establishment of compulsory mediation in Italy, see, among others, Giovanni Matteucci 'Mandatory Mediation, The Italian Experience' (2015) 16 Revista Eletrônica de Direito Processual – REDP 189-210.

31 Debating compulsory mediation, see, among others, Cátia Marques Cebola, *Mediación* (Marcial Pons 2013) 169-178; Jennifer Winestone, *Mandatory Mediation: A Comparative Review of How Legislatures in California and Ontario are Mandating the Peacemaking Process In Their Adversarial Systems* (2015) <https://www.mediate.com/articles/WinestoneJ4.cfm> accessed 7 January 2022; Lurdes Varregoso Mesquita, 'Mediação Civil e Comercial – As modalidades pré-judicial e intra-processual como elemento motivador' (2017) 1 Maia Jurídica – Revista de Direito 24-26.

32 See, among others, Ethan Katsh, Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass 2011) and Orna Rabinovich-Einy, Ethan Katsh, 'Technology and the Future of Dispute Systems Design' (2012) 17 Harvard Negotiation Law Review 151-199.

33 The Singapore Convention took a step forward in recognising the enforceability of mediation agreements internationally. This Convention was approved by the UN General Assembly on 20 December and opened for signature on 7 August 2019, with effect from 12 September 2020. Regarding this Convention and its effects see, among others, Nadja Alexander, Shouyu Chong, *The Singapore Convention on Mediation: A Commentary* (Wolters Kluwer 2019).

3.2.3. Arbitration or Judgement

Given the possibility that mediation may not be successful and an agreement between parties may not be reached, given the need to obtain an enforceable enforcement order in the European area of justice, a final adjudicatory phase should take place, which may involve the intervention of an arbitrator or a judge depending on the option of each member state.

It should be noted that introducing arbitration as a binding mechanism for the solution of small claims may be complex since, in this case, a situation of mandatory institutional arbitration would be created. If compulsory arbitration is allowed, as in Portugal, there will be no constitutional problems in this matter. But if the compulsory nature of this mechanism is not constitutionally permitted, as in Spain, the member states will have to opt for judicial mechanisms that may pass through specialised courts or indicate courts already competent in this matter.

Regardless of whether a judge or arbitrator was given jurisdiction, his or her appointment would occur via the online platform as soon as the mediator indicates that the agreement had not been reached.

At this adjudicatory stage, priority should be given to the written procedure. In other words, if the judge/arbitrator considers that he/she has all the necessary evidence and documentation, he/she could decide without holding a trial hearing. If he/she considered it necessary, it would be scheduled through the platform using the virtual tools integrated into it, in addition to the simultaneous translation of the trial.

The procedure would end with the publication of the judgement on the platform, which would communicate it to the parties. The judgement would be enforceable within the European area without any further procedures being required.34 If the judgement were in favour of the applicant, a certificate that would serve as an enforcement order would be sent to him/her. This enforcement order would be enforceable in any member state.

Regarding the costs, a uniform scheme for all member states should exist. Thus, the claimant would have to pay a small amount (e.g., EUR 100) when submitting the claim. The idea of delivering justice should not make the process so costly that the parties do not want to use it. If the proceedings end by mediation, a sum must be collected and divided equally between the parties (e.g., EUR 50). If the case ends by judgment, the amount to be paid for the end of the case should be charged to the losing party.

At the end of the process, all statistical data regarding the nationality of parties, the matter of the case, and the final outcome should be automatically processed by the platform and made publicly available. In this way, its functioning would be continuously monitored, and member states could have permanent access to important data in the adoption of legislative changes or in the definition of justice policies.

3.2.4. Process path: overview

In conclusion, the proposed European Online Platform for Small Claims would be a single point of procedural management where each interested party could trigger the process to

34 In view of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20 December 2012 1-32).

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be managed by the competent entity designated by each member state through the online system provided by the platform itself.

The process would have the following stages carried out through the platform:

- online submission of the form by the claimant;
- sending the form to the national body of the member state responsible for deciding the case determined by the platform, according to applicable rules;
- analysis of the claimant information sent by the competent national authority;
- if the case can proceed, the claimant's form is sent to the defendant for a response to be entered into the platform;
- receiving the defendant's reply, the case is sent to mediation, with the platform appointing a mediator (of a list created by member states);
- if the mediation succeeded in reaching an agreement, it would be enforceable – if an agreement was not reached, the case would proceed to trial, and the platform would appoint a judge or arbitrator for the case (according to the options of each member state);
- the judge/arbitrator in the case could dismiss the trial hearing if he/she had all the documentation and evidence necessary for the trial;
- if the judge/arbitrator considers it necessary to hold a trial hearing, it should take place using electronic means made available on the platform. The parties would be notified of the day and time of the trial hearing and should use the platform to enter the trial session. In this case, the judge/arbitrator would give the decision after the hearing and introduce it on the Platform for notification to the parties;
- once the procedure has been decided, the applicant may request a certificate that would serve as an enforcement order – this enforcement order may provide an enforceable application in any member state.

The parties and the competent national body could follow the entire case in real time, knowing at what stage it is and having access to the documentation annexed by the parties.

4 CONCLUSIONS

The proposal presented in this article aims to motivate the use of the small claims procedure in the EU and to overcome the difficulties already identified within the existing system. It also responds to the new challenges that justice systems face in the 21st century. Technological developments need to be properly incorporated into the procedures so that citizens have real access to the means of resolving their disputes.

This proposal also allows information to be collected, providing useful statistics. In this way, the system captures information on the type of problems submitted by parties feeding the aggregated data. Consequently, this information may be essential to promote legislative changes or behavioural changes in market players.

The proposed platform also promotes the parties' participation in the resolution of their conflicts since they could reach an agreement in the mediation stage. In conclusion, the right of access to justice must be fully promoted in a way that does not consist only of a mere possibility of access to a conflict resolution mechanism.

Access to justice must include an effective way of solving parties' disputes, which incorporates data produced by each process and is continuously improved, thus responding to the demands of the conflict.

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Research Article

THE PROSECUTORIAL MONOPOLY OF THE SLOVAK PUBLIC PROSECUTION SERVICE: NO ACCESS TO JUSTICE FOR THE INJURED PARTY?

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ABSTRACT

The recodification of criminal law realised in the Slovak Republic in 2005 brought several new elements to criminal proceedings. One of them was the expansion and significant strengthening of the discretion of the public prosecutor in criminal proceedings. However, this authority of the public prosecutor's office is, in many cases, perceived sensitively and controversially in Slovak society, especially in connection with many cases and scandals, when the prosecutor simply stated that 'the act did not occur'. One of the related problems is the fact that the injured party in the Slovak Republic has essentially no powers that would, independently of the prosecutor's office, ensure the control of the prosecutor's discretionary powers directly through an independent and impartial court. This situation also stems from the fact that the public prosecutor's office has a prosecution monopoly in Slovak criminal proceedings. However, the current prosecution monopoly of the prosecutor's office is not a rational consequence of its historical development in our territory but a consequence of the coup d'état in 1948 and the subsequent onset of the communist regime. The possibility for other entities (e.g., the injured party) to exercise their rights through criminal law institutions has thus been minimised.

Based on the above, the aim of this paper is to examine the existing scope of the discretion of public prosecutors in Slovakia, analyse the possibilities of controlling the exercise of these powers, and answer the question of how to improve the current possibilities of the control.

Keywords: *Prosecutor's Office of the Slovak Republic, public prosecution service, prosecutorial monopoly, injured party, discretionary powers*

1 INTRODUCTION

The recodification of criminal law realised in the Slovak Republic in 2005 brought several new elements to criminal proceedings. One of them was the extension of the application of the principle of opportunity in the activities of the Public Prosecutor's Office of the Slovak Republic, which resulted in a significant strengthening of the discretionary powers of the prosecutor in criminal proceedings. It is the discretionary powers that enable the public prosecutor to issue decisions in criminal proceedings, which by their nature often resemble court decisions on guilt and punishment. By adopting such an amendment, the legislator tried to find a way to unburden the courts and resolve cases of the so-called 'trivial offences' outside of time-consuming and costly criminal proceedings before a court. However, according to the current legislation, such a broad conception of the discretionary powers of the public prosecutor raises certain problems, which we would like to highlight in the following paper.

It should be pointed out that Slovak scientific literature is not directly dealing with the issue of prosecutorial monopoly of the Slovak Public Prosecution Service and the possibilities to contest inadequate decisions of the Public Prosecutor. Analysis and examination of this topic in Slovak scientific papers are completely absent. Slovak legal science only partially deals with the selected elements of the topic examined. Firstly, after the recodification of Slovak criminal law was finalised, we can mention a publication by M Marková, who notes alternative ways of solving criminal cases

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with reference to the importance of enforcing the principle of opportunity in the Slovak criminal procedure. She pays special attention to trends in diversion proceedings and their possible impact on strengthening the position and consolidating the influence of the injured party and the accused on the course of criminal proceedings.[3] Another author, A Kristková, deals with the principle of legality and opportunity in criminal proceedings. She characterises the basic concepts in general and then specifically in criminal proceedings. She also addresses the new pragmatic notion of opportunity and the application of this principle in the absence of public interest and in cases where the public interest has been weakened but has not disappeared.[4] Similarly, K Kandová, in her paper, aims to verify the validity of the statement about the connection of absolute theories of punishment with the principle of legality on the one hand and relative theories of punishment with the principle of opportunity on the other. To this end, she outlines the main theoretical background of the examined criminal theories, the basic principles of criminal procedure, and other related categories.[5]

A relatively important paper connected with the issue we examine is the paper by I Galovcová. This author states that the decision not to prosecute a suspect represents an alternative way of terminating criminal proceedings in a narrowly defined range of criminal cases. This is another element of opportunity gradually introduced into the criminal process and weakens the principle of legality. The author points out the conditions of application of this procedural institution and reflects on its contribution in relation to the consequences associated with another non-systemic intervention in the criminal code. She is critical of the effort to replace the purpose of the defunct substantive institution of active repentance for corrupt crimes with a procedural institution that interferes with the standard criminal process and its basic principles.[6]

A partially relevant paper is also that of T Gřivna, who deals with the development of the institution of private prosecution in criminal proceedings and its meaning in general, not excluding its comparison with the institution of the consent of the injured party to criminal prosecution. He also deals with foreign comparisons.[7] The issue of private indictment is also addressed by A Tibitanzlová, who is critical of this institution. Her paper deals with the institution of private indictment in criminal proceedings, and the author, as an opponent of this possibility, focuses on the criticism and possible negatives and disadvantages of this institute.[8]

As can be seen, the existing papers do not pay attention to the fundamental problems arising from the discretionary powers of the public prosecutor and the possibilities to contest inadequate decisions of the public prosecutor. That is why in this paper, we look at this neglected issue more closely, and through the generalisation and abstraction, we are

3 M Marková, *Odklony – alternatívne spôsoby riešenia trestných vecí a ich význam pre racionalizáciu trestného konania i v súvislostiach so zavádzaním prvkov oportunity do trestného poriadku [transl: Diversions – alternative ways of solving criminal cases and their importance for the rationalization of criminal proceedings and in connection with the introduction of elements of opportunity into the criminal code]* (Trnava University 2005) 261.

4 A Kristková 'K legalitě a oportunitě v českém trestním řízení [transl: On legality and opportunity in Czech criminal proceedings)' (2014) 18(4) *Trestní právo* 4.

5 K Kandová 'Trestně procesní zásady legality a oportunity ve světle trestních teorií [transl: Criminal procedural principles of legality and opportunity in the light of criminal theories]' (2018) 157(7) *Právník* 582.

6 I Galovcová 'Rozhodnutí o nestíhání podezřelého – (ne)důvodný zásah do standardního trestního procesu? [transl: Decision not to prosecute the suspect – (un)justified interference in the standard criminal procedure?]' (2019) 52(2) *Kriminalistika* 83.

7 T Gřivna, *Soukromá žaloba v trestním řízení [transl: Private indictment in criminal proceedings]* (Karolinum 2005).

8 A Tibitanzlová 'Kritika soukromé žaloby v trestním řízení [transl: Criticism of private lawsuits in criminal proceedings]' (2015) 14(9) *Trestněprávní revue* 216.

trying to bring new views and opinions to the (essentially non-existent) scientific debate in Slovak jurisprudence.

2 PUBLIC PROSECUTOR'S OFFICE OF THE SLOVAK REPUBLIC: THE AUTHORITY WITH STATE MONOPOLY ON PROSECUTION

In the Slovak scientific literature, the Public Prosecutor's Office of the Slovak Re-public belongs to one of the control authorities for the protection of law.[9] Its basic function is the protection of objective law and the defence of the public interest. On the basis of the nature of the legal means granted to the prosecutor's office by Act no. 153/2001 Coll. on the Prosecution Service, we can deduce that this state body performs preventive, repressive, restitution, and sanction activities.[10] The Prosecutor's Office of the Slovak Republic itself is defined as 'an autonomous, hierarchically arranged, unified system of state bodies headed by the Prosecutor General, in which public prosecutors operate in relations of subordination and superiority'.[11]

The Slovak Public Prosecutor's Office performs an important and irreplaceable role in the state, which is clearly formulated not only in the Constitution of the Slovak Republic but also in Act no. 153/2001 Coll. It is the protection of the rights and protected interests of natural and legal persons by the law. It follows from the role thus defined that the Prosecutor's Office of the Slovak Republic serves not only to represent the interests of the state, but in the conditions of the Slovak Republic, it can be considered a universal defender of legality which fulfils its mission in the public interest.

Tasks that fall within the competence of the Prosecutor's Office of the Slovak Republic are performed by the Prosecutor's Office of the Slovak Republic through its bodies – public prosecutors. They exercise the powers of this law protection authority in the following areas:

A. Prosecution of persons suspected of having committed criminal offences and supervision over observance of the law prior to the commencement of criminal prosecution in the pre-trial proceedings. In this case, it is the competence of the prosecutor's office in the field of criminal justice. The specific powers of the public prosecutor regarding criminal prosecution and supervision can be found in the Criminal Procedure Code no. 301/2005 Coll. They include, in particular, supervision of the observance of law during the pre-trial proceedings, filing the indictment, filing a motion to approve an agreement on guilt and punishment or filing another motion after the pre-trial proceedings, and, last but not least, securing the rights of the injured party under the Criminal Procedure Code, Act no. 514/2003 Coll. on liability caused during the exercise of public authority, Act

9 J Svák, B Balog, L Polka, *Orgány ochrany práva [transl: Law protection authorities]* (Wolters Kluwer 2017); J Ivor, P Polák, J Záhora, *Trestné právo procesné I: Všeobecná časť [transl: Criminal procedural law I: general part, 2nd edition]* (Wolters Kluwer 2021); J Mihálik, B Šramel 'Supervision of public prosecution service over public administration: The case study of Slovakia' (2018) 17(2) *Viešoji politika ir administravimas* 192; B Šramel 'Ústavné postavenie prokuratúry SR a niektoré otázky týkajúce sa jej nezávislosti [The constitutional status of the Prosecutor's Office of the Slovak Republic and some issues concerning its independence]' (2012) 64(1) *Justičná revue* 11.

10 J Ivor, P Polák, J Záhora (n 9).

11 Art 2 of Act no 153/2001 Coll. on the Prosecution Service as amended by later legislation ('zákon č. 153/2001 Z. z. o prokuratúre') <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2001/153/20210101> accessed 7 February 2022.

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no. 215/2006 Coll. on compensation of persons affected by violent crimes, and Act no. 256/1998 Coll. on witness protection.

B. Supervision of the observance of law in places where persons are deprived of their liberty or persons whose personal liberty is restricted by a decision of a court or other authorised state body. The public prosecutor shall ensure that in places of detention, imprisonment, disciplinary punishment of soldiers, protective treatment, protective education, institutional treatment, or institutional education on the basis of a court decision, as well as in police detention cells, persons are held only on the basis of a decision of a court or other authorised state body on deprivation or restriction of personal liberty. In addition, it also ensures that laws and other generally binding legal regulations are observed in these places.

C. Exercising their powers in court proceedings. In this case, we can talk about the competence of the prosecutor's office, both in the criminal area and in the civil area. In both of these areas, the prosecutor's office performs important tasks, but these differ in the individual procedures as well as in the means and methods used. Specific powers relating to the representation of a public prosecution before a criminal court are defined in Act no. 301/2005 Coll. – Criminal Procedure Code. In the area of civil proceedings, the public prosecutor acts as a public interest defender before a civil court. In this context, the prosecutor's office is also referred to as a body for the protection of objective law. The individual powers of the prosecutor in this area are defined in the Civil Dispute Code (Act no. 160/2015 Coll.), as well as in the Civil Non-dispute Code (Act no. 161/2015 Coll.).

D. Representation of the state in court proceedings, if so provided by a special law. These are mainly the cases where the public prosecutor represents the state in filing a motion to initiate proceedings before a civil court and in proceedings before this court in connection with violation of provisions of generally binding legislation concerning the transfer of state-owned property to other persons, especially Act no. 92/1991 Coll. on conditions for the transfer of the state property to other persons and Act no. 278/1993 Coll. on the administration of state property. It can be said that it is partly the performance of functions similar to the so-called financial public prosecutor's office existing in the Slovak territory until 1952. In the past, it represented the state in property matters.

E. Supervision over the observance of law by public administration bodies. In this case, it is the exercise of the powers of the prosecutor's office in the so-called non-criminal area. Within its framework, the prosecutor supervises the observance of laws and other generally binding legal regulations by public administration bodies by reviewing the legality of their decisions and generally binding legal regulations issued by them, conducting legality control, and also exercising an advisory function at public administration meetings.[12]

F. Participation in the preparation and implementation of preventive measures aimed at preventing violations of laws and other generally binding legal regulations and participation in the elimination of the causes and conditions of crime and in the prevention and suppression of crime. This competence of the public prosecutor's office is not regulated by any special legal regulation – it follows exclusively from Art. 4 (1) of Act no. 153/2001 Coll. This is a general provision,

12 J Mihálik, B Šramel (n 9).

which is reflected in several duties and requirements in the practical activities of the prosecutor. The prosecutor should, in the first instance, exercise his or her duties fairly, impartially, and objectively, respect and protect fundamental human rights and freedoms, and ensure that the criminal justice system operates as efficiently and expeditiously as possible. The public prosecutor must also avoid any discrimination on any grounds, such as sex, race, colour, language, religion, political opinion, national or social origin, membership of a national minority, property, birth, medical condition, disability, or other reason.13 The public prosecutor must monitor the equality of each citizen before the law and take into account the situation of the suspect and all the circumstances of the case, whether for the benefit or to the detriment of the suspect. In addition, the prosecutor must take into account the interests of witnesses and victims and ensure that they are informed of their rights and the development of criminal proceedings and that the necessary measures are taken to protect them physically and to protect their personal lives. In cases where the perpetrator is a juvenile or the victim is a child, the prosecutor is obliged to pay attention to strengthening the educational influence of criminal proceedings and being particularly sensitive in individual procedural acts.

G. Participation in law-making. Although the Prosecutor's Office of the Slovak Republic does not have the right of legislative initiative (the right to submit its own draft laws to the National Council of the Slovak Republic for approval), it may indirectly participate in the creation of legal regulations. Act no. 153/2001 Coll. allows the Prosecutor General to submit to the Government of the Slovak Republic suggestions for the adoption of laws and their amendments. The prosecutor's office can thus address its practical experience with the application of laws directly to the Ministry of Justice, which, on the basis of its initiatives, can submit to parliament any proposals for the approval of laws.[14] In addition, the Prosecutor General is entitled to submit motions for the adoption of laws, their amendments, and amendments to the Speaker of the National Council of the Slovak Republic. In this way, the prosecutor's office can achieve the transformation of its practical experience with the application of laws in the fight against crime or in the performance of other tasks directly into legislative proposals, which, once approved by the legislature, may eventually become a general statute (Act).

H. Execution of other tasks, if so provided by a special law or an international agreement declared in the manner prescribed by law. This competence leaves the possibility to extend the competence of the public prosecutor's office for the purpose of execution of other tasks. If it is socially necessary, it is enough to adopt an ordinary law and the Slovak Public Prosecutor's Office may be entrusted with tasks that it has not yet performed. As regards mutual recognition of judicial decisions in criminal law in the European context, such a law is, for example, Act no. 154/2010 Coll. on the European Arrest Warrant, which sets out important tasks for the Public Prosecutor's Office (Regional Prosecutor's Office) in connection with the European Arrest Warrant proceedings. These are the acts of the public prosecutor by which (s)he intervenes into the execution of the European arrest warrant if the judicial authorities of the Slovak Republic

13 P Szymaniec, *Exemptions to Generally Binding Laws in the Name of Religious Freedom as a Problem of Contemporary Legal Philosophy and Theory* (Masarykova univerzita 2017).

14 J Mihálik, B Šramel 'Constitutional and Legal Foundations for Local Self-Government 'Law-making: Does the Slovak Republic Need More Precise Legal Regulation?' (2019) 17(3) *Lex Localis* 393.

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are. First, the authorities issuing the European arrest warrant, and second, the authorities executing the European arrest warrant. Not only at the national level but also at the EU level, the public prosecutor plays an important procedural role in the issuing and the execution of the European arrest warrant.[15] Its role has been repeatedly confirmed by the Court of Justice of the European Union.[16] Another example in the area of mutual recognition of judicial decisions in criminal law is Act no. 549/2011 Coll. on the Recognition and Enforcement of Decisions Imposing Criminal Sanction Involving Deprivation of Liberty in the European Union. This law regulates national proceedings on, first, transmitting a decision imposing criminal sanction involving deprivation of liberty in another member state of the EU, and second, recognition and enforcement of such foreign decisions, i.e., decisions transmitted from other member states to Slovakia. It is considered as one of the most important national laws incorporating modern issues concerning recognition of foreign decisions of this type.[17] In case the court decides on recognition and enforcement of foreign decision involving deprivation of liberty, it shall consult it with the prosecutor; if the prosecutor does not agree with its decision (on recognition or on non-recognition of the decision), (s)he is eligible to appeal against it.

Of all the above types of competence, the most important competence for the Slovak Prosecutor's Office is the execution of criminal prosecution. In recent years, significant changes have been made in the Slovak legal system, which have led to the strengthening of the power of the prosecutor's office to apply the so-called diversions. Their essence lies in the possibility of the prosecutor's office to decide not to prosecute the perpetrator. However, this power of the prosecutor's office is in many cases perceived sensitively and controversially in Slovak society, especially in connection with many cases and scandals, when the public prosecutor simply stated that 'the act did not occur'.[18] It should be remembered that in the Slovak legal system, the public prosecutor's office is the state body that has a monopoly on the prosecution of criminal offences. This means that an entity other than the Public Prosecutor's Office of the Slovak Republic does not have the authority to prosecute and decide on filing the indictment to a criminal court. The only exception is the prosecution of the President, where the plaintiff is the National Council of the Slovak Republic. In this case, the indictment is filed to the court by the parliament,

15 L Klimek, *European arrest warrant* (Springer, 2015).

16 Judgment of the Court of Justice of the European Union of 27 May 2019 – Case C-509/18 – PF <https://curia.europa.eu/juris/document/document.jsf;jsessionid=A65CFF1BACDACD6B67895D40FD473392?text=&docid=214465&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=304505> accessed 13 December 2021; Judgment of the Court of Justice of the European Union of 9 October 2019 – Case C-489/19 PPU – NJ <https://curia.europa.eu/juris/document/document.jsf?text=&docid=218890&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=305328> accessed 13 December 2021; Judgment of the Court of Justice of the European Union of 12 December 2019 – Joined Cases C-566/19 PPU and C-626/19 PPU – JR & YC < https://curia.europa.eu/juris/document/document.jsf?text=&docid=221509&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=305450> accessed 13 December 2021; Judgment of the Court of Justice of the European Union of 12 December 2019 – Case C-625/19 PPU – XD <https://curia.europa.eu/juris/document/document.jsf?text=&docid=221513&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=305561> accessed 13 December 2021.

17 S Ferenčíková 'Analysis and evaluation of the legal regulation, de lege lata, concerning the imposition of a custodial sentence in the Slovak Republic' (2020) 10(3) *Sociopolitical Sciences*.

18 See, for instance, https://domov.sme.sk/c/20534115/prokuratura-definitivne-rozhodla-o-weissovi-skutok-sa-nestal.html; https://www.topky.sk/cl/100313/1649739/Skutok-sa-nestal-a----Prepusteny-kriminalnik-podal-trestne-oznamenie-na-markizacku-Kovesovu-; https://www.aktuality.sk/clanok/cbtyzdx/generalna-prokuratura-zrusila-obvinenie-aj-zoroslavovi-kollarovi-podla-namestnika-kanderu-chybaju-dokazy/; https://dennikn.sk/2520767/zo-zilinku-az-mrazi/?ref=tit; https://www.sevis.sk/page/index.php/sk/pohlad-pravnika/item/689-skutok-sa-nestal-a-co-moze-robit-poskodeny.html.

not by the public prosecutor.[19] However, this is an exception arising from the position of the prosecuted entity (head of state). In all other cases, the Public Prosecutor's Office of the Slovak Republic has this exclusive authority to prosecute or to file an indictment. Such a state monopoly on the prosecution of criminal matters is therefore unlimited. The philosophy of such an approach is based on the fact that only acts of greater seriousness are generally considered criminal, and it is therefore in the public interest that these acts be prosecuted by the state and its authority (public prosecutor's office). Widespread arguments include, in particular, that other entities, e.g., the injured parties are generally interested in damages only and thus, above all, in a civil action, not in a criminal action (indictment). For this reason, the prosecution must be taken over and carried out by an impartial and unbiased state body. On the other hand, the public prosecutor – or Prosecutor's Office – does not have unlimited 'influence' in criminal proceedings. As regards its 'breaks', the state guarantees the right to a defence, in particular, as regards suspect or convicted.[20]

It should be noted, however, that in many European countries, the state monopoly on prosecution is not absolute. On the contrary, it is limited to some extent. In this context, O Suchý states that in many European countries, certain types of criminal offences are considered by the legislator to be 'private prosecution offences', and thus their prosecution is left to the discretion of the injured parties.[21] These are mainly criminal offences that have violated legal individual rights, such as insult, defamation, minor bodily harm, violation of domestic freedom, or threat. The legislator here is based on the belief that the prosecution of such acts is not generally in the public interest and is a private matter for persons who have been harmed by crime.[22] In some countries, the power to prosecute the same offences is granted to public authorities as well as to private individuals or public or private organisations. The law grants the power to prosecute individuals and organisations independently of the prosecutor's decision. In the Slovak Republic, however, such a possibility is not given to private entities. In the Slovak Republic, private entities have no way to influence the decision-making activities of prosecutors.[23]

3 DECISION-MAKING POSSIBILITIES OF THE SLOVAK PUBLIC PROSECUTOR IN THE SLOVAK SYSTEM OF JUSTICE

Criminal proceedings are generally characterised by the fact that the bodies active in criminal proceedings and the court are obliged to act *ex officio* whenever the conditions are met.[24] These bodies are obliged to perform individual procedural acts independently of other entities, while they must always act proactively and independently and must not wait for possible suggestions for the execution of a procedural act. This obligation follows from the application of the principle of officiality in criminal proceedings, which is the basic mover of criminal proceedings

19 B Šramel, P Horváth, J Machyniak, 'Peculiarities of prosecution and indictment of the president of the Slovak Republic: Is current legal regulation really sufficient?' (2019) 8(3) *Social Sciences: Open Access Journal* 13.

20 P Čopko, S Romža, *Obhajoba obvineného v prípravnom konaní [transl: Defense of convicted person in pre-trial proceedings]* (Vydavatelství a nakladatelství Aleš Čeněk 2018).

21 O Suchý 'Odklon v trestním řízení [transl: Diversion in criminal proceedings]' (1991) 130(3) Právník 248.

22 Ibid, 249.

23 On the possibility of the public to influence the decision-making activities of other authorities in the Slovak Republic, see T Alman 'Possibilities of the public to influence decision-making of local self-government bodies' (2020) 9(2) *Political Science Forum* 53-59.

24 J Jelínek et al., Trestní právo procesní [transl: Criminal procedural law, 5th edition] (Leges 2018).

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covering its entire course. The principle of officiality manifests itself from the beginning of criminal proceedings until their end and prevents criminal offences from remaining unpunished and, at the same time, allows for the observance of uniform rules laid down by law in their criminal prosecution.[25]

Closely related to the principle of officiality is the principle of legality, which expresses the prosecutor's obligation to prosecute all criminal offences of which he has become aware.[26] The purpose of the principle of legality is, above all, to ensure the criminal prosecution of all criminal offences and thus to implement the monopoly right of the state to administer justice and to punish offenders. Only the state, through its body – the public prosecutor – is entitled and at the same time obliged to prosecute its citizens and thus protect the whole of society from committing further crimes.[27] In addition, the principle of legality is a basic condition for ensuring the equality of citizens before the law and a basic precondition for achieving a general preventive effect consisting in deterring other persons from committing a crime.[28]

By performing the duties of the public prosecutor arising from the principle of legality, the public prosecutor contributes to the confirmation of citizens that all crimes committed will be prosecuted and fairly punished (preventive and repressive function of criminal law).[29] However, strict adherence to the principle of legality can be in many cases considered to be counterproductive, too harsh, and does not have to lead to the basic purpose of criminal proceedings. Criminal law based on the principles of humanism is not aimed (and cannot be aimed) at excessive or unnecessary persecution of citizens. For this reason, too, the Criminal Procedure Code provides for several exceptions to the principle of legality, including cases where the public prosecutor does not have to prosecute criminal offences ((s)he has the possibility to prosecute, not the duty). This is the case where the legislator grants the public prosecutor the right to decide whether to prosecute a particular person or crime. *De facto*, it is the influence of the so-called principle of opportunity, where the public prosecutor can proceed differently than by filing the indictment. For that reason, (s)he is granted the so-called discretionary powers allowing exercising discretion when deciding how to settle a criminal case. Thus, the discretionary rights result from the principle of opportunity, the application of which has been considerably strengthened, especially after the recodification of criminal law in the Slovak Republic. In this context, the literature emphasises that the penetration of the elements of the principle of opportunity has become a significant trend in modern criminal policy in recent years, not only in the Slovak Republic, but also in many other countries, such as France, Holland, Belgium, Germany, and Great Britain.[30]

The essence of the principle of opportunity, as we have already indicated, is that the public prosecutor does not have to initiate criminal proceedings and prosecute the accused, even if there is sufficient evidence of the guilt. Therefore, under the principle

25 B Šramel 'Privatizácia trestného konania: cui bono? [Privatisation of criminal proceedings: cui bono?' (2013) 19(6) *Bulletin slovenskej advokácie* 31.

26 B Šramel, J Machyniak, D Guľan, 'Slovak criminal justice and the philosophy of its privatization: an appropriate solution of problems of Slovak justice in the 21st century?' (2020) 9(2) *Social Sciences: Open Access Journal* 4.

27 T Gřivna. 'Několik poznámek k zásadě oportunity v návrhu věcného záměru nového trestního řádu [transl: A few remarks on the principle of opportunity in the draft of the new Criminal Procedure Code]' (2004) 7(12) *Trestní právo* 3.

28 K Kandová (n 5).

29 A Letková, A Schneiderová, 'The Value of Justice in Czechoslovak Criminal Law Norms in the 20th Century' (2021) 2(10) *Access to Justice in Eastern Europe* 91.

30 M Marková (n 3).

of opportunity, the public prosecutor has the discretion as to whether there is a reason to prosecute a particular offender. In most cases, the prosecutor's discretion is based mainly on an assessment of the degree of public interest in prosecuting a specific crime and punishing its perpetrator. The principle of opportunity has a number of proponents, arguing in particular that opportunity allows a proportionate response to society's need to punish certain offences, further contributes to material justice instead of formal justice, and facilitates the right to a trial without undue delay.[31] It can also be stated that the principle of opportunity also significantly contributes to the proper conduct of adversarial proceedings before a court, as it prevents trivial cases from being heard in financially and time-consuming court proceedings.

The principle of opportunity applied in the proceedings and decisions of the public prosecutor is expressed in several provisions of the Criminal Procedure Code and is reflected in specific discretionary powers of the public prosecutor. The public prosecutor can use his/her discretion throughout the pre-trial proceedings, even prior to the commencement of criminal prosecution, where (s)he is entitled to suspend the case if the criminal prosecution is irrelevant ('inexpedient').[32] It is the expediency of criminal prosecution that, in the light of the principle of opportunity,[33] is a decisive factor on the basis of which the public prosecutor concludes that there is no need for criminal prosecution. However, the prosecutor cannot decide on the expediency of criminal prosecution on the basis of arbitrary behaviour. On the contrary, his/her discretion must be based on the legal boundaries specified in Art. 215 (2) of Criminal Procedure Code. Thus, if the public prosecutor, after examining the criminal report, concludes that the proceedings specified therein fulfil the characteristics of the factual nature of the criminal offence, (s)he may suspend the case only if the criminal prosecution would be inexpedient. The Criminal Procedure Code lists four legal boundaries (criteria) on the basis of which the public prosecutor evaluates the (in)expediency of prosecution. In the first case, the public prosecutor may assess a criminal prosecution as inexpedient if (s)he considers the sentence in which the prosecution may result to be fully insignificant compared with the sentence for another act the accused has already been charged with. In this case, the opinion of the public prosecutor is based on a comparison of the amount of the sentence that was lawfully imposed on the accused for another crime and the sentence that should be imposed for the given crime if the criminal prosecution was initiated. The second criterion of inexpediency is that the act committed by the accused has already been ruled by another body in a disciplinary, reprimand way or a foreign court or agency, and this decision may be considered satisfactory. When assessing expediency, the public prosecutor evaluates in particular the seriousness of the act committed, the circumstances of the accused, the possibility of his/her re-education, and the protection of society. The third criterion of the inexpediency of the prosecution is based on the fact that the act surrendered to another state for the purpose of prosecution was legally decided by a foreign court or other foreign authority competent to prosecute the offence, misdemeanour, or other administrative offence, and this decision can be considered sufficient. Finally, the last, fourth criterion for deciding on the inexpediency of criminal prosecution is that it is an act committed by a person in coercion in direct connection with the commission of the crime of trafficking in human beings, the crime

31 A Jalč 'Priblíženie niektorých nových trestnoprocesných zásad v slovenskom právnom poriadku, ich komparácia s niektorými zásadami platnými v kontinentálnej Európe [transl: Explanation of some new criminal procedure principles in the Slovak legal system, their comparison with some principles valid in continental Europe]' (2007) 15(2) *Časopis pro právní vědu a praxi* 130.

32 I Galovcová (n 6).

33 In the common-law legal system, the principle of opportunity is referred to as 'expediency'. The principle of opportunity can also be described as a principle of expediency.

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of sexual abuse, the crime of ill-treatment person and entrusted person, or the offence of producing child pornography.[34]

Only the four aforementioned legal criteria can be taken into account by the public prosecutor when deciding whether to decide to suspend the case before prosecuting. Other forms of decision-making by the public prosecutor before the commencement of criminal prosecution (e.g., referring of the matter or dismissal of the matter) are mandatory, and the public prosecutor is therefore not able to exercise his/her discretion under the principle of opportunity.

In the pre-trial proceedings, the discretionary powers of the public prosecutor are considerably more extensive than in the proceedings before the commencement of criminal prosecution. As the public prosecutor is considered to be the master of the dispute in the pre-trial proceedings (dominus litis), (s)he also has a dominant position at this stage of the criminal proceedings. The law grants him/her many powers over the accused (e.g., to decide on his/her compelling, on his/her detention, etc.), which (s)he can use whenever (s)he deems it necessary. As the master of the dispute, the public prosecutor even has the power to decide on the merits of the accused's criminal case without an indictment being filed and the case thus brought to court. Although many substantive decisions of the prosecutor in pre-trial proceedings are mandatory and the law forces the prosecutor to issue them (transfer of a case under Art. 214 of Slovak Criminal Procedure Code, stay of criminal prosecution under Art. 215 (1) of Slovak Criminal Procedure Code),[35] a large part of decisions is governed by the principle of opportunity, and the public prosecutor is autonomous when deciding whether to close the case without bringing it to court is indeed the right solution.

Thus, in the pre-trial proceedings, the public prosecutor is entitled to decide on the stay of criminal prosecution.[36] However, the prosecutor's discretion in deciding to stay the criminal prosecution cannot be limitless, and the law sets out the reasons that the prosecutor must take into account in his/her decision. These reasons are, in fact, the four criteria used by the prosecutor in assessing the aforementioned expediency of criminal proceedings in deciding to suspend the case during the proceedings prior to the commencement of the criminal prosecution.

The principle of opportunity is also expressed in the discretionary power of the public prosecutor to decide on the stay of criminal prosecution of a cooperating accused,[37] which is specific in that it cannot be applied to all accused, but only to a cooperating accused (the so-called crown witness). The public prosecutor can do so if there is a criminal prosecution

34 F Ščerba 'Posuzování případů zneužívání dětí prostředníctvím internetu k pornografickým účelům [transl: Assessment of cases of child abuse via the Internet for pornographic purposes]' (2020) 19(3) *Trestněprávní revue* 125.

35 L Michaľov, M Baločko 'Zastavenie trestného stíhania ako následok neprimerane dlho trvajúceho trestného stíhania [Stay of criminal prosecution as a result of a disproportionately long criminal prosecution]' (2019) 6(1) Štát a parvo 94.

36 In this case, we mean his/her authority arising from the principle of opportunity set out in Art. 215 (2) of the Slovak Criminal Procedure Code. However, in accordance with Art. 215 (1) of the Criminal Procedure Code, the public prosecutor is obliged to decide on the stay of criminal prosecution. There are eight reasons: 1) if it is beyond any doubt that the act, on the grounds of which the criminal prosecution shall be instituted, did not occur, 2) if this act is not a criminal offence, and there are no grounds to transfer the case, 3) if it is beyond any doubt that the act was not committed by the accused, 4) if the criminal prosecution is inadmissible under Art. 9 of Slovak Criminal Procedure Code, 5) if the accused bore no criminal liability for unsound mind while committing the act, 6) the accused juvenile, who at the time of the criminal offence did not exceed the age of fifteen, did not reach such a level of mental and moral maturity that (s)he could recognize his/her illegality or control his actions, 7) if a conciliation is approved between the accused and the injured party, 8) if the culpability of the act expired.

37 Z Kyjac 'Posudzovanie vierohodnosti výpovede spolupracujúcej osoby [transl: Assessment of credibility of the cooperating person's statement]' (2021) 73(6-7) *Justičná revue* 829.

against the accused, who played a significant role in clarifying the corruption,[38] the criminal offence of establishing, masterminding, or supporting a criminal group, the criminal offence of establishing, masterminding, or supporting a terrorist group, or a particularly serious felony committed by an organised group, a criminal group, or a terrorist group or in identifying or convicting offenders of such criminal offences, and the interest of society in clarifying such a criminal offence outweighs the interest in prosecuting the accused.[39] However, it must not be a person who organised, instigated, or commissioned a crime in the clarification of which (s)he participated. Thus, the public prosecutor has the opportunity to decide again whether the termination of criminal prosecution in the pre-trial proceedings is already beneficial, expedient, or necessary. Likewise, his/her professional assessment of the issuance of such a decision against a crown witness cannot be based on arbitrariness, but on careful and thorough consideration and assessment of the seriousness of the crime, the state's interest in clarifying such an act and prosecuting the accused, his/her character, his/her involvement and consequences, his/her ability to clarify such offences, and to identify and convict their perpetrators.[40] In addition, only the public prosecutor, as the protector of the public interest in criminal proceedings, is entitled to assess the degree of the society's interest in prosecuting the accused. Therefore, if (s)he considers that the society's interest in clarifying the crime is not large enough, (s)he will continue to prosecute the cooperating accused and will not apply the institution of staying the criminal prosecution. It should be emphasised that the prosecutor must be particularly careful in issuing this decision, as the decision to discontinue the prosecution creates a res judicata obstacle, and any negligent conduct by the prosecutor could result in the offender being acquitted and impossible to prosecute and punish further.

Another discretionary power of the public prosecutor is the possibility to conditionally stay the criminal prosecution.[41] This decision is a form of the so-called 'diversion'[42] when there is some kind of agreement between the state and the offender that if the offender proves him/herself during the probationary period, (s)he will not be punished at all for the crime committed. However, the prosecutor is limited by a provision stating that in no case can criminal prosecution be stayed if the crime has caused the death of a person, if there is a criminal prosecution for corruption, or if a criminal prosecution is conducted against a public official or a foreign public official. The application of this procedure is possible only if the accused has committed an intentional or negligent minor offence, for which the Criminal Code provides for imprisonment, the upper limit of which does not exceed five years. In addition, the consent of the accused is required, which must be done in a way that does not raise doubts, either in writing or by oral deposition. An expression of the principle of opportunity can be found in the conditions for the application of this institution. One of the conditions is also that 'the person of the perpetrator in consideration of his/her life so far and circumstances of the case suffice to justify such a decision.'[43] The assessment of the

38 M Kantorová, *Vývoj právnej úpravy trestných činov korupcie v Slovenskej republike. Metamorfózy práva ve střední Evropě [transl: Development of the legal regulation of corruption offenses in the Slovak Republic]* (Západočeská univerzita v Plzni 2018).

39 J Čentéš, A Beleš, 'Regulation of agent as a tool for combating organized crime' (2018) 8(2) *Journal of Security and Sustainability Issues* 152.

40 Š Minárik et al., *Trestný poriadok: Stručný komentár [transl: Criminal Procedure Code: Brief commentary.2nd edition]* (Iura Edition 2010).

41 Art 216 (1) of the Slovak Criminal Procedure Code.

42 J Klátik 'K histórii, pojmu a účelu odklonu v trestnom konaní [On the history, concept and purpose of diversion in criminal proceedings]' (2008) 14(3) *Bulletin slovenskej advokácie 25; J Zůbek, Odklony v trestním řízení [transl: Diversions in criminal proceedings]* (Wolters Kluwer ČR 2019).

43 Under Art 216 (1) of the Slovak Criminal Procedure Code, other conditions for the application of this diversion also include the fact that the accused declares that (s)he has committed the act for which (s)he is being prosecuted and there are no reasonable doubts that his/her statement was made freely, seriously, and intelligibly, and at the same time the accused compensated the damage caused by the act or concluded an agreement on its compensation with the injured party or took other necessary measures to replace it.

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fulfilment of this condition belongs exclusively to the public prosecutor, and the application of the institution of conditional stay of criminal prosecution depends on its evaluation.[44] The criterion for the public prosecutor is therefore the adequacy of this decision in terms of achieving the purpose of the criminal proceedings. The prosecutor's discretion is based on an assessment of the offender's personal circumstances, life to date, and the circumstances of the case.

The recodification also brought the public prosecutor the opportunity to terminate the cooperation with the cooperating perpetrator using a new form of diversion – a conditional stay of criminal prosecution of the cooperating accused.[45] This relatively new diversion in criminal proceedings is close to the aforementioned institution of stay of criminal prosecution of a cooperating accused and provides an opportunity for the cooperating accused not to have the criminal prosecution stayed definitively (thus creating a res judicata obstacle). On the contrary, it allows the cooperating accused to prove during the probationary period that (s)he will not actually continue to commit criminal offences. This provision also clearly reflects the principle of opportunity, as the public prosecutor does not have to (is entitled) act in a mentioned way. Moreover, this principle is also expressed in the conditions for the application of the said new diversion, which also include the condition that 'the interest of society in clarifying a crime through cooperation with the accused outweighs the interest in prosecuting the accused'.[46] When deciding whether the public prosecutor applies the institution of conditional stay of criminal prosecution of a cooperating accused, the public prosecutor proceeds on the basis of his discretion. However, it cannot be boundless. On the contrary, the prosecutor must comprehensively consider in particular the relationship between the seriousness of the crime and the interest of the state in prosecuting the offender, must assess the circumstances of the case, the offender, and its role in the crime and its consequences. Last but not least, (s)he must assess whether the person's statement is capable of making a significant contribution to clarifying the most serious crimes and identifying their perpetrators.

The institution of conciliation is another form of diversion in which the principle of opportunity is manifested. The public prosecutor is entitled to close the criminal matter using conciliation in the case of an offence for which the Criminal Code provides for imprisonment, the upper limit of which does not exceed five years. Approval of the conciliation also requires the consent of the accused and the injured party, which does not raise doubts. It should be added that, as with the conditional stay of criminal proceedings, the prosecutor may in no case approve conciliation if the crime has caused the death of a person, if criminal proceedings for corruption are being conducted or if criminal proceedings against a public official or a foreign public official are being conducted. The principle of opportunity is expressed, as in previous decisions, in conditions that provide the public prosecutor with discretion in the application of this form of diversion. As in previous decisions, the prosecutor may decide on conciliation if 'in view of the nature and gravity of the offense committed, the extent to which the public interest has been affected by the offense,

44 L Bartošová 'Rozsah dokazovania pri využití odklonov v prípravnom konaní [Extent of evidence taking when using diversions in the pre-trial proceedings]' (2007) 6(5) *Trestněprávní revue* 124.

45 Art 218 of the Slovak Criminal Procedure Code.

46 Under Art 218 of the Slovak Criminal Procedure Code other conditions for the application of this diversion include that the cooperating accused played a significant role in clarifying the criminal offence of corruption, the criminal offence of establishing, masterminding, or supporting a criminal group or a terrorist group or a particularly serious felony committed by an organised group, a criminal group, or a terrorist group or in identifying or convicting offenders of such criminal offences, However, it must not be a person who organised, instigated, or commissioned a crime in the clarification of which (s)he participated.

the person accused and his or her personal and financial circumstances deem such a decision'.[47]

The prosecutor's discretion is therefore based in particular on an assessment of the manner in which the crime was committed, the degree of culpability, the consequence, the person of the accused, the motive, and the imminent punishment. In assessing the personal and financial circumstances of the accused, the prosecutor takes into account the social environment in which (s)he lives, his/her) employment and financial situation, marital status, and possible obligations to pay maintenance.[48]

A characteristic feature of the conciliation is the fact that the accused must deposit a sum of money intended for a specific addressee for public benefit purposes in the court's account (in the pre-trial proceedings to the prosecutor's office). However, this sum of money must not be disproportionate to the seriousness of the offence committed. Here, too, the Criminal Procedure Code leaves the prosecutor room to implement a discretionary decision, as it does not set a specific amount of money needed to execute the conciliation.[49] It is therefore up to the public prosecutor to assess the adequacy of this amount, who must, of course, take into account the specific circumstances of the case, the person of the accused, and his/her personal and property circumstances. For this reason, too, the amount of a specific amount of money is (and should be) be different for different offenders.

Finally, it should be added that the principle of opportunity is, to a certain extent, also expressed in another new type of diversion, namely the guilt and punishment procedure (plea bargain procedure). However, this is a specific case, as the public prosecutor has the possibility to propose only the imposition of a milder sentence – a sentence of imprisonment reduced by one third below the lower limit of the statutory penalty rate (Art. 39 (4) of the Criminal Code).

4 ARE THE POSSIBILITIES OF CONTROLLING THE DECISIONS OF PUBLIC PROSECUTORS IN THE SLOVAK CRIMINAL JUSTICE SYSTEM SUFFICIENT?

The scope of the prosecutor's authority to decide not to prosecute a particular offender has increased in recent years to such an extent that the question arises as to whether public prosecutors are not abusing these powers and are not acting contrary to their mission as public interest defenders. This issue often arises in particular in connection with the prosecutor's decisions not to prosecute persons accused in cases of serious crime, where such decisions of the prosecutor are perceived particularly sensitively by the public in particular. It is therefore appropriate to ask what control mechanisms Slovak legal system recognises if the prosecutor's decision not to prosecute the offender appears to be inadequate and raises doubts.

47 Under Art 220 (1) of Slovak Criminal Procedure Code, other conditions for the application of this diversion include the fact that the accused declares that (s)he has committed the act for which (s)he is being prosecuted, and there are no reasonable doubts that his/her statement was made freely, seriously, and certainly, and the accused compensated the damage if caused by the act, or took other measures to compensate for the damage, or otherwise eliminated the damage caused by the crime.

48 B Šramel 'Zmier (narovnání) ako procesnoprávny prvok restoratívnej justície a problémy spojené s jeho aplikáciou [transl: Conciliation as a procedural element of restorative justice and problems associated with it application]' (2013) 17(11-12) *Trestní právo* 30.

49 J Čentéš, *Trestný poriadok: Veľký komentár [Criminal Procedure Code: Extensive commentary]* (Eurokódex 2019).

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All the above-mentioned substantive decisions not to prosecute the accused are made by the public prosecutor in the form of a resolution. According to Slovak law, such a resolution of the prosecutor in criminal proceedings can be reviewed only within the hierarchical system of the prosecutor's office. If the injured party considers that the prosecutor's resolution not to prosecute the perpetrator is inadequate, (s)he has the right to file a complaint against such a decision.[50] Here, however, begins the fundamental problem, which is the mechanism for deciding on remedies. The injured party first files a complaint with the prosecutor him/herself, who issued the contested decision. If the prosecutor denies the complaint filed by the injured party, (s)he must submit the matter to the superior prosecutor for a decision.[51] And this is where the problem is. As the prosecutor's office is based on hierarchical superiority and subordination, the discretion of the public prosecutor deciding on the merits of a given case can often be influenced by the superior prosecutor. This possibility follows directly from Art. 6 (1) of Act no. 153/2001 Coll., according to which the superior prosecutor is entitled to issue an instruction to the subordinate prosecutor on how to proceed in the proceedings, while the subordinate prosecutor is obliged to comply with the instruction. In such a case, if the superior prosecutor instructs the subordinate prosecutor not to prosecute a particular offender, the relevant prosecutor is obliged to proceed regardless of his/her personal assessment of the case. Of course, the Act on the Prosecutor's Office also contains a system of certain legal guarantees of non-abuse of such a position by a superior prosecutor if the situations provided for by law occur,[52] but they do not address the situation if both the superior and the subordinate prosecutor are directly affected by the accused or other persons with an interest in the illegal decision. As the remaining two ordinary remedies (appeal, refusal) can only be filed against court decisions,[53] it can be stated that the complaint is the only ordinary remedy used for reviewing the prosecutor's discretion. However, as it is decided in the environment of an office built on the principles of hierarchical subordination and centralism, there can be no guarantee that the control of the exercise of discretionary powers will be sufficient and proper.

The mechanism of extraordinary remedies is also based on the remedy decisions made within the hierarchical system of the prosecutor's office. Even if the injured party is entitled to file a petition for annulment of final prosecutorial decisions made in the pre-trial proceedings (to the detriment of the accused), this petition is decided by the prosecutor's office – the Prosecutor General, who, as the superior of all prosecutor's offices, also may not decide impartially. Another extraordinary remedy against a final resolution (decision) of the public prosecutor is the motion on retrial of proceedings. However, this motion can be filed by the public prosecutor only, not by the injured party. The problem is that if public prosecutors are directly or indirectly affected by the accused or other persons with an interest in not prosecuting, they cannot act properly, impartially, and legally, and there

50 Art 185 of Slovak Criminal Procedure Code.

51 D Korgo, *Trestné právo procesné [transl: Criminal procedural law]* (Vydavatelství a nakladatelství Aleš Čeněk 2017).

52 Under Art 6 of Act no. 153/2001 Coll., if the superior public prosecutor issues an instruction to the subordinate public prosecutor, this instruction must be in writing. However, if the subordinate prosecutor considers the instruction to be in conflict with the law or his/her legal opinion, (s)he may request in writing the superior prosecutor to withdraw the case. Likewise, a subordinate prosecutor may refuse to comply with such an instruction if, by complying with it, (s)he would immediately and seriously endanger his/her life or health or the life or health of a person close to him/her. Also, if there is a change in the evidentiary situation in the court proceedings, the subordinate prosecutor need not be bound by the instructions of the superior prosecutor. On the contrary, the subordinate prosecutor is obliged to refuse to comply with the instruction if by fulfilling it he would commit a criminal offence, misdemeanour, other administrative offence, or disciplinary offence.

53 E Szabová, *Odvolanie v trestnom konaní [transl: Appeal in criminal proceedings]* (Leges 2015); E Szabová, *Odvolanie [transl: Appeal]* (Leges 2015).

is no one to ensure that the real perpetrator is justly punished. To the detriment of the accused, only the public prosecutor is entitled to file the motion on retrial of proceedings. Finally, extraordinary appeal as an extraordinary remedy can only be filed against court decisions so that in relation to the review of the prosecutor's discretion, this appeal is devoid of purpose.

One of the related problems is also the fact that the injured party in the Slovak Republic has basically no rights,[54] which, independently of the prosecuting authorities, would ensure the control of the prosecutor's discretion directly through an independent and impartial court. This situation also stems from the fact that the public prosecutor's office has a prosecution monopoly in Slovak criminal proceedings.

However, the prosecution monopoly of the prosecutor's office is not a rational consequence of its historical development in the Slovak territory but a consequence of the *coup d'état* in 1948 and the subsequent onset of the communist regime. It was the communist party that rebuilt the prosecutor's office into a body for the general supervision of legality with the right to intervene in all areas of social life. For that reason, the prosecutor's office was also granted a prosecution monopoly and the resulting exclusive power to decide whether to prosecute and whether to file or not to file the indictment. The prosecution monopoly was thus granted to the prosecutor's office as a result of the communist regime's efforts to obtain a criminal law instrument to suppress political and class enemies. The possibility for other entities (e.g., the injured party) to exercise their rights through criminal law institutions has thus been minimised. This step was, of course, logical, as in the socialist establishment, the interest of the people is superior to the interest of the individual.

5 WHAT IS THE WAY OUT OF THE CURRENT SITUATION? (CONSIDERATIONS LEX FERENDA)

The wide range of discretionary powers of the public prosecutor, the execution of which is, moreover, insufficiently controlled and practically even uncontrollable, of course, creates room for their abuse and various machinations.[55] As we have pointed out in the previous lines, the current system of control of these powers by the prosecutor's office, initiated in principle only by the prosecutor's office and implemented only within the hierarchical system of the prosecutor's office, is insufficient. However, the issue of appropriate and effective control is very important, mainly because the decisions of the prosecutor made on the basis of his/her discretion in the pre-trial proceedings are similar to the court's decisions on guilt and punishment made at the court hearing. The difference is that while the injured party, as a private person with an interest in the outcome of criminal proceedings, can defend him/herself against court decisions (e.g., by filing an appeal)[56]

54 For more information on the status of the injured party, see J Čentéš, M Krajčovič 'Consideration of the effectiveness of flat-rate compensation for damage in insolvency proceedings' (2019) 7(2) *Entrepreneurship and Sustainability Issues* 1435-1449.

55 See 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* 64.

56 However, it should be noted that the injured party's right to defend him/herself against a court decision is also considerably limited. The injured party may file an appeal against the defendant only in relation to the verdict of damage compensation, never in relation to the verdict of guilt and punishment. However, from the point of view of the strict application of the principle of establishing the facts without reasonable doubt, such a limitation of the injured party's rights does not seem to be very appropriate and from the *de lege ferenda* view an extension of the injured party's right to appeal in relation to the guilt and punishment should be considered.

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in a higher court, the prosecutor's decisions are judicially non-reviewable, and thus the injured party cannot even defend him/herself at an independent and impartial court.

However, it should be emphasised that Art. 46 of the Constitution of the Slovak Republic stipulates the right of every person to judicial and other legal protection. The mentioned Art. in sect. 2 says that

> any person who claims his or her rights to have been denied by a decision of a body of public administration may come to court to have the legality of the decision reviewed, save otherwise provided by a law. The review of decisions in matters regarding the fundamental rights and freedoms however shall not be excluded from the jurisdiction of courts.

Therefore, the injured party's inability to go to court in the event of a substantive decision by the public prosecutor can be considered a serious shortcoming of the current legislation. The right to object to illegal and unjust decisions can be ranked among the rights on which the modern legal system of European countries is built.[57]

In addition, it should be recalled that even Recommendation Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system adopted by the Committee of Ministers on 6 October 2000[58] states in para. 34 that

> interested parties of recognised or identifiable status, in particular victims, should be able to challenge decisions of public prosecutors not to prosecute; such a challenge may be made, where appropriate after an hierarchical review, either by way of judicial review, or by authorising parties to engage private prosecution.

The above-mentioned Recommendation of the Committee of Ministers therefore clearly declares its interest in reviewing the substantive decisions of the public prosecutor not to prosecute outside the hierarchical structure of the public prosecutor's office.

The dangers of incorrect decisions by public prosecutors are also addressed in the Venice Commission[59] report on European standards as regards the independence of the judicial system: Part II – The Prosecution Service, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010). It states that

> ... a second, more insidious, and probably commoner, is where the prosecutor does not bring a prosecution which ought to be brought. This problem is frequently associated with corruption but may also be encountered where governments have behaved in a criminal or corrupt manner or when powerful interests bring political pressure to bear. In principle a wrong instruction not to prosecute may be more difficult to counter because it may not be easily made subject to judicial control. Victims' rights to seek judicial review of cases of non-prosecution may need to be developed to overcome this problem.

For these reasons, it would be appropriate to extend the possibilities for reviewing the decisions on the merits issued by public prosecutors on the basis of the application of the principle of opportunity. Thus, the intervention of authorities other than just prosecutor's offices would be very necessary. It is necessary to introduce a more effective system of control of discretionary decision-making of the public prosecutors, which would prevent (limit)

57 R Funta, *Základné práva v EÚ. Európa a Európske Právo [transl: Fundamental rights in the EU. Europe and European Law]* (IRIS – Vydavateľstvo a tlač 2016).

58 <https://rm.coe.int/16804be55a> accessed 26 January 2022. See also V Bazeliuk, Yu Demyanenko, O Maslova 'Peculiarities of Prosecutor Participation in Private Cases: Ukrainian Experience' (2022) 1(13) *Access to Justice in Eastern Europe* 205.

59 The full title of the Venice Commission is 'European Commission for Democracy through Law'.

the inadequate procedure and decision-making of the prosecutor. The control systems set out in the Recommendation Rec(2000)19 of the Committee of Ministers as well as in the Venice Commission Report are deeply embedded in the legal systems of the vast majority of European countries. In this context, T Gřivna and P Gřivnová state that there are three basic models of control of the prosecutor's discretion in the world – a subsidiary indictment, a review by a court on the basis of a motion of an authorised subject, and a prior authorisation of the court. These models have in common that the control of the prosecutor's decision-making takes place outside the hierarchical structure of public prosecution offices, which creates the preconditions for an objective and independent assessment of the legitimacy of not prosecuting the perpetrator of a certain crime.[60] All these models represent an effective form of control of the prosecutor's decision-making, and taking over one of them or a combination of them could probably lead, in Slovakia, to improvement and expansion of the control mechanisms over the prosecutor's decision-making.

A possible inspiration for the Slovak system of control of discretionary powers of a public prosecutor in criminal proceedings could be the regulation of control of discretionary powers of a public prosecutor existing in Poland. In Poland, the control of the public prosecutor's decisions is carried out using the so-called subsidiary indictment.[61] The essence of the subsidiary indictment is, in general, that the injured party has the right to prosecute where the public prosecutor refuses to prosecute or to continue the prosecution. This Polish legal institution can undoubtedly be considered an important instrument for securing an individual's fundamental rights arising from the crime committed.[62] Due to its importance from the point of view of controlling the discretionary powers of the Slovak public prosecutors, it is therefore desirable to get acquainted with this institution and to explain how it could also work in the conditions of the Slovak Republic.

However, under the Polish Criminal Procedure Code, the injured party may act as a subsidiary prosecutor (*oskarżyciel posiłkowy*) only after undergoing a relatively complex procedure. If the public prosecutor has refused to prosecute or has decided to discontinue the prosecution and the injured party is interested in acting as a subsidiary prosecutor, (s)he must file a complaint (*zażalenie*) against such decisions with the institutionally superior public prosecutor, who is obliged to refer it to the court if (s)he does not comply with the complaint.[63] If the court annuls the decision of the public prosecutor, it shall state the reasons for the annulment and, if necessary, the circumstances to be clarified and the actions to be taken. These recommendations are binding on the public prosecutor. However, if the public prosecutor still sees no reason to prosecute, (s)he is again entitled to refuse to prosecute or to decide to stay the criminal prosecution.[64] After issuing the final decision by the public prosecutor, the injured party is entitled to file an indictment in court (*akt oskarżenia*) within one month of receipt of the notification of such a decision by the public prosecutor. The indictment must be prepared and signed by an attorney and must contain the requisites stipulated by law. It should be noted that the court may limit the number of subsidiary prosecutors in a given criminal case, and if the number of subsidiary prosecutors allowed by the court is met, the court may decide that another

60 T Gřivna, P Gřivnová. *Prostředky kontroly dodržování zásady legality v trestním řízení [Means of monitoring compliance with the principle of legality in criminal proceedings]* (Bratislavská vysoká škola práva 2008).

61 J Skorupka et al., *Kodeks postępowania karnego. Komentarz [transl: Criminal Procedure Code. Commentary, 5th edition]* (CH Beck 2021).

62 P Szymaniec, *Bezpieczeństwo a ograniczenie praw jednostki. Zasada proporcjonalności a ochrona praw podstawowych w państwach Europy [transl: Security and the limitation of the rights of an individual. The principle of proportionality and human and civil rights in the legal systems of the EU member states]* (Państwowa wyzsza szkoła zawodowa im. Angelusa Silesiusa 2015).

63 Art 306 of Polish Criminal Procedure Code *(Kodeks postępowania karnego).*

64 Art 330 of Polish Criminal Procedure Code *(Kodeks postępowania karnego).*

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subsidiary prosecutor may no longer participate in the proceedings. In addition, the court will decide that the subsidiary prosecutor may not take part in the proceedings even if the court finds that such a person is not entitled to file the indictment or if the indictment was filed after the expiry of the time prescribed by law. At the same time, it must be emphasised that if the proceedings were instituted on the basis of a subsidiary indictment, any further involvement of the public prosecutor in the proceedings is admissible.[65] The subsidiary prosecutor is entitled to withdraw his/her indictment and, if (s)he does so, (s)he may not reopen the proceedings. In such a case, the court will notify the public prosecutor of the withdrawal of the indictment, who may intervene in the proceedings. If this does not happen within 14 days from the delivery of the notification, the criminal proceedings will be stopped.

In the event of the death of the subsidiary prosecutor, the criminal proceedings are not suspended, as the injured party's closest relatives as new subsidiary prosecutors may also intervene at any stage of the proceedings in the same way as their deceased relative.[66] Finally, if the accused has been acquitted or the court has stayed the criminal prosecution, the subsidiary prosecutor bears the costs of the entire proceedings. This provision is intended to help avoid unjustified or unnecessary indictments.

In addition to the subsidiary indictment, it may be mentioned that in the legal systems of some European states, there is another possibility for the injured party to reach a review of the prosecutor's discretionary decisions. This possibility is the so-called 'complaint against the public prosecutor's decision', on the basis of which the public prosecutor's discretionary decision will be subject to judicial review. In this regard, mention may be made in particular of the German system, under which the injured party may, within a period of two weeks, file a motion that the procedure of the public prosecutor be examined by a hierarchically superior public prosecutor. If this motion is rejected, the injured party may further seek a judicial decision within one month in relation to his/her rejected motion. However, the motion must contain the facts justifying filing the indictment. When examining the motion, the court may request from the public prosecutor the material collected so far and may also order an investigation in order to properly examine the injured party's application. If, on examination of the case, the court concludes that criminal prosecution should be conducted and the indictment filed, it will order the public prosecutor to file the indictment.[67] It can be seen that in Germany, the public prosecutor's prosecutorial monopoly is limited to some extent, as the court is entitled, in cases provided for by law, to impose on the public prosecutor its will to file the indictment. However, in terms of the principles on which the Slovak criminal proceedings are based, we do not consider this model to be suitable for Slovak criminal justice system. The intervention of the court and the imposition of its will on the prosecutor would be contrary to the accusation principle, according to which the right to file the indictment is a privilege of the public prosecutor acting in the pre-trial proceedings as the 'master' of the dispute (*dominus litis*).

In the light of the above, we believe that a subsidiary indictment could also be a possible and effective means of reviewing the public prosecutor's wide discretion in the Slovak legal system, through which the injured party could exercise his/her interest in prosecuting and punishing the offender if the public authorities refuse to perform their tasks. Unlike the above-mentioned complaint against the prosecutor's decision, the subsidiary indictment requires a much more active approach of the injured party, and no further involvement of the public prosecutor is required, who, moreover, considers

65 Art 55 of Polish Criminal Procedure Code *(Kodeks postępowania karnego)*.

66 Art 58 of Polish Criminal Procedure Code *(Kodeks postępowania karnego)*.

67 Arts. 172-175 of German Criminal Procedure Code *(Strafprozeßordnung)*.

the prosecution to be unnecessary or ineffective due to the absence of public interest. As a result of the subsidiary indictment, no one forces the public prosecutor against his/her will to file the indictment, and thus the public prosecutor also saves time and money associated with the conduct of criminal proceedings.[68] Thus, the state can 'use' the injured party and his/her financial resources for the purpose of examining the correctness of the prosecutor's discretionary decisions, outside the hierarchical structure of the prosecutor's office by an independent and impartial court. The injured party certainly has the greatest interest in the fair settlement of a criminal case and is logically another entity that should be entitled to initiate criminal proceedings before a court. From the point of view of the state theory, the subsidiary indictment also appears to be a fair tool enabling the injured party to partially compensate for what the state and its bodies have failed to detect: detect criminal offences, detect their perpetrators and impose fair punishments.

However, some legal scientists point out that the subsidiary indictment is solely an instrument enabling the injured party to promote his/her individual interest in the criminal proceedings, even though the public prosecutor has ruled that there is no public interest in the prosecution.[69] However, it is precisely the court that can avoid such a situation and, if it concludes that the public interest in the particular case is not present, the injured party as a subsidiary prosecutor will not assert his/her private interest before the court and vice versa, the court will not meet the injured party´s wishes, and the criminal prosecution will be stayed. The institution of the subsidiary indictment has its place precisely in those systems where the public prosecutor is endowed with extensive discretionary powers and where it is therefore necessary to create a kind of counterbalance to the public prosecution monopoly. However, its importance can be seen not only in enabling the injured party to exercise his/her rights using criminal law means, but also in the fact that the mere existence of a private indictment can act on public prosecutors as a kind of incentive to fulfil their duties properly, at least subconsciously, and to issue decisions reflecting the public interest in criminal prosecution. It is true that the practical use of the institution of subsidiary indictment is relatively rare in foreign countries. However, it can be concluded that this is the result of the fact that public prosecutors are forced by the existence of a subsidiary indictment to fulfil their obligations properly, and the injured party does not have to resort to private enforcement of his/her interest in criminal prosecution.

The introduction of the institution of a subsidiary indictment would not be in conflict with the Constitution of the Slovak Republic, as the provisions concerning the Prosecutor's Office of the Slovak Republic are relatively general and thus leave room for the introduction of new elements into the public prosecution system. Certain problems could be caused by the accusation principle stipulated in Art. 2 (15) of the Criminal Procedure Code, according to which 'judicial criminal proceedings shall only be initiated on the basis of a motion or an indictment filed by a public prosecutor who represents a motion or an indictment in judicial criminal proceedings'. For this reason, it would be necessary to include the injured party in the current legal formulation of the accusation principle as another entity authorised to file an indictment. As regards the manner and conditions of filing an indictment by the injured party, it would be possible to accordingly use the mechanism provided for in the Polish Criminal Procedure Code. The injured party would be obliged to file a complaint first, which would be decided by the superior public prosecutor, and if he did not satisfy the complaint, (s)he would have to submit it to the court. The court would then examine the complaint and indicate the circumstances necessary for the public prosecutor to re-examine. If (s)he again refused to prosecute, the injured party would be entitled to file an indictment in court. Such a procedure would

68 T Gřivna (n 7).

69 Ibid.

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prevent the criminal courts from being overwhelmed by unjustified and unnecessary indictments by the injured parties.

It should also be noted that the institution of the subsidiary indictment is not unknown to Slovak criminal justice system. Until 1950, Act no. XXXIII/1896 on the Code of Criminal Procedure (Ugrian Criminal Procedure Code) recognised several types of prosecutor – besides the public prosecutor, the legal regulation also recognised the main private prosecutor, the supporting private prosecutor, and, finally, the substitute private prosecutor.[70] Under the above-mentioned statutory article, if the public prosecutor's office refused to represent the indictment in a court in cases where it had the right to file an indictment, the injured party could take over the prosecution within eight days of receiving the prosecutor's refusal decision and become the substitute private prosecutor.[71] In general, the substitute private prosecutor exercised the rights of the Public Prosecutor's Office. However, (s)he did not have the rights arising from the nature of the Public Prosecutor's Office (as a public office), e.g., to make claims for mandatory cooperation between authorities, to request the transmission of files in the case, to propose to waive investigations, etc.). After the injured party took over the representation of the prosecution, the case continued at the stage where it was left. An exception was the case where the public prosecutor dropped the indictment only in the appeal proceedings. In this case, the injured party did not become a substitute prosecutor and owned only the rights of the injured party himself. The substitute private prosecutor could not even request a renewal of the continuation.[72]

However, the start of communism in the second half of the 20th century greatly reduced the rights of the injured party in criminal proceedings, and the institution of private/subsidiary prosecution was abolished. Subsequently, the prosecution monopoly of the public prosecutor's office was introduced. It is only to the detriment of the matter that after the fall of communism in 1989, the absolute prosecution monopoly of the prosecutor's office was not abolished, and the private/subsidiary prosecution was not re-admitted as an adequate counterweight. It is understandable, as a difficult process of transformation continues for all state institutions.[73] However, it is precisely this institution that, to a certain extent, makes it possible to correct the necessary negatives of the monocratic and centralist organisation of Slovak public prosecution office and to ensure a certain form of control over the execution of its powers. Unfortunately, the Slovak scientific literature is not devoted to this institution either, and papers in Slovak scientific journals are also completely absent.

6 CONCLUSIONS

The purpose of strengthening the discretionary powers of the public prosecutor in criminal proceedings was to unburden criminal courts from resolving a large number of less serious criminal cases and enable them to focus on resolving serious crimes. The prosecutor's discretionary powers are currently so broadly conceived that they allow the prosecutor to issue decisions that are very similar to those of a court on guilt and punishment.

70 A Ráliš, *Trestné právo procesné [transl: Criminal procedural law]* (Nakladateľstvo Justitia Bratislava 1942).

71 Art 42 (1) of the Act no XXXIII/1896 on the Code of Criminal Procedure *(Ugrian Criminal Procedure Code)*.

72 Art 43 (1) of the Act no XXXIII/1896 on the Code of Criminal Procedure *(Ugrian Criminal Procedure Code)*.

73 O Kaluzhna, 'The Struggle for Class Ranks and Prosecutor's Dress during Ukrainian Independence: Historical, Legal, and Cultural Perspectives' (2021) 3(11) *Access to Justice in Eastern Europe* 54.

However, the insufficient development of control mechanisms over the exercise of the prosecutor's discretion seems to be a problem. The existing control within the hierarchical system of the prosecutor's office cannot be considered sufficient, for the reasons outlined in the paper. As the decisions of the public prosecutor are currently unreviewable in court and cannot be properly defended, this creates room for the emergence of many negative phenomena, e.g., the abuse of wide discretion. The starting point seems to be the introduction of a system of reviewing the decisions on the merits of the prosecutor not to prosecute outside the hierarchical structure of the prosecutor's office.

An appropriate means of redress could be the institution of a subsidiary indictment enabling the injured party to take over the prosecution where the public prosecutor refuses to prosecute or to continue the prosecution. It can be stated that a similar system of control of the public prosecutor's discretion works not only in other countries of the world but is also recommended in many international legal documents.

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Research Article

UNCONDITIONAL GROUNDS FOR CHALLENGES TO JUDGES IN CRIMINAL PROCEEDINGS OF UKRAINE AND ECTHR STANDARDS

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Summary: 1. Introduction. – 2. The Concept and Types of Grounds for Challenge (Self-Challenge) of the Court, Investigating Judge, Judge. – 3. Correlation between the National Classification of Grounds for Challenge and the Criteria for Determining the Impartiality of the Court in the Case Law of the ECtHR. – 4. Characteristics of Unconditional Grounds for Challenge of an Investigating Judge, Judge, Court. – *4.1. Participation of a judge in different procedural statuses within one criminal proceeding. - 4.2. Family ties. – 4.3. Violation of the established art. 35 of the CrPC, the procedure for distribution of cases between judges by an automated document management system, the procedure for determining jurors to participate in court proceedings. – 4.4. Participation of a judge in the preliminary stages of criminal proceedings. – 4.5 Preventing the decision of the 'unlawful composition of the court'.* – 5. Conclusions.

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ABSTRACT

Background: *The proper resolution of applications for challenge (self-challenge) of a judge (investigative judge, court) is important for further criminal proceedings, as a judicial error in this matter may result in the violation of a person's right to 'lawful composition of the court' or the right to defence, which is grounds for the cancellation of the court decision in the case and its referral to a new trial (Art. 412 of the CrPC), the violation of the principles of reasonable time terms, and the legal certainty (finality) of court decisions as part of the rule of law.*

In judicial practice, proceedings on challenges belong to separate common proceedings, which usually end with a refusal to satisfy the challenge. Lawyers assess the institute of criminal proceedings of Ukraine as ineffective.

Methods: *The purpose of the present study is to examine the grounds for challenge using the comparative method, so that views on their understanding are consistent in the professional environment and in judicial practice.*

The article outlines the list of grounds for challenge of a judge (investigative judge, court) under the CrPC of Ukraine and presents their classification as unconditional and evaluative, which is crucial for the selection of methods of proof. The correlation between the national classification of grounds for challenge and the criteria for determining the impartiality of the court in the case law of the European Court of Human Rights (ECtHR) is shown. The main focus is on the analysis of unconditional grounds for challenge according to the national classification, and their content is revealed in relation to the positions of the ECtHR.

Results and Conclusions: *It is substantiated that the grounds for challenge are not only circumstances that cast doubt on the impartiality of a judge (investigating judge, court) found in para. 6 of Chapter 3 of the CrPC of Ukraine 'Challenge', but also circumstances that indicate that the judge does not meet the requirements of 'legal composition of the court' (Part 2 of Art. 412 of the CrPC) or 'Court established by law' (in the wording of part 1 of Art. 6 of the ECHR) found in various structural parts of the CrPC and in the Law 'On the Judiciary and the Status of Judges'. It is substantiated that the wording of Part 1 of Art. 76 of the CrPC of 14 January 2021 is not consistent with the principle of access to justice by an impartial court (Art. 21 of the CrPC) since the right to an impartial tribunal (part 1 of Art. 6 of the ECHR) creates a conflict with Chapter 18 of the CrPC on the procedure for election, change of precautionary measures, does not meet the requirements of legal certainty, and may be grounds for complaints to the ECtHR.*

Keywords: *impartiality of the court; objective and subjective criteria of impartiality of the court in the case law of the European Court of Human Rights; unconditional grounds for challenge of the court in the criminal proceedings of Ukraine.*

1 INTRODUCTION

A fair trial is possible only if it is conducted by an impartial and independent court.

The institute of challenge in criminal proceedings is aimed at:

a) implementation of the principle of equality of all before the law and the courts;

b) the adversarial nature of the parties and their freedom to present their evidence to the court and to prove their persuasiveness before the court;

c) ensuring the principle of the presumption of innocence;

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d) ensuring a comprehensive, complete, and impartial investigation of the circumstances of criminal proceedings;

e) making a lawful, reasonable, and fair decision in each proceeding;

e) proper performance of the tasks of criminal proceedings.

In the universal dimension, the institution of challenge is aimed at implementing the legal maxim:[3] ***'no one can be a judge in his own cause'*** (Nemo judex in re sua).

According to para. 12 of the Opinion of the Consultative Council of European Judges (hereinafter – CCEJ) No. 1 (2001),

> This principle also has significance well beyond that affecting the particular parties to any dispute. Not merely the parties to any particular dispute, but society as a whole must be able to trust the judiciary. A judge must thus not merely be free in fact from any inappropriate connection, bias or influence, he or she must also appear to a reasonable observer be free therefrom. Otherwise, confidence in the independence of the judiciary may be undermined.[4]

From an even more remote perspective, the institution of challenge is aimed at **ensuring public confidence in the judiciary, its authority**, and public conviction in the morality, honesty, and integrity of the judiciary, which are absolutely necessary for a modern democratic society. According to the ECtHR, 'even appearances may be important or, in other words, justice must not only be done: it must also be seen to be done'.5 'What is at stake is the confidence which the courts in a democratic society must inspire in the public'.[6]

The social sense of trust in the judicIary is achieved to a large extent by the actual implementation of the principles of **independence and impartiality** of the court. *Impartiality* of the court is a lack of bias and personal interest in the participants of the proceedings, and

> judicial *independence* is the means by which judges' impartiality is ensured. It is therefore the pre-condition for the guarantee that all citizens (and the other powers of the state) will have equality before the courts. Judicial independence is an intrinsic element of its duty to decide cases impartially. Only an independent judiciary can implement effectively the rights of all members of society, especially those groups that are vulnerable or unpopular.[7]

Sociological data is also informative about the state of affairs in the implementation of the principles of impartiality and independence of the judiciary. Thus, in 2017, 2019, 2020, opinion polls were conducted in all regions of Ukraine of respondents aged 18 and older who came to court in connection with the trial (plaintiffs, defendants, accused, victims, family members, participants in the proceedings, witnesses or a person who is a third

3 Legal maxim: a general legal principle, which is perceived as self-evident truth, does not require proof, and reflects the universal meaning of law.

4 Opinion No 1 (2001) of the Consultative Council of European Judges for the Committee of Ministers of the Council of Europe on Standards of Judicial Independence and Permanence of Judges 1 January 2001, para 12 <https://zakon.rada.gov.ua/laws/show/994_a52#Text> accessed 18 November 2021.

5 *De Cubber v Belgium*, 26 October 1984, para 26 <https://hudoc.echr.coe.int/ukr#{%22itemid%22:[%22001-57465%22]}> accessed 18 November 2021; Morice v France [GC], 29369/10, Judgment 23 April 2015 [GC] para 78 <http://hudoc.echr.coe.int/fre?i=002-10657> accessed 18 November 2021.

6 *Castillo Algar v Spain* 28 October 1998 para 45 <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-58256&filename=001-58256.pdf> accessed 18 November 2021.

7 CCJE Opinion no 18 on the position of the judiciary and its relation with the other powers of state in a modern democracy, 16 October 2015 <https://rm.coe.int/16807481a1> accessed 18 November 2021.

party to the trial) – in 2017, there were 2,018 people, in 2019, 2,016 people, and in 2020, 2,018 people. When answering questions about what judges are most often guided when making a court decision according to the opinion, most often the respondents thought that they were guided by their own benefit, including the illegal remuneration received for the decision – 39.5%, 33.2%, and 34%, respectively.[8] Much less often, the opinion was expressed that judges are most often guided by the property status and/or position of the parties (14.6%, 12.8%, 14.2%), and even less often, by law (8.9%, 11.4%, 13.3%), the circumstances of the case (8.3%, 12.8%, 11.7%), the instructions of the chairman of the court (7.9%, 8.1%, 7.6%), and the political situation in the state (6.8%, 7.0%, 5.1%).[9] Against this background, it is interesting that among those respondents in whose case a court decision was made, in 2020, 66.1% answered that the court decision was legal and fair, 14.3% did not consider it legal and fair (another 5.3 % did not know of the decision, and 14.3% said they found it difficult to answer this question).[10]

It is also important to know whether judges are considered independent in Ukraine today. Among the participants in court hearings, 35% (2019) and 33% (2020) considered judges to be completely or generally independent. And among the all-Ukrainian sample (regardless of the experience of communication with the courts), 60.0% (2019) and 69.1% (2020) considered judges to be completely or mostly dependent.[11]

It is also noteworthy that in a dispute between citizens with different income levels, 81-78% believe that high-income citizens have higher chances of winning; in a dispute between an employer and an employee, 74.7-69% think that the employer has higher chances of winning; and in a dispute between a citizen and a representative of the government, 78-74% think that a representative of the authority has higher chances of winning.[12]

According to another sociological survey of June 2021, while the majority of respondents consider Ukraine a sovereign state (67%) and independent (56%), only 36% consider it a state with the rule of law (with 52% of negative answers). Respondents also assessed the observance of human and civil rights in Ukraine over the past year on a 5-point scale, with a score of '1' meaning that rights were very poorly respected and '5' which meant the opposite. Respect for the right to a fair, open, and independent court and the presumption of innocence were assessed at the lowest rate.[13] According to regular research by the Razumkov Center of 'trust-distrust' in state and public institutions, the judiciary has negative indicators – in July-August 2021, 74% did not trust the courts, 68% did not trust the Supreme Anti-Corruption Court, and 63% did not trust the Supreme Court.[14]

8 The data are given in the order of 2017, 2019, 2020, respectively.

9 Council of Judges of Ukraine, Attitudes of Ukrainian citizens to the judicial system (conclusions from the results of polls), 15 November 2017, 21 <http://rsu.gov.ua/ua/news/stavlenna-gromadan-ukraini-do-sudovoi-sistemi-visnovki-za-rezultatami-opituvan> accessed 18 November 2021; Razumkov Center, Report on the results of the study 'Attitudes of Ukrainian citizens to the judiciary', 2020, 40 <https://rm.coe.int/zvitsud2020/1680a0c2d7> accessed 18 November 2021.

10 Razumkov Center (n 11) 17.

11 Ibid. 29.

12 Ibid. 39.

13 Razumkov Center, Implementation of the basic principles of the Constitution of Ukraine and the constitutional rights of citizens (June 2021) < https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/realizatsiia-osnovnykh-pryntsypiv-konstytutsii-ukrainy-i-konstytutsiinykh-prav-gromadian-cherven-2021r> accessed 18 November 2021.

14 Razumkov Center, Trust in the institutions of society and politicians, electoral orientations of the citizens of Ukraine (July-August 2021) <https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/dovira-do-instytutiv-suspilstva-ta-politykiv-elektoralni-oriientatsii-gromadian-ukrainy> accessed 18 November 2021.

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Of course, this sociology cannot be taken literally as a consequence of only the dysfunction of the principle of impartiality and independence of the judiciary because the credibility of the judiciary is influenced by a number of other factors, but to ignore it would be a big mistake.

In modern Ukrainian science, a number of articles and several dissertations (E.O. Semenkov,[15] 2012, which is based on the CrPC of Ukraine of 1960, O.V. Anufrieva,[16] and T.A. Tsuvina[17]) are devoted to the issue of challenge in all types of litigation. Researchers on the subject of challenge noted the imperfection of the application of this institution,[18] its ineffectiveness and the need for radical changes,[19] incompleteness at the legislative level of a number of issues regarding the procedure and consequences of challenges, insufficient theoretical development of delimitation of individual grounds for challenges and, accordingly, the difficulty of choosing the basis to be used in a particular situation, the unresolved process of establishing these grounds,[20] and that the absolute implementation of the standards of impartiality of the court from the practice of the ECtHR in the national legal system is not on the agenda.[21]

These estimates are true today. A study of the case law on challenge of judges and investigating judges leads to the conclusion that the superficial understanding of the grounds for challenge often leads to the erroneous application of law and the violation of the right to a fair trial (Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms; hereinafter – ECHR). Another problematic point is the formal motivation of decisions based on the consequences of consideration of branches.

In interpreting the content of grounds for challenge and their application to specific situations, the positions of the ECtHR, in which it develops a legal understanding of the impartiality of the court, can and should be useful. Today, the decisions of the ECtHR are generously used in substantiating applications for challenge and court decisions based on the results of their consideration. It is safe to say that the challenge proceedings have become one of those where the 'brand fashion' for ECtHR quotations prevails. However, the delicacy is that these citations are not always relevant – that is, the positions of the ECtHR were formulated in other circumstances or justify completely different legal conclusions. There are fragmentary quotations – references to ECtHR decisions without the fact and context of the decision, as well as arbitrary interpretation or distortion of

15 Y Semenkov, 'Institute of challenge in the criminal procedure of Ukraine' (Candidate of Law Science, Classic. private un. Zaporozhye 2012).

16 O Anufrieva, 'Challenge in the criminal procedure of Ukraine' (Candidate of Law Science, Kyiv 2013).

17 T Tsuvina, 'The principle of the rule of law in the civil proceedings: theoretical and applied research' (Candidate of Law Science, Kharkiv 2021).

18 O Anufrieva, 'Institute of removal of a judge in procedural law of Ukraine (comparative aspect)' (2011) 4(8) *Bulletin of the High Council of Justice* 41 <http://www.vru.gov.ua/content/article/visnik08_04.pdf> accessed 18 November 2021.

19 L Drobchak, 'The bias of the investigating judge, the court as a ground for challenge in the context of the case law of the European Court of Human Rights' (2018) 2(2) Law and Society 210 <http://pravoisuspilstvo.org.ua/archive/2018/2_2018/part_2/37.pdf> accessed 18 November 2021.

20 Y Semenkov (n 17) 5.

21 O Khotynska-Nor, '"Impartiality of the court" as a standard of fair justice: the case law of the European Court of Human Rights and prospects for Ukraine's development' (2021) 3(118) *Bulletin of the Taras Shevchenko National University of Kyiv. Legal sciences* 123 <http://visnyk.law.knu.ua/images/articles/118.pdf?fbclid=IwAR3yP-xUjpEP9tgGBlYTkT4Y-fk2FcLx42uwO7Ka_fE7Ag4pYamu0UyOzF0> accessed 18 November 2021.

quotations from ECtHR decisions.[22] The problem of incorrect and excessive citation of the ECtHR is recognised by the courts themselves.[23] You can often find three to five 'trend' decisions of the ECtHR for all or most specific situations.

Although in the criminal proceedings (Part 1 of Art. 81 of the CrPC)[24] of Ukraine, as opposed to the civil (Parts 2, 3 of Art. 40 of the CPC),[25] commercial (Parts 2, 3 of Art. 39 of the ComPC),[26] and administrative (Part 3 of Art. 40 of the CAP)[27] applications for a challenge of a judge (single-person court)[28] are always considered by another judge designated by the automated court document management system, which is certainly a positive approach of the legislator aimed at ensuring impartiality in resolving challenges, it is common practice for courts to recognise challenge of a judge as though it is psychologically uncomfortable. This is apparently due to corporate mutual support, and as a result of consideration of challenge, 'diplomatic', 'half-hearted', and, at the same time, heated decisions are made, which, on the one hand, state no grounds for challenge and their failure to prove, and on the other hand, the challenges are still satisfied with the motivation of trying to avoid any doubts about the impartiality of the judge. Such decisions are a kind of coercion of the participant to submit in the proceedings because, in the opinion of the court, they failed to prove the grounds for challenge, but the court recognises that there are doubts about the impartiality of judges. There is also a practice when, after a court decision refusing to satisfy a challenge on the grounds that it is unfounded, the judge to whom the challenge was filed submits an application for challenge, which is subsequently granted by the courts. Both situations testify to the efforts of judges who decide to challenge to maintain a perfect judicial reputation and their perception of challenge situations in terms of professional honour, corporate

22 V Frankiv, 'How to ensure the correctness of citations of ECtHR decisions' (2020) 18(1472) *Law and Business* <https://zib.com.ua/ua/142573-yak_zabezpechiti_korektnist_cituvan_rishen_espl.html> accessed 18 November 2021; A Bushchenko, 'Carefully precedent. Adventures of ECtHR decisions in national courts' (2017) 21(1319) Law and Business <https://webcache.googleusercontent.com/search?q=cache:dcxM8bEcvYYJ:https://zib.com.ua/ua/pda/128887.html+&cd=1&hl=uk&ct=clnk&gl=ua> accessed 18 November 2021.

23 Kharkiv Court of Appeal, Analysis of the application of the decisions of the European Court of Human Rights by the Kharkiv Court of Appeal and the courts of first instance in 2019 <https://hra.court.gov.ua/sud4818/inshe/inf_court/uzag20c12> accessed 18 November 2021.

24 Criminal Procedure Code of Ukraine, current version from 25 November 2021 <https://zakon.rada.gov.ua/laws/show/4651-17#Text> accessed 18 November 2021.

25 Civil Procedure Code of Ukraine, current version from 5 August 2021 <https://zakon.rada.gov.ua/laws/show/1618-15#n6328> accessed 18 November 2021.

26 Economic Procedural Code of Ukraine, current version 5 August 2021 <https://zakon.rada.gov.ua/laws/show/1798-12#n1805> accessed 18 November 2021.

27 Code of Administrative Procedure of Ukraine, current version from 5 August 2021 <https://zakon.rada.gov.ua/laws/show/2747-15#n9860> accessed 18 November 2021.

28 It should be pointed out that in the civil, commercial, and administrative proceedings, such a procedure for consideration of challenges, when a single-person court considered challenges/self- challenges against itself (contrary to the principle of ***nemo judex in re sua***) existed until 8 February 2020. In February 2020, the Law No 460-IX came into force, establishing a variable procedure for consideration of challenges in the types of the proceedings mentioned. For the time being, pursuant to Part 3 of Art 40 of the CrPC, Part 3 of Art 39 of the CPC and Part 3 of Art 40 CAP: 'If the court concludes that the challenge is unjustified and the application for such challenge was received by the court three working days (or earlier) before the next hearing, the issue on challenge shall be resolved by a judge who is not a member of the court that considers a case, and shall be defined by the automated court document management system. A challenge of such a judge shall not be declared. If the application for challenge of a judge is received by the court later than three working days before the next hearing, such an application shall not be referred for consideration to another judge, and the issue of challenge of a judge shall be resolved by the court that considers a case' (see Law of Ukraine 'On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Procedure of Ukraine on improving the procedure for consideration of court cases' from 15 January 2020 https://zakon.rada.gov.ua/laws/show/460-20# n99 accessed 18 November 2021).

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loyalty, personal understanding of the situation, i.e., the inability to distance themselves sufficiently. By the way, the latter is perceived by the ECtHR as a reason to doubt the impartiality of the court according to an objective criterion.[29] For the confidence in the court of participants in the proceedings, such decisions have the opposite psychological effect. Especially if the application for challenge is accompanied by appropriate and credible evidence to substantiate it, the applicant has the impression that their arguments were not heard, but the court tried to 'save face' and find a virtuous tactical solution to prevent possible future reversal of the decision in the case, as approved by the unlawful composition of the court.

It is important to add that the problem of challenge is extremely delicate and complicated, as it is closely related to the abuse of procedural rights of participants in the proceedings by filing unjustified challenges in order to delay the case and use up the time terms of criminal liability or to exclude from the composition of the court of principled judges and search for loyal and agreeable ones, which in turn is a violation of the right to a fair and impartial trial of *bona fide* participants in the proceedings. This issue is at the intersection of several diversified interests – the right to an impartial trial of all participants in the proceedings, the interests of justice, and the effective implementation of criminal justice (Art. 2 of the CrPC) so that everyone who commits a crime is punished, no innocent is prosecuted, and everyone is subject to due process of law.

Given the outlined context, the **aim** of this article is to help legal practitioners establish a stable system of ideas about the grounds for challenge of a judge (investigating judge), the content of each, their relationship, and the criteria of impartiality in the case law. Conflict and discussion issues should be analysed in the context of the principles of criminal justice and the comparative law method. We hope that this study will contribute to the meaningfulness of the decision to challenge and help us to reach a consensus in the professional environment on issues of debate and proper law enforcement in general.

To this end, in Section 2, we outline the list of grounds for challenge of a judge, investigating judge, or court under the national criminal procedure law and present their classification, which is crucial for selecting ways to prove and substantiate them. Section 3 will show the relationship and correlation between the national classification of grounds for challenge and the criteria for diagnosing the impartiality of the ECtHR. This section is of methodological value for the independent search for and selection of correct precedents of the ECtHR for similar situations, their adequate understanding, and, accordingly, their application. The largest is Section 4, which contains a detailed analysis of the ***unconditional grounds*** for challenge according to the national classification, reveals their content, including on the basis of the positions of the ECtHR, and highlights approaches to regulating similar issues abroad.

2 THE CONCEPT AND TYPES OF GROUNDS FOR CHALLENGE (SELF-CHALLENGE) OF THE COURT, INVESTIGATING JUDGE, JUDGE

Traditionally, in the procedural literature, grounds for challenge (self-challenge) are defined as factual circumstances provided in the criminal procedure law, which indicate

29 *Chmelíř v Czech Republic*, App no 64935/01, Judgment of 7 June 2005 <https://hudoc.echr.coe.int/eng?i=001-185757> accessed 18 November 2021.

or may indicate the impartiality[30] of a judge, investigating judge, juror, prosecutor, investigator, coroner, defence counsel, representative, expert, specialist, translator, secretary of the court session, or representative of the staff of the probation body.

Such factual circumstances may be social and legal relations to which a judge, prosecutor, investigator, coroner, defence counsel, representative, expert, specialist, translator, or court clerk was or still is a participant. The grounds for challenge (self-challenge) do not necessarily indicate the presence of factual bias of the person to whom challenge (self-challenge) is claimed, as these are circumstances that raise only doubts about its objectivity, even in the case of good faith and lack of desire to show partiality. The grounds for challenge may be not only legal relations governed by the rules of law in which the initiator of self-challenge was or is a participant, but also other social relations governed by other social norms (traditions, customs, morals, religious, corporate, etc.).

In most sources, the range of grounds for challenge of a judge (investigating judge) is considered and interpreted narrowly – only as grounds contained in para. 6 'Challenges' of Chapter 3 of the CrPC (Arts. 75 and 76) and may indicate bias of the judge.[31] Such a narrow (or literal) interpretation is dangerous and harmful to law enforcement practice, as it gives lawyers a truncated, incomplete idea of all possible grounds for challenge of a judge (investigating judge), which often leads to miscarriages of justice. In our opinion, the tool of 'challenge' should also be used in all cases of violation of the judicial independence principle and/or possible adoption of a court decision by an unlawful court to anticipate its annulment. This is required by the principles of observance of reasonable time limits, rule of law and legal certainty (finality of a court decision), and consideration of a case by a court established by law. In particular, the ECtHR has repeatedly stated that an important element of the rule of law is that 'the verdicts of a tribunal should be final and binding unless set aside by a superior court on the basis of irregularity or unfairness'.[32] Consequently, it is always important to ensure that the court decisions are not overturned by a higher court on the grounds of its inconsistency with the law or injustice.

Cases of unlawful court decisions are scattered throughout the CrPC outside of para. 6 'Challenges'. So, let us outline an approximate list of all grounds for challenge of a judge, investigating judge, or court:

1) if the judge is an applicant, victim, civil plaintiff, civil defendant, close relative, or family member of the investigator, prosecutor, suspect, accused, applicant, victim, civil plaintiff, or civil defendant (para. 1, part 1 of Art. 75 CrPC);

2) if the judge participated in these proceedings as a witness, expert, specialist, translator, investigator, prosecutor, defence counsel, or representative (para. 2, part 1 of Art. 75 of the CrPC);

30 O Anufrieva (n 18) 11, 14, 18, 203; S S.Vasyliev, Civil procedure (Kyiv 2019) 62; O Banchuk, R Kuybida, M Havronyuk (eds), Scientific and practical commentary to the Criminal Procedure Code of Ukraine of April 13, 2012 (Kharkiv 2013) 208; N Kucheruk, 'Challenge of a judge in the commercial procedure: the issues of theory and practice' (2016) 2(15) The Slovo of the National School of Judges of Ukraine 108; G Denisova, Differentiation between challenge and substitution of officials from participation in the criminal proceedings' (2014) 64 State and Law. Legal and Political Sciences 324-330; I Zozulia, 'Challenge (self- challenge) in the legislation of Ukraine. Theoretical issues of jurisprudence and problems of law enforcement: challenges of the 21st century', abstracts of participants' reports of the 3rd All-Ukrainian scientific and practical conference, Kharkiv, 19 June 2020, (Kharkiv 2020) 91; Y Kukharuk, 'Challenge in the criminal procedure and removal of the defense counsel from participation in the case' (2011) 4/5 Legal Science: scientific legal magazine 171; Y Shemshuchenko et al., Legal encyclopedia, vol 4 (6 volumes, Kyiv 2002) 45; O Kuchynska, 'Issues of consideration of applications for challenge in the criminal procedure of Ukraine' (2010) 3(19) Bulletin of the Bar Academy of Ukraine 104.

31 Ibid.

32 *Kyprianou v Cyprus,* App no 73797/01, ECHR 873 (15 December 2005) Grand Chamber, para 119 <http://www.bailii.org/eu/cases/ECHR/2005/873.html> accessed 19 October 2021.

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3) if the judge personally, their close relatives, or members of their family are interested in the results of the proceedings (para. 3, part 1 of Art. 75 of the CrPC);

4) in the presence of other circumstances that cast doubt on the impartiality of the judge (para. 4 of Part 1 of Art. 75 of the CrPC) (the definition of 'other' indicates their inexhaustible list);

5) violation of Part 3 of Art. 35 of the CrPC of the procedure for determining the investigating judge or judge for criminal proceedings (para. 5 of Part 1 of Art. 75 of the CrPC);

6) persons who are relatives of each other may not be a member of the court conducting court proceedings (Part 2 of Art. 75 of the CrPC);

7) the existence of circumstances that preclude the possibility of repeated participation of a judge in criminal proceedings (Art. 76 of the CrPC);

8) violation of the institutional, competent, and procedural components of the right of a person to the 'lawful composition of the court', which lead to the adoption of a court decision by the lawful composition of the court (para. 2, part 2 of Art. 412 of the CrPC):

8.1) criminal proceedings on a judge's application of committing a criminal offence may not be conducted by the court in which the accused holds or has held the position of a judge but must be transferred to the most territorially approximate court (Part 2 of Art. 32 of the CrPC);

8.2) criminal proceedings are transferred to another court if the accused or victim works or has worked in the court under whose jurisdiction the criminal proceedings fall (para. 3, part 1 of Art. 34 of the CrPC);

8.3) violation of the rule on the number of judges (Art. 31 of the CrPC),

8.4) violation of the rules of formation of the jury in accordance with Arts. 63-67 of the Law 'On the Judiciary and the Status of Judges',

8.5) violation of the rules on special professional requirements for a judge in certain categories of proceedings – five years of judicial experience for at least one member of the SAC (Supreme Anticorruption Court) (Part 12 of Art. 31 of the CrPC), experience of at least ten years, experience in criminal proceedings in court and high moral and business and professional qualities for consideration of cases concerning the accusation of a minor (Part 14 of Art. 31 of the CrPC and Part 6 of Art. 18 of the Law 'On the Judiciary and the Status of Judges'). If there are no judges with the required term of service in the court, a judge from among the judges with the longest term of service as a judge shall be elected to consider cases concerning minors;

8.6) violation of the rules of territorial, substantive, and instance jurisdiction (Art. 32 of the CrPC);

8.7) a judge whose term of office has expired took part in the consideration of the case,

8.8) at least one of the judges has not been appointed by the President of Ukraine in the manner prescribed by law (Section 4 of the Law 'On the Judiciary and the Status of Judges')

8.9) violation of the rules on the invariability of the court (Art. 319 of the CrPC);

8.10) if the court has not considered the application for challenge of a judge or jury in accordance with the procedure established by law;

9) violation by the court of other provisions of the CrPC that guarantee its independence and impartiality (for example, Part 1 of Art. 10, Art. 17, Part 2, Art. 3 of Art. 22, Art. 23, Art. 27, Part 1 of Art. 88, Art. 94, paras. 4, 5, part 2 of Art. 386 of the CrPC).

In order to avoid repetition and return to the consideration of the issues at the end of the general theoretical section, we can clarify the concept of grounds for challenge, the validity of which the reader will establish in the course of this study. Thus, **the grounds for challenge (self-challenge) of a judge, investigating judge, or court are the factual circumstances provided for in the criminal procedure law, which indicate or may indicate their bias or non-compliance with the requirements of the law.**

Depending on the nature of the obviousness of their influence on the impartiality of the judge, all grounds for challenge (self-challenge) are divided into ***'defined'*** (unconditional) and ***'those subject to assessment at the discretion of the court'*** (evaluative).

The unconditional grounds for challenge of a judge are clearly defined by law. They are objective in nature. **Their formal presence is already sufficient for the application of self-challenge (challenge) by a judge or a jury.** Circumstances that unconditionally prevent the participation of a judge or jury are provided for in paras 1, 2, 5 of Part 1 of Art. 75, part 2 of Art. 75, Art. 76 of the CrPC of Ukraine, as well as all cases of non-compliance with the rule of 'legal composition of the court'.

The vast majority of unconditional grounds for disqualification are obvious and unambiguous, so judges take the challenge, thus avoiding overturning the decision when it is reviewed by a higher court. However, there are still problems with some of them.

Evaluative grounds for challenge are considered to be those that require appropriate proof and evaluation, and the latter, to some extent, depends on the discretion of the court. The bases given in items 3 and 4 of part 1 of Art. 75 of the CrPC are:

- if the judge personally, their close relatives, or members of their family are interested in the results of the proceedings;
- other circumstances that cast *doubt on the judge's impartiality.*

This group of grounds is always problematic in law enforcement, as they are defined through evaluative concepts – 'self-interest' and 'doubts about impartiality' – which can be ambiguously interpreted by the participants in the process.

3 CORRELATION BETWEEN THE NATIONAL CLASSIFICATION OF GROUNDS FOR CHALLENGE AND THE CRITERIA FOR DETERMINING THE IMPARTIALITY OF THE COURT IN THE CASE LAW OF THE ECTHR

In the literature, **unconditional grounds** are sometimes called *objective* (as synonyms), and **evaluative** ones are called *subjective*.[33] The use of these alternative names is considered harmful from the point of view of the rule of unity of terminology: one term should denote the content of one concept. The terms 'objective' and 'subjective' have been established for four decades and are used by the ECtHR as criteria for determining

33 O Banchuk, R Kuybida, M Havronyuk (eds), *Scientific and practical commentary to the Criminal Procedure Code of Ukraine of April 13, 2012 (Kharkiv 2013) 208; V Kossak, Civil procedural law of Ukraine* (Kharkiv 2020) 63.

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(diagnosing) the impartiality of the court and have in its legal interpretation a slightly different meaning than the domestic doctrinal classification of grounds for 'unconditional and evaluative' under the national legislation of Ukraine. The use of these terms in parallel will inevitably result in a mixture of different, inconsistent concepts. Therefore, we encourage this dualism of terms in the domestic classification of grounds for challenge.

First of all, we note that in international legal acts (for example, Art. 10 of the Universal Declaration of Human Rights, Art. 14 of the International Covenant on Civil and Political Rights, Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms) the term **'impartiality'** is used, but instead, the term **'unbiasness'** is used in the national criminal procedure legislation of Ukraine (Arts 2, 75 of the CrPC). However, neither international law reveals the concept of 'impartiality', nor national, 'unbiasness'. These concepts are established by interpretation, and national courts often refer to the case law of the ECtHR for this purpose. 'Impartiality' and 'unbiasness' are identical concepts and are in fact used as synonyms in practice and even in national law. As here, in part 1 of Art. 57 of the Law 'On the Judiciary and the Status of Judges' in the oath of a judge: 'I solemnly swear to the Ukrainian people objectively, **impartially, unbiasedly, independently**, fairly and competently to administer justice'.[34]

Finally, the ECtHR itself defines ***impartiality*** as the *absence of prejudice* or preconceived notions, and this can be assessed in different ways.[35]

Impartiality and independence of the court are one of the main elements of a person's right to a fair trial, guaranteed by Art. 10 of the Universal Declaration of Human Rights, Art. 14 of the International Covenant on Civil and Political Rights, Art. 6 of the ECHR, according to which *everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall establish the merits of any criminal charge against him.*

In accordance with its stable and consistent case law, reflected in numerous decisions, the ECtHR has traditionally gone out to assess *impartiality* for the purposes of Part 1 of Art. 6 of the ECHR on ***objective and subjective criteria***.

It should be borne in mind that the objective and subjective criteria for determining the impartiality of the court in the case law of the ECtHR are ***framework criteria***, i.e., have an integrative nature, as the national procedural law of the member states of the Council of Europe is not identical (universal), and each state can have the features of both **kinds of the bases for challenge, and the order and practice of their decision**. Therefore, the ECtHR states in its decisions that the existence of national procedures aimed at ensuring the impartiality of the court, namely the rules of challenge, is an important factor. The ECtHR takes national rules into account when assessing whether the court was objectively impartial or whether there were legitimate grounds for doubting its impartiality. 'In each case, it must be decided whether the relationship

34 Law of Ukraine 'On the Judiciary and the Status of Judges' 401402-VIII, current version of 5 August 2021 <https://zakon.rada.gov.ua/laws/show/1402-19#n503> accessed 18 November 2021.

35 *Wettstein v Switzerland*, App no 33958/96, Judgment of 21 December 2000 [Section II] para 42 <http://hudoc.echr.coe.int/fre?i=001-59102 > accessed 18 November 2021; *Kyprianou v Cyprus,* App no 73797/01, ECHR 873, Judgment of 15 December 2005, Grand Chamber, para 119 <http://www.bailii.org/eu/cases/ECHR/2005/873.html> accessed 18 November 2021; Micallef v Malta, App no 17056/06, Judgment of 15 October 2009, Grand Chamber, para 93 <http://hudoc.echr.coe.int/fre?i=001-95031> accessed 18 November 2021.

in question is of a nature that demonstrates the impartiality of the court';[36] 'whether the court as such and its composition ensured the absence of any doubts about its impartiality'.[37]

Objective criterion. The court must be objectively impartial, i.e., it must provide sufficient guarantees to exclude any reasonable doubt in this regard.

The objective criterion of impartiality of the court (judges, panels) relates to the ***organisational and functional aspects of the court,*** namely:

1) the presence of family, official, financial, political, or other ties with the participants in criminal proceedings;

2) participation of a judge in different procedural statuses within one criminal proceeding;

3) performance by one person of various functions within one criminal proceeding.

In this case, we are talking about facts that can be verified. These facts do not depend on the behaviour of the judge, and their establishment may cast doubt on the impartiality of the court. The applicant's call for an objective criterion of impartiality creates a positive presumption of judicial bias, which the respondent state can and must refute. The ECtHR specified an objective criterion of impartiality in a number of decisions – the presence of a judge in direct or indirect official, financial, political, contractual, or other dependence on the party to the proceedings, implementation of non-judicial functions, etc.

The **subjective criterion** of impartiality of the court is personal and is a consequence of the judge's conduct in the case. It is formulated in the thesis that is prescribed from decision to decision: 'personal impartiality of the court is presumed until evidence to the contrary is provided'.[38] According to the **subjective criterion**, the personal conviction and behaviour of a particular judge are assessed, i.e., whether the judge (juror) showed intentional or negligent actions or statements that would indicate direct or indirect bias in deciding a particular case before or during the trial.

First of all, it is worth noting that ***the ECtHR does not consider it necessary to investigate the issue of subjective impartiality if it finds that the impartiality of the court according to objective criteria was breached.***

That is, in the cognitive algorithm in establishing the absence of court impartiality, the subjective criterion has become subsidiary-like in its application, and due to the difficulties in its establishment, the ECtHR uses it secondarily, after no signs of objective criteria of bias have been identified. 'The Court recognizes the difficulty of finding a violation of Art. 6 due to personal bias and therefore in the vast majority of cases applies an objective

36 *Pullar v the United Kingdom,* Judgment of 10 June 1996, Reports 1996-III, p. 793, para 38 <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-57995&filename=001-57995.pdf&TID=ihgdqbxnfi > accessed 18 November 2021; *Belukha v Ukraine*, App no 33949/02, Judgment 9.11.2006 [Section V] para 49 <http://hudoc.echr.coe.int/fre?i=002-3037> accessed 18 November 2021; *Mironenko and Martenko v Ukraine,* App no 4785/02, 10 December 2009, para 67 <http://hudoc.echr.coe.int/eng?i=001-96195> accessed 18 November 2021.

37 *Wettstein v Switzerland* (n 37) para 42; *Belukha v Ukraine* (n 40)para 49; *Mironenko and Martenko v Ukraine* (n 40) para 67 .

38 *Hauschildt v Denmark*, Judgment of 24 May 1989, Series A no. 154, p. 21, para 47 <http://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-45388&filename=HAUSCHILDT%20v.%20DENMARK.pdf&logEvent=False> accessed 18 November 2021; *Kyprianou v Cyprus,* App no 73797/01, ECHR 873, Judgment of 15 December 2005, Grand Chamber, para 119 <http://www.bailii.org/eu/cases/ECHR/2005/873.html> accessed 18 November 2021; *Wettstein v Switzerland* (n 37) para 43; Belukha v Ukraine (n 40) para 50; *Mironenko and Martenko v Ukraine* (n 40) para 67.

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approach'.[39] 'The Court sought to verify the merits of the allegations that the judge showed any hostility or, on personal grounds, forced the case to be assigned to him, but in the vast majority of cases acknowledged that bias on the objective test was sufficient'.[40] 'In cases where it is difficult to obtain evidence to rebut the presumption of subjective impartiality of a judge, the requirement of objective impartiality provides an additional important guarantee'.[41]

In deciding ***whether to distinguish between objective or subjective criteria of impartiality,*** the ECtHR provides a guideline:

> there is no watertight division between the two notions since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test) … therefore, whether a case falls to be dealt with under one test or the other, or both, will depend on the particular facts of the contested conduct.[42]

The final conclusion of the ECtHR is very important because as soon as a certain internal attitude is revealed from the outside – in comments, statements, implicit actions, decisions – it immediately becomes an objective criterion. Thus, the boundary between subjective and objective criteria is blurred.

In any event, the ECtHR has repeatedly stated that 1) 'the Court does not recognize that there are sufficient indications of a personal bias on the part of a judge if they have satisfied in whole or in part the various procedural requests of the participants'; 2) 'The court does not consider it necessary to decide on the existence of a subjective criterion of impartiality if there is evidence that the court was not impartial by an objective criterion'; 3) 'In determining the existence of legitimate grounds to doubt the impartiality of a particular judge, the position of the applicant (and the judge) is important but not crucial. It is crucial to be able to consider such doubts as objectively justified'.[43]

However, the latter position of the ECtHR was not formed immediately. In the beginning, the Court did not have a consistent position, *whose opinion is decisive during the objective test of impartiality*. In particular, in the above-mentioned case *De Cubber v. Belgium* (26 October 1984, para. 29), it considered whether the judge *'could in the eyes of the accused*' seem negative towards him; in the case of *Borgers v. Belgium* (30 October 1991, para. 26), it suggested that neutrality should be considered *'from the point of view of the parties*';[44] in the case of *Hauschildt v. Denmark* (24 May 1989, para. 48),

> for the conclusion that there is a legitimate reason to doubt the impartiality of a judge in a particular case, the opinion of the accused may be taken into account, but it is not decisive. What matters is whether such doubts can be considered as objectively justified.[45]

Since then, the ECtHR has reproduced this position in subsequent decisions.

39 *Kyprianou v Cyprus* (n 42) para 119.

40 *De Cubber v Belgium* (n 6) para 25; *Kyprianou v Cyprus* (n 42) para 119.

41 *Pullar v the United Kingdom* (n 40) para 32 ; *Morice v France*, no 29369/10 23 April 2015, Grand Chamber <http://hudoc.echr.coe.int/rus?i=001-154265> accessed 18 November 2021.

42 *Kyprianou v Cyprus* (n 42) paras 119 and 121

43 *Ferrantelli and Santangelo v Italy*, App no 19874/92, Judgment of 7 August 1996, para 58 <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-57997&filename=001-57997.pdf> accessed 18 November 2021; *Wettstein v Switzerland* (n 37) para 44 .

44 *Borgers v. Belgium,* Application no 12005/86, Judgment of 30 October 1991. https://hudoc.echr.coe.int/fre?i=002-10244 > accessed 18 November 2021.

45 *Hauschildt v Denmark,* Judgment of 24 May 1989, Series A no 154, para 48 <http://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-45388&filename=HAUSCHILDT%20v.%20DENMARK.pdf&logEvent=False;> accessed 18 November 2021.

The key issue is the need to ensure the trust that the courts in a democratic society must instil in the public. Thus, any judge who has a well-founded fear that s/he may be biased must self-challenge or be challenged from the case.[46]

In *Micallef v. Malta*, in particular, under Maltese law at the time, there was no automatic obligation for a judge to self-challenge in cases where impartiality was in doubt.[47] In addition, a party to the proceedings could not challenge the judge on the basis of a family relationship, including an 'uncle-nephew' relationship, between the judge and a lawyer representing the other party. Since then, Maltese law has changed and now provides for family relations as a basis for dismissing a judge.

These legal conclusions are especially important for the judicial practice of Ukraine, because when deciding on challenge (self-challenge), even if the participant gives specific facts that fall under the objective criterion of impartiality, courts often refuse to challenge, referring to the fact internally and externally that nothing affects the will, convictions, and consciousness of the judge and nothing prevents them from being impartial in the case, for example, their neighbour, family members of their employees, colleagues on various projects, and so on. While the ECtHR guides the practice of the Council of Europe, it is not so much the judge's attitude to the case, their aspirations, efforts, and even the implementation of impartiality during the proceedings that is important, but 'even visible signs may have some significance or, in other words, only justice must be administered, it must be seen that it is administered'.[48] In other words, the court's **external demonstration of independence and impartiality** is also important.

Thus, as the ECtHR has established framework criteria and filled them with concrete content in hundreds of cases, and the member states of the Council of Europe that have ratified the Convention have undertaken to implement it (Art. 1 of the Convention), then, in similar situations, the judges of national courts must not only satisfy the applications for challenge but also, if these have not been submitted, take the challenge. After all, the duty to ensure the right to a fair trial rests with the state in the person of its authorised bodies – in this case, the courts that decide applications for challenge, and the duty of judges to self-challenge. Otherwise, the state will not implement the Convention.

Thus, the range of situations that the ECtHR classifies as an *objective criterion of impartiality* is much wider than the '*unconditional*' grounds for disqualification under the CrPC of Ukraine and also covers cases of 'personal interest of a judge or their family members' and/or biased conduct of a judge, which has an obvious manifestation on the outside (and was objectively justified), and a prudent observer would raise concerns about the bias of the court.

We believe that in order to promote the national practice of application and resolution of challenge (self-challenge), the specification of objective and subjective criteria of impartiality of the ECtHR should be considered not separately, in their pure form, but adapted to the national classification of grounds for challenge.

It should not be forgotten that the right to a fair trial (Art. 6 of the ECHR) includes about 10 elements, among which, in addition to the *impartiality of the court* (a), there is also the

46 *Castillo Algar v Spain,* App no 79/1997/863/1074, Judgment of 28 October 1998, para 45 <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-58256&filename=001-58256.pdf> accessed 18 November 2021; *Micallef v Malta* (n 37) para 98 .

47 Ibid.

48 *De Cubber v Belgium* (n 6) .

independence of the court (c) and the *court established by law* (c). What unites these three elements of the right to a fair trial is that within national legal systems, they are provided by a challenge mechanism. The tool of challenge of these three components is a universal means of preventing violations of Art. 6 of the ECHR, and public authorities and officials should try to act ahead of time so that their state becomes the respondent to the ECtHR. In the Ukrainian system of grounds for challenge, the violation of the requirement of *independence of the court* and the *court established by law* belongs to the classification group of unconditional grounds for challenge and is covered by the concept of 'lawful composition of the court'.

4 CHARACTERISTICS OF UNCONDITIONAL GROUNDS FOR CHALLENGE OF AN INVESTIGATING JUDGE, JUDGE, COURT

4.1 Participation of a judge in different procedural statuses within one criminal proceeding (items 1, 2, part 1 of Art. 75 of the CrPC).

This ground is aimed at preventing a judge from participating in different procedural statuses within a single criminal proceeding, which is incompatible with the function of justice and is a classic embodiment of the principle 'no one can be a judge in his own cause'.

The legal understanding of this group of grounds is expanded by the ECtHR, such as:

- mixing the roles of plaintiff, witness, public prosecutor, and judge in itself instils objectively justified fears of court bias (*Kyprianou v. Cyprus*). In this case, the lawyer was convicted of insult in the courtroom by a court session, which considered the case of his client's murder. The ECtHR acknowledged that, in such circumstances, the judges were not free from being adversely affected by the fact that the lawyer had committed a criminal offence in the courtroom where they work and against their colleague. The ECtHR therefore concluded that the roles of the court and the prosecutor were mixed in the court's actions, as the lawyer had committed a criminal offence against a judge in the courtroom, whose judges later sentenced him.[49]
- the dual role of the judge, who was initially the plaintiffs' lawyer during the main proceedings and later, when he became a judge of the Constitutional Court, decided on the applicant's constitutional complaint. This dual role in one case was reinforced by his daughter's involvement as a plaintiff's lawyer, which created a situation that could raise legitimate doubts about the judge's impartiality (*Mežnarich v. Croatia*).[50]
- if the presiding judge before their appointment as a judge worked as a senior deputy prosecutor and was the head of the department to which the applicant's case was assigned (*Piersack v. Belgium*). The applicant complained about the judge's personal bias (*subjective criterion*). However, there was no evidence that Judge Van de Valle had information about the applicant's investigation during his service at the Royal Public Prosecutor's Office in Brussels. The ECtHR found a violation

49 *Kyprianou v Cyprus* (n 42) .

50 *Mežnarić v Croatia,* App no 71615/01, Judgment of 15 July 2005 <http://echr.pravo.unizg.hr/ECtHR_praksa/Meznaric.doc> accessed 18 November 2021.

of the requirement of impartiality on the basis of objective criteria. The ECtHR's decision was not based on specific facts about the judge's bias, but on the fact that it did not matter whether the judge personally participated in the preparation of the indictment, worked in the structural unit whose staff worked, or was the head of the prosecution. Van de Valle was the head of the section in the Brussels prosecutor's office that was investigating the Persak case, and as the superior head of the deputy prosecutors who conducted the case, he had the authority to make any changes to and discuss with them any documents he sent to court, discuss the position to be taken on the case, and give advice on legal issues. It did not matter if Persak knew about it. And there was no need to determine the exact details of the role that Van de Valle played in the case.[51]

- The ECtHR has developed and detailed a legal understanding of impartiality in the transition from prosecutorial to judicial work in the case of *Paunović v. Serbia*, in which the former Deputy Prosecutor of the City Prosecutor's Office of Aleksinac was appointed a judge of the Court of Appeal, and reviewed Dragoslav Paunovic's verdict on appeal and upheld it. The applicant alleged that the City Prosecutor's Office had prepared an indictment in his case, and that the judge of the Court of Appeal, V.K., at the time when the applicant was charged with the crime by the municipal prosecutor's office, worked as a deputy municipal prosecutor and later participated as a judge-rapporteur in the criminal proceedings against the applicant in the appellate court (para. 38). The ECtHR considers that in the case of *Paunović v. Serbia*, Judge V.K. did not in fact play a dual role in a single proceeding. The information provided by the Government confirms that Judge V.K. did not take an active or formal part in the preparatory stages of the criminal proceedings or in the drafting of the indictment by the prosecutor's office. In contrast to the Piercac case, in this case, Judge V.K. was in no way hierarchically superior to the Deputy Prosecutors acting in the applicant's case and did not give them any instructions on how to act in the present case. He had neither the power to review or correct the submissions of other alternates nor the power to influence the activities of alternates acting in the applicant's case.

> It would be too far-fetched to say that former prosecutors cannot be involved in every case originally investigated by this body, although they have never had to deal with it personally. Such a radical decision, based on an inflexible and formalistic notion of the unity and indivisibility of the prosecutor's office, would create a virtually impenetrable barrier between this body and the court. This would lead to turmoil in the judicial system of a number of Contracting States, when transfers from one of these agencies to another are common. First of all, the mere fact that a judge was once an employee of the prosecutor's office is not a cause for concern that he lacks impartiality (p. 41).

Although the Court emphasises the importance of 'apparent reasons' in this context, it considers that the judge's connection with the prosecution in this case was remote and is not convinced that the very fact that V.K. was an employee of the prosecutor's office at the time the applicant was charged is sufficient to cast doubt on the independence and impartiality of the court of second instance (para. 42). The ECtHR therefore considers that there has been no violation of Art. 6 of the Convention in this case (para. 43).[52]

- the absence of a prosecutor during the trial, which may place a judge in the position of the prosecutor's office during interrogation and evidence against the applicant,

51 *Piersack v Belgium,* App no 8692/79, Judgment of 1 October 1982, para 31 <http://hudoc.echr.coe.int/ukr?i=001-104050> accessed 18 November 2021.

52 *Paunović v Serbia,* App no 54574/07, Judgment of 3 December 2019 <https://hudoc.echr.coe.int/eng?i=001-198991> accessed 18 November 2021.

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is a confusion of two roles in the proceedings and therefore potentially violates the requirement of impartiality under Art. 6 of the Convention (*Karelin v. Russia*, paras. 51-85).[53] The ECtHR emphasised that the judge is the final guarantor of the proceedings, while the task of the public authority in the case of public prosecution is to present and substantiate criminal charges for adversarial discussion with the other party.[54]

- similarly, in the case of *Ozerov v. Russia*, it was declared inadmissible by the ECtHR when the court, considering the merits of the case and convicting the applicant in the absence of the prosecutor, assumed the duties that a prosecutor could have performed if he had been present. The district court read out the indictment issued by the prosecutor's office, then questioned the applicant and other witnesses, examined other evidence, and found some of the prosecution's written evidence inadmissible. The prosecutor did not have the opportunity to express his opinion on these actions. In the presence of the prosecutor, he could hypothetically refuse to uphold the charge. Therefore, the ECtHR recognised the mixing of the roles of prosecutor and judge, which became the basis for legitimate doubts about the impartiality of the court and the order of Part 1 of Art. 6 of the ECHR.[55] Similar circumstances appear in the case of *Krivoshapkin v. The Russian Federation*.[56]

For historical reference, before the 'minor judicial reform' (until June 2001) in Ukraine under the then-current CrPC of 1960, the court had the power to continue a criminal case if the prosecutor refused to prosecute, following all those actions that were referred to in the cited decisions of the ECtHR against Russia, and to pass a guilty verdict on its results. Certainly, this norm did not correspond to the principle of adversarial proceedings. The current CrPC of Ukraine in 2012 provides for the possibility of continuing the proceedings in case the prosecutor refuses to support the public prosecution, provided that the victim has agreed to support the prosecution in court. This approach is in line with the adversarial principle, as well as the functions of the court – the sole purpose of which is the administration of justice, and which should not be endowed with powers that indicate the performance of its unusual function of the prosecution.

4.2 Family ties

The decision of whether a judge, investigative judge, or juror belongs to the category of close relatives or family members of the investigator, prosecutor, suspect, accused, applicant, victim, civil plaintiff, or civil defendant should be guided by para. 1 part 1 of Art. 3 of the CrPC: **close relatives and family members** – husband, wife, father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, brother, sister, grandfather,

53 *Karelin v Russia,* App no 926/08 ECHR, Judgment of 20 September 2016 <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-141418&filename=001-141418.pdf > accessed 18 November 2021.

54 Handbook on Article 6 of the Convention – The right to a fair trial (criminal procedure) as of 31 December 2019, 28 <http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c=> accessed 18 November 2021.

55 *Ozerov v Russia,* App no 64962/01 Judgment of 18 May 2010 <https://hudoc.echr.coe.int/eng#{%22dmdocnumber%22:[%22867937%22],%22itemid%22:[%22001-98531%22]}> accessed 18 November 2021.

56 *Krivoshapkin v Russia,* App no 42224/02, Judgment of 27 January 2011 <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-103078&filename=001-103078.pdf&TID=vwielzecqk> accessed 18 November 2021.

grandmother, great-grandfather, great-grandmother, grandson, granddaughter, great-grandson, great-granddaughter, adoptive parent or guardian, guardian or trustee, person under guardianship or custody, as well as persons living together, connected by common life and having mutual rights and obligations, including persons living together, but not married.

According to the case law of the ECtHR, family ties with one of the parties may raise concerns about the judge's bias, but these concerns must be objectively justified. With regard to the civil aspect of the right to a fair trial, the ECtHR found that objective justification depended on the circumstances of the case and could be determined by a number of factors, including whether a judge's relative was involved, the judge's relative's position in the firm, the internal organisational structure, the financial significance of the case for the law firm, and any possible financial interests or potential benefits (and their amount) to be provided to a relative (Nicholas v. Cyprus, para. 62). In small cases, where the issue of family affiliation often arises, this situation should be disclosed at the beginning of the proceedings and should be assessed in the light of various factors in order to determine whether challenge of a judge in the case is really necessary (para. 64).[57]

In the criminal aspect, the existence of objectively justified doubts about impartiality was confirmed by the facts:

- the husband of the chairman of the court hearing the case led the investigative team authorised to investigate the applicants' case (*Dorozhko and Pozharskiy v. Estonia*, paras. 56-58);[58]
- the opposing party's lawyer was a nephew of the presiding judge – the ECtHR acknowledged that the close family relationship between the opposing party's lawyer and the presiding judge was sufficient to objectively substantiate fears that the panel was not impartial (*Micallef v. Malta*);[59]
- most of the jurors belonged to a political party that owned a company that published false information about an applicant who had been prosecuted for defamation (*Holm v. Sweden*);[60]
- a member of the court *ex officio* was subordinate to one of the parties in the proceedings (*Sramek v. Austria*);[61]
- A member of the jury worked for a firm whose partner was a witness in the *Pullar v. The United Kingdom* indictment.[62]

For the purposes of Part 2 of Art. 75 of the CrPC, in deciding on the impossibility of joining the same panel of judges who are related to each other, one should apply the concept of relatives in family law and take into account not only close but also further degrees of family ties as for para. 1. part 1 art. 75 of the CrPC.

57 *Nicholas v Cyprus,* App no 63246/10, Judgment of 9 January 2018 <http://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-179878&filename=CASE%20OF%20NICHOLAS%20v.%20CYPRUS.docx&logEvent=False> accessed 18 November 2021.

58 Handbook of Article 6 of the Convention – The right to a fair trial (criminal procedure) as of 31 December 2019, 30 <http://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c=> accessed 18 November 2021.

59 *Micallef v Malta* (n 37) para 98.

60 *Holm v Sweden,* App no 14191/88, Judgment 25 November 1993, paras 32-33 <https://hudoc.echr.coe.int/fre?i=002-9744> accessed 18 November 2021.

61 *Sramek v Austria,* App no 8790/79, Judgment 22 October 1984 <https://www.legal-tools.org/doc/de30a4/pdf> accessed 18 November 2021.

62 *Pullar v the United Kingdom* (n 40) para 32.

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For historical reference, we note that Art. 54 of the CrPC of Ukraine of 1960 used a broader category of 'relatives' rather than 'close relatives' both to outline the impossibility of a judge to participate in a case in one court, and in the cases currently provided for in paras. 1 and 3 of Part 1 of Art. 75 of the CrPC of Ukraine.

4.3 Violation of the established art. 35 of the CrPC, the procedure for distribution of cases between judges by an automated document management system, the procedure for determining jurors to participate in court proceedings (para. 5, part 1 of Art. 75 of the CrPC)

According to Recommendation No. (94) 12 of the Committee of Ministers of the Council of Europe, the distribution of court cases between judges can be done by lot, through an automatic distribution system, in alphabetical order, or through another similar system. The division of cases should not be influenced by the wishes of one of the parties to the case or of any person interested in the outcome of the case. A judge may not be dismissed from the proceedings without good reason, which is a serious illness or personal interest of the judge in the case. The reasons and procedure for exemption from the administration of justice must be determined by law and may not be influenced in any way by the interests of the government or administrative bodies. The decision to dismiss one of the judges from the proceedings must be taken by an authorised body with the same independence as the judges themselves.[63]

According to item 2.3.1 *Regulations on the automated court document management system* (hereinafter – ACDMS), in Ukraine, the distribution of court cases is carried out on the basis of information entered into the automated court system during the working day after registration of relevant documents. According to p. 2.3.3-2.3.7, the following information is used and taken into account in the automated distribution of court cases: specialisation (if any); load information; coefficients of the complexity of the judge's work; whether the judge has the authority to administer justice at the time of the division of court cases.[64]

Violations of the procedure for appointing a judge by an automated system, which may be grounds for challenge, include: entering false information into the system, entering information into the system by an unauthorised entity, violation of the registration deadline to influence the distribution of cases between judges, influence, and pressure on subordinate employees who maintain the automated system.

The ECtHR found a violation of the right to a 'lawful composition of the court' in connection with the violation of the order of distribution of cases between judges in the case of *Miracle Europe KFT v. Hungary*;[65] violation of the requirements of the law on drawing lots of two non-professional judges who were members of the panel along with professional judges (*Posokhov v. Russia*);[66] the chairman of the local court appointed

63 Recommendation No (94) 12 'Independence, effectiveness and role of judges' (adopted by the Committee of Ministers of the Council of Europe at the 518th meeting of the Ministers' Deputies on 13 October 1994) <https://zakon.rada.gov.ua/laws/show/994_323#Text> accessed 18 November 2021.

64 Decision of the Council of Judges of Ukraine dated 2 April 2015 no 25 as amended and supplemented from 11 June 2021 on approval of the Regulations on the Regulations on the automated document management system of the court <https://court.gov.ua/sudova-vlada/969076/polozhenniapasds/#_Toc414726370_24> accessed 18 November 2021.

65 *Miracle Europe Kft v Hungary,* App no 57774/13, Judgment of 12 January 2016 <http://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-159926&filename=CASE%20OF%20MIRACLE%20EUROPE%20KFT%20v.%20HUNGARY.pdf&logEvent=False> accessed 18 November 2021.

66 *Posokhov v Russia,* App no 63486/00, Judgment of 4 March 2003 <https://www.legislationline.org/documents/id/17185> accessed 18 November 2021.

himself presiding judge in the applicant's case instead of another judge and on the same day decided to close the proceedings in this case on unclear grounds and in a procedure devoid of procedural transparency (*DMD Group v. Slovakia*)[67] In the last case, the ECtHR drew attention to the following circumstances: a) the issue of transferring cases from one judge to another was not sufficiently clearly regulated by national law, which did not provide any guarantees against abuse; b) the only document that regulated the division of cases was the schedule of judges, which was changed uncontrollably by the chairman of the court.

4.4 Participation of a judge in the preliminary stages of criminal proceedings (Art. 76 of the CrPC of Ukraine)

This reason is related to concerns about the bias of the judge, which may arise every time a judge has previously decided on certain issues in the same case. The basis for such fears is the natural desire of the judge to defend in the subsequent stages of criminal proceedings the decisions s/he made in the previous stages, i.e., the conflict of interests of the judge.

The judge must be 'clean' of the arguments of both the prosecution and the defence during the trial. That is why the court's examination of evidence in criminal proceedings begins at the trial stage and should end there with a verdict of acquittal or indictment, depending on the results of the court's assessment of the evidence provided by the parties. The judge's conviction of the guilt of the accused before the trial can turn him/her into an 'instrument of the prosecution' and help him/her obtain the 'status' of the prosecution.

Therefore, the purpose of Art. 76 of the CrPC, which is called '*inadmissibility of re-participation of a judge in criminal proceedings*', is the anticipation of possible formation of the judge's own position on the merits and circumstances of the case and guilt or innocence in committing the criminal offence, which may form prejudice from the judge towards the case.

The Code of Criminal Procedure is based on the fact that a judge cannot be a member of a higher court that verifies the correctness of a court decision rendered with his participation. Conversely, a judge who was a member of a higher court who remitted a case for a review may not take part in a new trial of the same case in a lower court. A judge cannot simultaneously control their own actions, identify their own mistakes and follow their own instructions – this creates a conflict of interest for them. This is especially true in situations where the execution of the instructions of the higher court requires a decision contrary to the revoked one, which creates a real conflict of interest and, of course, will call into question the impartiality of the judge. And from the psychological point of view of the persons involved in the retrial, these rules are a guarantee of perception and their impartial attitude to the new composition of the court.

The ECtHR's classic position on the re-involvement of a judge in the case of *Oberschlik v. Austria*,[68] in which he found a violation of the impartiality of the court, when the Court of Appeal was presided over by the same judge as in the case in the first instance. The ECtHR ruled that it did not matter that no challenge had been announced and no objections had

67 DMD *Group, a.s. v Slovakia*, App no 19334/03, Judgment of 5 October 2010 <https://www.legal-tools.org/doc/6ab7cb/pdf/> accessed 18 November 2021.

68 *Oberschlick v Austria*, App no 11662/85, Judgment of 23 May 1991 <https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=001-94181&filename=CASE%20OF%20OBERSCHLICK%20v.%20AUSTRIA%20-%20[Russian%20Translation].pdf> accessed 18 November 2021.

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been raised against the presiding judge's participation, as the presiding judge and two other members of the appellate court had to commit to self-challenge *ex officio*.

At the same time, the ECtHR's practice of re-participating in a judge's case as a reason to doubt his impartiality is complex and ambiguous; the ECtHR has tried to differentiate it but has failed to build consistent approaches to different states in similar situations.

First of all, let us consider what is meant by **the same criminal proceedings**. This is a case of the same criminal offence (under the same factual circumstances), and the number of proceedings may differ due to, for example, the allocation to a separate proceeding or merger with another.

The ECtHR ***does not apply a restrictive interpretation to the concept of 'same proceedings'***. Thus, in *Indra v. Slovakia*, Judge S. was a member of the Chamber of Judges of the City Court, which on 19 November 1985 rejected the applicant's appeal for his release in 1982. She subsequently considered the applicant's appeal for his rehabilitation regarding his release. Although the subject-matter of the original proceedings differed from the subject-matter of the rehabilitation proceedings, the ECtHR proceeded from the fact that both the original proceedings and the rehabilitation proceedings examined the same set of facts. Therefore, this circumstance raises reasonable doubts of the applicant in the objective impartiality of Judge S. Therefore, the ECtHR found a violation of para. 1 of Art. 6 of the ECHR on the Requirement of an Impartial Tribunal.[69] The ECtHR reached a similar conclusion in the case of *Stoimenovikj and Miloshevikj v. Northern Macedonia* in criminal and civil proceedings involving agreements of a very similar, if not identical nature, and, in civil cases, the court used evidence and materials from criminal proceedings. In this case, Judge M.S., as a member of the Board of the Court of Appeal of Skopje, first made a negative decision in the applicant's criminal case and later, as a member of the Supreme Court, heard the applicant's civil case. The ECtHR found the applicant's fears that the judge had already formed his opinion on the merits of the case well-founded.[70]

National courts have adopted these approaches of the ECtHR. Thus, the Frankivsk District Court of Lviv challenged two of the three judges of the panel that considered the criminal proceedings on the grounds that they had previously considered the civil cases to which the accused was a party. In the course of these civil cases, they assessed the evidence presented in the statements of claim, which will also be the subject of the court's assessment and criminal proceedings. The judges had already formed their opinion on the evidence on which the accusation is based, even before the trial.[71] The Criminal Court of Cassation of the Supreme Court (hereinafter – the CCC of the Supreme Court) found that the judge's participation in other proceedings related to the seizure of property recognised as the subject of a crime could have objectively due to doubts about the impartiality of the judge.[72]

At the same time, *the ECtHR does not have a single practice for cases where several defendants have been heard in different proceedings and tries to differentiate approaches depending on the degree of involvement of the judge in the examination of evidence in the first case against an accomplice the case against whom will be considered later in a*

69 *Indra v Slovakia,* App no 46845/99, Judgment of 1 February 2005, paras 51-55 <https://lovdata.no/static/EMDN/emd-1999-046845.pdf> accessed 18 November 2021.

70 *Stoimenovikj and Miloshevikj v North Macedonia,* App no 59842/14, Judgment 25 March 2021 [Section V], paras 37-42 <https://hudoc.echr.coe.int/eng-press?i=003-6977072-9393949> accessed 18 November 2021.

71 Decision of the preparatory court hearing in criminal proceedings no 465/1665/18 from 19 April 2021 <https://reyestr.court.gov.ua/Review/96442322> accessed 18 November 2021.

72 Resolution of the Supreme Court of Cassation of 10 September 2019 in case no 157/2932/17 <https://reyestr.court.gov.ua/Review/84229853> accessed 18 November 2021.

separate proceeding. In particular, in the case of *Ferrantelli and Santangelo v. Italy*, the ECtHR found the applicants' fears of bias against the presiding judge and the national rapporteur, who had a few years ago presided over the case of their accomplices, objective and well-founded, and in the judgment which ended the case against the accomplices, considerable attention was paid to the applicants.[73] Similarly, in the case of *Otegi Mondragon v. Spain*, the judge had previously presided and was found to be biased against the applicant in a previous trial in respect of such charges.[74] However, in *Kriegisch v. Germany*[75] and *Khodorkovskiy and Lebedev v. Russia*,[76] the ECtHR acknowledged that the fact that a judge made a decision on similar but unrelated criminal charges, or that he considered a case with one of the defendants in a separate proceeding, was insufficient to doubt the impartiality of such a judge.

Similarly, ***the ECtHR does not have a unified approach to situations where a judge was first an investigating judge and later involved in the same substantive criminal proceedings***. In particular, in the late 1980s–early 1990s, the ECtHR held that the prior performance of a member of the panel of judges as an investigating judge in the same proceeding was incompatible with Art. 6 para. 1 of the Convention. Thus, in *De Cubber v. Belgium*, the applicant complained about a violation of the principle of impartiality, given that one of the three judges hearing his case had previously acted as an investigating judge in this case. The state justified the lack of judges and the need to consider the case within a reasonable time. The ECtHR recalled that a state party to the Convention must organise its legal system in such a way as to ensure compliance with the requirements of Part 1 of Art. 6 of the Labour Code, and impartiality is one of them. As it was not complied with, the ECtHR found a violation of Part 1 of Art. 6 of the Convention.[77] A similar approach (arrest warrant and trial cannot be carried out by the same judge) can be seen in *Ben Yaacoub v. Belgium*.[78] In other words, when a judge, in deciding whether to detain a suspect in custody, assesses the validity of the suspicion and, in the trial stage, decides on the guilt and punishment of the person, according to the ECtHR, this is evidence that the judge is convinced of 'particularly high clarity (certainty) in the issue of guilt', i.e., the decision to detain was based on 'obvious' guilt, so the impartiality of the court is in doubt, and the applicant's concerns in this regard can be considered objectively justified (*Hauschildt v. Denmark*).[79]

However, in the early to mid-1990s, the ECtHR sought in a number of decisions to take a more differentiated approach to addressing the impact of a judge's 'pre-trial' activities on the court's impartiality. Thus, in the case of *Nortier v. the Netherlands*, the ECtHR noted that 'the mere fact that a judge had made a decision at the pre-trial stage... could not be considered a reason to doubt his impartiality; the scope and nature of these decisions

73 *Ferrantelli* and Santangelo v Italy (n 49) .

74 *Otegi Mondragon v Spain,* App no 4184/15, Judgment 6 November 2018, paras 58-69 <https://hudoc.echr.coe.int/fre?i=001-187510> accessed 18 November 2021.

75 *Kriegisch v Germany,* Decision of Court (Fifth Section) as to the admissibility of App no 21698/06, 23 November 2010 <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-102203&filename=001-102203.pdf> accessed 18 November 2021.

76 *Khodorkovskiy and Lebedev v Russia,* App nos 11082/06 and 13772/05, Judgment 25 July 2013 [Section I] <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-7648&filename=002-7648.pdf&TID=ihgdqbxnfi > accessed 18 November 2021.

77 *De Cubber v. Belgium* (n 6) paras 32-33 .

78 *Ben Yaacoub v. Belgium,* Judgment of 27 November 1987 <http://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-57437&filename=CASE%20OF%20BEN%20YAACOUB%20v.%20BELGIUM.pdf&logEvent=False> accessed 18 November 2021.

79 *Hauschildt v Denmark,* Judgment of 24 May 1989, Series A no 154 , paras 48-53 <http://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-45388&filename=HAUSCHILDT%20v.%20DENMARK.pdf&logEvent=False> accessed 18 November 2021.

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are of paramount importance in the case'.[80] In the case of *Saint-Marie v. France*, two of the three members of the court had previously decided not to release the applicant from custody, which had not been found to be a violation of Art. 1 para. 1. 6 of the Convention, as the previous decision was limited to a brief assessment of the facts presented in order to establish whether the suspicions of the police were justified and whether they gave reason to fear that the accused would escape from custody.[81] A number of other cases are similar (*Thorgeir Thorgeirson v. Iceland*[82]; *Fey v. Austria*;[83] *Padovani v. Italy*[84]). In any case, it is always necessary to assess the individual circumstances of each case in order to determine the extent to which the investigating judge considered the case (*Borg v. Malta*[85]).

In the second half of the 1990s and 2020s, the ECtHR clarified that doubts about a judge's bias arise when, in other stages of the proceedings, the same judge has pleaded guilty, i.e., if previous decisions contain preliminary findings of guilt of the accused (*Ferrantelli and Santangelo v. Italy*;[86] *Schwarzenberger v. Germany*;[87] *Poppe v. the Netherlands*[88]) when there is a question of prejudice against the judge's prior participation in the proceedings, the period of almost two years between the previous and current participation and the same case, in the ECtHR's view, is not in itself a sufficient guarantee of the absence of bias (*Davidsons and Savins v. Latvia*).[89]

Such attention is paid to the case law of the ECtHR on the possibility of a judge who in the previous stages decided on the measure of restraint and therefore provided or did not assess the evidence of guilt due to changes in Ukrainian legislation on such situations.

Until 14 January 2021, Art. 76 of the CrPC of Ukraine imposed an unconditional prohibition on a professional judge participating in the same criminal proceedings twice (in the court of first, appellate, and cassation instances and in reviewing the case on newly discovered circumstances, as well as in new proceedings after reversal of a sentence or court decision). At the same time, the investigating judge has the right to participate in the proceedings throughout the pre-trial investigation.

On 14 January 2021, the amended version of Part 1 of Art. 76 of the CrPC came into force according to Law No. 1027-IX of 2 December 2020, which states:

> A judge who participated in criminal proceedings during the pre-trial investigation is not entitled to participate in the same proceedings in the court of first, appellate

80 *Nortier v the Netherlands,* App no 13924/88, Judgment 24 August 1993 , para 33 <https://hudoc.echr.coe.int/fre?i=002-9694> accessed 18 November 2021.

81 *Sainte-Marie v France,* App no 12981/87, Judgment of 16 December 1992, para 33 <https://jurinfo.jep.gov.co/normograma/compilacion/docs/pdf/CASE%20OF%20SAINTE-MARIE%20v.%20FRANCE.PDF> accessed 18 November 2021.

82 *Thorgeir Thorgeirson v. Iceland, App no 13778/88, judgment of 25 June 1992* https://hudoc.echr.coe.int/eng?i=001-57795 accessed 18 November 2021.

83 *Fey v Austria,* App no 14396/88, Judgment of 24 February 1993 , para 30 <https://www.stradalex.com/en/sl_src_publ_jur_int/document/echr_14396-88> accessed 18 November 2021.

84 *Padovani v Italy,* App no 13396/87, Judgment of 26 February 1993 , para 28 <http://hudoc.echr.coe.int/webservices/content/pdf/001-57812> accessed 18 November 2021.

85 *Borg v. Malta,* app no 37537/13, judgment of 12 January 2016 <https://hudoc.echr.coe.int/eng?i=001-159924> accessed 18 November 2021.

86 *Ferrantelli* and Santangelo v Italy (n 49) .

87 *Schwarzenberger v Germany,* App no 75737/01, Judgment of 10 August 2006, para 42 <https://hudoc.echr.coe.int/eng?i=001-76708> accessed 18 November 2021.

88 *Poppe v the Netherlands,* App no 32271/04, Judgment of 24 March 2009, para 26 <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-91880&filename=001-91880.pdf&TID=thkbhnilzk> accessed 18 November 2021.

89 *Dāvidsons and Savins v Latvia,* App nos 17574/07 and 25235/07, Judgment of 7 January 2016, para 57 <https://hudoc.echr.coe.int/eng?i=001-159768> accessed 18 November 2021.

> and cassation instances, *except in cases of review by appellate decision of the court of first instance on the choice of a measure of restraint in the form of detention, to change another measure of restraint to a measure of restraint in the form of detention or to extend the term of detention imposed during the trial proceedings in the court of first instance before a court decision on the merits.*[90]

This legislative change was adopted in pursuance of the decision of the Constitutional Court of Ukraine of 13 June 2019 No. 4-r/2019 on declaring Part 2 of Art. 392 of the CrPC, which prohibited a separate appeal against the court's decision to extend the period of detention imposed during the trial in the court of first instance until the court's decision on the merits.[91] The legislator's approach was due to the 'staff shortage' in the appellate courts and the intention to provide an opportunity to form an appellate court to review the decision on the merits on appeal, because after the appellate review of investigative judges' decisions, as well as decisions of the court of first instance, judges who did not previously take part in the proceedings may not remain in custody in the Court of Appeal, and it is impossible to form a panel of judges to review the decision on the merits.

However, this innovation is quite delicate and controversial and, we hope, will be temporary – until the vacancies in the courts of appeal are filled.

Firstly, the legislator's inconsistency is surprising: why is the participation of a judge of the appellate court in the pre-trial investigation stage in the appellate review of the investigative judge's decision to elect, change, or extend detention considered grounds for assuming his/her second participation in the case, while participation in the appellate review of the same issue at the stage of court proceedings before the court decision on the merits in the court of first instance is not?

Secondly, prior to this legislative innovation, a separate appeal and review of first instance court decisions on the election, change, or extension of detention at the stage of consideration of the case in the first instance was impossible and was carried out in a single (joint) appeal process during the appellate review of the case on the merits. Therefore, we can assume that the subjects of the legislative initiative were guided by the reasoning 'the amount does not change from the permutation of terms' and that there are no obstacles to the new version of Part 1 of Art. 76 of the CrPC of Ukraine. The appellate review of the case was carried out by the same panel of judges as the review of the decision of the court of first instance on the election, change, or extension of detention since these issues were considered by the same court. However, this logic is misleading because the appellate review of these decisions is prolonged, and the appellate proceedings will essentially be preceded by an appellate review of first instance court rulings extending, changing, or choosing a measure of restraint.

Thirdly, this legislative innovation is not fully consistent with the principle of access to justice and the impartial court (Part 1 of Art. 21 of the CrPC of Ukraine and Part 1 of Art. 6 of the Convention), but rather is a formal (mechanical) objectification in Part 1 of Art. 76 of the CrPC of Ukraine, which attempts to ensure the formation in the appellate court for appellate review of the decision on the merits.

90 Law of Ukraine of 2 December 2020 No 1027-IX 'On Amendments to the Criminal Procedure Code of Ukraine to Enforce the Decision of the Constitutional Court of Ukraine on Appealing the Court's Decision to Extend the Term of Detention ' <https://zakon.rada.gov.ua/laws/show/1027-20#n6> accessed 18 November 2021.

91 Decision of the Constitutional Court of Ukraine in the case of the constitutional complaint of Glushchenko Viktor Mykolayovych regarding the compliance of the Constitution of Ukraine (constitutionality) with the provisions of the second part of Article 392 of the Criminal Procedure Code of Ukraine of 13 June 2019 No 4-p/2019 <https://zakon.rada.gov.ua/laws/show/v004p710-19#Text> accessed 18 November 2021.

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Fourthly, the factual nuance is that when considering both petitions for election, change, or extension of precautionary measures, and appeals for reconsideration of decisions on these issues, the court on the merits is forced by the law to assess not only the presence of risks (para. 1, part 1 of Art. 194 of the CrPC of Ukraine), but also to establish or prove the evidence provided by the parties to the criminal proceedings – *the circumstances that indicate a reasonable suspicion* of committing a criminal offence (para. 2, part 1 of Art. 194 of the CrPC of Ukraine). In accordance with para. 2 part 3 of Art. 407 of the CrPC of Ukraine ruling on the consequences of the appellate review of the appeal against the court decision on the election, change, or extension of detention, decided during the trial in the court of first instance before the decision on the merits*, the appellate court decides on precautionary measures, provided for in Chapter 18 of Section II of this Code,* i.e., subject to part 2. Art. 177, item 1 part 1 of Art. 178, item 3 part 1 of Art. 184, item 1 part 1 of Art. 194, item 1, 4 part 2 of Art. 196 of the CrPC of Ukraine. Therefore, in reviewing appeals against decisions of the court of first instance on the election, change, or extension of detention, the appellate court cannot help but form an opinion on the evidence on which the accusation is based and is unlikely to be objective and impartial in appellate verification of the decision of the court of first instance, which ended the criminal proceedings on the merits. Thus, this situation does not apply to cases where the appellate court makes purely formal and procedural decisions, which, in the case of the ECtHR, should not raise questions of lack of impartiality in the case of re-participation in the appellate review of the same judges. In any case, such situations in national law fall under para. 4 of Part 1 of Art. 75 of the CrPC of Ukraine – the presence of other circumstances that may indicate the bias of the judge – and can be justified as grounds for challenge.

Thus, the new version of Part 1 of Art. 76 of the CrPC of Ukraine awaits the trial and verification of the ECtHR (if there are such statements, and there will be). The legislator created a legal conflict in Part 1 of Art. 76 of the CrPC of Ukraine and para. 4 of Part 1 of Art. 75 of the CrPC of Ukraine; Part 2 of Art. 422-1 of the CrPC of Ukraine from Part 3 of Art. 407, part 2 of Art. 177, item 1 part 1 of Art. 178, item 3 part 1 of Art. 184, item 1 part 1 of Art. 194, item 1, 4 part 2 of Art. 196, part 1 of Art. 422 of the CrPC of Ukraine. In doing so, he made life difficult for Ukrainian law enforcement. After all, the new version of Part 1 of Art. 76 of the CrPC of Ukraine, together with the practice of the ECtHR, requires the panel for the review of judicial decisions on the merits to determine whether the judge who participated in the preliminary review of decisions on the election, change, or extension of detention understood and assessed the circumstances, substantiated the accusations, or limited him/herself to resolving procedural issues. In general, it is difficult to model situations where an appellate review of decisions to choose, change, or extend detention would not compel a judge of the appellate court to assess the prosecution's evidence and, accordingly, allow him/her to remain impartial during a future review of the merits.[92]

The gap in the law is the situation of inadmissibility of repeated participation of the investigating judge in the criminal proceedings, within which his/her previous decision was revoked. In practice, situations may arise that require the investigating judge to make a decision contrary to the revoked one, which creates a real conflict of interest. For example, this could occur when the investigating judge previously demonstrated his/her position on the criminal proceedings and recognised the investigator's decision to close the criminal proceedings as lawful and reasonable, but this position of the investigating judge did not coincide with the position of the higher court, which overturned the investigating judge's

92 OM Kaluzhna, MI Shevchuk, 'Light rain from a large cloud (or will there be a new procedure for appealing the decisions of the court of first instance on the election, change or extension of detention term an effective means of legal protection of the accused?' (2021) 1 Law and Society 219 <http://www.pravoisuspilstvo.org.ua/archive/2021/1_2021/35.pdf> accessed 18 November 2021.

decision on refusal to satisfy the complaint against the decision of the investigator to close the criminal proceedings. What is the chance that this investigating judge will make the opposite decision overturned in the same criminal proceedings if the investigator re-orders the closure of the criminal proceedings and it is appealed to the investigating judge? An interesting example in such situations can be the rulings of the investigating judge of the Shevchenkivsky District Court of Lviv from 3 September 2018 and 14 April 2021, which were issued within the same criminal proceeding. In his decision of 3 September 2018, the investigating judge concluded that the investigator's decision to close the criminal proceedings on the basis of para. 2 of Part 1 of Art. 284 of the Criminal Procedure Code of Ukraine was lawful. However, this decision of the investigating judge was overturned by the appellate court. A year later, the investigators re-issued a decision to close the criminal proceedings, which was also appealed by the victim to the investigating judge. However, this time, the investigating judge, by his decision of 14 April 2021, upheld the victim's complaint against the investigator's decision to close the criminal proceedings, stating that the investigator's procedural decision did not properly substantiate the conclusion that there was no *corpus delicti* (components of crime).[93]

4.5 Preventing the decision of the 'unlawful composition of the court'

The concept of 'legal composition of the court' is literally not defined in the law. It is derived (systematised) by doctrine and case law from the provisions of the law,[94] which enshrines the requirements (features) that must meet the legal composition of the court. The adoption of a court decision by the unlawful composition of the court is enshrined in para. 2 of Part 2 of Art. 412 of the CrPC as a ground for its unconditional repeal and significant violation of the requirements of the criminal procedure law. Therefore, in criminal cases where there are obvious circumstances that indicate that the court designated for criminal proceedings does not meet the requirements of the 'lawful composition of the court', the parties and other participants in criminal proceedings may challenge the judge/judges, all members of the panel, or the entire court. The mechanism for eliminating a defect in the composition of the court by challenge (self-challenge) is designed to prevent the annulment of a court decision in a timely manner and is determined by the principle of reasonable time and the right to a court established by law.

The composition of the court is considered unlawful if there are grounds that precluded the judge's participation in the case; the verdict (decision) was signed by a judge who did not participate in the proceedings; the judge violated the rules of collegial proceedings; the judge or judges who heard the case were elected to the court to which the case is not subject; a judge whose term of office has expired took part in the consideration of the case; at least one of the judges was not elected by the Verkhovna Rada of Ukraine or appointed by the President of Ukraine in the manner prescribed by law; if the court in the manner prescribed by law

93 Decision of the Investigating Judge of the Shevchenkivsky District Court of Lviv of 3 September 2018, Case No 466/6944/18 <https://reyestr.court.gov.ua/Review/76369924> accessed 18 November 2021; Decision of the Investigating Judge of the Shevchenkivsky District Court of Lviv of 14 April 2021, Case No 466/6944/18 <https://reyestr.court.gov.ua/Review/96353834> accessed 18 November 2021.

94 Supreme Specialized Court of Ukraine for Civil and Criminal Cases, Generalization of the practice of exercising procedural authority by the appellate court to appoint a new trial in the court of first instance (review from 1 January 2017) <https://ips.ligazakon.net/document/VRR00217> accessed 18 November 2021; N Siza, 'The composition of the court in criminal proceedings' (2012) 93 *Bulletin of the Taras Shevchenko National University of Kyiv. Legal sciences* 58-61 <http://irbis-nbuv.gov.ua/cgi-bin/irbis_nbuv/cgiirbis_64.exe?C21COM=2&I21DBN=UJRN&P21DBN=UJRN&IMAGE_FILE_DOWNLOAD=1&Image_file_name=PDF/VKNU_Yur_2012_93_17.pdf> accessed 18 November 2021.

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has not considered the request to challenge a judge or jury;[95] the procedural requirements for criminal proceedings involving jurors have not been met; the criminal proceedings were heard by a judge while on leave or sick leave; the requirements of the CrPC regarding the implementation of exclusively automated distribution of materials of criminal proceedings between judges have not been met; the procedural requirements for the replacement of the court, established by Art. 319 of the CrPC.[96]

Since the concept of 'lawful composition of the court' is a compiled list of requirements for it, for an orderly and easy perception, we structure its elements into three conditional blocks – ***institutional, procedural, and jurisdictional***. In the outline (context) of Part 1 of Art. 6 of the ECHR, these three blocks were in different proportions scattered in the following three components of the right to a fair trial: a) the right to a fair trial, b) the right to a court established by law, and c) the right to an independent and impartial tribunal (Art. 6 of the ECHR). Each of the blocks has its own meaning, being closely tied to the others.

4.5.1) The first block of grounds is the compliance of the court with the ***institutional requirements*** (they are also called *organisational requirements* because they determine the principles of legitimate judicial power in the state), established by the Constitution of Ukraine and the Laws of Ukraine 'On the Judiciary and the Status of Judges' and 'On the Supreme Anti-Corruption Court', in particular: the requirements for professional judges (Part 2 of Art. 127 of the Constitution of Ukraine, Art. 69 of the Law of Ukraine 'On the Judiciary and the Status of Judges'); the special requirements for a judge who conducts criminal proceedings against a minor (Art. 18 of the Law of Ukraine 'On the Judiciary and the Status of Judges'); the special requirements for a judge of the Supreme Anti-Corruption Court (Art. 7 of the Law of Ukraine 'On the Supreme Anti-Corruption Court'); the requirement to divide cases taking into account the specialisation of judges (Part 5 of Art. 15 of the Law of Ukraine 'On the Judiciary and the Status of Judges'); the requirements for jurors (Arts. 65, 66 of the Law of Ukraine 'On the Judiciary and the Status of Judges'); the requirements for the appointment of a judge (Art. 128 of the Constitution of Ukraine, Section IV of the Law of Ukraine 'On the Judiciary and the Status of Judges', Art. 8 of the Law of Ukraine 'On the Supreme Anti-Corruption Court'); requirements for the term of office and the procedure for challenge and termination of a judge (Art. 126 of the Constitution of Ukraine, Section VII of the Law of Ukraine 'On the Judiciary and the Status of Judges'); requirements for the procedure for involving jurors in the performance of duties in court (Arts. 64, 67 of the Law of Ukraine 'On the Judiciary and the Status of Judges'); requirements for the procedure for challenge of a juror (Art. 66 of the Law of Ukraine 'On the Judiciary and the Status of Judges').

Failure to comply with these and other requirements is reflected in the case law of the ECtHR through the prism of such an element of the right to a fair trial as a '*court established by law*' (Part 1, Art. 6 of the ECHR)

- The court, along with professional judges, included two non-professional judges selected to participate in proceedings in violation of the law on the maximum term of office, which should not exceed two weeks per year under Russian law (*Posokhov v. Russia*);[97]
- The court also included non-professional judges, who continued to rule on cases in accordance with established tradition, although the law on non-professional

95 SV Kivalov, SM Mishchenko, VY Zakharchenko (eds), *Criminal Procedure Code of Ukraine: Scientific and Practical Commentary* (Odyssey 2013) 743.

96 Supreme Specialized Court of Ukraine for Civil and Criminal Cases (n 97).

97 *Posokhov v Russia,* App no 63486/00, Judgment of 4 March 2003 <https://www.legislationline.org/documents/id/17185> accessed 18 November 2021.

judges was repealed and a new law was not adopted (*Panjikidze and others v. Georgia*);[98]

- the term of office of the judge at the time of the case had expired (*Gurov v. Moldova*);[99]
- the court ruled a judgment in the first instance against the Minister of Government and four other persons who had never held ministerial posts, although under national law this court was empowered to rule only on ministers (*Coeme and others v. Belgium*);[100]
- the court passed a verdict with the participation of lay judges, the procedure for whose election was violated (*Ilatovsky v. Russia*);[101]
- the court was composed of a judge appointed to the position of judge in breach of procedure (*Guðmundur Andri Ástráðsson v. Iceland*).[102] A statutory evaluation committee submitted a list of the 15 highest-scoring candidates to the Ministry of Justice, but the Minister of Justice submitted another list to the parliament, including the first 11 candidates and four other candidates who also participated in the selection procedure, but took the 17th to 30th places in the final rating. It was these candidates who were supported by the parliament of Iceland, and the president approved their appointment to the office of a judge. Guðmundur Andri Ástráðsson, whose case was being considered by the appellate court, challenged one of the newly appointed judges for violating the appointment procedure. However, his appeal was rejected, and he appealed to the Supreme Court, arguing that his right to a 'court established by law' was violated, but the higher instance court did not accept this argument either. The ECtHR found that the executive had an unjustified and unforeseen discretion under national law to elect four judges to a new appellate court, combined with a failure by parliament to ensure a proper balance between the executive and the legislature in the appointment of judges. Thus, this process reduced the public's confidence in the judiciary, which is necessary in a democratic society, and therefore contradicted the very essence of the rule of law – the administration of justice by a court established by law.
- Thus, the ECtHR requires adherence to the procedure for appointing judges, as it is important not only for judges but also the judicial appointment process itself to be impartial and independent – otherwise, credibility in the judiciary and confidence in their independence and impartiality will be undermined.

4.5.2) The procedural component of the 'lawful composition of the court' (also called *jurisdictional*[103] or *functional component*) means that the court must act in the manner

98 *Pandjikidze and others v Georgia,* App no30323/02, Judgment of 27 October 2009 <http://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=001-144308&filename=PANDJIKIDZE%20AND%20SIX%20OTHERS%20v.%20GEORGIA%20-%20%5BUkrainian%20Translation%5D.pdf> accessed 18 November 2021.

99 *Gurov v Moldova,* App no 36455/02, Judgment of 11 July 2006, paras 37-39 <https://hudoc.echr.coe.int/eng?i=001-76297> accessed 18 November 2021.

100 *Coëme and others v. Belgium,* App nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgment of 22 June 2000 <https://hudoc.echr.coe.int/eng?i=001-59194> accessed 18 November 2021.

101 *Ilatovskiy v Russia,* App no 6945/04, Judgment of 9 July 2009 <https://hudoc.echr.coe.int/eng?i=001-93498> accessed 18 November 2021.

102 *Guðmundur Andri Ástráðsson v Iceland,* App no 26374/18, Judgment of 12 March 2019 <https://hudoc.echr.coe.int/eng?i=001-206582> accessed 18 November 2021.

103 OZ Khotynska-Nor, 'The right to a "court established by law" as a structural element of the right to a fair trial: the Ukrainian context' 2015 1 *Lawyer* <https://iadvocate.com.ua/pravo-na-sud-vstanovlenyj-zakonom-yak-strukturnyj-element-prava-na-spravedlyvyj-sud-ukrayinskyj-kontekst/> accessed 18 November 2021.

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and in accordance with the powers provided by law, within its competence. It covers compliance with the rules of jurisdiction (Arts. 32, 33, 33-1 of the CrPC), the principle of invariability of the composition of the court, which ensures that among professional judges and jurors who have signed a court decision, there are no persons who did not participate in the trial consideration (Arts. 319, 320, 390 of the CrPC), and the presumption of 'unlawful composition of the court', if the court in the manner prescribed by law has not considered the application for challenge of a judge (juror, the entire court).

The presumption of a court decision by an unlawful composition of the court, if the challenge of the court was declared but not decided, follows from para. 2 of Part 2 of Art. 412 of the CrPC, as further doubts about the bias or incompetence of the court remain undisputed. This presumption is not worded in the CrPC: it does not contain norms such as 'leaving applications for challenge without consideration is not allowed' or 'leaving of applications for challenge without consideration is grounds for revocation of a court decision'. It is derived from a systematic interpretation of the rules on the 'lawful composition of the court', which is well established in judicial practice and does not result in discussions or problems. For example, the Supreme Court of Cassation revoked the decision of the Court of Appeal, as ruled in substantial violation of the requirements of the Criminal Procedure Code due to the appellate court's disregard for the application for challenge, referring to para. 2 part 2 of Art. 412 of the CrPC.[104] In the circumstances of the case, Person 1 filed an appeal against the decision of the investigating judge of the Zavodsky District Court of Mykolayiv to refuse to recognise them as a victim, which contained an application to dismiss all judges of the Mykolayiv Court of Appeal and was registered by the court office. After determining the composition of the panel and the judge-rapporteur and submitting the appeal to it, the judge of the Mykolayiv Court of Appeal refused to open proceedings on the appeal. However, the judge did not consider the existence of a motion for challenge, in which Person 1 indicated the existence of distrust in the judges of the Court of Appeal. The issue of challenge was not resolved in the manner prescribed by procedural law.

The ECtHR found a violation of the right to a 'court established by law' (Art. 6 para. 1 of the ECHR) in the following situations:

- unreasonable change of territorial jurisdiction of the case (*Bochan v. Ukraine*);[105]
- unjustified replacement in the composition of the court hearing the case, without stating the reasons for the replacement (*Moiseyev v. Russia*).[106] There were 11 court substitutions in this case, and Russian law did not specify in which cases the presiding judge had the right to transfer the case to another judge, so they were given unlimited discretion without any procedural safeguards for the parties, such as the court's obligation to inform the parties, like giving reasons for changing the composition of the court or giving them the opportunity to express a position in this regard or to challenge the change in the composition of the court in a higher court. The same violation was established in the case of *Sutyagin v. the Russian Federation*.[107] Incidentally, the Committee of Ministers of the Council of Europe

104 Statute of the panel of judges of the Third Judicial Chamber of the CCC No 487/4598/19 of 26 February 2020 <https://reyestr.court.gov.ua/Review/87951214> accessed 18 November 2021.

105 *Bochan v Ukraine,* App no 7577/02, Fifth Section, Judgment of 3 August 2007, paras 67-72 <https://hudoc.echr.coe.int/eng?i=001-171916> accessed 18 November 2021.

106 *Moiseyev v Russia,* App no 62936/00, First Section, Judgment of 9 October 2008 <https://hudoc.echr.coe.int/eng?i=001-88780> accessed 18 November 2021.

107 *Sutyagin v Russia,* App no 30024/02, First Section, Judgment of 3 May 2011 <https://hudoc.echr.coe.int/eng?i=001-104651> accessed 18 November 2021.

stated in para. 9 of its Recommendation CM/Rec (2010) 12 of 17 November 2010 that no one has the right to withdraw a case from a judge without good reason, based on objective, pre-established criteria and a transparent procedure.[108]

4.5.3) *The competence* component of the concept of 'lawful composition of the court' is inextricably linked to the *institutional* and *procedural* components because the competence to hear cases belongs to the composition of the court appointed and determined to consider a case in accordance with the law. The competence component is a ***special professional level and requirements for a judge (court composition)***, which include special requirements for, e.g., a juvenile judge (Art. 18 of the Law 'On the Judiciary and the Status of Judges'), judges of the Supreme Anti-Corruption Court (Part 12 of Art. 31 CrPC), and the specialisation of judges in the distribution of cases (Part 5 of Art. 15 of the Law 'On the Judiciary and the Status of Judges'). ***Competence*** can be considered ***horizontally***, as 'empowerment, giving a range of powers' arising from the institutional and procedural component of the 'court established by law', and ***vertically***, as 'one who knows, knowledgeable, authoritative in a particular field or on certain issues', that is, the qualified and skilful use by a judge of their powers.

Insufficient vertical competence of a judge determines inevitable omissions in the process of proving – from failure to give certain circumstances of the case and evidence proper weight and evaluation or ignoring them to their non-investigation, non-detection, and non-establishment in general. Lack of knowledge results in random proving and a high probability of an incompetent judge 'drifting' in the accusatory or acquittal direction. In other words, the incompetence of a judge with a high probability causes incompleteness and one-sidedness of clarifying the circumstances of the case and confirming them with appropriate and admissible evidence, which in turn are grounds for challenging the court decision (paras. 1 and 2 of Part 1 of Art. 409 CrPC). Therefore, situations of possible incompetence of judges should be anticipated and prevented, including by way of challenge (self-challenge). Proper competence is the key to a judge's objectivity.

Therefore, at first glance, we can understand the approach of those lawyers who do not consider incompetence 'in its purest form' as a basis for challenge. *Secondly*, it should be borne in mind that the incompetence of a judge is not a static, a generalised, subjective characteristic, or a hypothetical, potential opportunity to conduct the proceedings incompetently. The competence of all judges of Ukraine is presumed and ensured by the system of selection, appointment, and qualification of judges. Incompetence is always specific and will be manifested in the dynamics of the judge in a particular case and expressed in specific consequences in the form of violation of the rights, freedoms, and interests of participants in the proceedings, unreasonable procedural decisions, or errors. It is these specific consequences (and not subjective impressions) that may be grounds for challenge, but they fall under the characteristics of the grounds for challenge, provided for in para. 4 of Part 1 of Art. 75 of the CrPC – the presence of other circumstances that cast doubt on impartiality.

Therefore, all situations of incompetence of a judge can be divided into two groups. 1) When incompetence stems from non-compliance with special institutional requirements of the law on qualifications and other features of the court (juvenile and investigative judges, high anti-corruption court boards, specialisations in general courts, etc.). In these cases, the presumption of incompetence must be applied. Incompetence of this kind is an independent and sufficient ground for challenge as non-compliance with

108 Recommendation CM/Rec (2010) 12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities, 17 November 2010 <https://zakon.rada.gov.ua/laws/show/994_a38#Text> accessed 18 November 2021.

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the component of the concept of 'lawful composition of the court'. 2) When the court is appointed and determined to consider specific proceedings, taking into account the special requirements of the law on the qualification of judges, but allows unprofessionalism in the form of obviously erroneous interim procedural decisions, irrelevant to the law actions, statements, etc. In these cases, the jurisdiction of the court is presumed, the grounds for challenge must be proved, and it may be expressed as a violation of the principles of process, rights, and interests of the person and fall under para. 4 of Part 1 of Art. 75 of the CrPC.

Understanding the ***competent*** component of the 'lawful composition of the court' in law enforcement practice is problematic.

In particular, due to the lack of judges in the appellate courts (in some courts, the staff shortage rate is 87%), there is a problem with establishing panels for the appellate review of criminal proceedings after expulsion from the distribution of judges of the criminal chamber with a ban on re-participation. As a way of combating situations, some appellate courts have made it a practice to involve 'side' judges in the panel to consider criminal proceedings against judges from the Civil Chamber. Thus, the meeting of judges of the Rivne Court of Appeal on 13 July 2021 decided

> in case of impossibility to form a panel for criminal proceedings from among the judges of the Criminal Chamber: the presiding judge (judge-rapporteur) is determined from among the judges of this chamber, and other members are determined from among all judges of the court without taking into account their affiliation to the judicial chambers. If it is impossible to determine the presiding judge from among the judges of the Criminal Chamber, the case is transferred to determine jurisdiction in the manner prescribed by the CrPC.[109]

In most courts of appeal, judges of the Civil Chamber did not agree to participate in criminal proceedings.

Case No. 1828/2dp/15-20 of the High Council of Justice (hereinafter – HCJ) of 15 June 2020 on bringing two judges of the Kherson Court of Appeal to disciplinary responsibility for violating the rules of self-challenge is indicative. Due to the insufficient number of judges of the Criminal Chamber for the distribution of a specific criminal case, a meeting of judges was held on 10 May 2019, where three judges of the Civil Judicial Chamber – B., M., and P. – were appointed for the time of the automated distribution of these proceedings. By the protocol of a repeated automated distribution, a board was created: the speaker was K. (criminologist), and members of the board were P. and B. (civil judges).

Having started the case (on preparation for contract killing and attempted intentional destruction of property by arson, explosion, or other dangerous methods), civil judges B. and P. found a lack of experience and practice in hearing criminal cases during the examination of the defendant's motions and for these reasons declared self-challenge, which was satisfied. On 24 May 2019, the prosecutor filed a disciplinary complaint with the Supreme Council of Justice (SCJ) against this court ruling, arguing that the grounds for challenge were known to judges before 10 May 2019. The SCJ Disciplinary Chamber established a disciplinary misdemeanour – breaking the rules of self-challenge – in the actions of judges (subpara. d, para 1, part 1 of Art. 106 of the Law 'On the Judiciary and the Status of Judges'). The SCJ pointed out that judges B. and P. had not complied with the rules on self-challenge, that there was no objective criterion for impartiality

109 Рішення зборів суддів від 13 July 2021 року. Рівненський апеляційний суд <https://rva.court.gov.ua/sud4815/inshe/zboru_siddiv/1151662/ > accessed 18 November 2021.

in their reasons, and that references to insufficient qualifications were not a ground for impartiality.[110]

In our opinion, the decision of the SCJ disciplinary chamber is unconvincing.

Firstly, in accordance with Art. 34 of the CrPC, if after satisfying the challenges (self-challenges), it is impossible to form a court to consider the proceedings. The appellate court had to submit a proposal to the CCC of the Supreme Court to resolve the issue of referring proceedings from one court of appeal to another. The CrPC of Ukraine does not provide for the possibility of a lack of criminal judges in the judicial chamber of the appellate court by involving judges from the civil chamber of the same appellate court for consideration of criminal proceedings.

Secondly, in accordance with Part 1 of Art. 52 of the Law 'On the Judiciary and the Status of Judges' a judge is a citizen of Ukraine who, in accordance with the Constitution of Ukraine and this Law, is appointed a judge, *holds a full-time judicial position in one of the courts of Ukraine* (our highlight - O.K., M.S.) and administers justice on a professional basis. Judges of the Appellate and Supreme Courts do not hold an abstract judicial position (see the Kherson Court of Appeals staff list),[111] but hold a position in the Civil or Criminal Judicial Chamber of the Court of Appeal or in the relevant Court of Cassation within the Supreme Court. In the analysed case, during the judicial reform of 2016-2019 and reorganisation of appellate courts, judges B. and P. were transferred from the Court of Appeal of the Kherson region to the Kherson Court of Appeal with confirmation of their ability to administer justice in civil cases. The power of the meeting of judges 'to determine the specialization of judges to consider specific categories of cases' (Part 2 of Art. 18 and para. 2 of Part 5 of Art. 128 of the Law 'On Judiciary and Status of Judges') in appellate and cassation courts can be implemented as a specific priority (narrower) profile of a judge within the chamber of the appellate court or within the court of cassation. For example, it could be simulated that specialisations (permanent boards) for reviewing official, violent crimes or appellate review of investigative judges' decisions could be established within the Criminal Court in appellate courts, which should be taken into account when determining the composition of the ASDC (Automated System of Document Control). However, due to the shortage of staff in courts of general jurisdiction, specialisation of judges on this principle, unfortunately, is not practiced.

'Specialisation of courts' and 'specialisation of judges' are not identical concepts. Part 1 of Art. 18 of the Law 'On the Judiciary and the Status of Judges' foresees ***five specialisations of courts***: 'Courts shall specialise in ***civil, criminal***, commercial, and administrative cases, as well as cases of administrative offences'. Consequently, the specialisation of courts relates to a type of proceedings – civil, criminal, commercial, and administrative, as well as for cases of administrative offences. Part 2 of Art. 18 stipulates that 'in cases prescribed by law, as well as by the decision of the conference of judges of the respective court, ***a system of judge specialisation in hearing specific categories of cases may be introduced***'. Thus, the specialisation of judges is a category narrower than the specialisation of courts and may take place within the specialisation of courts as a type of proceeding.

110 About attraction of judges of the Kherson appellate court Bugryk VV, Polikarpova OM to disciplinary responsibility and refusal to bring to disciplinary responsibility the judge of the Kherson Court of Appeal Kalinichenko IS Decision No 1828/2дп/15-20 of the Second Disciplinary Chamber of the High Council of Justice from 15 July 2020 <https://hcj.gov.ua/doc/doc/3415?fbclid=IwAR3rRjLsk1wYHg5-yQbA-l8A1sQGZjkPkDH4-9-P_y4EEAlxlR_bG8n94n0> accessed 18 November 2021.

111 Judges of the Kherson Court of Appeal <https://ksa.court.gov.ua/sud4819/info_sud/judges/> accessed 18 November 2021.

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The specialisation of judges was one of the new ideas of judicial reform in 2016[112] and was meant to promote the efficiency and optimisation of justice, reduce judicial errors, and ensure the unity of judicial practice on similar issues. The specialisation of judges of a narrower profile by the decision of the meeting of judges may remain constant for a certain period or change every certain period (two to three years). This procedure for determining and changing the specialisation of judges is a guarantee of predictability for judges of the main level of work in the near future and guides them to choose topics for training aimed at increasing the competence of judges within their narrower specialisations. Based on the teleological interpretation of para. 2 of Part 5 of Art. 128 of the Law 'On the Judiciary and the Status of Judges', the purpose of this rule is not the possibility of creating one-time multi-specialised boards to consider specific cases. Thus, the decision of the meeting of the Kherson Court of Appeal on ***one-time*** involvement in the appellate review of criminal proceedings of judges from the Civil Chamber is beyond the powers of the meeting of judges.

From the point of view of the judge's personality, his/her internal independence, capability to deal with all aspects of the prosecution, correct cognition of the facts, their assessment, criminal law qualification, and sufficient level of professional knowledge is important and necessary, i.e., a proper and sufficient competence as a subjective quality. *A sufficient competence of the judge is an important guarantee for their internal independence in their decision-making*. After all, the level of knowledge and professional training of a judge gives them confidence in their own abilities, makes them free to assess the evidence and facts of the case, and does not encourage them to focus on the position, statements, and actions of the presiding criminalist. 'Side' judges of the panel cannot be considered secondary, for *pro forma* or sham visibility of complying with the formal requirement of collegial review by three judges, as a person has the right to appeal their case by a competent collegial court, in which each judge has an equal vote. The status of a judge and the position of a judge are not a 'license' to administer justice in any and all types of proceedings, as persons seeking judicial protection have an expectation from the court that it will be professional in its case, delve into all important details and carefully justify the decision. Guarantees of the 'right to a court established by law' and to a 'fair trial' for its proper jurisdiction must be real and effective, not a formal farce. The case analysed here did not take into account the criterion of judges' specialisation in the division of the criminal case, as it is obvious to a moderate outside observer that civil jurisdiction (civil chamber) judges do not have enough competence to consider criminal cases (just as a gastroenterologist does not have the competence of a dentist).

Third, the approach taken by the Kherson Court of Appeals should be analysed in light of its compliance with the ECHR 'court established by law 'requirement, in particular, from the angle of such a criterion, taken by the ECtHR as the basis for the recognition of certain body as a 'court' within the meaning of Art. 6 of the Convention, as the ***mandatory legal regulation of the activities and functioning of the 'court'***. The ECtHR repeatedly emphasised in its decisions that the phrase 'established by law' applies not only to the legal basis of the very existence of a 'court', but also to the observance by such a court of certain rules (norms) governing its activities and determining the composition of the court in each case (*Bulut v. Austria*;[113] *Buscarini v. San Marino*;[114] *Posokhov v. Russia*;[115] *Fatullayev*

112 See Explanatory note dated 30 May 2016 to the Draft Law On the Judiciary and the Status of Judges ' <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=4734&skl=9> accessed 18 November 2021.

113 *Bulut v Austria,* App no 17358/90, Judgment of 22 February 1996 <https://hudoc.echr.coe.int/eng?i=001-57971> accessed 18 November 2021.

114 *Buscarini v San Marino,* App no 24645/94, Grand Chamber, Judgment of 18 February 1999 <https://hudoc.echr.coe.int/eng?i=001-58915> accessed 18 November 2021.

115 *Posokhov v Russia,* App no 63486/00, Judgment of 4 March 2003 , para 39 <https://www.legislationline.org/documents/id/17185> accessed 18 November 2021.

v. Azerbaijan;[116] *Kontalexis v. Greece*[117]). 'Introduction of the expression "established by law" in Art. 6 of the ECHR is to ensure that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from parliament' (*Richert v. Poland,*[118] *Coeme and others v. Belgium*[119]). The 'established by law' principle in Article 6 § 1 is intended to prevent the organisation of the judicial system from being left to the discretion of the executive and ensure that this matter is governed by an Act of Parliament (*Savino and others v. Italy*).[120] In countries with codified law, the organisation of the judicial system cannot be left to the discretion of the judicial authorities either, which does not, however, excludes granting them a certain power of interpretation of the national legislation on the matter (ibid., *Gorgiladze v. Georgia*).[121] The ECtHR expresses the same opinion in both the criminal and civil aspects. 'Nor, in countries where the law is codified, can organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation' (*Savino and others v. Italy*).[122] Moreover, the delegation of powers in matters relating to the organisation of the judiciary is acceptable insofar as this possibility falls within the framework of the domestic law of the state in question, including the relevant provisions of the Constitution (ibid.).[123] Consequently, the ECtHR's thesis that 'the organization of the functioning of the courts should not be left to the discretion of the executive branch and should be regulated by law passed by parliament' cannot be interpreted restrictively only in relation to the executive branch, but also as a takeover by judicial self-government of functions not assigned to it by law.

Therefore, *in terms of legislative regulation of the court functioning*, again, in deciding whether the statutory procedure for appointing a judge for the appellate review of a criminal case has been violated, it is necessary to be guided not only by the provisions of Part 3 of Art. 35 of the CrPC of Ukraine, but also by the provisions of Art. 34 of the CrPC and Part 5 of Art. 15 of the Law 'On the Judiciary and the Status of Judges'.

Let us sum up the results of the analysis of this case: 1) Failure to remove judges who self-challenged in the case would result in non-compliance with the institutional and jurisdictional component of the right to a lawful court, i.e., violation of the right to a court established by law (Part 6 of Art. 6 of the ECHR). 2) The statement of self-challenge by judges of civil specialisation in criminal proceedings was correct, as the mechanism of challenge in the described conditions remained the only way to correct the erroneous decision of the meeting of judges of the Kherson Court of Appeal. 3) Of course, it would be more expected and correct if judges raised and discussed the issue of lack of competence of civilian judges to consider a criminal case during a meeting of judges. It can be assumed that at the time of the meeting of judges that they, having 26 and 29 years of judicial experience, had good faith that extensive experience would help them to administer justice professionally and competently in criminal proceedings as well. However, such a calculation turned out to

116 *Fatullayev v Azerbaijan,* App no 40984/07, Judgment of 22 April 2010 , para 144 <https://hudoc.echr.coe.int/eng?i=001-179167> accessed 18 November 2021.

117 *Kontalexis v Greece,* App no 59000/08, Judgment of 31 May 2011 , para 42 <https://hudoc.echr.coe.int/eng?i=001-104951> accessed 18 November 2021.

118 *Richert v Poland,* App no 54809/07, Fourth Section, Judgment of 25 October 2011, para 42 <https://hudoc.echr.coe.int/eng?i=001-107165> accessed 18 November 2021.

119 Coëme and others v Belgium (n 104) para 98 .

120 *Savino and others v Italy,* App no 17214/05, Judgment 28 April 2009 [Section II], para 94 <https://hudoc.echr.coe.int/eng?i=002-1559> accessed 18 November 2021.

121 *Gorgiladze v Georgia,* App no 4313/04, Judgment 20 October 2009, para 69 <https://hudoc.echr.coe.int/eng?i=001-95161> accessed 18 November 2021.

122 *Savino and Others v Italy* (n 127) para 94.

123 Ibid.

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be reckless and was not confirmed at the stage of consideration by the panel of the first motions of the defence, which prompted the civil judges to self-challenge immediately. 4) The meeting of judges was guided, *prima facie*, by 'good intentions' to ensure the appellate review of criminal proceedings in the Kherson Court of Appeal in order to save costs of obtaining participants in the neighbouring nearest appellate court and the best possible access to court. But, as the saying goes, the road to hell is paved with good intentions. Access to court should not only be formal and optimised as the fastest access to any court and access to the proper composition of the court established by law. 5) As can be seen from the motivational part of the decision of the SCJ disciplinary board, SCJ members were guided by a 'narrow' understanding of the grounds for challenge – only as signs of partiality. According to the essence of the case, the latter is absent, as the judges did not show favour or prejudice to the parties, but they did not meet the requirement of 'lawful composition of the court' for the competence component. 6) Scholars and authors of textbooks and manuals should be as moderate as possible in formulating theoretical definitions, as they can guide law enforcement practice to make erroneous or controversial decisions. 6) The case considered here confirms the relevance of 'a broad understanding of the grounds for challenge' in the doctrine of criminal procedure.

5 CONCLUSIONS

For the effective and correct implementation of the institution of challenge of a judge, the necessary condition is the achievement by professional participants in criminal proceedings of three components: a) understanding of the essence of each of the grounds for challenge at the appropriate level; b) the ability to justify the existence of grounds for challenge and support them with evidence; c) thorough and convincing motivation of court decisions as a result of consideration of objections so that each party perceives it as motivated and fair.

The right to a fair trial (Art. 6 of the ECHR) includes, *inter alia*, three elements provided by the challenge mechanism: a) an *impartial court*, b) an *independent court*, and c) a *court established by law*. The tool of challenge for these three components is a universal means of preventing violations of Art. 6 of the ECHR, and public authorities and officials must act ahead of time so that their state becomes a defendant in the ECtHR (Art. 1 of the ECHR). In the Ukrainian system of grounds for challenge, violations of the requirement of *independence of the court* and the *court established by law* belong to the classification group of *unconditional* grounds for challenge and are covered by the concept of 'legal composition of the court'. Therefore, the grounds for disqualification of a judge (investigating judge, court) are not only circumstances that cast doubt on his/her impartiality and are localised in para. 6 of Chapter 3 of the CrPC of Ukraine, but also the grounds that indicate that the court does not meet the requirements of the 'lawful composition of the court' (Part 2 of Art. 412 of the CrPC), i.e., a 'court established by law' (Part 1 of Art. 6 of the ECHR), localised in various structural parts of the CrPC and the Law 'On the Judiciary and the Status of Judges'. The grounds for challenge (self-challenge) of a judge, investigating judge, or court are the factual circumstances provided by law, which indicate or may indicate their bias or non-compliance with the requirements imposed on them by law.

The current problem in the judicial practice of Ukraine is the understaffing of appellate courts. In some courts, the vacancy rate is up to 80%. As a result, Ukraine suffers, first of all, from the jurisdiction of the 'court established by law' at the stage of appellate proceedings in criminal cases, which courts try to resolve on their own, preferring the formal right to 'access to court' to the detriment of law to the consideration by a qualified

court, established by the provisions of the CrPC and the Law 'On the Judiciary and the Status of Judges', taking into account the criminal specialisation of judges. Secondly, the provision of Ukraine with the requirement of an impartial court at the stage of appellate review of court decisions is endangered by the new wording of Part 1 of Art. 76 of the CrPC, which entered into force in January 2021, which is not fully consistent with the principle of access to justice by an impartial court (Art. 21 of the CrPC), creates a conflict with the provisions of Part 2 of Art. 422-1 of Part 3 of Art. 407, part 2 of Art. 177, item 1 part 1 of Art. 178, item 3 part 1 of Art. 184, item 1 part 1 of Art. 194, item 1, 4 part 2 of Art. 196, part 1 of Art. 422 of the CrPC of Ukraine, does not meet the requirement of legal certainty, and may be the basis for complaints to the ECtHR.

The range of situations that the ECtHR considers *objective criteria of impartiality* is much wider than the *'unconditional'* grounds for challenge under the CrPC of Ukraine and also includes cases of 'personal interest of a judge or their family members', prejudiced behaviour of judges manifested from the outside (objectively justified), and circumstances that a prudent observer would raise concerns about regarding the bias of the court.

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Research Article

JUDICIAL TRANSPARENCY: TOWARDS SUSTAINABLE DEVELOPMENT IN POST-SOVIET CIVIL SOCIETY[1]

Oksana Khotynska-Nor[2]

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ABSTRACT

Background: *The processes of transition to democracy that post-Soviet countries underwent in the early 1990s predetermined different directions for their further development. The author presents and proves the hypothesis that in the context of post-Soviet civil society, judicial transparency arose as a response to a social demand at a certain historical moment of crisis of public authority. The idea of transparency in post-Soviet countries appeared only at a certain level of development of political institutions and public law, pointing out the democratic*

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2 Professor, Dr. Sc (Law), Head of the Department, Law School, Taras Shevchenko National University of Kyiv, Ukraine o.khotynskanor@knu.ua https://orcid.org/0000-0002-4480-6677 Corresponding author, solely responsible for the manuscript preparing. **Competing interests:** Although the author serves at the same institution as the Editor-in-Chief of AJEE, which may cause a potential conflict or the perception of bias, the final decisions for the publication of this article, including the choice of peer reviewers, were handled by the editor and the editorial board members, who are not affiliated with the same institution. Disclaimer: The author declares that her opinion and views expressed in this manuscript are free of any impact of any organizations, including Supreme Court, when she is serving as a Member of the Consultative Board.
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transition of power. At the same time, its emergence established information asymmetry and the poor quality of state institutions of power.

Methods: *The need to ensure the transparency of judicial activity, in addition to the natural process of the democratic transition of power, is also driven in post-Soviet countries by two important factors. The first is that in the modern world, the judiciary is increasingly becoming involved in the process of law-making, which requires the transformation of existing ideas about the system of checks and balances. The second is related to a global tendency in the fight against corruption, which has been a key problem for the countries of this region for many years. Although it has become the de facto rule for developed democracies, transparency affects the development of the legal culture of populations in transitional democracies differently. It performs various functions, including educational, preventive, stimulating, communicative, protective, and others.*

Results and Conclusions: *The article pays special attention to the unique forms of communication between courts and the public that have arisen in post-Soviet countries with an unstable political situation. In studying them, the author highlights the transformation of transparency from a factor of the development of civil society into one of its results.*

Keywords: *civil society, legal culture, transparency, judiciary, post-Soviet countries, sustainable development, sustainable justice*

1 INTRODUCTION

In recent years, the reinterpretation of the role of a person in relations with the state has become the impetus for the emergence of a number of different concepts of civil society,[3] determining the leading position of this notion in sociology and political science. Numbering more than a dozen, these concepts nonetheless provide a flexible structure, with the help of which it is possible to study the 'geometry of human relations'[4] developing into relations with the state.

However, the formation of civil society, especially in the context of post-totalitarian countries, is impossible without an independent and effective judiciary acting as a legal instrument for the protection of human rights. Civil society and the judiciary are strongly interrelated as causal, mandatory components of the rule of law. This interrelation is especially inherent in post-Soviet countries, where all institutions of power, including the judiciary, have only relatively recently begun to develop in the direction of transparency, becoming accessible and comprehensible to people. It is important to understand that in post-Soviet countries, both the development of the judiciary as a precondition for a democratic state and the development of the processes of civil self-organisation of the society have the same source – changes in the social behaviour of people, which involve overcoming the stereotypes of mass legal consciousness (including the professional one) that interfere or distort people's social activity.[5] However, the strength of the traditions of the 'Soviet' court and the slowly-changing consciousness of the 'Soviet' people exert their influence, predetermining the features of the development of both civil society and the judiciary in this region.

3 H Veltmeyer, 'Civil Society and Local Development' (2008) 9(2) Interações (Campo Grande).

4 M Edwards, 'Introduction: Civil Society and the Geometry of Human Relations', in *The Oxford Handbook of Civil Society* <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780195398571.001.0001/oxfordhb-9780195398571-e-1> accessed 4 February 2021.

5 IL Petrukhina (ed), *Judiciary* (LLC 'TK Velbi' 2003).

It should be noted that studies on transparency in stable democracies and in post-Soviet space differ. Thus, in Western scientific works, one rarely finds a clear definition of judicial transparency (justice). As a rule, it means the ability to observe the trial and monitor court decisions.[6] Transparency is seen as a necessary condition for independence, accountability, legitimacy of the judiciary, and development of democracy.[7] At the same time, modern studies of this concept are already drawing attention to the issues of using artificial intelligence in the judicial process.[8]

For the studies on transparency in post-Soviet countries, as a cultural heritage of Soviet science, the desire for clarity of definitions traditionally remains strong. Therefore, it is associated with the principle of publicity (openness) of judicial proceedings, a concept historically formed in the Soviet space. It is specified as an obligatory condition (principle) of the judicial process in most of the Constitutions of post-Soviet countries.[9] In addition, the development of views on the role of the judiciary in society has led to the use of such words as publicity, accessibility, and transparency.[10] This was significantly influenced by international regulations, including the Universal Declaration of Human Rights (Art. 10),[11] the International Covenant on Civil and Political Rights (Art. 14),[12] and the Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 6),[13] as well as others where, in various interpretations, the right to a public hearing by an independent and impartial tribunal must be guaranteed.

The first direct mention of the term 'transparency' appeared in post-Soviet space only at the start of the 2000s in the context of the development of various configurations of communication between public authorities and civil society. The term, which was alien to the languages of post-Soviet countries, began to be widely used in political discourse and as a subject of scientific research. This was facilitated by globalisation, the emergence of access to foreign sources of information, the development of information technology, and the intensification of international cooperation. The involvement of various international organisations (for example, USAD and ABBA), which acted as donors of judicial reforms in post-Soviet countries, made it possible to focus on the world experience in constructing communication between government and society.

6 TS Ellis III, 'Sealing, Judicial Transparency and Judicial Independence' (2008) 53 *Vill. L. Rev.* 939; B Ahl, D Sprick, 'Towards judicial transparency in China: The new public access database for court decisions' (2018) 32(1) *China Information* 3-22; W Voermans, 'Judicial transparency furthering public accountability for new judiciaries' (2007) 3(1) *Utrecht Law Review* 148-159; TR Harrison, 'Cameras in the United States Supreme Court: Judicial Transparency & the Obligation Thereof' (2019) <http://hdl.handle.net/1969.1/175466> accessed 4 February 2022.

7 M Lasser, *On Judicial Transparency, Control, and Accountability n Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press 2009) <https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199575169.001.0001/acprof-9780199575169-chapter-10> accessed 4 February 2021; K Hoch, 'Judicial transparency: communication, democracy and the United States federal judiciary' (2009) <https://escholarship.org/uc/item/44g491tk#article_abstract> accessed 4 February 2022; S Grimmelikhuijsen, 'The effects of judicial transparency on public trust: Evidence from a field experiment' (2015) 93 *Public Administration* 10.1111/padm.12149.

8 V Chiao, 'Fairness, accountability and transparency: Notes on algorithmic decision-making in criminal justice' (2019) 15 *International Journal of Law in Context* 126-139.

9 For example, such rules are contained in the Constitutions of Azerbaijan, Belarus, Georgia, Lithuania, Moldova, Tajikistan, Turkmenistan, Uzbekistan, and Ukraine.

10 See more about openness of justice in I Izarova, 'Sustainable Civil Justice Through Open Enforcement – The Ukrainian Experience Studying' (2020) 9(5) *Academic Journal of Interdisciplinary Research* 206-216.

11 The Universal Declaration of Human Rights, 10 December 1948 <https://www.un.org/en/universal-declaration-human-rights/> accessed 4 February 2022.

12 International Covenant on Civil and Political Rights, 16 December 1966 <http://www.un.org.ua/images/International_Covenant_on_Civil_and_Political_Rights_CCPR_eng1.pdf> accessed 4 February 2022.

13 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 4 February 2022.

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In any case, we must state that in post-Soviet space, judicial transparency was perceived as a tool that provides society with information about the functioning of the judiciary in a variety of its manifestations. Today, it seems quite logical in the context of the development of an information society and the extraordinary value of information.

But the main reason for borrowing this concept was the emerging need of the population of post-Soviet countries for information about the judiciary, judicial activity, and methods of judicial protection of their rights. The worsening crisis of public trust in the government, as a whole, forced the government to take measures targeted at interaction with society and the stabilisation of relations. Power that is trusted is more effective because it takes less effort to prove the expediency of its existence to society. The simultaneous activation of the civic position of society members, who seeking of taking part in state administration, required the relevant information. That is why we consider judicial transparency to be a form of communication with society through a mutual exchange of information. In post-Soviet countries, it arose at a certain historical moment of crisis for public authority. In contributing to the development of civil society, it has become its product.

It is the purpose of this study to prove the proposed thesis. To achieve this, we will first briefly outline the distinctive features of post-Soviet civil society and identify the factors that predetermined the emergence of the concept of judicial transparency in it. Next, we will demonstrate the impact of transparency on the development of post-Soviet civil society and give examples of non-standard solutions for the development of communication between the judiciary and post-Soviet civil society.

2 SOCIETY AND JUDICIARY IN POST-SOVIET COUNTRIES: FUNCTIONING FEATURES

As a society that began its formation in the Soviet Union, the society of post-Soviet countries in the early 1990s was distinguished by a high level of indifference to its legal area of life. This happened for several reasons:

- The totalitarian regime and the underlying ideology, which dominated in the USSR for a long time, formed the stereotype of a 'super-powerful state', in which there was no place for the manifestation of an individual.
- The destructurisation of society, its atomisation, was accompanied by the emergence of the mechanisms that ensured the functioning of the economic system, deprived of natural incentives, as well as the exercise of governmental power outside and in addition to legally established powers and procedures. Shadow economics and shadow politics have become such mechanisms. Since the latter determined everyday life to a greater extent than written laws, there was basically no ground for cultivating respect for the law as a civilised form of the idea of justice and an instrument of protection against arbitrariness.

The socio-political changes that took place in the countries of the former USSR with the attainment of independence led to the transformation of the judicial system into an independent judiciary and the extension of the jurisdiction of courts to all legal relations. Simultaneously with the development of a private form of ownership and the restriction of legislative and executive powers at the level of constitutions, these factors significantly influenced the change in the public consciousness. The proof of this was the rapid pace of the development of human rights and other public organisations and a sharp increase in the prestige of legal education, and the need for lawyers. Along with economic reforms in post-Soviet countries in the early 1990s, large-scale judicial reforms began, the purpose of

which was to ensure the independence of the judiciary. The need for its guarantees turned out to be an overly complex task of the transition to democracy.[14]

Yet, the stereotypes of Soviet thinking remained very stable for a long time. A sociological survey conducted in Ukraine in 2000 showed that most of the citizens of this country did not even make attempts to protect their civil rights and human dignity. When asked what they did if their rights were violated, almost 47% of the respondents said they did nothing, while 17% answered that in this case they 'used their ties', and only 15% of the respondents applied to the court for the protection of their rights.[15] Thus, the judicial protection of rights was replaced in society by informal ties with officials who made the necessary decisions, including illegal ones, laying the foundation for the rapid development of corruption for many years to come.

The unpopularity of the judiciary was associated with a high level of distrust in its effectiveness and in the fairness of the decisions made, which, in principle, is a characteristic feature of transit societies in general and transit justice in particular.[16] However, a no less compelling reason for this is the 'closed nature' of the judiciary for society, which was traditional for the Soviet period. The information vacuum that formed around judicial activity during the long period of the Soviet regime created a strong belief in the inaccessibility of justice, aggravating the corporate nature of the judicial system and its remoteness from people.

This naturally put on the agenda the introduction and development of technologies that may reduce this distance and improve communication between courts and society.

3 JUDICIAL TRANSPARENCY AS RESPONSE TO SOCIAL DEMAND

The idea of transparency in post-Soviet countries emerged only at a certain level of the development of political institutions and public law, pointing to the democratic transition of power. At the same time, its emergence fixed a certain lack of institutional quality, information asymmetry, and poor quality of state institutions of power.[17] This exacerbated the risks of destabilising social development and predetermined the need for open and accessible information about the activity of government bodies. In such a situation, transparency emerged as a slogan, formulating the social request as briefly as possible.[18]

This has become particularly evident in relation to the judiciary, since historically in this region, it was not customary to comment on court decisions, and public speeches of judges were recognised as inappropriate. Access to judicial information for citizens was very restricted, and the media did not have the necessary skills to cover judicial issues. At the same time, unlike in developed democracies, where transparency was seen as a

14 A Mihr, 'Transitional Justice and the Quality of Democracy', (2013) 7(2) *International Journal of Conflict and Violence* 298-313.

15 'Development of civil society in independent Ukraine' <http://political-studies.com/?page_id=186> accessed 4 February 2022.

16 O Khotynska-Nor, L Moskvych, A Mamychev, Y Vasilyev, S Kuzina, 'Role of Confidence and Supply Chain Strategy during Legitimization of Justice in Countries of Transitional Period' (2019) 8(6) *International Journal of Supply Chain Management* 533-543.

17 G Akerlof, 'The Market for Lemons: Quality Uncertainty and the Market Mechanism' (1970) 84 *Quarterly Journal of Economics* 485-500; M Spence, *Market Signaling* (Harvard University Press 1974); S Grossman, J Stiglitz, 'On the Impossibility of Informationally Efficient Markets' (1980) 70 *American Economic* Review 393-408.

18 O Afanasyeva, '"Open State" in the conceptual system of social science' (2014) 1 *Issues of state and municipal management* 171-187.

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necessary condition for the independence of the court,[19] in post-Soviet countries, it was teetering on the brink of a threat to this independence due to a lack of the guarantees of judges' immunity envisaged by the legislation. Nevertheless, in post-Soviet society, owing to a change in political rhetoric, the famous phrase 'Justice must not only be done, it must be seen to be done'[20] began to be cultivated.

The need to ensure the transparency of judicial activity in post-Soviet countries, in addition to the natural process of democratic transition of power, is also dictated by two meaningful factors. The first is that in the modern world, the judiciary is increasingly being involved in the process of law-making, which requires the transformation of existing ideas about the system of checks and balances. Thus, a 'soft accountability' model is being formed, which allows the court to take into account the various interests and needs of a changing social environment, as well as to be sensitive to the values and demands of society.[21] The second is associated with a global tendency in the fight against corruption. Corruption in the judiciary of post-Soviet countries has perhaps been the most important problem for many years. It covers different levels of courts and pursues different goals: ranging from the banal desire to speed up or, alternately, drag out the trial to the delivery of an illegal decision.

Many works[22] are devoted to the problems of corruption in the judiciary. In recent studies of this systemic phenomenon, the following types of corruption have been distinguished: (1) bribery; (2) unreasonable political influence on the outcome or political interference in the litigation; (3) extortion; (4) misuse of public funds and resources.[23]

Judicial transparency, based on the right of the public to information about the judicial activity, their results, judicial officials, their income levels, etc., is one of the generally recognised methods of combating corruption in the courts. Art, 10 of the UN Convention against corruption emphasises the duty of the states to take such measures 'as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate'.[24] At the same time, in para. 13 of Opinion No. 21 (2018) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe 'Preventing corruption among judges' clearly states that

> A lack of transparency caused by preventing access to information relating to the judicial system facilitates corrupt behaviour, and is therefore often an important trigger for corruption. There is clear evidence that a judicial system with a (traditionally) high degree of transparency and integrity presents the best safeguard against corruption.[25]

19 T Ellis III (n 6).

20 *R v Sussex Justices*, Ex parte McCarthy ([1924] 1 KB 256, [1923] All ER 233) <https://issuu.com/js-ror/docs/1924_rvsussexjustices> accessed 4 February 2022.

21 W Voermans (n 6).

22 E Buscaglia, 'Judicial Corruption in Developing Countries: Its Causes and Economic Consequences' (1999) UC Berkeley: Berkeley Program in Law and Economics <https://escholarship.org/uc/item/48r8474j> accessed 4 February 2022; S Gloppen, 'Courts, Corruption and Judicial Independence', in T Soreide, A Williams (eds), *Corruption, Grabbing and Development: Real World Challenges* (Edward Elgar Publishing 2014); G Brooks, 'Judicial Corruption: Magistrates, Judges and Prosecutors', in *Criminal Justice and Corruption* (Palgrave Macmillan 2019).

23 International Bar Association, 'The Basel Institute on Governance. Judicial Integrity Initiative: Judicial Systems and Corruption' (2016) <https://www.baselgovernance.org/sites/default/files/2019-01/the_judicil_integrity_initiative_may_2016_full.pdf> accessed 4 February 2022.

24 United Nations Convention against Corruption (2004) <https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf> accessed 4 February 2022.

25 Opinion No 21 (2018) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe 'Preventing corruption among judges' <https://www.coe.int/en/web/ccje/ccje-opinions-and-magna-carta> accessed 4 February 2022.

Thus, the development of judicial transparency in post-Soviet countries was not only a response to a social demand that arose at a certain stage of their historical development but also an example of one of the most consistent global trends in the fight against corruption in the judiciary.

4 IMPACT OF JUDICIAL TRANSPARENCY ON CIVIL SOCIETY FORMATION

The recognition of transparency as one of the main conditions for judicial activity in the current conditions of the formation of civil society predetermines its broad understanding as a tool that provides society with information about the functioning of the judiciary and its various institutions and establishments. As a kind of toolkit, judicial transparency, in this case, has an informative function. This is especially critical for the study of the influence on the formation of civic consciousness in post-Soviet countries. However, this is not the only function of transparency that is important. There are other functions, which, in our opinion, should be specified:

- Educational (owning to information about the judicial activity, citizens become aware of their rights and obligations, as well as methods and mechanisms for rights protection).
- Preventive (provides for identification of the facts of human rights violations in the judicial system, contributes to the elimination and prevention of crisis phenomena in it, such as corruption, pressure on judges, low qualification of personnel).
- Stimulating (encourages changes in the public consciousness, development of civil activity, and the legal culture of society).
- Communicative (provides an open dialogue between the judiciary and society).
- Protective (protects the judiciary from unreasonable criticism and political pressure – the more society is aware of the work and effectiveness of the judiciary, the less the political authorities have the opportunity to implement groundless reforms of the judiciary for their own benefit).
- Creation and provision of opportunities for society to influence the development of the judiciary and its reforming process.
- Ensuring civil control over the activity of the judiciary and its accountability to society.

Thus, the basis of judicial transparency should be the information component. Therefore, transparency characterises the influence of information on the mechanisms of social organisation and state of awareness (full, sufficient, and reliable knowledge) about various aspects of judicial activity, on the one hand, and the right of citizens to access information, on the other.

Considering judicial transparency as a factor in the formation of civic consciousness in post-Soviet countries, mass information, in our opinion, is the most significant and meaningful in terms of influencing people in this region, specifically the information:

- About the organisation of the judicial system in the country. These are the principles of the organisation of the court system, the territorial and subject jurisdiction of courts, the differentiation of judicial specialisation profiles, and the hierarchy of judicial institutions and their powers.
- About judicial procedures. This group includes information about the procedure for applying to a court, the procedure for filing appeals against court decisions,

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court composition and procedure for its formation, litigation practice in cases that are the most common in a certain period of development of society, and court decisions.

- About judges. This type of information includes information about access to the judicial profession, information about candidates for judicial positions and careers of judges, about the rights and obligations of a judge, and information on holding them accountable. This should also include the availability of information about the level of income and property of judges and members of their families.
- About high-profile lawsuits, their progress, and outcomes.
- About judicial reform. Such information should convey details about the goals of reforming the judiciary, the necessary planned measures and timeframes, and the expected outcomes.

Transparency may be viewed as a principle of interaction between the judiciary and civil society, consisting of the following components:

- The mode of operation of the judiciary, providing: the opportunity for any interested person to obtain information about judicial activity by any means provided for by the law; the opportunity to observe the development of the judicial system, creating conditions for civil society actors to effectively monitor and influence this process.
- The provision of the information by authorities, including directly by the representatives of the judiciary, on their own initiative or at the request of the society members about various aspects of judicial activity. This process may be both targeted and addressed to a mass audience.
- The ability of society to evaluate and use information about judicial activity at its own discretion, which involves analysis and critical assessment of the information about the functioning of the judiciary. As a result of these processes, the initial information is being transformed into the derivative one; that is, public opinion is being formed.

Thus, judicial transparency ensures the formation of ideas and views on judicial activity in post-Soviet society, which contributes to fostering its legal culture. Accordingly, the development of judicial transparency affects the evolution of the civil consciousness of the society as a condition for civil society formation.

5 SPECIFICITY OF JUDICIAL TRANSPARENCY IN POST-SOVIET COUNTRIES

The influence of judicial transparency on the formation of civil society in post-Soviet countries led to the emergence of various institutions both in the environment of judicial activity and in society itself. In developing national legislation and implementing international regulations, the authorities began to gradually take measures targeted at openness, information accessibility, and the comprehensibility of activity of courts for the citizens. The introduction of press secretaries in courts, the creation of open registries of court cases and bases of court decisions, the functioning of official websites of courts or web portals of the judiciary, the gradual IT penetration into the judicial process, the interaction of judges with the media, and many other things have become typical for all post-Soviet countries without exception.

On the part of society, public organisations monitoring the most important areas of judicial activity have emerged: the transparency of the judiciary formation, the fairness

of trials, and holding judges accountable. In some countries, such as Ukraine, their role has become so significant that it has contributed to the emergence of hybrid forms of cooperation between the judiciary and society at the state level. In 2016, a law was passed in Ukraine[26] that served as the basis for the creation of the Public Integrity Council at the body responsible for the selection of candidates for judges (the High Qualifications Commission of Judges of Ukraine). Its active participation in the evaluation of judges and judicial candidates has become a unique experience of direct public influence on the procedures for the formation of personnel in the judiciary.[27] However, this is not the only form that has become a hallmark of judicial transparency as a factor in the formation of civil society in post-Soviet countries. Before turning to the description of these other forms, we shall make a short digression and return to the historical insight.

The subsequent processes of the transition to democracy experienced by post-Soviet countries in the early 1990s predetermined a different direction for their further development. Part of the region (Central Asia, Azerbaijan, Belarus, and to a large extent, Russia) pursued the process of political regime concentration and a silent alliance between courts and authorities. The Baltic States initially expressed their desire to become members of the European Union and tried to get rid of the Soviet legacy as quickly as possible by resorting to lustration procedures. Some countries (Armenia, Georgia, Moldova, Ukraine, and Kyrgyzstan) have taken the path of long-term political instability,[28] reforms, and revolutions, which in one way or another were reflected in the formation of civil society and the evolution of the judiciary.

The countries that have experienced outbreaks of civic activity (revolutions) are distinguished by non-standard approaches to the development of judicial transparency. It suggests that judicial transparency, forms of its manifestation, and methods of development depend on political stability and political regime in the country. Obviously, this is because societies that have called the legitimacy of power into question, in general, try to overcome crises, including the crisis of communication, through innovative methods. These include, in addition to the example mentioned above, the institution of a judge-speaker (Ukraine, Georgia), borrowed from the practice of Western European countries, in particular Germany, Holland, and Sweden. This is a judge specially trained in communication skills and able to professionally comment on the judgements of his/her colleagues, translating it from legal language into public language. The peculiarity of this institution is that the initiator of its implementation was the judicial community itself.[29] The national legislation contains neither direct nor indirect indications about the mandatory existence of such a figure. Thus, not only the authorities or members of the public but also judges shall initiate new forms of communication with society. They are driven by the desire to avoid unfounded accusations against them, which is possible if they provide timely and relevant information about themselves and their activities. The lack (insufficiency) of this information gives rise to myths (speculation), impeding

26 Law of Ukraine 'On Judiciary and Status of Judges' of 2 June 2016 <https://zakon.rada.gov.ua/laws/show/1402-19/ed20160602> accessed 4 February 2022.

27 See more about this Law in I Izarova, 'Independent judiciary: experience of current reforms in Ukraine as regards appointment of judges', in K Gajda-Rosczynialska, D Szumilo-Kulczycka (eds) *Judicial Management Versus Independence of Judiciary* (Walters Kluwer 2018) 242-263.

28 A Mazmanyan, 'Judicialization of politics: The post-Soviet way' (2015) 13 *International Journal of Constitutional Law* 200-218 <https://doi.org/10.1093/icon/mov003> accessed 4 February 2022.

29 Judgment of the Council of Judges of Ukraine No 14 as of 12 March 2015 on Recommendations of the International Conference 'Strengthening Trust in the Judiciary by Improving Mutual Communication' <http://rsu.court.gov.ua/rsu/rishennya/qqqdwd/> accessed 4 February 2022; Basic Principles of Activities of Speaker-Judges / Supreme Court of Georgia <http://www.supremecourt.ge/eng/public-relation-department/speaker-judges/regulations/> accessed 4 February 2022.

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free and independent thinking, which may lead to such consequences as dogmatism, ideologization, and the disorientation of society.

Among the variety of manifestations of judicial transparency existing in post-Soviet space, special attention is drawn to the initiatives distinguished by self-organisation and founded without any participation of the state. They are considered to be the classical elements of civil society.[30] The project called 'Open Court' (Ukraine) is quite unique, and not only for post-Soviet countries. Its emergence became possible in 2015 due to the legally guaranteed possibility of taking a photo, video, and audio recording in the courtroom without obtaining separate permission from the court. The specificity of this project is 'live' and public monitoring of trials, which involves video filming of court sessions in civil, criminal, and other cases. Video recordings of court sessions are posted on the project website, on the Open Court YouTube channel and are also distributed by social networks to the public. According to its creators, the project is targeted at creating in society a sense of total intolerance towards corruption, injustice, and disrespect in courts; support for the professionalism of judges, prosecutors, and lawyers and their encouragement to reject colleagues discrediting their profession; the introduction of a system for applying liability measures to judges, prosecutors and lawyers due to unprofessional performance (deethicalisation, procedural violations), including on the basis of a video dossier.[31]

We are convinced that the basis of the initiative described is the desire to change the professional consciousness of the subjects of judicial activity and civic awareness of the society towards the undoubted authority of the court and reference standards of justice. The tools that have been chosen for this are informational in nature, which means they are commensurate with the requirements and capabilities of a modern information society and are able to satisfy its needs, being decisive for their unmediated effectiveness.

Video recordings of court sessions are available to the public to admonish and deter judges, lawyers, and prosecutors from taking actions that might discredit their status, to encourage them to improve their professional level, and to properly prepare for participation in the case. At the same time, the demonstration of trials allows the observer to form his/her own unbiased opinion about its participants and protects them from unfounded criticism. In addition, it contributes to the formation of ideas about the standards of the profession of a judge, lawyer, and prosecutor, developing awareness and legal culture in the population.

The examples above of non-standard solutions in the development of communication between the judiciary and society in post-Soviet countries show the tendency of transparency to transform from a factor of the development of civil society into one of its results.

6 CONCLUSIONS

Different countries use different information strategies for the development of civil society (in particular, judicial transparency), the models of which depend on the political regime and political stability existing in the country. The Post-Soviet countries with an unstable political situation are distinguished by atypical forms of communication between courts and society, associated with the need to find non-standard solutions to overcome crisis situations. This takes both the courts and society beyond the limits

30 R Cooper, 'What is Civil Society? How is the term used and what is seen to be its role and value (internationally) in 2018?' (2018) K4D Helpdesk Report, Brighton, UK: Institute of Development Studies.

31 Project 'Open Court' <http://open-court.org/about/> accessed 4 February 2022.

of informational rights and obligations provided for by the law. Acting within the framework of the law, these two subjects produce new informal models of interaction, allowing the formation of the legal culture of the population as a necessary prerequisite for the formation of civil society.

We argue that in post-Soviet countries, the concept of judicial transparency arose as a response to a social demand at a certain historical moment of crisis in public authority. It also exemplifies one of the most consistent global tendencies in the fight against corruption in the judiciary. Given the peculiarities of the development of post-Soviet society and statehood, judicial transparency has acquired special forms and manifestations in this region and become its hallmark. It has become a determining factor in the formation of this type of public consciousness, predetermining the development of civil society. At the same time, civic activism has predetermined the tendency of judicial transparency to transform from a factor of the development of civil society into one of its results.

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Research Article

AN EXAMINATION OF THE ADMINISTRATIVE COURTS OF UKRAINE IN THE CONTEXT OF UNDERSTANDING THE CONCEPT OF 'A COURT ESTABLISHED BY LAW'

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ABSTRACT

Background: *Constituent parts of the right to a fair trial, which presuppose the need for the existence of institutions in a state that are authorised to review and resolve legal conflicts and united by the concept of 'a court established by law', are identified and studied in this article. The study is based on the decisions of the European Court of Human Rights, which outlines the criteria to which any institution authorised to administer justice must correspond. The aim of the study is to verify the Ukrainian laws that determine the principles of developing and functioning administrative courts in order to enshrine in their texts the requirements arising from the content of a legal formula for a 'court established by law'.*

Methods: *In this article, the authors use the following special legal methods: conceptual-legal, comparative-legal, formal-legal, and others. For example, with the help of the formal-legal method, it was possible to analyse the current trends in the practice of national administrative courts in compliance with the proposed requirements.*

Results and Conclusions: *The article states that the operation of Ukrainian laws creates the right conditions for administrative courts to be perceived as institutions with 'full jurisdiction' in resolving public disputes of any kind. At the same time, the authors conclude that there are cases in which the courts violate the provisions of Art. 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, despite the fact that such provisions have been implemented in the national administrative, procedural law.*

1 INTRODUCTION

Each state that has become a party to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereafter, the Convention) has agreed to put forth all efforts to ensure the proper fulfilment of its obligations. Ukraine, which enacted the Ratification Act of this crucial international agreement on 17 July 1997, giving it the status of an authoritative source of national law,[4] is among these states.

Elaborating on the statement above, let us explain that in the event of a conflict between an act of domestic law and an international treaty to which Ukraine acceded, the subject of enforcement should be given priority to the rules of the latter (part 2 of Art. 19 of the Law 'On International Treaties of Ukraine').[5] This is fully in line with Art. 27 of the Vienna Convention on the Law of Treaties, which forbade a party to invoke the provisions of its domestic law as a justification for not fulfilling the treaty.[6]

In the first sentence of Art. 6 § 1 of the Convention, 'Right to a Fair Trial', it is stated:

> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall decide the dispute

4 Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, ratified by the Verkhovna Rada of Ukraine. Ref. to: Law of Ukraine 'Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the First Protocol and Protocols No 2, 4, 7 and 11 to the Convention' [1997] Official Bulletin of the Verkhovna Rada of Ukraine 40/263; Official translation of the text of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, Ref. to: (2006) Official Journal of Ukraine 32/2371.

5 Law of Ukraine 'On the international treaties of Ukraine' [2004]: Official Bulletin of the Verkhovna Rada of Ukraine 50/540.

6 *Vienna Convention on the Law of Treaties* (1969) United Nations, Treaty Series 1155/331 <https://www.refworld.org/docid/3ae6b3a10.html> accessed 1 December 2021.

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over his civil rights and obligations of a civil type or establish the validity of any criminal charge against him.

Obviously, the injunction contains information regarding the constituents that form the right to due process. Such constituents can safely be called guarantees of a fair trial since their fixing ensures the realisation of the said right. For the purposes of our study, we propose to distinguish those which presuppose the need for the existence of institutions authorised to review and resolve legal conflicts in the state and united by the notion of 'a court established by law'.

2 'FULL LEVEL OF JURISDICTION' AS A DEFINING CHARACTERISTIC OF THE BODY ADMINISTERING JUSTICE

The issue of determining the essence of the right to due process, the spectrum of guarantees that shape its content, and the implementation of their classification have repeatedly attracted the attention of scientists.[7] Some of them, based on the jurisprudence of the European Court of Human Rights (hereafter the ECtHR, the Court), sought to delineate the scope of fair trial guarantees;[8] others focused on examining the state of implementation of Art. 6 of the Convention into Ukrainian legislation, emphasising the specifics of the national context of creating the necessary conditions for the state to exercise the right to a fair trial[9] for everyone under its jurisdiction. At the same time, an extremely important element of the latter – the right of every person to try and settle his or her case by an institution that has all the characteristics of the concept of 'a court established by law' – has not received due attention. These considerations lead us to the choice of the topic of this study, a significant part of which will be devoted to the analysis of the practice of Ukrainian courts in order to uncover the state of their compliance with the requirements arising from the content of the legal formula mentioned.

For the purpose of determining the content of Art. 6 of the Convention in the wording of the category of 'a court established by law', let us turn to the case law of the ECtHR, which has exclusive jurisdiction to interpret convention rules (Art. 46 of the Convention).

First, let us examine the characteristics of an institution that is capable of administering justice and can therefore be referred to as a 'court' within the meaning of the ECtHR. The latter, by applying Art. 6 § 1 of the Convention, made it clear that a court does not necessarily need to be a classical judicial body integrated into the national judicial system.[10] It may be another organ formed outside this system but be able, acting in accordance with its competence, to resolve disputable issues within the limits of the due course of the

7 L Lukaides, 'Fair Trial. Commentary to Article 6, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2004) 2 Russian Justice; TA Tsuvina, The right to a trial in civil proceedings (Slovo 2015); TI Fulei, Application of the case law of the European Court of Human Rights in administrative justice (2nd edn, 2015); OZ Khotunska-Nor, 'The influence of the legal opinions of the European Court of Human Rights on the development of justice in Ukraine: material aspect' (2014) 11 N 3 Bulletin of the Bar Academy of Ukraine.

8 TB Vavrynchuk, 'Review of the case law of the European Court of Human Rights under Article 6 of the European Convention on Human Rights (Civil Procedure) in Ukraine' (2014) 1 Law and Civil Society; NB Pysarenko, 'Applicability of guarantees of the right to a fair trial in administrative proceedings: the case law of the European Court of Human Rights and Ukrainian realities' (2016) 3 (86) Bulletin of the National Academy of Law of Ukraine.

9 O Tolochko, 'The right to a fair trial (Article 6 ECHR) in the light of Ukrainian law and case law' in OL Zhukovska (ed.), European Convention on Human Rights: Basics, Application Practice, Ukrainian Context (VIPOL 2004)

10 *Gustafsson v Sweden* App no 1107043 (ECtHR, 30 July 1998) < https://hudoc.echr.coe.int/eng?i=001-58213> accessed 1 December 2021.

proceedings.[11] This body must also meet such requirements as: independence, especially from the executive power; impartiality; the duration of the judges' mandates; providing procedural guarantees for a fair trial.[12]

In Ukraine, at the constitutional level, the mandatory existence of administrative courts is identified as 'an inalienable part of the national judicial system' (Art. 125, para. 5 of the Constitution of Ukraine).[13] While paying particular attention to the courts of administrative jurisdiction in the Basic Law, the legislator emphasised the importance of the task that they implement nationwide. In particular, it is a fair, unbiased, and timely resolution of disputes in the field of public-legal relations in order to protect the rights, freedoms, and interests of individuals and the rights and interests of legal entities from violations by the authorities. Thus, in our state, bodies that specialise in resolving public law disputes represent the judiciary and are 'jurisdictions of the classical type'.[14] It is noteworthy that the rules according to which administrative courts hear cases that are within their competence are accumulated in a special procedural law – the Code of Administrative Proceedings of Ukraine (hereafter, the CAP, Code).[15]

At the same time, as a result of the analysis of the ECtHR judgments against Ukraine, it can be concluded that the Court sometimes extends the convention's meaning of the 'trial' to the subjects of the resolution of the public-law conflict that are not jurisdictions of the classical type. To illustrate this point, we refer to the ECtHR decision in the case of *Oleksandr Volkov v. Ukraine,* noting that the issue of dismissing Mr Volkov from the post of judge was considered by the High Council of Justice (hereafter, the HCJ), which resolved this conflict on the merits by holding a hearing and evaluating the evidence. The HCJ case ended with two motions for Mr Volkov's dismissal, forwarded to parliament and considered by the Parliamentary Justice Committee, which at the time was given some discretion in assessing the HCJ's findings, as it had the power to discuss and, if necessary, further review them and this could have resulted in a recommendation on whether to dismiss the judge. At the plenary session of parliament, on the basis of the submissions of the HCJ and the proposal of the Parliamentary Committee, a decision to release Mr Volkov was subsequently taken. Against this background, the ECtHR concluded that, by deciding the case and approving the HCJ decision, the Parliamentary Committee and the plenary session of the parliament jointly acted as a court. Their decision was binding and could only be reviewed by the Supreme Administrative Court of Ukraine.[16]

Describing such institutions, the ECtHR indicates that their activities may be related to the performance of various functions – administrative, disciplinary, advisory, etc. However, one of the areas should be the judicial function. The number of functions cannot by itself exclude such bodies from among the 'courts'.[17] It is important, in the Court's view, that, first, these 'non-judicial' authorities have a 'full level of jurisdiction', that is, in the process of dealing

11 *Sramek v the Austria* App no 8790/79 (ECtHR, 22 October 1984) <http://hudoc.echr.coe.int/eng?i=001-57581> accessed 1 December 2021.

12 *Demicoli v Malta* App no 13057/87 (ECtHR, 27 August 1991) <https://hudoc.echr.coe.int/eng?i=001-57682> accessed 1 December 2021.

13 Constitution of Ukraine dated 28 June 1996 No 254 k/96-BP (1996) Official Bulletin of the Verkhovna Rada of Ukraine 30/141.

14 *Campbell and Fell v the United Kingdom* App nos 7819/77; 7878/77 (ECtHR, 28 June 1984) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57456%22]}> accessed 1 December 2021.

15 The Code of Administrative Proceedings of Ukraine (as amended of 3 October 2017) <https://zakon.rada.gov.ua/laws/show/2747-15> accessed 1 December 2021.

16 *Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR, 9 January 2013) https://hudoc.echr.coe.int/eng?i=001-115871> accessed 1 December 2021.

17 *H v Belgium* App no 8950/80 (ECtHR, 30 November 1987) <https://hudoc.echr.coe.int/eng?i=001-57501) accessed 1 December 2021.

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with a case, resolve legal conflicts on merits.[18] The settlement of a dispute by a body not vested with full jurisdiction is not a violation of the Convention, but in such case, national law should provide for the possibility of reviewing the relevant decision directly by a court.[19] Second, their decisions must be binding and cannot be modified by non-judicial authorities in the future.[20]

Regarding the 'full level of jurisdiction', it should be noted once again that, according to the ECtHR, 'a court' can be considered only a body authorised to resolve legal conflicts on the merits. This means that the latter must be provided with an opportunity to review all issues of fact and law relevant to the dispute in question.[21] Thus, in determining the issues of fact, the court fully and thoroughly examines the circumstances that are relevant to the correct resolution of the case. While doing so, it shall verify that they are supported by appropriate, admissible, reliable, and sufficient evidence. In resolving the issue of law, the court provides a legal assessment of the circumstances established by it, with reference to which parties to the dispute substantiate the legitimacy of their positions and formulates a conclusion on the merits of the disputed issues.

3 'FULL LEVEL OF JURISDICTION' FOR ADMINISTRATIVE COURTS (FEATURES OF PROVIDING MEANS OF NATIONAL PROCEDURAL LAW)

Considering the topic of this study, we propose to analyse the Code of Administrative Proceedings of Ukraine and fix in it the prescriptions that allow us to answer the question of whether there are grounds to consider the administrative courts of Ukraine as institutions having 'full level of jurisdiction'.

We will begin the search for the necessary procedural rules by referring to the general provisions of administrative justice set out in the very first section of the Code. A considerable number of these provisions reflect information on principles, that is, guiding ideas of a particular type of justice – those that express its essence and specificity and are aimed at ensuring its effectiveness.

However, only one of these principles – *the formal clarification of all the circumstances of the case* – is specific to administrative proceedings only, which is stipulated by the specific nature of the relations that give rise to legal disputes falling within the jurisdiction of administrative courts. The effect of this principle is, first of all, on the court's 'behaviour'. Thus, unlike courts in other jurisdictions, the court, during an administrative trial, has an additional formal capacity to clarify the circumstances of the case and to outline the requirements for satisfaction of which it deliberates. By taking advantage of these opportunities, the administrative court finds itself more active, which can significantly affect the outcome of the case.

The official clarification of all the circumstances of the case affects the parties' *adversariality* and *dispositiveness*, giving them a specific meaning. First, let us examine how the *adversarial principle of parties* is transformed under this influence. According to part 1 of Art. 9 of the CAP, the parties are free to submit their evidence and to prove their conviction before a

18 *Benthem v the Netherlands* App no 8848/80 (ECtHR, 23 October 1985) <https://hudoc.echr.coe.int/eng?i=001-57436 accessed 1 December 2021.

19 *Gautrin and others v France* App nos 38/1997/822/1025-1028 (ECtHR, 20 May 1998) <https://hudoc.echr.coe.int/eng?i=001-58166> accessed 1 December 2021.

20 *Van de Hurk v the Netherlands* App no 16034/90 (ECtHR, 19 April 1994) <https://hudoc.echr.coe.int/eng?i=001-57878> accessed 1 December 2021.

21 *Terra Woningen BV v the Netherlands* App no 20641/92 (ECtHR, 17 September 1996) < https://hudoc.echr.coe.int/eng?i=001-58082> accessed 1 December 2021.

court. At the same time, part 4 of the same article imposes on the court the obligation to take measures prescribed by law to clarify all the circumstances of the case, including the identification and requirement of evidence on its own initiative. The Administrative Court is also empowered to require evidence before a claim is filed – at the request of a person who may acquire claimant status if there are reasons to believe that the means of proof may be lost or the collection or presentation of relevant evidence will subsequently be impossible or impeded (Arts. 80 and 114 of the Code).

The content of the *principle of dispositiveness* is explained in parts 2 and 3 of Art. 9 of the CAP, according to which: (a) the court shall consider administrative cases not otherwise than by the claim filed in accordance with the Code within the limits of the claims under the lawsuit; (b) each person who seeks redress disposes claims on his or her own discretion. However, in administrative proceedings, due to the influence of the official clarification of all the circumstances of the case on the dispositive nature of the case, the court may go beyond the claims if it is necessary for the effective protection of the rights, freedoms, interests of an individual and a citizen, other subjects in the field of public-legal relations from violations on the part of the authorities.

In addition, in order to comply with the specific requirements of the principle of disposition, the court must exercise control over the enforcement of the following rights of the parties: (a) the plaintiff's right to refuse the claim in whole or in part; (b) the defendant's right to admit the claim in whole or in part; (c) the rights of the parties to reconciliation (Arts. 47, 189, 190, 191 CAP). If discontinuance, its recognition, or the terms of reconciliation agreed by the parties contravene the law or violate anyone's rights, freedoms, and interests, the court must refuse to uphold the claim submitted for the implementation of the relevant dispositive law and continue the administrative trial.

Based on the above, it can be said that administrative courts of Ukraine have a wide range of possibilities to review all issues of fact and law relating to their public law disputes. At the same time, the question of whether there should be an exception to this general conclusion is due to the referral to the jurisdiction of the designated courts of cases of appeal against administrative acts adopted as a result of the exercise of discretionary powers by authorities, remains unanswered.

Recall that the subjects of public administration with discretionary powers, in the decision of a particular administrative situation, have the right to act at their own discretion, that is, to choose, taking into account the actual circumstances of this situation, one of the alternatives provided by the law. In this case, the administrative court is able to check the adherence of a subject of power to legal requirements only and can not interfere with its discretion (sole discretion). Otherwise, there is a risk of violating the constitutional principle of separation of powers and the courts taking over powers to resolve issues that are within the competence of another state body.

It turns out that certain factual aspects of a decision 'at its discretion' cannot be controlled by a court, and therefore the latter, being part of a normal judicial mechanism, will not look like an institution having a 'full level of jurisdiction'.[22] Considering this assumption, it should be noted that these formulations do not negate the ability of a court that controls the lawfulness of a discretionary administrative act to examine its essence as well.

22 As an aside, the ECtHR concluded in some of its decisions that institutions, integrated into national judicial systems, lacked a 'full level of jurisdiction' and were therefore not regarded by the courts within the meaning of Art. 6 § 1 of the Convention. Thus, in the judgment in *Obermeier v Austria* App no 11761/85 (ECtHR, 28 June 1990) <https://hudoc.echr.coe.int/eng?i=001-57631> the administrative court was found not to have 'full jurisdiction' since it was authorised only to determine the compliance of the administrative acts with the object and the purpose of the law.

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So, the requirements for adherence to judicial review are in the ECtHR's decision in *Sigma Radio Television Ltd. v. Cyprus*. The claimant in the case complained of a violation of his right to a fair trial in the proceedings concerning the lawfulness of the application by the Committee of Radio and Television of Cyprus of penalties for failure to comply with the provisions of the Broadcasting Law and the Broadcasting Stations Regulation.

In this decision, the ECtHR identified three requirements that must be met simultaneously. The first is that a court assessing an administrative decision 'at its discretion' should investigate as deeply as possible the so-called 'simple' facts, that is, those ones that do not require special knowledge. The second is that the court should take into account the procedural safeguards that took place when the decision was made by the subject of the administration: if during the administrative procedure the applicant used guarantees that comply with the rules of Art. 6, then this may justify a 'facilitated' form of judicial review. Finally, the third one is that the court is required to (a) hear all of the applicant's arguments and (b) review all the facts that are central to his or her (the applicant's) case.[23]

A worthwhile illustration of complying with such requirements is the court decision in the case of *Potocka and Others v. Poland,* which was issued 10 years earlier than the above-mentioned decision in the case against Cyprus. The applicants from Poland complained of non-compliance with the right to a fair trial in resolving a dispute about the legality of administrative acts adopted in respect of their inherited land plots. According to Polish proceeding law, the jurisdiction of the Supreme Administrative Court, which heard the conflict, was limited by the study of legal issues. However, this Court was authorised to cancel the decisions of the courts of lower instance in whole or in part if it was found that the procedural requirements of impartiality were not met during the proceeding, which resulted in the adoption of their decisions. The Supreme Administrative Court's argument stated that it had, in fact, examined the validity of the case. Even though the Court could have limited the investigation to the finding that the contested decisions should be upheld due to procedural and substantive deficiencies in the applicants' complaint, it considered the latter in essence, in detail, without refusing to establish the facts. The Court made the decision which was carefully reasoned, and the applicants' arguments were fully examined. Considering the above, the ECtHR stated that the scope of the review of the case by the Supreme Administrative Court was sufficient to comply with paragraph 1 of Art.6 of the Convention.[24]

Thus, studying the ECtHR case law suggests that the right to a fair trial can be exercised if the court has examined all the issues – both fact and law. Alternatively, a situation when the actual circumstances that were decisive for the resolution of the conflict may not be properly reviewed can arise. This, according to the ECtHR, is in itself a violation of Art. 6 § 1 of the Convention.[25] In other words, even if the law does not empower the court to decide the facts of the case, the latter must be considered in order to provide a sufficient amount of judicial review of the act adopted by the authority 'at its discretion'.

The Committee of Ministers of the Council of Europe, while referring to the practice of the ECtHR, also sought to outline the optimal ways and means of ensuring effective control of administrative acts. In its recommendations, it also addressed the problem of determining the limits of such control. For example, in the Recommendation on Judicial Review of Administrative Acts, the Committee of Ministers emphasised that all administrative acts are

23 *Sigma Radio Television Ltd v Cyprus* App nos 32181/04 and 35122/05 (ECtHR, 21 July 2011) <https://hudoc.echr.coe.int/eng?i=001-105766b> accessed 1 December 2021.

24 Potocka and others v Poland App no 33776/96 (ECtHR, 04 October 2001) <http://hudoc.echr.coe.int/eng?i=001-59703> accessed 1 December 2021.

25 Terra Woningen BV v the Netherlands App no 20641/92 (ECtHR, 17 September 1996) <https://hudoc.echr.coe.int/eng?i=001-58082> accessed 1 December 2021.

subject to judicial review and that the court should be able to consider all questions of law and factual circumstances relevant to the parties' case.[26]

The text of that Recommendation does not refer to the particularities of discretionary acts review. However, the explanatory comment to this Recommendation states that, with respect to administrative acts resulting from the exercise of discretion, although such powers are, in principle, not subject to judicial review, the court may ascertain whether the relevant administrative authority has exceeded the permitted limits when exercising such discretion and has made any obvious mistakes. In the view of the Committee of Ministers, a discretionary act may be abrogated by a court if, in adopting it, the administrative authority has exceeded its powers. In doing so, the court must verify the correct application of the law to the facts of the case.[27]

Paragraph 9 of the Recommendation on the exercise of discretion by the administrative authorities is as follows:

> 9. An act adopted/implemented during the exercise of discretionary powers may be reviewed for legality by a court or other independent body.
>
> Such control does not exclude the possibility of prior control by an administrative body empowered to decide both on the legality and the merits of such an act'.[28]

However, in the explanatory comment, traditionally annexed to this Recommendation, it is noted that the above wording does not negate the possibility that a court controlling the lawfulness of a discretionary administrative act may also control the subject matter of such an act. Sub-para. 9 of para. 2 of the Recommendation expressly provides that 'the control of both the lawfulness of an act and its subject matter by a competent administrative authority shall not be construed as excluding additional, double control by a court or other independent body'.[29]

In the development of the cited provisions, we recall the extraordinarily interesting, thorough work of Eberhard Schmidt-Assmann, *Common Administrative Law as an Idea of Regulation: the Basic Principles and Tasks of Administrative Law*,' in which the author noted the following: 'Discretion does not mean freedom of choice. Public administration bodies make no choice; as a rule-of-law authority, they must be guided by the criteria laid down in the law and the task entrusted to them, and weigh these scales independently within their authority.'[30] This understanding of the nature of the reasoning allowed Professor Schmidt-Assmann to conclude that the authority of the administrative authorities to make final decisions did not exclude judicial review but narrowed its intensity.[31] We see that this conclusion only confirms the position reflected in the decisions of the ECtHR regarding the need for the court to carry out a full review of any administrative act, including its discretion.

26 REC Recommendation (2004) 20 on judicial review of administrative acts: adopted by Com. Of Ministers of the Council of Europe 15 December 2004, in RO Kuibida & VI Shishkin (eds), Fundamentals of administrative proceedings and administrative law (Staryi Svit 2006) 552-555.

27 Explanatory comment on Recommendation REEC (2004) 20 on judicial review of administrative acts (adopted by the Committee of Ministers of the Council of Europe on 15 December 2004), ibid, 556-575.

28 Recommendation No R (80) 2 on the exercise of discretion by administrative authorities: adopted by Com. Of Ministers of the Council of Europe 11 March 1980, ibid, 438-441.

29 Explanatory comment to Recommendation No R (80) 2 on the exercise of discretionary powers by the administrative authorities (adopted by the Committee of Ministers of the Council of Europe on 11 March 1980), ibid, 441-451.

30 E Schmidt-Assmann, General Administrative Law as an Idea of Regulation: Basic Principles and Tasks of Administrative Law Systematics (H Ryzhkov, I Soiko & A Bakanov transl. from German, O Syroid ed., IS 2009) 239.

31 Ibid. 253.

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When considering cases of the lawfulness of administrative acts that may be classified as discretionary, the Ukrainian courts should take into account the provisions of Art. 2 part 2 of the Code of Administrative Proceedings of Ukraine, which oblige them to evaluate a management act against certain criteria. In particular, the decisions, actions, or omissions of the subject of authority shall be verified as to whether they have adopted/are made: (a) on the basis, within the powers and in the manner provided by the Constitution and laws of Ukraine; (b) using the power for the purpose for which that power was conferred; (c) substantiated, that is, taking into account all circumstances relevant to the decision or action; (d) impartially (without bias); (e) in good faith; (f) reasonably; (g) respecting the principle of equality before the law, preventing all forms of discrimination; (h) in proportion, in particular, maintaining the necessary balance between any adverse effects on the rights, freedoms and interests of the person and the purposes to which this decision (action) is directed; (i) taking into account the individual's right to participate in the decision-making process; (j) in a timely manner, i.e., within a reasonable time.

The Administrative Courts demonstrate a position that takes into account these procedural requirements and is in line with ECtHR practices and recommendations of the Committee of Ministers of the Council of Europe analysed above. An example is the decision of the Poltava District Administrative Court in a case on a lawsuit filed by the village council against the regional state administration to declare it illegal and to cancel the order of the head of the administration.[32]

The object of the dispute in this case was the decision of the Chairman of the administration to rename two streets in the urban village. The adoption of such an act was necessitated by the implementation of the provisions of the Law of Ukraine 'On Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and Prohibition of Propagation of Their Symbolism', by which the authorities were authorised to rename the geographical objects, the names of which contain the symbolism of the communist totalitarian regime.[33]

The power to rename geographic objects is clearly discretionary. After all, the representative of the government has the right to determine the need for such renaming independently, as well as under the conditions of public discussion, to assign new names to these objects.

The Poltava District Administrative Court upheld the claim in part: it found the order illegal to rename one of the streets and revoked it in the relevant part. The judgment is set out on 10 pages. An examination of the text makes it clear that the court did not limit itself to determining whether the subject of power is authorised by law to adopt a discretionary act – the decision concerned not only the statement of the administration chairman's compliance with the order of passing the ruling. The Court, on the basis of the evaluation of the parties' arguments and the evaluation of the evidence requested by it on its own initiative, skilfully examined the validity of the plaintiff's position, indicating that both the facts and the issues of law were within its field of view. At the same time, the court did not interfere in any way with the implementation by the other authorised representative of the power given exclusively to it to act in cases determined by law at its own discretion. After all, it only found the unlawfulness of the discretionary act and revoked it, which, no doubt, does not exclude the possibility of the head of the state administration to take another decision on this issue, which, under civilised conditions, should take into account the court's findings.

32 Case No 816/2196/16 [2017] Poltava District Administrative Court <https://www.reyestr.court.gov.ua/Review/65769378> accessed 1 December 2021.

33 Law of Ukraine 'On the Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of Propagating Their Symbolism' [2015] Official Bulletin of the Verkhovna Rada of Ukraine 26/219

Therefore, it can be stated that national law has created necessary conditions for an administrative court to be regarded as an institution with a 'full level of jurisdiction' within the meaning of Art. 6 § 1 of the Convention on the Protection of Human Rights and Fundamental Freedoms of 1950.

4 THE CONCEPT OF 'COURT ESTABLISHED BY LAW' IN NATIONAL LAWS

According to the convention, the right to a fair trial is considered to be respected if the legal conflict is resolved by an institution that not only has full jurisdiction but is also *established by law*. Explaining this phrase, the ECtHR noted that its introduction into the text of Art. 6 of the Convention was due to the need to avoid regulating matters of the administration of justice by the public administration and to ensure that they were standardised by parliamentary acts.[34] Otherwise, a judicial body formed out of the will of the people, reflected in the law, would not have legitimacy and therefore would not be able to hear cases with the participation of individuals in a democratic society.[35]

A significant step in the development of the concept of 'a court established by law' was made by the European Commission of Human Rights in 1978 following the outcome of the *Leo Zand v. Austria* case. The Commission then explained that the law issued by parliament should, at a minimum, establish the organisational structure of the judiciary and not regulate every detail in this area. Subject to this condition, delegated legislation should not be regarded as wholly inadmissible in the light of Art. 6 § 1 of the Convention.[36]

The state of regulation of the system of bodies authorised to administer justice in Ukraine fully meets the above requirements. The regulations have even been enshrined in the text of the Basic Law, clause 14, part 1 of Art. 92, which states that only the laws of Ukraine determine the judiciary, the judicial proceedings, and the status of judges. In other constitutional provisions, this information develops as follows: (1) justice in Ukraine is exclusively administered by the courts (Art. 124, part 1); (2) the delegation and assignment of the functions of the courts to other bodies or officials are not allowed (Art. 124, part 2); (3) the judicial system in Ukraine is built on the principles of territoriality and specialisation and is determined by law (Art. 125, part 1); (4) a court shall be formed, reorganised, and liquidated by law, the draft of which shall be submitted to the Verkhovna Rada of Ukraine by the President of Ukraine after consultation with the High Council of Justice (Art. 125, part 2).

In order to fulfil the abovementioned provisions of the Constitution of Ukraine, the Parliament approved the law 'On the Judiciary and the Status of Judges' (Law on Judiciary), which provides for a three-tier judicial system, represented by local courts, courts of appeal, and the Supreme Court as the highest in this system.[37]

As for the system of specialised administrative courts, today, it is formed by circuit administrative and appellate administrative courts. At the same time, it is not only these courts that are involved in the resolution of public law disputes. Thus, the Law on Judiciary

34 *Coeme and others v Belgium* App nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96 (ECtHR, 22 June 2000) <https://hudoc.echr.coe.int/eng?i=001-59194> accessed 1 December 2021.

35 *Lavents v Latvia* App no 58442/00 (ECtHR, 28 November 2002) <https://hudoc.echr.coe.int/eng?i=001-65362> accessed 1 December 2021.

36 *Leo Zand v Austria* App no 7360/76 (European Commission of Human Rights, 12 October 1978) <https://www.legislationline.org/download/id/4074/file/ZAND%20v%20AUSTRIA_1978.pdf> accessed 1 December 2021.

37 Law of Ukraine 'On the Judiciary and Status of Judges' (2016) <https://zakon.rada.gov.ua/laws/show/1402-19> accessed 1 December 2021.

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operates with the general concept of 'local administrative courts', which covers both circuit administrative and other courts defined by the Code of Administrative Proceedings of Ukraine. Art. 20 of the CAP lists the categories of administrative cases that are heard at first instance by the local general courts. The circuit administrative courts decide all other administrative cases. Thus, administrative litigation covers more than just the specialised administrative courts since certain types of public-law conflicts at first instance, as noted above, are resolved by local trial courts under the rules of the Code.

Courts of appeal trying administrative cases are administrative courts of appeal, which are formed in appellate districts. It should be noted that outside the system of administrative courts is the Supreme Court, which, in accordance with the requirements of the CAP, can also appeal cases decided by the courts of appeal as courts of the first instance (Art. 23, part 2 of the Law on the Judiciary).[38]

It is worth noting that in order to exercise the powers vested in the Supreme Court, important integral parts, such as the Grand Chamber and the Administrative Cassation Court, have been distinguished in their structure. The Grand Chamber of the Supreme Court conducts an appellate review of the cases decided by the Administrative Cassation Court within the Supreme Court as a court of first instance (Art. 23 part 3).[39] However, the main task of the Supreme Court in the area of administrative justice is an appellate review of the administrative courts' judgements.

An equally significant aspect of the requirement for the establishment of judicial institutions under the law is that under Art. 6 § 1 of the Convention, every trial must be carried out by a court formed in accordance with legal rules.[40]

In its decision, O*leksandr Volkov v. Ukraine*, the ECtHR also insisted that the phrase 'established by law' extends, first, to the legal basis of the very existence of the 'court' and, second, to the composition of the panel in each case. However, in this decision, the ECtHR focused on clarifying whether the Chamber of the Supreme Administrative Court of Ukraine (SACU) had been established and its personnel had been defined in a lawful manner that would meet the requirement of 'a court established by law'.

It should be recalled that Mr Volkov's case was to be heard by a special SACU chamber, which had to be created in accordance with the decision of the President of this court. The panel of this chamber was determined by the Chairman and approved by the Presidium of the Supreme Administrative Court. However, by the time these actions were taken, the five-year term of office of the Chief Justice of the Supreme Administrative Court had expired, and the procedure for appointing presidents of courts was not governed by national law. It turned out that the SACU chairman continued to perform his functions beyond the statutory term of his authority, relying on the fact that the procedures for appointment and/or reappointment were not provided for by the legislation in force at the time, and the legislative grounds for extending

38 Pursuant to Art. 22, part 2, of the CAP, the Administrative Court of Appeal in the district of appeal, which includes the city of Kyiv, as the court of first instance, is responsible for challenging certain decisions, actions, and omissions of the Central Election Commission, actions of candidates for the post of President of Ukraine, and their election agents. Part 3 of the same article provides that the administrative courts of appeal at first instance shall consider claims for compulsory acquisition on grounds of the public necessity of the land and other objects of immovable property placed therein.

39 Pursuant to Art. 22, part 4, of the CAP, the Supreme Court, as a court of first instance, is responsible for determining the results of elections or the all-Ukrainian referendum by the Central Election Commission, the cases of a suit for early termination of powers of the People's Deputy of Ukraine, and cases concerning appeals of acts, actions, or omissions of the Verkhovna Rada of Ukraine, the President of Ukraine, the High Council of Justice, and the High Qualifications Commission of Judges of Ukraine.

40 Posokhov v the Russia App no 63486/00 (ECtHR, 4 March 2003) <https://hudoc.echr.coe.int/eng?i=001-60967> accessed 1 December 2021.

his authority were not sufficient to the extent defined. In these circumstances, the ECtHR concluded that there had been a violation of Art. 6 § 1 of the Convention in this respect.[41] The ECtHR further reinforced its position by referring to earlier decisions. For example, it cited the decision in the case of *Gurov v. Moldova*, dated 11 July 2006, which noted that the practice of extending the powers of judges automatically indefinitely after the expiration of their statutory term until they were re-appointed violates the principle of 'a court established by law'.[42]

Based on the analysis of the current version of the CAP, we conclude that the composition of the court should include a judge or a panel of judges appointed to consider a particular administrative case by the Unified Judicial Information and Telecommunication System (UJITS). According to Part 1 of Art. 31 of the CAP, the automated distribution of cases is carried out taking into account the specialisation and uniform workload for each judge on a random basis and in chronological order of registration of cases. If the case is subject to mandatory collegial review, the UJITS designates a judge-rapporteur when registering the statement of claim, complaint (appeal or cassation), and other documents that may be subject to judicial review. He or she is responsible for verifying these procedural documents for compliance with the requirements of the Code and preparing the case for consideration. At the same time, the case is considered by the permanent panel of judges of the relevant court, which includes this judge-rapporteur. The composition of the permanent panels of judges shall be determined by the conference of judges of the relevant court.

According to Art.35 of the CAP, the composition of the court must be unchanged throughout the proceedings in the court of the relevant instance, except in cases that make it impossible for a judge to participate in the proceedings.

As a general rule, in case of a change in the composition of the court at the stage of preparatory proceedings, the consideration of the case starts again. If the composition of the court changes at the stage of consideration of the case on the merits**,** the court starts the consideration of the case on the merits again. The exception is the situation when it is necessary to repeat the preparatory proceedings.

According to Art. 32 of the CAP, all the administrative cases in the court of the first instance are considered and resolved by a judge individually, except as provided by the Code.

At the same time, the collegial consideration of the administrative case is carried out in view of the following. Thus, in accordance with Part 2 of Art. 33 of the CAP, any case, which falls under the jurisdiction of a court of the first instance, depending on the type and complexity of the case, may be considered by the panel of three judges, except for cases that are considered in simplified action proceedings. The relevant issue is resolved before the end of the preparatory hearing in a case (or before the start of case consideration on the merits, if the preparatory hearing is not held) by a judge considering a case by his or her own initiative or by the request of a trial participant upon the adoption of an appropriate order. In addition, the law establishes a list of administrative cases to be considered collectively in the court of first instance: (1) cases subject to appeal against decisions, actions, or inactivity of the Cabinet of Ministers of Ukraine, the National Bank of Ukraine, or the district electoral commission (the district electoral commission for the referendum); (2) cases falling within the jurisdiction of the Administrative Court of Appeal as a court of first instance; (3) cases falling within the jurisdiction of the Supreme Court as a court of first instance.

It is also important to note that the appellate review of court decisions in administrative cases is carried out by a panel of three judges, and the cassation review by a panel of three or a

41 *Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR, 9 January 2013) paras 151, 154, 156 <https://hudoc.echr.coe.int/eng?i=001-115871> accessed 1 December 2021.

42 Ibid, para 151.

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greater odd number of judges. It should be added that in the cases specified in Art. 346 of the CAP, cassation review of court decisions is carried out by a chamber or joint chamber of the Administrative Cassation Court or the Grand Chamber of the Supreme Court. Moreover, the session of the chamber is considered valid if more than half of its members are present, and in the case of the joint chamber and the Grand Chamber, not less than two-thirds of its members.

Arts. 36 and 37 of the CAP define the circumstances in which the judge's impartiality may be questioned. Such circumstances are, for example, the direct or indirect interest of the judge in the outcome of the case or his or her prior participation in the proceedings in any procedural status. Since these articles of the CAP do not contain comprehensive information on the circumstances under consideration, in fact, they can include any that can cast doubt on the impartiality of the judge. The presence of at least one of these circumstances is the ground for the recusal of the judge. The parties to the case also have the right to initiate the recusal of a judge by submitting a reasoned application. It should be taken into account that the disagreement of the party with the procedural decisions of the judge, the decision or dissenting opinion of the judge in other cases, or the public opinion of the judge on a legal issue can not be grounds for recusal.

5 THE CONCEPT OF 'COURT ESTABLISHED BY LAW' IN THE PRACTICE OF NATIONAL COURTS

In resolving the case of *Sokurenko and Strygun v. Ukraine*, the ECtHR was also forced to resort to interpreting the extremely important convention phrase 'established by law'. Regarding the background of this case, the Supreme Court of Ukraine (SCU) upheld the decision of the Court of Appeal, ruling against the applicants and revoking the decision of the court of cassation on the ground that the latter's findings were not factual and were unjustified and erroneous. In this regard, Sokurenko and Strygun complained that the SCU had ruled in their case, exceeding the powers conferred on it, and therefore could not be considered 'a court established by law' within the meaning of Art. 6 § 1 of the Convention.

It should be clarified that the conflicts involving Sokurenko and Strygun were public law but were resolved according to the rules of the Commercial and Procedural Code of Ukraine (CPU) since, at the time of their resolution, the CAP had not been adopted. According to Art. 111[18] of the Commercial and Procedural Code, in the version in force at the date of the decision of the case of Sokurenko and Stryhun, the SCU was not entitled to annul the 'cassation' decision and to maintain the decision of the court of appeals.

The ECtHR accepted the applicants' position and found that an SCU that had gone beyond its powers could not be regarded as 'a court established by law'. Therefore, the Court found a violation of Art. 6 § 1 of the Convention. Referring to its case law, the ECtHR noted that the phrase 'established by law ' extends not only to the legal basis of the existence of a 'court' but also to the court's observance of certain rules governing its activities. The Court stated that in the present case, the SCU had taken acts which were not provided for by the procedural Code; there was no other rule of law that would grant the SCU the right to overturn the decision of the cassation court and to uphold the decisions of the courts of first and appeal instances. However, the ECtHR noted that the highest judicial authority empowered to interpret the law could make decisions not established by law. Such application of the law must, however, be of an exceptional nature, and the aforesaid court must give clear and probable grounds for such an exceptional departure from the exercise of its defined powers. However, in the case of Sokurenko and Stryhun, according to the ECtHR, the SCU did not provide any arguments for adopting such a decision, went beyond its powers, deliberately

violated the procedural law, and therefore cannot be considered 'a court established by law 'within the meaning of the convention provision in question'.[43]

In terms of defining the essence of the concept of 'a court established by law', the ruling of the Grand Chamber of the Supreme Court (Grand Chamber) of 4 September 2019 in a case against a claim of an individual to the State of Ukraine as represented by the Cabinet of Ministers of Ukraine, the State Treasury Service of Ukraine damages (Decree)[44] is also worth noting. This resolution was not adopted according to the rules of administrative proceedings, but the results of its analysis do not become less significant for the purposes of our research. It appears that the appeal to the said court decision makes it possible to look at the problem resolved by the ECtHR in the case of *Sokurenko and Strygun v. Ukraine* from a different perspective.

The Grand Chamber revoked the decision of the courts of first instance and the appellate court by the Resolution adopted on the consequences of consideration of the cassation appeal and referred the case to a new trial. The problem was that in avoiding the resolution of the dispute on the merits and choosing precisely such a wording of the Resolution, the Grand Chamber failed to give a proper justification for its 'conduct'. In particular, it did not specify the violations of procedural law committed by the courts of the previous instances, the establishment of which is a prerequisite for the cassation instance to reach a decision on such content. The Grand Chamber embraced a position opposite to that demonstrated by the Supreme Court of Ukraine in the case of Sokurenko and Stryhun: when the latter exceeded its powers, seeking at last to 'mark a decisive end' to a lengthy trial, then the Grand Chamber did not use all of its procedural options for a quicker and final resolution of the conflict. The two aforementioned judgments are also similar in that their texts did not properly state the grounds on which they were based, and this can be seen as a violation of another requirement of a fair trial – the motivation of judicial acts.

Let us return to the analysis of the case before the Grand Chamber and briefly summarise its factual allegations. In 2016, the plaintiff filed a lawsuit claiming compensation owed to her at the expense of the State Budget of Ukraine for the damage caused by a terrorist act for damaged commercial premises. The statement of claim was motivated by the fact that on 24 January 2015, during an anti-terrorist operation consisting of artillery shelling of a housing estate in the Mariupol East neighbourhood, the commercial property of the plaintiff was damaged (destroyed).

The fact that the plaintiff had previously appealed for a redress of damages to the Mariupol City Council and the Donetsk Regional State Administration, which exercised their powers in full, was another reason for bringing the case to the court. However, she received a refusal justified by the uncertainty of the law of the public authority responsible for a redress of the damage and the lack of state programs to compensate for the expenses incurred by the population because of terrorist acts.

In addition, the Main SBU (The Security Service of Ukraine) Office in Donetsk and Luhansk Region conducted a pre-trial investigation in criminal proceedings on the grounds of the crime provided for in part 3 of Art. 258 of the Criminal Code of Ukraine – a terrorist act that led to the death of a person. According to the said pre-trial investigation, on 24 January 2015, an artillery attack took place, resulting in 30 deaths. At least 119 people received injuries of varying severity, and houses and non-residential premises and the Kyivsky and Denys markets were damaged. In this criminal proceeding, the claimant was a victim.

43 *Sokurenko and Strygun v Ukraine* App nos 29458/04 and 29465/04 (ECTHR, 20 July 2006) <https://hudoc.echr.coe.int/eng?i=001-76467> accessed 1 December 2021.

44 Case No 265/6582/16-ц [2019] Grand Chamber of the Supreme Court <https://www.reyestr.court.gov.ua/Review/86310215> accessed 1 December 2021.

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On 20 April 2017, the trial court ruled that the claim was upheld on the ground that the compensation for damage caused to citizens by a terrorist act was carried out at the expense of the State Budget of Ukraine under Art. 19 of the Law 'On Combating Terrorism' along with the subsequent recovery of the amount of compensation from the injured party. It is the state's responsibility to recover the damage done, regardless of its fault. Moreover, the existence of an indictment of a court against persons engaged in terrorist activities is not a condition for compensation for damage by the state under Art. 19 of the Law. By compensating for damage to an individual, the state gains the right to claim a person guilty of a terrorist act.[45]

On 16 August 2017, the Court of Appeal upheld the findings of the trial court, leaving the original decision unchanged. In the reasoning of its decision, the Court of Appeal emphasised that Ukraine had not waived the obligations set out in Art. 1 of Protocol No. 1 in certain areas of the Donetsk and Luhansk regions. Also referring to the ECtHR ruling of 8 January 2004 in *Aider et al. V. Turkey*, the Court of Appeal emphasised that the responsibility of the state was absolute and objective in nature, based on social risk theory. The state may be held liable to compensate those who have suffered from the acts of unidentified persons or terrorists when the state recognises its inability to maintain public order and security or to protect people's lives and property. According to the ECtHR, the absence of an objective and independent investigation into the case of damage is an independent basis for the responsibility of the state for the actions of its bodies and their officials.[46]

In August 2017, the Cabinet of Ministers of Ukraine filed a cassation requesting the decision of the courts of first instance and appellate courts to overturn and approve a new one – on refusal to satisfy the claim. The appeals court panel decided to refer the case to the Grand Chamber of the Supreme Court. The ruling was substantiated by the fact that in this case, there was an exceptional legal problem, the solution to which needed to ensure the development of law and the formation of a uniform law enforcement practice in disputes about compensation for damage caused by a terrorist act. One of the central issues raised before the Grand Chamber was the determination of the legal basis for compensation for the damage caused by a terrorist act – in particular, should Art. 19 of the Law of Ukraine 'On Combating Terrorism' be considered as such, and should the possibility of exercising the right to receive the said compensation be made conditional on the existence of a compensation mechanism provided for by a separate law, given the content of its formulations?

The Grand Chamber demonstrated that the plaintiff in this case was not entitled to legitimate expectations of receiving compensation from the state for damage caused during the course of an anti-terrorist operation as a result of damage to a commercial property she owned in a terrorist act since such expectations do not have a legal basis in the legislation of Ukraine, which allows the specific property interest of the plaintiff to be determined.

Two judges of the Grand Chamber, T. Antsupova and O. Yanovska, did not support this ruling and expressed a dissenting opinion. They rightly pointed out that the evasion of the state from the introduction of an effective compensation mechanism for damaged/destroyed property in the context of armed conflict in the territories controlled by the Government of Ukraine for five years should not prevent the protection of property rights guaranteed by the Constitution of Ukraine. Moreover, it is for the national courts to develop approaches to the application of the relevant principles and rules of law

45 Law of Ukraine 'On Combating Terrorism' [2003] Official Bulletin of the Verkhovna Rada of Ukraine 25/180.

46 *Ayder and Others v Turkey* App no 23656/94 (ECtHR, 8 January 2004) <https://hudoc.echr.coe.int/eng?i=001-61560> accessed 1 December 2021.

in these disputes, and the task of the Supreme Court, in particular, is to ensure the consistency of case law.[47]

In addition, the judges criticised the wording used in the operative part of the Resolution, according to which the Grand Chamber granted the cassation partially. The decisions of the courts of first instance and the appellate instance were annulled, and the case was referred for re-examination to the court of first instance. Moreover, Ms Antsupova and Ms Yanovska did not support both the content of such formulations – in their view, there was every ground to settle the dispute in essence by satisfying the claims, and there was a lack of proper justification of the Grand Chamber's conclusion based on the outcome of the cassation. The fact was that the Grand Chamber, contrary to the requirements of Art. 411 of the Code of Civil Procedure of Ukraine, as indicated above, did not specify which procedural rules were violated by the courts of the previous instances; that is, it did not justify the overruling of the appealed decisions with the referral of the case for reconsideration.

Therefore, there were doubts as to the sufficiency of the measures taken by the Grand Chamber of the Supreme Court to resolve the aforementioned legal conflict effectively. In our view, the Grand Chamber did not give legal certainty to the person who went to court to resolve a matter of extreme importance to her, even though it was within its competence. The highest court in the state failed to reach a final decision in the case, delaying the resolution of the case and leaving aside the problems faced by citizens who were in difficult living conditions because of the events in eastern Ukraine. Such 'court behaviour', in our view, cannot be judged as being in conformity with the requirements of Art. 6 § 1 of the Convention.

6 CONCLUSIONS

The right to a fair trial, enshrined in Art. 6 § 1 of the 1950 Convention on the Protection of Human Rights and Fundamental Freedoms, has a complex structure, one of the important elements of which is 'a court established by law' requirement. The content of this requirement can be determined by referring to the case law of the ECtHR.

In a number of ECtHR decisions, particular attention has been paid to establishing the characteristics of an institution that may be referred to as a 'court' in light of the provisions of Art. 6 of the Convention. According to the ECtHR, a 'court' can be any national body not necessarily integrated into the judicial system – the main thing is that it has 'full jurisdiction', i.e., in the process of dealing with legal conflicts on the merits, it must be able to verify all questions of fact and law. Such authority shall also be considered to be established by law if it resolves a case within its jurisdiction and its constituent body is authorised.

In Ukraine, judicial review of public-law disputes is carried out by administrative courts and bodies representing the judiciary that can be considered 'classic type jurisdictions'. The Code of Administrative Proceedings of Ukraine creates the proper conditions for these courts to be regarded as institutions with a 'full level of jurisdiction' in resolving public-law disputes of any kind. However, the case law of national courts has shown that there has been a breach of the requirements arising from the content of the convention's requirement of 'a court established by law'. These cases are, as a rule, stipulated by the Ukrainian courts' neglect of the rules of the national administrative, procedural law, in which the specified requirements were properly reflected.

47 Dissenting opinion of judges of the Grand Chamber of the Supreme Court TO Antsupova and OH Yanovska about Resolution of the Grand Chamber of the Supreme Court, 4 September 2019, Case No 265/6582/16-ц <https://www.reyestr.court.gov.ua/Review/86435735> accessed 1 December 2021.

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Reform Forum Note

PARTICIPATORY ENFORCEMENT OF JUDGMENTS AND OTHER ENFORCEABLE INSTRUMENTS: BEST EUROPEAN PRACTICES

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Summary: 1. Introduction. – 2. International Standards. – 3 Role of Enforcement Agents in Debt Collection. – 4. Categories of Cases to Be Submitted to Participatory Enforcement. – 5. Application of Mediation by Enforcement Agents in Countries Where Enforcement Agents are not Officially Recognised as Mediators by National Law. – 6. Benefits of Participatory Enforcement. – 7. Conclusion.

Keywords: *Participatory Enforcement, Post-Judicial Mediation, Enforcement Officer, Mediator, Best Practice.*

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ABSTRACT

Mediation in the context of the enforcement of judgments and other enforceable documents should be distinguished from the broader and more general question of whether or not enforcement agents may serve as mediators. In Europe, there are some jurisdictions where enforcement agents may indeed serve as mediators. This does not necessarily mean that in these jurisdictions enforcement agents use mediation in ongoing enforcement procedures executed under their supervision (the latter is qualified as 'post-judicial mediation' or 'participatory enforcement'). In actual fact, examples of post-judicial mediation are scarce or non-existent even though they are discussed in literature. As will be shown in the present contribution, 'post-judicial mediation' is often not conceived as mediation in the strict sense (i.e. the bringing about of an amicable settlement under the guidance of a neutral mediator), but as a series of activities aimed at providing efficient and effective enforcement services. It is often better to refer to 'post-judicial mediation' as 'participatory enforcement' or 'amicable enforcement'. Best practices in participatory enforcement are the central topic of the present contribution.

1 INTRODUCTION

Mediation in the context of the enforcement of judgments and other enforceable documents should be distinguished from the broader and more general question of whether or not enforcement agents may serve as mediators. In Europe, there are some jurisdictions where enforcement agents may indeed serve as mediators. Examples are France, Belgium, Italy, the Netherlands, Portugal, Switzerland and Spain.2 This does not necessarily mean that in these jurisdictions enforcement agents use mediation in ongoing enforcement procedures executed under their supervision (the latter is qualified as 'post-judicial mediation' by the International Union of Judicial Officers (UIHJ); hereafter also 'participatory enforcement'). In actual fact, examples of post-judicial mediation are scarce or non-existent even though they are discussed in literature.3 However, examples where enforcement agents offer their services as a mediator in general, outside the context of enforcement, are more numerous. In this context it should not be forgotten that in the jurisdictions mentioned, enforcement agents can often be qualified as private enforcement agents (i.e. they do not act as civil servants and do not come under the authority of the civil service and the Ministry of Justice). Such private enforcement agents, who have a liberal and independent status, often provide additional services of a commercial nature next to enforcement, such as amicable debt recovery (i.e. debt recovery without a judgment ordering payment), voluntary sale of moveable or immoveable property at public auctions, the provision of legal advice, or the representation of parties in courts. In recent years (and this is relevant in the present context) they have also started to offer their services as mediators in various types of disputes.[4]

2 CEPEJ, *Mediation Awareness and Training Programme for Enforcement Agents Ensuring the Efficiency of the Judicial Referral to Mediation* CEPEJ (2021) 7, Introduction (2): 'Even if, to date, few member countries of the Council of Europe (France, Belgium, Italy, the Netherlands, Portugal, Switzerland and Spain among others) allow enforcement agents to officially practice as mediators, it is important to raise the awareness of enforcement agents as regards mediation in civil and commercial matters. Such role of the enforcement agent as a mediator is also confirmed by the CEPEJ Guidelines (2009) 11 REC on enforcement (Guideline 8).'

3 For a recent study on enforcement in a comparative perspective, see W Kennett, *Civil Enforcement in a Comparative Perspective. A Public Management Challenge* (Intersentia 2021).

4 CEPEJ, *Guidelines for a Better Implementation of the Existing Council of Europe's Recommendation on Enforcement* CEPEJ (2009)11REV2, para 34: 'Enforcement agents may also be authorized to perform secondary activities compatible with their role, tending to safeguard and secure recognition of parties' rights and aimed at expediting the judicial process or reducing the workload of the courts.'

Several of the additional services mentioned are of major importance to private enforcement agents since they provide them with the largest part of their income. After all, their official activities such as enforcement of judgments are executed at a relatively low standard rate set by the legislature, and these activities are often 'cross-financed', so to say, by their commercial activities. It is indeed in this context that the discussion about whether enforcement agents should be allowed to act as mediators may often be placed: not necessarily within the context of 'post-judicial mediation' or 'participatory enforcement', but in the context of providing additional commercial services in general. This is not surprising because, generally speaking, enforcement agents may be ideal mediators due to their training and practical experience requiring all kinds of legal and social skills. As the CEPEJ stated in the context of its *Mediation Awareness and Training Programme for Enforcement Agents Ensuring the Efficiency of the Judicial Referral to Mediation:*

> For many years the profession of enforcement agent has been active in the field of mediation due to the nature of its functions. It was recognized that enforcement agents, because of the qualities of impartiality, neutrality and confidentiality inherent to their function, appear to be the ideal professional to act as mediators in the context of alternative dispute resolution. In the daily practice of their profession, they play a crucial role in the resolution of disputes.[5]

Within this same context, the CEPEJ also made important observations regarding 'post-judicial mediation'. It stated:

> Enforcement agents must … daily try to conciliate two opposing interests, on the one hand the interest of the creditor wishing to recover what is owed to him according to an enforceable title and on the other hand the debtor not knowing or not wishing to pay the debt to which he has been condemned. This is what the International Union of Judicial Officers (UIHJ) calls 'post-judicial mediation', a method by which the enforcement agent tries to obtain an agreement from the parties by negotiating either a payment plan, or obtain a remission of interest or even obtain a reduction of the debt against a payment of the negotiated sum.[6]

As will be shown below, 'post-judicial mediation' is often not conceived as mediation in the strict sense (i.e. the bringing about of an amicable settlement under the guidance of a neutral mediator), but as a series of activities aimed at providing efficient and effective enforcement services. It is often better to refer to 'post-judicial mediation' as 'participatory enforcement' or 'amicable enforcement'.

2 INTERNATIONAL STANDARDS

When looking for international standards on enforcement, little can be found on 'post-judicial mediation' or 'participatory enforcement'. The standards that may be found deal with enforcement in general, and obviously within this context the most important international standard is the human right to effective enforcement that is part of the fundamental guarantees of Article 6 of the European Convention of Human Rights. As is widely known, in Hornsby v. Greece,[7] the European Court of Human Rights stated as follows:

> 40. The Court reiterates that, according to its established case-law, Article 6 para. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights

5 CEPEJ (n 2) 2.

6 Idem.

7 *Hornsby v Greece* App no 18357/91 (Judgment of 19 March 1997) Reports 1997-II, 510.

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> and obligations brought before a court or tribunal; in this way it embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect … However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 para. 1 (art. 6-1) should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions; to construe Article 6 (art. 6) as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention … Execution of a judgment given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6 (art. 6) …

Given the fact that effective enforcement is a human right, member states of the Council of Europe are advised to make sure that their enforcement systems are effective and efficient. In Recommendation Rec(2003)17 of the Committee of Ministers of the Council of Europe to member states on enforcement, one finds expressed that the enforcement creditor and the enforcement debtor have a duty to co-operate to make enforcement as effective and efficient possible, whereas the relevant authorities have a duty to facilitate cooperation. Furthermore, 'a proper balance should be struck between claimants' and defendants' interests' during enforcement. These requirements should be kept in mind when discussing ideas on constructing models of alternative or participatory enforcement as discussed below since a participatory approach to enforcement might increase possibilities to take into consideration all interests involved in debt enforcement.

Further international standards may be found in the 2009 CEPEJ Guidelines for a Better Implementation of the Existing Council of Europe's Recommendation on Enforcement. These Guidelines provide:[8]

> 6. …. enforcement may only be achieved where the defendant has the means or ability to satisfy the judgment.
>
> 7. Enforcement should strike a balance between the needs of the claimant and the rights of the defendant. …
>
> 8. The enforcement process should be sufficiently flexible so as to allow the enforcement agent a reasonable measure of latitude to make arrangements with the defendant, where there is a consensus between the claimant and the defendant. Such arrangements should be subject to thorough control to ensure the enforcement agent's impartiality and the protection of the claimant's and third parties' interests.

It is within this context that 'post-judicial mediation' is explicitly mentioned. Par. 8 cited above continues:

> [t]he enforcement agent's role should be clearly defined by national law (for example their degree of autonomy). They can (for example) have the role of a 'post judicial mediator' during the enforcement stage.

The Guidelines do, however, not discuss in detail what the tasks of a 'post judicial mediator' should be. It is likely that participatory enforcement may be brought under this heading.

In the context of the Mediation Awareness and Training Programme for Enforcement Agents Ensuring the Efficiency of the Judicial Referral to Mediation we also find a reference to 'post-judicial mediation'. It is stated that:

8 CEPEJ (n 4).

> Enforcement agents must … be able to communicate in a fair and balanced manner in order to carry out their mainly judicial mission but also regularly in their accessory missions such as, for example, amicable debt collection. It is therefore essential that enforcement agents have a full knowledge and understanding of the process and benefits of mediation, not only to practice so-called 'post-judicial' mediation but also to be able to act as mediators in a broader sense in the context of alternative dispute resolution.[9]

In the Global Code of Enforcement of the International Union of Judicial Officers (UIHJ) we also find relevant information on best practices in this field. This Code introduced 'modern concepts such as 'amicable' enforcement, 'participatory' enforcement and 'soft' enforcement'. 'Participatory' or 'amicable' enforcement is defined as an 'enforcement procedure that allows parties to reach an agreement on enforcement terms and conditions under the authority of the enforcement agent and the supervision of a judge.' It should be noted that enforcement agents exercise their authority under the supervision of the judge.[10]

Article 10 of the Global Enforcement Code, is relevant in this respect. It provides:

> Article 10: Alternative or participatory enforcement
>
> States must ensure that the professional instructed with the enforcement has the option of adopting a consensual enforcement procedure at the request of the debtor. In order to adapt the enforcement to the situation of the creditor and the debtor, States must allow the active participation of the parties to the enforcement.

Furthermore, in Article 21, amicable debt collection is mentioned as one of the enforcements agent's secondary activities (in the introduction above I referred to these activities as 'additional services of a commercial nature next to enforcement').

> Article 21: Secondary activities
>
> The professional status must allow judicial officers and enforcement agents to pursue secondary activities that are compatible with their position. In particular, they must be capable of being authorized to proceed with the amicable collection of debts.

The important role played by the judge in the enforcement stage is underlined in Article 22. This article seems only to leave limited room for post-judicial mediation by an enforcement agent, although an amicable procedure (participatory enforcement) leading to an amicable settlement may not be excluded.

> Article 22: Role of judges
>
> Only a judge can rule on disputes arising from the enforcement and order the measures necessary for its implementation at the request of one of the parties or of the enforcement agent. The judge to whom application is made by the debtor, an interested third party, the judicial officer or enforcement agent may suspend or cancel an enforcement measure should a sound reason justify such.

Further relevant articles are Articles 27 and 29 since proportionality and flexibility in enforcement may result in states opting for alternative forms of enforcement due to the shortcoming of ordinary enforcement. The relevant articles provide as follows:

9 CEPEJ (n 2) 2.

10 UIHJ Publication, 'Global Code of Digital Enforcement' (UIHI, November 2021) <https://www.uihj.com/downloads/global-code-of-enforcement/> accessed 10 February 2022.

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> Article 27: Proportionality of the measure of enforcement
>
> The enforcement measure must be proportional to the amount of the claim. In the event of abuse, the creditor may be directed to make reparations.
>
> Article 29: Flexibility of the measures of enforcement
>
> States must organize their enforcement systems by adapting them to the interests of the creditor and the economic and social situation of the debtor. For this reason, they must diversify the enforcement measures so that the judicial officer or enforcement agent may choose among them in keeping with the circumstances.

As stated above, few international standards on post-judicial mediation understood as participatory enforcement can be found apart from the above standards related to amicable enforcement. It is telling that in the 2021 Draft World Code of Digital Enforcement of the International Union of Judicial Officers[11] no specific rules on post-judicial mediation or participatory enforcement can be found either.

3 ROLE OF ENFORCEMENT AGENTS IN DEBT COLLECTION

As stated above, enforcement agents may function as mediators in a selection of European states such as France, Belgium, Italy, the Netherlands, Portugal, Switzerland and Spain. However, examples of mediation by an enforcement officer in the enforcement stage have not been found so far. Enforcement disputes where the debtor's only aim is the postponement of enforcement are highly unlikely to be candidates for mediation, at least where mediation is meant to settle the dispute in a timely manner since the debtor wishes to delay the procedure as much as possible. Furthermore, no examples have been found where mediation is used in cases of disputes regarding disciplinary liability between the professional community of private enforcement agents and a state regulator. In these cases one may even ask whether mediation would be the right approach to matters since legal certainty is better served by a binding and public court decision on the matter which can serve as guidance in future cases (it should be remembered that unlike court proceedings mediation is private and not public).

Although examples of mediation in the enforcement stage cannot easily be found in Europe, what can be found are attempts to introduce amicable or alternative enforcement schemes. These are widely discussed in literature and interesting suggestions for the introduction of these models can be found. Here I will discuss the Dutch model as proposed in a recent research report since it provides a very advanced model.[12]

Procedure of Debt Collection in the Netherlands: A Recent Report

As stated in a recent report by Nadja Jungmann and others, initial steps in the collection of debts in the Netherlands are often the activities of debt collection agencies or enforcement agents acting as debt collection agencies (i.e. one of the secondary activities of the enforcement agent mentioned above!) hired by the creditor. Neither a collection agency nor the enforcement agent acting as a collection agency (I will refer to both of them as collection agency hereafter) have legal authority to force debtors to pay their debts (the enforcement agent will only acquire this power after a judgment has been issued, but that usually only

11 I have this draft in my possession. It have not been able to locate it on the Internet.

12 The information that follows is based on N Jungmann et al., 'Betalingsregelingen: Bevorderen van haalbare betalingsregelingen bij private schuldeisers' WODC 2020 <https://open.overheid.nl/repository/ronl-41ffba83-6b19-4fc6-9490-2277677fae0c/1/pdf/tk-bijlage-eindrapport-betalingsregelingen.pdf> accessed 10 March 2022. Parts of this report are rendered in English translation below.

happens after amicable debt collection attempts through a debt collection agency have been terminated). Collection agencies mainly try to get in touch with the debtor and to convince the debtor that paying quickly prevents annoying procedures and collection costs. If a debtor is willing to pay, but cannot do so immediately for the full amount, most collection agencies will offer a payment arrangement if the creditor has allowed them to do this. It is here where the debt collection agency starts what may be called participatory enforcement.

It should be underlined that a distinction most debt collection agencies make is between debtors who cannot pay and debtors who do not want to pay. The first group qualifies for participatory enforcement, which may include referral to debt counseling, whereas the second group does not qualify for an amicable approach. Furthermore, agencies may advice their clients (creditors) that in the case of small claims it is wise to write off the amounts instead of starting enforcement, at least from a cost point of view. Obviously, it is the creditor who decides about the course of action that is to be taken.

When can Payment Arrangements be Made?

In the Netherlands, debtors do not have a right to a payment arrangement. There are, however, some statutory exceptions to this rule, namely where it concerns:

1. health insurance premium arrears;

2. energy and water debts;

3. mortgage debts.

A payment arrangement can be negotiated during the debt collection procedure. Creditors may not charge any costs for this. However, if after the summons has been served a payment arrangement is established, the creditor may charge court fees including the costs of serving the summons and of the lawyer's salary.

Why Do Payment Arrangements Fail?

As stated by Nadja Jungmann et al.,13 payment arrangements often fail for the following reasons:

> 1. When determining the monthly amount of payment, the debtor's other existing obligations are not taken into consideration (these may even be unknown);
>
> 2. A change of circumstances, for example additional creditors starting debt collection procedures at a later stage.

In order to counter these problems, it has been suggested to that a debt centralizing intermediary be appointed, (the debt collection agency or an enforcement agent may act as such) which would be given the task of creating a central repayment plan that should be submitted to a judge for approval. In addition, having a central register of debts is considered advisable.

Measures to Stimulate Payment Arrangements

It is felt in the Netherlands that attempts to reach an amicable agreement (i.e. a payment arrangement) before the case is brought to court should be intensified. Nadja Jungmann et al.14 state that linking the creditor's right to be indemnified for collection costs to serious attempts to establish a payment arrangement may encourage such agreements. Increasing court fees to make it more expensive for creditors to litigate may also serve as an incentive to

13 Ibidem.

14 Ibidem.

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establish a payment arrangement. Furthermore, one may think about the introduction of a power for courts to issue costs orders when court action is initiated by the creditor too soon. Settling the debt for the principal amount and not for the collection costs may be an idea as well. In that manner an incentive for creditors is introduced to minimize collection costs and, as a derivative thereof, an incentive to establish payment arrangements.

4 CATEGORIES OF CASES TO BE SUBMITTED TO PARTICIPATORY ENFORCEMENT

As Nadja Jungmann et al. state, cases concerning the enforcement of monetary claims can particularly benefit from participatory enforcement, provided that the debtor is willing to pay but unable to do so at once for the full amount. In these cases, a feasible payment arrangement may be negotiated between debtor and creditor. In the absence of measures stimulating the creditor to agree with the establishment of a payment arrangement, much depends on the creditor's knowledge and willingness to attempt an amicable solution. It may be the task of the debt collection agent to provide the debtor and the creditor with the necessary information, including the provision of a centralized overview of the other debts and the identity of the other creditors before a payment arrangement can be attempted. All of this is of course not relevant where the debtor is able (i.e. the debtor is not overindebted but has sufficient assets) but only unwilling to pay. In those cases attempting an amicable settlement (participatory enforcement) may be a waste of time and money.

It should be noted here, that participatory enforcement is not necessarily the same as mediation. A mediator acts as a neutral facilitating the parties to settle their dispute themselves. Participatory enforcement is not about revisiting the court decision on the merits, but it is aimed at effective debt collection arrangements in which over-indebted debtors are helped to pay their debts, something that would be impossible or hard to achieve in ordinary enforcement proceedings. A payment arrangement is not only in the interest of the debtor, but also of the creditor who would like to receive as much of his claim as possible without incurring unnecessary debt collection costs. The debt collection agent (for example an enforcement officer acting as such) may be the right agent to facilitate the process, also by providing the necessary information, both as regards participatory enforcement and alternatives.

5 APPLICATION OF MEDIATION BY ENFORCEMENT AGENTS IN COUNTRIES WHERE ENFORCEMENT AGENTS ARE NOT OFFICIALLY RECOGNISED AS MEDIATORS BY NATIONAL LAW

Enforcement agents may be officially recognized as mediators by national law, but this is not necessarily the case. In countries where enforcement officers are allowed to initiate secondary, commercial activities, these secondary activities are often not regulated by the law but by codes of conduct (ethical rules). An example is the Netherlands where the relevant code of conduct allows additional activities as long as there is no conflict of interest with the official activities of the enforcement officer. It is hard to see why acting in the area of amicable enforcement could result in a conflict of interest, especially where enforcement officers are already allowed to act as debt collection agencies (i.e. debt collection agencies in the amicable stage before court action has been taken).

6 BENEFITS OF PARTICIPATORY ENFORCEMENT

The benefits of participatory enforcement are manifold. The following benefits may be listed:

- It allows creditors to obtain payment of larger proportions of their claims since it takes the financial position of the debtor into consideration as well as the debtor's willingness to cooperate in payment;
- It reduces the burden on courts who do not have to issue judgments ordering the debtor to pay, judgments that are often only of an administrative nature since the debtor does not make a court appearance in most of these cases (default judgments);
- It reduces enforcement costs, which is not only beneficial for the debtor who might not be able to pay these costs anyway, but also for the creditor whose claims will not increase due to high enforcement costs.

7 CONCLUSION

Participatory enforcement is not being discussed widely in international comparative literature. However, it is an important instrument in making debt collection more effective since it takes into consideration the financial situation of the individual debtor and allows the debtor to influence the enforcement procedure. Participatory enforcement should not be considered as 'mediation' during the enforcement stage, since this is not what the concept refers too, and also because it might give the wrongful impression that claims that have been adjudicated by a court of law can be mediated in the enforcement stage. Participatory enforcement is very different from this. It allows for the involvement of both the debtor and the creditor in the enforcement stage where it concerns the modalities of enforcement with the aim of making enforcement more effective. The example of the Netherlands as discussed by Nadja Jungmann et al. may serve as a best practice in this respect.

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Reform Forum Note

SPECIALISED COURTS OF UKRAINE AND EUROPEAN COUNTRIES: A COMPARATIVE LEGAL ANALYSIS

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Summary: 1. Introduction. – 2. Specialised Courts within the Methodological Framework and International Discussion. – 3. Specialised Courts as an Urgent Need for the State Development of Ukraine. – 4. The Experience of European Countries in the Context of Judicial Specialisation. – 5. Conclusions.

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ABSTRACT

Background: *The issue of judicial specialisation is one of the main concerns in the development of a judicial system. This study aims to analyse the function and legal basis of specialised courts among the member states of the European Union (EU) and in Ukraine.*

Methods: *In the article, the authors used the following special legal methods: conceptual-legal, comparative-legal, formal-legal, and others. For example, the comparative-legal method helped the authors compare the features of specialised court practice in other countries and allowed them to identify how different countries regulate this issue at the legislative level.*

Results and Conclusions: *This article argues that specialisation is driven by the need to improve the efficiency of justice and the need to apply in-depth specialist knowledge in a specific area of justice. Information and knowledge gained from the experience of different countries can be used as a basis for the implementation, adaptation, and development of relevant new provisions in Ukraine.*

Keywords: *judicial system; principle of specialisation; specialisation of courts; judicial reform; judges, European integration*

1 INTRODUCTION

In Ukraine, the need for change in the area of judicial reform still remains an urgent issue.[6] Among the areas of judicial reform are the professional development of judges, the efficiency of justice, and the optimisation of the powers of courts in different jurisdictions. The implementation of change in these areas is not possible without the application of the principle of specialisation of judges.[7] Court specialisation is commonly considered to be an important reform initiative to advance the development of a successful judicial system.[8]

Specialised courts are defined as tribunals of narrowly focused jurisdiction to which all cases that fall within that jurisdiction are routed.[9] A court can be recognised as specialised if this court is designed to resolve a certain range of cases, acts on the basis of a codified act, has its own procedural form, and specialises in regulating a certain group of relations.

Indeed, a distinctive feature of specialised courts is that they have a narrow specialisation, a general subject of litigation, and high qualifications of judges in certain branches of law, aimed at reducing the number of judicial errors. Cases that are considered by specialised courts require a specialised approach. So, the purpose of creating specialised courts is to improve the efficiency of the judiciary.

Specialised courts play a special role in the judicial systems of the EU member states and Ukraine. They differ in their competence, structure, and procedures – in other words, in each country with judicial specialisation, specialised courts are represented by unique institutions.

6 V Timashov, 'Some issues of the judicial system in Ukraine on the way to further reform' (2016) 2 National Law Journal 66.

7 A Biletska, 'General characteristics of the implementation of the principle of specialization of judges' (2016) 1 L&S 16.

8 H Gramckow, B Walsh, 'Developing specialized court services international experiences and lessons learned' (2013) <https://openknowledge.worldbank.org/handle/10986/16677> accessed 9 February 2022.

9 M Zimmer, 'Overview of specialized courts' (2009) 2(1) International Journal for Court Administration 49.

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One of the criteria for dividing specialised courts is specialisation in relation to the subjects acting as a party to the case. Thus, specialised courts consider cases against minors and military personnel, as well as land, administrative, tax, customs, commercial cases, etc. The judges of these courts, in addition to a legal education, usually have further training, for example, pedagogical training for the consideration of cases of minors. Another criterion for dividing specialised courts should be specialisation in relation to substantive relations that are the subject of the dispute. According to this criterion, labour, social, administrative, financial, military, administrative, and other courts can be distinguished – the legal relationship itself is important for subject specialisation.

The functioning of specialised courts is a scientifically sound, legally conditioned requirement of the time. It meets the modern needs of society for effective and professional protection of rights, freedoms, and legally protected interests of persons and legal entities in a state governed by the rule of law. Specialised courts are formed at different stages of the construction and development of the judicial system, depending on the existing needs and public funding opportunities. The establishment of specialised courts is one of the means of improving the efficiency of the judicial system, unloading it, and ensuring adequate judicial administration.[10] It should be noted that during the judicial reform, it is important for Ukraine to study the experience of the judicial branch of government in foreign countries.[11] Taking into account the European integration course of Ukraine, it is necessary to consider the experience of the member states of the EU when considering judicial specialisation.

2 SPECIALISED COURTS WITHIN THE METHODOLOGICAL FRAMEWORK AND INTERNATIONAL DISCUSSION

The problems of specialised courts in Ukraine have been studied by a number of scholars. E. Silantyeva notes that the discussion on the specialisation of the judicial system of Ukraine began in the initial stages of judicial reform in 1992, when its tasks were proclaimed, namely:

> 1) by effectively delineating the powers of the judiciary to guarantee their independence and independence from the legislative and executive branches of government;
>
> 2) to implement the democratic ideas of justice, developed by world science and practice;
>
> 3) to create such a system of legislation on the judiciary, which would ensure the independence of the judiciary;
>
> 4) gradually specialize courts;
>
> 5) bring them as close as possible to the population;
>
> 6) clearly define the competence of different levels of this system;
>
> 7) guarantee the right of a citizen to have his case considered by a competent, independent and impartial court.[12]

10 O Salenko, 'The principle of specialization in the national judicial system' (2018) 3 Bulletin of Criminal Proceedings 95.

11 I Lisna, 'Foreign experience in the functioning of judicial systems and the possibility of its use during judicial reform in Ukraine' (2018) 1 Relevant Problems of Law: Theory and Practice 125.

12 E Silantyeva, 'The principle of specialization in the judicial system of Ukraine at the new stage of judicial reform' (2011) 116 Legality Issues 5.

It was also proposed to create a separate system of administrative courts, as well as to reform the system of military proceedings. Gradually, step by step, these tasks were implemented.

L. Nesterchuk studied the principle of specialisation in the construction of the judicial system of Ukraine. In particular, under specialisation as a principle of judicial construction, he defines

> the creation of judicial units that are hierarchically organized, with different competence, whose task is to resolve legal disputes in certain areas of substantive law (criminal, civil, administrative, commercial).[13]

The principle of specialisation of courts has been studied by other scholars. For example, O. Namyasenko studied the constitutional and legislative consolidation of judicial specialisation.[14] O. Salenko analysed the principle of specialisation in the national judicial system.[15] A. Biletska considered the general characteristics of the implementation of the principle of specialisation of judges.[16] O. Rudenko noted that European countries are characterised by wide application of the principle of internal specialisation of judges by enshrining at the legislative level a provision on the mandatory establishment of branches (chambers) in the court structure to consider certain categories of cases or the possibility of such specialisation.[17]

The organisation and functioning of specialised courts have recently become the subject of special attention in Ukraine and abroad. The main task of this study was to make a comparative analysis of the function and legal basis of specialised courts among the member states of the EU and in Ukraine. That is why the article is devoted to the analysis of the practice of the member states of the EU and Ukraine in the field of legal regulation of the activities of specialised courts.

In order to analyse the problems of scientific research, a set of different general scientific techniques and methods were used in the work. In particular, the authors used analysis and synthesis, generalisation, modelling, and others. The method of systematic analysis and synthesis was used to identify the main features of specialised courts of Ukraine and the member states of the EU.

In addition, special legal methods were used in the article, such as conceptual-legal, comparative-legal, formal-legal, and others. The leading method in this research was the comparative-legal method. It helped the authors compare the features of the practice of other countries in the field of specialised courts, as well as identify how this issue is regulated in different countries at the legislative level. Information and knowledge gained from the experience of different countries can be used as a basis for the adoption, adaptation, and development of new relevant provisions in Ukraine.

The normative legal basis of the study consisted of the Constitution of Ukraine, Ukrainian legislation, and foreign legislation governing the functioning of specialised courts.

The methodological foundations of the study of the nature, genesis and system, structure, and functions, as well as the functioning of specialised courts, have been studied by many scholars. The conclusions drawn in the work are based on the synthesis of methodological

13 L Nesterchuk, 'The principle of specialization in the construction of the judicial system of Ukraine' (2017) 2 Scientific Bulletin of Kharkiv State University 162.

14 Ibid., 15.

15 Ibid., 11.

16 Ibid., 7.

17 O Rudenko, 'Peculiarities of realization of principles of construction of judicial system in the organization of activity of local general courts in Ukraine' (2020) 3 Legal Scientific Electronic Journal 504.

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approaches and theoretical solutions proposed in the works of Ukrainian scholars in particular. Despite the broad theoretical development of this problem, the study of the activities of specialised courts in a comparative aspect still requires further analysis.

3 A SPECIALISED COURTS AS AN URGENT NEED FOR THE STATE DEVELOPMENT OF UKRAINE

A specialised court is a state judicial body that administers justice, resolves disputes, and considers specific categories of cases that have their own specific subject matter and procedure for considering cases, subject to jurisdiction, in civil, administrative and criminal proceedings, etc. It should be noted that the current stage of judicial reform, which was marked by significant changes in the judicial system of Ukraine, as well as the creation of a specialised anti-corruption court, needs further changes not only for the state development of Ukraine but also due to its international obligations.[18]

In accordance with Art. 125 of the Constitution of Ukraine[19] and Art. 17 of the Law of Ukraine 'On the Judiciary and the Status of Judges',[20] the basic principles of building the judicial system of Ukraine are the principles of territoriality, instance, and specialisation. In this regard, it should be noted that the principle of specialisation is fundamental to the organisation of any of the specialised courts since, on this principle, courts of general jurisdiction specialise in civil, criminal, economic, and administrative cases, as well as cases of administrative offences, corruption offences, and offences in the field on intellectual property.[21] Based on this, the implementation of this principle allows for the legal regulation of social relations of certain types.

It should be noted that the new Law of Ukraine 'On the Judiciary and the Status of Judges' was adopted in 2016.[22] In this respect, it is interesting to analyse the recently established High Court on Intellectual Property and the High Anti-Corruption Court. Today, there is no single position on the establishment of the High Court on Intellectual Property. On the one hand, it is noted that the number of lawsuits that could be classified as intellectual property cases is small, which also confirms the inexpediency of creating a separate court. This further emphasises the 'artificiality' of creating higher specialised courts, which further confuses consumers of judicial services – ordinary citizens.[23] On the other hand, scholars point out that specialised intellectual property courts are a practice followed by many foreign countries (the United Kingdom, Germany, Switzerland, Finland, etc.) and are a well-established approach to intellectual property justice organisations when considering the specifics of the objects.

18 L Nesterchuk, 'The principle of specialization', 15

19 Law of Ukraine 'The Constitution of Ukraine' (1996) <https://zakon.rada.gov.ua/laws/show/254k/96-vr> accessed 22 December 2021.

20 Law of Ukraine 'On the Judiciary and the Status of Judges' (2016) <https://zakon.rada.gov.ua/laws/show/1402-19#Text> accessed 22 December 2021.

21 SI Glodan, 'The state and problems of corruption in Ukraine' (2019) <https://pzmrujust.gov.ua/yurydychni-konsultatsii/464-stan-i-problemy-koruptsii-v-ukraini> accessed 22 December 2021.

22 Law of Ukraine 'On the Judiciary and the Status of Judges' (2016) < https://zakon.rada.gov.ua/laws/show/1402-19#Text > accessed 22 December 2021.

23 Supreme Court of Ukraine 'Opinion of the Supreme Court of Ukraine on the draft Law of Ukraine 'On the Judiciary and the Status of Judges' (2016) <https://www.viaduk.net/clients/vsu/vsu.nsf/b580 56fd9c7f6dc4c225745700474565/2dbe64236e27ca66c225804200312dd2?OpenDocument>accessed 22 December 2021.

We agree with the expediency of establishing specialised courts for intellectual property matters. We share the opinion of Yu. Kanaryk and V. Petliuk, who note that the availability of technical education for judges of the High Court on Intellectual Property would be appropriate since, in almost all patent courts of foreign countries, such a requirement for judges exists, which saves a lot of money and time.[24] For example, in Germany, the judiciary of the Federal Patent Court includes so-called 'technical judges' who have a technical and legal education. Judges of the patent courts of the United Kingdom and Switzerland must also have two educations: technical and legal.

The territorial remoteness of the High Court on Intellectual Property remains a problematic issue (all cases will be considered in Kyiv, which will affect access to justice for citizens, especially in this category of cases).[25]

On 5 September 2019, the High Anti-Corruption Court of Ukraine began its work. During the five years since its creation, Ukrainian society has maintained a steady demand for the fight against corruption. The task of the High Anti-Corruption Court is to administer justice in accordance with the principles and procedures of justice provided by law in order to protect individuals, society, and the state from corruption and related criminal offences and judicial control over the pre-trial investigation of these criminal offences, observance of the rights, freedoms, and interests of persons in criminal proceedings, as well as resolving the issue of recognising unfounded assets and their recovery into state revenue in cases provided by law and in civil proceedings.[26]

However, today, there is no single position on the establishment of the High Anti-Corruption Court of Ukraine. For example, S. Shevchenko and N. Sidorenko note that the Supreme Anti-Corruption Court of Ukraine is by nature a specialised judicial institution, which was created to consider a special list of cases that increases the efficiency of justice in these categories of cases.[27]

Many scholars point out that there are some expert comments on the feasibility of establishing a High Anti-Corruption Court. Negative feedback on the establishment of the High Anti-Corruption Court is heard in particular from representatives of the High Qualifications Commission of Judges and the High Council of Justice. Opponents of the creation of a separate anti-corruption court highlight the following main shortcomings: 1) the small number of cases under investigation by the National Anti-Corruption Bureau of Ukraine, which makes it inappropriate to create a separate court; 2) to some extent, the inconsistency of Art. 125 of the Constitution of Ukraine, which stipulates that the judicial system in Ukraine is built on the principles of territoriality and specialisation, and the creation of emergency and special courts is not allowed; 3) the absence of a separate procedural law for anti-corruption proceedings suggests that such a Court is not specialised in understanding the concept of external specialisation; 4) the need for high budgetary and time costs for the establishment of a new judicial body and its maintenance, compared to the creation of separate chambers in the current courts.[28]

24 Yu Kanaryk, V Petliuk, 'Relevant issues of establishing a Hight court on intellectual property issues' (2017) 5 Legal Scientific Electronic Journal 68.

25 Yu Kanaryk, M Bank, 'Jurisdiction of the court on intellectual property issues' (2018) 6 Young Scientist 186.

26 S Prylutskyi, O Strieltsova, I Nurullaiev 'Judicial Specialisation Through the Prism of the Principle of a "Natural Court": A Comparative Analysis' 2022 1(13) Access to Justice in Eastern Europe 113.

27 S Shevchenko, N Sidorenko, 'The essence of the concept of political corruption and its danger in Ukraine' in Discussion Issues of Application of Anti-Corruption Legislation: Materials International. Scientific-Practical Conf. (DDUVS, 2019).

28 K Rostovska, 'Problematic issues of creating anti-corruption courts in Ukraine' (2017) 2 Legal Position 159.

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The expediency of establishing this body remains questionable because if we analyse the international experience of anti-corruption courts, none of them met expectations and did not become part of the country's anti-corruption system that would be decisive in the fight against corruption within the state. As for the experience of European countries in creating such courts, they operate in only three countries: Bulgaria, Slovakia, and Croatia. However, no leading country has created or envisaged the creation of such a body, so the question of the expediency of establishing such a court on the territory of Ukraine remains open.[29] Although the courts of Ukraine practice the specialisation of courts for juvenile delinquency, it would also be appropriate to create specialised courts based on subjective criteria.[30]

4 THE EXPERIENCE OF EUROPEAN COUNTRIES IN THE CONTEXT OF JUDICIAL SPECIALISATION

In contrast to Ukraine, there are countries in the EU that do not have any specialised first instance courts,[31] such as Andorra, Bosnia, Herzegovina, and the Czech Republic. The countries with fewer than five specialised courts are Denmark, Estonia, Ireland, the Netherlands, Lithuania, Malta, Moldova, Montenegro, Macedonia, Romania, Slovakia, Slovenia, Austria, and Norway. Among the countries that have a relatively high number of specialised courts, the most numerous specialised courts are also different in nature. For instance, most of the specialised courts in Belgium are the justices of the peace, Croatia has misdemeanour courts, and several countries have a whole range of 'specialised' jurisdictions. Cyprus has specialised criminal courts, family courts, military courts, rent control tribunals, and industrial dispute tribunal; Finland has administrative courts, market courts, labour courts, and insurance courts; Spain has labour courts, administrative courts, juvenile courts, commercial courts, family courts, mortgage courts, warship courts, and violence against women courts; Switzerland has the *tribunal des baux et loyer, the tribunal de prud'hommes*, administrative courts, social courts, minor courts, economic courts, a specialised federal criminal court, and a specialised federal administrative court.[32]

In Germany, in accordance with Art. 95 of the Basic Law of Germany,[33] the justice system is represented by five areas: general, labour, social, administrative, financial, which have their own independent court system and their own high court. These are the Federal Supreme Court, Federal Labor Court, Federal Social Court, Federal Administrative Court, and Federal Financial Court. Germany also has disciplinary, military, and patent courts.

The jurisdiction of the administrative justice is represented by the Federal Administrative Court, which includes the consideration of claims of citizens against state bodies and employees on the observance of civil rights, disputes between civil servants and the administration on issues of their rights, and disputes between administrative-territorial

29 B Prokopiv, 'The specifics of the functioning of the High Anti-Corruption Court in Ukraine: international experience and Ukrainian realities' (2018) 3 Relevant Problems of Jurisprudence 103.

30 Ibid, 17.

31 A Uzelac, 'Mixed blessing of judicial specialisation: The devil is in the detail' (2014) 4 RLJ 147.

32 Ibid.

33 Constitution of the Federal Republic of Germany (1949) <https://www.bmi.bund.de/EN/topics/constitution/constitutional-issues/constitutional-issues.html#:~:text=The%20current%20version%20of%20the,the%20Federal%20Republic%20of%20Germany.&text=The%20Basic%20Law%20was%20adopted,the%20state%20until%20German%20reunification> accessed 9 February 2022. See also <https://www.bverwg.de/en/das-gericht > accessed 9 February 2022.

units, as well as complaints on issues related to the issuance or refusal to issue a permit for holding mass events, etc. Administrative courts are thus called upon to resolve disputes of a public law nature and to protect citizens in relations with bodies and institutions of state power.

They are organised in a three-step system. Each land has only one second instance court; however, in some cases, the two lands may create a joint second instance court. Land administrative courts include courts of first instance and second instance. The supreme body in this area is the Federal Administrative Court, which mainly serves as a cassation instance. The bulk of cases is considered by courts of second instance. In addition to those named in the land, there are so-called specialised administrative courts, for example, the Patent Court, which is represented by the Patent Office of the Federal Republic of Germany.

There is also financial justice represented by the Federal Financial Court, which is the highest court, and the lower courts. They are in charge of disputes over taxes and fees. Labor Justice, represented by the Federal Labor Court and the Land Labor Courts, deals with disputes arising in the field of labour relations, i.e., between employers and employees, as well as between trade unions and employers. Labour courts have collegia consisting of one professional and several (two or four) honorary judges. The competence of social courts, consisting of land social courts and the Federal Social Court, includes a set of issues related to social benefits, pensions, unemployment insurance, etc. All these bodies are independent in relation to each other and to other bodies.

In France,[34] along with the courts of general jurisdiction, there is a fairly large number of courts that can be called specialised. They function in the field of both civil and criminal law. In the literature, it is possible to find their other name – tribunals. Most civil courts are not professional judges, but judges elected or appointed from the areas where disputes arise, that is, those who understand the essence of the issue more deeply. France has *conseils des prud'hommes*, commercial courts, minor courts, social courts, and *tribunaux paritaires des baux ruraux*. Special jurisdictions include councils of law courts (labour disputes), various criminal courts (for example, in juvenile cases), maritime, military, and administrative courts. Commercial courts belong to the same category (there are 191 of them on the territory of mainland France), consisting of three members, elected by the merchants themselves.

They are composed of professional judges in the field of commerce, elected by merchants from among those who have been in business for at least five years. Usually, commercial courts are created in cities as needed and are named after that city. The competence of merchant courts covers three types of disputes: arising from obligations, from transactions between entrepreneurs, merchants, and bankers; between members of partnerships; from trade transactions between any persons; cases related to the liquidation of enterprises, etc.

Labor disputes are resolved by conciliatory conflict councils (*conseils des prud'hommes*). They handle labour disputes between employees and employers. They are formed on a parity basis from elected members (two from employers and two from employees), and if necessary, to overcome the equality of votes, a judge of a tribunal of a minor instance joins them. Specialised courts in Sweden, with the exception of a special branch of administrative justice, do not represent any special bodies but in fact are the same general civil court in a special composition (this applies, for example, to the courts for land ownership and environmental courts). Standing apart is the country's only Labor Court

34 About the judiciary in France see more in < http://www.justice.gouv.fr/organisation-de-la-justice-10031/> accessed 9 February 2022.

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with 17 members (three of them are labour market experts, the rest are representatives of entrepreneurs and trade unions). Administrative justice has a similar structure to civil courts: 23 district administrative courts, four administrative courts of appeal, and the Supreme Administrative Court.

One of the specialised courts in Denmark,[35] which carries an important burden for the country, is the Maritime and Commercial Court in Copenhagen, whose decisions are appealed by the Supreme Court. At the same time, there is no separate administrative justice in this country: it is replaced by control tribunals and commissions functioning within ministries but not subordinate to a specific minister. Thus, in sum, it should be noted that the key advantage of specialised courts is the specialisation of judges, which allows for more detailed study of the substantive and procedural features of the consideration of certain categories of cases.

At the EU level, there is no common standard for establishing requirements for the specialisation of courts in the member states. Moreover, in some EU countries, there is no specialisation of courts at all. Taking into account Ukraine's European integration aspirations, it is important to bring the standards of Ukraine's judicial system into line with the principles of exercising judicial power established at the EU level.[36]

However, in the judicial systems of the EU member states, there are certain trends in the specialisation of courts, which include: the expansion of judicial specialisation, which provides professional consideration of certain categories of cases in a complex legal relationship; expansion of the competence of the courts of first instance to consider minor categories of cases that constitute a separate part of the judicial system with the use of simplified and shortened court procedures; narrowing the competence of military courts with the transfer of all cases with the participation of servicemen to general courts and with the gradual liquidation of military courts; the establishment by the state of judicial and extrajudicial control over military proceedings in states, where it still exists; for higher courts (courts of appeal, courts of cassation) it is more typical to see internal judicial specialisation, which is implemented through the formation of appropriate specialised judicial panels; specialised courts of first instance join the system of courts of general jurisdiction at the highest level of the judicial system by reviewing decisions of a specialised lower court in a court of first instance, an appellate court or a court of cassation of general jurisdiction.[37]

It should be noted that the work of specialised courts may be associated with the need to apply other social regulators in addition to the law and the use of non-legal knowledge in the field of psychology, pedagogy, information technology, economics, accounting, and so on. Therefore, as judges of specialised courts, citizens who have not only legal education and work experience in the legal profession but also special knowledge, create optimal conditions for the consideration of cases for participants in the trial, in particular minors, as well as persons with a special status, such as military personnel, employees, employers, etc., taking into account the peculiarities of legal relations in specific areas, which can be expressed in the creation of special procedures for considering cases correspond to the specifics of certain social relations, reduction of miscarriages of justice, and uniform enforcement among specialised courts.

35 More about national specialized courts see here < https://e-justice.europa.eu/content_specialised_courts-19-dk-en.do?member=1 > accessed 9 February 2022.

36 OV Shcherblyuk, 'Procedures of formation and liquidation of court in Ukraine: problems and prospects' (2020) 3(2) Scientific Bulletin of Public and Private Law 193.

37 G Butler, 'An interim post-mortem specialized courts in the EU judicial architecture after the civil service tribunal' (2020) 17(3) IOLR 589.

5 CONCLUSIONS

The presence of certain specialised courts, their systems, and their competence in each state are determined by historical, political, and social characteristics, financial capabilities, the degree of prevalence of cases of a particular category, and many other factors. As the judicial system evolves, the category of cases under consideration becomes more complex. This inevitably leads to the formation of specialisation, which mainly depends on the category of the case. Participation in legal relations regulated with the participation of the court, in which one of the parties is the institutions of power, both state bodies and local authorities, sets the trend for the formation of specialisation of judges and even the creation of specialised types of courts that have jurisdiction over cases of a certain category. Thus, specialisation is both the basis for building the judicial system of the state and an important means of its dynamic, progressive development.

The importance of specialisation in the administration of justice is significant. First, it is conditioned by the need to apply in-depth specialist knowledge in a specific area of justice. Second, specialisation is driven by the need to improve the efficiency of justice. This means that judicial specialisation will reduce the judicial burden and help to increase the competence and professionalism of judges. The division of courts into courts of general and special jurisdiction is based on a common criterion: the type of justice. But this does not exclude a more detailed differentiation in relation to the category of cases on the scale of the same type of justice. In the practice of modern states, there is both the fragmentation of the judicial system into many different types of courts and the existence of general courts with the presence of specialisation of judges to resolve a certain category of cases.

The deep penetration of the principle of specialisation into the judicial system of Ukraine has led to the formation of such a significant number of specialised courts. Currently, courts of general jurisdiction of Ukraine specialise in civil, criminal, commercial, and administrative cases, as well as cases of administrative offences. In the judicial system, there are also higher specialised courts as courts of first and appellate instance to hear certain categories of cases. The higher specialised courts are the High Court on Intellectual Property and the High Anti-Corruption Court. Higher specialised courts hear cases that fall within their jurisdiction.

Ukraine should take an experience from Germany, the United Kingdom, and Switzerland in the sphere of functioning of the High Court on Intellectual Property. Their judges must have two educations – technical and legal. The disadvantages of creating a High Anti-Corruption Court are: 1) the small number of cases, which makes it impractical to create a separate court; 2) to some extent, the inconsistency of Art. 125 of the Constitution of Ukraine, which stipulates that the judicial system in Ukraine is built on the principles of territoriality and specialisation, and the creation of emergency and special courts is not allowed; 3) the absence of a separate procedural law for anti-corruption proceedings indicates that such a Court does not specialise in understanding the concept of external specialisation; 4) the need for high budgetary and time costs for the establishment of a new judicial body and its maintenance compared to the establishment of separate chambers in existing courts. As for the experience of European countries in creating such courts, they operate in only three countries: Bulgaria, Slovakia, and Croatia.

To conclude, it should be noted that the experience of creating specialised courts globally is huge at the moment. Correctly adapting and applying it to Ukrainian realities is the task of the state. The development of the judicial system in many of its aspects will definitely improve the administration of justice in Ukraine.

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Reform Forum

EFFECTIVE DISPUTE RESOLUTION FOR A SOCIAL-LABOUR PARTNERSHIP: THE EXPERIENCE OF UKRAINE

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Keywords: *social partnership, collective bargaining, social dialogue, labour relations, court proceedings, socio-economic development*

ABSTRACT

Background: *The further democratic development of Ukraine requires the formation of the ideology of social partnership, which is a form of social interaction of many state institutions and social groups of civil society that allows them to express their interests freely and find civilised ways to harmonise and implement them. An important task is the development of social partnership to ensure justice in the field of labour relations. Social partnership and its tools are recognised worldwide as the most civilised way to reconcile the interests of employees, employers, and the state.*

Methods: *The research methods were chosen based on the purpose and objectives of the study, its object, and subject. During the research, philosophical, general scientific, and special legal methods of scientific cognition were used. The purpose of the study is to identify the features of the prospects for developing a mechanism of social partnership in terms of reforming all spheres of public life in the context of social security and identify features of social and labour partnership within court proceedings in Ukraine.*

Results and Conclusions: *The authors argue that the effectiveness of social partnership depends on how fully it is integrated into the management system of the socio-economic development of the state. The labour legislation of Ukraine needs to be improved. In particular, a special law covering individual contracts (agreements) in flexible forms of employment must be adopted.*

1 INTRODUCTION

Social partnership is a necessary condition for the formation of civil society in a market transformation. In many countries with economies in transition, social partnership is still under development, and many social problems remain unresolved not only due to the lack of necessary financial resources but also due to a lack of initiative and coordination between civil society, government, and business. At the same time, building a platform for dialogue and identifying prospects for cooperation is essential in the development of social partnership and outlining its forms.[6]

The development of the social partnership system as one of the forms of regulation of social and labour relations at the present stage of market transformations in Ukraine is a very urgent problem. The very idea of social partnership occupies an important place in the scientific analysis of modern society, the evolution of labour relations, and legislative practices in many countries. In addition, for Ukraine, social partnership is an institutional mechanism through which the subjects of social and labour relations learn new social roles and patterns of behaviour in the regulation and coordination of interests. The formation of market relations in our country is closely connected with the processes of Ukraine's integration into the European Union (EU), whose countries have been using the principles of social partnership for a long time and actively.[7]

6 O Kostyuchenko, 'The essence of social partnership' (2017) 1 BNTUUKPIPSSL 78-82.

7 L Ostapenko, 'Legal regulation of employment of the population of Ukraine' (2016) 1 (2) SBKSUSLS 86-88.

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Establishing the function of the social partnership system in Ukraine is a guarantee of maintaining an appropriate level of competitiveness for employees and creating social dialogue in society. Thus, it is relevant at the present stage of development of the domestic economy to study the peculiarities of the formation of social partnership in Ukraine and identify shortcomings in the functioning and development of prospects and areas for further improvement.

Effective social partnership is an integral part of the labour market and social policy at the national, regional, sectoral, and microeconomic levels. Its development both depends on and leads to the improvement of the socio-economic situation, the growth of wages and employment, respectively, the reduction of unemployment and poverty, and the improvement of legislation in the field of social policy. Through the prism of the implementation of social partnership mechanisms, the role of social and human capital, the degree of integration and development of society, and the level of development of corporate governance can be traced.

The model of the welfare state is attractive because it guarantees economic freedom and recognition of the right of entrepreneurs and employees (their representatives) to tariff autonomy. This principle is the basis for the regulation of social and labour relations through the negotiation process and the development of agreements through a system of social partnership with the mandatory participation of the state in the legal provision of conditions for this.[8] In addition, the model of the welfare state assumes industrial democracy, i.e., employee participation in the management of the organisation: the development and implementation of socio-economic decisions regarding pay and labour conditions and prospects for the organisation, which creates conditions for employee interest in collective results. Even though nowadays, social partnership as a basis for conflict-free regulation of social relations in economically developed countries is based on general principles, the evolutionary nature of social partnership has led to differences between models of social partnership in different countries due to national characteristics and the implementation of social partnership in the respective state.[9]

The aim of the present article is to identify the peculiarities of the formation and prospects of forming a model of social partnership as a prerequisite for the development of a socially oriented economy in Ukraine. The growing interest of scientists in the problem of social partnership is natural for our country, which has faced social contradictions and conflicts on the way to the transition from an administrative-command economy to a market model of management

2 SOCIAL PARTNERSHIP WITHIN THE NATIONAL LEGISLATION OF UKRAINE

The basis of social harmony in industrial and post-industrial society is the consideration and reconciliation of the interests of different social groups, strata, and classes. This task is best solved through social partnership. The system of social partnership is based on the coordination and protection of the interests of different social groups. Recognising the difference, diversity, and insecurity (in isolation) of the interests of individual social groups, strata, and classes, partnerships also involve awareness of the need for interaction, interdependence, and the impossibility of existence without each other.

8 S Synchuk, 'Model of the national social security system in the context of the European direction of Ukraine's development' (2016) 8 LU 17-23.

9 V Sydorenko, I Shorobura, A Ponomarenko, M Dei, O Dzhus, 'Application of technologies of formal and non-formal education for continuous professional development of the modern specialist' (2020) 13 (32) RTEE 1-24.

Social partnership provides for the provision of appropriate rights to various social groups, strata, and classes to participate in political and economic processes of development and decision-making on topical issues of society. Social partnership is a special type of social relation and a natural result of a developed, socially oriented economy. Thus, it is an important indicator of the economic, social, and political maturity of a society. In an industrialised society with a market economy, there is a need to move towards social partnerships in the field of labour due to a number of economic and social factors.

In a general sense, social partnership is a system of relations between employees (mostly trade unions), employers and their associations, and the state and local governments, which is expressed in mutual consultations, negotiations, and conciliation procedures on mutually agreed principles to respect the rights and interests of each party. Social partnership is a recognised global form of reconciling interests and increasing the social responsibility of the parties and subjects of social dialogue (employees, businesses (employers), the state, civil society institutions).

'Business' in the system of social partnership means the owners, entrepreneurs, employers, and their authorised persons, as well as a set of structures and institutions of the market economy that provide the production and distribution of goods and services and meet the needs of individuals, social groups, and society as a whole. It would be useful for participants in social dialogue, and especially businesses and government agencies, to remember the existence of the so-called 'iron law of responsibility', which was formulated in the 1970s by the famous American scientist K. Davis. The essence of this law is as follows: 'Ultimately, those who use power in a way that society considers responsible may lose it'.[10]

According to many scientists, an important prerequisite for the implementation of social partnership in modern conditions is its foundation on the principles of social responsibility. However, some scholars identify corporate social responsibility with social partnership. In particular, these arguments are based on the statement that social partnership is one of the most effective means of forming a system of social responsibility, and the latter can be considered, on the one hand, as a result (or one of the results) of social partnership, and, on the other, as a prerequisite for success. The feasibility and effectiveness of social responsibility at the micro level are confirmed by many different studies that have shown a positive effect of the implementation of social responsibility for reputation, achieving competitive advantage, and one of the main goals of its operation: profit maximisation. Studies conducted by the American consulting companies Walker Information and Council on Foundations have confirmed the hypothesis of the impact of social factors, on a par with financial and economic, on the company's core business performance.[11]

The main purpose of social partnership is to ensure the sustainable development of social and labour relations. Thus, it is important to determine the conditions under which such development may be possible. The modern concept of social partnership was established in the legislation of a number of European countries (Germany, Austria, Scandinavia) in 1960 as a result of many years of searching for effective forms of regulation of social and labour relations. Experts from the International Labor Organization (ILO) define social partnership as a mechanism by which employers, workers' representatives, and governments develop a set of agreed and multilateral issues to address socio-economic issues by finding compromises. In the West, social partnership is seen as a concept that characterises the principle of organisation of society, which regulates the joint work of social partners – the parties to social and labour relations.[12]

10 L Borysova, 'Problems and prospects of social partnership development in Ukraine' (2016) 3 ES 350-354.

11 L Mogilevsky, 'To the problem of defining the concept of "social partnership"' (2018) 1 BCFNUOLA 96-106.

12 Ibid.

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Ukrainian researchers propose to consider social partnership in several aspects: as a principle of activity of the subjects of collective labour relations (in the broad understanding of the term) and as a legal institution (in the narrow understanding of the term), which is a set of rules governing the competence of specially trained bodies (obviously, one of these bodies is the National Mediation and Conciliation Service). In view of this, the goals of social partnership in the labour sphere are: the formation of a mechanism of collective bargaining regulation of social and labour relations; ensuring employment and social protection, labour protection, and safety; the professional training of employees; the preservation of the labour potential of society; a gradual increase in employee incomes based on productivity growth; and increase production efficiency.[13]

Models of social partnership in Ukraine have the following characteristics. First, there is the existence of special bodies that would coordinate the activities of the parties to social and labour relations, such as the National Council of Social Partnership, a special advisory body under the President of Ukraine. The creation of the National Council for Social Partnership was to promote the formation and better coordination of employers' organisations, giving them a more active role in solving problems of social and labour relations. The National Council consists of an equal number of plenipotentiaries of the parties to the social dialogue at the national level and unites 60 members who exercise their powers on a voluntary basis: 20 trade union members who are delegated by representative unions of all-Ukrainian unions; 20 members of the employers' party, who are delegated by representative associations of employers' organisations, which are all-Ukrainian; 20 members of the executive bodies appointed by the Cabinet of Ministers of Ukraine.[14]

The Regional Council of Social Partnership has the function of creating a common policy in the most important areas of socio-economic development of the region and is the coordinator of joint actions of the parties and their implementation. One of the areas of this work was the conducting of tripartite consultations and negotiations focusing on the adoption of agreed decisions on socio-economic protection of relations between workers and workers, reducing social tensions, and preventing the emergence of collective labour disputes. An exchange of views takes place during the negotiations.

The most developed and important form of social partnership is collective bargaining, which is aimed at resolving individual labour relations, but this form mainly operates only in large enterprises of state and mixed ownership. Many private companies still do not have such agreements. A lack of collective agreements, weak control by trade unions over the implementation of the provisions of collective agreements, a significant percentage of unregistered agreements with local authorities, i.e., that have no legal force, and a lack of accountability measures for managers who evade signing and execution complicate social relations. Thus, the low level of collective bargaining in the regions is one of the reasons for the emergence of collective labour conflicts.[15]

The ideology and culture of social partnership are spreading in the state and social awareness, and certain normative-legal and organisational mechanisms of formation of the system of social partnership are being created. The organisational mechanism of the social partnership system consists of collective agreements at enterprises and the existing system of agreements – the General Agreement and sectoral and regional agreements. The economic mechanism

13 N Gabelko, 'Social partnership: the main element and method of social management of society' (2015) 4 TS 100-107.

14 I Sydoruk, 'Social partnership in the formation of competence of future social workers' (2020) 102 (2) NPT 80-83.

15 A Amirkhanyan, 'Social partnership as a regulator of labor relations' (2015) 2 (13) MYV 91-95.

of the social partnership system is a set of economic conditions that affect the subjects of government. The effect of this mechanism should be manifested in the emergence of the subjects of management liability and interest in the implementation of requirements that have been fixed in collective agreements and contracts. The social mechanism of the social partnership system is a set of psychological attitudes that characterise society's attitude towards the idea of social partnership.[16]

Ukraine adopted the Law of Ukraine 'On Social Dialogue'[17] in 2010. This law defines the legal basis for the organisation and procedure of social dialogue in order to develop and implement state, social, and economic policies, regulate labour, social, and economic relations and improve the standard and quality of life of citizens and social stability in society. The law stipulates that social dialogue is a process of defining and converging positions, reaching joint agreements, and making decisions by the parties to the social dialogue representing the interests of employees, employers and executive authorities, and local governments on the formation and implementation of state social and economic policy and the regulation of labour, social, and economic relations.

The specifics of the formation of social partnership relations in Ukraine at the present stage is their formation in terms of the abandonment of a centralised (state) regulation of labour relations, as well as changes in ownership associated with the privatisation process in various fields. Weakening state intervention in social relations and the formation of a new sector of the economy independent of the state significantly increase the role of local (contractual) regulation, in which contractual forms of establishing the rights and responsibilities of participants in the social process are crucial. This model is based on socio-cultural heritage and the realities of a market economy.

The large number of formal procedures for the interaction of social partnership actors, the lack of a regulatory framework, and the low level of self-organisation of workers and civil society in general make this model quite vulnerable to pressure from the authorities concerned. The system of interaction of institutions representing the interests of the parties is developing at regional and territorial levels. Thus, the Ukrainian model of social partnership is characterised by pronounced regional features.[18]

It should be noted that today, the social partnership system in Ukraine is not fully formed, and traditional reasons for low efficiency can be considered, mainly the underdevelopment of some elements of the social partnership system (legislative, organisational, socio-economic, etc.) at both state and regional levels. Therefore, government officials need to develop the main legislative provisions for the formation of Ukrainian integrated corporate structures and the procedure for applying their innovation and investment potential. The state should pay attention to the development of corporate legislation, which needs to be reformed in Ukraine.

The low efficiency of trade unions as the primary links to protect the interests of employees is due to several factors. First, there is the imperfection of the content of collective agreements, which does not cover all the important aspects of social relations. In addition, the process of collective bargaining involves an insufficient number of employees – the signing of collective agreements does not guarantee their fair implementation, which is sometimes associated with incompetence and reluctance of social partners to reach a compromise. There is also the inability of employees to

16 N Romanova, I Melnik, Social partnership (National Pedagogic Dragomanov University 2017).

17 Law of Ukraine No 2862-VI 'On Social Dialogue in Ukraine' (2010) <https://zakon.rada.gov.ua/laws/show/2862-17#Text> accessed 2 February 2022.

18 O Ostapenko, L Ostapenko, O Khytra, M Tsvok, S Vasyliv, 'A modern vision of methodological approaches in regulation of labor relations' (2019) 10 (7) JARLE 2070-2076.

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actively influence the formation of socially responsible employer behaviour. Further improvement of the social partnership system in Ukraine implies the need to develop an organisational and economic mechanism to increase the efficiency of the social partnership system.[19]

Today in Ukraine, the development of forms of social partnership is hampered by political and socio-economic factors. In particular, the legal framework for social partnership in Ukraine is underdeveloped. Its imperfection, as well as the violation of the rights of working citizens by employers, are causes of serious social and labour conflicts, which could be prevented by establishing adequate legal mechanisms. It is difficult to imagine overcoming such a situation without the presence of state legal regulation and the formation of a regulatory framework that would ensure the avoidance of social conflicts between the parties to social partnerships and contribute to their improvement. In this regard, it is especially important to develop and provide recommendations for the improvement of social partnership in Ukraine.

Various transformational changes in our country have led to a change in attitudes towards social partnership. The sharp division of citizens by income, the presence of socially vulnerable segments of society, the desire to move away from the established paternalism of the state of the previous historical epoch – all these situations required new approaches to the whole sphere of social policy. The state began to actively promote the ideology of social partnership as an attribute of a modern market economy and successful national development. Social partnership is designed to ensure civil peace in the context of radical market reforms and the principles of market development of the national economy.[20]

Studies of social partnership in Ukraine have shown that the following problems are inherent in our state: 1) the dominance of paternalistic sentiments in the minds of the citizens of Ukraine; 2) the weakness of trade unions as a representative and defender of the interests of workers and the social dialogue; 3) the dominance of employers in the process of social dialogue; 4) overcoming the negative impact of the actual inequality of the parties to the social dialogue; 5) overcoming the formal nature of the collective bargaining process; 6) strengthening the responsibility of the social partners for non-compliance with their collective agreements and contracts; 7) ensuring the possibility of prompt resolution of the conflict.

The current state of relations of social partners in the field of labour in Ukraine should be characterised by the predominance of formal social partnership procedures that do not have significant real economic consequences. These factors in the development of social partnership need to be translated into a specific program of action for the social partners. It is necessary to develop the concept of social partnership for the period of stabilisation and economic growth that began in recent years.

Thus, in the near future, all parties to social and labour relations in Ukraine should occupy their niche in regulating the national labour market in order to socialise it: the main task of trade unions should be a real improvement in the sale of labour services by employees; entrepreneurs must realise the dependence of the success of their business on the social situation in the country and in the enterprise, and therefore take into account the goals of entrepreneurship and human life in general; the state must create a mechanism to encourage (especially economic) parties to solve social and labour problems by methods of social partnership.

19 L Ostapenko, 'Legal regulation of employment of the population of Ukraine' (2016) 1 (2) SBKSUSLS 86–88.

20 T Tkachuk, L Chystokletov, O Khytra, V Shyshko, L Ostapenko, 'Philosophical reflections on the information society in the context of a security-creating paradigm' (2021) 13 (1) IJESDF 105-113.

3 DISPUTE RESOLUTION WITHIN A LABOUR PARTNERSHIP SYSTEM IN UKRAINE

The majority of the population of Ukraine believes that the state should ensure the material well-being of citizens and maintain social justice in society. In general, paternalism leads to the dominance of relations between managers (owners) and employees in the social and labour sphere. This type of relationship, based on the loyalty of employees to management in exchange for management considering their interests, precludes both equal cooperation between the parties and their open confrontation. This situation significantly limits the possibilities of effective social dialogue.

The weakness of trade unions has a negative impact on the effectiveness of the collective bargaining process and contributes to the consolidation of low national standards at the national level. The state should be interested in strengthening trade unions as a party to social dialogue because it is ultimately responsible for the living standards of citizens and the state of the social sphere and will be forced to take on challenges that are transformed into socio-political instability in the country.

In modern social and labour relations in the practice of Ukrainian social dialogue, employers are the strongest and most influential party. In the process of social dialogue, employers' organisations are focused primarily on defending their own corporate economic interests. This position of employers is possible, in particular, due to the low level of social responsibility of Ukrainian businesses, which sees a duty to employees and society not as an integral part of the social partnership system but as a pure expression of goodwill or charity. This situation creates the danger of replacing a clearly structured system of social partnership with vague and optional corporate social responsibility. The current situation is complicated by the lack of a basic law in Ukraine that would regulate the issue of corporate social responsibility.[21]

The most powerful factor in the development of social partnership (as well as its result) is the creation of a favourable economic climate, in particular, by easing tax pressures and combating corruption, which will lead to the recovery of the national economy and its de-shadowing and gradual exit from the crisis. Increasing the income of the population in general, and labour income in particular, overcoming poverty, and creating conditions for the development of the middle class should become a priority of society and the state. State protectionism in the labour market, its socialisation, and a significant increase in wages in state budget organisations should be considered an important prerequisite for reconciling the interests of the subjects of social partnership. A separate large-scale task should be considered for improving the moral climate in society, overcoming corruption, ensuring law and order, and restoring confidence in state institutions and civil servants.[22]

The role of employers and their representative organisations in society in general and in the organisation of social partnership in particular must be established. It is also important to increase social awareness and the role of employees as participants in social partnership. Trade unions must become real representatives of workers' interests. According to trade unions, the authorities and employers (and society as a whole) should have the right to fight for the establishment of more favourable (compared to non-union workers) working conditions and payment for trade union members. The employee must have a real motivation to join trade unions, in particular, the opportunity to collectively sell their labour services more profitably.[23]

21 V Venediktov, Modern problems of labor law of Ukraine (Pravo 2018).

22 O Kostyuchenko, 'The essence of social partnership' (2017) 1 BNTUUKPIPSSL 78-82.

23 M Butko, A Revko, 'Social infrastructure as a catalyst for modernization of the socio-humanitarian space of the regions of Ukraine' (2018) 4 RE 28-36.

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Since it is unrealistic to count on the de-monopolisation of the labour market in the near future (this can be considered a task of social partnership down the road), it is necessary to focus on such a balance in the labour market that the monopoly of buyers of labour services – employers – would be balanced with the monopoly of sellers. In order to balance the interests of the subjects of social partnership, employees and their representatives – trade unions – must compensate employers and the state for the increase in the price of labour services. An attractive but abstract goal – social harmony – does little to inspire employers to make concessions. Increasing labour productivity and the final results of the enterprise depend not only on employees but also on the level of management and support of the production process. The counter-responsibilities of employees should be as specific as the responsibilities of employers to increase wages.[24]

The following responsibilities can be considered as possible, real contributions of employees and trade unions to economic growth at the micro, meso, and macroeconomic levels: the participation of employees in investment programs of their enterprises (industries, regions); the formation of a self-financed system of maintenance of the qualification of the labour force and the development of human capital; targeted lending to state and municipal programs in agreed strategic areas, etc. Mechanisms for ensuring counter-obligations of employees and trade unions and their dependence on the level of performance of their duties by employers must be set aside in the relevant agreements. However, the principle of voluntary participation of a particular employee in programs that provide for certain deductions from wages should not be violated.[25]

State authorities and local self-government should create such conditions that would focus the parties' attention on common interests, encourage them to settle social and labour relations through all the above steps, and spread the practice of social partnership. In particular, it is necessary to create a mechanism that would link the possibilities of state and municipal preferences (budget loans, tax benefits, government orders) with the level of efficiency of social and labour relations in a particular enterprise.[26]

In order to ensure the balance of interests of the parties to social partnership and the effective development of the tripartite system, it is necessary to consistently spread the ideology and technology of social partnership and establish it in the consciousness and practice of all labour market actors – state, businesses, and trade unions. Much work is needed to form full-fledged parties to the social partnership. It is important for the creation and functioning of a successful social partnership system to improve its mechanism, the main components of which will be discussed in the next section.[27]

Another important task is the education of citizens regarding social competence and legal training in human rights and building relationships with employers, employment, social protection, labour law, trade unions, pensions, insurance and other funds, and more. For the younger generation, this task needs to be addressed primarily through the education system, and this should also become an important contribution of the state in the formation of social partnership relations. For citizens who have already entered the labour market, such training and education could become one of the important new functions of public organisations, especially trade unions, in their contribution to the dissemination of social

24 S Sunyagin, Socio-normative principles of social policy: the need for systematic understanding. State and law (Yuridichna Dumka Publishing House 2016).

25 VV Tatarinov, VS Tatarinov, A Ivko, 'Social partnership as a factor in the development of small business in Ukraine' (2019) 1 EVED 138-154.

26 T Shapovalova, Economic bases of social security (Lviv Polytechnic Publishing House 2018).

27 V Sydorenko, I Shorobura, A Ponomarenko, M Dei, O Dzhus, 'Application of technologies of formal and non-formal education for continuous professional development of the modern specialist' (2020) 13 (32) RTEE 1-24.

partnership ideas. At the same time, it will help increase the competitiveness of employees, increase their social and economic activity, and their responsibility for their own destiny, which will have not only social but also economic results.[28]

Unfortunately, today, significant obstacles to civilised social partnership are widespread corruption in Ukraine, the predominance of corporate interests and attitudes, and the merging of entrepreneurship with hardware structures. Entrepreneurs find themselves in conditions far from the normal, legal relationship between capital and power. A vicious circle is being created: the state does not protect the interests of entrepreneurs; entrepreneurs do not follow the law. To a lesser extent, this also applies to other citizens.

A significant share of the 'shadow' economy in Ukraine also does not contribute to the development of social partnership. As a rule, shadow enterprises do not comply with labour legislation, in particular, labour protection and social guarantees, do not pay taxes, and do not register employment agreements. Workers are considered exclusively as labour resources for production, the sole purpose of which is to make a profit. A significant obstacle to the formation of social partnership is the erosion of the regulatory system of society due to mass violations of laws and social norms. This does not contribute to the spread of social partnership practices.[29]

Thus, the processes taking place in Ukraine require a significant adjustment of social security policy. In such a situation, it is necessary to build a society on the principles of cooperation and mutual respect and the implementation of the principles of social justice, which becomes possible only if economic and social development are balanced. Universal and social values must come to the fore. This requires the pooling of all constructive forces at both the national and regional levels and the creation of an effective social partnership system to address emerging issues and ensure sustainable development. Moreover, it is important to develop such mechanisms of interaction between the subjects of social partnership so that the interests of some do not harm the interests of others. Cooperation and partnership are important to address as serious issues that can affect the processes that take place.[30]

For Ukraine, the need to form an effective model of social partnership arose after the transition of the economy to a market basis in connection with the separation of business from the state. The reforms carried out in the country primarily affected the most vulnerable segments of the population: pensioners, the disabled, and large families. The adoption of a number of laws and the development of social programs have not alleviated the vital problems of many groups of the population. One of the problems caused by socio-economic and political reforms in Ukraine is the acute conflict of value orientations. In the absence of a basic system of values capable of being the basis of social consensus, such a conflict carries the danger of an irreversible division of society.[31]

4 CONCLUSIONS

Establishing a functioning social partnership system in Ukraine is a guarantee of maintaining an appropriate level of competitiveness of employees and establishing social dialogue in society. Thus, it is relevant at the present stage of development of the domestic

28 S Synchuk, 'Model of the national social security system in the context of the European direction of Ukraine's development' (2016) 8 LU 17-23.

29 M Pyzhova, 'Peculiarities of labor relations regulation regarding the implementation of legal guarantees' (2020) 2 (14) ESPLIS 46-50.

30 M Pyzhova, 'Functions of legal guarantees in labor law: current issues' (2021) 1 (33) LI 65-69.

31 A Shevchenko, S Kydin, S Kamarali, M Dei, 'Issues with interpreting the social and legal value of a person in the context of the integrative type of legal-awareness' (2020) 38 (2) FARPLSS 54-61.

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economy to study the peculiarities of the formation of social partnership in Ukraine, identify shortcomings in the functioning, and develop areas for further improvement.

In the conditions of social partnership, various social problems arising in a society can be rationally and effectively solved. It is this circumstance that makes social partnership an essential factor in ensuring social security as a component of Ukraine's national security and is one of the mechanisms that makes it possible to reduce tensions in society. Social partnership in a market economy is the most promising and civilised type of relationship between these entities. This form of agreement between government agencies and NGOs combines intellectual potential and human and financial resources around a particular social problem.

Social partnership in Ukraine is in its infancy, but the conditions for civilised, equal, and effective interaction of the main social partners (workers, employers, and the state) have not yet been created. However, it is necessary to recognise the fact that this process is evolutionary and long, so it is unlikely that there will be radical changes in the social and labour sphere in the near future. It is necessary to create a single legal space in the system of social partnership in accordance with International Labor Organization conventions to improve the material and technical base. The effectiveness of social partnership will depend on how fully it is integrated into the management system of socio-economic development of the state. The labour legislation of Ukraine needs to be improved – in particular, a separate law on the use of individual contracts (agreements) in flexible forms of employment must be developed.

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CASE NOTE

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Case Note

THE RIGHT TO A FAIR TRIAL AND THE RIGHT TO A FAIR DECISION IN SLOVAK CRIMINAL LAW

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ABSTRACT

Background: The right to a fair trial, resulting from international documents, the Constitution, and the legal order of the Slovak Republic, is confronted in terms of content with the requirement and reasonable expectation of fair decision-making in criminal proceedings. The paper seeks to define the concept of justice and its procedural and substantive aspects as the course but also as the result of criminal proceedings. Criminal proceedings are always aimed at resulting in a certain decision of the body active in criminal proceedings and the court. Criminal proceedings

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without a decision would not make sense. The content and quality of the decision, especially from the point of view of legality and fairness, reflect the legal culture of the state and its bodies.

Methods: *The scientific methods used in this article are legal comparison, content analysis of websites, functional analysis of legal acts, and analysis of the decisions of many international and national courts.*

Results and Conclusions: *Justice in law has an ambiguous meaning from a legal-theoretical point of view, mainly because it is a concept with a high degree of abstractness. No legal-theoretical definition of justice can be found in the case-law of Slovak as well as Czech courts. In Slovak case law, the term justice occurs exclusively in the context of the right to a fair trial, i.e., at the procedural level. However, as already mentioned, the Criminal Codes also refer in several places to the term 'fair decision' as the result of criminal proceedings, i.e., the substantive level of justice. It should be recalled here that each individual has his or her own autonomous idea of justice and his or her own criteria for evaluating other people's actions. It is almost impossible to reach a consensus on guilt and punishment in an individual criminal decision with the public and especially with the parties to the proceedings, i.e., the injured party and the accused. Especially, individual justice in the decision is debatable, especially in cases of diversions or in the application of the principle of opportunity.*

1 INTRODUCTION

We have a principle of ancient lawyers that has been passed down since the Roman period: 'Law is the art of knowing what is just and morally good'. Or, as one of Rome's most famous lawyers, Publius Iuventius Celsus, says: 'Ius est ars boni et aequi' – 'Law is the art of goodness and justice'.

Justice as such has affected humanity since its inception. The clear and obvious roots of justice date back to antiquity and are associated primarily with mythology. The embodiment of truth and justice was first associated with the goddess Maat and later Isis from ancient Egypt. In Greek mythology, it was the goddesses Themis and Dike. For the Romans, these goddesses merged into one – the goddess Justitia, representing the allegory of justice as we know it today, i.e., as a young woman holding a set of scales (the symbol of justice) and a double-edged sword (the symbol of judgment) in her hands. Nowadays, she is also shown as blindfolded (the symbol of impartiality).

In the historical-theoretical, philosophical, and legal discourses on the concept of justice, it is necessary to reflect primarily on the teachings of Plato and Aristotle. Their teaching was based on the Hellenic notion of justice as a civil virtue assuming loyalty to the law when observed. It is worth mentioning that Aristotle distinguished between moral justice and legal justice. Moral justice is reflected in personal relationships; legal justice is found in public relations. Aristotle's conception distinguishes between two basic forms of justice, the definition of which has survived to the present day. Distributive (distributional) justice is applied in the distribution of goods according to the rule 'treat equals equally'. Procedural (commutative, compensatory) justice is applied to the treatment of the individual according to the 'equals should be treated equally and unequals unequally' rule.

Justice was also the focus of other important philosophers and philosophical trends (Thomas Aquinas, David Hume, Immanuel Kant, Hans Kelsen, Thomas Hobbes, John Rawls, Gustav Radbruch, and others). Over the years, a number of theories and definitions have emerged in attempts to clarify the essence of justice. However, it is necessary to keep in mind that every theory of justice is directly dependent and derived from the specific ideological and moral view of the world of individual authors.

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2 JUSTICE IN LAW

Justice is a rich and frequently invoked concept in the past and present. It is used in heterogeneous contexts and in various scientific disciplines (law, sociology, economics, history, political science, etc.), but it is also mastered (and relatively intensively) by the general public. The heterogeneity of the application is currently confirmed by adjectives that are associated with justice: legal, ethical, political, economic, social, environmental, historical, gender-based, etc. The hypertrophy of this concept also affects the creation and application of law, but not always in a positive sense. However, justice is not only a question of rationality but also a problem of emotionality. As Weinberger stated: 'The pursuit of justice is a task of search, a task of reason and heart'.[3]

When examining the concept of justice in law, it is possible to look at the concept in four interconnected ways, none of which can be sovereign. Therefore, it is possible to consider:

- Descriptive justice (to find out how justice is perceived)
- Explanatory justice (to explain the principles of justice)
- Normative justice (to formulate essential principles of justice)
- Instrumental justice (to characterise justice as a tool to achieve results).[4]

When examining the attributes of the concept of justice, we inevitably come across the problem of objectivity or subjectivity of justice, and thus the objectivity or subjectivity of morality or law as well. From the point of view of a specific legal culture and legal order, it is necessary to consider the basic inevitable agreement on the objectivity of these concepts, at least. Otherwise, the law would only become an unreliable normative system. Efforts to unify jurisprudence would fail, and court decisions would vary radically from case to case. In this context, however, we must accept that each individual has their own autonomous idea of justice and their own criteria using which he evaluates the actions of other people or social institutions. Or, as Bernd Rüthers points out, not only every individual but also every religion or worldview has its own justice.[5] After all, in ancient times, when a crime was committed, it was fair to require 'an eye for an eye, a tooth for a tooth', but now the tendencies of restorative justice prevail.

In this context, the relativism of opinions was expressed very well by Hans Kelsen in the idea:

> What is justice? No other question is so passionately discussed, for no other question has so much precious blood flowed, so many hot tears, so many other noble greats have thought about any other question, from Plato to Kant. And yet even today, this question is as unanswered as it once was. Maybe because it's one of those questions for which the resigning wisdom applies, that one never finds a definitive answer to it, but one can only keep trying, to ask better.[6]

From the point of view of the development of law, whether continental or Anglo-American, it can be stated that in the past, the principle of justice was emphasised in the substantive sense, but now procedural justice is touted as a guarantee of fairness.[7] Therefore, the imperative also applies: 'criminal proceedings are led to end with a lawful and fair verdict'.[8]

3 O Weinberger, *Inštitucionalizmus: nová teória konania, práva a demokracie* (Bratislava 2010) 364.

4 M Večeřa, *Spravedlnost v právu* (Masarykova univerzit, Brno 1997) 15-16.

5 B Rüthers, *Das Ungerechte an der gerechtigkeit: Fehldentungen eines Begriffs* (Mohr Siebeck 2009) 8.

6 H Kelsen, *Reine Rechtslehre* (Verlag Österreich 1960) 201.

7 P Holländer, *Filosofie práva* (Aleš Čeněk 2012) 380.

8 J Jelínek, J Říha, Z Sovák, *Rozhodnutí ve věcech trestních se vzory rozhodnutí soudu a podání advokátů* (Leges 2015) 65.

Given the scope, diversity, and multiplicity of the issue, we will further focus on the theoretical, normative, and application contexts of the concept of justice in the field of criminal law in the legal order of the Slovak Republic.

The most important international human rights treaty on the European continent, ensuring respect for the most important human rights and at the same time containing an institutional framework that allows individuals to defend themselves effectively against the state if these rights are denied, is the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, the ECHR). The Czech and Slovak Federal Republic joined the Council of Europe only in 1992 and ratified the Convention on 19 March 1992. The Convention became binding on the Slovak Republic on 1 January 1993.

In modern democratic society, the regulation of rights and freedoms is ensured at the international, union, and national levels. The right to a fair trial is undoubtedly one of these fundamental rights and freedoms. It can even be seen as a right that stands above others because it guarantees a way to protect other rights. Despite its importance, it is paradoxically the most violated right. The reason is undoubtedly its wide content, which consists of several components and the insufficient interpretation and application of these components to specific cases.

However, we cannot find an explicit definition of the right to a fair trial in any regulation dating back to the 17th and 18th centuries that enshrines this right. The definition consists of several components that guarantee the individual procedural protection in the exercise of their rights and interests.

3 ART. 6 OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Although Art. 6 of the ECHR is entitled 'Right to a Fair Trial', it cannot be said that it defines the content of that guarantee in a comprehensive manner. Other rights and guarantees are also enshrined in other articles (Art. 5, Art. 7, Art. 13, Art. 4 of the Protocol 7).[9]

What are then the basic procedural guarantees of a fair trial contained in Art. 6 of the ECHR?

A fair, public, and reasonably expeditious hearing is a fundamental guarantee that every process, both criminal and civil, must comply with in order to be considered fair under Art. 6. These guarantees are minimal, not exhaustive. From the general concept of justice, the court implied other rights of the accused, not explicitly stated in Art. 6, e.g., the right to remain silent and not to accuse oneself, the right to be present at a hearing, etc. Similarly, the right to the presumption of innocence under Art. 6(2) is only one aspect of the broader concept of a fair trial.

The guarantee of fairness of the proceedings is of a procedural nature and does not mean a guarantee of any material subjective right, nor that the outcome of the proceedings (court decision) will be fair. Thus, it is not the fairness of the decision but the fairness of the proceedings on the basis of which the decision was made that is guaranteed by Art. 6 of the ECHR.[10]

Due to the scope of the issue, we will briefly outline the basic requirements of Art. 6 in relation to justice:

9 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 Order as amended <https://www.refworld.org/docid/3ae6b3b04.html015> accessed 22 November 2021.

10 B Repík, *Evropská úmluva o lidských právech a trestní právo* (ORAC Praha 2002) 135 et seq.

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A) Publicity of proceedings and decisions

This requirement protects its participants from the secret execution of justice beyond public scrutiny. It is also one of the means of maintaining public confidence in the courts. The right to a public proceeding is closely linked to the right to an adversarial procedure, generally assuming the oral nature of the proceedings. The right to a public proceeding applies only to court proceedings and does not, in general, apply to preparatory proceedings, which are more or less secretive. The publicity of the judgment is exceptional.

B) Speed of proceedings

An integral part of the right to a fair trial is the right of the accused to have their criminal charges decided within a reasonable time. This right prevents the loss of evidence or the weakening of its probative value. It also prevents the accused from being exposed to the infringement of their rights and freedoms and to uncertainty about their fate for too long. The slow administration of justice is the most serious problem of justice in most countries of the Council of Europe. The concept of reasonable time is relative. The appropriateness of the time of the proceedings is assessed according to the specific circumstances of the case. The state is obliged to organize its criminal system in such a way that courts and other law enforcement authorities can act at the required speed.

C) The right to a fair trial

The right to a fair trial is only one component of the broader concept of the right to a fair trial, although it appears to be a central component of it. It is an open concept with no exact boundaries. These individual guarantees are regulated in Art. 6(3 and 2).

1) Principle of equality of arms

Equality in court has two meanings. Above all, the aim is for everyone to be tried by the same courts and according to the same procedural rules, without any discrimination or privileges. At the same time, it is a question of equality of the parties to the proceedings, who are in different, conflicting procedural positions. This equality is not expressly stated in the Convention, but it had to be implied from the requirement of justice by the case-law.

2) Principle of an adversarial process

Adversarial proceedings are considered to be a general principle of conduct, without which it is impossible to talk about a process which is essentially a confrontation between two parties, each of whom must be able to express themselves, deny the other party's suggestions, arguments, and evidence, and present their own evidence. Its close principle is 'Audiatur et altera pars', which was already known to the Romans. The European Court of Human Rights (hereafter, ECtHR) has defined adversarial proceedings that each party must in principle not only be able to present the evidence and arguments they deem necessary for their claims to succeed but also to acquaint themselves with any documents and observations submitted to the court in order to influence its decision and comment (Mantovanelli v. Commission France 18 March 1997).

3) The right of the accused to be present at the court hearing

This right is not explicitly stated in Art. 6 but was deduced by the case-law of the ECtHR. Participation in the hearing is derived from the purpose of Art. 6 as a whole, stating that the right of the accused to defend themselves in person, to hear or have witnesses to be heard, to have an interpreter present at the hearing free of charge, may be exercised only in their presence at the hearing.

4) Right to state reasons for the decision

This correlates with the accused's right to make suggestions, arguments, and objections in order to receive an appropriate response. It is also given in the public interest, as it is one of the guarantees that the administration of justice is not arbitrary and non-transparent and that court decisions are subject to public scrutiny. It is also a precondition for the accused to be able to exercise the remedies available to them effectively.

D) Right of appeal

According to the case-law of the European Court of Justice, the guarantees of Art. 6 also apply to corrective proceedings if the state has established appeal or cassation cases.

Everyone whose rights and freedoms as set forth in the Convention have been violated shall have an effective remedy before a national authority, even if the violations have been committed by persons in the performance of their official duties (Art. 13).

The concept of appeal mentioned in the title of Art. 2 of Protocol 7 has an autonomous meaning. It means any appeal against a decision on guilt or punishment, not just an appeal.

E) Right of defence

Art. 6(3) contains a list of the elements of the broader concept of a fair trial, the summary of which forms the right to defence. These rights are closely interlinked, interdependent, and, to some extent, overlapping. Their inherent goal is to ensure the justice of criminal proceedings as a whole.

1) The right to be informed of the charges

As regards the content of the information, the accused must be informed in detail of the nature and reasons for the accusation. The act of the accusation must be sufficiently identified by a description of the proceedings, an indication of the place and time of its commission, or by stating who the injured party is. The nature of the accusation is then the legal qualification of this act. This right does not apply only to the original act of the accusation but also applies throughout the proceedings, with the right to inspect the file.

2) The right to have adequate time and facilities to prepare a defence

This right contributes to redressing the imbalance between the accused and the law enforcement authorities, which have the means of investigative and coercive powers. The requirement is at the same time a guarantee against too rapid procedure and a counterweight to the right guaranteed in Art. 6(1) to decide on the charges within a reasonable time. However, it is not about granting a single time limit after that moment, but of a series of time limits after the accused should have reacted to a particular act or measure, as well as time limits for the election or appointment of a lawyer, for lodging an appeal, etc.

3) The right to defend oneself in person or with the assistance of a lawyer

This is another fundamental element of a fair trial. It ensures equality of arms, and its primary purpose is to provide the accused with a position that is not significantly less favourable than the position of the prosecution. The lawyer is also referred to as the 'guard dog of the lawfulness of the proceedings' (*Ensslin et al. v. Germany,* 8 July 1978). The assistance of a lawyer is crucial in terms of respecting all other rights under Art. 6. Most of these rights would be ineffective for the average accused without the help of a lawyer.

This right includes the right to free assistance from a lawyer if the accused does not have the means to pay for a lawyer and it is requested by the interests of justice.

4) The right to free assistance from an interpreter

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The purpose of this right is to prevent inequalities between the accused who does not understand the language used in court and the accused who speaks and understands that language. It is therefore a special provision preventing discrimination, especially in relation to Art. 6 in relation to Art. 14 of the Convention.

F) The right to the presumption of innocence

The principle of the presumption of innocence is intended to ensure that the person accused of a criminal offence does not bear the negative consequences of this accusation, equivalent to the consequences of a guilty verdict, and at the same time to allow the judge to decide impartially.

In general, the following known rules are derived from the presumption of innocence:

- Unproven guilt has the same meaning as proven innocence
- The burden of proof lies with the prosecution, and the accused is not obliged to prove their innocence
- The *In dubio pro reo* rule
- The rule that, in the course of criminal proceedings, only such restrictions may be imposed on the accused as are strictly necessary to achieve the purpose of the criminal proceedings.

G) Right to proper evidence

The Convention guarantees a fair trial in Art. 6(1) and the right of the accused to have their guilt proven in a lawful manner in Art. 6(2) but does not regulate evidence as such, although this is an essential, if not the most important, part of the proceedings. The adjustment of evidence is primarily a matter for the member states.

This approach is necessary given the great variety of evidence arrangements that exist not only between continental systems and the common law system but also within those systems. In principle, it is therefore for national law to regulate and assess by the national court the admissibility of evidence, as well as the weight, relevance, and veracity of the evidence and its probative value.

4 APPLICATION PRACTICE IN THE SLOVAK REPUBLIC

It is interesting that the Constitution of the Slovak Republic, as amended, does not explicitly mention the concept of the right to a fair trial in any of its provisions.[11]

In principle, however, the rights belonging to a fair trial (and resulting from international documents) and enshrined in the Constitution of the Slovak Republic can be classified into two groups. In the first group, we include constitutional rights according to Arts. 46, 47, and 48. This type of constitutional procedural right can be applied regardless of the type of proceedings or proceedings, as they have universal validity. The second set of rights forming a fair trial is the so-called criminal peculiarities, which can be found in the Constitution of the Slovak Republic in Arts. 49, 50, and 17. In addition to the provisions quoted, Art. 7 of the Constitution must be mentioned, which has enabled the application of the rights to a fair trial under the ECHR and the settled case-law of the ECtHR.

In the case-law of the Supreme Court of the Slovak Republic, the use of the term 'justice' can be divided into two basic categories in court decisions. The first contains cases of

11 Constitutional Act no. 460/1992 Coll. Constitution of the Slovak Republic, as amended <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/20210101> accessed 22 November 2021.

interpretation of those provisions of the legal order, which contain the concept of justice. The second category consists of cases where the National Council of the Slovak Republic deals with justice in a procedural sense rather than an evaluation of the procedure of participants and courts (as a procedure within the right to a fair trial).

The most frequently interpreted provisions in connection with the right to a fair trial are usually Art. 46(1) of the Constitution and Art. 6(1) of the Convention.

According to the opinion of the National Council of the Slovak Republic presented in one of its decisions: '(It is ...) the court's duty in each case to make every effort to find such a solution that will be compatible with the general idea of justice'.12

In this sentence, the court untraditionally expressed the material form of justice. The Supreme Court of the Slovak Republic often emphasises that every state body:

> Must not only respect the law itself, but its interpretation and application of the law must lead to a just result in accordance with the ancient Roman principle of *ius est ars boni et aequi* (law is the art of good and justice). In other words, law must first and foremost be a living instrument of justice, and not just a body of legislation that is mechanically and formally applied without regard to the meaning and purpose of the specific interest protected by the relevant legal norm.[13]

For the sake of coherence, it will undoubtedly be necessary to address the question of how often and in what context the concept of justice and its derivatives occurs in the individual provisions of valid and effective criminal codes.

In the Criminal Code, the concept of justice is explicitly mentioned twice. In the first case, it is the name of the factual nature of the crime according to S. 344, i.e., 'Obstruction of justice'.[14] This offence is committed by a person who, in court or in criminal proceedings, presents evidence as true, even though they know that the evidence is falsified or altered, further falsifies, alters, or obstructs the evidence, or obstructs its acquisition, as well as obstructing or preventing the presence or statement of the party to the proceedings, participants, their representatives, witness, expert interpreter, or a translator.

A person who uses violence, a threat of violence, or another threat of serious harm to act on a judge, a party to a criminal proceeding, a party to a proceeding, a witness, an expert, an interpreter, a translator, or a law enforcement authority shall also interfere with justice. Thus, the substance of the offence expresses an interest in the protection of a proper and fair criminal procedure so that a fair decision can be reached.[15]

The second reference to justice is found in the criminal offence of persecution of the population under S. 432(2e), according to which this criminal offence is committed by a person who arbitrarily prevents the civilian population or prisoners of war from deciding on their criminal offences in a fair trial. Thus, again, it is an appeal to and an interest in a fair trial, even during war.

In the Slovak Criminal Procedure Code, the term 'justice' and its verbal derivatives occur a total of five times.[16] Already in the provision of S. 1, the subject of the law is defined as the regulation

12 Resolution of the National Council of the SR, Ref. No. 6CDo 71/2011.

13 Judgment of the Highest Court of the SR, Ref. No. 1Sžso/36/2010. See also D Čurila, *Spravedlnost a soudcovské rozhodování, Disertační práce* (Právnická fakulta Masarykovy univerzity Brno 2014) 154.

14 Act no. 300/2005 Coll. Criminal Code, as amended <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2005/300/20210701> accessed 22 November 2021.

15 J Ivor, P Polák, J Záhora, *Trestné právo hmotné, Osobitná časť* (Wolters Kluwer 2017) 412.

16 Act no. 301/2005 Coll. Criminal Procedure Act, as amended <https://www.slov-lex.sk/pravnepredpisy/SK/ZZ/2005/301/20211201> accessed 22 November 2021.

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of the procedure of bodies active in criminal proceedings and courts so that 'criminal offenses are duly detected and their perpetrators are justly punished according to the law'.

Although the text directly implies an appeal for the just punishment of perpetrators, it also indirectly implies a demand for a fair trial. Among the basic principles of criminal proceedings, in the provision of S. 2(7), the right to a fair trial is explained as the right of everyone to have their criminal case heard fairly and within a reasonable time by an independent and impartial tribunal ... The provision of S. 2(10) addresses the principle of evidence so that law enforcement authorities can establish the facts of the case without reasonable doubt, clarify with equal care the circumstances of the accused and the accused, and take evidence to enable the court to make a fair decision. However, the concept of a fair decision is not specified in this or other provisions.

The term can be found again in the provision of S. 253(3) regulating the procedure of the President of the Chamber at the main hearing to ensure that the main hearing is not delayed by interpretations and speeches unrelated to the present case and that it is aimed at clarifying the matter as effectively as possible to the extent necessary for a fair decision.

The last reference of the concept of justice is given in the provision of S. 334(2) governing the court's procedure for deciding on a proposing the agreement on guilt and punishment:

> If the court deems the agreement on guilt and punishment not manifestly disproportionate in the proposed wording but consider it unfair, it shall communicate its reservations to the parties, who may propose a new wording of the agreement... However, the legislator did not specify, in view of the circumstances and criteria, the fairness (unfairness) of a draft guilt and punishment agreement should be assessed. The institute of the agreement on guilt and punishment has many supporters in our legal theory and application practice, but at the same time many opponents. It is often referred to as an agreed justice or justice market. The absence of legislative criteria for justice is consistent with this view.

5 CONCLUDING REMARKS

In conclusion, here are a few summary ideas drawing on the philosophical-legal considerations on the definition, application, and content of the concept of justice and its conceptual derivatives in criminal proceedings.

At present, it can be stated that there is a mutual and substantive interconnection between the international, European, and Strasbourg interpretations of the right to a fair trial. The guarantee of the right to a fair trial with all partial components of the set of a fair trial is also reflected in the Slovak constitutional and criminal law level and legislation.

Justice in law has an ambiguous meaning from a legal-theoretical point of view, mainly because it is a concept with a high degree of abstractness. No legal-theoretical definition of justice can be found in the case-law of Slovak as well as Czech courts. In Slovak case law, the term justice occurs exclusively in the context of the right to a fair trial, i.e., at the procedural level.

However, as already mentioned, the Criminal Codes also refer in several places to a 'fair decision' as the result of criminal proceedings, i.e., the substantive level of justice. It should be recalled here that each individual has his or her own autonomous idea of justice and his or her own criteria for evaluating other people's actions. It is almost impossible to reach a consensus on guilt and punishment in an individual criminal decision with the public and especially with the parties to the proceedings, i.e., the injured party and the accused.

Individual justice in the decision is debatable, especially in cases of diversions or in the application of the principle of opportunity.

In this sense, the question arises as to whether the vague substantive concept of a fair decision should not have been replaced by the concept of a legal decision.

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Case Note

ELECTRONIC EVIDENCE IN PROVING CRIMES OF DRUGS AND PSYCHOTROPIC SUBSTANCES TURNOVER[1]

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Maksym Korniienko[5]

1 The study was conducted as part of research work No. 0114U004013 'Ensuring the rights and freedoms of citizens in administrative (police) activities', Department of Administrative Activities of the Odesa State University of Internal Affairs, and as part of research work No. 0121U109271 'Security and protection of rights, freedoms and legal interests of participants in criminal proceedings', Department of Criminal Procedure of Odesa State University of Internal Affairs, as well as the concept of the program of informatization of the Ministry of Internal Affairs of Ukraine and central executive bodies, whose activities during 2021-2023 are directed and coordinated by the Cabinet of Ministers. See 'Development of digital infrastructure and creation of digital services for citizens is a priority of the program of informatization of the system of the Ministry of Internal Affairs' (22 April 2021 No. 301) <https://mvs.gov.ua/en/press-center/news/rozvitok- cifrovoyi-infrastrukturi-ta-stvorennya-cifrovix-servisiv-dlya-gromadyan-prioritet-programi-informatizaciyi-sistemi-mvs> accessed 30 January 2022.

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ABSTRACT

Background: *This article is prompted by the increasing levels of crime in the sphere of illicit trafficking in narcotic drugs, psychotropic substances, their analogues, or precursors using information and telecommunication systems. The aim of the article is a comprehensive analysis of the problem of the use of electronic evidence in proving crimes of trafficking in these substances.*

Methods: *A number of methods were used in this article, namely: theoretical analysis – the study and analysis of official documentation, scientific, methodological, and educational literature, summarising information to determine the theoretical and methodological foundations of the study; logical analysis – to formulate basic concepts and classification; concrete-historical analysis – to demonstrate the dynamics of development of the use of electronic evidence in criminal proceedings; the dialectical method – to reveal the meaning of concepts of 'electronic evidence'. The judicial practice of the Supreme Court of Ukraine regarding the recognition of electronic proof as appropriate evidence in cases is disclosed. The definition of electronic proof in the Ukrainian legal system, as well as the forms and features of electronic proof, are also considered.*

Results and Conclusions: *It is established that the main causes of drug trafficking crimes include insufficient legal regulation of cyberspace, the lack of geographical boundaries, the spread of information about drugs on the Internet, especially on the Darknet, and the uncontrolled development of the cryptocurrency market.*

Keywords: *electronic evidence; criminal process; narcotics; information technologies; evidence.*

1 INTRODUCTION

Over the past decade, Ukraine has made significant strides in informatising society, as evidenced by statistics from GlobalLogic, which found that 60% of Ukraine's population is already registered on social networks, the most popular of which is YouTube, with users at 96% of the population. As for the dynamics of growth, from the beginning of 2020 to the beginning of 2021, the Ukrainian audience of social networks increased from 19 million to 26 million users, that is, by 7 million people.[6]

At the state level, the development of informatisation in our country is considered one of the national priorities, as exemplified by the mobile application, web portal, and brand of the digital state, developed by the Ministry of Digital Transformation of Ukraine (DIIA), which has an ambitious goal to translate 100% of public services online.[7] According to the Minister of Digital Transformation of Ukraine, M. Fedorov, over the next two years,

6 During the year of quarantine, the number of Ukrainians on social networks increased by seven million (2021). <https://www.dw.com/en/za-rik-karantUnu-kilkist-ukraintsiv-u-sotsmereznakn-zrosla-na-sim-milioniv/a-56899697> accessed 30 January 2022.

7 DIIA (service) <https://diia.gov.ua> accessed 30 January 2022.

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electronic voting tools may be introduced that will operate during referendums and elections in Ukraine. But along with the necessary information changes in the public life of every person, it is natural that there are new schemes of illegal behaviour and criminal elements to which the law enforcement system must respond. Such a reaction must be on a par with modern information technology, which unfortunately almost never happens. This is a problem not only in Ukraine but also globally.

The public danger of crimes in the sphere of illegal circulation of drugs and their analogues, committed using computer technologies, is determined along with other signs of an increase in the criminality of the information space of the global network, influencing various spheres of society and causing inappropriate social and criminal behaviour of individuals or groups of people. This is due to the general availability and openness of the global network and insufficient legal regulation of its activities. Criminal elements are the first to have the most advanced software – they have the opportunity to hire the most professional workers, as well as to operate in different legal systems in different countries. For example, the UN Program on International Drug Control and Crime Prevention contains the Model Law on the Punishment of Drug-Related Crimes, which prohibits the use of computer data exchange networks to facilitate or advance the production, manufacture, trafficking, and illicit use of drugs. In some foreign countries, the use of the global network in the commission of crimes in the sphere of illicit drug trafficking is criminalised either as a mandatory sign of the main *corpusdelicti* or as a qualifying sign. This testifies to the increased attention of the world community to the problem of drug distribution via the Internet. It should be noted that the main source of law in the countries of the Romano-Germanic legal family, including Ukraine, is a legal act, and the legal norm is considered an abstract, general, and impersonal rule of conduct that can be repeatedly applied to an indefinite number of cases and persons.

Electronic evidence and the issue of its use in the judicial process of Ukraine remain controversial topics in the legal community. The concept of 'electronic evidence' appeared in the 1970s with the advent of machine documents. According to Art. 2 of the Model Law on Electronic Commerce of 1997, recommended by the UN General Assembly, it is defined as information prepared, sent, received, or stored by electronic, optical, or similar means, including electronic data exchange, e-mail, telegraph, or fax. As for the typical schemes of committing crimes in the field of trafficking in narcotic drugs, psychotropic substances, their analogues, or precursors, these have undergone significant changes over the past ten years. The results of human activity are increasingly reflected in electronic (digital) forms, including those that acquire the meaning of legal facts. There are no more real meetings for the sale of drugs – all communication has moved online for the sake of anonymity. Therefore, a large share of drug sales is made through such means of communication as messengers (Telegram, Viber, WhatsApp, and Signal) and social networks (Instagram, Facebook, and Twitter). This makes the issue of the use of electronic evidence especially relevant in the investigation of crimes in the field of trafficking in narcotic drugs, psychotropic substances, their analogues, or precursors.

Analysis of the current reality in the field of procedural law of Ukraine8 shows its transformation into case law when the court's own conviction takes precedence over legal norms so that it is impossible to consider them a unified tool for establishing the truth. Indicative in this aspect is the use of electronic evidence in criminal proceedings. Various aspects of electronic evidence in criminal procedure legislation have been studied

8 S Studennykov, 'Electronic evidence in procedural law: how it works in Ukrainian realities' (2019) Jud & Leg Newspaper <https://sud.ua/en/news/publication/138354-elektronni-dokazi-v-protsesualnomu-pravi-yak-tse- pratsyuye-v-ukrayinskikh-realiyak> accessed 30 January 2022; VI Zavydniak, Introduction of judicial precedent in the criminal process of Ukraine (SFS University of Ukraine 2019).

by Ukrainian scholars. But there are still several practical and scientific inconsistencies regarding electronic evidence and their recognition as appropriate and admissible in court, which led to our study.

The purpose of the present article is an analysis of the problem of using electronic evidence in proving crimes in the field of trafficking in narcotic drugs, psychotropic substances, their analogues, or precursors. The study was conducted based on practical experience gained in senior positions of the Main Directorate of the National Police of Ukraine in the Odessa region during the implementation of professional activities, as well as during scientific and pedagogical activities in higher education institutions of the Ministry of Internal Affairs of Ukraine.

To achieve this goal, a number of scientific methods were used, namely: theoretical analysis – to study and analyse official documentation, scientific, methodological, and educational literature and to generalise information to determine the theoretical and methodological foundations of the study; logical analysis – to formulate the basic concepts and classification; concrete-historical analysis – to demonstrate the dynamics of development use of electronic evidence in criminal proceedings; the dialectical method – to reveal the meaning of the concepts of 'electronic proof', 'electronic traces', and signs of electronic evidence, as well as to establish the content and features of the constituent elements of the implementation and application of electronic evidence in law enforcement; empirical methods – for the generalisation of practical experience, observation, and discussion. The formal-legal method was used in the analysis of current national legislation, identifying inherent advantages and disadvantages in the use of electronic evidence, as well as formulating proposals to improve the procedural use of electronic evidence in Ukraine.

2 SCIENTIFIC APPROACHES: VIEW FROM UKRAINE

The current state of crime in the sphere of illegal drug trafficking, including crimes committed using the Internet, is characterised by a high level of latency. This is due to the lack of mechanisms for automatic detection of resources on the network containing illegal information about drugs or those used for illegal activities, as well as identification of offenders. The emergence of such resources is monitored and analysed using search engines, and the result depends on the development of information retrieval and what encryption programs are used by offenders. In addition, in the case of identification of sites on the Internet registered outside the territory of Ukraine and used for the distribution of drugs and involvement in their consumption, it becomes difficult to prosecute the owners of such resources. As a rule, the only measure applied to the owners of prohibited resources on the Internet is for providers to restrict access.

Also, such activities can be conducted in other countries from the territory of Ukraine, despite the establishment of access restrictions for the Ukrainian consumer, which significantly limits Ukrainian law enforcement officers in the methods of detecting such activities. The possibilities of the Internet in the commission of crimes in the sphere of trafficking in narcotic drugs, psychotropic substances, their analogues, or precursors have undergone significant changes. The characteristic features of these acts include:

- the remote nature of illegal actions in the absence of physical contact between 1) the drug dealer and the purchaser, 2) the person who posted information about the manufacture or processing of drugs and the person who manufactures or processes them, 3) the person who posted information aimed at inducement to the use of drugs and the person who is being persuaded;

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- the increased secrecy of the commission of a crime, provided by the specifics of the network space (developed mechanisms of anonymity, the complexity of the infrastructure);
- the cross-border nature of drug crimes, in which the perpetrator, the object of the criminal offence, and/or the victim may be under the jurisdiction of different states;
- the high level of preparedness of offenders and the intellectual nature of their illegal activities (preparation and commission of drug crimes require special knowledge and skills);
- the special nature of the crime scene. Traces of criminal actions are distributed over a variety of objects (computer systems of the criminal, provider, intermediate network nodes, etc.);
- the non-standard, complex, diverse, and frequently updated ways of committing drug crimes and the special means used, including the development of the cryptocurrency market;
- the multi-episode nature of illegal actions;
- the possibility of committing a crime in an automated mode, the implementation of complex scenarios by one person when combining the resources of individual computers;
- the absence of witnesses of illegal actions, such as persons who observed the event of the crime and are able to identify the offender.

Before considering the peculiarities of proving crimes in the field of trafficking in narcotic drugs, psychotropic substances, their analogues, or precursors, it is necessary to explore the concept of 'electronic evidence' because there is the problem of insufficient fixation in Ukrainian legislation. Therefore, in accordance with Part 1 of Art. 100 of the Civil Procedure Code of Ukraine, electronic evidence is information in an electronic (digital) form, containing data on the 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 forms.

Such data can be stored on portable devices (memory cards, mobile phones, etc.), servers, backup systems, and other places of data storage in electronic form (including the Internet).[9]

In accordance with para. 3 of Part 2 of Art. 99 of the Criminal Procedure Code of Ukraine (hereafter, CrPC), the documents may also include media on which procedural actions are recorded by technical means, if they are compiled in the manner prescribed by the CrPC. In Part 4 of Art. 99 of the CrPC states that a duplicate of the document (a document made in the same way as its original), as well as copies of information contained in information (automated systems, telecommunications systems, information and telecommunications systems, their integral parts, made by the investigator or prosecutor with the involvement of a specialist), are considered by the court as an original document.

According to Art. 84 of the CrPC, evidence in criminal proceedings are factual data obtained in the manner prescribed by this Code, on the basis of which the investigator,

9 Civil Procedure Code of Ukraine: Law of Ukraine No 1618-IV <https://zakon.rada.gov.ua/laws/show/1618-15#Text> accessed 30 January 2022.

prosecutor, investigating judge, and court establish the presence or absence of facts and circumstances relevant to criminal proceedings and subject to proof. Procedural sources of evidence are testimony, physical evidence, documents, and expert opinions.[10] Among the definitions provided by scientists, the most common among them are the electronic evidence is a set of information stored electronically on any type of electronic media and electronic means,[11] including evidence in criminal proceedings in electronic form.[12]

The concept of 'electronic traces' is also reflected in domestic forensic literature. The electronic digital traces are materially invisible traces that can be detected, recorded, and studied by digital electronic devices and contain any forensic material information (information, data) recorded in electronic digital form on physical media. This definition focuses on the principles of working with electronic traces but, unfortunately, lacks due attention to their nature.

It should be noted that both the criminal procedure legislation and the scientific doctrine of some foreign countries are currently at a slightly higher level of development in relation to electronic sources compared to domestic ones. At the beginning of the development of computer technology, the problem of using digital information in evidence arose in the United States, where, at that time, the rules for the use of 'novel evidence' were first expressed. According to the peculiarities of the Anglo-American legal system, the source of such rules is the case law in *Frye v. the United States*, which concerned the use of new data and methods of science in evidence and consisted of two elements: the court must determine first, which field of scientific knowledge data and techniques underlie the evidence, and second, whether the leading scientists in this field recognise the principle on which the evidence is formed.[13]

There are also differing views on the place of electronic evidence in the system of procedural sources of evidence. A. Bilousov proposes that we consider computer objects one of the varieties of a separate group of physical evidence.[14] Yu. Orlov and S. Cherniavskyi believe that electronic evidence is similar to physical evidence in relation to criminal proceedings.[15] A. Stolitnii and A. Kalancha emphasise that a document as a source of evidence in criminal proceedings can be in both paper and electronic form. D. Tsekhan argues that digital information and its media, due to its unique characteristics (especially the intangible ones), cannot be attributed to any qualification group.[16] Tsekhan also notes that when detecting digital information, investigators have many difficulties in capturing it, taking into account the requirements of criminal procedure law for evidence and further use in criminal proceedings.[17] This is due to the ability to quickly change the content of a site, the physical location of servers in other countries, and the use of anonymous software. V. Markov and R. Savchenko determine the absence

10 Criminal Procedure Code of Ukraine: Law of Ukraine No 4651-VI (2012) <http://law.rada.gov.ua/laws/show/4651- 17> accessed 30 January 2022.

11 DO Alekseeva-Protsyuk, OM Briskovskaya, 'Electronic evidence in criminal proceedings: concepts, features and problematic aspects of application' (2018) 2 Sci Bull of Publ and Priv L 250.

12 OO Volkov, 'The main sources of forensic information about malware are related to malware' (2018) 3(22) Inn Sols in Modern Sci 15.

13 DM Tsekhan, 'Digital evidence: concepts, features and place in the system of proof' (2013) 5 Sci Bull of the Intern Hum Univ. Ser: Jur 258.

14 AS Bilousov, *Forensic analysis of objects of computer crimes* (Classic Private University 2008).

15 YuYu Orlov, SS Cherniavskyi, 'Electronic reflection as a source of evidence in criminal proceedings' (2017) 1(13) Leg J of the NAIA 12-22.

16 Tsekhan (n 12) 258.

17 Ibid 256-260.

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of grounds for inadmissibility of electronic evidence obtained from any digital media and the legal order obtained in accordance with the CrPC.[18]

G. Chyhryna singles out the lack of knowledge of the subjects of evidence in the field of computer hardware and software and the need to develop and improve existing special training programs for law enforcement officers so they can work with media computer (electronic) information, detection, analysis, and imaging.[19] V. Muradov also notes that due to the lack of basic knowledge in the field of IT and a well-established method of collecting and using such evidence, it is necessary to involve specialists (and appoint examinations), remove a large amount of equipment, or spend a lot of time finding and fixing them.[20]

Thus, for electronic evidence, the following features can be identified:

- existence in intangible form;
- the need to use certain technical means for reproduction;
- the ability to transfer or copy to different devices without losing performance;
- the original electronic proof can exist in many places at the same time.

In particular, A. Kalamayko identifies the following features:

> 1) the impossibility of direct perception of information, which necessitates the use of hardware and software to obtain information; 2) the presence of a technical storage medium that can be used repeatedly; 3) a specific process of creating and storing information, which allows you to easily change the media without losing content and vice versa, provides the ability to make changes to the content without leaving traces on the media; 4) the absence of the concept of "original" electronic means of proof due to the complete identity of electronic copies; 5) the presence of specific "details", the so-called metadata – information of a technical nature, which is encoded within the files.[21]

In our opinion, there is no need to single out electronic evidence as an independent procedural source of evidence, but it is necessary to clearly define the preservation of electronic data, which must be integral and unchangeable. We must therefore define in regulations the algorithm of obtaining, recording, using, storing, and analysing data. In addition, certain algorithms should be immediately introduced into the curricula of higher education for the formation of high-quality modern knowledge and skills in the field of information and telecommunications. When working with electronic evidence, certain principles must be followed:

1. Legality. Employees of law enforcement agencies conducting investigations and investigating evidence in electronic forms have an obligation to comply with current legislation and general procedural and forensic principles.
2. Data integrity. The actions of the specialist should not lead to material changes in the data, electronic devices, or media that can be used as evidence.
3. Documenting the process. Any actions performed in relation to electronic evidence must be documented, and these documents must be stored in case of verification so that an independent third party could repeat these steps and get a similar result.

18 BB Markov, RR Savchenko, 'Principles of reliance on electronic evidence obtained from mobile devices' (2014) 1(52) L&S 89-95.

19 G Chyhpyna, 'Electronic documents: involvement of a specialist in the closure and use during the criminal conduct' (2017) 1 Nat Leg J: Theory & Practice 136.

20 VV Muradov, 'Electronic evidence: a forensic aspect of use' (2013) 3(2) Comparative-Analytical Law 314.

21 AYu Kalamayko, *Electronic means of proof in civil process* (Yaroslav Mudriy National University of Law 2016).

4. Expert support. If it is assumed that during the inspection (search), electronic evidence may be detected, support from specialists (specialists) providing, if possible, their presence at the scene is required.
5. Appropriate professional training. If in the process of inspection (search), there are no specialists from electronic evidence, priority actions at the scene are carried out by persons who have the necessary knowledge and skills to identify and gather evidence.
6. Reasonable caution. Avoid any intentional or unintentional actions that can damage potential evidence presented in digital form.[22]

3 THE PRACTICE OF THE ELECTRONICAL EVIDENCE USING IN PROVING CRIMES

Let us move on to practical analysis. Because today, the sale of narcotic drugs, psychotropic substances, their analogues, or precursors mostly takes place through messengers, the Supreme Court investigating whether a screenshot of messages from a phone can be proper proof is particularly important[23]. The plaintiff stated that in the phone correspondence between herself and her ex-husband concerning organisational meetings with her son, he had made open threats, insulted her, humiliated her honour and dignity, and used obscene language regarding the applicant and her family.

The court of first instance upheld the claim in part. A restrictive order was issued. The following measures of temporary restriction of rights for a period of six months were established: it was forbidden for the ex-husband to conduct correspondence, telephone conversations, or communicate through any other means of communication with the applicant and the child personally or through third parties. The Court of Appeal upheld the decision of the court of first instance. Disagreeing with the court's decision, the ex-husband filed a cassation appeal. Considering the case, the Supreme Court referred to Part 1.3 of Art. 100 of the CPC, which we previously cited, and further noted that such data may be stored on portable devices (memory cards, mobile phones, etc.), servers, backup systems, and other places of data storage in electronic form (in including the Internet). The parties to the case had the right to submit electronic evidence in paper copies, certified in the manner prescribed by law.[24] Even so, a paper copy of an electronic proof is not considered written proof. Thus, the Supreme Court emphasised that in support of the claims, the applicant had provided screenshots of telephone and tablet messages and Viber printouts, which the trial court and appellate court considered appropriate and admissible evidence.

The content of specific phrases, vocabulary, and the nature of the language used by the ex-husband in correspondence with his ex-wife and young son provided grounds to conclude that his actions should be classified as domestic violence, and the court reasonably prohibited him from correspondence, telephone conversations, and communications through other means with the ex-wife and child personally and through third parties. Thus, the Supreme Court dismissed the cassation appeal and upheld the decision of the court of first and appellate instance, recognising the screenshots of the messages as evidence in the case.[25]

22 IP Ponomarev, 'Digital alibi and its verification' (2011) 2 Bull of VSU 440.

23 Resolution of the Supreme Court of Ukraine of 13 July 2020 No 753/10840/19 (2020) <https://reyestr.court.gov.ua/Review/90385050> accessed 30 January 2022.

24 Civil Procedure Code of Ukraine: Law of Ukraine No 1618-IV (n 10).

25 Resolution of the Supreme Court of Ukraine of 13 July 2020 No 753/10840/19 (2020) <https://reyestr.court.gov.ua/Review/90385050> accessed 30 January 2022.

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Contrary to the above-mentioned decision, the Supreme Court noted in the other case [26]that an electronic copy of written evidence is not considered electronic evidence. Thus, in the cassation appeal, the cassator pointed out that the cassation appeal concerns the issue of law, which is fundamental for the formation of a unified law enforcement practice, namely, the use of electronic evidence in the form of electronic correspondence, including messengers (Skype, Viber, and WhatsApp). He also pointed out that correspondence via messengers (in the form of text and multimedia messages) fully meets the requirements of electronic proof.

However, in response to the cassation appeal, the defendant considered unfounded the plaintiff's arguments about the existence of a contractual relationship between them. Thus, the defendant pointed out that the plaintiff provided the court with electronic correspondence, screenshots, and copies of documents to confirm his arguments, which cannot be considered appropriate evidence. The Supreme Court noted that if a copy (paper copy) of the electronic evidence is submitted, the court may, at the request of the party to the case or on its own initiative, request the original electronic evidence from the person concerned. If the original electronic evidence is not submitted, and the party to the case or the court questions the compliance of the submitted copy (paper copy) of the original, such evidence is not taken into account by the court (Part 5 of Art. 96 of the CPC). The Court also concluded that the party to the case has the right to submit electronic evidence in the following forms to substantiate his 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.[27]

It should also be noted that on 14 February 2019, the Grand Chamber of the Supreme Court[28] decided that the electronic digital signature is the main requisite of this form of electronic evidence. The absence of such details in an electronic document excludes grounds to consider it original and therefore appropriate evidence in the case[29].

4 CONCLUSIONS

The main reasons for drug crimes on the Internet include insufficient legal regulation of cyberspace, a lack of geographical boundaries, dissemination of information about drugs on the Internet, and the uncontrolled development of the cryptocurrency market. The main conditions for drug crimes on the network include anonymity, public availability of information disseminated via the Internet, virtualisation (lack of material component when working on the Internet), lack of methodological developments in the investigation of law enforcement agencies, and improper organisation of the work of telecommunication service providers (providers). In today's conditions, the use of electronic means of proof,

26 Resolution of the Supreme Court of Ukraine of 29 January 2021 No 922/51/20 (2021) <https://reyestr.court.gov.ua/Review/94517830?fbclid=IwAR2NHSc2-GkGdPohIKGbS5b2KsOreDLF3kVyblnRrBflii48jLcojXikgDQ> accessed 30 January 2022.

27 Ibid.

28 Decision of the Supreme Court of Ukraine of 14 February 2019 No 9901 / 43/19 (2019) <https://verdictum.ligazakon.net/document/79883385> accessed 30 January 2022.

29 A similar legal position was expressed by the Supreme Court in the decision of 19 December 2018 in case No. 226/1204/18, from 4 December 2018 in case No. 2340/3060/18, from 23 November 2018 in case No. 813/1368/18, and from 14 December 2018 in case No. 804/3580/18. Therefore, both the original and a copy of the electronic document must be certified by a Single Digital Signature.

their admissibility, and their probative value are becoming increasingly important. In practice, and especially when proving crimes in the field of trafficking in narcotic drugs, psychotropic substances, their analogues, or precursors, as this type of illegal activity has almost completely gone online, there are many questions about the possibility of using information from messengers, social networks, network games, or proprietary programs. In the course of the research, we came to the conclusion that the issues of electronic evidence are poorly regulated by law and especially by the CPC.

According to the practice of the Supreme Court of Ukraine, electronic evidence can be stored on portable devices (memory cards, mobile phones, etc.), servers, backup systems, and other places of data storage in electronic form (including the Internet). According to the above provisions, an original electronic document is an electronic copy of the document with the required details, including the electronic signature of the author. Messenger correspondence (in the form of text and multimedia messages) fully meets the requirements of electronic proof. However, the court may not take into account a copy (paper copy) of the electronic evidence if the original electronic evidence is not submitted, and the party to the case or the court questions the responsibility of the submitted copy (paper copy) of the original.

Also, in our opinion, there is no need to distinguish electronic evidence as an independent procedural source of evidence, but it is necessary to clearly define the preservation of electronic data, which must be integral and unchangeable. Therefore, we need to define in regulations the algorithm for obtaining, recording, using, storing, and analysing this data. The independence of the concept of electronic evidence depends on the characteristics of the data carrier. In addition, certain algorithms should be immediately introduced into the curricula of higher education for the formation of the latest high-quality modern knowledge and skills in the field of information and telecommunications.

To achieve this aim, we need an appropriate procedural form that would ensure that the judge and other parties to the process can demonstrate the facts of the case and present the necessary evidence and make information technologies serve litigation purposes more effectively. The solutions to those questions are closely linked to the understanding of the essence of electronic evidence, as well as its place in the trial process. Thus, the current negative trends of drug-related crime on the Internet and the peculiarities of its existence and reproduction in the global network dictate the need for further research into the criminological characteristics of the crimes under consideration and the grounds for criminalising the method of drug distribution.

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Case Notes

THE LEGAL FOUNDATIONS OF ORGANIC AGRICULTURE AS A MEANS OF SECURITY OF PUBLIC HEALTH

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ABSTRACT

Background: *The decisive role in the process of organic agriculture and organic food production belongs to legal regulation. This article sets out the relevance of the study of the issues of legal provision of organic agriculture as a means of maintaining public health, both nationally and internationally. Having this in mind, the aim of the article is to find ways to solve medical and legal problems of public health by forming an effective legal mechanism for organic agriculture at both national and international levels.*

Methods: *The methodological basis for the study of legal support of organic agriculture are general and special methods of scientific knowledge: dialectical, analysis and synthesis, synergism, historical and legal, formal-logical, system-structural, comparative-legal, formal-legal, and statistical. The empirical materials for the article were theoretical developments of representatives of legal and economic science, international legal acts (the 2030 Agenda for Sustainable Development, United Nations, Codex Alimentarius), legislation of Ukraine (Law of Ukraine 'On basic principles and requirements for organic production, circulation and labelling of organic products' (2018)), acts from the UN (Commission Regulation (EC) 889/2008 with provisions on the implementation of Council Regulation (EU) No. 834/2007 on organic production, labeling of organic products and control, Council Regulation (EC) No. 834/2007 of 28 June 2007 on organic production and labeling of organic products), acts from the USA (Organic Foods Production Act, OFPA (1990)), and documentation from other states that regulate public relations in the field of legal support of organic agriculture and analyse UN, WHO, FAO, and IFOAM Statistics.*

Results and Conclusions: *The need to address medical and legal issues of public health requires a joint effort of the world community in the development and creation of unified legal foundations for organic production and universal standards for organic agricultural products, as well as the introduction of an effective international legal mechanism for legal support of organic agriculture, stimulating its development and promoting a healthy lifestyle and organic foods.*

1 INTRODUCTION

The preservation of human health and the possibility of exercising one's natural right to life are directly related to the quality and safety of food. Currently, there is a global trend toward increasing demand for organic products of plant and animal origin, which, in turn, encourages agricultural producers around the world to switch to organic agriculture. Conducting this alternative form of agricultural production is a means of ensuring public health, and its development largely depends on the perfection of legal support.

Eliminating hunger, improving nutrition, ensuring that everyone has access to safe and nutritious food, promoting sustainable agriculture, maintaining a healthy lifestyle, and promoting well-being for everyone of all ages are landmarks enshrined in Sustainable Development Goals (SDGs) in the final document of the UN 'Transforming our world: The 2030 Agenda for Sustainable Development'.[4]

Meanwhile, the negative consequences of intensive industrial production with the active use of pesticides, agrochemistry, antibiotics, growth stimulants, and hormones are not only environmental pollution and reduced soil fertility and biodiversity but also deteriorating health and the spread of allergies, cancer, and cardiovascular and other diseases observed in recent

4 United Nations Sustainable Development Goals (SDGs) 'Transforming our world: The 2030 Agenda for Sustainable Development' (Santiago: Printed at United Nations 2018) 19-23.

decades. According to the WHO, the most common causes of death in the world in 2020 were cardiovascular disease (coronary heart disease, stroke), chronic obstructive pulmonary disease, respiratory infections of the lower respiratory tract, diarrhoea, tuberculosis, HIV/AIDS, cancer, etc.[5] The extreme prevalence of allergic diseases (up to 40% of the population) has prompted the international medical community to join the World Allergy Organization (WAO), develop the WAO White Paper on Allergies, and take systematic action to prevent and treat the disease.[6]

According to IFOAM, the use of pesticides in the cultivation of crop products is associated with a number of human health problems – from short-term consequences (headache, nausea) to chronic diseases and cognitive impairment during pregnancy – in addition to environmental damage. Additionally, low standards of keeping animals in the global livestock sector lead to the systematic and excessive use of antibiotics in veterinary medicine, which, in turn, reduces their ability to treat life-threatening human infections and promotes the emergence of antibiotic-resistant microorganisms.[7]

The problem of healthy eating has become even more acute due to the unprecedented events caused by the COVID-19 pandemic when issues of maintaining health and strengthening the human immune system (due to the lack of specific vaccines and drugs) came to the fore. This reiterated the need to ensure the sustainable development of the agricultural sector, the transition to a 'green economy', and alternative forms of agricultural production, in particular through organic farming. Thus, the European Agricultural Fund for Rural Development program during the pandemic provides for increased funding to support farmers and rural areas to 90 billion euros in the relevant structural changes needed to achieve these goals.[8]

Of course, the decisive role in the process of organic agriculture and organic food production belongs to legal regulation. This article sets out the relevance of the study of the issues of legal provision of organic agriculture as a means of maintaining public health, both nationally and internationally.

2 ORGANIC AGRICULTURE AS AN ALTERNATIVE FORM OF AGRICULTURAL PRODUCTION

Organic agriculture as an alternative form of agricultural production is one of the unconditional modern world trends and is a form of practical implementation of sustainable agriculture policy, as it combines three components: economic efficiency (increasing the competitiveness of agricultural products), environmental orientation (restoration of agroecosystems), and environmental protection and social effect (providing consumers with safe and high-quality food, etc.). Organic farming has a number of environmental, social, and economic benefits, as it saves natural and energy resources while minimising the negative impact of agricultural activities on the environment, and organic nutrition is a guarantee of maintaining public health, increasing life expectancy, and improving the quality of life. Consumption of organic products at a higher level provides the physiological needs of humans for vitamins, trace elements, and nutrients. According to experts, organic products are more useful than their conventional counterparts (for example, in organic milk,

5 World Health Organization 'Top 10 Causes of Death' <https://www.who.int/news-room/fact-sheets/detail/the-top-10-causes-of-death> accessed 11 April 2022.

6 World Allergy Organization, 'The official website of the WAO' <https://www.worldallergy.org/> accessed 11 April 2022.

7 IFOAM, 'Health' <https://www.ifoam.bio/our-work/what/health> accessed 11 April 2022.

8 'Are European governments pushing for a green recovery?' <https://think.ing.com/articles/are-european-governments-pushing-for-a-green-recovery> accessed 11 April 2022.

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there are 70% more vitamins, and in organic products, there are 18-19% more antioxidants and polyunsaturated fatty acids and 50% less heavy metals). In addition, organic farms generate 30% less greenhouse gas emissions than conventional farms and therefore pollute the atmosphere and the environment less,[9] which also has a positive impact on human health and is so important for the current and subsequent generations. Such products do not contain GMOs, preservatives, artificial dyes, pesticide residues, and other substances harmful to human health.

In general, the concept of alternative agricultural production based on compliance with environmental imperatives is currently opposed to traditional agricultural production and is seen as more complex because it is based on a holistic approach. Agrotechnical and other production measures are considered in combination with all possible consequences for the environment (soils, flora, fauna, etc.), as well as for human health and quality of life. It is based on the principle: 'From healthy soils to healthy plants, animals, and humans'.

Among the goals of organic agriculture, there are: (a) ecological: preservation and increase of soil fertility; environmental protection; conservation of biological diversity; protection of water and atmospheric air in the process of agricultural production, etc.; b) socio-economic: production of quality and environmentally friendly products of plant and animal origin; ensuring the competitiveness of the agricultural sector; improving the health and life expectancy of the population by improving the quality of food and the environment; ensuring sustainable development of the agrosphere, etc.

According to the IFOAM, the production of organic agricultural products is currently developing in more than 170 countries. The development is characterised by a steady upward trend, and its market size has reached 50-60 billion US dollars.[10] The world leaders in the area of organic production are Australia with 17.2 million hectares, 97% of which are pastures, Argentina with 3.1 million hectares, and the United States of America with 2.2 million hectares.[11]

In Ukraine in 2019, according to the Ministry of Economic Development, Trade and Agriculture, the total area of agricultural land with organic status and transition period amounted to about 468 thousand hectares (1.1% of the total area of agricultural land). Of the 617 registered organic market operators, 470 of them are agricultural producers. This allowed Ukraine to take second place in terms of imported organic products to the EU.[12]

Organic agricultural production as the latest method of agricultural management began in the 1920s based on the theory of anthroposophy of the Austrian philosopher R. Steiner. According to his teachings, humans, as part of the universe, must live in harmony with the world around them and must protect the natural balance by maintaining the chain: healthy animals eat healthy plants, healthy plants grow on healthy soil, and healthy soil depends on healthy animals, which, in turn, ensures human health. In 1924, R. Steiner read his

9 L Artemenko, 'Yevropeyskyy dosvid derzhavnoyi pidtrymky organichnoho vyrobnytstva u konteksti zabezpechennya prodovolchoyi bezpeky Ukrainy [The European experience of government support of the organic production in the context of ensuring food security of Ukraine]' (2009) 9 Agrosvit 46-52. DOI: 10.32702/2306-6792.2019.9.46

10 The official website of the International Federation of Organic Agriculture Movements https://www.ifoam.bio/ accessed 11 April 2022.

11 V Grigoruk, Ye Klimov, 'Razvitiye organicheskogo sel'skogo khozyaystva v mire i Kazakhstane [Development of organic agriculture in the world and Kazakhstan]' in H Muminjanova (ed) FAO (Ankara 2016) 9-26; 'Orhanichne vyrobnytstvo v Ukrayini: informatsiyno-analitychnyy portal APK Ukrayiny [Organic production in Ukraine: information-analytical portal of the agro-industrial complex of Ukraine]' (11 December 2020) <https://agro.me.gov.ua/ua/napryamki/organichne-virobnictvo/organichne-virobnictvo-v-ukrayini> accessed 11 April 2022.

12 'Orhanichne vyrobnytstvo v Ukrayini' (n 11).

'Agricultural Course' in Koberwitz (Poland), which became the concept of biodynamic agriculture as the basis of organic agriculture.[13]

The term 'organic farming' was first used in 1940 in England by Lord Northbourn (Walter Ernest Christopher James), an agricultural specialist at the University of Oxford. The British botanist Albert Howard also made a significant contribution to the development of organic agriculture. It was he who first described the negative effects of chemicals on the condition of plants and animals and suggested the use of plant composts and organic fertilisers. The beginning of organic gardening was laid by D.I. Rodeil. In 1971, the Rodeil Institute of Experimental Farming was established, which today occupies a leading position in the area of organic agriculture and has its own research farm.[14]

In 1972, the International Federation of the Organic Agricultural Movement (IFOAM) was founded in Versailles with the aim of introducing and disseminating information about organic agriculture in the world. IFOAM now brings together 760 member organisations in 108 countries, holds conferences, seminars, and meetings, publishes a quarterly newsletter in four languages, and coordinates the activities of various movements promoting organic agriculture around the world.[15]

IFOAM defines the principles of organic agriculture, which are universal for all countries, forms of ownership, and production of organic products. Among them are: 1) the principle of health. Organic agriculture aims to preserve and enhance the health of the soil, plants, animals, and humans as a whole – the health of the ecosystem. This principle shows that the health of the individual and society cannot exist separately from the health of ecosystems because healthy plants that support the health of animals and humans grow on healthy soils. Health is the unity and integrity of living systems. It is not just the absence of disease but the preservation of physical, mental, social, and environmental well-being. Immunity, resilience, and the ability to recover are key characteristics of health. There is also 2) the principle of environmental friendliness; 3) the principle of justice; 4) the principle of care. Organic agriculture is based on a responsible approach to the health and well-being of present and future generations of mankind and the environment in general.[16] These basic principles should be used as a whole. In many countries around the world, both the organic food market and the relevant certification and marketing services have been operating effectively in recent years. They adhere to these principles and respond to consumer demand in the global agri-food market. However, it should be noted that these IFOAM principles are declarative – they acquire legal force only by being enshrined in the law of a particular state. At the same time, not every state will follow this path because it will be quite difficult to ensure their observance. For example, no country in the world guarantees justice in terms of equal access of all segments of the population to organic products because their cost is much higher, taking into account not only their safety and quality level but also the investment of additional labour, certification costs, creating conditions for compliance with the requirements of organic production, etc.

Organic agriculture, as one of the alternative forms of agricultural production, is the latest attempt adapted to the environmental management system, which is based on a holistic approach and consists of the conduct of agricultural production, ensuring its sustainable

13 R Steine, Anthroposophical Leading Thoughts, translated by George and Mary Adams (Rudolf Steiner Press 1924) 230.

14 T Kurman, Stalyy rozvytok sil's'kohsopodars'koho vyrobnytstva: problemy pravovoho zabezpechennya. [Sustainable development of agricultural production: problems of legal support] (Urayt 2018) 241-243.

15 IFOAM, 'Organics International. Official website' <https://www.ifoam.bio/en/about-us> accessed 11 April 2022.

16 T Kurman (n 14) 241-243.

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development to meet the needs of present and future human generations in organic products of crop production, animal husbandry, aquaculture, and agroforestry.[17]

Proper legal regulation of relations in the production of organic agricultural products is one of the means of ensuring food security and public health. The formation of the quality of organic products is under the influence of technological measures, norms, and requirements for the processes of its production. It is due to the observance of such norms and rules that agricultural products of plant and animal origin acquire organic properties. Its quality indicators should differ from indicators of products produced in the framework of traditional or transitional production. Among them, there are safety, reliability, economy, environmental friendliness, compliance with sanitary, technological, hygienic, and physiological standards, etc.

The safety of organic products is its most important characteristic in terms of its ability to affect human health and life. Its essence is the absence of the threat of harmful effects of these products on the human body. At the same time, the production of organic products is a means of ensuring agri-environmental safety and therefore should be characterised by the absence of harmful effects not only on the consumer but also on the environment.

In general, the legal provision of organic agriculture has evolved in world practice from the local level, from private standards set by farmers themselves. Farmers' associations, such as Bioland, Soil Association, and BioSuisse, developed and implemented their own voluntary standards, which later became the basis for the emergence of a legal framework in the field of organic agriculture. The first International Standards, harmonised by IFOAM, appeared in 1983.[18]

Today, most developed countries have their own system of legal regulation for organic production. The first laws in this area appeared in the 1980s in France and Denmark. In the United States, organic standards began to develop at the state level in the early 1970s, and, in 1990, the Organic Foods Production Act was passed. In order to implement the provisions of this law in the United States, the National Organic Program (NOP) – a federal legal framework governing the production of organic food – was established.[19] Under the Safe Food for Canadian Regulations (SFCR), any food that is labelled organic is regulated by the Canadian Food Inspection Agency (CFIA). With the adoption of the Organic Products Regulations (OPR) in 2009, the Canada Organic Regime (COR), which includes mandatory national standards, uniform labelling rules, national logos, and strict compliance with Canadian Food Inspection Agency requirements, was introduced.[20] In Argentina and Australia, there are organic regulations equivalent to Council Regulation (EC) No. 834/2007.[21] In Ukraine, relations in the area of organic production are regulated by the Law 'On basic principles and requirements for organic production, circulation and labeling of organic products' (2018).[22]

The United Nations Organization for Agriculture and Food (FAO) and the International Federation of Organic Agricultural Movements (IFOAM) are important for the formation of an international regulatory framework for organic production. In 1963, the FAO established

17 T Kurman, 'Teoretiko-pravovyye osnovy organicheskogo sel'skogo khozyaystva v Ukraine. [Theoretical and legal bases of organic agriculture in Ukraine]' (2018) 7 (2) Legea si viata 67-71.

18 V Grigoruk, Ye Klimov (n 11) 9-26.

19 Ibid.

20 Ibid.

21 Office of the United Nations High Commissioner for Human Rights, 'Human rights. The right to adequate food. Statement of facts' (2011) 34: 58.

22 Zakon Ukrayiny, 'Pro osnovni pryntsypy ta vymohy do orhanichnoho vyrobnytstva, obihu ta markuvannya orhanichnoyi produktsiyi [On the basic principles and requirements for organic production, circulation and labeling of organic products]' of 10 July 2018; Information of the Verkhovna Rada of Ukraine (VVR) (2018) 36, Art. 275.

an intergovernmental organisation, the Codex Alimentarius Commission, which introduced the International Food Standards (Codex Alimentarius)[23] and developed the 'Guidelines for the Manufacture, Processing, Labeling and Sale of Organic Products' to introduce uniform international requirements. However, this normative document ignores the requirements for the original organic agricultural raw materials from which such products originate. IFOAM formulated the first Basic Standards for Organic Agriculture. Products can only be considered organic if they are certified by an IFOAM accredited body. The regulatory requirements developed by the Codex Alimentarius and IFOAM include the principles of management of organic production, rules for processing, storage, packaging, and transportation of organic food, as well as a list of substances permitted for use in their production and processing.

It should be noted that the permissible content of inorganic substances should also be determined separately for raw materials and finished products because the concentration of chemicals may change as a result of processing.

The legal basis for European legislation in this area is Commission Directive (EC) No. 889/2008 of 5 September 2008 'Detailed rules on organic production, labeling and control for the implementation of Council Regulation (EC) No. 834/2007 on organic production and labeling organic products, Council Regulation (EC) No. 834/2007 of 5 September 2008 "On organic production and labeling of organic products"'.[24]

In non-EU countries, the standard of the International Accredited Certification Bodies for Organic Production and Processing, equivalent to the European Union Standard according to Council Regulation (UN) No. 834/2007 and No. 889/2008[25], is applied. In 2021, a new EU legislative act in the area of production and labeling of organic products came into force – the Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labeling of organic products and repealing Council Regulation (UN)) No. 834/2007.[26]

The essential properties of organic products are environmental friendliness, naturalness, and the absence of preservatives, antibiotics, other chemicals, GMOs, any inorganic components, etc. Compliance with these properties must be confirmed by a certificate. This feature is legal in nature, as it has a normative basis, both at the national and international levels. It is also important to consider the specific needs of the consumer because when buying organic products, one expects higher safety and quality.

Therefore, when formulating the content of the legal category 'quality of organic products', fixing quality requirements in special regulations, standards, and other technical documentation and confirmation of compliance with the certificate of conformity should be considered as objective components, and the ability to meet consumer needs in natural, environmentally friendly products as a subjective component.

Among the responsibilities of any state to guarantee the right to safe and wholesome food at the national level are: observance of the right of the population to access safe (children's, medical, and dietary) food, including organic food; strengthening economic and social opportunities for the population to access organic food. If the population is unable, for objective reasons, to

23 FAO of the UN, World Health Organization, 'Codex Alimentarius. International food standards' <http://www.fao.org/fao-who-codexalimentarius/codex-texts/maximum-residue-limits/en/> accessed 11 April 2022.

24 Commission Regulation (EC) 889/2008 with provisions on the implementation of Council Regulation (EU) No 834/2007 on organic production, labeling of organic products and control. Official Journal of the European Union (OJ L) 2008 250: 1.

25 Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products. Official Journal of the European Union (OJ L) 2007; 189: 1.

26 Office of the United Nations High Commissioner for Human Rights (n 21).

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use the right to organic food at the expense of available funds, the state should provide access to it, for example, through food aid or social assistance coverage for the most vulnerable.[27]

To fulfil this duty at the legislative level, we need a unified procedure for certification of organic production, a procedure for determining the suitability of soils for organic agriculture, special standards and technical regulations for certain types of organic products,[28] a list and mechanism of effective means of state support for both producers of organic food and its consumers (especially socially vulnerable groups), etc.

3 CONCLUSIONS

The preservation of human health, the possibility to realise one's natural right to life, and the state of demographic processes directly depend on the level of safety and quality of food. Organic agriculture is the key to ensuring a high level of safety and quality of agricultural products, environmental protection, public health, and many other tasks. Differences in the organic legislation of different countries are reflected in the legal support of organic agriculture at the national level. However, the need to address medical and legal issues of public health requires a joint effort of the world community in the development and creation of unified legal foundations for organic production and universal standards for organic agricultural products, the introduction of an effective international legal mechanism for legal support of organic agriculture, and the stimulation of its development and promotion healthy lifestyle and organic foods.

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27 Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) № 834/2007. Official Journal of the European Union (OJ L) 2018; 150: 1-92.

28 M Shulga, N Malysheva, V Nosik et al., Orhanichne sil's'kohospodars'ke vyrobnytstvo v Ukrayini: pravovi zasady vedennya [Organic agricultural production in Ukraine: legal principles] (Yuryt 2020) 205.

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Note from the Field
Access to Justice Amid War in Ukraine Gateway

ENFORCEMENT PROCEEDINGS AMID MILITARY AGGRESSION IN UKRAINE: CURRENT CHALLENGES

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Keywords: *war in Ukraine, access to justice, enforcement of court decisions, enforcement proceedings, private enforcement agents, state enforcement service, problems of enforcement proceedings*

ABSTRACT

In this note, the peculiarities of the implementation of decisions of courts or other jurisdictions during the military aggression against Ukraine were studied. The note also reveals the main causes

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of problematic situations in the implementation of enforcement proceedings under martial law and proposes comprehensive solutions based on law enforcement practice and specific changes to current legislation.

Particular attention was paid to the legal regulation of enforcement proceedings in the occupied Ukrainian territories during 2014-2022.

The conclusion discusses the contradiction of unresolved issues in the theory and practice of legislation in implementing enforcement proceedings during the period of martial law as a result of significant updating and reforms.

1 BACKGROUND OF THE STUDY

On 24 February 2022, the russian federation launched a military attack on Ukraine. By openly invading Ukraine by land, sea, and air, they grossly violated the UN Charter and numerous norms of international law and committed an act of aggression, the most serious and gross violation of international law.[3]

On the same day, the President of Ukraine, Volodymyr Zelensky, signed Decree No. 64 'On the imposition of martial law in Ukraine'. This decision was made on the basis of a proposal from the National Security and Defense Council and in accordance with Ukrainian law.[4]

According to Art. 64 of the Constitution of Ukraine, the constitutional rights and freedoms of man and citizen may not be restricted, except in cases provided by the Constitution of Ukraine.[5]

In conditions of martial law or a state of emergency, certain restrictions on rights and freedoms may be imposed, indicating the term of these restrictions. Art. 20 of the Law of Ukraine 'On Martial Law' provides that the legal status and restrictions on the rights and freedoms of citizens and the rights and legitimate interests of legal entities in martial law are determined in accordance with the Constitution of Ukraine and this Law.[6]

The national regime of enforcement proceedings is determined by the Law of Ukraine 'On Enforcement Proceedings'.[7] On 24 February 2022, about 2 million 300 enforcement proceedings were underway in the State Enforcement Service. According to the report of the Association of Private Performers of Ukraine for December 2020 – October 2021, 275 private performers and 4250 state performers operate in Ukraine.[8][9]

3 It should be noted that russia was excluded from the Council of Europe on 15 of March 2022 <https://www.coe.int/en/web/portal/-/the-russian-federation-is-excluded-from-the-council-of-europe> accessed 13 April 2022. See UN General Assembly suspended russia from the Human Rights Council <https://news.un.org/en/story/2022/04/1115782> accessed 13 April 2022.

4 Decree of the President of Ukraine no 64/2022 'On the introduction of martial law in Ukraine' <https://www.president.gov.ua/en/news/prezident-pidpisav-ukaz-pro-zaprovadzhennya-voyennogo-stanu-73109> accessed 13 April 2022.

5 Constitution Ukraine, 28 June 1996 <https://zakon.rada.gov.ua/laws/show/254к/96-вр #Text> accessed 13 April 2022.

6 Law of Ukraine 'On the Legal Mode Military Status' of 12 May 2015 no 389-VIII <https://zakon.rada.gov.ua/laws/show/389-19 #Text> accessed 13 April 2022.

7 Law of Ukraine 'On Enforcement Proceedings' of 2 June 2016 no 1404-VIII <https://zakon.rada.gov.ua/laws/show/1404-19 #Text> accessed 13 April 2022.

8 <https://ukurier.gov.ua/uk/articles/zastupnik-ministra-yusticiyi-ukrayini-z-pitan-viko/> accessed 13 April 2022.

9 Report of the Association of Private Performers of Ukraine for December 2020 – October 2021 <https://drive.google.com/file/d/1in_a2EGzo0HpxCgRGgvTBdCOxJGruZKD/view> accessed 13 April 2022.

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However, in order to ensure the protection of national interests in connection with the military aggression of the Russian Federation and to ensure the constitutional rights and freedoms of man and citizen in martial law, we need to resolve some issues of enforcement.

2 LEGAL REGULATION OF ENFORCEMENT PROCEEDINGS IN THE OCCUPIED TERRITORIES DURING 2014-2022

After the beginning of the armed conflict, Ukrainian enforcement proceedings ceased to function in the temporarily occupied territories of the Luhansk and Donetsk oblasts, but the number of legal issues among residents of these territories and internally displaced persons only increased. For example, law enforcement agencies were forced to leave unfinished enforcement proceedings in the Donetsk and Luhansk oblasts, where the authorities suspended their powers because they were unable to remove documents during the relocation of territory uncontrolled by the Ukrainian authorities. It is clear that it is impossible to continue to take measures to enforce any decision without the state executor having an executive document.

Obtaining an executive document in the case, the materials of which remained in the occupied territory, is too complicated a procedure and requires the restoration of lost case materials.

In the context of the research question, it should be noted that in Part 4 of Art. 4 of the Law of Ukraine 'On temporary measures for the period of anti-terrorist operation', it is determined that the list of settlements on the territory of which public authorities temporarily do not exercise their powers and the list of settlements located on the line of contact are approved by the Cabinet of Ministers of Ukraine, which ensures their timely updating.[10] The list of settlements in the territory over which public authorities temporarily do not exercise their powers and the list of settlements located on the line of contact have been approved. In particular, the bodies of the state executive service in the cities of Donetsk, Horlivka, Debaltseve, Dokuchaevsk, Yenakiieve, Zhdanovka, Makeyevka, Luhansk, Alchevsk, Pervomaisk, and others – more than 23 departments of the state executive service – cannot exercise their powers.

In 2018, a study called 'Justice in the East of Ukraine in the Conditions of Armed Aggression of the Russian Federation' was conducted by a group of authors under the general editorship of Roman Kuibida and Markiyan Galabala. In particular, it was concluded that the actual reason for the impossibility of exporting case files in court and enforcement proceedings that lasted or were completed from the occupied territories and zones of active hostilities was the slowness in the actions of the central government. In addition, the abandonment of materials for enforcement proceedings in the temporarily occupied territory caused significant obstacles to the execution of court decisions. It should be noted that in the Block 'Assessment of the relevance (presence) of problems of justice in eastern Ukraine in the context of armed conflict', 36.75%[11] of respondents pointed to the insufficiency in the

10 Law of Ukraine 'On temporary measures for the period of the anti-terrorist operation' of 2 May 2014 no 1669-VII <https://zakon.rada.gov.ua/laws/show/1669-18#Text> accessed 13 April 2022; On approval of the list of settlements on the territory of which state authorities temporarily do not exercise their powers, and the list of settlements located on the contact line: Order of the Cabinet of Ministers of Ukraine dated 7 November 2014 no 1085-p <https://zakon.rada.gov.ua/laws/show/1085-2014-r#n8> accessed 13 April 2022.

11 R Kuibida, M Galabals (eds), Justice in the East of Ukraine in the Context of Armed Aggression of the Russian Federation: Report on the Results of the Capacity Study forensic the system of ensuring justice in the context of the armed conflict in the east Ukraine <https://www.irf.ua/content/files/justice_in_eastern_ukr.pdf> accessed 13 April 2022.

legislation of Ukraine regarding enforcement proceedings of mechanisms that ensured the execution of court decisions in conditions of armed conflict, and 60.8% of respondents also highlighted the lack of access to the materials of court cases and materials of enforcement proceedings remaining in the temporarily occupied territories.[12]

We would like to draw your attention to the fact that *the courts often refuse to restore the lost case materials, even if there is reliable information about the content of the court decision from the Unified State Register of Court Decisions*.

Judicial practice illustrates that for the production of executive documents or their duplicates, the court often first restores the materials of lost court cases using information from the Unified State Register of Court Decisions as one of the sources of information and only after that do they apply court decisions for execution. We are convinced that these procedures should be simplified because the data of this register is sufficient for the publication of executive documents.

Also*, as a result of the termination of the activities of state bodies and institutions in the occupied territories, the execution of court decisions in cases where such a body or institution was a party became more complicated*.

In particular, enforcement proceedings in cases where the debtor was the body of the Pension Fund of Ukraine are extensive. Some of these bodies, which were in the temporarily occupied territory, were moved to the controlled territory, but the powers to serve the insured were transferred to other bodies of the Pension Fund. Therefore, there was a problem with the determination of the debtor – whether it will be a relocated body or one that has acquired powers to serve policyholders.

The courts in such disputes took the position that there are no grounds for replacing the debtor since he or she was moved to the territory controlled by Ukraine and did not cease his or her activities.

In practice, there were also situations when *state executors refused to open enforcement proceedings, citing the impossibility of implementing the court decision as a result of the anti-terrorist operation on the territory of the Luhansk and Donetsk regions*, without even finding out whether the debtor had property outside certain districts of the Donetsk and Luhansk regions. Judicial practice has developed an approach in which the actual registration of an enterprise in the territory where state authorities temporarily do not exercise their powers does not exclude the possibility of finding the debtor's property outside that territory.

One of the most recent studies on this topic in 2021 is that of the UNDP 'Availability of archival and judicial cases remaining in the territory of Donetsk and Luhansk regions not controlled by the Government of Ukraine', which was conducted by Olena Sapozhnikova and Oleksiy Plotnikov. It was established that the courts considering applications from persons who came from the territory of the Donetsk and Luhansk regions not controlled by the Government of Ukraine to the territory controlled by the Government of Ukraine do not allocate such cases in any way – that is, the number of cases transferred is not accounted for, since the State Judicial Administration has not developed such a criterion of electronic reporting.[13]

Taking into account the above, there are certain shortcomings of the national legal regulation of enforcement proceedings in the conditions of military aggression of the Russian Federation:

12 Law of Ukraine 'On temporary measures for the period of the anti-terrorist operation' (n 10).

13 Availability of archival and court cases remaining in the non-government-controlled territory of Donetsk and Luhansk regions: Report on the results of the study <https://webcache.googleusercontent.com/search?q=cache:E1ohcLu4wu8J:https://www1.undp.org/content/dam/ukraine/docs/DG/HR4U/Archive-p.pdf+&cd=2&hl=ru&ct=clnk&gl=es&client=safari> accessed 13 April 2022.

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- the absence of the circumstances of temporary occupation of territories and armed aggression of the Russian Federation as a basis for suspending the period of presentation of executive documents for execution or renewal of such a period;
- the imperfection of judicial practice in disputes arising in connection with the resumption of enforcement proceedings;
- the absence of typical algorithms for enforcement proceedings in the presence of problems caused by the aggression of the Russian Federation as methodological recommendations to state and private performers;
- the insecurity of the possibility due to amendments to the legislation for the production of certified copies of court decisions and the issuance of executive documents and their duplicates on the basis of data from the Unified State Register of Court Decisions without applying the procedure for restoring materials of lost proceedings.

3 PROTECTION OF NATIONAL INTERESTS IN OPEN ENFORCEMENT PROCEEDINGS AMID THE MILITARY AGGRESSION

In connection with the introduction of martial law in Ukraine, amendments and clarifications were made to the normative legal acts regulating the principles of enforcement proceedings.

1. The changes particularly affected the functioning of the automated system of enforcement proceedings under martial law. It should be noted that the state enterprise 'National Information Systems' reported on the emergence of *force majeure* circumstances and temporarily suspended the work of the Unified and State Registers of the Ministry of Justice of Ukraine, especially the Automated System of Enforcement Proceedings and the Unified Register of Debtors.[14] This, in turn, makes it impossible for public and private executors to carry out executive actions. This decision was made in order to prevent any unauthorised actions with the information of the Unified and State Registers of the Ministry of Justice of Ukraine by the enemy and to ensure the preservation and protection of the information contained in them, as well as in connection with numerous cyberattacks.

2. The Cabinet of Ministers of Ukraine immediately introduced temporary measures (until the termination or cancellation of martial law) in the field of enforcement proceedings, namely:

- In order to ensure the life of the population under martial law, individuals are allowed to carry out expenditure operations from accounts that have been arrested by state executive service bodies, private executors, *without taking into account such arrest*, provided that the amount of recovery under the executive document for such a person does not exceed UAH 100,000. Therefore, debtors whose debt does not exceed UAH 100,000 can use the arrested account and do not need to apply to the executor at all by resolution[15] (Order of the Cabinet of Ministers of Ukraine dated 2 March 2022 No. 198-p).
- In order to ensure the protection of national interests on future claims of the state of Ukraine, there is a moratorium (prohibition) on execution, including involuntarily,

14 Information on payments collected by executors in the course of enforcement of decisions: Government portal <https://www.kmu.gov.ua/news/minyust-informaciya-shchodo-viplat-yaki-styaguyutsya-vikonavcyami-v-hodi-primusovogo-vikonannya-rishen> accessed 13 April 2022.

15 On ensuring the implementation of settlements of the population under martial law: Order of the Cabinet of Ministers of Ukraine dated 2 March 2022 no 198-p <https://zakon.rada.gov.ua/laws/show/198-2022-p#Text> accessed 13 April 2022.

monetary, and other obligations, on creditors (collectors) connected with the Russian[16] Federalization or persons associated with the aggressor state (Cabinet of Ministers of Ukraine dated 3 March 2022 No. 187).

- In order to ensure settlements with the population and the budget, debtor legal entities are allowed to carry out expenditure operations from accounts from which funds are seized by state executive service bodies or private executors exclusively for the payment of wages in the amount of not more than five minimum wages per month per employee of the debtor legal entity, as well as for the payment of taxes, fees, and a single contribution to compulsory state social insurance[17] (Cabinet of Ministers of Ukraine dated 11 March 2022 No. 212-p).

At the same time, it should be stated that the legal status and restriction of the rights and freedoms of citizens and the rights and legitimate interests of legal entities under martial law are determined in accordance with the Constitution of Ukraine and the Law of Ukraine On the Legal Regime of Martial Law' dated 12 May 2015 No. 389-VIII. The Constitution of Ukraine stipulates that the procedure for execution of court decisions is determined exclusively by the laws of Ukraine, and the state ensures the execution of a court decision in accordance with the procedure established by law.[18]

Taking into account the specified specifics of the regulation of the sphere of enforcement proceedings, the Verkhovna Rada of Ukraine adopted the Law of 15 March 2022 No. 2129-IX 'On Amendments to Section XIII "Final and Transitional Provisions" of the Law of Ukraine "On Enforcement Proceedings"'[19] (hereinafter referred to as the Law), which entered into force on 26 March 2022 and by which the above-mentioned provisions were legislated.

We consider it necessary to note that from now on, there is a moratorium (ban) on:

- fulfilment, including involuntarily, monetary, and other obligations, creditors (collectors) that are members of the Russian Federation or citizens of the Russian Federation, legal entities established and registered in accordance with the legislation of the Russian Federation, legal entities established and registered in accordance with the legislation of Ukraine as the ultimate beneficial owner, member, or participant (shareholder) who has a share in the authorised capital of 10 per cent or more, which is part of the Russian Federation, a citizen of the Russian Federation, or a legal entity established and registered in accordance with the legislation of the Russian Federation;
- actions that have or may result in the alienation of real estate, securities, corporate rights, vehicles, air and sea vessels, or inland navigation vessels by persons associated with the aggressor state, except for free alienation in favour of the state of Ukraine, as well as in favour of persons associated with the aggressor state or in favour of the Russian Federation.

It is also established that transactions (including power of attorney) concluded in violation of the moratorium are null and void, and notarization of transactions violating the moratorium is prohibited.

16 Concerning Ensure Protection National Interests per Future claims State Ukraine into Communication with Military Aggression Russian Federation: Resolution Cabinet Ministers Ukraine dated 3 March 2022 no 187 <https://zakon.rada.gov.ua/laws/show/187-2022-p #Text> accessed 13 April 2022.

17 On ensuring the implementation of settlements of enterprises, institutions, organizations under martial law: Resolution of the Cabinet of Ministers of Ukraine dated 11 March 2022 no 212-p <https://www.kmu.gov.ua/npas/pro-zabezpechennya-zdijsnennya-rozrahunkiv-pidpriyemstv-ustanov-organizacij-v-umovah-voyennogo-stanu-212-> accessed 13 April 2022.

18 Law of Ukraine 'On Legal Mode Military Status' of 12 May 2015 no 389-VIII <https://zakon.rada.gov.ua/laws/show/389-19 #Text> accessed 13 April 2022.

19 Law of Ukraine 'On Amendments to Section XIII "Final and Transitional Provisions" of the Law of Ukraine "On Enforcement Proceedings"' of 15 March 2022 no 2129-IX <https://zakon.rada.gov.ua/laws/show/2129-20 #Text> accessed 13 April 2022.

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At the same time, several exceptions to the application of the moratorium (prohibition) have been established. Thus, the corresponding restriction does not apply to:

- citizens of the Russian Federation who live on the territory of Ukraine legally;
- legal entities established and registered in accordance with the legislation of Ukraine, the ultimate beneficial owner, member, or participant (shareholder) of which are exclusively citizens of the Russian Federation living on the territory of Ukraine legally;
- legal entities established and registered in accordance with the legislation of Ukraine, the ultimate beneficial owner, member, or participant (shareholder) of which are exclusively citizens of Ukraine and citizens of the Russian Federation living on the territory of Ukraine legally.

3. The law prohibits the opening of enforcement proceedings and the enforcement of decisions on the territory of administrative-territorial units temporarily occupied as a result of military aggression of the Russian Federation during such occupation.

4. According to the decisions on recovery of alimony, enterprises, institutions, organisations, individuals, individual entrepreneurs who make deductions from wages, pensions, scholarships, and other income of the debtor, transfer the recovered funds to the account specified in the application or application of the collector and, in the absence of details of the collector's account, to the appropriate account of the state executive service body or private executor. The amendments adopted by the Law do not provide for the prohibition of accrual and collection of penalties for late payment of alimony.

5. In addition, according to the materials of the government portal to ensure the life of citizens, the Ministry of Justice of Ukraine sent a letter to the National Bank regarding the failure of banks to take into account the resolutions of state and private performers on the arrest of funds when debtors open new accounts in banks, which, in turn, will inform all banking institutions of Ukraine about this. Clients can open such an account and use it without taking into account the previously imposed arrest before the end of martial law in Ukraine.[20]

4 CONCLUDING REMARKS

We conclude that within the legal regime of martial law, the area of enforcement proceedings has undergone significant temporary changes that should be applied based on an understanding of the need to stop the armed aggression of the Russian Federation against Ukraine as soon as possible.

In general, our chosen angle of analysis of the legal regime of enforcement proceedings in wartime requires further study and regulatory improvement.

20 Information on payments collected by executors in the course of enforcement of decisions: Government portal <https://www.kmu.gov.ua/news/minyust-informaciya-shchodo-viplat-yaki-styaguyutsya-vikonavcyami-v-hodi-primusovogo-vikonannya-rishen> accessed 13 April 2022.

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