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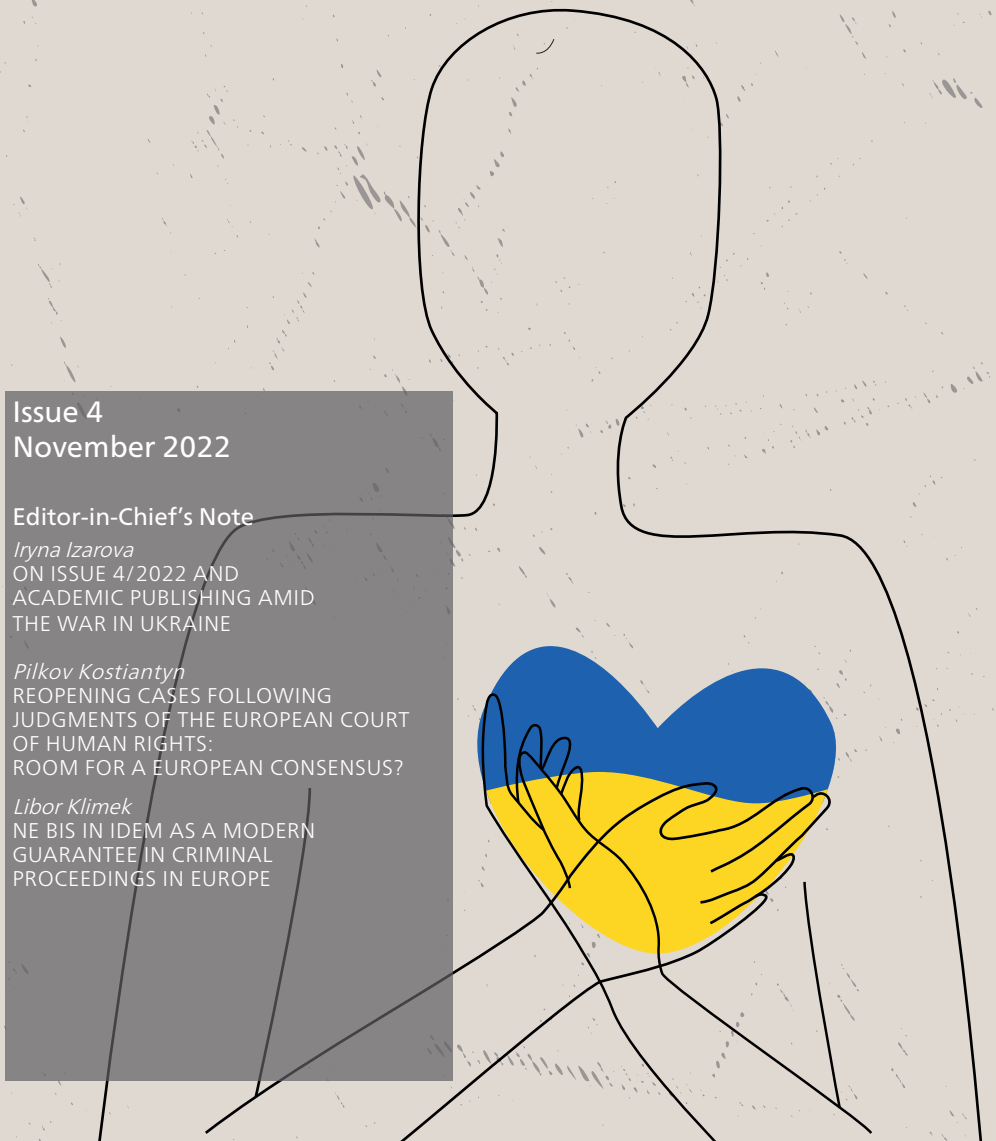

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# ACCESS TO JUSTICE IN EASTERN EUROPE

**Founded by the East European Law Research Center**

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**Editor-in-Chief's Note**

# ON ISSUE 4/2022 AND ACADEMIC PUBLISHING AMID THE WAR IN UKRAINE

This fall, AJEE, which was founded in 2018, is going to be four years old.

My idea to create the journal was motivated not only for the purpose of academic publishing but for the purpose of spreading Ukrainian scholarly research to an international audience, according to international standards of academic publishing.

The old soviet traditions of publishing strangled the very idea of modern Ukrainian scholarly research being available to an international audience, combined with the absence of regulations, experience, and professionals. To remedy this situation, I started by seeking out a professional community and exchanging knowledge and experience, and my efforts led to the creation of the Ukrainian Regional Chapter of the European Association of Science Editors, as well as our University Hub for Academic Publishing. We have successfully organised a series of events related to academic integrity, quality of publishing, and peer review, and now we are holding the first School for Editors in Ukraine, together with the Association of Ukrainian Editors and the European Association of Science Editors. I am happy to be one of the authors of this initiative and truly believe in its useful and productive results.

Within our Ukrainian Regional Chapter of the European Association of Science Editors, together with Maryna Zhenchenko and Yuliia Baklazhenko, we conducted a survey targeting 1,447 science journals published in Ukraine according to the electronic register of the State Scientific Institution 'Ukrainian Institute of Scientific and Technical Expertise and Information' (as of 1 August 2022). The main aim of this research was to collect and analyse data on how the war has changed the plans and daily lives of those who work in editorial services and how significantly it has impacted their job and work. This research will help us identify the range of issues and find effective ways to support the editors of scientific journals affected by the war in Ukraine.

I would like to take this opportunity to continue our work and also to express my endless gratitude to my wonderful team, who have taken care of the journal in this period of war, devastation, and disillusion. You are great! Thank you, Polina, for your constant support and care for the communication and dissemination of our results! My special thanks to our spectacular editors, Yuliia, Serhij, Tetiana, Oksana, and Olena as well – you are incredible! Thank you for all the excellent contributions to our journal and for handling articles with such high professional standards. Sarah, thank you for correcting our English and helping to make our research accessible! The wonderful language of Shakespeare gives academics and practitioners from all over the world a unique opportunity to communicate and understand each other. Ana and Polina, thank you for your help with our own beloved Ukrainian

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language, our mother tongue, which is the soul and heart of every Ukrainian. And, of course, with Oleksandr's support, we are visible on the web and to the world – thank you for your careful work! Lastly, my sincere gratitude to our publishers, Nataliia and Iryna – you have been the best partners since the very beginning of our journal's life!

Stay strong in your beliefs and endeavours – our contribution to the development and internationalisation of Ukrainian law is so crucial at this time.

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

# REOPENING CASES FOLLOWING JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS: ROOM FOR A EUROPEAN CONSENSUS?

***Pilkov Kostiantyn***

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## ABSTRACT

***Background:*** *The reopening of domestic criminal, civil, and administrative proceedings following European Court of Human Rights findings of a violation of the ECHR is an extraordinary remedy; its application is debatable in the Contracting States to the Convention. The overall objective of this article is to analyse the availability of the reopening of proceedings as a means of ensuring* restitutio in integrum*, i.e., the restoration of the* status quo ante *for a victim of violation or awarding compensation that would be sufficient in order bring the victim of a violation back to their position as if no violation had been committed.*

***Methods:*** *This article focuses on the examination of whether reopening a case following an adversarial ECtHR judgment is available as a remedy in the national legal systems throughout Europe. The method is comparative analysis without claiming to be exhaustive. Where analysed data made it possible, certain generalisations were made.*

***Results and Conclusions:*** *The research allowed us to conclude that in contrast to the successful implementation of the CoE CM Recommendation, in part related to making available reopening in criminal proceedings to the benefit of a victim of a violation of the ECHR in almost every member state, the reopening of civil and administrative proceedings remains available only in half of the member states, where it faces significant limitations aimed at protecting* res judicata *and interests of good faith third parties (the* bona fide *third parties). Also, it has become subject to a test of effectiveness as a legal remedy compared to compensation measures.*

***Keywords:*** *finality of judgments,* beneficium cohaesionis, erga omnes *effect*, res judicata, restitutio in integrum*, rule of law*

## 1 INTRODUCTION

The right to have unfair or otherwise unjust proceedings reopened[1] is generally recognised throughout Europe with respect to criminal cases, and many states also have rules for the reopening of civil and administrative judicial proceedings following a judgment of the European Court of Human Rights (hereinafter the Court or ECtHR) finding a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the Convention or ECHR), taking due account of the requirements of legal certainty and the rights of good faith third parties.[2] However, the extent to which this remedy is provided in national legislation and applied by courts remains unclear. As Nico Krisch noted in his widely cited paper, it has long been the case in most of Europe that reopening proceedings after they have been closed by a final judgment faces high hurdles, and the ECtHR finding a Convention violation in a given case generally does not suffice.[3]

The rules on finality with developed doctrines of *res judicata*, estoppel, or other neighbouring ideas supporting legal certainty are found in many national legal systems; however, there is

1 For the sake of clarity and use of unified terminology, the term 're-examination' is used in this paper as a generic term. The term 'reopening of proceedings' denotes the reopening of court proceedings which had resulted in a judgment that had become res judicata, as a specific means of re-examination. The term 'retrial' covers procedural means that allow for a case already decided by the court of final instance to be re-examined in essence if it becomes necessary after the reopening of the proceedings. Reopening has broader meaning and may include or be followed by retrial and other proceedings, such as reopening of investigation.

2 The European Court of Human Rights. Questions & Answers for Lawyers (2020) 17. <https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/PD_STRAS/PDS_Guides___recommendations/EN_PDS_2020_guide-CEDH.pdf> accessed 18 February 2022.

3 N Krisch, 'The open architecture of European human rights law' (2008) 71(2) Modern Law Review 183-216

no uniformity in contents and scope. In Europe, the ECtHR's case-law has done a great job of harmonising national laws on the matter. For the Court, finality is a part of the rule of law. From that principle, the ECtHR derives legal certainty, which requires, *inter alia*, respect for *res judicata*.[4]

Probably because of this immense impact of the Court's case-law on both promoting standards of fundamental rights' protection and guarding the value of finality of judgments, scholars have focused primarily on the effect that the ECtHR decisions have on the development of the law,[5] but not on the outcome of a particular domestic proceeding that led to cases having been brought before the ECtHR. This calls for further examination.

In this paper, we will try to discover whether it is in the discretionary power of the member states of the Council of Europe (hereinafter the CoE) to decide whether they wish to go beyond what they are obliged to do in terms of Art. 41 of the ECHR and allow the reopening of proceedings, and whether denying or providing access to reopening of domestic court proceedings when a violation of the ECHR established by the Court is commonly accepted in Europe.

The article is structured as follows. It begins by analysing the view of the ECtHR on the matter in Part II of this paper and sheds some light on changes in the Court's rhetoric regarding the role of reopening of domestic judicial proceedings as a measure of *restitutio in integrum*. According to the ECtHR, its findings of a violation of Art. 6 of the ECHR do not inevitably require the reopening of the domestic criminal proceedings, which is even more true for civil and administrative court cases. Yet, it is, in principle, the proper and often the most effective way of discontinuing or eliminating the violation and making available redress for its effects. According to the Court, this position is supported by the wide range of remedies in Europe, enabling individuals to apply for the reopening of a criminal case which has been concluded by a final judgment following a finding by the Court of a violation of the Convention. In that regard, the Court noted that there is no uniform approach among the member states as regards the access to the reopening of proceedings after they have been closed by a final judgment. The ECtHR also observed that in most of the member states, the reopening of proceedings is not available by default and is subject to certain admissibility criteria, whose observance is in the domain of domestic courts, which have a broader margin of appreciation in that area.[6]

Parts III and IV of this article systematically analyse the wide variety of approaches adopted throughout the member states with respect to making the reopening of domestic court proceedings available and establishing limitations and preconditions aimed at protecting important values other than the restoration of a violated fundamental right of a person.

The article relies on expert reports, as well as legal statutes regulating the reopening throughout the European countries and the relevant literature. In 2015, the Committee of Experts on the Reform of the Court arranged a sharing of data amongst the CoE's member states in order to identify good practice and details of how practical or procedural barriers to the reopening of domestic courts proceedings had been addressed. These data contained in the respective country reports[7] have been used as one of the sources of information for this

4 K Gusarov, V Terekhov 'Finality of Judgments in Civil Cases and Related Considerations: The Experience of Ukraine and Lithuania' (2019) 4(5) Access to Justice in Eastern Europe 9.

5 V Komarov, T Tsuvina, 'The Impact of the ECHR and the Case law of the ECtHR on Civil Procedure in Ukraine' (2021) 1(9) Access to Justice in Eastern Europe 79-101.

6 *Moreira Ferreira v Portugal (no 2)* App no 19867/12 (ECtHR, 11 July 2017) <https://hudoc.echr.coe.int/eng?i=001-175646> accessed 18 February 2022.

7 *Reopening of proceedings following a judgment of the European Court of Human Rights. Country Reports at the Round table.* Strasbourg, 5-6 October 2015 <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/echr-system/implementation-and-execution-judgments/reopening-cases> accessed 22 January 2022.

paper, accompanied by the analysis of more recent legislative changes. Where analysed data made it possible, certain generalisations were made. The last part of the article assesses the development of approaches of European legislators and judiciary towards reopening a case as an appropriate remedial measure.

## 2 REOPENING AS A *RESTITUTIO IN INTEGRUM*: THE ECTHR PERSPECTIVE

Art. 46 para. 1 of the ECHR stipulates that the contracting parties 'undertake to abide by the final judgment of the Court in any case to which they are parties'. This entails for the member states the following three types of obligations:

- to pay the sums awarded by the Court under Art. 41 of the ECHR (just satisfaction);
- to ensure an end to the violation and that the consequences have been erased to the extent possible (individual measures);
- to refrain from future violations similar to those found in the judgment (general measures).

In *Lyons and Others v. The United Kingdom*, the ECtHR recalled that based on Art. 46 of the Convention, the member states had undertaken to abide by the final judgments of the ECtHR in any case to which they were parties, execution being supervised by the Committee of Ministers of the Council of Europe (hereinafter the CoE CM). It follows, *inter alia*, that a judgment in which the ECtHR finds a breach of the Convention or its Protocols imposes on the respondent state a legal obligation not just to pay those concerned the amount of money awarded by way of just satisfaction but also to choose, subject to supervision by the CoE CM, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to cease and eliminate the violation established by the ECtHR and to redress the effects as far as possible. The ECtHR reiterated that, subject to monitoring by the CoE CM, the respondent state remained free to select the means by which it would discharge its legal obligation under Art. 46 of the ECHR, provided that such means would be compatible with the conclusions set out in the Court's judgment. For its part, the ECtHR cannot assume any role in this dialogue. The Court noted in particular that the ECHR did not give it jurisdiction to direct a state to open a new trial or to quash a conviction.[8]

Thus, the ECHR neither guarantees the right to the reopening of proceedings nor contains any provisions demanding that member states establish reopening mechanisms in their national laws.

It is widely recognised that only in exceptional cases can the Court impose an obligation on a state to take specific individual action, such as reopening unfair or otherwise unjust proceedings.[9] In general, the ECtHR recognises that, with respect to the reopening of domestic proceedings, it does not have jurisdiction to request such a measure. However, where a person has been convicted following proceedings that have entailed a violation of Art. 6 of the ECHR, the Court may state that the reopening of the proceeding, if requested,

8 *Lyons and Others v The United Kingdom* App no 15227/03 (ECtHR, 8 July 2003) <https://hudoc.echr.coe.int/eng?i=001-23303> accessed 18 February 2022. See also § 43 *in Pisano v Italy* (Striking Out) App no 36732/97 (GC ECtHR, 24 October 2002) <https://hudoc.echr.coe.int/eng?i=001-60706> accessed 18 February 2022; § 249 in *Scozzari and Giunta v Italy* App nos 39221/98 and 41963/98 (GC ECtHR, 13 July 2000) <https://hudoc.echr.coe.int/eng?i=001-58752> accessed 18 February 2022. See also § 46 in *Saïdi v France* App no 14647/89 (ECtHR, 20 September 1993) <https://hudoc.echr.coe.int/eng?i=001-57839> accessed 18 February 2022; § 44 in Pelladoah v the Netherlands App no 16737/90 (ECtHR, 20 September 1994) <https://hudoc.echr.coe.int/eng?i=001-57902> accessed 18 February 2022.

9 The European Court of Human Rights. Questions & Answers for Lawyers (n 3) 16.

represents, in principle, an appropriate remedy.[10] Only recently and only in exceptional cases has the ECtHR started to order such specific remedies in its judgments, i.e., to specify them in the operative provisions. However, even in these cases, the ECtHR only orders the reopening of domestic proceedings if the respective national legal order envisages this possibility. The ECtHR case law suggests, though, that the issue of ordering this way of redressing violations of the Convention by the Court remains disputed among its judges.[11]

Most recently, in *Melgarejo Martinez de Abellanosa v. Spain*, the ECtHR, in its judgment of 14 December 2021, noted that it had consistently held that where a person has been the victim of proceedings that have entailed a violation of Art. 6 of the ECHR, the most appropriate remedy would, in principle, be a retrial or the reopening of the case, at the request of the interested person.[12]

On the other hand, in some of its judgments, the ECtHR has itself explicitly ruled out the reopening of proceedings concluded by final judicial decisions following a finding of a breach of the requirements of Art. 6 of the ECHR.[13] According to the Court, the ECHR does not generally guarantee a right to have a terminated case reopened, and, importantly, Art. 6 of the Convention is not applicable to proceedings concerning an application for the reopening of civil proceedings which have been terminated by a final decision.[14] This is because, in so far as the matter is covered by the principle of *res judicata* of a final judgment in national proceedings, it cannot in principle be maintained that a subsequent extraordinary application or appeal seeking revision of that judgment gives rise to an arguable claim as to the existence of a right recognised under national law or that the outcome of the proceedings involving a decision on whether or not to reconsider the same case is decisive for the 'determination of ... civil rights and obligations'.[15] Indeed, the ECtHR had built up a unique doctrine of permitted reversal of finality, where priority is always given to stability and immutability of a final decision. Departure from the general rule is only possible when made necessary by circumstances of substantial and compelling character. Such is the case where some fundamental errors are present, and no other remedy is available to address them.[16] And, as we might deduce from the above analysis of the ECtHR on the matter, the Court generally hesitates to give any express opinions on whether there are any such remedies.

10 Council of Europe/European Court of Human Rights. Guide on Article 46 of the European Convention on Human Rights. Binding force and execution of judgments (2021) para. 15 <https://www.refworld.org/pdfid/6048e29d2.pdf> accessed 22 January 2022.

11 *Sejdovic v Italy* App no 56581/00 (ECtHR, 10 November 2004). This judgment was later watered down by the Grand Chamber. See *Sejdovic v Italy* App no 56581/00 (GC ECtHR, 1 March 2006); *Moreira Ferreira v Portugal* (n 7); R Kunz, 'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts' (2020) 30(4) The European Journal of International Law 1129-1163.

12 *Melgarejo Martinez de Abellanosa v Spain* App no 11200/19 (ECtHR, 14 December 2021) <https://hudoc.echr.coe.int/eng?i=001-214033> accessed 18 February 2022. See also § 27 in *Gençel v Turkey* App no 53431/99 (ECtHR, 23 October 2003) <https://hudoc.echr.coe.int/eng?i=001-65950> accessed 18 February 2022.

13 § 66 in *Henryk Urban and Ryszard Urban v Poland* App no 23614/08 (ECtHR, 30 November 2010) <https://hudoc.echr.coe.int/eng?i=001-101962> accessed 18 February 2022; §§ 47-51 in *Moreira Ferreira v. Portugal* (n 7); §§ 311-314 in *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18 (GC ECtHR,1 December 2020) <http://hudoc.echr.coe.int/eng?i=001-206582> accessed 18 February 2022.

14 § 86 in *Sablon v Belgium* App no 36445/97 (ECtHR, 10 April 2001) <https://hudoc.echr.coe.int/eng?i=001-63932> accessed 18 February 2022. See also § 24 in *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland (no 2)* App no 32772/02 (ECtHR, 4 October 2007) <http://hudoc.echr.coe.int/eng?i=001-82559> accessed 18 February 2022.

15 §§ 44-45 in *Bochan v Ukraine* (no 2) App no 22251/08 (GC ECtHR, 5 February 2015), <http://hudoc.echr.coe.int/eng?i=001-152331> accessed 18 February 2022. See also Council of Europe/European Court of Human Rights. Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb). Updated to 31 August 2021 (2022) 20-21 <https://www.echr.coe.int/documents/guide_art_6_eng.pdf> accessed 22 January 2022.

16 K Gusarov, V Terekhov (n 5) 11.

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Thus, although the ECtHR continues to reiterate that it does not have authority to order the reopening of domestic judicial proceedings, it is clear that the ECtHR still could state that the reopening of the case and even the subsequent retrial, if requested, may represent an appropriate remedy in principle. Moreover, in exceptional cases, the very nature of the violation of conventional rights may be such as to provide with no real alternative as to the measures required to remedy it, except for the reopening of the respective proceeding, and this will prompt the Court to indicate only one such measure. On the other hand, as already mentioned, in some of its judgments, the Court has itself explicitly ruled out the reopening.

In order to provide some clarity with respect to this seemingly controversial approach, the Court set out general principles related to reopening. With regard to domestic criminal proceedings, those principles might be summarised as follows:

(a) Where an individual has been convicted following proceedings that have entailed a violation of Art. 6 of the ECHR, a retrial or the reopening of the case if requested represents, in principle, an appropriate way of redressing the violation. However, the specific remedial measures, if any, required of a respondent state in order for it to discharge its obligations under the Convention must depend on the particular circumstances of the individual case and be determined in the light of the Court's judgment in that case, and with due regard to the Court's case-law.

(b) It is not for the ECtHR to indicate how any new trial is to proceed and what form it is to take. The respondent state remains free to choose the means by which it will discharge its obligation to put the applicant, as far as possible, in the position he/she would have been in had the requirements of the Convention not been disregarded, provided that such means are compatible with the conclusions set out in the Court's judgment and with the rights of the defence.[17]

On a more general scale, including in civil and administrative proceedings, the principles above transformed into a set of criteria of when the ECtHR may consider the reopening as a proper remedy, which took the form of Recommendation No. R (2000) 2 of 19 January 2000, adopted by the CoE CM (hereinafter the CoE CM Recommendation), where the latter invited member states to introduce mechanisms for re-examining cases in which the Court had found a violation of the ECHR, especially where:

(i) the injured party continues to suffer very serious negative consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and

(ii) the judgment of the Court leads to the conclusion that

(a) the impugned domestic decision is on the merits contrary to the Convention, or

(b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.[18]

As we may notice, there is no mention of the value of *res judicata* and *bona fide* third-party interests in the CoE CM Recommendation. They are out of this equation, as it deals with calculating forces moving towards the necessity of reopening and aimed at finding

17 *Moreira Ferreira v Portugal* (n 7).

18 Recommendation No R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights (adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies)<https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2f06>accessed 3 January 2022.

out whether reopening is an effective remedy. However, each time the ECtHR returns to the question of reopening domestic court proceedings, it will inevitably face the necessity of finding a balance between two sets of opposing values: on the one hand, there is the effective protection of a violated fundamental right, and on the other hand, there is the value of finality of a judgment in a domestic court proceeding. And, since it is not for the ECtHR to weigh these values upfront, it will likely never undertake the task of giving any specific criteria regarding how these values might be reconciled. Legislators and, to an even greater degree, domestic judicial bodies struggle to reconcile these values, too. That is why the further analysis will be dedicated to searching for similarities and, if possible, general tendencies towards a unification of approaches to availability of reopening of court proceedings throughout European countries.

## 3 REOPENING OF CRIMINAL PROCEEDINGS IN MEMBER STATES

### 3.1. Availability of reopening

In the majority of the member states, procedural law provides access to the reopening of criminal proceedings if a violation of the ECHR has been found by the ECtHR by directly naming it or in other wordings that have been interpreted by domestic courts as encompassing the ECtHR judgments. Specific provisions naming the ECtHR finding of a violation of the ECHR as the reason for reopening are in criminal procedural laws of Albania,[19] Austria,[20] Germany,[21] Estonia,[22] Lithuania,[23] the Netherlands,[24] Georgia,[25] Greece,[26] Portugal,[27] Romania, San Marino, Slovenia,[28] Spain,[29] Switzerland,[30] and Turkey.[31]

19 I Roagna, E Skendaj, 'The legal framework for the re-examination and re-opening of criminal proceedings following the finding of a violation by the European Court of Human Rights: An assessment of the legal framework of Albania' (Council of Europe November 2017) 14 <https://rm.coe.int/assessment-fairness-of-criminal-proceedings/16808b7c68> accessed 19 February 2022.

20 § 363(a)(1) of the CrCP of Austria.

21 § 359 (9) of the CrCP of Germany.

22 § 366 (7) of the CrCP of Estonia.

23 Art. 456 of the Lithuanian CrCP of 2003 as reported in *Reopening of proceedings following a judgment of the European Court of Human Rights. Country Reports at the Round table* (n 8).

24 Art. 457 § 1 (b) of the CrCP of Netherlands <https://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf> accessed 4 February 2022.

25 Execution of Rulings of the European Court of Human Rights and the United Nations Treaty Bodies in Georgia. Report (Tbilisi 2020) § 18 <http://ewmi-prolog.org/images/files/3904MonitoringExecutionoftheEuropeanCourtRulings.engop.pdf> accessed 4 February 2022.

26 H Keller, A Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008) 508.

27 Art. 449, §1(g) of the CrCP of Portugal.

28 Art. 416, of the CrCP of Slovenia.

29 Art. 954 of the CrCP of Spain.

30 Art. 122 of the Federal Law of 17 June 2005 on the Federal Supreme Court <https://www.fedlex.admin.ch/eli/cc/2006/218/fr#art_122> accessed 4 February 2022.

31 Arts. 311 to 323 of the CrCP of Turkey (Law no 5271). In particular, the criminal proceeding was reopened following *İşeri and Others v Turkey* (no 29283/07). Procedural law in Turkey (Art. 172 § 3 of the CrCP) also specifically prescribes that if it is established in a final judgment of the ECtHR that the decision not to prosecute was taken without an effective investigation having been carried out and if a request is made to that effect within three months of the judgment becoming final, a new investigation is opened, e.g., following *Ümran Durmaz v Turkey* (no 3621/07). See Turkey country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

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The reopening of criminal proceedings following the judgment of an international body is envisaged by the procedural laws in Poland[32] and Ukraine,[33] and reopening following the judgment of an international court is provided in Norway.[34]

In Belgium,[35] Serbia,[36] and Slovakia, an ECtHR judgment might be regarded as a novel fact and thus constitute the ground for reopening a criminal proceeding.[37] Also, in the Russian Federation, the reopening is available if new facts are revealed, and an ECtHR judgment finding a violation of the ECHR is listed among those new facts that give access to the reopening procedure.[38]

In some countries, although the law contains no specific rules providing access to the reopening of proceedings following a judgment of the ECtHR (e.g., in Sweden[39] and Finland[40]), general provisions of the procedural codes regarding extraordinary appeals, provisions concerning the annulment of a judgment issued as a result of a proceeding conducted with grave procedural errors, and provisions regarding a reversal of a final judgment in a criminal proceeding on the grounds of a substantive error apply respectively.[41]

Thus, currently, thirty -four member states allow the reopening of domestic criminal proceedings following a judgment of the ECtHR.[42]

Ireland and Liechtenstein are among the few European countries that rigorously adhere to

32 Art. 540 § 3 of the CrCP of Poland. According to well established case-law, those provisions encompass the ECtHR judgments. See Poland country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8). See also M Dziurda, A Gołąb, T Zembrzuski, 'European Convention of Human Rights and Fundamental Freedoms: Impact on Polish Law Development' (2021) 1(9) Access to Justice in Eastern Europe 42; L Garlicki, I Kondak, 'Poland: Human Rights between International and Constitutional Law' in Iulia Motoc, Ineta Ziemele (eds), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe: Judicial Perspectives* (Cambridge University Press 2016).

33 Art. 459 (3)(2) of the CrCP of Ukraine <https://zakon.rada.gov.ua/laws/show/4651-17#Text> accessed 4 February 2022.

34 Section 391 § 2 of the Criminal Procedure Act of Norway. Act of 22 May 1981 No 25 with subsequent amendments, the latest made by Act of 21 June 2013 No 84 <https://www.legislationline.org/download/id/8290/file/Norway_Criminal_Procedure_Act_1981_am2013_en.pdf> accessed 4 February 2022.

35 Art. 441 of the CrCP. See H Keller, A Stone Sweet (n 27) 294.

36 Art. 473 of the CrCP. However, specific provisions are in the Law on Minor Offences (Art. 280, § 1(5)). See Serbia country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

37 Section 394 §§ 1 and 4 of the CrCP, reported in Slovakia country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8). See also H Keller, A Stone Sweet (n 27) 582.

38 Art. 413, § 4(2) of the CrCP <http://www.consultant.ru/document/cons_doc_LAW_34481> accessed 4 February 2022.

39 The reopening of the criminal proceedings can be granted according to Chapter 58, Section 2 of the Swedish Code of Judicial Procedure as a 'relief for substantive defects'. In 2013, the Supreme Court specifically found that reopening could be granted in certain situations based on Art. 13 of the Convention. See Sweden country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

40 S Sistonen, 'Reopening of civil proceedings; experience of Finland' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

41 Ibid.

42 Albania, Armenia, Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Italy, Latvia, Lithuania, the Republic of Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, and Ukraine. See *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8). See also I Roagna, E Skendaj (n 20) 9.

the *res judicata* principle with respect to criminal proceedings in as much as their laws do not provide for access for reopening following ECtHR judgments.[43]

Having no doubt that *res judicata* constitutes a valuable principle in criminal proceedings, we might still ask ourselves whether there are any means other than the reopening of proceedings by which the judiciary is able to ensure the existence of adequate ways of achieving *restitutio in integrum* insofar as possible. Among those, the following come to mind:

a) a range of individual measures that aim at mitigation of negative consequences of unjust conviction and may be sufficient to offer adequate redress in criminal matters: rehabilitation; unconditional release or, if this is not possible, release on parole; restoration of rights; procedural acceleration; acts of clemency and reduction of sentences (amnesty, public excuse or pardon); an agreement not to enforce the respective domestic measure, or other forms of waiver or abstention from enforcement of certain judgments; the clearing up of information in public records, in particular, the rectification of criminal records if it is not conditional on a final judgment being reopened and if it leads to the certain ending of restrictions on individuals' rights;

b) tort liability as a compensation measure.

Nevertheless, the reopening, in general, is recognised as the most effective remedy for achieving *restitutio in integrum* because it might result in a decision on the innocence, i.e., the acquittal of a victim, due to possible full re-establishment of the person's status before the violation of the ECHR. For this reason, an application to reopen the domestic criminal proceedings in favour of a victim of unjust conviction formally may be filed even after the convicted person has served a sentence and with no regard to the statute of limitations, and even after amnesty or pardon.

In practical terms, according to the case-law in many countries (e.g., in Greece and Ukraine), reopening is ordered only if the violation of the ECHR has negative outcomes for the judgment of the criminal court that impacted the main course of the proceedings and were within their main issues, namely the question of guilt and criminal liability, and the defects of the judgment cannot be rectified in any other way than through re-examination of the case or its parts. It is for this reason that the Supreme Court in Ukraine normally refuses to reopen following findings of an ECHR violation related to the excessive length of proceedings or some procedural error, e.g., those related to the application of preventive measures, such as pre-trial detention, holding that these violations do not affect the final judgment.

To sum up, reopening might be ordered when the proceedings were unfair or otherwise significantly unjust, or their outcome breached the requirements of the ECHR, which is in line with the CoE CM Recommendation. In contrast, procedural defects in criminal matters which did not directly and significantly affect the final judgment on the merits normally would not justify a reopening.

## 3.2. Competent court

State bodies having authority to provide a review of final judgments in criminal proceedings following the ECtHR findings differ throughout Europe: those are either courts or administrative bodies, structurally and functionally independent of courts and investigation

43 Ireland and Liechtenstein country reports in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

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authorities. Among court options, the most common are those of entrusting the highest courts that are dealing with questions of law (supreme courts or, in some jurisdictions, constitutional courts) or the same court that issued the final judgment with the task of deciding upon reopening, such as:

a) the Constitutional Court (in the Czech Republic),

b) the Supreme Court or other common court of highest instance (the Supreme Court of Appeal in Belgium,[44] the Supreme Court in Estonia,[45] Cyprus, Lithuania,[46] and the Netherlands,[47] the Federal Supreme Court in Switzerland, Grand Chamber of the Supreme Court in Ukraine, Presidium of the Supreme Court in Russian Federation[48]),

c) the court that issued a final judgment (Serbia, Slovakia, and Portugal, where it is for the Supreme Court to authorise the reopening first[49]).

In Norway, in order to separate the judiciary from the task of deciding upon applications to reopen criminal proceedings that have resulted in legally enforceable convictions, probably for the reason of potential bias of courts in this matter, an independent administrative body (the Norwegian Criminal Cases Review Commission, NCCRC) was established in 2004 and vested with the authority to decide upon the said applications.[50] When the NCCRC has reopened a case, it is referred for re-examination to a court district other than the district of the court that issued the original judgment.[51] Organisations similar to NCCRC were created in England in 1995 and in Scotland.[52] This shows that bestowing the power of granting access to reopening final judgments on the judiciary is not the only way of dealing with this matter throughout Europe.

In the majority of countries in which it is for the highest court instance to decide upon reopening, once it allows reopening, the same court will either rule on the essence of the case itself (usually if no evidence needs to be re-evaluated and no new facts need to be ascertained) or refer the case to the trial court or the court of appeal responsible for the breach of the requirements of the ECHR while entering a final judgment on factual matters of the case. If procedural errors in a criminal matter that resulted in an ECtHR judgment and a subsequent reopening of the domestic criminal proceeding took place at a pre-trial stage, the case might even be referred to the Office of the Attorney General or other authority responsible for criminal investigation for a new pre-trial proceeding to be conducted (e.g., in Estonia[53]).

Thus, although the reopening of court proceedings is one of the individual measures, its significance to the development of the rule of law is so important that in many member states, the question of granting access to it remains subject to the highest court instances, so

44 H Keller, A Stone Sweet (n 27) 294.

45 § 365 (1) of the CrCP of Estonia.

46 Art. 458 of the Lithuanian CrCP of 2003.

47 Art. 457 § 1 (b) of the CrCP of Netherlands.

48 Art. 415 §5 of the CrCP of the Russian Federation.

49 Portugal country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

50 The Norwegian Criminal Cases Review Commission. Annual Report 2019 <www.nsd.uib.no/polsys/data/filer/aarsmeldinger/AE_2019_13683.pdf> accessed 4 February 2022.

51 U Stridbeck, S Magnussen, 'Prevention of wrongful convictions: Norwegian legal safeguards and the criminal cases review commission' (2012) 80(4) University of Cincinnati Law Review 1384.

52 In the Interests of Justice. An inquiry into the Criminal Cases Review Commission. 2021 Report by the Westminster Commission on Miscarriages of Justice <https://appgmiscarriagesofjustice.files.wordpress.com/2021/03/westminster-commission-on-miscarriages-of-justice-in-the-interests-of-justice.pdf> accessed 4 February 2022.

53 § 373 (1)-(2) of the CrCP of Estonia.

that their case-law can guide lower courts in order to avoid in future the fundamental errors that led to the respective ECtHR judgment.

## 3.3. Who can seek reopening?

In the majority of member states, access to the reopening of domestic criminal proceedings is provided either to the applicant to the ECtHR or to the public prosecutor or some other public authority,[54] and legislative reforms in this matter are in progress in other states.[55] Generally speaking, we might distinguish three groups of persons who are allowed to seek reopening:

a) the victim of the violation (if we narrow down this notion to an applicant to the ECtHR him or herself being a party in the domestic proceeding, then we might recognise that the access to reopening is provided in all member states where reopening following the ECtHR judgment is allowed);

b) family members in cases of the absence or death of the victim of the violation, other persons related to the victim (the list of these related persons or representatives differs significantly in various jurisdictions);

c) governmental agents (the Attorney General in Austria,[56] Estonia,[57] the Chancellor of Justice as one of the Supreme Guardians of law in Finland[58]). Apart from convicted persons (their direct relatives) whose complaint to the ECtHR was successful, access to the reopening procedure is also available to the Attorney General (upon the request of the Minister of Justice) in Belgium.[59] In Russia, it is for the President of the Supreme Court to initiate the reopening before the Presidium of the said court.[60]

This is generally in line with the margin of appreciation the ECtHR recognises to states in determining who can initiate the reopening.

Access to reopening might be open to the convicted person, his/her close relatives or lawyers, or the prosecutor or other governmental agent, but only in the interests of the convicted person (or, broadly speaking, a victim of the violation), as no *reformatio in peius*[61]

54 Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Norway, Poland, Romania, the Russian Federation, San Marino, Slovakia, Slovenia, Spain, Switzerland, the 'former Yugoslav Republic of Macedonia', Turkey, Ukraine, and the United Kingdom.

55 Review of the implementation of Recommendation (2000) 2 of the Committee of Ministers to the Member States on re-examination and reopening of certain cases at domestic level following judgments of the European Court of Human Rights Rapporteur: A Scheidegger. Paras 4 and 8 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168066b42a> accessed 3 January 2022. See also I Roagna, E Skendaj (n 20) 15.

56 § 363a(2) of the CrCP of Austria.

57 § 367(2) of the CrCP of Estonia.

58 S Sistonen, 'Reopening of civil proceedings; experience of Finland' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

59 However, for the sake of legal certainty the reopening shall not affect rights of third parties. See H Keller, A Stone Sweet (n 27) 294.

60 Art. 415 § 5 of the CrCP of Russian Federation. We believe though that the functions of this official need to be separated, as in case of Russia the President of the Supreme Court plays more of an independent procedural role, but not represents any party to the criminal proceeding interested in reopening.

61 *Reformatio in peius* (from Latin *reformatio*, 'change', and *peius*, 'worse') is an expression used in law meaning that a decision from a court of appeal is amended to a worse one. The prohibition of *reformationis in peius* expresses a request to prohibit the deterioration of the procedural status of the accused person who lodged an appeal or for whom the appeal was lodged by another authorized person. See J Jelínek, K Klíma (eds), *Protection of fundamental rights and freedoms in criminal procedure* (Leges 2020) 60.

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is allowed.[62] Criminal proceedings ended with an enforceable conviction may be reopened only to the benefit of a convicted person in Albania,[63] Bosnia and Herzegovina,[64] Norway, Poland,[65] and Serbia.[66] Specific provisions allowing reopening of the proceedings upon respective requests of the prosecutor, convicted person or relatives of the deceased convicted person exist in the Netherlands.[67] To sum up, *reformatio in peius* following reopening is prohibited in many member states.[68]

Thus, the procedural laws or case-law on reopening in many European countries seem to recognise the right to initiate reopening only to the benefit of the victim of the violation established by the ECtHR, which is in line with the CoE CM Recommendation, and the margin of appreciation the Court recognises to states in determining this issue. Still, this leaves us with the questions of (1) who is the victim of the violation for the purposes of recognition of the right to request reopening, and respectively (2) whether the definition of the victim narrowed down to the convicted person in the initial domestic criminal proceeding who was an applicant to the ECtHR shall remain intact.

## 3.4. Erga omnes effect and beneficium cohaesionis

According to the classic interpretation of the member states' obligation to 'abide by the final judgment of the Court in any case to which they are parties', the judgments of the Court are only formally binding *inter partes* and do not have a binding *erga omnes* effect across the states that are not parties to the respective case, which is different from the member states obligation to integrate the Court's case-law into their national law.[69] With regard to this problematic issue of reopening of domestic court proceedings, Z. Varga even points out that 'retrial following ECtHR judgments is only possible in the single case concerned by the ECtHR judgment'.[70]

The rationale behind this approach is that the inconsistency of a final domestic judgment with the ECtHR case-law is considered a matter of interpretation and application of the law. Thus, since misinterpretation of law cannot serve as a reason to reopen criminal proceedings where a final judgment has already been delivered, therefore, the abovementioned inconsistency is not a reason for reopening. This is true for the majority of the member states.[71] In Germany, the Federal Constitutional Court, in its 2019 decision, expressly ruled that the constitutional law of Germany did not require that the binding effect of a final judgment (*res judicata*) be lifted in the event that the ECtHR issued a judgment in proceedings concerning other

62 H Keller, A Stone Sweet (n 27) 508.

63 Art. 449 para. 2 of the CrCP of Albania as reported in I Roagna, E Skendaj (n 20) 17.

64 Art. 327 § 1(f) of the CrCP of Bosnia and Herzegovina of 2003.

65 Also upon the request of a next of kin to the deceased convicted person.

66 Art. 473 of the CrCP of Serbia.

67 Art. 458 of the CrCP of Netherlands.

68 Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Denmark, Finland, Germany, Luxembourg, Moldova, the Netherlands, Norway, Poland, Romania, Serbia, Slovakia, Sweden, Turkey, and the United Kingdom. See Review of the implementation of the CoE CM Recommendation (n 56) para 12.

69 MA Oddný, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights' (2017) 28(3) European Journal of International Law 821.

70 Z Varga 'Remedies for violation of EU law by member state courts. What place for the Köbler doctrine?' (Doctoral Thesis, Eötvös Loránd University 2016) 102.

71 In particular, for Ukraine. Also Sweden, Georgia (see § 19 of the Execution of Rulings of the European Court of Human Rights and the United Nations Treaty Bodies in Georgia Report (n 26)).

applicants finding a violation of the ECHR.[72] Also, in Ukraine, the Grand Chamber of the Supreme Court consistently reiterated in its rulings that access to the reopening procedure might have been granted only to a successful applicant to the ECtHR.[73]

However, the case-law in several countries is on the path of developing some exceptions from this general approach. The ECtHR judgment in *Del Rio Prada v. Spain,*[74] in which the Court specified that Art. 7 of the Convention also sets down the principle that the criminal law must not be extensively construed to an accused person's detriment, for instance, by analogy, had *erga omnes* effect in Spain, where the ECtHR judgment resulted in the reopening of all the domestic cases where the jurisprudence had been the same. In Poland, the jurisprudence of the Supreme Court developed an approach according to which access to reopening is not only available to the applicant who is the victim of a violation of the ECHR in the criminal proceedings as established by the ECtHR but also to other individuals in a similar situation (i.e., *de facto erga omnes* effect).[75] There is a similar situation in Finland, where access to reopening is also granted to other accused persons in other criminal cases in which the same violation of the ECHR was found (when it comes to the combination of factual and legal aspects). The Supreme Court has, in various proceedings, taken into consideration the case-law of the ECtHR in general, i.e., not only related to Finland, as a ground for reopening when no application to the ECtHR has been lodged against Finland.[76] However, even in this case, the reopening does not take place automatically by virtue of an ECtHR judgment serving as a ground for the reopening: an accused person still needs to lodge an individual request.

In Estonia, access to reopening of criminal proceedings is available to persons whose applications with the Court in a similar matter and on the identical legal ground are pending or who have the right to lodge such an application, taking into consideration the provisions of Art. 35(1) of the ECHR.[77] In Belgium, apart from convicted persons (their direct relatives) whose complaints to the ECtHR were successful, access to the reopening procedure is also available to other persons who were convicted on the basis of the same facts and evidence.[78]

Apart from the classic understanding of *erga omnes* effect of ECtHR findings, it is also important to reveal the problem of the *beneficium cohaesionis*[79] effect of ECtHR judgments, which is related more to the acceptance of this doctrine in domestic procedural law of the member states, rather than to the nature and effect of the ECtHR judgments. The application of the *beneficium cohaesionis* doctrine in reopening procedures following the ECtHR findings was detected in Bulgaria and the Czech Republic, where, consequently, an ECtHR

72 BVerfG, Beschlussder 3. Kammer des Zweiten Senats vom 13. Februar 2019-2 BvR 2136/17-, Rn. 1-35, <http://www.bverfg.de/e/rk20190213_2bvr213617.html> accessed 18 February 2022.

73 See, e.g., case No 36-46749 [2019] Supreme Court <https://reyestr.court.gov.ua/Review/81139247> accessed 4 July 2022; case No 05-54к2001 [2020] Supreme Court <https://reyestr.court.gov.ua/Review/86989428> accessed 4 July 2022.

74 Del Río Prada v Spain App no. 42750/09 (GC ECtHR, 21 October 2013), §§ 78-80 <https://hudoc.echr.coe.int/eng?i=001-127697> accessed 18 February 2022.

75 See Spain and Poland country reports in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

76 S Sistonen, 'Reopening of civil proceedings; experience of Finland' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

77 § 367 (2) of the CrCP of Estonia.

78 However, for the sake of legal certainty the reopening shall not affect rights of third parties. See H Keller, A Stone Sweet (n 27) 294.

79 *Beneficium cohaesionis* ('benefit of attachment') is a Latin phrase, which means that effects of appeal or recourse trial also relate to co-defendants, who have not filed the appeal. See L Çukaj, D Laçi, 'Reviewing, as an Extraordinary Mean of Appeal' (2020) 5(2) European Journal of Multidisciplinary Studies 74-91.

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finding served as a ground for the reopening of the whole domestic criminal proceeding with respect to and to the benefit of the applicant as well as the applicant's co-accused.[80]

However, on a general scale, procedural laws in European countries do not provide *beneficium cohaesionis* explicitly in cases of reopening following ECtHR judgments, even though, from the case-law and jurisprudence related to the application of procedural rules on other forms of appeal, beneficial effects of the review might be applicable to other defendants who have not lodged the appeal or requested the review. This is because the legal provisions on extraordinary review of final judgments following the ECtHR findings and possible retrial after a domestic case is reopened are rather general and not burdened with details. Normally, it is for the domestic courts to elaborate on whether certain aspects of other procedures of review are applicable *mutatis mutandis*, namely whether *beneficium cohaesionis* is applicable in such cases.

## 3.5. Unilateral declaration and friendly settlement as a ground for reopening

The wording of procedural laws in many European countries (e.g., Austria, Slovak Republic, Spain, Switzerland, Turkey, and Ukraine) is such that a criminal proceeding is to be reopened only if there is a final judgment of the ECtHR in which it finds a violation of the ECHR. Hence, friendly settlements or unilateral declarations may not be considered a proper formal ground for reopening. In some countries (e.g., Estonia[81]), this approach was established in jurisprudence. In Germany, the Federal Constitutional Court ruled that a friendly settlement reached in proceedings before the ECtHR cannot be considered to constitute a finding of a violation of the Convention or of its Protocols within the meaning of respective provisions of the Code of Criminal Procedure (§ 359 (6)). This also holds true for cases where the settlement facilitated by the ECtHR relied on a previous judgment against Germany in a similar case.[82] Although there is no specific provision related to the reopening following a unilateral declaration or friendly settlement, the situation is unclear in Lithuania and Russia, as there is no case-law regarding this matter.[83] Nevertheless, reopening following unilateral declarations or friendly settlements is, in principle, possible in a significant number of member states (Czech Republic, Georgia, Latvia, Moldova, Poland, and Slovenia).[84]

This variety of approaches provides no path to a definitive conclusion about the prevailing trends in the development of domestic procedural laws. This is because, in contrast to the formal meaning of an ECtHR judgment as the one establishing a member state's obligation to introduce an individual and, in case the violation has a widespread character, general measures, unilateral declarations, and friendly settlements are closely linked to the procedures before the ECtHR and should mark their finality. This is especially true with respect to friendly settlements.

## 3.6. Time limits

In contrast to the compelling unity of the member states' approaches toward the availability of reopening stands the matter of time limits during which the reopening is available. Domestic

80 I Roagna, E Skendaj (n 20) 18.

81 The judgment of the Constitutional Review Chamber of the Supreme Court of 22 February 2011 in a constitutional review case no. 3-4-1-18-10, as reported in Estonia country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

82 BVerfG (n 73).

83 Lithuania and Russia country reports in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

84 I Roagna, E Skendaj (n 20) 8.

criminal procedural laws and case-law greatly differ in whether any reasonable time limit has to be established at all, as well as in what event to be taken as its starting point: 90 days after the ECtHR judgment becomes final (in Switzerland[85]); three months (in Cyprus), six months (in Albania,[86] Austria, Belgium,[87] Estonia, Finland[88]), or one year after the ECtHR judgment becomes final (in Spain[89]); three months after the convicted person became aware of the ECtHR judgment (in the Netherlands[90]); 30 days after the person became aware of the final ECtHR judgment (in Ukraine[91]).

In some member states, the procedure is not restricted by any time limits, at least explicitly in procedural laws (in Bosnia and Herzegovina, Greece,[92] Poland, and Russia[93]).

Thus, we may point out that the time limits for seeking reopening, if they are applied at all and are clearly defined in the procedural laws, share several qualities throughout the European countries: they are reasonable, and they also take into account the length of the proceeding before the ECtHR such that they are linked with the moment the respective ECtHR judgment becomes final, or a person seeking reopening becomes aware of it.

## 4 REOPENING OF CIVIL AND ADMINISTRATIVE PROCEEDINGS

### 4.1. Why not reopen?

Due to the almost axiomatic difference in values that are at stake in criminal and civil proceedings, the importance of *res judicata,* if compared to other aspects of these types of court procedures, differs greatly as well. Exactly because of this predominant value of *res judicata* in civil and, to a lesser extent, in administrative proceedings, we will not face the same unity among the member states in allowing the reopening of civil and administrative proceedings as we witnessed earlier with respect to reopening of criminal proceedings.

Nevertheless, access to reopening is envisaged more or less explicitly in procedural laws of many countries (Bosnia and Herzegovina,[94] Bulgaria,[95] Estonia,[96] Georgia,[97] Germany,[98]

85 Art. 124 of the Federal Law on the Federal Supreme Court (n 31).

86 I Roagna, E Skendaj (n 20) 13.

87 H Keller, A Stone Sweet (n 27) 294.

88 S Sistonen, 'Reopening of civil proceedings; experience of Finland' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

89 Art. 954 of the CrCP of Spain.

90 Netherlands country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

91 Art. 461 (5)(2) of the CrCP of Ukraine (n 24).

92 H Keller, A Stone Sweet (n 27) 508.

93 According to Art. 414 § 1 of the CrCP of Russian Federation the reopening for the benefit of the convicted person is not bound with any time limits.

94 Art. 231a of the Non-contentious Proceedings Act of BiH.

95 Art. 303, § 1, 7 of the CCP of Bulgaria, and Art. 239 of the Code of administrative proceedings of Bulgaria.

96 § 702(2) of the CCP of Estonia, §§ 204(1) and 240(2) of the Code of administrative proceedings of Estonia.

97 In civil, but not administrative proceedings. See § 18 of the Execution of Rulings of the European Court of Human Rights and the United Nations Treaty Bodies in Georgia Report (n 26).

98 § 580(8) of the CCP of Germany.

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Lithuania,[99] the Republic of Moldova,[100] Portugal,[101] Romania, Serbia,[102] Spain,[103] Republic of North Macedonia,[104] Slovak Republic,[105] Switzerland,[106] and Turkey[107]).

Procedural laws in a significant number of countries do not distinguish ECtHR findings as a separate ground for reopening but still provide access for reopening on more or less general grounds that are applicable to ECtHR judgments. Norwegian[108] and Ukrainian[109] procedural laws refer to an international court (international judicial body) finding a violation of an international treaty as the ground for reopening. Czech law envisages the right to request the case to be reopened before the Constitutional Court following a judgment of an international court delivered in the proceeding subsequent to the domestic case. This procedure seems to apply primarily to the ECtHR judgments.[110] Also, in Finland, there are no specific rules providing for the reopening of domestic civil proceedings following an adverse judgment of the ECtHR. The Code of Judicial Proceedings contains only general provisions concerning extraordinary appeal in a civil matter, as well as rules regarding the annulment of a judgment that is already *res judicata* on the grounds of significant procedural errors and provisions regulating the reversal of a final judgment based on a substantive error in the contents of a decision.[111]

In Latvia, a judgment of the ECtHR can serve as a ground for the reopening of a final judgment with the possibility of a subsequent 'adjudication of matters *de novo*', i.e., the retrial in view of newly discovered facts in terms of the Latvian procedural law.[112] Similarly, in Lithuania, both administrative and civil procedure codes provide explicit grounds for reopening and subsequent retrial of the case where a judgment by the ECtHR finds the violation of the ECHR by a final domestic decision.[113] In a similar manner to new facts, the

99 Art. 366 § 1(1) of the Lithuanian CCP of 2003. Also for administrative proceedings Art. 153 § 2(1) of the Law on Administrative Proceedings.

100 Art. 449(h) of the Code of Civil Proceedings of Moldova, as amended on 11 November 2021 <http://continent-online.com/Document/?doc_id=30397949#pos=6;-141> accessed 4 February 2022.

101 Art. 771, §1(f) of the CCP of Portugal.

102 Art. 426 of the CCP of Serbia.

103 Art. 510 of the CCP of Spain. Access to reopening is available in Spain for administrative cases according to § 2 of section 102 of the Spanish Administrative Procedure Act, as amended by Organic Law no 7/2015 of 21 July 2015, as specified in *Melgarejo Martinez de Abellanosa v Spain* (n 13).

104 Art. 400 of the Law on civil proceedings of the Republic of North Macedonia, adopted in 2005 as reported in Z Stoileva, 'Reopening of civil proceedings following a judgment of the European Court of Human Rights in Republic of North Macedonia' (2021) 9(15-16) JUSTICIA–International Journal of Legal Sciences 108.

105 Section 228 § 1 (d) of the CCP of Slovak Republic, as reported in Slovak Republic country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

106 Art. 122 of the Federal Law on the Federal Supreme Court (n 31).

107 Art. 375 of the CCP of Turkey (Law no 6100). Retrial of respective civil cases following the ECtHR judgments of Dilipak and Karakaya v Turkey (App nos 7942/05 and 24838/05) and Ruhat Mengi v Turkey (App nos 13471/05 and 38787/07) was reported. See Turkey country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

108 Section 31-3 §1(d) and section 31-4 (b) of the Act relating to mediation and procedure in civil disputes of Norway (The Dispute Act) of 2005. Last consolidated 1 January 2018 <https://lovdata.no/dokument/NLE/lov/2005-06-17-90/KAPITTEL_6#KAPITTEL_6> accessed 4 February 2022.

109 Art. 423, para 3(2) of the CCP of Ukraine <https://zakon.rada.gov.ua/laws/show/1618-15#Text>; Art. 361, para 5(3) of the Code of Administrative Procedures <https://zakon.rada.gov.ua/laws/show/2747-15#Text> accessed 4 February 2022.

110 Act on the Constitutional Court, § 119 according to Z Varga, 'Retrial in the Member States on the Ground of Violation of EU Law' (2017) 1 ELTE Law Journal 62.

111 S Sistonen, 'Reopening of civil proceedings; experience of Finland' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

112 Art. 353. para 6 of the Code of administrative proceedings of Latvia; Art. 479 para. 6 of the CCP of Latvia as reported by Z Varga (n 111) 76.

113 Chapter XVIII Art. 366 para. 1. Of the Lithuanian CCP as reported by Z Varga (n 111) 77.

ECtHR judgments are regarded in Estonia[114] and the Russian Federation as formal grounds for reopening of civil proceedings.[115] In many of the above states, access to reopening of civil and administrative proceedings was provided through legislative changes implementing the CoE CM Recommendation.

Meanwhile, in a significant number of the member states, where *res judicata* is valued at the highest, the legislator traditionally sees no practical reason in adopting changes allowing cases to be reopened as a result of the ECtHR findings. The rationale behind this is that the state remains liable for the violation of fundamental rights and may be obliged to compensate for the damages suffered; thus compensation mechanism is more effective and, what is more important, does not require the distortion of the finality of domestic court judgments.

However, in several member states, liability claims are considered as offering only secondary, subsidiary relief in cases where primary actions aimed at *restitutio in integrum* by way of restoration of *status quo ante* have not succeeded. The current jurisprudence of the German Federal Supreme Court reflects this view.[116] Similarly, in Poland, the declaration of the unlawfulness of a final domestic judgment – which is a procedural element of a liability claim – can only be introduced if a claimant has used all remedies available to them in order to restore the initial rights before lodging the liability claim. The liability of the state is therefore regarded as a secondary remedy.[117]

On the other end of the spectrum, in terms of the availability of the reopening, there are a significant number of European countries that do not grant access to the reopening of civil and administrative proceedings on the ground of their inconsistency with the ECHR found by the ECtHR. In Slovenia, where the *res judicata* principle is traditionally valued in jurisprudence, and legal doctrine, the reopening of civil and administrative proceedings (where the Civil Procedure Act is applicable) on the ground of the adverse ECtHR findings is currently not explicitly provided for by the existing procedural rules.[118] There is a similar situation in Austria[119] and Cyprus.

In Sweden, the procedural law did not originally provide for the reopening of domestic cases following decisions by international courts. It remains unclear how far the general provisions on reopening of civil cases[120] could be applied for such purposes, nor was there any jurisprudence on the subject. Historically, if the Chancellor of Justice or a court found that a national authority had acted wrongly in dealing with a particular case, they could provide compensation.[121] In addition, the government could make *ex gratia* compensation payments to citizens.[122] The situation has not changed since 2013, when certain amendments

114 § 702 (1) and § 702 (2)(8) of the CCP of Estonia.

115 Art. 392 § 4(4) of the CCP of Russian Federation.

116 BGH, Urteil, 09/10/2003, III ZR 342/02, NJW 2004, S. 1241

117 Art. 4241, § 1 of the CCP of Poland according to Z Varga (n 111) 98. Until recently, the situation was different, as judgments of the Strasburg court was not listed in Art. 401 of the CCP of Poland among formal grounds for reopening and according to the case-law of the Supreme Court should not be treated as such. See H Keller, A Stone Sweet (n 27) 582.

118 Slovenia country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

119 Austria country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

120 Chapter 58 of the CCP of Sweden.

121 Under Chapter 3, section 2 of the Tort Liability Act of Sweden.

122 International Covenant on Civil and Political Rights, Human Rights Committee, Seventy-fourth session, Summary record of the 1989th meeting, 20 March 2002, Consideration of reports submitted by States parties under Art. 40 of the Covenant (continued), Fifth periodic report of Sweden (CCPR/C/SWE/2000/5, CCPR/C/74/L/SWE) <http://docstore.ohchr.org> accessed 4 February 2022.

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regarding reopening were made in criminal justice, which, however, did not affect civil proceedings.[123]

In Greece, the Code of Civil Procedure does not allow for civil proceedings to be reopened in domestic courts should there be a finding of a violation of the Convention by the ECtHR.[124] The Areios Pagos (Greek Supreme Court of Cassation) has ruled that an adverse ECtHR judgment can serve as a ground to reopen a domestic judicial proceeding ended with a final judgment only in criminal matters. As for administrative or civil disputes, an adverse ECtHR judgment can only give rise to compensation but cannot serve as a ground to reopen a final judgment.[125]

In a similar manner, no access to reopening civil proceedings following an ECtHR judgment is provided by the procedural law in Ireland, Liechtenstein, and the Netherlands.[126] In the Netherlands, however, the Parliament of the Netherlands initiated introducing amendments to the General Administrative Law Act (Art. 8:88) in order to open access for reviewing judgments of administrative courts, in particular following the ECtHR judgments. However, the Dutch Government held that there was no reason for such a measure, in view of [...] the right to sue the state as liable for errors made by the highest administrative courts.[127] Also, in the Netherlands, it is clear from the Supreme Court's jurisprudence that the state can be sued for tort as a result of the unlawful dispensation of justice. Although, in practical terms, the state is held liable only if no other effective remedy remains open and only in exceptional cases where the fundamental principles of law were so badly neglected when conducting the respective judicial proceeding and adopting the judgment that the parties can no longer be said to have had their case heard in a fair and impartial manner, at least in one reported state liability case, this resulted in compensation having been paid to the applicant on this ground.[128]

According to Z. Varga, in several member states (e.g., Bulgaria, Czech Republic, Estonia, Greece, Spain and Netherlands), there is an *expressis verbis* established hierarchy between reopening with a possible subsequent retrial and state liability. In Bulgaria, the procedural law opens access to retrial only if it is necessary to remedy an injustice suffered.[129] Under Czech law, an application for reopening on the ground of violation of fundamental rights may be regarded as inadmissible if the consequences of the violation have already been remedied, e.g., by providing just satisfaction.[130] In Estonia, although the law formally provides the right to request the reopening of domestic court proceedings, as was mentioned before, it tends to prioritise liability claims over retrials.[131] The Riigikohus (Supreme Court in Estonia) stated, concerning ECHR violations, that reopening of cases is only possible if

123 Sweden country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

124 A. Firmansyah, 'Molla Sali v. Greece: a pyrrhic victory following just satisfaction judgment?' (*Strasbourg Observers*, 15 July 2020) <https://strasbourgobservers.com/2020/07/15/molla-sali-v-greece-a-pyrrhic-victory-following-just-satisfaction-judgment/> accessed 26 January 2022. See also H Keller, A Stone Sweet (n 27) 509.

125 Z Varga (n 111) 74-75.

126 C Drion, 'IV.2 Remedies under Dutch law for violation of human rights in civil proceedings: state liability and/or reopening the case?' in *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (Leiden, Brill Nijhoff 1999) 202.

127 Z Varga (n 111) 80-81.

128 See Court of Appeal, The Hague 17 July 1997, NJK 1997/75 as reported in the Netherlands country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

129 Art. 303 of the CCP of Bulgaria and Art. 239 of the Code of Administrative Procedures of Bulgaria.

130 § 119 of the Law on Constitutional Court of Czech Republic.

131 § 7(1), (21) of the Estonian Law on Liability of the State.

compensation by damages is not available.[132] Also, in Spain, reopening is available in theory, 'provided that the violation, due to its nature and seriousness, has a persistent effect and cannot cease in any other way than by means of this review, without this prejudicing the *bona fide* rights acquired by third parties'.[133] According to the jurisprudence of the Spanish Tribunal Supremo, even if a retrial is not possible, a liability claim may be lodged.[134] Although state liability for judicial decisions in Europe has its roots in the perception of the state as a single entity, the liability of the state for damages caused by a miscarriage of justice requires a sufficiently serious violation to be proved.[135] Procedural law in Switzerland[136] demonstrates a similar inclination towards compensation being a predominant remedy. Also, in the Slovak Republic, procedural law allows reopening unless substantial consequences arising from the ECHR violation have been duly remedied by awarding a just satisfaction. The right to have a case reopened is subject to further conditions in Norway. The competent court might refuse to reopen if the violation of the convention can be redressed in another way, for example, by means of just satisfaction.[137] Moreover, in Norway, a case shall not be reopened if it is reasonably probable that a new hearing of the case would not lead to an amendment of significance to the party.[138]

This overview of various approaches throughout Europe shows that they differ in one significant aspect: in one group of legal systems that, in principle, allow the reopening of domestic civil proceedings, there is a clear requirement that this measure is available only if the consequences of the violation of the ECHR were not redressed by way of just satisfaction (e.g., Czech Republic, Slovak Republic, Norway), whereas, in other countries, state liability claims are considered an effective primary remedy, although this does not mean that reopening is not allowed in principle (Estonia, Spain, Switzerland).

Ukrainian jurisprudence tends to adopt the first of the approaches summarised above. Formally, there is no requirement for the compensation to be proved ineffective as a formal precondition for allowing the reopening. However, the case-law developed strict criteria of availability of the reopening, which are in line with the CoE CM Recommendation, namely that a competent court needs to come to a conclusion that the reopening might provide effective redress.

Thus, although clearly there is no consensus among European countries on whether to allow the reopening of domestic civil and administrative proceedings following an ECtHR judgment, the tendency has appeared according to which those countries that made the reopening available in law are further developing their case-law in order to narrow the access so that it remains open in those rare cases when it is the most effective, if not the only, measure of *restitutio in integrum*. Those countries that historically did not provide access to reopening and still do not tend to develop paths for liability claims as an effective compensation measure.

132 Riigikohtu halduskolleegiumi, 22 February 2010, no 3-3-2-1-10; and Riigikohtu üldkogu, 10 March 2008, no 3-3-2-1-07 according to Z Varga (n 111) 97.

133 Art. 510 of the Code of Civil Procedure. See Spain country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

134 Z Varga (n 111) 97.

135 A Davies, 'State Liability for Judicial Decisions in European Union and International Law' (2012) 61(3) The International and Comparative Law Quarterly 585.

136 According to Art. 122(b) of the Federal Law of 17 June 2005 on the Federal Supreme Court compensation being not such as to remedy the effects of the violation of the ECHR is one of the conditions for reopening the proceedings (both criminal and civil).

137 Norway country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

138 Section 31-5 § 3 of the Norwegian Dispute Act.

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## 4.2. Competent court

Although there is a number of similarities in the principles applicable to the reopening of criminal and civil proceedings in general, we might notice that the member states do not always tend to apply the same approaches. By that, we mean that although member states establish in their procedural laws, criminal and civil, various approaches to the reopening procedure (in particular, in the aspect of what courts should be vested with the power to grant reopening – highest courts instances or courts that issued a final judgment that triggered the proceedings before the ECtHR), it is not mandatory that the reopening of both types of proceedings follow the same path. Again, applicable approaches are split into the following options:

a) an extraordinary revision appeal before the court that issued a final judgment that is *res judicata* (reviewed the judgment) in Moldova,[139] Russia,[140] Serbia, the Slovak Republic (also the Constitutional Court, if an unsuccessful petition of a person to this court for a constitutional remedy was followed by the respective ECtHR proceeding),

b) reopening procedure before the Supreme Court or other highest court (in Switzerland, Finland,[141] Lithuania,[142] Ukraine[143]) or the Constitutional Court (in the Czech Republic).[144] In Portugal and Estonia, the Supreme Court must first authorise the reopening of the case, which then can be retried by the respective court that issued the final decision. In Bosnia and Herzegovina, it is the court that had ruled in the first instance in the proceedings resulting in a decision that violated the relevant fundamental human right so as to have the impugned decision amended.[145] However, it is the Constitutional Court if the reopening of proceedings upon the constitutional appeal is sought due to the ECtHR finding that the violation of the ECHR took place during that proceeding.[146]

Norwegian procedural law aiming at removing decisions on reopening from the sphere of the courts that had originally ruled on these cases established that final and enforceable judgments of the district court and the court of appeal may be reopened upon a request to a court of the same level in a judicial district that borders onto the court that made the original ruling. However, rulings of the Supreme Court, including the Appeals Committee of the Supreme Court, may be reopened upon a request to the Supreme Court (it is for the Appeals Committee of the Supreme Court to rule upon such requests).[147]

Thus, the detectable pattern similar to one in criminal proceedings emerges, that member states tend to pay significant attention to the reopening procedures, probably in view of their

139 L Apostol, 'The Moldovan experience' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

140 Art. 393 of the CCP of the Russian Federation.

141 S Sistonen, 'Reopening of civil proceedings; experience of Finland' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

142 Art. 367 of the Lithuanian CCP of 2003. Supreme Administrative Court of Lithuania in case of reopen of administrative proceedings (Art. 156 § 1 of the Law on Administrative Proceedings).

143 The Grand Chamber of the Supreme Court (Art. 425, para. 3 of the CCP of Ukraine, Art. 365, para. 3 of the Code of Administrative Procedures (n 110)).

144 I Pospíšil, 'Comments on Reopening Trials in the Civil Matters after the ECtHR Judgments: Experience from the Czech Republic' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

145 Art. 231a of the Non-contentious Proceedings Act of BiH

146 Rules of the Constitutional Court of BH as amended in May 2014.

147 Section 31-1 §§ 3 and 4 of the Norwegian Dispute Act.

impact on the development of the domestic law and entrusting the highest court instances with the task of deciding upon reopening.

## 4.3. Who can seek reopening?

Generally, the reopening of the domestic court proceeding where the final judgment was rendered on the ground of violation of the ECHR is possible upon the condition that the violation was found by the ECtHR in the subsequent proceeding and the reopening concerns only the main proceedings at hand.[148]

In the member states where there is access to reopening, the right to lodge a request is granted to an applicant being a party to the original domestic case and, in some jurisdictions, to a governmental agent (the Chancellor of Justice as one of the Supreme Guardians of law in Finland,[149] the Governmental Agent in Moldova[150]).

Thus, in those countries where the reopening of civil and administrative proceedings following judgments by the ECtHR is available by law, it is, generally, only possible in the original domestic case concerned by the final judgment: the parties in the case before the ECtHR and before the national court need to be identical.

## 4.4. Unilateral declaration and friendly settlement as a ground for reopening

Only a small number of member states allow the reopening of civil or administrative proceedings following unilateral declarations admitting violation of the ECHR and friendly settlements (the Czech Republic, Georgia (only in relation to civil proceedings),[151] Turkey,[152] Moldova,[153] and the Czech Republic (only in relation to friendly settlements).[154] Due to the lack of detailed regulation of this matter in the procedural laws and because not many countries have faced this problem up until now, access to reopening following friendly settlement or unilateral declarations remains a 'grey' area in many countries.

148 E.g., in Ukraine, according to the well-established case-law of the Grand Chamber of the Supreme Court which shows its adherence to literal interpretation of the corresponding provisions of the procedural codes, only a party to the respective domestic procedure followed by an ECtHR judgment in their favour can initiate reopening of that domestic procedure (see § 13 in case No 202/2315/18 [2021] Supreme Court <https://reyestr.court.gov.ua/Review/99482734> accessed 4 July 2022).

149 S Sistonen, 'Reopening of civil proceedings; experience of Finland' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

150 L Apostol, 'The Moldovan experience' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

151 Overview of the exchange of views held at the 8th meeting of DH-GDR on the provision in the domestic legal order for the re-examination or reopening of cases following judgments of the Court. Steering Committee for Human Rights (CDDH), Committee of Experts on the Reform of the Court (Strasbourg 12 February 2016, DH-GDR (2015)008 Rev.) 11 <https://rm.coe.int/1680654d5a> accessed 20 February 2022.

152 Art. 375 §1 of the CCP of Turkey (Law no. 6100), as amended by Law no 7145 of 31 July 2018, now constitutes a ground for the reopening of civil proceedings in cases where the ECtHR decided to strike an application out of its list of cases following a friendly settlement or a unilateral declaration.

153 L Apostol, 'The Moldovan experience' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

154 According to the opinion of the Constitutional Court and despite the explicit wording in the domestic law that explicitly refers to a decision of an international tribunal. See I Pospíšil, 'Comments on Reopening Trials in the Civil Matters after the ECtHR Judgments: Experience from the Czech Republic' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

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This might be because, according to the approach supported in many countries (e.g., Austria, Estonia, and Switzerland), the very definition of a friendly settlement is the final resolution of the case of the ECtHR and ending the applicant's status of a victim is a serious legal obstacle for reopening.[155] Also, in some states (e.g., Spain and Ukraine), the legislation provides only for reopening following the respective *judgments*. Restrictive or extensive interpretation and application of respective procedural provisions are in the hands of the judiciary. Current jurisprudence demonstrates rather restrictive tendencies.

## 4.5. Time limits

Similar to the diversity of approaches to the time-limits for requests for reopening of criminal proceedings, there is no prevailing option of time-limits applied to reopening of civil proceedings, as well as with regard to the event which should be taken as a starting point:

(i) one year after the ECtHR judgment becomes *final* in Spain,[156] 90 days in Bosnia and Herzegovina (six months in case of reopening of proceedings upon the constitutional appeals before the Constitutional Court).[157] In Finland, a motion for the annulment on the grounds of a serious procedural error must be filed to the Supreme Court or, in some cases, to a Court of Appeal, within a six-month time limit starting from the day when a law enforcement or supervisory body competent in the supervision of international human rights obligations (the ECtHR is considered as one of these bodies) gives its final decision. A request for the reversal on substantive grounds shall usually be made within one year of the date on which the judgment became final. However, this rule is applied flexibly;[158]

(ii) the six-month time limit since the judgment was *delivered* in Moldova (no requirement for the judgment to become final);[159]

(iii) three months from the day the ground for reopening is revealed in Lithuania,[160] the Russian Federation,[161] the Slovak Republic,[162] six months in Estonia and Norway,[163] and one month in Germany.[164]

It seems clear that there is not much room for debate on the fundamental benefits or disadvantages of any of these options over the others. Where the procedural law does not distinguish the ECtHR judgment among other grounds for an extraordinary review of a

155 DH-GDR Overview (n 152) 11.

156 Section 1 of Art. 512 of the CCP of Spain.

157 Art. 231a of the Non-contentious Proceedings Act of BiH for civil proceedings and the Rules of the Constitutional Court of BH as amended in May 2014.

158 S Sistonen, 'Reopening of civil proceedings; experience of Finland' in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

159 Art. 450(f) of the CCP of Moldova.

160 Art. 367 of the Lithuanian CCP. However, no later than within five years from the date when the judgment of the domestic court came into effect (Art. 368 § 2). Art. 156 § 1 of the Law on Administrative Proceedings (period of limitation for the reopening of cases on the ground of the judgment of the ECtHR).

161 Art. 394 § 1 of the CCP of Russian Federation.

162 Section 230 § 1of the CCP of Slovak Republic, as reported in Slovakia country report in *Reopening of proceedings following a judgment of the European Court of Human Rights* (n 8).

163 Section 31-6 § 1 of the Norwegian Dispute Act. However, according to Section 31-6 § 2 a case cannot be reopened after more than ten years.

164 §586(1) of the CCP of Germany.

final judgment in terms of procedure, it may avoid establishing a specific term or tie it to the moment respective ground for the reopening revealed. It is left for the judiciary to establish what moment needs to be taken as a starting point with respect to the review following an ECtHR judgment, and usually, it is the moment when the judgment becomes final.

## 5 CONCLUDING REMARKS

Procedural laws, case-law, and many known legislative and scholarly debates on the subject of whether reopening domestic court procedures in light of ECtHR findings of a violation of the Convention is justified demonstrate that European countries are struggling to find a fair balance between *res judicata*, legal certainty in general, and a duty to restore violated fundamental rights.

The ECtHR does not push countries in either direction. It carefully reiterates that it has no power to order the reopening of court proceedings, although encouraged to do so by many experts. Only in recent decades has the ECtHR started to indicate that the reopening might be an effective instrument of *restitutio in integrum*, especially if it revealed that the procedural laws of a particular state envisaged the reopening. Also, only recently and only in exceptional cases has the ECtHR specifically ordered domestic court proceedings to be reopened.

Provisions regarding reopening can be found in the criminal procedural codes of the majority of the member states and in the civil or administrative procedural legislation in many European countries, but not in the majority of the member states. States enjoy a margin of appreciation while deciding on whether to provide access to the reopening of domestic court cases. This margin of appreciation is wider in civil and administrative proceedings.

It should be pointed out that the case-law shows that domestic courts apply various criteria while deciding on whether to order a reopening. Among those criteria, the one that plays one of the most significant roles in criminal proceedings is whether the violation found by the ECtHR affected the result of the domestic criminal proceeding. Thus, normally the ECtHR findings concerning excessive length of criminal proceedings and of pre-trial detention do not serve as the reason for ordering reopening.

The case-law has pointed out two types of violations that justify the reopening following the ECtHR findings. Usually, it is either grave procedural errors that have occurred in the main course of the criminal proceeding, which could have had an impact on the content of the final judgment, or substantive defects when the ECtHR's findings of the violation of the Convention stem from the very content of the final judgment in the domestic proceedings.

Despite the fact that the CoE CM, in its Recommendation, made the distinction between situations when the impugned domestic judgment that became *res judicata* is on the merits contrary to the ECHR and when the violation found is based on serious procedural errors, in many member states, the law does not make any distinction between the two situations as the reasons for granting reopening.

Although we may agree that the access to reopening of criminal proceedings following the judgment of the ECtHR is provided in procedural laws of the majority of the member states, the domestic procedural laws do not explicitly refer to reopening of criminal proceedings for a full retrial but contains a reference to review which can take the form of a mere reassessment by the same judicial body in order to redress the situation that gave rise to the breach of the requirements of the ECHR.

It is noteworthy that in the vast majority of the member states, the access to reopening based on the violation of the ECHR is generally limited to specific cases in which the ECtHR has

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rendered its judgment. The member states remain conservative in this matter, providing access to usually reopening upon request and only to the applicant's benefit. Clearly, there is strong ground for the European consensus in that reopening of the criminal proceedings concluded by a final judgment shall be available only for the benefit of the victim of a violation of fundamental rights.

With regard to the *beneficium cohaesionis* and, broadly speaking, the *erga omnes* effect of the ECtHR judgments, the majority of European countries remain on restrictive rails, recognising that the reopening might be ordered upon the request of an applicant who succeeded in the ECtHR. However, due to the absence of detailed rules of the reopening in most countries, it remains possible to elaborate in case-law the variety of approaches towards *erga omnes* effect: (i) full recognition (normally, in countries like Finland where an adverse ECtHR judgment is not specified explicitly as a ground for reopening but is considered by domestic courts as one of the reasons for an extraordinary review on the grounds of substantive error in law); (ii) *de facto erga omnes effect* (an ECtHR judgment finding a violation in a case to which the country is a party remains a prerequisite of the access to reopening, however, it might also be granted upon requests of other persons in similar circumstances in other criminal proceedings which were not among the successful applicants to the ECtHR); (iii) application of the principle of *beneficium cohaesionis* or (iv) a traditionalist interpretation of Art. 46 of the ECHR, which is strongly based on the respect of national procedural autonomy that usually provides for reopening of the domestic criminal proceeding only with respect to the successful applicant to the ECtHR who then lodged a request for reopening.

Although reopening of a court case following an ECtHR judgment is an individual measure, the attention paid to it in procedural laws and case-law, especially the fact that many member states have vested their highest courts with the power to decide upon whether to grant the reopening, says much about the impact of the ECtHR findings on the development of the national law. Of course, one of the reasons why those countries do not automatically forward respective cases to lower courts is to avoid new trials and new stages of appeal where there is no need for that, i.e., the judgment of the highest courts might be the final one and the only one needed. However, it also becomes part of the case-law on how to deal with problems similar to those that resulted in the respective ECtHR case, and this case-law reaches lower courts long before their jurisprudence in cases where they applied respectively, the ECtHR will have the chance to be tested by the highest courts.

As to civil and administrative proceedings, it is worth noting that explicitly or according to general rules on state liability, the member states have accepted their liability for breaches of fundamental rights under the ECHR. The relationship between a liability action and other effective remedies available under the national law falls within the principle of national procedural autonomy. Therefore, whatever remedy is available under national law, it fulfils the requirements of the Convention provided that it assures *restitutio in integrum* by way of restoration of violated rights or provides adequate compensation.

Thus, although around twenty member states allow access to the reopening of civil and administrative proceedings following an individual application or the request of a public authority, many member states are inclined towards a compensation mechanism protecting *res judicata* in civil proceedings, as well as the interests of good faith third parties. In those member states that formally provide access to reopening in law, its practical availability is usually conditioned on finding out whether it is necessary due to the nature of the violation, as well as whether it is able to redress the violation effectively. Consequently, allowing reopening based on a violation of the ECHR is rare.

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Research Article

# THE RECOGNITION AND ENFORCEMENT OF AGREEMENTS RESULTING FROM MEDIATION: AUSTRIAN AND UKRAINIAN PERSPECTIVES

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***Keywords:*** *mediation, settlement agreements resulting from mediation, recognition of settlement agreements resulting from mediation, enforcement of settlement agreements resulting from mediation, Singapore Convention*

## ABSTRACT

***Background:*** *The recognition and enforcement of settlement agreements resulting from mediation are of key importance for the effectiveness of this alternative dispute resolution method. Austria is considered to be one of the pioneers of mediation practice in Europe, and its developments can be helpful and interesting for other countries, especially for Ukraine, which obtained the EU candidate country status. In Austria, there are three main possibilities for making such settlement agreements enforceable: a notarial deed, approval by the arbitration tribunal, and approval by the court. In cross-border disputes, enforceability can be reached within the Brussel Ia Regulation, the New York Convention, and national procedures for the recognition and enforcement of foreign court judgments and other acts. In Ukraine, there is the possibility of court approval and approval by arbitration of such settlement agreements.*

***Methods:*** *The present research is based on a comparative approach. The authors juxtaposed Austrian and Ukrainian national models of recognition and enforcement of agreements resulting from mediation. The comparison allows us to see both models' strengths and drawbacks. The analytical method was used to interpret national legislature and international instruments. Using hypothetical models, the authors make a prognosis about the legal effects of recognition and enforcement of agreements resulting from mediation in cross-border disputes in national legal orders.*

***Results and Conclusions:*** *The authors propose amendments to the Ukrainian legislation, in particular, to enshrine in the CPC of Ukraine a new procedure of approval of settlement agreements resulting from out-of-court mediation and the possibility of the enforcement of such agreements as notarial deeds; to provide direct enforcement of arbitration awards; to introduce a new simplified procedure for the enforcement of judgments and other enforceable titles for the implementation of the Brussel Ia Regulation during the adaptation of Ukrainian legislation to the EU law; to adopt the Law on ratification of the Singapore Convention and enshrined simplified procedure for enforcement of the international settlement agreements resulting from mediation.*

## 1 INTRODUCTION

Mediation is defined as a voluntary consensual procedure used for resolving conflicts (disputes), conducted by a third neutral person – a mediator – who has no adjudicative power and facilitates the communication between the parties to help them to reach a settlement of their conflict.[1] Though the decision of whether to use this method is up to the parties, international documents, such as Directive 2008/52/EC of the European Parliament and of

1 KJ Hopt, F Steffek (eds), *Mediation: Principles and Regulation in Comparative Perspective* (Oxford University Press 2016) 11-15; M L Moffitt, R C Bordone (eds), *Handbook of Dispute Resolution* (Jossey-Bass 2005) 304.

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the Council on certain Aspects of Mediation in Civil and Commercial Matters (EU Mediation Directive, 2008)[2] and UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (UNCITRAL Model Law, 2018),[3] have enshrined that agreements resulting from mediation should be enforceable.

Austria is considered to be a pioneer[4] of the mediation movement in the European region, thanks to the strict regulation of standards for mediators and the mediation process. This also applies to the issue of the diversified national regulation of the enforcement of settlement agreements resulting from mediation (a mediation settlement agreement, or MSA). In Ukraine, the Law 'On Mediation' was only adopted on 16 November 2021.[5] It defines the scope of mediation, its principles, requirements for mediators, and the possibility of its integration into court proceedings and arbitration. This act is more like a framework and leaves open a number of issues that are quite important for the effective functioning of mediation at the national level. One such issue is the enforcement of the agreements resulting from mediation. From this point of view, the experience of Austria can be useful for strengthening mediation in Ukraine and making it an effective method for resolving disputes.

At the same time, the issue of enforcing MSAs has not only a national but also an international dimension. Within the EU, the main act in this regard is 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) (the Brussels Ia Regulation).[6] These provisions are of crucial importance for Ukraine, considering that the latter has obtained the status of an EU candidate country and is now on the way to the adaptation of its legislation to EU law.[7] However, the rash of global attention[8] on the enforcement of MSAs is primarily connected with the adoption of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention, 2018),[9] which aims to introduce an enforcement

2 Art. 6 of the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0052&from=en> accessed 1 October 2022.

3 Art. 15 of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01363_mediation_guide_e_ebook_rev.pdf> accessed 1 October 2022.

4 K J Hopt, F Steffek (n 3) 247.

5 The Law of Ukraine 'On Mediation', No 1845-IX of 16 November 2021 <https://zakon.rada.gov.ua/laws/show/1875-20#Text> accessed 1 October 2022.

6 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 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215> accessed 1 October 2022.

7 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part of the 27 of June 2014 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0529%2801%29> accessed 1 October 2022; Commission's Opinion on Ukraine's Application for membership of the EU of the 16 June 2022 <https://ec.europa.eu/neighbourhood-enlargement/opinion-ukraines-application-membership-european-union_en> accessed 1 October 2022.

8 N Alexander, S Chong, *The Singapore Convention on Mediation: A Commentary* (Wolters Kluwer 2019); T Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2018) 19 Pepperdine Dispute Resolution Law Journal 1-60; T Schnabel, 'Implementation of the Singapore Convention: Federalism, Self-Execution, and Private Law Treaties' (2020) 30 The American Review of International Arbitration 265-289, etc.

9 United Nations Convention on International Settlement Agreements Resulting from Mediation <https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf> accessed 1 October 2022.

procedure for international MSAs similar to the procedure of recognition and enforcement of international commercial arbitration awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention, 1958).[10] Yet, there are many concerns among lawmakers and scholars about the ratification of the Singapore Convention by the EU. Ukraine, as well as working on the draft law on ratification of the Singapore Convention.[11]

The aim of this article is to examine the existing national and international mechanisms for the enforcement of MSAs in Austria and Ukraine and to offer new legal approaches for Ukraine. The article consists of three parts: the first addresses the enforcement of MSAs with regard to the principle of voluntariness and requirements for such agreements to be enforceable; the second focuses on the national perspective on the issue, in particular court and out-of-court methods for making such agreements enforceable in cases where both parties of the agreement are domiciled in one jurisdiction; the third deals with the international perspective on the issue, i.e., the situations where parties to the agreement are domiciled in different jurisdictions, with special attention to EU law and the Singapore Convention. In the conclusion, perspectives on improving the national and international regulations of the enforcement of the MSAs in Austria and Ukraine will be outlined.

## 2 ENFORCEMENT OF MSAS: PRELIMINARY REMARKS

### *2.1. Voluntariness in mediation and the enforcement of MSA: the effectiveness issue*

Voluntariness is the core principle of mediation, which is designed to ensure the free participation of the parties in the mediation and the implementation of the MSAs resulting from it. Voluntariness is multifaceted and appears at all stages of mediation. It refers to the parties as well as to the mediator and includes such aspects as: a) the parties voluntarily, by mutual consent, decide to participate in mediation; b) the parties choose a mediator; c) the mediator freely agrees to participate in the mediation and defines the methods of conducting the mediation; d) the parties voluntarily stay in the procedure and are free to terminate it at any moment; e) the parties determine the issues that will be considered during the mediation; f) the parties voluntarily sign an MSA and enforce it.[12] In this regard, J. Nolan-Haley highlights the existence of two forms of consent in mediation – 'front-end participation consent', which is the consent to begin the mediation and participate in the procedure, and the so-called 'back-end outcome consent', which is reflected in the parties' settlement agreement.[13]

Voluntariness is thus considered to be an important issue in mediation, which largely determines its success. T. Hedeen points out that in literature, we can see the spread of the opinion that 'voluntary action in mediation is part of the "magic of mediation" that leads

10 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf> accessed 1 October 2022.

11 More detail is provided in part 4.3 of this article.

12 N Mazaraki, 'The Scope and the Effect of Voluntariness Principle in Mediation' (2018) 1 Juridical Scientific Electronic Journal 24-27 <http://lsej.org.ua/1_2018/7.pdf> accessed 1 October 2022; M Dewdney, 'The Partial Loss of Voluntariness and Confidentiality in Mediation' (2009) 20 Australasian Dispute Resolution Journal 17-18; J Nolan-Haley, 'Mediation Exceptionality' (2009) 78 Fordham Law Review 1247; M Malacka, 'Multi-Door Courthouse established through the European Mediation Directive?' (2016) 16(1) International and Comparative Law Review 131; KJ Hopt, F Steffek (n 1) 45.

13 J Nolan-Haley (n 14) 1251; See also JM Nolan-Haley, 'Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking' (1999) 74 Notre Dame Law Review 775-840.

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to better results than those from courts or other forums: higher satisfaction with process and outcomes, higher rates of settlement and greater adherence to settlement terms'.[14] It is believed that if the parties have voluntarily participated in mediation and reached an MSA, they should voluntarily execute the latter because it was reached independently based on the parties' real interests. In actual practice, however, we can see examples where one of the parties does not perform the MSA. This can be caused by different reasons. It may seem that one of the parties abused the mediation, that the real interests of the parties were not determined during the mediation, or that the circumstances changed after the conclusion of the MSA, and it is necessary to return to the discussion of the issues, etc.

Therefore, it is important to discuss the possibility of obtaining enforcement of an MSA as a tool to increase the effectiveness of the whole mediation, thereby highlighting the advantages of mediation and influencing the decision of the parties to choose mediation as an effective method of dispute resolution. To avoid this, the state strengthens its efforts to support this ADR method by providing different mechanisms to enforce MSAs. In this case, we can speak about some sort of coercion in connection with mediation.

The problem of coercion in mediation is frequently discussed in the literature.[15] At first glance, coercion in mediation 'seems inconsistent with, and even antithetical to, the fundamental tenets of the consensual mediation process'.[16] Thus, 'any attempts to impose a formal and involuntary process on a party may potentially undermine the *raison d'être* of mediation'.[17] However, the problem of using coercion in mediation is not as simple as it might seem to be. Coercion in mediation is usually connected to two aspects – '*coercion into*' and '*coercion within*' the mediation.[18] The first refers to the different kinds of mandatory mediation, and the latter to the behaviour of mediators during the mediation. In our opinion, nowadays, we can also distinguish some sort of '*coercion after*' mediation, which is coercion during the enforcement procedure of the MSA.

However, more importantly, these types of coercion are different in nature. '*Coercion within*' the mediation is the coercion of the mediator during the mediation procedure; it has a private nature and is connected to the behaviour and skills of a mediator inside the mediation process, taking into account the functions of a mediator and the essence of the mediation procedure. This type of coercion is considered to be contrary to the voluntariness principle, and the mediator should avoid it. At the same time, '*coercion into*' and '*coercion after*' the mediation have a public nature. This is state coercion, which can be prescribed directly by law (in the case of mandatory mediation under the law and after the parties' decision for enforcement of the MSA) or applied by a judge (in case of court-ordered mediation).

But when did the idea of the possibility of applying such public coercion in mediation appear, and how does it influence the voluntariness and self-determination of parties? The answer to this question lies in the evaluation of the mediation and its interaction with the court

14 T Hedeen, 'Coercion and Self-determination in Court-Connected Mediation: All Mediations Are Voluntary, But Some Are More Voluntary than Others' (2005) 26(3) The Justice System Journal 275.

15 See: FEA Sander, HW Allen, D Hensler, 'Judicial (Mis)use of ADR? A Debate' (1996) 27 The University of Toledo Law Review 886; DQ Anderson 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11(2) Cardozo Journal of Conflict Resolution 479-509; T Hedeen (n 16) 273-291; DE Matz, 'Mediators' Pressure and Parties' Autonomy: Are They Consistent with Each Other?' (1994) 10 Negotiation Journal 359-365.

16 DQ Anderson (n 17) 484.

17 Ibid, 481.

18 FEA Sander, HW Allen, D Hensler (n 17) 886; DQ Anderson (n 17) 485; M Hanks, 'Perspectives on Mandatory Mediation' (2012) 35(3) UNSW Law Journal 930; J Nolan-Haley (n 14) 1254.

proceedings. Both directions of public coercion in mediation – the spread of mandatory mediation and the enforcement of MSAs – are connected not only with the mediation itself and the private interests of the parties in a particular case but also with the public interests and the effectiveness of the justice sector as a whole. This is because the introduction of mandatory mediation, as well as the possibility of enforcing the MSA, can decrease the court case-load, improve the effectiveness of the entire justice system, rationalise the use of judicial resources by excluding small claims and other disputes for which mediation fits better than court proceedings, enforce citizens' satisfaction and trust in the courts, etc. From this point of view, the interference of the state in the mediation process, which is private by nature, is determined by the issue of the effectiveness of the whole justice sector. At the same time, we can see the balance between public and private interests in the case of using public coercion in mediation. In the case of mandatory mediation, it is reached through the parties' right to terminate the procedure at any time and, in the case of the enforcement of MSAs, by the fact that only the parties can decide whether they want to make the MSA enforceable. All these circumstances caused the shift in the interpretation of the voluntariness principle in mediation: voluntariness in mediation could no longer be interpreted as absolute in all aspects, as it was at the outset. Nowadays, the principle of voluntariness can be limited and co-exist with public coercion into mediation, taking into account effectiveness concerns – the effectiveness of the justice sector as a whole as well as the effectiveness of mediation as a special method of ADR in particular.

### 2.2. The recognition and enforcement of MSAs: a general understanding

As already mentioned, the idea of making an MSA enforceable is widely supported by international institutions and has been repeatedly stated in international documents. The EU Mediation Directive emphasises the importance of ensuring the enforcement of MSAs, based on the provision that national legislation should provide mechanisms for the enforcement of such agreements upon the consent of the parties unless 'the content of that agreement is contrary to the law of the Member State where the request is made, or the law of that Member State does not provide for its enforceability'.[19] According to the UNCITRAL Model Law, 'if the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable'.[20] Moreover, with the implementation of the Singapore Convention, the idea of enforceability of such agreements has expanded beyond the boundaries of the national legal orders and divided the issue into two dimensions – national and international.

MSAs can vary depending on their form (oral or written), content (provisions of a legal and non-legal nature, for example, moral or ethical issues, etc.), and the method of making them enforceable (with the consent of one or both parties). All these factors are decisive for the issue of the enforceability of MSAs. The Austrian Mediation Act does not prescribe any particular form of MSA, leaving the choice of an oral or written form to the discretion of the parties.[21] The Ukrainian Law 'On Mediation' provides for the same approach.[22] This means that it is up to the parties to decide whether they want to make some sort of oral or a written statement, as well as whether they want to make such an agreement enforceable by using some special procedures enshrined in national law. At the same time, the EU Mediation Directive provides for the possibility of enforcing only written agreements.[23] The

19 Art. 6 of the EU Mediation Directive.

20 Art. 15 of the UNCITRAL Model Law.

21 C Lenz, M Risak, 'Austria' in N Alexander, S Walsh, M Svatos (eds), *EU Mediation Law Handbook: Regulatory Robustness Ratings for Mediation Regimes* (Walters Kluver 2017) 53; KJ Hopt, F Steffek (n 3) 44.

22 Subpart 9 Part 9 Art. 1 of the Law of Ukraine 'On Mediation'.

23 Art. 6 of the EU Mediation Directive.

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same approach is used in Austrian and Ukrainian legislation, which only recognise written documents as enforceable titles.[24]

According to the EU Mediation Directive, the enforcement of such agreements is permissible only if they contain provisions of legal nature not contrary to the law of the state where the enforcement is requested. Such provisions should also be recognised as enforceable according to national legislation.[25] Therefore, all the provisions which have no legal basis could not be compulsorily enforced. Taking into account the fact that such agreements are considered to be contracts and have a civil law nature, they should also meet some other requirements. For example, in Ukraine, such agreements should not affect the rights of third parties who are not a party to the contract and did not participate in the mediation, as well as public or state interests.[26]

Last but not least, MSAs can become enforceable in different national jurisdictions at the request of at least one party or by the consent of both parties.[27] However, the EU Mediation Directive states that both parties or one alone with the express consent of the other may apply for enforcement.[28] The latter approach is user-oriented and gives the parties the opportunity to decide whether they want to make an MSA enforceable as well as whether they want to choose out-of-court or court methods for this purpose, which are enshrined in national legislation.

Within the international dimension of this issue, an important question arises regarding whether we should talk about both the recognition and enforcement of such MSAs or only about their enforcement. Special attention was paid to this issue during the drafting of the Singapore Convention. H. Abramson emphasised the different meanings of the 'recognition' concept in civil and common law traditions, arguing that in order to avoid confusion, the proposed solution was 'to omit the term "recognition" and design a separate article.'[29] In two parts of Art. 3 of the Singapore Convention, the sense of these concepts was separated: part one refers to the enforcement, whereas part two deals with the recognition, though without using this term. The latter term was 'replaced with a functional definition that uses other words to address key aspects of recognition such as the ability to assert a mediated settlement as a complete defense if another party tries to raise the underlying settled claims'.[30] In other articles, the term 'relief', covering both concepts, is used in the text of the Singapore Convention.

The term 'recognition', as understood in many countries, means the possibility for the party to invoke the title preventing the reopening of the proceedings if another party tries to bring the dispute previously settled in mediation to court.[31] Para. 2 Art. 3 of the Singapore Convention provides the same meaning. Taking into account the interpretation of both paragraphs of the Art. 3 of the Singapore Convention, T. Schnabel pointed out that it 'provides for the use

24 Art. 433a of the Civil Procedure Code of Austria () <https://www.jusline.at/gesetz/zpo> accessed 1 October 2022; Art. 1 of the Execution Act of Austria (Exekutionsordnung) <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001700&fbclid=IwAR23j_IIDEWxl53XXGP8NknoyMgjhAkc9COz2ww_6ZF9Ifww06TQCRJxqJc> accessed 1 October 2022; Art. 3 of the Law of Ukraine, No 1404-VIII of 02 June 2016 'On Enforcement Proceedings' <https://zakon.rada.gov.ua/laws/show/1404-19#Text> accessed 1 October 2022.

25 Para 1 Art. 6 EU Mediation Directive.

26 Part 3 Art. 21 of the Law of Ukraine 'On Mediation'.

27 K J Hopt, F Steffek (n 3) 47.

28 Art. 6 of the EU Mediation Directive.

29 H Abramson, 'The New Singapore Mediation Convention: The Process and Key Choices' (2019) 20 Cardozo Journal of Conflict Resolution 1057.

30 Ibid, 1057.

31 T Schnabel, 'Recognition by any other Name: Article 3 of the Singapore Convention on Mediation' (2019) 20 Cardozo Journal of Conflict Resolution 1185.

of settlement agreements as both a "sword" (the offensive use of a settlement agreement via a request for enforcement, to compel compliance with the obligations in the settlement agreement) and as a "shield" (the ability to use a settlement agreement as a complete defense)'.[32] In this sense, the recognition is granted 'prima facie […] by the courts, unless the requirements in relation to scope, form and/or evidence are not fulfilled, or if a party successfully proves that one or more of the Article 5 grounds for refusal exist'.[33]

The approach used in the Singapore Convention is vital because it obliges the states not only to enforce MSAs but also to consider them 'conclusive proof that a dispute had been resolved',[34] which is important in the context of the more general principle *pacta sunt servanda*. This approach is consonant with the provisions of the New York Convention, in which the words 'recognition and enforcement' are used in the title and in the text. It is important because in many countries, 'recognition is a prerequisite to enforcement',[35] which is why the Singapore Convention should provide 'a complete defense',[36] e.g., 'both a "sword" and a "shield"'.[37] Such a functional approach[38] and complete defence, as provided by the Singapore Convention, are important from the users' perspective, e.g., parties rely not only on enforcement but also on the exclusion of such a dispute from the jurisdiction of other organs, thus avoiding procedural abuses of other parties to the dispute.[39] Besides this, complete defence positively influences the popularisation of mediation and increases the level of trust in such an ADR method, providing the same set of safeguards as the New York Convention for arbitration.

At the same time, we should point out that in some jurisdictions, MSAs do not have the *res judicata* effect, and there is no 'necessary link between *res judicata* and enforcement'.[40] For example, in Austria, the notarial deed has no *res judicata* effect. Nevertheless, as we shall see, it is recognised as an enforceable title.[41] For other settlement agreements, especially those approved within the meaning of the international commercial arbitration award or judgments of foreign courts, recognition is the precondition for enforcement.

## 3 ENFORCEMENT AGREEMENTS RESULTING FROM MEDIATION AT THE NATIONAL LEVEL: THE EXPERIENCE OF AUSTRIA AND UKRAINE

In order to encourage parties to use mediation and increase its effectiveness, states implement different methods of making MSAs enforceable. In Austria, the following methods can be distinguished: a) approval of the MSA by a notarial deed; b) approval of the MSA by arbitration; c) approval of the MSA by the court.

The Ukrainian legislation does not contain any special provisions devoted to the possibility of the enforcement of MSAs resulting from out-of-court mediation. If the MSA is reached in an

32 Ibid, 1185.

33 N Alexander (n 10) 70.

34 T Schnabel (n 33) 1193.

35 Ibid, 1187.

36 Ibid, 1185, 1191; M Kallipetis, 'Singapore Convention Defenses Based on Mediator's Misconduct: Articles 5.1(E) & (F)' (2019) 20 Cardozo Journal of Conflict Resolution 1209.

37 T Schnabel (n 33) 1187.

38 N Alexander (n 10) 71.

39 T Schnabel (n 33) 1193.

40 M Kallipetis (n 38) 1209.

41 M Trenker, 'Der Vollstreckbare Notariatsakt als Alternative zur einvernehmlich Streitbeilegung' (2021) 191 *Österreichische Notariatszeitung* 709.

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out-of-court mediation, it has the power of a contract, and, in the case of the non-enforcement of such an agreement, the parties can only lodge a claim to the court in order to protect their rights and interests. If the MSA is reached during a trial, it can be approved by the court as a court settlement agreement.[42] Taking into account the first steps in the development of legal regulations of mediation in Ukraine, there are no draft laws connected to the enforceability of MSA. This is why the Austrian approach to this issue can be useful for further implementation.

### *3.1. Notarial deed*

In Austria, the mechanisms to make MSAs resulting from out-of-court mediation enforceable are regulated in Art. 3, 54 (1) of the Notarial Act of Austria (*Notariatsordnung*)[43] and Art. 1 (17) of the Execution Act of Austria (*Exekutionsordnung*).[44] A notarial deed, like a court settlement agreement, can be enforceable if: a) an obligation to perform or to refrain from performing is stated therein; the obligation to vacate a dwelling or individual parts of a dwelling is excepted unless it is a question of the owner or co-owner of the property vacating the dwelling; b) the entitled person and the obligor, the legal title, the object, the nature, the extent and the time of the performance or omission are defined; c) extinction of obligation under lit. a is admissible; d) the obligor has agreed in this or a separate notarial deed that the notarial deed shall be immediately enforceable.[45] At the same time, if the parties to a deed want to confirm notarially a private deed that has already been drawn up, a corresponding notarial deed must be drawn up to that effect.[46] In this case, the obligor's declaration of submission to enforcement is also compulsory.

The Ukrainian legislation does not directly provide for the possibility of bringing agreements resulting from mediation to enforcement by means of a notarial deed. According to the Ukrainian Law 'On Enforcement Proceedings', the only notary document recognised as an enforcement title is the notary writ (*vykonavchyi napys notariusa*),[47] which can only be used for certain types of deeds certifying arrears of debt payment.[48] The list of such documents is established by the Cabinet of Ministers. For example, these can be notary certified: contracts providing for the payment of sums of money, the transfer or return of the property, and the right to foreclose on the pledged property; mortgage agreements that provide for the right to foreclose on the mortgaged property if payments on the principal obligation are overdue before the maturity of the principal obligation expires; leasing contracts that provide for the undisputed return of the leased asset, etc.[49] In such a situation, the notarial writ is issued at the creditor's motion without any previous or later consent of the debtor. There is no possibility of automatic enforcement of any notarial deed, as well as no special notions about notarial approval of MSAs in Ukrainian legislation.

42 Art. 21 of the Law of Ukraine 'On Mediation', Art. 207 of the CPC of Ukraine.

43 The Notarial Act of Austria (Notariatsordnung) <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001677&FassungVom=2004-12-31&fbclid=IwAR3YKe69GaAofKbGqzb1bCcFiso-qs3mctCWsek-udmbvuY9g4K-5fqykM0> accessed 1 October 2022.

44 The Execution Act of Austria (Exekutionsordnung) <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001700&fbclid=IwAR23j_IIDEWxl53XXGP8NknoyMgjhAkc9COz2ww_6ZF9Ifww06TQCRJxqJc> accessed 1 October 2022.

45 Para 3 of the Notarial Act of Austria.

46 Para. 54(1) of the Notarial Act of Austria.

47 Subpart 3 Part 1 Art. 3 of the Law of Ukraine 'On Enforcement Proceedings'.

48 Art. 87 of the Law of Ukraine 'On Notariat' <https://zakon.rada.gov.ua/laws/show/3425-12#Text> accessed 1 October 2022.

49 The Resolution of the Cabinet of the Ministers of Ukraine No 1172 of 29 June 1999 'On the Approval of the List of Documents, According to which Debt Collection is Carried out in an Undisputed Manner on the Basis of Executive Inscriptions of Notaries' < https://zakon.rada.gov.ua/laws/show/1172-99-п#n10> accessed 1 October 2022.

A refusal to fulfil an MSA, which should be understood as a civil law contract according to Ukrainian legislation, constitutes a waiver to execute the contract. So, there are two options to protect the rights of the creditor in this situation – to ask for a notarial writ if the MSA is in the form of one of the documents included in the list of the Cabinet of Ministers of notarial writs, or to lodge a suit with the court to force the party to fulfil the obligation. In such a situation, the advantages of out-of-court mediation become illusory because in order to force the party to the MSA to fulfil its obligation, even if it was certified by the notary, another party almost always must go to court.

Despite this, notaries have the possibility to conduct mediation if they pass the basic mediation training.[50] Moreover, the Notarial Chamber of Ukraine conducts mediation training for notaries and maintains and publishes registers of notaries who have completed mediation training.[51] On the one hand, this shows the efforts to promote mediation among the notarial community and to integrate it into notarial practice. On the other hand, the inefficiency of legislation in regard to the enforcement of the MSAs resulting from out-of-court mediation slows down such attempts. In our opinion, amendments in the Ukrainian legislature, connected to the possibility of making MSAs enforceable by a notarial deed with the consent of both parties, would promote out-of-court mediation and increase the number of cases because it can bring the parties the same results as a court settlement without going to court, saving time and recourses of the parties. Therefore, it is useful to prescribe by law that the MSAs carried out without referring a dispute to a court or arbitration can be recognised as valid enforcement titles within the parties' consent if it is certified as a notarial deed and contains an obligation to perform or to refrain from performing.

### 3.2. Approval of the agreement by arbitration

In recent decades, arbitral institutions have maintained the common practice of using mediation during arbitration in various types of med-arb, arb-med, and arb-med-arb procedures.[52] In case of a wise choice of procedural sequence – the appropriate one would be the latter option – the MSA can be made enforceable as a part of the arbitration decision at the end of the arbitration procedure. In Austria, rules of arbitration are regulated by the Fourth Chapter of the Austrian CPC. The parties have the right to settle their dispute and conclude the agreement. There are two options for such an agreement – the arbitral award with agreed wording (*den Schiedsspruch mit vereinbartem Wortlaut*) and the arbitral settlement (recording of an arbitral settlement, *den Schiedsvergleich*).[53] In both options, the subject matter of the dispute must be able to be a subject of a settlement, and the content of the settlement should not violate fundamental values of the Austrian legal system (order public).[54] The arbitral settlement presupposes the registration of the settlement, signed by the parties and the arbiter, at the arbitration.[55] At the same time, an arbitral award with agreed wording must meet the requirements for the arbitral award and have the same

50 Art. 1 of the Law of Ukraine 'On Notariat'.

51 Art. 16 of the Law of Ukraine 'On Notariat'.

52 D Nigmattulina, 'The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Studies' (2016) 33(1) Journal of International Arbitration 37-82; B A Pappas, 'Med-Arb and the Legalization of Alternative Dispute Resolution' (2015) 20 Harvard Negotiation Law Review 157-203; D. Ruckteschler, A. Wendelstein 'Efficient Arb-Med-Arb Proceedings: Should the Arbitrator also be the Mediator?' (2021) 38(6) Journal of International Arbitration 761-774, etc.

53 Art. 605 of the CPC of Austria.

54 Art. 605 of the CPC of Austria.

55 Art. 605 (1) of the CPC of Austria.

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effect.[56] At the national level, both types of agreements are recognised as an enforcement title,[57] whereas at the international level, only an arbitral award with agreed wording can be compulsory enforced under the New York Convention. The parties also can reach an out-of-arbitration settlement, which means the end of an arbitral hearing without any special act of settlement.[58] The awards of national arbitration become enforceable automatically,[59] whereas foreign arbitral awards are subject to the special recognition and enforcement procedure prescribed by the Execution Act of Austria.[60]

In Ukraine, two types of arbitration exist – arbitration tribunals (*treteyski sudy*), which deal with domestic disputes,[61] and international commercial arbitration.[62] In arbitration tribunals, the trial ends with an arbitral award.[63] Even if the parties reach a settlement, the arbitral tribunal may, at the request of the parties, approve the settlement and record the contents of the settlement directly in the award.[64] In international commercial arbitration, there are two options for terminating the trial – an arbitral award[65] and an arbitral award with agreed wording.[66] Both the awards of the arbitration tribunal and the international commercial arbitration can be enforced only after obtaining an enforcement order at the state court under a special procedure of giving the writ for execution, regulated in the CPC of Ukraine.[67] During this procedure, the state court can deny the request for enforcement only on procedural grounds, for example, if the arbitration tribunal has no jurisdiction to hear the case, if the enforcement of such an award is contrary to the public order, etc.

### 3.3 Approval of the agreement by the court

The most widespread mechanism to make MSAs enforceable is their approval by the court. Here, we can distinguish two situations – court approval of MSAs resulting from court-connected or out-of-court mediation.

The Ukrainian legislation provides for the possibility of only making enforceable the MSAs in disputes which are already tried before the court by their approval as court settlement agreements (Part 7 Art. 49 of the CPC of Ukraine). According to the provisions of procedural legislation, a court settlement agreement can be concluded at any stage of the civil procedure, including the trial at courts of appeal and Supreme Court and enforcement proceedings.[68] There is a possibility only in pending cases to get approval by the court.

However, in Austrian civil procedure, we can see a different approach. Art. 433a of the Austrian CPC provides for the possibility of obtaining a court settlement before a district

56 Art. 605 (2), 606 of the CPC of Austria.

57 Art. 1 (16) of the Execution Act of Austria.

58 VIAC (eds.), Handbook on the Vienna Rules and the Vienna Mediation Rules 2018 (WKÖ Service GmbH 2019) 294.

59 Art. 606 (6) and 607 of the CPC of Austria.

60 Art. 614 of the CPC of Austria, Art. 406-416 of the Execution Act of Austria.

61 The Law of Ukraine 'On Arbitration Tribunal' <URL: https://zakon.rada.gov.ua/laws/show/1701-15#Text> accessed 1 October 2022.

62 The Law of Ukraine 'On International Commercial Arbitration' <https://zakon.rada.gov.ua/laws/show/4002-12#Text> accessed 1 October 2022.

63 Art. 33, 45 of the Law of Ukraine 'On Arbitration Tribunal'.

64 Art. 33 of the Law of Ukraine 'On Arbitration Tribunal'.

65 Art. 31 of the Law of Ukraine 'On International Commercial Arbitration'.

66 Part 1 Art. 30 of the Law of Ukraine 'On International Commercial Arbitration'.

67 Section X of the CPC of Ukraine.

68 Art. 207, Part 2 Art. 373, Part 2 Art. 408 of the CPC of Ukraine, Part 2 Art. 19 of the Law 'On Executive Proceedings'

court on the content of the written agreement reached in mediation. To use such a procedure, several requirements must be met: a) the agreement should be on civil or commercial matters falling within the jurisdiction of the district court; b) such agreement should be written and result from mediation; c) the rights and the obligations contained in the agreement should be at the disposal of the parties; d) the parties should have the right to conclude a court settlement agreement in such a category of cases; e) the content of the agreement must include the obligations, which are enforceable by their nature.[69] This procedure can be used for all MSAs, whether conducted by registered or unregistered mediators in domestic or cross-border disputes.[70] MSAs approved by the court have the power of an enforcement title like the other judicial acts.

Another procedure that should be mentioned in this context is the so-called 'pretoric settlement'. Art. 433 of the Austrian CPC gives any person intending to file an action the right to approach the district court at the opponent's domicile to reach a settlement before filing a lawsuit. Such a settlement is provided for by the judge and can end with the court settlement agreement. The Rules of Procedure for the Courts of I and II instances state that the purpose of Art. 433 of the Austrian CPC is to settle disputes in the simplest way. On the other hand, 'the courts are neither obliged nor entitled to authenticate and make enforceable agreements reached between the parties out of court. Rather, the establishment of the enforceable notarial deed (Art. 3 of the Notarial Act) must serve this purpose'.[71]

The difference between the procedures enshrined in Arts. 433 and 433a of the CPC of Austria lies in the purpose of these procedures: Art. 433 regulates the pretoric settlement, which is a special settlement procedure conducted by a judge prior to the lodging of a claim by the claimant, whereas Art. 433a concerns the procedure of approving the MSAs resulting from out-of-court mediation. At the same time, if parties concluded the MSA with the help of a private mediator after filing a suit, it could be approved by the court as a court settlement agreement (Art. 204 of the Austrian CPC).

A wide range of possibilities for court approval of MSAs resulting from different types of mediation is important for the popularisation of mediation. The possibility of enforcement of both court-related and out-of-court MSAs is included in Recital 19 of the EU Mediation Directive, which states that mediation should not be understood as a lesser alternative to the court trial. If there is no opportunity to enforce out-of-court MSAs, it cannot be said that the aim of Art. 1 of the EU Mediation Directive, namely, to promote the use of mediation, could be achieved.[72] Besides this, the possibility of judicial approval of MSAs is vital for mandatory mediation and court-connected mediation, which can be used without formally filing the claim with the court. For such types of mediation, the state should introduce the possibility of making agreements enforceable; otherwise, it makes no sense to use them in practice.

The Constitution of Ukraine states that in cases prescribed by law, the pre-trial methods of dispute settlement can be mandatory (Art. 124). In spite of the fact that for civil cases, such

69 C Lenz, 'The EU Directive on Mediation – The Implementation in Austria and the Preparations in Germany' (2012) 2 Yearbook on International Arbitration 389-390; S Ferz 'Sehnsucht nach Anerkennung – Der Exekutionstitel als Türöffner für die Mediation?' (2021) 21 Graz Law Working Paper 6-7 <https://ssrn.com/abstract=3972411> accessed 1 October 2022; S Ferz, Ch Matti, 'Implementation of directive 2008/52/EC ('Mediation Directive')' in *Mediation in Cross-Border Succession Conflicts and the effect of the EU Succession regulation – Research report* (Stuttgart, Steinbeis-Edition 2019) 26-27.

70 S Ferz (n 71) 6-7; S Ferz, Ch Matti (n 71) 26.

71 Art. 547 (3) of the Rules of Procedure for the Courts of I. and II. Instance of Austria (Geschäftsordnung für die Gerichte I. und II. Instanz) <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000240> accessed 1 October 2022.

72 C Lenz (n 71) 382.

mechanisms have not yet been established, it is supposed that in a few years, mandatory mediation in some types of cases may be introduced.[73] For this purpose, both out-of-court and court-connected mediation schemes can be used in practice. All these circumstances show that there should be special provisions in civil procedure for the enforcement of MSAs for both types of mediation. This can be done by providing a special procedure for the approval of such MSAs by the court in a simplified procedure.

## 4 THE ENFORCEMENT OF MSAS IN CROSS-BORDER DISPUTES: EU AND UKRAINIAN PERSPECTIVES

The EU Mediation Directive emphasises not only the national but also the international aspect of the enforcement of MSAs. It states that 'agreements which have been made enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community or national law'.[74] Such a notion opens the discussion on the enforcement proceedings applicable to MSAs in cross-border disputes. The method of making the MSAs enforceable at the national level (by court judgment, arbitration award, or notarial deed) is a decisive factor when choosing the particular recognition procedure for foreign MSAs. Below, we will examine the main legal provisions in this regard.

### *4.1 The Brussels Ia Regulation and the enforcement of MSAs*

The main regulation for the EU countries is 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 (the Brussels Ia Regulation).[75] The main aim of the Brussels Ia Regulation is to 'maintain and develop an area of freedom, security and justice, inter alia, by facilitating access to justice, in particular through the principle of mutual recognition of judicial and extra-judicial decisions in civil matters'.[76] This regulation is a binding and directly applicable document which provides for the recognition and enforcement of judgments and extra-judicial decisions within the EU area. This document reflects the desire of the EU Member States to recognise judgments of other member states as their own and to ensure their free circulation, based on the principle that 'the judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed'.[77] At the same time, the Brussels Ia Regulation is not applicable for arbitral awards,[78] which can be enforced under the New York Convention.

The main purpose of the Brussels Ia Regulation is to provide for the recognition and enforcement of judgments given in one of the EU member states in another of the EU member states without any special procedure or any declaration of enforceability being required.[79] Such foreign judgments are prescribed to be enforceable under the same conditions as their own

73 In connection to mandatory mediation in Ukraine, see T Tsuvina, T Vakhonieva 'Law of Ukraine "On Mediation": Main Achievements and Further Steps of Developing Mediation in Ukraine' (2022) 1(13) Access to Justice in Eastern Europe 142-153; N Mazaraki (n 14) 24-27.

74 Recital 20 of the EU Mediation Directive.

75 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 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215> accessed 1 October 2022.

76 Recital 3 of the Brussels Ia Regulation.

77 Recital 26 of the Brussels Ia Regulation.

78 Recital 12, Para 2(a) Art 1 of the Brussels Ia Regulation.

79 Para 1 Art. 36, Art. 39 of the Brussels Ia Regulation.

judgments, and 'the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed'.[80] The same provisions apply to authentic instruments[81] and court settlements.[82] The core change of the Brussels Ia Regulation compared to the previous regulations in this matter is the abolition of the exequatur procedure, the essence of which is the obtaining of a court order before the enforcement of a foreign judgment.[83] Currently, in order to start an enforcement procedure, the creditor should only provide the national authority with a copy of the judgment and the standard certificate.[84]

We can distinguish several situations with regard to the recognition and enforcement of MSAs for the purposes of our survey: a) the recognition and enforcement of MSAs originating in Austria in other EU countries, and vice versa; b) the recognition and enforcement of MSAs originating in a non-EU country in Austria; c) the recognition and enforcement of MSAs originating in foreign countries in Ukraine.

***a) Recognition and enforcement of MSAs originating in Austria in other EU countries***

MSAs approved by the Austrian court should be recognised as enforcement orders according to the Brussels Ia Regulation in other EU states. At the same time, MSAs approved as notarial deeds should also be enforceable since the Brussels Ia Regulation covers not only judgments but also extra-judicial documents, which can be recognised as enforcement titles in the national system of a member state.[85] To obtain the enforcement writ for MSAs approved by the court or a notarial deed, a copy of the judgment and a standard form certificate should be submitted to the national authority.[86] The same rules should be applicable for the recognition, and enforcement of MSAs originated in other EU countries, for instance, in Austria, according to the Brussels Ia Regulation. At the same time, all kinds of arbitral awards originating in Austria or other EU states are not covered by the Brussels Ia Regulation but can be enforced under the New York Convention.

***b) Recognition and enforcement of MSAs originating in a non-EU country in Austria***

The recognition and enforcement of court judgments of non-EU countries are regulated by the Austrian Enforcement Act (Art. 406-416) and international bilateral and multilateral agreements. In general, there is a two-step procedure for the recognition and enforcement of foreign judgments – the declaration of enforceability and the enforcement itself. The application for the declaration of enforceability and the motion of enforcement can be lodged at the same time in the same court, but these can be different courts.[87] The competent court for the declaration of enforceability is the district court in whose district the opposing party is domiciled.[88]

The procedure is the same for the court acts and deeds.[89] The main requirements for enforcement can be summarised as follows: a) the act or deed is enforceable according to the legislature of the state of origin; b) the principle of reciprocity is guaranteed by state treaties

80 Para 1 Art. 41 of the Brussels Ia Regulation.

81 Art. 58 of the Brussels Ia Regulation.

82 Art. 59 of the Brussels Ia Regulation.

83 K Kitzberger, S Weber 'Austria' in O Browne, T Wartner, G Blears (eds), Enforcement of Foreign Judgments (Lexology 2022) 24 <https://weber.co.at/wp-content/uploads/2021/11/2022_enforcement_of_foreign_judgements_austria.pdf> accessed 1 October 2022.

84 Art. 37 of the Brussels Ia Regulation.

85 Art. 58 of the Brussels Ia Regulation.

86 Art. 37 of the Brussels Ia Regulation.

87 Art. 412 (1) of the Executive Act of Austria; doe more detail, see K Kitzberger, S Weber (n 85) 5-6.

88 Art. 409 of the Executive Act of Austria.

89 Art. 406 of the Executive Act of Austria.

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or regulations;[90] c) the case fell within the jurisdiction of a foreign state court or authority according to the domestic state legislation;[91] d) the requirements of the due notification of the person were fulfilled, and the defendant participated in the proceedings or at least had an opportunity to do so;[92] e) the judgment is no longer a subject to a trial or another process and has the status *res judicata*;[93] f) the act should not be wholly unlawful or unenforceable under the Austrian legislation, and its execution should not be contrary to the public policy or morality.[94] The application of a declaration of enforceability is decided by order without prior oral hearings and without hearing the opposing party.[95] The debtor has the possibility to appeal against this order.[96] As soon as the proceedings for the recognition of the foreign judicial act or deeds have ended, the latter has the power to be enforced as an enforceable domestic title.[97] The district court is responsible for the pending enforcement proceedings, and the process is conducted by bailiffs who act as judicial staff.

***c) Recognition and enforcement of MSAs originating in foreign countries in Ukraine***

As Ukraine is not an EU member state, the Brussels Ia Regulation is not applicable on its territory; therefore, there is no difference whether the country in which the judgement originated was an EU or non-EU state. However, as was previously mentioned for the recognition and enforcement of MSAs originating in a non-EU country in Austria, the more important point is whether there is a bilateral or multilateral international agreement between Ukraine and the state from which the judgment originated.

The main provisions connected to the enforcement of foreign judgments are contained in Art. 462-470 of the CPC of Ukraine. The main rule is that the judgments of a foreign court (court of a foreign state, other competent bodies of foreign states whose competence includes the consideration of civil cases) are recognised and enforced in Ukraine if their recognition and enforcement are provided for by an international treaty whose consent to be bound is granted by the Verkhovna Rada of Ukraine[98] or on the principle of reciprocity. The latter shall be presumed to exist unless it is proved otherwise.[99]

The main requirements for the enforcement can be summarised as follows: a) the judgments of a foreign court should be *res judicata* according to the legislature of the state of origin; b) the recognition and enforcement is provided for by an international treaty whose consent to be bound is granted by the Verkhovna Rada of Ukraine, or on the principle of reciprocity; c) requirements of the due notification of the person were fulfilled; d) the case is not within the exceptional jurisdiction of the Ukrainian court; e) there is neither a judgment nor a pending trial in the Ukrainian court on the same case; f) the term for submitting such an application have not been expired; g) the subject matter of the dispute should can be the subject of proceedings under the Ukrainian legislature; h) the enforcement of the judgment is not contrary to the interests of Ukraine; i) there is no other enforcement title on this judgment given by the Ukrainian court (Part 1 Art. 462, Art. 468 of the CPC of the Ukraine).

90 Art. 406 of the Executive Act of Austria.
91 Art. 407(1) of the Executive Act of Austria.
92 Art. 407(2), Art. 408 (1) of the Executive Act of Austria
93 Art. 407 (3) of the Executive Act of Austria.
94 Art. 408 (2), Art. 408 (3) of the Executive Act of Austria.
95 Art. 410 of the Executive Act of Austria.
96 Art. 411 of the Executive Act of Austria.
97 Art. 413 of the Executive Act of Austria.
98 The Verkhovna Rada of Ukraine is the official name of the Ukrainian Parliament.
99 Art. 462 of the CPC of Ukraine.

In order to obtain compulsory enforcement, the creditor should make an application to the court at the place of residence or location of the debtor, if the debtor has no such place in Ukraine – to the court according to the location of the debtor's property in Ukraine (Art. 464 of the CPC of Ukraine). Such a motion can be submitted for compulsory enforcement in Ukraine within three years from the date of obtaining *res judicata* status or, if the enforcement is connected with the periodic payments, during the entire period of such payments (Art. 463 of the CPC Ukraine). The creditor should provide the court with the documents stipulated by international treaties and, if such a treaty does not exist or determine the list of such documents, the following documents shall be attached to the application: a certified copy of the judgment, an official document that the judgment of the foreign court has entered into force; a document certifying that the party against whom the decision of the foreign court was issued and who did not participate in the proceedings was duly notified of the date, time and place of the proceedings; a document stating in which part or from which time the decision of the foreign court is enforceable (if it has been enforced previously); document certifying the authorisation of a representative (if the application is submitted by a representative); a statutorily certified translation of the above documents into the Ukrainian language or a language stipulated by international treaties of Ukraine (Parts 2, 3 Art. 466 of the CPC Ukraine). After obtaining the application with all the necessary documents, the court should notify the debtors about the proceedings and give them one month to provide the objections. The examination of the motion must be carried out by a judge in an open court hearing (Part 1, 4 Art. 467 of the CPC Ukraine.). Thereupon, the court can decide whether to grant permission to enforce the judgment of a foreign court or refuse to satisfy the motion (Part 6 Art. 467, Part 1 Art. 468 of the CPC Ukraine). On the basis of the judgment of a foreign court and the decision to grant permission for its enforcement, the court shall issue an enforcement writ (Art. 470 of the CPC Ukraine), which should be submitted to the Public Executive Service or to the private bailiffs for enforcement.

The above-mentioned procedure is applicable only to the MSAs approved by foreign courts. There is no special procedure for the enforcement of MSAs that have been certified as a notarial deeds abroad. At the same time, the MSAs that were approved by arbitration of a foreign country can be enforceable in Ukraine under the New York Convention. Therefore, taking into account the Ukrainian obligations on the adaptation of the Ukrainian legislature to the EU legislation, two steps should be made with regard to the enforcement of MSAs: providing the special simplified mechanisms for the enforcement of judgments and court settlements (including the MSAs, approved by a court) originated in the EU states, as well as extra-judicial documents, such as the enforcement of MSAs, certified as a notarial deed.

### *4.2 The New York Convention and the enforcement of MSAs approved by the international commercial arbitration*

As the Brussels Ia Regulation excludes arbitration awards, the MSAs that are approved by a foreign arbitration tribunal can be recognised and enforced under the New York Convention, whose main purpose is to 'provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards'.[100] Today, the New York Convention is one of the most effective international treaties in the civil justice sector, signed by 170 states.[101] Austria and Ukraine are also participants of the New York Convention.

100 United Nations Commission on International Trade Law, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 1 <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf > accessed 1 October 2022.

101 Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the 'New York Convention') <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2> accessed 1 October 2022.

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The New York Convention prescribes to its member states to provide for a special procedure at the national level for the recognition and enforcement of foreign and non-domestic arbitral awards on commercial matters.[102] In order to obtain an enforcement writ, the party applying for recognition and enforcement shall submit the application to the competent court with the duly authenticated original of the award or a duly certified copy thereof and the original of the arbitration agreement or a duly certified copy thereof and the translation of these documents.[103] The grounds for refusing the enforcement of arbitration awards include the parties' incapacity, the arbitration agreement's invalidity, improper notification or impossibility to present the case for the debtor, the scope of the arbitration agreement, the jurisdiction of the arbitration tribunal, the setting aside or suspension of an award in a country in which or under the law of which that award was made, or the arbitrability of the dispute and grounds of public policy.[104]

Austria provides regulation in this regard in Art. 614 of the CPC of Austria, which states that the procedure of the recognition and enforcement of arbitration awards is regulated by the Execution Act 'unless otherwise provided in international law or in legal instruments of the EU'.[105] This procedure is actually the same as the procedure of the recognition and enforcement of foreign judgments (Art. 406-416 of the Execution Act).

In Ukraine, the regulation of this issue is quite similar, with the special procedure for the recognition and enforcement of the foreign arbitration awards enshrined in Art. 474-482 of the CPC of Ukraine. This procedure conforms to the provisions of the New York Convention. The application for recognition and permission to enforce the international commercial arbitration award must be submitted to the Court of Appeal, whose jurisdiction extends to the city of Kyiv, within three years from the date of the arbitral award.[106] The case is considered by a judge within two months at an open court hearing with notification of the parties.[107] The debtors are notified by the court about the application and can submit their objections to it within a month.[108] The grounds for the rejection of the application are exactly the same as those set out in the New York Convention.[109]

### *4.3 The Singapore Convention as a global regulation of the enforcement of MSAs resulting from international commercial mediation*

The Singapore Convention was developed by the UNCITRAL Working Group II (Arbitration and Conciliation/Dispute Settlement) and entered into force on 12 September 2020. The purpose of the Singapore Convention is to provide the simplest and most effective mechanism for the enforcement of cross-border MSAs while retaining the inherent flexibility of the procedure. The act seeks to introduce an international regime for the enforcement of MSAs in commercial disputes, similar to that provided for arbitral awards by the New York Convention, as the absence of cross-border enforcement mechanisms to international MSAs in commercial matters is considered to be one of the main obstacles for choosing the mediation as an effective dispute resolution method among users in this category of

102 Arts. I and III of the New-York Convention.
103 Art. IV of the New-York Convention.
104 Art. V of the New-York Convention.
105 Art. 614(1) of the CPC of Austria.
106 Part 3 Art. 475 of the CPC of Ukraine.
107 Part 1 Art. 477 of the CPC of Ukraine.
108 Part 4 Art. 477 of the CPC of Ukraine.
109 Art. V of the New York Convention, Art. 478 of the CPC of Ukraine.

cases.[110] T. Schnabel noticed that MSAs within the meaning of the Singapore Convention would 'be able to circulate across borders in their own right, without the need to rely on domestic contract law or being transformed into an arbitral award on agreed terms'.[111] The Singapore Convention is considered to be 'the missing third piece in the international dispute resolution enforcement framework'[112] within the procedure of enforcement for MSAs, approved by a foreign court and arbitration tribunal. At the moment of publication of this article, 55 countries signed the Singapore Convention, and ten of them have already ratified it.[113]

The Singapore Convention does not prescribe that the courts refer cases to a mediator if there is a mediation clause as it is prescribed in the New York Convention.[114] This means that the Singapore Convention chooses a softer approach to the mediation clause, as the New York Convention does to the arbitration clause. At the same time, the Singapore Convention and the New York Convention provide quite similar mechanisms.[115] Thus, we can see a clear tendency towards the approximation and unification of the regulations of both procedures.

The Singapore Convention applies to (a) mediated (b) international (c) written (d) commercial (e) settlement agreements.[116] This means that:

1) *the agreement has to be concluded solely as a result of mediation*

2) *the agreement should be international* – this means that: a) at the time of signing, at least two parties to the mediation agreement are doing business in different states; b) if the parties are doing business in one state, that state is i) neither the state in which a substantial part of the obligations under the mediation agreement is to be performed; ii) nor the state with which the subject matter of the mediation agreement has the closest connection.[117]

3) *the agreement should be in writing and recorded in any form*

*4) the dispute in which the settlement agreement is reached should be commercial by nature* – which excludes disputes over contracts concluded for personal, family or household purposes or agreements arising out of family, inheritance, or employment law.[118]

5) *a mediation agreement could not be approved by any other means (through a court or an arbitration tribunal)* – which opens the possibility of obtaining enforcement by the use of other procedures. This means that international MSAs approved by a court, an arbitration tribunal or through other procedures which themselves make enforcement of such agreements possible are excluded from the scope of the Singapore Convention. The aim of this statement is to avoid concurrence with the other enforcement mechanisms, providing the mechanism for MSAs in out-of-court and out-of-arbitration mediation.

110 NY Morris-Sharma, 'The Singapore Convention Is Live, And Multilateralism, Alive!' (2019) 20 Cardozo Journal of Conflict Resolution 1014; JH Chahine, EM Lombardi, D Lutran, C Peulve 'The acceleration of the development of international business mediation after the Singapore Convention' (2020) 4 European Business Law Review 773.

111 T Schnabel (n 10) 266.

112 JH Chahine, EM Lombardi, D Lutran, C Peulve (n 112) 772.

113 Singapore Convention on Mediation <https://www.singaporeconvention.org/> accessed 1 October 2022.

114 Art. II of the New York Convention.

115 NY Morris-Sharma (n 112) 1010.

116 Para. 1 Art. 1 of the Singapore Convention.

117 Para. 1 Art. 1 of the Singapore Convention.

118 Para. 2 Art. 1 of the Singapore Convention.

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There is a general question of whether the provisions of the Singapore Convention should apply automatically to all international MSAs or only to those to which the parties have agreed upon a specific clause to that effect. According to Para. 1 (b) of Art. 8 of the Singapore Convention, 'a party […] may declare that it shall apply this Convention only to the extent that the parties to the MSA have agreed to the application of the Convention'[119]. In fact, the stated provision establishes the possibility of applying an 'opt-in regime'[120] at the national level. In accordance with Para. 3 Art. 8 of the Singapore Convention, reservations may be made by a party to the Convention at any time. When Ukraine signed the Singapore Convention, an appropriate reservation was not made in this regard. There is a debate among scholars and practitioners about this issue, connected with the concerns that the relevant reservation will nullify the positive effect of the ratification since parties will rarely use the relevant opportunity in practice. By comparison, the New York Convention does not contain such a provision for the application of execution of international commercial arbitration, as it is applied by default.[121]

The Singapore Convention, like the New York Convention, is a framework, setting out only the general requirements for the procedure, such as the documents to be filed to the court or other competent institution to obtain the enforceable title for the international MSAs and the cases which exclude the enforcement of such agreements. This means that it gives a wide range of discretion to the national legislator for the creation of the special procedure for this purpose in the national civil procedural legislation.

The grounds for refusing to grant the relief includes parties' incapacity; any sort of invalidation of the agreement according to the applicable law; the mediation ability of the case; a serious breach by the mediator of standards without which the party would not have entered into the MSA; the mediator's misconduct in relation to issues of impartiality and independence; the fact that the settlement is not binding or is not final, or has been subsequently modified; the fact that the obligations in the MSA have been performed or are not clear or comprehensible; when the enforcement is contrary to the terms of the MSA or public policy.[122] In order to avoid the parallel proceedings within the meaning of Art. 6 of the Singapore Convention, the national authority can adjourn the decision or oblige the other party to provide suitable security at the request of a party.

Ukraine signed the Singapore Convention in 2019, but it has not been ratified yet. In Ukraine, the development of amendments to the procedural legislation, connected with the signing of the Singapore Convention, took place simultaneously with the preparation of the Draft Law of Ukraine 'On Mediation', which was adopted on 16 November 2021. In 2019, a Working Group was established in the Ministry of Justice of Ukraine to prepare both draft laws – the Draft Law of Ukraine 'On Mediation' and the Draft Law of Ukraine 'On Ratification of the Singapore Convention' (the Draft Law) within the relevant amendments to the procedural legislation on this regard.[123] Both acts were prepared, but the government decided to separate them for voting in the Verkhovna Rada.

119 Para. 1 (b) Art. 8 of the Singapore Convention.

120 N Alexander, S Chong (n 10) 150.

121 Ibid, 161.

122 Art. 5 of the Singapore Convention.

123 Working Group was established at the Ministry of Justice of Ukraine to prepare both draft laws – the Draft Law of Ukraine 'On Mediation' and the Draft Law of Ukraine 'On Ratification of the Singapore Convention' according to the Decree of the Ministry of Justice of Ukraine on the 27 of June 2019 No 2487/7.

The Draft Law proposed a procedure that is quite similar to the mechanism of recognition and enforcement of international commercial arbitration awards[124] and reflects the main statements of the Singapore Convention. It proposed an 'opt-in regime' for MSAs in which the debtor's place of residence, business, or property is located in Ukraine. It is proposed that an application for enforcement of international MSAs may be submitted within three years from the date of its signing. It should contain all information provided for in Art. 4 of the Singapore Convention and should be submitted to the Court of Appeal, whose jurisdiction extends to the city of Kyiv (as for the procedure for recognition and enforcement of arbitral awards). It is proposed to consider such an application in the open court hearing by a judge within two months from the date of its admission to court, notifying the parties of the possibility of filing the objections for the debtor within one month.

The grounds for the rejection of the enforcement of the MSAs are the same as in Art. 5 of the Singapore Convention. At the same time, the practical application of these grounds can cause serious difficulties. This applies, for example, to such grounds as 'a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement' since, in this case, it would be extremely difficult for national judges to assess whether the mediator complied with certain standards, especially if the mediation took place abroad and under the rules of another state due to the lack of knowledge of Ukrainian judges of the relevant standards. In addition, it may be extremely problematic in this case to assess the conduct of a Ukrainian mediator in the event of a MSA being enforced abroad, as at the moment in Ukraine, there are still no uniform standards that should be followed by mediators and to which they should adjust their behaviour, and this may in fact prevent an acceptance of such agreements. Ultimately, it is a question of trust in mediation and the work of the mediators; increasing this trust and improving professional, ethical standards is therefore of crucial importance. This increase in the value of mediation as an alternative to court proceedings and, thus, an increase in trust in this method is the starting point of the Mediation Directive, in particular, in Recitals 5 and 19.[125]

As to Austria's perspective on the ratification of the Singapore Convention, the EU has not signed the Singapore Convention yet. This is a difficult question connected with the status of the EU and the rules for ratification of international treaties by the EU as a single unity. The question is whether the whole EU as a unit should sign the convention or whether individual states also can do so.[126] In the literature, we can find different concerns about the joining of the EU to the Singapore Convention, which can be summarised in two focal points connected to the mediation standards and existing mechanisms for the regulation of international MSAs in the EU. The first concern relates to the competence of the third-country mediators and mediation standards, taking into account different approaches around the world.[127] From this point of view, the EU has adopted the EU Mediation Directive, which provides a compendium of the unified general approach to mediation despite the national peculiarities within the EU, but third countries can have their own standards, which can vary and raise some concerns about the professional level of mediators. The second notion is connected to the fact that the EU Mediation Directive also provides the possibility to obtain the enforcement of mediation

124 Arts. 474-482 of the CPC of Ukraine.

125 Recitals 5 and 19 of the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0052&from=en> accessed 1 October 2022.

126 JH Chahine, M Lombardi, D Lutran, C Peulve (n 112) 771.

127 S Ferz (n 71) 12.

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agreements resulting from mediation within the existing national mechanisms within the EU, which is quite effective.[128]

All in all, the joining and ratification of the Singapore Convention may take mediation practice to a new level by significantly increasing its use in cross-border commercial disputes, as occurred after the adoption of the New York Convention in the context of arbitration.[129] The ratification of the Singapore Convention will have a positive impact on Ukraine's image as an economic partner on the global stage and the development of mediation practices in Ukraine. Ukraine's accession to this act requires ensuring the existence of mechanisms at the level of national procedural legislation capable of implementing the provisions of the Singapore Convention.

## 5 CONCLUSIONS

The recognition and enforcement of MSAs play a significant role in the promotion of mediation both at the national and international levels, making mediation a real alternative to litigation and arbitration in a private law context. In Austria, there are several possibilities for making MSAs enforceable at the national level in line with Art. 6 of the EU Mediation Directive – a notarial deed, approval by the arbitration tribunal, and approval by the court. At the same time, there is a set of international instruments to make MSAs enforceable in cross-border disputes within the meaning of the Brussels Ia Regulation, the New York Convention, national procedures for the recognition and enforcement of foreign court judgments, and other acts. Such a harmonious system of mechanisms covers a huge variety of MSAs and is considered to be effective. That is why it is useful to consider Austrian approaches on this matter for the improvement of the Ukrainian procedures connected to the enforcement of MSAs. In particular, the procedure of approval of MSAs in out-of-court mediation and the possibility of the enforcement of such agreements as notarial deeds should be provided. The procedure for obtaining the enforcement writ for the award of a domestic arbitration can be simplified by the possibility of direct enforcement of such awards as it is in Austrian civil procedure. Taking into account Ukraine's status as an EU candidate country, special attention should be paid to the Brussels Ia Regulation during the adaptation of Ukrainian legislation to EU law. In this regard, the new simplified procedure for the enforcement of judgments and other enforceable titles should be introduced in future. At the same time, we can see a similar regulation of the proceedings for recognition and obtaining an enforceable writ for international arbitral awards caused by the adoption of the New York Convention. More problematic in this regard for both legal orders is the ratification of the Singapore Convention. Ukraine has signed it and taken the first steps towards its ratification. For Austria, as a member of the EU, this process is not so easy. However, we believe that the development and unification of the standards of the mediation procedure all over the world and the great efforts of the international community can bring the mediation practice to a new level, as occurred with arbitration at the time of the ratification of the New York Convention back in 1958.

128 Ch Chong, F Steffec 'Enforcement settlement agreements resulting from mediation under the Singapore Convention: Private International Law Issues in Perspective' (2019) 31 Singapore Academy of Law Journal 485-486.

129 Ch G Hioureas 'The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward?' 46 Ecology Law Quarterly 64; E Silvestri 'The Singapore Convention on Mediated Settlement Agreements: A New String to the Bow of International Mediation?' (2019) 3(4) Access to Justice in Eastern Europe 5.

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Research Article

# NATURAL LAW AS AXIOLOGICAL ASPIRATION AND ETHICAL REFINER OF LAW

***Valon Leci***

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***Summary:*** 1. The Distinction of Natural Law and Positive Law – 2. On Theories of Natural Law as Theories of Justice. – 3. Conclusions.

***Keywords:*** natural law, positive law, justice, law, state

## ABSTRACT

*It is not uncommon for us to see or give speeches on the subject of law. By qualifying it as right or wrong, good or bad, etc., we not only talk about its quality but in fact abstract from a simple legal reality whose subject is the state and aspire to meta-legal, mainly ethical, values. Moreover, these values must be a measuring criterion but also must be inherent in the legal act itself that has force and effect and that, as such, derives from the will of the competent state authority through certain procedures. Consequently, there are some rights that are not the product of the state but belong to man through the mere fact of being human. As such, the state has an obligation to recognise them and to ensure that man enjoys them. They are known as natural rights. This paper aims to clarify the relationship of these rights with the positive law, commonalities, and dividing points, as well as some different variations of natural law.*

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## 1 THE DISTINCTION OF NATURAL LAW AND POSITIVE LAW

The claim to the definition of justice but also of law, especially if the definition is a claim derived from a contemplative outline and philosophical consideration, is accompanied by systematic subtleties, as is the definition of philosophy or ethics. However, to make the study and understanding of justice and law easier, we can orient ourselves based on the etymology of the word. The word justice is derived from Roman mythology, but in another instance, it is also related to ancient Greek. The word *justice* is derived from *Justitia* or *Iustitia*. Justitia, in Roman mythology, is the goddess of justice.

> Justitia (Iustitia; Justice) *Roman*: The goddess of justice; some say a mere personification of the legal concept of fairness. Justitia was often portrayed as blindfolded so that she was not swayed by what she saw, and carrying scales in her hands to weigh each side of a disagreement.[1]

In the ancient Greek world, we find many words related to mythology and depicting gods of justice, law, or even their effects, but the closest seems to be the goddess Dike.

> DIKE (DICE; JUSTICE) Gr: The personification of justice, particularly under the law. Dike was a daughter of Zeus and Themis. As one of the three Horae, guardians of the seasons, Dike was the sister of Eirene (Peace) and Eunomia (Order). She was the mother of Hesychia (Quiet, Tranquility).[2]

So, from the mythological manifestation of justice through the gods, we see how justice is differentiated from positive law,[3] possesses a system of values, and has a cohesive and inseparable relationship with other values such as peace, tranquillity, etc.

However, the delicacy in the definition of justice has continued throughout the course of time since these social values emerged as an object of the study of philosophy through the philosophy of law, political philosophy, the philosophy of morality, etc.

During the development of discourse and reflection on these issues, different philosophers and theorists have given various views on them. In principle, there is a differentiation from the general position of the legal sciences on the definition of law, as well as an abstraction from simplicity and empiricism from such definitions. Due to the nature of their work,

1 KN Daly, Greek and Roman Mythology A to Z (3rd edn revised by M Rengel, Chelsea Hause Publishers 2009 ) 81.

2 Ibid 45.

3 Positive law is the law of which the subject is the state. As such, this law does not have any inherent necessity to have ethics within it nor as a measuring criterion, but it is enough to have passed the empowerment procedures through the competent institutional instances. Consequently, the term 'positivism' has the meaning of a right or law which is as it is, issued and empowered by the state and without being prejudiced, suspending any moral evaluation of it. The concept of 'positivism', as Raymond Wacks puts it in his book Philosophy of Law, is derived from the Latin positum, which refers to law as defined or laid out. In general, the essence of legal positivism is the view that the validity of any law can be traced to a verified source. Simply put, legal positivism, like scientific positivism, rejects the view held by natural defenders [VL. The natural theory of rights] – the law exists regardless of human approval.
A clear differentiation between natural law and positive law was also made by the famous Austrian philosopher Friedrich Hayek in his work "LAW, LEGISLATION AND LIBERTY". Hayek considers that it is necessary to take into account the fact that laws are also related to the past, to the cultural level as well as to other social and traditional rules; consequently, even in cases where the legislative power wants to issue new laws, it must take into account these circumstances and the need to issue a new law. It is crucial for liberal democracies and for social cohesion that the Parliament issues laws that are necessary and does not express any arbitrariness in issuing laws, invoking its own right to issue laws, because this would lead to a government arbitrary. See: Friedrich Hayek, Law, Legislation and Liberty, (Volume 3 The Political Order of a Free People, The University of Chicago Press, 1979 ) 102.

lawyers and professional legal practitioners, such as judges, prosecutors, lawyers, notaries, mediators, etc., generally define law as a whole or as a unification of legal norms or acts within a given constitutional organisation, which have taken their legal force from a certain legal procedure.

However, very often, human society and individuals are faced with the fact that many legal norms that have had legal force and consequently legal effect have not been worthy and have not had the proper effect based on the purpose of their creation, articulated and empowered in principle in order to guarantee and provide security to the parties that their rights will be recognised and guaranteed. In such cases, it is evidenced that legal norms are not good norms and have not fulfilled the purpose of their existence.

On this basis, it is considered that a legal norm or law is that norm or that law that in itself conveys the teleology of its existence in the best possible way. Moreover, these legal norms should be good norms. This gives rise to a series of very important questions.

What is law? Where does the law come from? Does law emanate from any transcendental and omnipotent being, from nature, from human nature, from any other human authority?

Then, if the law originates from human authority, the question arises as to who gave this authority the right to give the human authority the right to issue laws.

Questions also arise as to what the relationship of the law is with other norms that affect the maintenance of social unity but also recognise and give rights as well as obligations. On what metric indicators can we call something law?

Depending on the answers to these questions, philosophers and theorists are categorised into two discourses that represent two different philosophical theories on law: the theory of natural law and the theory of positivist law.

Within these theories, there are sub-theories and many differences, even within sub-theories. As an example, there is a difference between how Aristotle, Hobbes, Locke, Rousseau, etc. define rights and how Bentham, Austin, Hart, Rawls, Kelsen, etc. also differ in their attitudes and treatments of law. Moreover, these differences are so pronounced that there are philosophers of law who identify any of the sub-theories as independent theories of law. In this way, the philosopher of law Andrei Marmor identifies three schools of thought on what he calls the conditions of legal validity, or what actually makes a law valid, and on what conditions a norm should be built for it to have legal validity and effect.

In addition to legal positivism and natural law related to the theory of natural rights, Marmor differentiates as an independent school that considers morality and qualifies it as sufficient value but not necessary. And this definition, according to Marmor, differentiates this school from the school on natural law because it sees no inseparable and necessary connection between law and morality.

> According to one school of thought—called *legal positivism*, which emerged during the early nineteenth century and has retained considerable influence ever since—the conditions of legal validity are constituted by social facts. Legality is constituted by a complex set of facts relating to people's actions, beliefs, and attitudes, and those social facts basically exhaust the conditions of legal validity.[4]

The other school of thought on legal validity, according to Marmor, is

> Another school of thought, originating in a much older tradition, called *natural law*, maintains that the conditions of legal validity—though necessarily tied to actions and

4 A Marmor, Philosophy of Law (Princeton University Press 2011 ) 4.

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> events that take place—are not exhausted by those law creating acts/events. The content of the putative norm, mostly its moral content, also bears on its legal validity. Normative content that does not meet a certain minimal threshold of moral acceptability cannot be *legally* valid. As the famous dictum of St. Augustine has it: *lex iniusta non est lex* (unjust law is not law).[5]

And as the third school of thought on the validity of legal norms, Marmor finds that

> which has drawn some inspiration from the Natural Law tradition but differs from it in essential details, maintains that moral content is not a necessary condition of legality, but it may be a sufficient one.[6]

Based on the great *Collins Dictionary of Law* on the question of what law is, depending on the answer, we have the differentiations of the so-called schools of thought, which are divided into three: natural law, positivism, and realism.

> Jurisprudence 1. The study of law in the philosophical sense, given questions such as "what is law?" There are many schools of thought, the leading ones being NATURAL LAW, POSITIVISM and REALISM.[7]

This is more or less what one of the greatest philosophers of all time, Immanuel Kant, states:

> The System of Rights, viewed as a scientific System of Doctrines, is divided into natural right and positive right. Natural Right rests upon pure rational principles *a priori*; A positive or Statutory Right is what procedures from the Will of a Legislator.[8]

Consequently, according to Kant, natural law stands on those principles which derive from the *a priori* elements of reason and, as such, stand in relation to morality, while positive law derives from the state. Moreover, claims have been made by various theorists, and opinions have been articulated to give natural law a scientific character in the sense that, as such, it can be justified by scientific arguments. One such theorist is Ota Weinberger, who, while arguing for the natural theory of law and shunning the religious concept, says:

> I will not deal with such a presentation of natural law and will confine myself to examining those arguments which can be presented as purely scientific arguments for the concepts of natural law.[9]

With all these questions and answers and more, which extend to the wide range of these two theories, is a special discipline of philosophy called the philosophy of law. This discipline treats law philosophically, using the methodology of how philosophy is done in general, but in the concrete case of the law. To treat law as lucidly and correctly as possible, the philosophy of law has a close relationship with other disciplines of philosophy, mainly political philosophy and the philosophy of morality. But since this discipline of philosophy examines the law, the concept of *philosophy of law* has not been used by all scholars because, in most cases, legal scholars are jurists and have used the concept of jurisprudence or legal theory. However, in the literature, these concepts are very often encountered as synonyms, as is the case with the *Collins Dictionary of Law*. However, these concepts also have differences between them and consequently are not identical.

5 Ibid.

6 Ibid 5.

7 WJ Stewart, Collins Dictionary of Law (2nd edn 2001) 223.

8 I Kant, The philosophy of law, an exposition of the fundamental principles of jurisprudence as the science of right (translated from German by H Hastie, T & T Clark, 1887) 55.

9 N MacCormick, O Weinberger, An Institutional Theory of Law - New Approaches to Legal Positivism (D. Reidel Publishing Company 1986 ) 139.

The philosophy of law, influenced by the connection with other philosophical disciplines, such as political philosophy and moral philosophy, focuses mainly, but not only, on the relationship of law with political authority and the effects of the expression of this authority on the rights of the individual as well as in the freedoms of the individual and society. Thus Raymond Wacks states from the beginning of his work *Philosophy of Law*, where he says that:

> The "philosophy of law", as its name implies, normally proceeds from the standpoint of the discipline of philosophy (e.g. it attempts to unravel the sort of problems that might vex moral or political philosophers, such as the concepts of freedom or authority).[10]
>
> "jurisprudence" concerns the theoretical analysis of law at the highest level of abstraction (e.g. questions about the nature of a right or a duty, judicial reasoning, etc, and are frequently implied within substantive legal disciplines).[11]
>
> "Legal theory" is often used to denote theoretical enquiries about law "as such" that extend beyond the boundaries of law as understood by professional lawyers (e.g. Marxist approaches to legal domination).[12]

However, regardless of the concepts and professional affiliation of different theorists on law, depending on whether these theorists belonged to and defended ideas that were the same as theories on natural law or even positivist theories on law, we have two different approaches to the definition of law as such. The approach of natural theories on law is the approach of affirming an inseparable relationship between law and morality, while the approach of positivist theories on law differentiates law from any inseparable connection with any norm. Consequently, theories on natural rights deal with the study of law or good law, or law *as it should be*, while positivist theories on law deal with the study of applicable law as *it is*. In this way, we are dealing with what Wacks calls descriptive and normative theories. Descriptive theories seek to explain what *the law is*, why, and its consequences.

> Normative legal theories, on the other hand, are concerned with what the law ought to be.[13]

What Wacks calls descriptive theory, in various literature and dictionaries of law, we also find as analytical jurisprudence. Thus, for example, we find it in *Oran's Dictionary of Law*, according to which analytical jurisprudence is:

> A method of studying legal systems by analyzing and comparing legal principles in the abstract without considering their ethical backgrounds or practical applications.[14]

So, on the one hand, we are dealing with *the law as it is*, as a legal act, which, after going through a certain legal procedure, has entered into force and consequently causes a legal effect. On the other hand, we are dealing with the moral evaluation of a legal norm in order to ascertain whether that norm is the right norm and a good norm. If it is not, it should have no legal effect and not exist at all.

## 2 ON THEORIES OF NATURAL LAW AS THEORIES OF JUSTICE

In dealing with the differentiation of *law as it should be* and *law as it is,* it was noted that the theories of natural law, despite eventual differences between the views and worldviews of

10 R Wacks, Philosophy of Law - A very short introduction (Oxford University Press 2006) XIII.
11 Ibid.
12 Ibid.
13 Ibid.
14 D Oran, M Tosti, Oran's Dictionary of Law (3rd edn, West Legal Studies 2000) 29.

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different philosophers, affirm the idea that law should be inseparably and necessarily related with morality. Consequently, these views and worldviews focus on the analysis of the law as a whole, the drafting standards, as well as the content, but also some goals that the law must carry in itself. In this way, these theories make a moral evaluation of the legislation, alluding to different conclusions on whether the law is a good law or not a law at all because the existence of the law also depends on the goodness of which it consists and which it carries in itself. Otherwise, it does not exist at all, or we can not qualify it as a law, and consequently, we have no obligation to respect it as such.

> But unjust law is not genuine law. And thus it deserves no respect.[15]

From what has been said above, we see that several aspects emerge that constitute the various theories on natural law. Initially, just like the philosophy of law in general, the theories on natural law deal with the study of law and justice in their entirety and do not extend to the practical empirical plane to deal only with the national legislation of a certain country, nor with any concrete law. But, even if the philosophy of law or these theories on natural law fall at the level of study on a certain law, or eventually on a certain legislation or legal system, they do so for the purpose of studying law and comparison and differentiation with higher principles that the law must respect.

> Natural law is a higher law against which human laws can be measured.[16]

Consequently, the aspect of equality or commensurability of law with justice as such is studied. In this way, the purpose of studying theories on natural rights is for law to be equal to justice and not only equal. By studying law in its entirety, as well as finding the points where law converges with morality or even the divergences between them, these theories on natural law claim to build a moral, good, and orderly legal system to fulfil its existential teleology.

> A theory of natural law claims to be able to identify conditions and principles of practical right-mindedness, of good and proper order among persons, and in individual conduct.[17]

Or, as Ota Weinberger puts it:

> Objectively, the following three bases seem to me to be crucial motives for adopting a theory of natural law:
>
> (A) The desire to justify criteria of fair law
>
> (B) The desire to conceive of law as something more than the outcome of power
>
> (C) The aim of offering help in resolving hard cases.[18]

On this basis, it is noted that morality in relation to law is not only important in measuring the compatibility of law with morality, in which case, morality would be considered a standard or measurement indicator by which we measure whether a positive legal norm is a good norm, but moreover, morality should be an integral part of all legal norms that present legal effect, and generally, these are the two main planes that build the relationship between ethics and law.

> Perhaps the most distinctive tenet of natural law theory is that morality—or some sector of morality, notably, justice—is not simply a useful criterion for evaluating any given system

15 D Lyons, Moral Aspects of Legal Theory - Essays on law, justice, and political responsibility (Cambridge University Press 1993 ) 1.

16 Stewart, op cit 265.

17 J Finnis, Natural Law and Natural Rights (2nd edn, Oxford University Press 2011 ) 18.

18 MacCormick, Weinberger, op cit 119.

> of human law nor simply a desirable feature to import into law. In natural law theory, morality is an essential part of law as it is.[19]

However, there are theorists who give ethics a very important and significant role in the influences it has in the political field. In fact, James Otteson considers that:

> Actual Ethics offers a moral defense of the "classical liberal" political tradition and applies it to several of today's vexing moral and political issues. James Otteson argues that a Kantian conception of personhood and an Aristotelian conception of judgment are compatible and even complementary. He shows why they are morally attractive, and perhaps most controversially, when combined, they imply a limited, classical liberal political state. Otteson then addresses several contemporary problems—wealth and poverty, public education, animal welfare, and affirmative action—and shows how each can be plausibly addressed within the Kantian, Aristotelian, and classical liberal framework.[20]

Since the so-called 'natural law' is a law that does not derive from any human authority in the sense that man by his authority does not issue and does not enforce such a law, then in principle, it means that such a law and the rule that emerges as the consequence of that law must have universal validity and the object of this law must be all human beings. This is the substrate of the theory of human rights as universal rights. The fact that it is called natural law shows that some rights belong to man because of his human nature or being a human being and not because of any residential affiliation to a certain political-legal organisation. In fact, the universality of the validity of these laws does not extend only within the geographical connotation but, as much as it extends to the geographical, transboundary, and meta-state plane, it also extends to the historical plane, where these rights are such that they cannot apply only in a certain historical circumstance and then lose the effect, but are valid at all times. Indeed, such a nature of law is given by the so-called cosmopolitan theory of justice, which is related to distributive justice, a mechanism of social justice. Simon Caney identifies three different types of contemporary cosmopolitanism, one of which is the so-called legal cosmopolitanism.

> Focusing entirely on contemporary cosmopolitanism, it is important to draw attention to three distinct types of cosmopolitanism, what I would call legal cosmopolitanism, ethical cosmopolitanism, and political cosmopolitanism.[21]

This theory is directly related to the etymology and semantics of the word cosmopolitanism, where cosmopolitanists thought they were citizens of the world and were not associated with any state or national identity. The practical personification of this theory and this discourse is Diogenes of Sinope. This theory presupposes that justice, specifically distributive justice as developed by Caney, is based on universal principles that prevail over any differentiating theory and practice concerning the people of the world because people are inhabitants of the same world, have the same moral status, live under the same sky, and are warmed by the same sun. Consequently, no man should be differentiated, stigmatised, or marginalised, but all should be equally considered deserving of justice and benefits.

> Juridical cosmopolitanism is a claim about the scope and nature of distributive justice. It maintains that there are global principles of distributive justice that include all persons in their scope. Put slightly differently, what I have termed juridical cosmopolitanism (and what others like Samuel Scheffler call "cosmopolitanism about justice" (Scheffler 2001:

19 J Feinberg, Problems at the Roots of Law - Essays in Legal and Political Theory (Oxford University Press 2003) 3.

20 JR Otteson, Actual Ethics (Cambridge University Press 2006) 2.

21 S Caney, 'Cosmopolitanism and Justice' in T Christiano, J Christman (eds), Contemporary Debates in Political Philosophy (Wiley & Sons, Ltd. 2009) 388.

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> esp. 111)) avers that the scope of some principles of distributive justice should include all persons within their remit. We are all citizens of the world in the sense that we should all be included within a common scheme of distributive justice. This view stands opposed to those who maintain that distributive justice applies only among members of the same nation or state. This kind of cosmopolitanism is affirmed by a variety of different thinkers. In Political Theory and International Relations (1999) Charles Beitz draws on Rawls's theory of justice and argues that there should be a global difference principle. Furthermore, Henry Shue argues in Basic Rights (1996) that there is a human right to subsistence which entails negative duties on others not to deprive them and positive duties to provide such subsistence if it be necessary. To give a third example, Thomas Pogge's more recent World Poverty and Human Rights (2008) provides an argument for the existence of global principles of distributive justice.[22]

In this line of thought stand the theorists Andrew Altman and Christopher Heath Wellman, who, in the discourse on international distributive justice, treat as equal cosmopolitanism, which rejects the approach of the influence of geography, whether as a birthplace or place where one lives, while affirming that this kind of cosmopolitanism threatens and discredits the concept of self-determination of nations or states that would result in inequality of people anytime, anywhere.

As such, there are five basic claims:

> (1) Every human has a right to equal consideration.
>
> (2) Existing boundaries separating political states have been drawn in a morally arbitrary fashion.
>
> (3) Political communities owe their membership neither to consent nor to any other voluntary transaction.
>
> (4) There is such great disparity in international wealth that many people's life prospects are profoundly affected by the country in which they are born.
>
> (5) One's country of birth is a matter of brute luck.[23]

On this basis, these rights are undeniable and, in most cases, also *inalienable*. They can be alienated only in cases clearly defined by the legislation in force, always realising a principle of proportionality. For example, in cases where there is a public interest in expropriating an immovable property, that property can be *alienated* in the sense that the ownership belongs to another owner, in this case, a public institution or the state itself, while the owner must be compensated with the real value of the *alienated property*.

The observance of these rights does not remain only the will of the state, but it is an obligation for it to recognise them as such and to guarantee their observance through various mechanisms of monitoring the observance of the positive rights deriving from these natural rights. These natural rights enjoy independence from state authority because their source lies elsewhere or in the existence of the human being. But this is the theoretical concept of natural rights as human rights because, practically, even these rights are not universal. Consequently, the concept of natural rights as human rights is a concept of the western discourse and is applied within this discourse and by no means globally. The universal validity of natural rights as human rights often lies in incompatibility with ethical relativism. This is because the great differences that are found within varying cultural contexts, often antagonistic, also affect moral and legal judgments, where the same human deeds are judged in different or

22 Ibid 388-389.

23 A Altman, CH Wellman, A Liberal Theory of International Justice (Oxford University Press 2009) 123.

even opposite ways and consequently do not respect one of the basic principles of law, which is affirmed by the natural theory of rights that *the same cases should be tried in the same way.* In this case, we notice that natural rights are identified as human rights because human rights have their source in these rights, or as Hegel calls them, abstract rights.

> Our main focus will be on rights that are universal, universally claimed or universally ascribed, rights of the form that, if anyone has them, everyone does. These will be what the French declared to be the Rights of Man; often they have been described as natural rights. Hegel… called them abstract rights.[24]

There are two reasons why natural rights are known as human rights, and the term 'human rights' is better. First, it relates to the language of the above-mentioned founding acts, declarations, and conventions which describe rights as a principle of international law. For better or worse, it is *the human rights* to which these documents refer, and so it is the human right of citizens to complain against their governments.

> The older term, natural rights, carries with it a distinct provenance. Natural rights, to simplify, were deemed natural because they were the product of natural law.[25]

As for this issue, George W. Rainbolt, in the ongoing tendency to treat moral rights as such given the possibility of their existence, calls natural rights or human rights moral rights. These rights, according to Rainbolt, often coincide with legal rights, although different authors have articulated different concepts about them.

> We have been assuming that there are moral rights. It is now time to examine that assumption. Before we can discuss whether or not there are moral rights, we must consider what moral rights are. A moral right is a right implied by the moral rule system. A legal right is a right implied by a legal rule system. A legal right and a moral right can have the same subject, object, and content. If one holds that people have the *legal* right to be given what they have paid for and that people have the *moral* right to be given what they have paid for, then one holds that these two rights have the same subjects, objects, and contents. This usage of "moral rights" is far from universal. Some authors use "human" or "natural" to refer to what I call "moral" rights. Some, such as Feinberg, use "human" and "natural" to refer to subclasses of moral rights. In other cases, the term "human" is reserved for a subclass of legal rights established by international law. In still other cases, "human" rights are those moral rights that all humans have…[26]

As an example, we can consider adultery, which is judged differently in different countries and is indicative of the universality of these rights on the theoretical plane while being relative on the practical plane. So, the same act is judged differently. In the vast majority of countries where liberal democracy is installed, it is not sanctioned by legislation at all, and in some countries, there are minimal sanctions, such as in some states in the United States. In the Eastern world, whether in some countries in the Middle East or even the Far East, there are brutal and inhumane punishments for such acts. These punishments range from beatings in various forms to murder in inhumane ways.

Of course, the norms that regulate such judgments are in complete contradiction with the concept of natural rights and human rights because liberal democracy, which offers the most appropriate conditions for the application of human rights, considers man as the god of enabling himself to decide for himself how he wants to live within a given political, constitutional and legal system, always keeping on the pedestal the rights and freedoms of the individual.

24 D Knowles, Political Philosophy (Routledge 2001) 135.

25 Ibid 135.

26 GW Rainbolt, The concept of rights (Georgia State University 2006) 77-78.

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This and many other examples are factual arguments of how the concept of natural rights and human rights, in theory, can have universal validity. This is fully justifiable and justified, but, in practical terms, this concept is relative. Yet many authors, when referring to the conception of natural rights, refer to the theoretical plane as universal rights, and they consider these rights either as a paradigm or as a source of positive law, which then takes on a positive character. For example, Gerald J. Postema, referring to Horwitz and Feldman, thinks that:

> Immediately after the American Revolution, most states [VL. of the US] decided to keep common English law, despite anti-British sentiments. The reason was simple. According to the jurisprudence of the time, the common law doctrine was derived from the principles of natural law. Due to the universal nature of these principles, legal decision makers thought that common-law doctrines for the most part were equally applicable in England and the United States.[27]

In general, natural law is considered a very abstract law. An example is the universal right to life, which is also identified by John Locke as one of the three basic human rights, which is very abstract. From this right, Locke derived many legal provisions used in various state mechanisms for the observance of this right, but also for monitoring in order to guarantee this observance.

> First, there wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them: for though the law of nature be plain and intelligible to all rational creatures; yet men being biassed by their interest, as well as ignorant for want of study of it, are not apt to allow of it as a law binding to them in the application of it to their particular cases.[28]

The abstract character of ethics, which is inseparable from natural law, is also observed by other thinkers, as is the case with Simon Glendinning, who, referring to Paul Ricoeur, thinks that it cannot regulate interpersonal relationships sufficiently. Therefore, these relationships are supported and enabled by positive legal provisions empowered by the state.

> Ethics cease to be abstract when the mediation between individuals is facilitated by the establishment of concrete institutions which ensure justice.[29]

However, paradoxically, natural law is considered very concrete, easily understood, and applicable because such a law is a morally correct law and morality is a form of organisation of good human activity, which is part of the personality of individuals and transmitted to us across generations. Thus, morality and human activity in harmony with this morality are known in advance and easily understood. This is also because each norm, in addition to defining a certain behaviour by determining how we should behave at this time, also determines the way we should behave in the future. Consequently, as a result of the norm, we have in advance knowledge of how we will behave in a given situation. In this case, as an example, a researcher knows in advance how to conduct research in a particular library or even how to follow certain rules of writing, including respecting the rights of an author to whom he/she refers. Morality is known and easily applicable because it is rooted in the human personality, and therefore there is great belief in its observance, and natural law is inextricably linked to morality or even identified with it. Thus, natural law is considered to be easily understood and applicable.

27 GJ Postema, Philosophy and the Law of Torts (Cambridge University Press 2002) 254.

28 J Locke, Second Treatise of Government (Chapter IX, eBook #7370, Relese date 2005) 127-128.

29 S Glendinning, The Edinburgh Encyclopedia of Continental Philosophy (Edinburgh University Press 1999) 192.

For example, every rational being knows in advance that we must respect the human right to life, and we must not violate this right by taking life. Moreover, every rational being knows that if he/she violates this right unjustly, then he/she is in contradiction with the law and consequently will be penalised, or at least should be penalised. So, we are talking about rights and obligations that apply to rational beings because natural law is understood by them, as is morality. While moral activity is obligatory for rational beings and rules are dedicated to these beings because the moral judgment of irrational beings is unjustified and unjustifiable, then even activity in accordance with natural law is thought of in relation to these beings. But this does not mean that the rights arising from natural law again apply only to rational beings but apply to human beings in general, regardless of time and space.

On this basis, respect for rights deriving from a norm or rule should apply to all human beings, but not all these human beings are expected to respect these rights. When they do not respect them, according to Socrates, they act irrationally, and as such, we can consider these to be abnormal acts. At this moment, we fall into the philosophical background of Socrates's ethical rationalism, according to which good is identified with the mind and doing good comes from wisdom, while doing bad results from a lack of knowledge. However, the connection of morality with reason is also affirmed by many other philosophers, such as Plato, Aristotle, Kant, etc.

In the first case, when the difficulty of respecting natural law as a very abstract norm is ascertained, positivists generally side with this, while in the second case, there are theorists who affirm and defend the theory of natural rights. In fact, it is normal for positive laws to differ because each country and each time has its own circumstances, and legislation is drafted depending on these circumstances.

Moreover, legislation that is not adapted to the circumstances and that cannot be enforced cannot be called good legislation. But it is imperative that all these legal differences or different laws be different only to the extent that they do not go beyond the boundaries that limit natural law. Since natural law is a right dedicated to the well-being of people in the sense of a good life, where certain rights and obligations are applied that are identified with being human beings, then it is an obligation but also a logical conclusion that positive law should be drafted and enforced in harmony with natural law. For example, the right to life, which we took as an example above, in different temporal and spatial circumstances, can be regulated in different ways by positive legislation. But this way of regulating differently can be extended only to the recognition of this right, for what period of time[30] it should be recognised, or even how and when one can take one's own life[31] without this being considered a violation of natural law, which gives the right to life.

30 The period of time here means only when an unborn being is recognised as having the right to life by prohibiting abortion. By this logic, different countries have regulated the right to abortion in different ways by setting different time limits than how much time can pass before one can have an abortion. These rights are defined in order to respect the right to life from the development of the foetus, and this right can be violated only when provided by law, mainly to protect the right to life of the woman who is expected to give birth. In the Republic of Kosovo, elective termination of pregnancy can be done until the end of the tenth (10) week of pregnancy, counting from the first day of the last menstrual cycle. For this see: Law No 03 / L-110 on termination of pregnancy <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2624> Official Gazette of the Republic of Kosova / Pristina: Year Iv / No. 48 / 06 February 2009.

31 This is about the death penalty. The death penalty is allowed and regulated by law in many liberal states to this day, including in the United States. This type of punishment is mainly justified as a form of punishment or sanction that has a legal basis and is applied in proportion to the crime committed by the convict and for which no other measure can be considered proportionate. The death penalty, and also abortion, remain one of the most debated issues among human rights theorists, lawyers, religious preachers, etc. In the Republic of Kosovo, the death penalty is not allowed, and the Constitution, in Art. 25, which defines the right to life, after para. 1, where it says: Every individual enjoys the right to life, also says in para. 2: The death penalty is prohibited.

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Depending on the chronological aspect of the construction of worldview and the articulation of thought on law, we also have the division of natural theories of law into the *classical theory* and *modern theory* of natural law. The natural theory of law is a very old theory of law. "In legal theory, most of the approaches dubbed "natural law" can be placed into one of two broad groups, which I call "traditional" and "modern" natural law theory…'[32]

While theories on natural law affirm the necessary and inherent connection with morality, or as a more advanced stage often even their identification, various religious theorists on ethics and law think that the source of ethics, as well as the source of law, is god, or even religion, which is actually the source of the whole world in its variety and complexity. Consequently, a division of the theories of natural law can be found: *The secular theory of natural law* and *The theological theory of natural law*.

## 3 CONCLUSIONS

The issue of preserving the functionality of the state and social cohesion is not entirely simple. To achieve this goal, legal norms are a necessary condition but are not sufficient by themselves. This insufficiency of legal norms consists in the fact that they are often unfair. Legal norms must also be good and fair. To be such, legal norms must contain ethical elements within them and always be compatible with these elements. Only when legal norms are good, fair, and carry the spirit of the purpose of drafting and empowering them will people as rational and emotional beings voluntarily obey the constitutional, legal, and political system of a country.

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**Research Article**

# MEDIATION IN THE BALTIC STATES: DEVELOPMENTS AND CHALLENGES OF IMPLEMENTATION

***Agnė Tvaronavičienė, Natalija Kaminskienė, Dana Rone and Rea Uudeküll***

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## ABSTRACT

***Background:*** *This article explores the response of Lithuania, Latvia, and Estonia to major European initiatives in the field of mediation. Accordingly, the paper examines EU attempts to foster mediation and introduces the process and the outcome of the implementation of the Mediation Directive (as the main legal instrument of setting the unified standards for mediation in the EU) in the aforementioned Baltic States.*

***Methods:*** *Research commenced with a review of the existing literature, followed by an analysis of mediation models currently being implemented in the three Baltic States. A comparative analysis of the models presented by the authors and a discussion of common issues and challenges enabled us to draw certain conclusions.*

***Results and Conclusions:*** *Throughout, the paper considers key developments in the implementation of mediation and presents an analysis of what are considered to be the main challenges that need to be addressed. This research assists dispute resolution practitioners and researchers who are interested in better understanding how different countries are implementing mediation practices and processes.*

## 1 INTRODUCTION

Lithuania and Latvia in 2020 and Estonia in 2021 celebrated their 30th anniversary since regaining independence. In building a modern state and democratic legal system, developing an effective, citizens' needs-based dispute resolution system is vitally important. Whilst all three states have developed and maintained a well-organised modern judiciary, they have taken the equally important step of fostering sustainable[1] alternatives to the traditional court-based dispute resolution system.

It is important to capture and share with those outside the Baltic region the experience and constant effort to accommodate mediation, as it is relevant to other countries that have recently embarked on the process. The Baltic experience may also encourage those who may be disappointed in the slow progress being made in their own countries, conscious of the enormous effort needed to transform outmoded dispute resolution culture processes. The article aims to provide an analysis of the key developments of mediation in the three countries and identify the main challenges yet to be addressed. In fact, the experience of Lithuania, Latvia, and Estonia and stories of their success and setbacks may help other countries that are currently integrating mediation into their legal systems to identify the most effective means to foster mediation.

This study is both original and novel, and as a pioneer study, it brings together for the first time a landscape of mediation in three Baltic states from the perspective of civil, administrative,

1 The notion of sustainable dispute resolution and its main characteristics were first presented by N Kaminskienė, A Tvaronavičienė, I Žalėnienė, 'Bringing sustainability into dispute resolution processes' (2014) 4(1) Journal of Security and Sustainability Issues 69-77.

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and criminal justices. There have been previous attempts to provide an overview of the development of mediation in the Baltic states. For example, Lithuanian, Latvian, and Estonian mediation models were briefly presented in the article 'Baltic Countries'.[2] Detailed information about the development of mediation in all EU member states, including Baltic states, can be found in the book *Variegated Landscape of Mediation*,[3] which inspired other scholars to research and fill the gap in data in the legal regulation of mediation across the EU. Another piece of comparative research on mediation laws in the Baltic states was conducted by Pihlak, Rone, and Valančius.[4] Another comparative example of the situation in the Baltic region can be found in *Mediation to Foster European Wide Settlement of Disputes*.[5] In fairness, mediation regulation is in a constant state of flux, and empirical data requires regular reviews. Scholars in Lithuania, Latvia, and Estonia explore mediation mostly at the national level. The majority of this body of work is published in the respective national languages, which makes it difficult to disseminate on a wider international stage. We assert that this article provides a structured and all-encompassing comparative analysis of the contemporary mediation systems in the Baltic states.

## 2 EUROPEAN MEDIATION POLICY AND ITS IMPLEMENTATION IN THE BALTIC STATES

Around the world, different cultural traditions and jurisdictions increasingly turn towards mediation as a desirable form of dispute resolution.[6] Sustainable, flexible, quick, and relatively inexpensive, mediation is an attractive alternative to litigation and is not only oriented toward dispute resolution but seeks to restore relationships. However, for reasons of their own, not every country has embraced mediation. This may be due to the considerable efforts needed to promote the practice and also because national legal systems are not homogeneous; besides, there is no 'one size fits all' solution.[7] These differences in traditions, cultures, and history of the judiciary and out-of-court dispute resolution suggest the need for us to carefully (if, when, and to what extent it is appropriate) introduce proven practices of other countries into another state's national system.

A decade ago, mediation experts 'concluded that the institutionalization of mediation in every country proceeds in two phases: an initial phase involving national mediation organizations (starting in 1980); and a second phase represented by international collaborative initiatives'.[8] This pattern was absent in the Baltic states that only regained their independence circa 1990 and 1991. It is only now that Lithuania, Latvia, and Estonia are implementing the first phase of institutionalisation of mediation – national institutionalisation.

2 V Nekrosius, V Vebraitė, 'Baltic Countries' in Cs Esplugues, JL Iglesias, G Palao (eds), *Civil and Commercial Mediation in Europe* (Intersentia 2012); V Nekrosius, V Vebraitė, 'Baltic Countries' in Cs Esplugues (ed), *Civil and Commercial Mediation in Europe* Vol II (Intersentia 2014).

3 M Schonewille, F Schonewille (eds), *Variegated Landscape of Mediation* (Eleven International Publishing 2014).

4 M Pihlak, 'Chapter 10. Estonia', D Rone, 'Chapter 18. Latvia', V Valančius, 'Chapter 19. Lithuania' in N Alexander, S Walsh, M Svatos (eds), *EU Mediation Law Handbook. Regulatory Robustness Ratings for Mediation Regimes* (Wolters Kluwer 2017).

5 F Pesce, D Rone (eds), *Mediation to Foster European Wide Settlement of Disputes* (Aracne 2016).

6 NM Alexander, *International and Comparative Mediation: Legal Perspectives* (Kluwer law International 2009), 1.

7 'European Handbook for Mediation Lawmaking' (European Commission for the Efficiency of Justice, 2019) <https://rm.coe.int/cepej-2019-9-en-handbook/1680951928> accessed 6 August 2022.

8 Alexander (n 14) 55.

Nonetheless, the initiative to foster mediation in Europe launched by the Council of Europe[9] served as an accelerator for national legislation in this field. Unsurprisingly, these initiatives were mirrored in EU legislation. The adoption of the Mediation Directive[10] in 2008 was a strong stimulus for all EU member states to introduce, or essentially review, national legal regulations on mediation. It was also meant to accommodate all EU states by means of 'soft regulation' rather than to impose an across-the-board approach, which might not be appropriate in certain legal systems. On the one hand, such a liberal approach sat well with those countries that quickly grasped the idea of mediation and accepted it easily. As the Directive required member states to ensure a minimum level of harmonisation, they were expected to apply the measures to resolve cross–border disputes. At the same time, such regulation did not prevent each country from enacting laws allowing the application of mediation in purely national disputes.[11] On the other hand, one result of 'soft regulation' was that some countries, including Lithuania and Estonia, failed to make any significant progress in the acceptance of mediation, preferring instead to allow mediation to develop, rather like a neglected plant.

The issue of the proper implementation of the Mediation Directive remains relevant, as this is still the only legal tool for harmonising mediation standards within the EU. In addition, in 2017, the European Parliament[12] stated that the goals of the Mediation Directive have still not been reached in many member states, which reduces the accessibility of mediation within the EU and inhibits the saving of a significant part of public finances assigned for the maintenance of the judicial system.[13] Lithuania commenced implementation of the EU Mediation Directive when it adopted the Law on Conciliatory Mediation in Civil Disputes[14] in 2008, choosing to apply the same regulations both for international and national mediation processes. For the most part, implementation was transitional and hesitant, and no significant additional measures accelerating the mediation development were introduced. For almost a decade, mediation in Lithuania was slow to develop, restrained by the court-connected mediation scheme that applied to civil cases. Inconsistent qualification requirements for mediators (except court mediators), insufficient funding, scarce promotional measures, and low dissemination of mediation in society forced the state to consider active promotional measures to foster mediation. Hence, the reforms that started in 2017 are still ongoing.

9 Council of Europe Committee of Ministers, Recommendation (98) 1 on family mediation <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804ecb6e> accessed 6 August 2022; Council of Europe Committee of Ministers, Recommendation (2001) 9 on alternatives to litigation between administrative authorities and private parties <https://rm.coe.int/16805e2b59> accessed 6 August 2022; Council of Europe Committee of Ministers, Recommendation (2002) 10 on mediation in civil matters <https://rm.coe.int/16805e1f76> accessed 6 August 2022; Council of Europe Committee of Ministers, Recommendation CM/Rec(2018) 8 concerning restorative justice in criminal matters <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808e35f3> accessed 6 August 2022, etc.

10 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (24 May 2008) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008L0052> accessed 6 August 2022.

11 A Pera, 'The European Union policies on access to justice and ADRs' in A Miranda (ed), *Mediation in Europe* (Aracne 2014) 97-124, at 109.

12 European Parliament resolution of 12 September 2017 on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the 'Mediation Directive') (2016/2066(INI)) <https://www.europarl.europa.eu/doceo/document/TA-8-2017-0321_EN.pdf> accessed 25 August 2022.

13 G De Palo, 'A Ten-Year-Long "EU Mediation Paradox" When an EU Directive Needs To Be More …Directive' <https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/608847/IPOL_BRI(2018)608847_EN.pdf> accessed 25 August 2022.

14 Law on Conciliatory Mediation in Civil Disputes <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.330591> accessed 6 August 2022.

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Latvia adopted the Mediation Law in 2014,[15] formulating equal rules for any type of mediation, and, at the same time, amended the Civil Procedure Law.[16] Although the Mediation Law was adopted slightly later, as it was ordered by the Mediation Directive, the law has turned out to be a well-balanced and stable instrument operating without significant amendments. It provides for basic principles of mediation, a mediation process, rules on court-annexed mediation, the status of certified mediators, and a review of the complaints procedure that applies to certified mediators. Three months after the adoption of the Mediation Law, the Cabinet of Ministers Regulation No. 433 was adopted 'On Certification and Attestation of Mediators' (hereinafter – Regulation No. 433),[17] which described in detail the process of certification and later attestation of mediators.

Estonia also implemented the Mediation Directive, adopting the Conciliation Act in early 2010.[18] Unfortunately, the new legislation failed to stimulate changes to mediation processes and practices in the country. Why was this the case? Firstly, the new bill merely regulated mediation proceedings in civil matters, leaving administrative and criminal justice matters out of the legislative framework. Secondly, the penetration and regulation of mediation were also hindered by the fact that the legislation left unregulated the supervisory tasks of mediation, the professional certification of a mediator, as well as the profession of a mediator. However, the act describes the process of mediation. Despite the obligation of a country to encourage the practice of mediation, in the case of Estonia, new amendments and efforts to meet EU standards have failed.

In conclusion, the implementation of the EU mediation policy in all three countries has had different outcomes. In Lithuania, the initial impact was that it failed to promote the broad expansion of mediation in society, although it later encouraged further processes of mediation reforms and warranted the quality of mediation services. Latvia took a different route by implementing the Mediation Directive to the extent that it has encouraged the adoption of necessary national rules for mediation to start developing. Indeed, it has helped greatly in constructing a well-balanced model of mediation. In the case of Estonia, national mediation regulation adopted for the purpose of implementing the Directive has failed to encourage the practice of mediation, with a preference for self-regulation.

## 3 MEDIATION MODELS IN THE BALTIC STATES

### *3.1 MEDIATION IN LITHUANIA*

In Lithuania, mediation reforms were introduced in 2017, so the country now enjoys court-connected mediation in civil and administrative procedures, a well-framed out-of-court mediation system in civil disputes, out-of-court mediation in administrative disputes, and mandatory pre-trial mediation in most family disputes. There is also a time-checked mediation institute in probation service activities.

15 Mediation Law (2014) <https://likumi.lv/ta/en/en/id/266615-mediation-law> accessed 6 August 2022.

16 Amendments of Civil Procedure Law (22 May 2014) <https://likumi.lv/ta/id/266611-grozijumi-civilprocesa-likuma> accessed 6 August 2022.

17 Cabinet of Ministers Regulation No. 433 On Certification and Attestation of Mediators (5 August 2014) <https://likumi.lv/ta/id/268136-mediatoru-sertifikacijas-un-atestacijas-kartiba> accessed 6 August 2022.

18 Conciliation Act <https://www.riigiteataja.ee/en/eli/530102013028/consolide> accessed 6 August 2022.

### 3.1.1 Mediation in Civil Justice

The qualification requirements for mediators have been some of the most important elements of the recent reforms in Lithuania. A national list of mediators was established in early 2019. The Law on Mediation[19] provides a rule that only mediators who are listed may provide mediation services in Lithuania (Art. 4, part 1). To be listed as a mediator, one must have: successfully completed a university education; participated in 40 hours of mediation training; passed the mediators' qualification exam; and have an unblemished reputation. At the end of 2021, there were more than 600 mediators included in the national list of mediators,[20] 117 of which are judge-mediators.[21] However, there are exceptions to these qualification requirements, and these include those employed as university lecturers, judges, attorneys, notaries, and bailiffs.

The first attempts to apply mediation in the Lithuanian legal system were related to the launch of the pilot court-connected mediation project in 2005. 'The pilot project was conducted by several judges and academicians familiar with the notion of mediation, and who strongly supported the model adopted by the province of Quebec in Canada and its introduction in the Lithuanian courts'.[22] In 2014, the model presented by the pilot project was admitted as the Lithuanian court-connected mediation model and began to apply in all courts dealing with civil cases.[23]

The latest statistics show that court-connected mediation still is not popular enough in Lithuanian courts. According to the data from 2021, 144,919 civil cases were started in Lithuanian courts in 2021.[24] During the same year, only 574 court-connected mediations were initiated.[25] In 47 per cent of mediated cases, a settlement was reached. Scholars have stated that 'during the last four years, the number of the court-connected mediation cases has shown no significant change'.[26]

The development of out-of-court mediation in Lithuania has been rather slow, which can partly be explained by the country's historical tradition of relying on the courts to resolve disputes. The reform of mediation was initiated by both the Ministry of Justice and social partners involved in the preparation of the Concept on Mediation Development in Lithuania.[27] This important document provided a roadmap for further steps in the development of mediation in all three justices: civil, administrative, and criminal. The legal regulation of mediation introduced in 2008 established a liberal framework for the mediation process, but this has not witnessed growth in mediation. Aware of the inertia created by such legal regulation

19 Law on Mediation <available at https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.325294/asr> accessed 6 August 2022.

20 'National List of Mediators' (Teisis 2021) <https://teisis.lt/external/mediator/list?filter=%7B%22page%22:1,% 22pageSize%22:100,%22searchSpecialisationChildren%22:true,%22orderBy%22:%22name%22,% 22sortingOrder%22:%22asc%22%7D> accessed 6 August 2022.

21 'Annual Report of Court Mediation Commission' (Court Mediation Commission, 2021) <https://www.teismai.lt/data/public/uploads/2022/03/tmk-ataskaita-2021.pdf> accessed 6 August 2022.

22 N Kaminskienė, 'Teisminė mediacija Lietuvoje. Quo vadis?' (2010) 9(1) Socialinis darbas 54-63, at 57.

23 For more information on the Lithuanian court-connected model and its specifics, please see Agnė Tvaronavičienė et al, 'Towards more sustainable dispute resolution in courts: empirical study on challenges of the court-connected mediation in Lithuania' (2021) 8(3) Entrepreneurship and Sustainability Issues 633-653.

24 'Annual Report of Lithuanian Courts' (National Courts administration, 2021) <https://www.teismai.lt/lt/visuomenei-ir-ziniasklaidai/statistika/106> accessed 6 August 2022.

25 'Annual Report of Court Mediation Commission' (Court Mediation Commission, 2021) <https://www.teismai.lt/data/public/uploads/2022/03/tmk-ataskaita-2021.pdf> accessed 6 August 2022.

26 A Tvaronavičienė et al (n 27) 637.

27 The Concept of Development of the Mediation in Lithuania (Minister of Justice, 2015) <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/1de59bf05d7211e5beff92bd32ec99a1?jfwid=pd6eq2kwp> accessed 6 August 2022.

and observing the ongoing processes of introducing mandatory mediation schemes in other European countries, Lithuania's law-making bodies decided not only to offer precise regulation over the professional activities of the mediators to encourage a higher quality of mediation services and bring more trust in mediators but also to introduce mandatory mediation in family disputes. These changes influenced Lithuanian mediation legislation away from taking a purely formal regulatory framework approach toward responsible and explicit regulation.

The outcome is that today out-of-court mediation in civil matters is currently supported by the Lithuanian state. In general, it works on a contractual basis. Parties to a dispute may hire a professional mediator and agree with him or her on payment and other important rules of their collaboration. In addition, state-funded mediation services are provided for those citizens who cannot afford to hire a private mediator.[28] All mediators who are willing to provide mediation services must be enrolled in the Lithuanian List of Mediators, which is administered by the State Legal Aid Service. Failure to enrol means that they are not allowed to issue documents confirming that mediation has taken place and therefore cannot legally practice as mediators. Mediators are obliged to present documents confirming their qualification development every five years and comply with the rules and principles provided in the Law on Mediation.

Mandatory mediation in family disputes was introduced into the Lithuanian legal system in January 2020 through the Laws on Mediation and on State Guaranteed Legal Aid.[29] Free access to mandatory mediation for all citizens and permanent residents of Lithuania in family disputes is provided. Such processes are administered by the State Guaranteed Legal Aid Service. In case disputing parties are willing to choose the mediator themselves, they are allowed to do so, but the services of the mediator selected by the parties are not funded by the state. In comparison with mandatory mediation models in other countries, the Lithuanian model seems to be quite liberal, as it imposes an obligation to initiate mandatory mediation on the future claimant but does not oblige participation in mandatory mediation by the prospective respondent.

According to statistics from 2021,[30] there were 6,369 requests for mandatory mediation received. In 2,838 cases, mediators were appointed. Unfortunately, in other cases (more than 50 per cent), the second party to a dispute (the respondent) did not agree to participate in mandatory mediation. A total of 2,900 mediations were completed, and in slightly more than 50 per cent of them, settlements were reached. These numbers demonstrate that far too many cases never reach mediators and follow the formal procedure of a request and rejection of mediation. This raises the question: without direct contact with a professional mediator, how is it possible to explain to the parties the pros and cons of mediation and peaceful dispute resolution? In this instance, we can hardly expect them to be highly motivated to participate in such a process.

In line with the mandatory mediation of family disputes, several other state support incentives for the promotion of mediation are applied. Firstly, parties can save 25 per cent off stamp duty if they have tried mediation before filing the claim to the court.[31] Secondly,

28 Law on State Guaranteed Legal Aid Service <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.98693/asr> accessed 6 August 2022.

29 Law on Mediation <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.325294/asr> accessed 6 August 2022; Law on State Guaranteed Legal Aid Service <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.98693/asr> accessed 6 August 2022.

30 'Annual report of State Guaranteed Legal Aid Service' (State Guaranteed Legal Aid Service, 2021) <https://vgtpt.lrv.lt/uploads/vgtpt/documents/files/VEIKLOS%20ATASKAITA%202021.pdf> accessed 6 August 2022.

31 Code of Civil Procedure Art. 80, part 8 <https://www.e-tar.lt/portal/lt/legalAct/TAR.2E7C18F61454/asr> accessed 6 August 2022.

limitation periods are suspended if parties are involved in the mediation process (for the period of conducting mediation).[32] Thirdly, as of 2019, courts have the right to depart from the general rules of distributing litigation costs in case of dishonest behaviour of the party during the mediation process.[33]

In conclusion, mediation in civil justice in Lithuania is well-structured and explicitly regulated, which is a strong basis for the further development of respected professional mediators. It also sets a clear vision of mediation development both at judicial and non-judicial levels. If the so-called 'liberal model' of mandatory mediation has already shown good results both in numbers and in awareness of mediation in society, there exists a need for further procedural measures to create a more user-friendly and fast-track system and make it easier to access civil mediation procedures. Finally, the issue of adequate public funding for mandatory mediation, particularly mediators' remuneration, remains problematic.

### *3.1.2 Mediation in Administrative Justice*

In administrative disputes, one party always is the state or a municipal body, either of which acts within the limits of its functions and authority. This may leave little or no room for negotiation. Regardless, the practice of administrative courts in Lithuania shows that settlement in certain administrative disputes is possible. In 2013, the Law on Administrative Procedure[34] was amended by the rule allowing the parties to an administrative dispute to settle, with some exceptions. Following that course, in 2019, court-connected mediation was introduced in Lithuanian administrative justice under the initiative of the administrative courts. The model of court-connected mediation in administrative disputes is similar to the one used in civil justice. In 2021, only seven mediations took place in the administrative courts.[35] Very few disputes were referred to court-connected mediation since the start of this initiative, proving that the path of development of this initiative is slow.

The new version of the Law on Mediation came into force on 1 January 2021.[36] It broadened the scope of the law and included mediation in not only civil but also administrative disputes. What is novel about this legislation is out-of-court mediation in administrative disputes. Purely voluntary mediation became an option for a disputant who started a pre-litigation dispute resolution process in the Commission of Administrative Disputes of Lithuania. Members of this Commission can serve as mediators, and mandatory enrolment in the Lithuanian List of Mediators is required. Besides that, other mediators from the list have the possibility of being appointed, granting them per-hour payment from the state budget. Out-of-court mediation in administrative disputes is free of charge for the disputants. In 2021, 11 out-of-court mediation processes took place in the Commission of Administrative Disputes of Lithuania.[37]

To summarise, in Lithuania, the implementation of mediation in administrative justice is

32 Law on Mediation Art. 18. <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.325294/asr> accessed 6 August 2022.

33 Code of Civil Procedure Art. 93, part 4 <https://www.e-tar.lt/portal/lt/legalAct/TAR.2E7C18F61454/asr> accessed 6 August 2022.

34 Law on Administrative Procedure <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.72290/asr> accessed 6 August 2022.

35 'Annual Report of Court Mediation Commission' (Court Mediation Commission, 2021) <https://www.teismai.lt/data/public/uploads/2022/03/tmk-ataskaita-2021.pdf> accessed 6 August 2022.

36 Law on Mediation <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.325294/asr> accessed 6 August 2022.

37 'Annual report of the Commission of Administrative Disputes of Lithuania' (The Commission of Administrative Disputes of Lithuania, 2021) <https://lagk.lrv.lt/veikla/veiklos-ataskaitos/> accessed 6 August 2022.

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in its infancy and is rarely used. There is a clear need to adopt additional support measures, firstly by consistently informing the parties about mediation opportunity, and secondly by encouraging the administrative authorities to legally seek a settlement without fear of being blamed for having secretly colluded with the 'offender', and thirdly by clearly balancing the right to settle with the principle of imperative regulation prevailing in public law.

#### 3.1.3 Mediation in Criminal Justice

Mediation in criminal justice is the least developed branch of mediation in Lithuania. Currently, mediation is applied only in the probation system, which ignores huge opportunities for reconciliation and resocialisation in all stages of the criminal procedure through victim and offender mediation. The possibility of mediation in probation became a reality in 2014 following support from the Norwegian government.[38] A well-structured and effective system of services was created with mediators on probation placed in five major cities of Lithuania and employed on the basis of a labour contract.

The number of mediations in probation is inspiring when compared with mediation statistics in other areas of law. In 2021, mediation was conducted in 605 cases (721 cases in 2020; 894 cases in 2019). As a result, in 2021, mediators prepared 413 settlements (391 settlements in 2020; 440 settlements in 2019).[39] Unfortunately, the number of mediated cases in the probation system is dropping, as fewer mediators are employed, and the lack of attention towards the development of amicable dispute resolution in this area is obvious. Most issues referred to mediation in probation were connected with compensation of damages and family violence.

The main obstacle to the future of mediation in Lithuania's criminal justice is a lack of clear legal regulation. Thus, the potential of mediation in criminal justice cannot be exploited without essential amendments to the Code of Criminal Procedure legalising the option of mediation in all stages of criminal prosecution procedure, including in pre-trial investigation.

### 3.2 MEDIATION IN LATVIA

Mediation was popular in Latvia even before the country adopted the Mediation Law in 2014. Enthusiasts organised mediation seminars and invited foreign specialists and mediation activists from national NGOs, among others. Translations of mediation books by foreign authors were issued, as well as the first books authored by Latvian nationals. Governmental and municipal authorities offered free mediation services to certain groups, mostly in family law cases. Mediation in criminal disputes has deeper legal roots in Latvia than mediation in civil and commercial cases, taking into consideration the inclusion of restorative justice ideas in the Latvian Criminal Procedure Code two decades before the Mediation Law was adopted. In line with notions of the restorative justice concept, the settlement process, also called mediation, in criminal cases in Latvia has been available since 2004, when the State Probation Service Law came into effect. For these reasons, the first mediators in Latvia were trained and started their practice in criminal cases, later amplifying their professional skills in sectors of civil and commercial law. State-paid mediation in criminal cases has been available

38 'Implementation of mediation in probation offices (MIPT)' (EEA grants, 2014) <https://eeagrants.org/archive/2009-2014/projects/LT14-0006> accessed 6 August 2022.

39 R Petkevičiūtė, 'The Experience of the Application of Mediation in Probation Service and the need of Interinstitutional Cooperation' (4 February 2022) <https://www.youtube.com/watch?v=TijuEizXvXA&t=12857s> accessed 6 August 2022.

since 2005 and is organised by the State Probation Service officers and volunteer mediators.[40] Mediation in administrative cases is the newest of all mediation types, and its development commenced after the possibility of settlement was introduced in administrative procedures.

### 3.2.1 Mediation in Civil Justice

The Mediation Law regulates mediation in general, as well as the profession and the legal liability of certified mediators. To become a certified mediator, a person must meet certain standards provided in Regulation No. 433. Namely, a person shall be at least 25 years old, with a good reputation and no criminal record, possess a higher education qualification in any field, be fluent in the Latvian language, and have completed at least 100 hours of studies in mediation. Such a person may apply to sit for the examination of certified mediators, which is organised once a year. If the candidate is successful and accepted as a mediator, they receive a certificate valid for five years (Art. *60). Currently*, in 2022, there are 50 certified registered mediators in Latvia, although an unknown number of people practice without a certificate. Only certified mediators are supervised by the Council of Certified Mediators and must undergo continuous education and meet all practice requirements.

Mediation in civil disputes in Latvia is informed by several procedural measures. First, the court encourages the litigant in a matter of civil procedure to consider mediation as an option to settle their dispute. It is mandatory for the court to ask the question: 'Has mediation been tried before submission of the claim to the court?'[41] With that, the legislator has left mediation optional but invites the claimant to at least think about mediation as a possible tool to settle the dispute. Another mandatory requisite has been added whereby the respondent must tell the court if they agree to try mediation.[42] Secondly, there is a possibility for reimbursement of 50% of the state fee for litigation under current budget provisions. This serves as a strong motivator for both parties to mediate. Thus, if the parties conclude an amicable agreement, or if the claim is revoked because a settlement was reached in the mediation process, 50% of the state fee can be recovered, provided the claim is lodged within three years after payment of the fee and in the same court instance.[43]

The court can suspend litigation proceedings for up to six months if the parties agree to mediation. Confidentiality in civil cases where mediation is agreed upon is protected by the civil procedural rule that no person may be questioned in the capacity of a witness who has participated in mediation in a particular or related case.[44]

In 2016, the Ministry of Justice made financial provisions to promote mediation, fully covering five free mediation sessions for persons in family law disputes where minors are involved and seven free mediation sessions for low-income persons with children. More than half of all certified mediators in Latvia (currently 33) are involved in this state-financed mediation project.[45] According to the statistics, mediation in family law disputes is the most popular type of mediation in Latvia, mostly thanks to the financial support provided by

40 State Probation Service Law <https://likumi.lv/ta/en/en/id/82551-state-probation-service-law> accessed 6 August 2022.

41 Civil Procedure Law Art. 128, part 2, Clause 5-1; Art. 148, part 2, clause 6 <https://likumi.lv/ta/id/50500-civilprocesa-likums> accessed 6 August 2022.

42 Ibid Art. 148, part 2, clause 6

43 Ibid Art. 37, part 1, clause 7 and part 2.

44 Ibid Art. 106, clause 5.

45 Certified mediators <http://sertificetimediatori.lv/mediacijas-pakalpojumi-gimenes-stridu-risinasana/> accessed 6 August 2022.

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the Ministry of Justice projects.[46] In 2021, 346 out of 389 mediated cases were family law cases. Simultaneously with the Ministry of Justice's financial support, in 2020, the CEPEJ was also financing mediation across the entire spectrum of disputes.[47] Unfortunately, the latest statistics are not available yet.

In summary, both court-connected and out-of-court mediation enjoys strong legal regulation and is widely used in practice in Latvia. Mediation is purely voluntary, although it is encouraged using certain procedural stimulation measures. State financing for mediation services in family disputes is provided only on a project basis so that there is a need for organisations to search for regular funds to maintain access to mediation.

### 3.2.2 Mediation in Administrative Justice

According to Gatis Litvins, 'Latvia's Mediation Law is an umbrella law for all legal sectors, although as yet this setting has not been fully implemented. This law provides for a general framework for mediation, which also applies to disputes, not only in civil law but also in other areas of law'.[48] At the same time, neither the Mediation Law nor any other legislation explicitly requires or allows the use of mediation in the administrative process. 'Such an additional legal framework is necessary because private law is based on the principle of the private autonomy of individuals'.[49] However, in public law, the legislator has wider discretion to lay down rules for mediation, and these must be laid down in regulatory enactments.

In 2012, the Administrative Procedure Law[50] in Latvia was significantly amended, introducing a new tool in administrative cases – a settlement, which, *inter alia*, can be reached by means of mediation. This was an entirely new concept for settlement in administrative processes. When examining an application about a dispute involving an administrative act, the institution must consider the possibility of entering into a settlement before any decision is taken. If the institution agrees that a settlement is possible, then it must inform the individual of the settlement process and agree on an amicable arrangement so that the person may express their opinion on the possibility of concluding the settlement.[51] Furthermore, in the administrative procedure, if a dispute is reviewed by the court and the presiding judge considers that a settlement may be possible, the court may explain to participants in the proceedings the possibility of entering into a settlement (administrative contract), as well as suggest possible terms of any settlement. A court may offer explanations of the possibility of entering into a settlement in writing and in a court session and may convene a hearing only for the discussion of this matter.[52] Although the term mediation or cross-references to the Mediation Law is not *expressis verbis* mentioned in the Latvian Administrative Procedure Law, the settlement can be organised and facilitated by mediators.

46 'Statistics on mediation' (Mediaicja LV, 2020) <http://www.mediacija.lv/?Resursi:Statistika> accessed 6 August 2022.

47 'Pieejams sertificēta mediatora-konsultanta atbalsts mediācijai civillietās' (Sertificeti mediatori, 2021) <http://sertificetimediatori.lv/projekts-mediacija-civillietas/> accessed 6 August 2022.

48 G Litvins 'Directions and Perspectives of Mediation Development' (2019) <https://www.apgads.lu.lv/fileadmin/user_upload/lu_portal/apgads/PDF/Juridiskas-konferences/LUJFZK-7-2019/iscflul-7_2019_Ties-zin-uzd-noz-nak_23.pdf> accessed 6 August 2022.

49 Ibid.

50 Administrative Procedure Law <https://likumi.lv/ta/en/en/id/55567-administrative-procedure-law> accessed 6 August 2022.

51 Administrative Procedure Law Art. 80, part 1 <https://likumi.lv/ta/en/en/id/55567-administrative-procedure-law> accessed 6 August 2022.

52 Ibid Art. 107, part 1.

### *3.2.3 Mediation in Criminal Justice*

Historically, the settlement procedure in criminal cases developed in parallel to mediation in civil law cases. As a result of intergovernmental cooperation between Latvia and Norway and training seminars for public servants from the Latvian State Probation Service, the mediation of criminal cases received legal sanction and regulation (and mediators were trained) even before the adoption of the Mediation Law. Although the term 'mediation' is not used in the Criminal Procedure Law,[53] the settlement is a process organised by mediation methods and by trained mediators who are mostly public servants employed by the State Probation Service, as well as specially trained settlement volunteer team members approved by the latter.

A mediator acting on behalf of the State Probation Service cannot be questioned about the settlement process, save for the cases when new instances of criminal conduct are discovered. This guarantee of confidentiality is positive in terms of the settlement process in mediation, helping to ensure a safe information environment for the parties in the settlement.

According to the Criminal Procedure Law, criminal proceedings shall be terminated where 'a settlement between a victim and a suspect or accused person has been concluded in criminal proceedings that may be initiated only on the basis of an application of a victim, and the harm inflicted by the criminal offence has been completely eliminated or reimbursed'.[54] An investigator acting with the consent of a supervising prosecutor, prosecutor, or a court may terminate criminal proceedings, *inter alia*, 'if the person who has committed a criminal violation or a less serious crime has made a settlement with the victim or their representative in cases determined in the Criminal Procedure Law.'[55] 'The termination of criminal proceedings on the basis of a settlement shall not be permitted if information has been acquired that the settlement was achieved as a result of threats or violence, or by the use of other illegal means'.[56]

Criminal Procedure Law states that 'in the case of a settlement, an intermediary trained by the State Probation Service may facilitate the conciliation of a victim and the person who has a right to a defence'.[57] Further, it is declared that where settlement is possible and the involvement of an impartial third party seems to be beneficial, 'the person directing the proceedings may inform the State Probation Service of such possibility or usefulness, but if the criminal offence was committed by a minor, then the State Probation Service shall be informed in any case, except when the settlement has already been entered into'.[58]

Parties to a dispute should enter into settlement voluntarily and know the likely consequences. The law requires settlement to be attached to a criminal case. An oral announcement expressed in a court hearing can be made to include the settlement in the minutes. 'A settlement shall be signed by both parties – the victim and the person who has the right to defence – in the presence of the person directing the proceedings or an intermediary trained by the State Probation Service, who shall certify the signatures of the parties. The parties may also submit a notarially certified settlement to the person directing the proceedings'.[59]

53 Criminal Procedure Law <https://likumi.lv/ta/en/en/id/107820-criminal-procedure-law> accessed 6 August 2022.

54 Ibid Art. 377, clause 9.

55 Ibid 379, Part 1, clause 2.74.

56 Criminal Procedure Law Art. 379, Part 4 <https://likumi.lv/ta/en/en/id/107820-criminal-procedure-law> accessed 6 August 2022.
Ibid Art. 377, clause 9.

57 Ibid Art. 381, Part 1.

58 Ibid Art. 381, Part 2.

59 Ibid Art. 381, Part 4.

In 2020, most requests to organise mediation were received from the perpetrator (43%) and from the police (44%).[60] One-fourth of all perpetrators requesting mediation in criminal cases were minors. Unfortunately, the latest data and numbers for mediation processes are not available.

In conclusion, Latvia has developed a functioning mediation model in criminal justice based on the active role of the probation institution. Appropriate legal regulation and a well-structured scheme of mediation service may serve as a good example for the implementation of criminal justice mediation in other countries.

## 3.3 MEDIATION IN ESTONIA

The development of mediation in Estonia as a field of scholarly research, as well as in practical terms, has been gradual. Despite the wider community's lack of general knowledge of mediation, the endorsement of mediation has largely been left to professionals active in the field. For instance, since 1997, divorcing or separating parents have been able to use voluntary family mediation services. Whether or not it remains a voluntary process is up for debate, as the Estonian Code of Civil Procedure requires the court to take all measures possible to settle the case or a part of a case through compromise or with the help of a mediator.[61]

However, due to the lack of sustained government support, mediation has not reached all those in need. The three largest universities in the country – Tallinn University, Tallinn University of Technology, and the University of Tartu – have organised courses, lectures, and seminars in an attempt to increase public awareness and understanding. Despite efforts made by the universities to increase public awareness, opportunities to practice as a professional mediator remain scarce.

### 3.3.1 Mediation in Civil Justice

Mediation in civil justice in Estonia is regulated under the Conciliation Act. However, the legislation does not establish a legal framework for court-connected mediation, leaving the out-of-court mediation model somewhat general in nature. With regard to the profession and qualification of a mediator, the law recognises the mediator as 'a natural person to whom the parties have entrusted the task',[62] as well as the sworn advocates and notaries, together with 'a conciliation body of the government or a local authority'.[63] No official accreditation procedures are in place, and neither is an all-inclusive list of mediators active in the country, although the Estonian Bar Association holds a special list of attorneys-at-law who provide mediation services.[64] The legislation leaves open the requirements for mediation training, as well as the coordination of mediation by the government. With this in mind, it is unsurprising that the development of mediation is held back, and this has done nothing to strengthen the state's efforts to engage in the process.

The aforementioned law provided a general framework for the provision of mediation services, which, up until that point, had not existed. However, the various types of

60 'Statistics on mediation' (State Probation Service, 2019) <https://www.vpd.gov.lv/lv/2019gada-statistikas-raditaji> accessed 5 August 2022.

61 Code of Civil Procedure (as amended of 1 July 2022) para. 4 (4) <https://www.riigiteataja.ee/en/eli/513122013001/consolide> accessed 5 August 2022.

62 Ibid para. 2 (1).

63 Conciliation Act (as amended of 10 January 2010) para. 2 (2-4) <https://www.riigiteataja.ee/en/eli/ee/530102013028/consolide/current> accessed 5 August 2022.

64 'Lepitusmenetlus ja vandeadvokaatidest lepitajad' (Eesti Advokatuur, nd) <https://advokatuur.ee/est/advokaadid/vandeadvokaatidest-lepitajad> accessed 5 August 2022.

mediation are not regulated under current legislation. The most common areas of mediation cases in Estonia comprise: family and inheritance, employment and contract law, and commercial law and real estate disputes. Unfortunately, no statistics for the services provided are available. Perhaps the most widespread type of mediation over the years is family mediation, which has been provided by private practitioners since 1997. The leading and, for years, a sole organisation providing family mediation services is the Estonian Association of Mediators (in Estonian: *Eesti Lepitajate* Ühing).[65] The organisation was established to enhance family mediation services in the country and has received partial support from the government over the years. In addition, supportive cooperation has been in place with local government as well as the courts. In 2018, another family mediation association, the Mediation Institute (in Estonian: *Lepituse Instituut*), emerged on the market.[66]

Besides the private market, Tallinn, Tartu, and other local government units have provided family mediation free of charge for its citizens throughout the years. However, recent studies by the government have shown that service accessibility is greatly fragmented across the country.[67] The state of fragmentation is illustrated by the reality that not every local government provides, refers, or pays for family mediation services for its citizens, which many find the process prohibitively expensive. In the absence of a coordinating governmental unit for mediation, the overview of the quality and statistics of the service is simply not possible; some service providers, such as the Tallinn Family Centre, assisted less than 100 families in 2019.[68] Unfortunately, the latest data is unavailable.

Considering all the efforts made by dedicated specialists over the year, it is no surprise that the biggest shifts regarding the development of mediation in the country are taking place in family mediation. It is envisaged that the coordinating governmental organisation for family mediation will be the Estonian Social Insurance Board, where families in need will have the chance to receive free service. The state-funded service is being developed, keeping in mind the congestion of courts regarding child custody disputes. The Parliament of Estonia passed the National Family Mediation Service Act in late 2021, which created the foundation for the service, which is now available nationwide and free for all separated parents. Most importantly, the new regulation guarantees state funding for the service from September 2022.[69]

This overview of civil mediation in Estonia shows that while mediation in civil disputes is present, self-regulation and the private market prevail. Unfortunately, mediation is not perceived as an equal alternative to court procedure and exists only due to the efforts of dedicated enthusiasts. Far more support from the state is expected for civil mediation if alternative dispute resolution becomes a natural part of the legal landscape in Estonia.

65 Estonian Association of Mediators (nd) <http://lepitus.ee/uhingu-info/> accessed 5 August 2022.

66 Lepituse Instituut (nd) <https://lepituseinstituut.ee> accessed 5 August 2022.

67 E Soodla, LL Raag, *Analüüs ja ettepanekud perelepituse riikliku süsteemi loomiseks* (Ministry of Social Affairs and Ministry of the Interior, 2019); R Uudeküll, *Ekspertanalüüs perelepitusteenusest kuue Euroopa riigi võrdlusel* (Estonian Social Insurance Board, 2020).

68 Ibid 9.

69 'The Riigikogu passed the National Family Mediation Service Act' (Parliament of Estonia, 2022) <https://www.riigikogu.ee/en/sitting-reviews/the-riigikogu-passed-the-national-family-mediation-service-act/> accessed 5 August 2022.

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### 3.3.2 Mediation in Administrative Justice

The process of conciliation in administrative justice is established under the Code of Administrative Court Procedure.[70] However, the regulation only sets forth the model of court-connected conciliation in administrative cases. Here, mediation is presented as one of the forms of conciliation. Introduced in early 2012, the mediation chapter in the act was intended to reduce the burden on administrative courts, yet the legislation reveals few details of the procedure. For instance, conciliation cannot be conducted in court by the judge hearing the case but by an impartial judge who acts as a conciliation judge and conducts the mediation proceedings (para. 137). It is the court's responsibility to explain the exact procedural rules and aims of conciliation as well as the rights of conciliation participants.

The law prohibits written and other types of recordings of the mediation procedure (para. 138 (6)). The fee for mediation is borne by the parties of the dispute (para. 141). Compared to civil conciliation cases, the information on statistics and the practice of administrative conciliation (including mediation) remains unavailable and has not entered the public debate, despite the regulation being in place.

The obstacle to the future of out-of-court mediation in administrative justice in Estonia is the Conciliation Act, which has the sole power to regulate the possibility of mediation in civil proceedings and should therefore be expanded to include administrative justice. Furthermore, more precise rules on court-connected mediation would help judges and the parties to understand conciliation (including mediation as one possible form of it) and choose it more often. Thus far, the new law amendments have not been under public discussion.

### 3.3.3 Mediation in Criminal Justice

Mediation in criminal justice in Estonia is not regulated by the Conciliation Act but falls under the regulation of the Code of Criminal Procedure[71] as well as the Victim Support Act,[72] under which the established regulation of procedure on conciliation has been enforced by the Government of the Republic of Estonia.[73] According to the legislation, the coordinating organisation of mediation in criminal justice cases, more specifically in second-degree criminal offences, is the Estonian Social Insurance Board. The out-of-court model for mediation in criminal justice has been in place under the governmental organisation since 2007, which now sits under the victim support service. Here, the mediator is chosen from one of the four regional victim support offices[74] around the country and receives special training organised by the Social Insurance Board.[75] The mediation process is free and must be completed within two months, resulting in a written agreement delivered to the prosecutor's office along with a descriptive report.[76] The out-of-court model of mediation in criminal

70 Code of Administrative Court Procedure (as amended of 1 June 2022) <https://www.riigiteataja.ee/en/eli/ee/527012014001/consolide/current> accessed 5 August 2022.

71 Code of Criminal Procedure (as amended of 1 January 2022) <https://www.riigiteataja.ee/en/eli/ee/531052016002/consolide/current> accessed 5 August 2022.

72 Victim Support Act (as amended of 7 May 2020) <https://www.riigiteataja.ee/en/eli/ee/513062016001/consolide/current> accessed 5 August 2022.

73 Lepitusmenetluse läbiviimise kord (as amended of 31 December 2016) para. 4-5 <https://www.riigiteataja.ee/akt/12854160> accessed 5 August 2022.

74 'Ohvriabi- ja ennetusteenuste töötajate kontaktandmed' (Estonian Social Insurance Board, nd) <https://www.sotsiaalkindlustusamet.ee/et/ohvriabi/ohvriabi-ja-ennetusteenuste-tootajate-kontaktandmed> accessed 5 August 2022.

75 'Ohvriabi- ja lepitusteenus' (Estonian Social Insurance Board, nd) <https://www.sotsiaalkindlustusamet.ee/et/ohvriabi-huvitis/ohvriabi-ja-lepitusteenus> accessed 5 August 2022.

76 Lepitusmenetluse läbiviimise kord (as amended of 31 December 2016) para. 4-5 <https://www.riigiteataja.ee/akt/12854160> accessed 5 August 2022.

justice provided by the Social Insurance Board was enforced to enhance the involvement of the victim in the decision-making process and decrease the unease, anger, and other negative feelings resulting from the crime. What makes the victim support mediation different from the other types of mediation is the practice that the best interest of the victim is taken into consideration.[77] In addition, the Code of Criminal Procedure imposes clear restrictions that the victim and accused must have given consent to mediation. Fortunately, the close cooperation between the police, the prosecutor's office, and the Social Insurance Board has seen an increase in the number of mediation cases in recent years.

In view of this, it is reasonable to assert that mediation in criminal justice in Estonia has found its rightful place and is supported by different stakeholders in the criminal justice system. Hence, the out-of-court model for mediation in criminal justice has grown from a small initiative implemented by the governmental organisation and since become an important player in the mechanism of restorative justice.

## 4 COMPARISON OF THE DEVELOPED MEDIATION MODELS IN LITHUANIA, LATVIA, AND ESTONIA AND RECOMMENDATIONS FOR THE FUTURE

Despite the territorial proximity of the Baltic States, the presented mediation models reveal a surprising diversity.

The three cases in this research demonstrate that it is possible to establish an institution of mediation either by one 'umbrella' law on mediation (Latvia and Lithuania) or by introducing special legal acts regulating the peculiarities of mediation in a particular type of justice (Estonia). Lithuania has the most scrupulous mediation regulation, whereas Latvia and Estonia enjoy more general, summarised mediation regulations. The switch to a more defined regulation in Lithuania in 2017 had a significant increase in the number of mediated cases. This may suggest the need to introduce more detailed regulation, especially measures ensuring the quality of mediation services.

The experience of the Baltic states shows that without explicit qualification requirements for the mediators, we cannot expect a high level of professionalism. Even so, in the case of Estonia, where the issue of mediators' qualification has until now remained subject to market forces, there is evidence this does not have any positive impact on the development of mediation. Conversely, the experience of Lithuania and Latvia proves that setting up qualification requirements for mediators ensures a pool of highly skilled professionals who are ready to mediate. As long as this question is regulated differently (Latvia – 100 hours, Lithuania – 40 hours with exceptions for the judges), it is evident that further discussion is needed on the amount of mediation training hours required.

Mediation in the Baltic states is being developed, albeit unevenly, in all three directions: civil, administrative, and criminal. The strongest mediation development was noticed for Lithuania in civil mediation, for Latvia in civil and criminal justice, and for Estonia in criminal justice. The weakest mediation development was detected for Lithuania in mediation in criminal justice and for Latvia and Estonia in administrative justice.

All three countries combine the use of out-of-court and court-connected mediation schemes in civil justice. Both Latvian and Lithuanian legal regulation of civil procedure envisages

77 'Ohvriabi- ja lepitusteenus' (Estonian Social Insurance Board, nd) <https://www.sotsiaalkindlustusamet.ee/et/ohvriabi-huvitis/ohvriabi-ja-lepitusteenus. accessed 5 August 2022.

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procedural incentives for the disputants who have tried mediation before litigation. Even though such incentives have not yet significantly increased the mediation numbers, they should be recognised as effective and worth applying as a tool to promote mediation.

The findings of this comparative analysis suggest that the Baltic states should vest responsibility for mediation administration and supervision either in state institutions (Lithuania) or in a combination of state institutions and non-governmental organisations (Latvia). In none of the countries was the institution of mediation left completely unregulated or unattended. We hold that it is encouraging when the state is open to sharing its responsibilities of mediation, administration, and supervision with the private sector. Following an example of self-regulation of independent professions (e.g., advocates), the future of mediation administration could be developed in the same direction, i.e., entrusted to mediators with external supervision from the state, but only when absolutely necessary. It is important to stress that removing the 'hand of the state' is possible only when the community of local mediators has matured sufficiently so as to be able to regulate itself.

In terms of mediation in civil disputes, it is apparent that Lithuania enjoys the highest level of state support, whereas, in Estonia, the development of mediation has been left in the hands of private mediators and NGOs. The liberal Lithuanian model of mandatory family mediation (where services are free for all citizens) results in better outcomes – more settlements – in comparison with other countries, where mediation is purely voluntary. The Latvian practice where family mediation services are paid from the temporary project offers accessibility to mediation yet does not guarantee continuity due to inadequate financial support.

Despite the high divergence of administrative disputes, all three Baltic states demonstrate a strong resolve to use mediation, allowing the parties to settle within the administrative procedure. Court-connected mediation is institutionalised only in Lithuania and Estonia. In Latvia, the possibility to mediate in the administrative procedure is based not on precise legal regulation but more on the interpretation of the legal norms allowing settlement. This might create obstacles to the development of out-of-court mediation in administrative justice.

Mediation in criminal justice is well developed in Latvia. Historically, the model of mediation in criminal justice was built even earlier than in civil justice. The necessary legal regulation and active state intervention through the Latvian State Probation Service have led to the creation of a straightforward and transparent mediation system that is easy to use. In fact, Estonia is a positive example of mediation in criminal justice, where out-of-court mediation is based on easily accessible services provided by trained mediators. In our opinion, the most important factor for the development of mediation in criminal justice is proper legal regulation and the clear stipulation of the possibility of mediation in criminal procedure. In both Latvia and Estonia, provisions are embodied in the legal regulation, thereby creating the necessary conditions for the use of mediation and validation of mediated agreements. In Lithuania, mediation services in criminal justice are provided only after a judgement is made and as part of probation services. Even though in Lithuania and Latvia, the same state institution (state probation service) takes care of the mediation application, the Latvian scheme is more effective since the Latvian State Probation Service administers mediation in all phases of criminal procedure. Lithuania would benefit from the same scheme.

With their common historical and cultural background, and relatively short ADR history, the comparison of these countries revealed two common problems – lack of mediation awareness and a paucity of statistics. To overcome the first obstacle, additional state support measures in implementing mediation are strongly recommended. It is also evident that mediation as a private and confidential process is difficult to research. For example, in Estonia, there are no available data on the numbers and outcomes of mediations that have been organised. In Lithuania, data are available only about court-connected mediation processes, mandatory mediation, and mediation in probation – the quantity of private out-of-court mediations is

still unknown. In Latvia, data are available on mediations led by certified mediators, mostly in civil law cases, as well as specialised statistics about mediations in criminal law cases organised by the State Probation Service and its volunteer mediators. Mediation statistics and mediation success rates serve firstly as a basis for further developments and secondly to encourage parties to disputes to choose mediation and have confidence in its success. Thus, it is necessary to gather and analyse the results of the application of mediation in practice.

It is important to state that the comparative analysis of three different mediation stories demonstrates that all three neighbouring countries have some distance to go in finding the best solutions to overcome shortcomings in traditional litigation and encourage a respectable and diplomatic approach to resolving disputes of any kind, especially in cases where there is a high degree of emotion and long-established relationships.[78]

## 5 CONCLUSIONS

1. The research showed that the implementation of the EU Mediation Directive in three Baltic states has had different outcomes. Initially, in the case of Lithuania, it did not facilitate the broad expansion of mediation; in Latvia, it was sufficient to encourage the adoption of national rules which stimulated the development of mediation; in the case of Estonia, the EU Directive did not encourage the practice of mediation, leaving many important aspects of mediation practice for self-regulation.

2. The research also showed that mediation might be set up either by one 'framework' law on mediation (Latvia and Lithuania) or by introducing special legal acts for each type of justice (Estonia). Lithuania has the most scrupulous mediation regulation, whereas Latvia and Estonia enjoy more general mediation regulation.

3. The Baltic States vest the responsibility of mediation administration and supervision in either state institutions (Lithuania) or the dual system of state institutions and non-governmental organisations (Latvia).

4. Without explicit qualification requirements for the mediators, a high level of professionalism cannot be expected. Even so, in the case of Estonia, where the issue of mediators' qualification has until now remained subject to market forces, there is evidence that this does not have any positive impact on the development of mediation. Conversely, the experience of Lithuania and Latvia proves that setting up such requirements ensures a pool of highly skilled professionals who are ready to mediate and improves the quality of mediation services.

5. Mediation in the Baltic states is being developed, albeit unevenly, in civil, administrative, and criminal justice. The strongest mediation development was noticed for Lithuania in civil and administrative mediation, for Latvia in civil and criminal justice, and for Estonia in criminal justice. The weakest mediation development was detected for Lithuania in mediation in criminal justice and for Latvia and Estonia in administrative justice.

6. All three countries combine the use of out-of-court and court-connected mediation schemes in civil justice, whereas Lithuania and Latvia additionally use procedural mediation incentives for the disputants who have tried mediation before litigation or settled during the court proceedings, which should be recognised as effective and worth applying as a tool to promote mediation.

78 N Kaminskienė, A Tvaronavičienė, R Sirgedienė, 'Collaborative law as a tool for more sustainable dispute resolution' (2015) 4(4) Journal of Security and Sustainability Issues 633-642, at 641.

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7. The comparison revealed two common problems – lack of mediation awareness and a paucity of statistics. To overcome the first obstacle, additional state support measures (legislative, procedural, financial, publicity, etc.) are strongly recommended. To solve the second problem, it is important to ensure systematic and continuous gathering and periodical analysis of data on mediation and its results.

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Research Article

# ALGORITHMS IN THE COURTS: IS THERE ANY ROOM FOR A RULE OF LAW?

***Yulia Razmetaeva***

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***Keywords:*** algorithms; decision-making; digitalization; judicial independence; rule of law

## ABSTRACT

***Background:*** *The rule of law is one of the fundamental pillars, along with human rights and democracy, which are affected by digitalisation today. Digital technologies used for the victory of populism, the manipulation of opinions, attacks on the independence of judges, and the general instrumentalisation of the law contribute significantly to the onset of negative consequences for the rule of law. Particularly dangerous are the far-reaching consequences of the algorithmisation of decision-making, including judicial decisions.*

***Methods.*** *The theoretical line of this research is based on the axiological method since the rule of law, democracy, and human rights are not only the foundations of legal order, but also values*

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*recognised in many societies and supported at the individual level. The study also relied on the phenomenological method in terms of assessing the experience of being influenced by digital technologies in public and private life. The practical line of research is based on the analysis of cases of the European Court of Human Rights and the Court of Justice to illustrate the changes in jurisprudence influenced by digitalisation.*

***Results and Conclusions:***

*This article argues that the potential weakening of the rule of law could be related to the impact of certain technologies itself, and to their impact on certain values and foundations which is significantly aggravated.*

*Judicial independence is affected since the judges are involved in digital interactions and are influenced by technologies along personal and public lines. That technologies often belong private sector but are perceived as neutral and infallible, which is highly predictive of court decisions. This leads to a distortion of the essence of legal certainty and a shift of trust from the courts to certain technologies and their creators.*

*The possibility of algorithmic decision-making raises the question of whether the results will be fairer, or at least as fair, as those handed down by human judges. This entails two problems, the first of which is related to the task of interpreting the law and the second of which involves the need to explain decisions. Algorithms, often perceived as reliable, are not really capable of interpreting the law, and their ability to provide proper explanations for decisions or understand context and social practices is questionable. Even partial reliance on algorithms should be limited, given the growing inability to draw a line between the human and algorithmic roles in decision-making and determine who should be responsible for the decision and to what extent.*

## 1 INTRODUCTION

Digitalisation is understood in different ways – from the transfer of paper documents to digital format to significant transformations of all aspects of life under the influence of digital technologies. Given the broad definition of digitalisation as 'the legal, political, economic, cultural, social, and political changes brought about by the use of digital tools and technologies',[1] attention should be paid to how it affects such fundamental foundations as the rule of law, democracy, and human rights. Undoubtedly, some aspects of digitalisation can help strengthen the rule of law, as well as provide new tools for both access to justice and maintaining the independence of judges. At the same time, the threats that digitalisation poses cannot be ignored, especially insofar as it can undermine the very foundations of the rule of law and change our understanding of justice.

Bearing these things in mind, this article analyses the impact of digitalisation on the rule of law, taking into account the direct and hidden consequences of the introduction of digital technologies in the private and public spheres of life. This study focuses primarily on those aspects of the rule of law that are related to the courts and judicial independence. A particular task of the study is to determine what changes are and may be present in the adoption of judicial decisions under the influence of the algorithmisation of decision-making.

The general theoretical framework of this study is based on the axiological method since the rule of law, democracy, and human rights are not only the foundations of the legal order but also values recognised in many societies and supported at the individual level.

1 Yu Razmetaeva, Yu Barabash, D Lukianov, 'The Concept of Human Rights in the Digital Era: Changes and Consequences for Judicial Practice' (2022) 3(15) Access to Justice in Eastern Europe 44.

The study also relied on the phenomenological method in terms of assessing the experience of being influenced by digital technologies in public and private life. The practice of two leading courts, namely the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), was chosen as an empirical basis for the analysis. This choice was made for two reasons: firstly, it is in the European legal order that the rule of law constitutes a recognised pillar, along with democracy and human rights, and secondly, the extensive practice of these courts on issues related to the impact of digital technologies provides the most complete picture of the impact digitalisation on aspects of the rule of law.

## 2 THE RULE OF LAW IN TIMES OF DIGITAL TECHNOLOGIES

The rule of law is or should be one of the pillars of both the international and national legal order. Attacks on the rule of law and its weakness affect societies in the most negative way and are closely related to the decline of democracy and disillusionment with human rights. Digitalisation has called into question many of the foundations and values that we used to rely on, forcing us to reconsider their importance and understanding.

It is no secret that it is extremely difficult to define the rule of law, both because of the divergence in concepts and because of the magnitude of the phenomenon itself. In the context of the digital world, it is defined as 'a principle of governance by which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, independently adjudicated and consistent with international human rights norms and standards'.[2] As Mantas Pakamanis pointed out, 'the concept of the rule of law *inter alia* requires accessibility of law, questions of legal right should be decided by law not discretion, and compliance by the state with its obligations in international law'.[3] According to Graham Butler, 'If it cannot be agreed what the rule of law is, at least it can be agreed what the rule of law is not. It is not compatible with extra-constitutional governance arrangements, nor with authoritarianism, fascism or a regime constructed around an individual'.[4] In other words, faced with an attack on the rule of law, a significant weakening, or an absence of it, we seem to be able to determine what is missing. At the same time, a feature of a world imbued with digital technologies is a rather imperceptible influence that transforms both social structures and individual experiences.

Are the consequences of digitalisation critical for the rule of law? Do the positive effects of digitalisation outweigh its negative effects? Is there something so dangerous about the digital age itself that it contributes to negative consequences, or are the implications so significant because the fundamental pillars had already weakened by the time digital technologies took hold?

There are conflicting opinions about the implications of digitalization for the rule of law and the process of administration of justice. For instance, a study on the consequences of using Online Dispute Resolution 'does not suggest any "rule of law" and "justice" implications

2 Council of Europe, 'The rule of law on the Internet and in the wider digital world' (December 2014) Issue paper published by the Council of Europe Commissioner for Human Rights Executive summary and Commissioner's recommendations 8.

3 M Pakamanis, 'Interaction between the doctrines of forum non conveniens, judgment enforcement, and the concept of the rule of law in transnational litigation in the United States' (2015) 1 International Comparative Jurisprudence 110.

4 G Butler, 'The European Rule of Law Standard, the Nordic States, and EU Law' in A Bakardjieva Engelbrekt, A Moberg, J Nergelius (eds), Rule of law in the EU: 30 years after the fall of the Berlin Wall (Hurt Publishing, an imprint of Bloomsbury Publishing 2021) 246.

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for small claim ODR' and basically supports 'wider use of ODR'.[5] At the same time, despite the obvious benefits of quick and easy access to dispute resolution, there are some fair concerns, most notably those related to access to technology and the deeper digital divide. In particular, Tania Sourdin, Bin Li, and Donna Marie McNamara write about 'the use of such technologies in the justice system, including how to safeguard the rights of vulnerable social groups and manage the disruptions to justice caused by some innovations'.[6] The further the application of digital technologies goes, the more these unresolved problems are amplified. This is what is happening now with algorithmic technologies, without which it is already difficult to imagine some actions and processes.

Existing challenges to the rule of law may have weakened the viability of its concept, which, combined with the features of the digital age, creates a 'double whammy' for the rule of law. First of all, we need to take into account the growth of populism, which has been discussed in recent decades. According to Bojan Bugaric, who studied the rise of populism and the resulting weakening of the rule of law in Central and Eastern Europe, 'Democracies in CEE are not about to collapse because of the rise of populism. Nevertheless, the populist challenge to liberal democracy has to be taken seriously'.[7] The virus of populism is not something that specifically affects Central and Eastern Europe. The so-called old Western democracies are also subject to it, and digital technologies have opened new floodgates for this. It can be assumed that digitalisation contributes to this in two aspects. Firstly, the ease with which communication tools connect people with some particular view of the world, including the most fantastical, conspiracy theological, radical, or extremely irrational views, plays a role. Secondly, the volume of information that each of us is forced to consume on a daily basis has significantly increased, and so has the amount of false, albeit authentic-looking, data that falls into the information field in one way or another. This leads to information fatigue and a desire for simplification. Both of these aspects add fuel to the fire of populism.

Another existing challenge to the rule of law is instrumentalisation of law. According to Brian Z. Tamanaha, 'rather than represent a means to advance the public welfare, the law is becoming a means pure and simple, with the ends up for grabs'.[8] The trend of instrumentalisation fits very well with the specifics of the digital era when the private and public spheres are full of tools provided by technologies and their developers. This, in turn, may contribute to the devaluation of certain concepts that are or were important to us. Getting used to evaluate many things as tools, and not as values, we may begin to look at things only from the point of view of utility. Therefore, it can be difficult for us to abandon an effective but discriminatory recruitment algorithm. It can also be difficult for us to refuse a decision that is effective but violates human rights, or a decision that is politically expedient but runs counter to the requirements of justice.

Thus, some weakening of the rule of law can be traced today due to reasons not directly caused by digitalisation. Simultaneously, there are two lines of concern about the potential further weakening of the rule of law. Firstly, it is a feature of the digital age and, specifically, some technologies that significantly exacerbate the negative effect of some attacks on certain values and foundations. In particular, this concerns the erosion of democracy under the influence of digital manipulation of opinions and electoral processes, the harm to human rights from penetration into private life, and the accumulation of data and automation of

5 U Ojiako, M Chipulu, A Marshall, T Williams, 'An examination of the "rule of law" and "justice" implications in Online Dispute Resolution in construction projects' (2018) 36 International Journal of Project Management 301.

6 T Sourdin, B Li, DM McNamara, 'Court innovations and access to justice in times of crisis' (2020) 9 Health Policy and Technology 452.

7 B Bugaric 'Populism, liberal democracy, and the rule of law in Central and Eastern Europe' (2008) 41 Communist and Post-Communist Studies 192.

8 BZ Tamanaha, Law as a Means to an End Threat to the Rule of Law (Cambridge University Press 2006) 4.

interaction processes, as well as doubts about the fairness, independence, and objectivity of decisions made in the light of algorithmisation. Secondly, there are specific challenges to the rule of law caused by digitalisation itself.

One of the most severe challenges to the rule of law in light of digitalisation is mass surveillance technologies. The scale of challenges brought about by digitalization is not clearly and carefully assessed even in case law. In the classic ECtHR case of *Klass and Others v. Germany*, it was established that there should be adequate and effective guarantees against abuse, no matter what system of surveillance is adopted.[9] Since this case, secret surveillance systems have advanced significantly. In addition, surveillance has become massive, both in terms of the technical tools used by states and in terms of filling our spaces with surveillance technologies as such. From satellites in space to video cameras on the roads, this massive technological presence allows for a fairly accurate view of the lives of almost everyone, even with all the legal restrictions on processing and accessing data. Today's particular concern is facial recognition technologies. For instance, the UN High Commissioner for Human Rights report showed how risky the use of facial recognition technology could be to the right to peaceful assembly and non-discrimination.[10] Despite attempts to restrict governments and big tech companies from using such dangerous tools, it seems far from the truth that the development of such technologies will not continue in the near future.

Besides, digitalisation is changing the very essence of the requirements that make up the smallest elements of the rule of law. Some things are already taken for granted, like filing documents by email or joining a court hearing online, although courts still consider barriers to digital access. It could be seen, for example, in the recent case of *Xavier Lucas v. France*, where the decision of the court was recognised as overly formalistic, bearing in mind that the applicant could not send e-files because there were practical hurdles.[11] This example clearly illustrates that the courts are capable of remaining a bulwark of substantive justice. The requirement to use electronic means, however, is becoming more and more common.

It is worth bearing in mind that courts are increasingly forced to evaluate actions in digital spaces and the consequences of using digital tools. In fact, the courts have to determine those things that remain undetermined in understanding individuals and societies. This often causes discussions, as in the case of *Sanchez v. France*, where it was assessed whether the owner of a public account on social media has special duties of control and vigilance.[12] The court concluded that there was no violation of the right to freedom of expression against the applicant, a local politician, who was convicted of inciting hatred for failing to immediately remove third-party hate speech comments. According to the court, he was obliged to monitor the content of the published comments, knowingly making his account on the social network publicly available and allowing comments to be placed under his posts.

Other examples of this include the landmark decisions of the CJEU, which have contributed to redefining what we mean by the protection of human rights in light of digitalisation. In particular, these include the cases regarding privacy and data protection, such as the case of *Digital Rights Ireland,* which established important retention criteria regarding data,[13]

9 Klass and Others v Germany (1979) 2 EHRR 214.

10 Report of the UN High Commissioner for Human Rights on 'Impact of New Technologies on the Promotion and Protection of Human Rights in the Context of Assemblies, Including Peaceful Protests', 24 June 2020, A/HRC/44/24 <https://undocs.org/en/a/hrc/44/24> accessed 19 July 2022.

11 Xavier Lucas v France (2022) ECHR 462.

12 Sanchez v France 45581/15 Judgment 2 September 2021 [Section V] (this case was referred to the Grand Chamber on 17 January 2022).

13 Court of Justice of the European Union joined cases nos C293/12 and C594/12 'Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others' (April 2014) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0293> accessed 22 July 2022.

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and the case of *Schrems II*, which reaffirmed the high standard of privacy protection and annulled the EU-US data transfer agreement as inconsistent with this standard.[14] In this sense, the expectations placed on the judges are extremely high, given the fact that even certain technology creators find it difficult to understand the intricacies of some digital tools, not to mention the fact that certain cases require the simultaneous presence of legal, ethical, and technological expertise.

In this way, the consequences of court decisions in the digital age can be significant both for the rule of law, as one of the pillars of a democratic society, and for society as a whole. Further, the courts with broader discretion can be at the forefront today, reshaping established legal perceptions. This happened, for example, in two key cases in the CJEU about the right to be forgotten. In the *Google v. Spain*[15] case, the CJEU recognised this right, and in the case of *Google v. CNIL,*[16] it partly established its global character. In the digital era, as Evangelia Psychogiopoulou writes, 'there may be ample opportunities for the CJEU to examine whether EU law may give more extensive protection to fundamental rights than the ECHR and the ways to do so'.[17] It seems we have yet to see how such courts cope with the increased need to interpret and balance certain rights and interests in the digital age. This is especially interesting given that judges are also included in today's digital interactions and all-encompassing technologies and therefore subject to the influences of this.

## 3 JUDICIAL INDEPENDENCE UNDER THE INFLUENCE OF DIGITALISATION

Judicial independence promotes the rule of law by helping to maintain the separation of powers and prevent the abuse of power. Independent and impartial judges embody justice and equality, allow the interests of certain powerful individuals and legal entities to be restrained, and also maintain the authority of law in society. All this undoubtedly works together with flourishing human rights, democracy, and the rule of law as a system and is based on the smallest building blocks of this system – from protecting freedom of expression to enforcing the procedural aspects for access to justice.

In accordance with the Magna Carta of Judges, 'judicial independence shall be statutory, functional, and financial. It shall be guaranteed with regard to the other powers of the State, to those seeking justice, other judges and society in general, by means of national rules at the highest level'.[18] Functional, not declared, formal independence is supported by a whole system of various guarantees, including the dynamic practice of international judicial institutions.

Needless to say, judicial independence is not so easy to maintain and is also subject to numerous attacks. As Leonard Besselink writes, 'the annoyance with the independence of

14 Court of Justice of the European Union case no C311/18 'Data Protection Commissioner v. Facebook Ireland Limited and Maximillian Schrems' (July 2020) <https://curia.europa.eu/juris/liste.jsf?num=C-311/18> accessed 24 July 2022.

15 Court of Justice of the European Union case no C131/12 'Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González' (May 2014) <https://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=152065> accessed 18 July 2022.

16 Court of Justice of the European Union case no C507/17 'Google LLC, successor in law to Google Inc. v. Commission nationale de l'informatique et des libertés (CNIL)' (September 2019) <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-507/17> accessed 19 July 2022.

17 E Psychogiopoulou, 'Judicial Dialogue and Digitalization: CJEU Engagement with ECtHR Case Law and Fundamental Rights Standards in the EU' (2022) 13 JIPITEC 145 para 1 <https://www.jipitec.eu/issues/jipitec-13-2-2022/5541> accessed 12 August 2022.

18 Magna Carta of Judges (Fundamental Principles) CCJE (2010) 3 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168063e431> accessed 3 August 2022.

the judicial machinery that frustrates power-seeking despots, logically tempts them into "normalising" the courts, filling them with politically friendly judges in order to make them work in function of the power holders claim to have authority because the people want them to have that authority'.[19] Political engagement is one of the biggest challenges to judicial independence. In particular, it was pointed out that 'while judicial independence is often considered to be a foundation for the rule of law and economic prosperity, there is overwhelming evidence suggesting that judges and court decision-making are sensitive to the political environment'.[20] Thus, even without being direct creatures of certain political forces, judges may be influenced by the political situation, especially when it comes to serious social upheavals. In order to make fair decisions on significant public issues in such cases, judges must be aware of the political context and, at the same time, be outside of it, primarily in the sense of impartiality. This seems rather complex and requires constant reflection on the part of the judges themselves. A similar challenge is facing them in connection with digitalisation, as the involvement in the digital environment and the consequences of the use of digital technologies are intensifying.

It seems that the independence of judges also includes independence of judgment and discretion, since it allows judges to maintain free will as the freedom to think and act and take a case-by-case approach while respecting reasonableness. At the same time, the independence of judgment and discretion is not unlimited, and the results of its application could be criticised. For instance, in the case of *Brzezinski v. Poland,* the ECtHR used the term 'fake news',[21] introducing it even though neither the applicant nor the Polish government used it. This example also illustrates how the interpretation of certain phenomena of the digital age is thin ice, in the sense that it is not always possible to give a proper definition or explanation.

Digitisation can reduce the burden on judges and speed up and reduce the cost of litigation, making it ultimately more efficient and even promoting legal certainty, in the sense that some automated actions will be more predictable and understandable. At the same time, digitalisation threatens to subtly undermine important foundations of justice, in particular, the independence of judges.

The first issue here is the increased number of influences on judges that we could see in the digital age. These influences run along two lines: personal and public. On a personal level, judges and juries, just like other people, are, to some extent, involved in the digital space today. They may have social media accounts and other digital footprints that make it easier for stakeholders to profile them and get a more accurate psychological profile. This, in turn, is used to build a strategy in litigation based on the vulnerabilities and characteristics of specific decision-makers. On a public level, digital tools and especially algorithms make it relatively easy to manipulate public opinion. They allow, for example, certain opinions about litigation to be widely disseminated, imbued with the right doubts and the right emphasis, to influence both decision-makers and the public's expectations of those decisions. This is especially important in high-profile cases with high publicity or political implications.

This effect may be exacerbated by the fact that innovations find it hard to take root in a conservative judiciary. Judges and courts, as rightly pointed out, 'can use the opportunities provided by technology to change the way in which courts work and function and to alter the way in which reform takes place. To date however, most courts have used technology to

19 L Besselink, 'Rule of Law as Problems of Democracy' in A Bakardjieva Engelbrekt, A Moberg, J Nergelius (eds), Rule of law in the EU: 30 years after the fall of the Berlin Wall (Hurt Publishing, an imprint of Bloomsbury Publishing 2021) 48.

20 J Fałkowski, J Lewkowicz, 'Are Adjudication Panels Strategically Selected? The Case of Constitutional Court in Poland' (2021) 65 International Review of Law and Economics 105950.

21 Brzezinski v Poland 47542/07 (2019) ECHR 590.

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replicate existing systems and processes rather than focusing on reforming the structures and processes that exist within the justice system'.[22] Some conservative elements of the judiciary, which previously performed a rather protective function for independence, turn out to be inoperative in the face of the challenges of digitalisation, which have to be responded to rather quickly, given the rapidity of technological development.

It is also worth considering the issue of predictability, primarily the predictability of judicial decisions, which could contribute to attacks on judicial independence. Apparent or actual predictability may lead to such consequences as public doubts about judicial impartiality or professionalism, as well as rising pressure on judges. It should be noted that these public doubts may not be based on facts but on false premises or unverified, insufficiently verified, or out-of-context statements and may be rapidly divergent in the digital environment. The deeper consequences may include a distortion of the essence of legal certainty, which in turn affects the distortion of the rule of law since legal certainty is one of its elements.

Technology already makes it possible to fairly accurately predict the outcome of court cases not only in a general sense but also in important details. The degree of accuracy of such predictions in relation to national and international courts is increasing every year, and today, it is already threatening.[23] Digitisation also has greatly expanded access to court data. One example is a study of how formal and informal institutions shape judicial sentencing cycles that relied on data from US states that had digitised their trial court sentencing data and had processes in place for sharing these data, including judge identifiers in the sentencing data given by ten states.[24] Therefore, the first important point in predictive practice regarding judicial decisions reflects how pieces of data, collected in huge quantities and successfully put together thanks to smart technologies, leave less and less space for incalculable actions and opinions.

Another important point is that these court predictive systems belong to the private sector, whether it be the French project *Predictice*, which touts itself as the only search engine on the market that allows you to sort results by meaning, or infamous risk-scoring algorithms such as the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) in the US and the Harm Assessment Risk Tool (HART) in the UK. Considering the problems of algorithmic governance in the public sector, Maciej Kuziemski and Gianluca Misuraca write that 'agenda setting bottlenecks are further perpetuated by misaligned incentives, goals and measures: public sector's duties towards the citizens are at odds with those of the profit maximizing private sector'.[25] Despite the fact that profit maximisation as a goal of the private sector is nothing fundamentally new, the growth in the number of technological solutions offered by private developers and used in the public sector makes us look at it more closely. The lack of ethical basis for such decisions and the absence of stable standards for them can lead – and already have led – to growing inequality and undermining the value foundations of justice.

It should be emphasised that the problem is not that we can now examine the decision-making of judges with the help of technologies and successfully find errors, biases, or

22 T Sourdin, B Li, DM McNamara, 'Court innovations and access to justice in times of crisis' (2020) 9 Health Policy and Technology 448.

23 See details of such prediction models in N Giansiracusa, C Ricciardi, 'Computational geometry and the U.S. Supreme Court' (2019) 98 Mathematical Social Sciences 1-9; D Ji, P Tao, H Fei, Y Ren, 'An end-to-end joint model for evidence information extraction from court record document' (2020) 57 Information Processing and Management 102305; E Mumcuoğlu, CE Öztürk, HM Ozaktas, A Koç, 'Natural language processing in law: Prediction of outcomes in the higher courts of Turkey' (2021) 58 Information Processing and Management 102684.

24 C Dippel, M Poyker, 'Rules versus norms: How formal and informal institutions shape judicial sentencing cycles' (2021) 49 Journal of Comparative Economics 647.

25 M Kuziemski, G Misuraca, 'AI governance in the public sector: Three tales from the frontiers of automated decision-making in democratic settings' (2020) 44 Telecommunications Policy 101976.

incompetence of some judges. The call to consider technological tools in the context of attacks on the independence of the judiciary does not mean that we should abandon such studies. However, we must take them with caution. The problem is that we begin to overly trust the results of certain technological applications, primarily algorithms, perceiving them as objective, impartial, and error-free.

## 4 THE ALGORITHMISATION OF DECISION-MAKING

The introduction of algorithms in decision-making, including judicial ones, seems inevitable today. The processes of algorithmisation continue in public and private spheres, despite criticism and reasonable concerns about low-predictable consequences. Algorithmisation here means the application of smart algorithms or artificial intelligence in their synonymous understanding. The definition of them, moreover, may include the following: 'machine learning (ML) and deep learning (DL) techniques, such as classification (e.g. support vector machine), transfer learning, reinforcement learning, natural language processing, and recurrent neural network (e.g. long short-term memory)'.[26]

According to Gloria Phillips-Wren, and Lakhmi Jain, AI 'is being used in decision support for tasks such as aiding the decision maker to select actions in real-time and stressful decision problems; reducing information overload, enabling up-to-date information, and providing a dynamic response with intelligent agents; enabling communication required for collaborative decisions; and dealing with uncertainty in decision problems'.[27] Algorithms are therefore becoming an increasingly necessary part of decision-making. This leads to some decisions being completely automated, and in many other cases, we are increasingly relying on the prompts offered by AI. This happens in both the private and public spheres regarding the results of information searches sorted by algorithms, as well as in relation to the data processed by them and shown in a form convenient for perception.

Remarkably, people tend to perceive algorithmic decisions as more reliable compared to human ones. This perceived reliability is achieved by making algorithmic decisions seem factual, more unbiased, and freer from any outside influences. In addition, they are impersonal because a specific person, official, or judge, who voices and personifies the decision often does not stand behind the voiced decision in the case of AI.

In this sense, smart algorithms seem to be both depersonalised and collective systems. One of the studies that propose to replace individual decision-making systems with collective ones, based on pooling, emphasises that 'pooling independent opinions will often be more reliable and predictable than betting on an individual expert, thus promoting actual and perceived fairness'.[28] In addition, such systems as 'more reliable and predictable – due to lower outcome variation – are typically also perceived as more trustworthy'.[29] Therefore, it often seems that in AI systems, we can avoid the errors inherent in one person or group and, at the same time, we can have trustworthy algorithmic help.

26 S Lanagan, KKR Choo, 'On the need for AI to triage encrypted data containers in U.S. law enforcement applications' (2021) 38 Forensic Science International: Digital Investigation 301217. doi:10.1016/j.fsidi.2021.301217.

27 G Phillips-Wren, L Jain, 'Artificial Intelligence for Decision Making' in B Gabrys, RJ Howlett, LC Jain (eds), Knowledge-Based Intelligent Information and Engineering Systems (KES 2006, Lecture Notes in Computer Science, 4252, Springer) 532.

28 R Kurvers et al, 'Pooling decisions decreases variation in response bias and accuracy' (2021) 24 iScience 102740.

29 Ibid.

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There are many expected benefits of implementing algorithms in decision-making other than reliability. Considering AI systems in the judiciary, Paweł Marcin Nowotko writes that their introduction 'is certainly advocated by factors such as shortening the time of examination of court cases, reduced court costs or the fact that when it comes to analytical capabilities such systems exceed perceptive skills of even the best of judges'.[30] An important advantage would be 'the gain in procedural speed with AI'.[31] The algorithms seem to be able to significantly improve other processes that are important for subsequent decision-making by judges. In particular, Maria Noriega argues that 'applying artificial intelligence within the interrogation room may minimize the two-fold bias occurring in the dynamic'.[32] She writes that the potential use of AI here may be due to programmable similarity since a smart algorithm can imitate racial, ethnic, and cultural similarities with the suspect.

On the other hand, there are many legitimate concerns about the deployment of AI in decision-making. This includes, for example, some concerns 'about the legality of digital evidence or machine-generated conclusions, particularly given that these decisions can differ for the same scientific evidence, just as they do with human experts'.[33] This is also reflected in concerns of a different kind, which 'is beyond the level of "access" to justice and is inherently relevant to the quality of judicial services. Essentially, the question is whether the use of artificial intelligence technology and algorithms in court systems could produce "just" outcomes'.[34] In other words, will the outcomes of algorithmic decision-making be fairer or at least as fair as those made by human judges?

The problems that arise here can be described as (1) those that arise from the need to interpret the law and (2) the problems of explaining the decisions made on the basis of law, especially in the motivational parts. In a broader sense, the question arises as to whether justice can be automated.

Kieron O'Hara sees law as a hermeneutic practice since 'rather than being of this categorical form, law is written, either as legislation or judgments, to be interpreted in a specific legal context'.[35] While the interpretation of law given by judges differs across legal systems and is not always what everyone agrees on, AI is not a good substitute here. The ability of algorithms to interpret law is more than questionable as such. The interpretation of the law is not mechanical work and is not something that can be programmed for the endless series of cases that the courts face. Indeed, there are simple cases, and there are those that can be grouped into typical cases. However, the variability in life cases and individual circumstances is higher than the variability that is acceptable for a working algorithm. In addition, the interpretation of law is based not only on data that can be fed to a smart algorithm but also on the experience and, to some extent, on the intuition of judges.

30 PM Nowotko, 'AI in judicial application of law and the right to a court' (2021) 192 Procedia Computer Science 2227.

31 WG de Sousa et al, 'Artificial intelligence and speedy trial in the judiciary: Myth, reality or need? A case study in the Brazilian Supreme Court (STF)' (2022) 39 Government Information Quarterly 101660.

32 M Noriega, 'The application of artificial intelligence in police interrogations: An analysis addressing the proposed effect AI has on racial and gender bias, cooperation, and false confessions' (2020) 117 Futures 102510.

33 AA Solanke, 'Explainable digital forensics AI: Towards mitigating distrust in AI-based digital forensics analysis using interpretable models' (2022) 42 Forensic Science International: Digital Investigation 301403.

34 T Sourdin, B Li, DM McNamara, 'Court innovations and access to justice in times of crisis' (2020) 9 Health Policy and Technology 451.

35 K O'Hara, 'Explainable AI and the philosophy and practice of explanation' (2020) 39 Computer Law & Security Review 105474.

As Katie Atkinson, Trevor Bench-Capon, and Danushka Bollegala rightly point out: 'Justice must not only be done, but must be seen to be done, and, without an explanation, the required transparency is missing. Therefore, explanation is essential for any legal application that is to be used in a practical setting'.[36] The ability of algorithms to explain the decision is also questionable. Particularly, there is a difference between the descriptive part and the reasoning part of a court decision. AI seems to be able to describe the solution but not to motivate. In other words, although, in most cases, we can follow how the algorithm arrives at a particular solution, it is not clear why it arrives at that solution.

Considering unintended AI influence, Laura Crompton writes that 'the influence AI can have on human agents, results in the inability to draw important lines between the point where human 'processing' ends, and AI processing starts. If we can't determine who or what makes a decision, how can we ascribe responsibilities for the respective action?'[37] The impossibility of drawing a line between the human and algorithmic in decision-making is one of the significant shortcomings of algorithmisation, including in relation to judicial decisions. Another serious problem arising from this is the growing inability to determine who should be responsible for the decision. This, in turn, leads to a blurring of the concept of responsibility and ultimately affects the rule of law.

Further, context is important for decision-making. This can be a weakness affecting the independence of judges when it comes to political contexts, for example. However, this can be the strength of human decisions, the one that allows us to maintain justice in its deepest sense. Sandra Wachter, Brent Mittelstadt, and Chris Russell rightly doubt that fairness and contextual equality can be automated. They write that 'even if standard metrics and thresholds were to emerge in European jurisprudence, problems remain. Cases have historically been brought against actions and policies that are potentially discriminatory in an intuitive or obvious sense. Compared to human decision-making, algorithms are not similarly intuitive'.[38] The example of discrimination cases is also very illustrative because they must be felt to some extent in order to make a truly fair decision. In addition, in discriminatory cases, especially in relation to some types of discrimination, judges should understand social practices, stereotypes, and the reasons for such practices.

To sum up, it can be assumed in judicial decision-making, unlimited algorithmisation is unacceptable. Given that algorithms have firmly entered the private and public spheres of life, it is hardly worth considering abandoning them to prevent problems in decision-making. At the same time, the practice of making judicial decisions should remain such that it meets the standards of fairness in formal, procedural, and substantive terms.

## 5 CONCLUSIONS

Digitalisation affects every aspect of people's lives and societies today, and in this regard, the rule of law does not remain unaffected. Despite conflicting opinions about whether the implications of digitalisation for the rule of law are rather positive or rather negative, there are some threats that cannot be ignored. The potential weakening of the rule of law can be associated both with the impact of technologies itself, due to which the negative effect

36 K Atkinson, T Bench-Capon, D Bollegala, 'Explanation in AI and law: Past, present and future' (2020) 289 Artificial Intelligence 103387.

37 M Kuziemski, G Misuraca, 'AI governance in the public sector: Three tales from the frontiers of automated decision-making in democratic settings' (2020) 44 Telecommunications Policy 101976.

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of encroachments on certain values and foundations is significantly aggravated, creating an increase in populism, undermining democracy and human rights, and with the specific negative consequences of the development of some of them, especially technologies of mass surveillance.

Today, courts are increasingly forced to evaluate actions in digital spaces and the consequences of using technological tools. The courts may be at the forefront of progress today, changing some of the established legal concepts. At the same time, the need to interpret complex phenomena that require technological and ethical expertise in addition to legal expertise and to balance certain rights and interests are difficult challenges for judges. This is especially difficult because judges are also involved in digital interactions and are influenced by technologies and their owners.

Influence on judges occurs in the personal sphere, reflecting involvement in the digital environment, successful profiling, and obtaining an accurate psychological profile, which is used to build a strategy in litigation based on the vulnerabilities and characteristics of specific decision-makers. Influence on judges also occurs through a public line, which makes it possible to widely disseminate artificially created opinions about trials and manipulate public expectations regarding decisions. All this, in turn, affects the independence of judges. An additional challenge to this independence is that technologies often belong to the private sector but are perceived as neutral and infallible, and are highly predictive of court decisions. This leads to a distortion of the essence of legal certainty and a shift of trust from the courts to certain technologies and their creators.

Algorithmic decision-making raises the question of whether the results will be fairer, or at least as fair, as those handed down by human judges. The problems that arise from this include both those related to the task of interpreting the law and those involving the need to explain decisions. The apparent reliability of algorithmic results is achieved due to the fact that they are perceived as based on facts, more impartial, impersonal, and free from external influences. However, we should not rely entirely on algorithms in the courts, as their ability to interpret the law and provide proper explanations for decisions is questionable. Besides, they lack an understanding of context, intuition, and social practices. Partial reliance on algorithms should also be used with caution, given the growing inability to draw a line between the human and algorithmic roles in decision-making and determine who should be responsible for the decision and to what extent.

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Research Article

# NE BIS IN IDEM AS A MODERN GUARANTEE IN CRIMINAL PROCEEDINGS IN EUROPE

***Libor Klimek***

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This publication contains some results of research that has previously appeared in the following of my publications, which were substantively updated: L Klimek, *European Arrest Warrant* (Springer Cham 2015) <https://doi.org/10.1007/978-3-319-07338-5>; L Klimek, *Mutual Recognition of Judicial Decisions in European Criminal Law* (Springer Cham 2017) <https://doi.org/10.1007/978-3-319-44377-5>; L Klimek, 'Transnational application of the Ne bis idem principle in Europe' (2011) 5(3) Notitiae ex Academia Bratislavensi Iurisprudentiae 12-33; L Klimek, *Judikatúra Súdneho dvora Európskej únie vo veciach trestných* [transl.: Case-law of the Court of Justice of the European Union in Criminal Matters] (Wolters Kluwer 2018); L Klimek, *Judikatúra Súdneho dvora Európskej únie vo veciach zneužívania trhu a súvisiacich trestnoprávnych otázok* [transl.: Case-law of the Court of Justice of the European Union in Matters of Market Abuse and Related Criminal Issues] (Wolters Kluwer 2020).

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***Keywords:*** ne bis in idem; criminal proceedings; procedural guarantee; European context

## ABSTRACT

***Background:*** *The principle* ne bis in idem *is a traditional principle relevant to criminal proceedings in European states. While in the past, crime had a primarily national dimension, these days, it has an international dimension as well. The Europeanisation of law also occurred in criminal law, including criminal proceedings. Thus, an understanding of* ne bis in idem *as a modern guarantee involving the international dimension is needed.*

***Methods:*** *The basic sources used for the elaboration of the paper are scholarly sources (monographs, textbooks, studies, and scientific papers, etc.), legislative instruments (international agreements, etc.), and case-law (of the European Court of Human Rights and the Court of Justice of the European Union). The materials used here also include the available explanatory memorandums. The author uses traditional methods of legal scientific (jurisprudential) research – general scientific methods as well as special methods of legal science (jurisprudence). The general scientific methods used in the paper are predominantly logical methods, namely, the method of analysis, the method of synthesis, and the method of analogy, as well as the descriptive method. The descriptive method has been used to familiarise the reader with the current legal regulation of* ne bis in idem. *The method of analysis has been used as regards relevant provisions and case-law. The method of synthesis has also been used, as has the method of analogy. The special methods of legal science used here predominantly include methods belonging to a group of interpretative methods, namely, the teleological method, the systematic method, the historical method, and the comparative method. The teleological method has been used as regards the explanation of the purpose of legislative instruments. The systematic method has been used in the classification of the principle of* ne bis in idem. *The historical method has been used as regards the genesis and historical aspects of* ne bis in idem. *The comparative method has been used to examine the relationship between legislative instruments.*

***Results and Conclusions:*** *The principle of* ne bis in idem *is one of the oldest norms in western civilisation. Since the Europeanisation of law also occurred in criminal law, including criminal proceedings, the principle of* ne bis in idem *became a part of international legal documents. The Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 7, introduced a new right – the 'right not to be tried or punished twice'. In addition, the Charter of Fundamental Rights of the European Union, which is the first bill of rights developed explicitly for the EU, also introduced the principle of* ne bis in idem *as the 'right not to be tried or punished twice in criminal proceedings for the same criminal offence'. However, its understanding in the Charter has no additional significance. In principle, it is the same. Despite the fact the primary purpose of the Convention implementing the Schengen Agreement is to facilitate the free movement of persons between member states of the EU by removing internal border controls, several measures have been introduced which focus on police and judicial co-operation, including the principle of* ne bis in idem, *in the provision entitled 'Application of the* ne bis in idem *principle'. This provision is considered the most developed expression of an internationally applicable* ne bis in idem. Ne bis in idem *also occurs in extradition proceedings and surrender proceedings. Its operation under the European Convention on Extradition prevents the double prosecution of the same person for the same offence in different jurisdictions. As regards the new procedural system introduced by the Framework Decision 2002/584/JHA on the European arrest warrant, based on the surrender proceedings as a special kind of criminal proceedings, there is no absolute obligation to execute the European arrest warrant. The Framework Decision, in its core text, includes grounds for non-execution of the arrest warrant in the executing state – and one of them is the principle of* ne bis in idem.

## 1 INTRODUCTION TO NE BIS IN IDEM IN CRIMINAL PROCEEDINGS

The principle known by the Latin maxim *ne bis in idem* or *non bis in idem* (in common law jurisdictions, *double jeopardy*[1]), which means 'not the same thing twice', implies that a person cannot be sentenced or prosecuted twice in respect of the same act (criminal offence). When society has exercised its legitimate right to punish the perpetrator for an act contrary to its rules, it has exhausted its right to prosecute him/her. That principle is therefore inseparable from the principle of *res judicata* and is intended to provide a convicted person with a guarantee that, when s(he) has served a sentence and 'paid his/her debt' to society, s(he) can regain his/her place in the society without fear of renewed prosecution.[2]

The principle of *ne bis in idem* is one of the oldest recognised norms in western civilisation, drawing its traditional origins from European culture. For example, in *Nahum*, an Old Testament book, we see a passage stating that 'affliction shall not rise up the second time'.[3] As regards Roman law, we can turn to the *Digest of Justinian* (hereinafter – the *Digest*), part of the *Corpus Iuris Civilis*, which represents the compilations of Roman law[4] promulgated by the Roman emperor Justinian, containing four parts – namely (*i*) the *Institutes*, (*ii*) the *Digest*, (*iii*) Justinian's *Code*, and (*iv*) the *Novels*. As regards *ne bis in idem*, attention is mainly focused on the *Digest*, which is the principal source for attempts to reconstruct the law of classical Rome. Despite the fact that Roman law deals especially with civil law, we see in Book 48 of the *Digest* that 'the governor should not permit the same person to be again accused of a crime of which he has been acquitted'.[5] However, the understanding of *ne bis in idem* in Roman law is significantly different from today's modern form.[6]

Although the principle of *ne bis in idem* did not carry the same legal significance then as it does today, its historical significance can be found in its effect on criminal proceedings. These days, most civilised nations recognise it. Although different states may have their own reasons for adopting it, the rationale for supporting it generally falls into two categories: first, a human rights oriented rationale and, second, a pragmatic rationale. The human rights rationale reflects concerns over the individual, and the pragmatic rationale concerns the impact of multiple prosecutions on judicial systems.[7]

During recent decades, the principle of *ne bis in idem* has – in European states – become a part of their constitutions as well as their criminal law systems. For instance, according to the German Constitution[8] (Basic Law), 'no person may be punished for the same act more than

1 See, for example: GP Fletcher, *Basic Concepts of Criminal Law (Oxford University Press 1998); GC Thomas, Double Jeopardy: The History, The Law* (New York University Press 1998).

2 Case No C-261/09 – *Criminal proceedings against Gaetano Mantello,* Court of Justice of the European Union – Opinion of Advocate General Yves Bot of 7 September 2010 <www.curia.europa.eu/juris/document/document.jsf?text=&docid=78746&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=311319> accessed 15 July 2022.

3 Nahum 1:9.

4 M Turošík, *Roman Law* (Matej Bel University in Banská Bystrica, 2013) 66.

5 Digest of Justinian, Book XLVIII (48). English translation: SP Scott, *The Civil Law: Including the Twelve Tables, the Institutes of Gaius, the Rules of Ulpian, the Opinions of Paulus, the Enactments of Justinian, and the Constitutions of Leo* (Central Trust 1932, Vol. 11) 17 (reprinted by The Lawbook Exchange, 2001).

6 DS Rudstein, *Double Jeopardy: A Reference Guide to the United States Constitution* (Greenwood Publishing Group 2004) 3.

7 L Sure, 'The Practical Applications of Ne Bis in Idem in International Criminal Law', in Y Sienho (ed), *International Crime and Punishment: Selected Issues, Vol. 2* (University Press of America 2004) 172.

8 The Basic Law for the Federal Republic of Germany 'Grundgesetz für die Bundesrepublik Deutschland' of 8 May 1949 (as amended by later legislation) <www.gesetze-im-internet.de/gg/BJNR000010949.html> accessed 1 September 2022.

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once under the general criminal laws'.[9] The Slovak Republic the Constitution[10] establishes this principle by stipulating that 'no one shall be made criminally liable for an act for which s(he) has already been sentenced or of which s(he) has already been acquitted in a legally valid manner'.[11]

## 2 THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS: THE FIRST STEP TOWARDS THE EUROPEANISATION OF NE BIS IN IDEM IN ALL TYPES OF PROCEEDINGS

The Convention for the Protection of Human Rights and Fundamental Freedoms[12] (hereinafter – the Convention or ECHR), adopted in 1950 by the Council of Europe, is the most important source of human rights in Europe. Although the text of the Convention was inescapably a historic compromise, it represented a clear victory for the affirmation of certain human rights, as opposed to rights-scepticism, and for the non-integrationist conception of post-war Europe. The Convention was signed two years later as the Universal Declaration of Human Rights.[13] Yet unlike the Universal Declaration, the Convention had the advantage of creating an international mechanism for the enforcement of the rights it guarantees.[14]

The ECHR includes a number of rights, and its protocols have introduced further rights. Protocol No. 7 to the ECHR[15] of 1984 introduced a new right – the 'right not to be tried or punished twice' – which reads 'no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State'.[16] The words 'under the jurisdiction of the same State' limit the application of the cited provision of the Protocol to the national level. It should not be overlooked that the rule established by this provision is applicable only after the person has been acquitted or convicted in accordance with the law and criminal proceedings of the state concerned. There must be a final decision resulting from criminal proceedings. Even so, the provision of Protocol No. 7 to the ECHR does not prevent a reopening of the proceedings in favour of the convicted person and any other changing of the judgment to the benefit of the convicted

9 Art. 103(3) of Basic Law for the Federal Republic of Germany; in original language – *'[n]iemand darf wegen derselben Tat auf Grund der allgemeinen Strafgesetze mehrmals bestraft werden'*. For details, see, for example: M Sachs *Grundgesetz: Kommentar* (9th edn, CH Beck 2021).

10 The Constitution of the Slovak Republic No 460/1992 Coll. 'Ústava Slovenskej republiky č. 460/1992 Zb.' of 1 September 1992 (as amended by later legislation) <www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/20210101> accessed 1 October 2022.

11 Art. 50(5) of the Constitution of the Slovak Republic; in original language – *'[n]ikoho nemožno trestne stíhať za čin, za ktorý bol už právoplatne odsúdený alebo oslobodený spod obžaloby'*. For details, see, for example: J Drgonec 'Ústava Slovenskej republiky: Komentár' (2nd edn, CH Beck 2019).

12 The Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 <www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=005> accessed 17 September 2022.

13 The Universal Declaration of Human Rights of 10 December 1948 <www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 17 September 2022.

14 MB Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge University Press 2006) 20.

15 The Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 22 November 1984 <www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=117> accessed 17 September 2022. For details, see, for example: WA Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015).

16 Art. 4 of the Protocol No. 7 to the Convention.

person.[17]

In the case of *Gradinger v. Austria*,[18] adopted by the European Court of Human Rights (hereinafter – the ECtHR), the question arose as to whether the 'offence' the applicant was tried and sanctioned for by the criminal court – causing death by negligence, while driving a car – concerned the same 'offence' as his subsequent conviction for driving under the influence of alcohol by the administrative authorities. The former offence constituted a violation of the Criminal Code (criminal law act), and the latter came under the Road Traffic Act (administrative law act). The relevant provisions differed with regard to their nature and purpose. Nevertheless, the ECtHR reached the conclusion that Art. 4 of Protocol No. 7 to the ECHR did apply and therefore was violated. It appeared to be crucial in the court's view that the decision of the criminal court under the Criminal Code and the decision of the administrative authorities under the Road Traffic Act were based on the same conduct.[19] Thus, the ECtHR adopted a broad interpretation of *ne bis in idem*.

On the other hand, in the case of *Oliveira v. Switzerland*,[20] the ECtHR adopted a narrow interpretation of *ne bis in idem*. In that case, the defendant seriously injured another motorist in a traffic accident, and due to an administrative error, the defendant's case was tried in a court of limited jurisdiction. Although in the proceedings, the court fined her for failing to control her vehicle, it did not have the jurisdiction to punish her for the more serious charge of negligently inflicting physical injury. After her conviction, the defendant was fined for the more serious offence. The ECtHR upheld the subsequent conviction stating that this was a typical example of a single act constituting various offences; according to the Court, a characteristic feature of this notion is that a single criminal act is split up into two separate offences, in this case, the failure to control the vehicle and the negligent causing of physical injury. In such cases, the greater penalty will usually absorb the lesser one. There is nothing in that situation that infringed Art. 4 of Protocol No. 7 to the ECHR since that provision prohibits people from being tried twice for the same offence, whereas in cases concerning a single act constituting various offences, one criminal act constitutes two separate offences. Thus, the Court adopted the narrow view that individuals could be re-prosecuted for the same conduct, provided that they were charged with two separate criminal offences.

## 3 THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION: A STEP FORWARD OR A 'COPY' OF THE CONVENTION?

The Charter of Fundamental Rights of the European Union[21] (hereinafter – the Charter) is the first bill of rights developed explicitly for the EU.[22] When it was proclaimed in 2000, the European Council believed that it could be an amalgam of rights. Since its proclamation, the

17 Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms <https://rm.coe.int/16800c96fd> accessed 17 September 2022.

18 *Gradinger v Austria* App no 15963/90 (ECtHR, 23 October 1995) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57958%22]}> accessed 17 September 2022.

19 P van Dijk, F van Hoof, A van Rijn, L Zwaak *'Theory and practice of the European Convention on Human Rights'* (5th edn, Intersentia 2017) 723.

20 *Oliveira v Switzerland* App no 25711/94 (ECtHR, 30 Julz 1998) <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-6835%22]}> accessed 17 September 2022.

21 Charter of Fundamental Rights of the European Union [2010] C 83/389.

22 O Zetterquist, 'The Charter of Fundamental Rights and the European Res Publica', in G di Federico (ed), *The EU Charter of Fundamental Rights: From Declaration to Binding Document* (Springer 2011) 3; R Funta, L Golovko, F Juriš, *Európa a európske právo* [transl.: Europe and European Law] (2nd edn, Brno 2020) 194.

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nature, value, and scope of the Charter have been thoroughly investigated. Although initially, it had no formal legal status within EU law, it had a profound influence on the institutions after it was adopted.[23] It is viewed as codifying existing rights enjoyed by European citizens. The rights enshrined in the Charter are somewhat vague but, in essence, are not new. They are invariably based on a precursor text. A wide range of rights is included, such as civil and political rights reminiscent of the ECHR.[24]

The Charter was not a formal legal instrument like the ECHR, but it was an authoritative statement of the rights considered to be fundamental in the EU. Advocates General began referring to it as a source of fundamental rights.[25] The Court of Justice of the European Union also began to refer to the Charter as a source of fundamental rights, but there has never been exclusive reliance on the Charter.[26] The approach has been continued by the Treaty on European Union.[27] It states that 'the European Union recognises the rights, freedoms and principles set out in the Charter, which shall have the same legal value as the Treaties'[28] – i.e., the Treaty on European Union and the Treaty on the functioning of the European Union.[29] With regard to this provision, the Charter became a part of the primary EU law. The change to the legal status of the Charter was followed by a prolonged battle as regards the question of whether it should be made legally binding.[30]

*Ne bis in idem*, in the provisions of the Charter, is entitled the 'right not to be tried or punished twice in criminal proceedings for the same criminal offence'. It reads that '[n]o one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the European Union in accordance with the law'.[31] As was seen, the Charter is not the first instrument recognising the principle of *ne bis in idem* at the international level. Thus, we can presume that the scope and content of the provision are identical to its understanding in Protocol No. 7 to the ECHR.[32] However, if we compare *ne bis in idem* in Protocol No. 7 to the ECHR and in the Charter, its understanding in the Charter has no additional significance.[33]

23 EU Network of Independent Experts on Fundamental Rights *'Commentary of Charter of Fundamental Rights of the European Union'* (2006) 15.

24 RKM Smith, *Textbook on International Human Rights* (7th edition, Oxford University Press 2017) 117.

25 See, for example: Case No C-540/03 – *European Parliament v Council of the European Union,* Court of Justice of the European Union – Opinion of Advocate General Juliane Kokott of 8 September 2005 <www.curia.europa.eu/juris/document/document.jsf?te xt=&docid=59709&pageIndex=0&doc lang=en&mode=req&dir=&occ=first&part=1&cid=6798836 > accessed 15 July 2022

26 D Chalmers, G Davies, G Monti, *European Union Law* (4th edn, Cambridge University Press 2019) 242.

27 Treaty on European Union as amended by the Treaty of Lisbon [2010] OJ C 83/47.

28 Art. 6(1) of the Treaty on European Union.

29 Treaty on the functioning of the European Union as amended by the Treaty of Lisbon [2010] OJ C 83/47.

30 L Klimek, 'Transnational application of the Ne bis idem principle in Europe' (2011) 5(3) Notitiae ex Academia Bratislavensi Iurisprudentiae 18.

31 Art. 50 of the Charter.

32 EU Network of Independent Experts on Fundamental Rights, *Commentary of Charter of Fundamental Rights of the European Union* (2006) 384; Draft Charter of Fundamental Rights of the European Union, CHARTE 4473/00, CONVENT 49 45.

33 L Klimek, 'Trestnoprávne záruky Charty základných práv Európskej únie: krok vpred alebo "nový obal" Dohovoru o ochrane ľudských práv a základných slobôd?' [transl.: Criminal Guaranties of the Charter of Fundamental Rights of the European Union: Step Ahead or "New Label" of the Convention for the Protection of Human Rights and Fundamental Freedoms?], in V Marková (ed) *Aktuálne otázky trestného práva v teórii a praxi,* Zborník príspevkov vedeckej konferencie na Akadémii policajného zboru v Bratislave konanej dňa 19. marca 2015 [transl.: Current Issues of Criminal Law in Theory and Practice, Proceedings of the Scientific Conference at the Academy of Police Force in Bratislava held on 19 March 2015] (Academy of Police Force in Bratislava 2015) 339-349.

It should be noted that ever prior to the Charter, the Court of Justice of the European Union had adopted a number of decisions concerning *ne bis in idem*. The first case before the Court of Justice was *Gutmann v. Commission*.[34] Mr. Gutmann, an official of the European Atomic Energy Community, was accused of charging the Community the expense of repairs for a camera belonging to him and for private telephone calls. A decision was reached to issue a reprimand, and the inquiry was terminated. After that, further inquiries were launched on the grounds of certain irregularities that had been found and a complaint that had been lodged by a head of the division without specifying whether these were new factors. The Court of Justice held that it was not sufficiently clear from the file presented to it by the Commission what precisely the first proceedings were based on and ordered the Commission to present the files in their entirety. When the Commission came forward with the files, the Court held that there were no grounds for finding that the two inquiries were based on different conduct and that there were therefore no circumstances that could justify a second inquiry. It appears from the judgment that the Court of Justice based its findings mainly on the Commission's inability to produce any convincing circumstances that could justify the second proceedings against Mr. Gutmann.[35] However, the *ne bis in idem* principle as such was hardly given any consideration.

On the other hand, the case of *Walt Wilhelm*[36] is considered a landmark judgment of the Court of Justice of the European Union. As noted by van Bockel, it played a key role in the development of the case-law on the principle of *ne bis in idem*[37] (despite the fact that it was related to the area of competition law, not criminal law). The Court of Justice faced the question of what legal consequences might result for the member states of European Communities (i.e., their former states) in the application of their national competition laws, drawing on the fact that the European Commission had already taken action in a specific case. The case concerned an agreement between a group of German undertakings, and the Bundeskartellamt had initiated proceedings under German competition law after the European Commission had done the same on that very basis. A specialised court dealing with competition cases under German law (Kammergericht Berlin) stayed proceedings in order to ask the Court of Justice whether national authorities are at liberty to 'apply to the same facts the provisions of national law' after the European Commission has initiated proceedings in the same case. Regarding the question of whether the risk of accumulation of penalties imposed 'render[ed] impossible the acceptance for one set of facts of two parallel procedures, the one Community and the other national', the Court of Justice observed that the special system of sharing jurisdiction between the Community and the member states with regard to cartels (laid down by Regulation 17/62,[38] which is still applicable) does not preclude the possibility of different proceedings, each pursuing distinct ends. However, it should be noted that these findings do not appear to build on the *ne bis in idem* principle as such.

Since the Charter is applicable, it has affected several areas of law in practice. One of the most interesting is its application as a criminal law guarantee in the area of market abuse.[39] The Court of Justice of the European Union has ruled, for example, following rulings regarding the Charter's application.

34 *Max Gutmann v Commission of the European Communities* – Case 92/82 (CoJEC, 20 October 1983) <www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61982CJ0092> accessed 17 September 2022.

35 B van Bockel, *The ne bis in idem Principle in EU Law* (Cambridge University Press 2016) 134.

36 *Walt Wilhelm and others v Bundeskartellamt* – Case 14-68 (CoJEC, 13 February 1969) <www.eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61968CJ0014> accessed 17 September 2022.

37 B van Bockel, *The ne bis in idem Principle in EU Law* (Cambridge University Press 2016) 134.

38 Council Regulation No 17: First Regulation implemented in Arts. 85 and 86 of the Treaty [1962] OJ 13.

39 L Klimek, *Judikatúra Súdneho dvora Európskej únie vo veciach zneužívania trhu a súvisiacich trestnoprávnych otázok* [transl.: Case-law of the Court of Justice of the European Union in Matters of Market Abuse and Related Criminal Issues] (Wolters Kluwer 2020).

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In the case of *Garlsson Real Estate and others*,[40] the Court of Justice ruled that Art. 50 of the Charter must be interpreted as precluding national legislation, which permits the possibility of bringing administrative proceedings against a person in respect of unlawful conduct consisting of market manipulation for which the same person has already been convicted, in so far as that conviction is, given the harm caused to the company by the offence committed, sufficient to punish that offence in an effective, proportionate, and dissuasive manner. The *ne bis in idem* principle guaranteed by Art. 50 of the Charter confers on individuals a right that is directly applicable in the context of a dispute, such as that at issue in the main proceedings.

In the joined cases of *Enzo Di Puma & Commissione Nazionale*,[41] the Court of Justice ruled that Art. 14(1) of Directive 2003/6/EC on insider dealing and market manipulation,[42] read in the light of Art. 50 of the Charter, must be interpreted as not precluding national legislation in accordance with which proceedings for an administrative fine of a criminal nature may not be brought following a final criminal judgment of acquittal ruling that the acts capable of constituting a violation of the legislation relating to insider dealing, on the basis of which those proceedings had also been initiated, were not established.

In the case of *Criminal proceedings against Luca Menci* [43] the Court of Justice ruled that Art. 50 of the Charter must be interpreted as not precluding national legislation in accordance with which criminal proceedings may be brought against a person for failing to pay the value-added tax due within the time limits stipulated by law, although that person has already been made subject, in relation to the same acts, to a final administrative penalty of criminal nature for the purposes of Art. 50 of the Charter, on the condition that that legislation: (*i*) pursues an objective of general interest which is such as to justify such duplication of proceedings and penalties, namely, combating value added tax offences, it being necessary for those proceedings and penalties to pursue additional objectives, (*ii*) contains rules ensuring co-ordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from duplication of proceedings, and (*iii*) provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned. It is for the national court to ensure, considering all the circumstances in the main proceedings, that the actual disadvantage resulting for the person concerned from the application of the national legislation at issue in the main proceedings and from the duplication of the proceedings and penalties that that legislation authorises is not excessive in relation to the seriousness of the offence committed.

In the case of ***Åklagaren v Hans Åkerberg Fransson***,[44] the Court of Justice ruled that the *ne bis in idem* principle laid down in Art. 50 of the Charter does not preclude a member state

40 *Garlsson Real Estate SA, in liquidation, Stefano Ricucci, Magiste International SA versus Commissione Nazionale per le Società e la Borsa (Consob)* – Case C-537/16 (CoJEU, 20 March 2018) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=200402&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=147102> accessed 20 September 2022.

41 *Enzo Di Puma versus Commissione Nazionale per le Società e la Borsa (Consob) (C-596/16), and Commissione Nazionale per le Società e la Borsa (Consob) versus Antonio Zecca (C-597/16)* – Joined Cases C-596/1 and C-597/16 (CoJEU, 20 March 2018) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=200401&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=148942> accessed 20 September 2022.

42 The Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation [2003] OJ L 96/16. The Directive was replaced and repealed by Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) [2014] OJ L 173/1.

43 *Criminal proceedings against Luca Menci* – Case C-524/15X (CoJEU, 20 March 2018) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=200404&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=150673> accessed 20 September 2022.

44 *Åklagaren v Hans Åkerberg Fransson* – Case C-617/10 (CoJEU, 26 February 2013) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=134202&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=152785> accessed 20 September 2022.

of the EU from imposing successively, for the same acts of non-compliance with declaration obligations in the field of value-added tax, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine. EU law does not govern the relations between the ECHR and the legal systems of the member states, nor does it determine the conclusions to be drawn by a national court in the event of a conflict between the rights guaranteed by that Convention and a rule of national law. EU law precludes a judicial practice that makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case-law relating to it since it withholds from the national court the power to assess, with, as the case may be, the co-operation of the Court of Justice, whether that provision is compatible with the Charter.

## 4 THE CONVENTION IMPLEMENTING THE SCHENGEN AGREEMENT: THE RECOGNITION OF NE BIS IN IDEM AT INTER-STATE LEVEL

In 1984, Germany and France reached an agreement in which they expressed their intention to slowly proceed to the abolition of checks at their common border. The Benelux Member States were allowed to join their surrounding neighbours. In 1985, the five states signed the Schengen Agreement.[45] This agreement contains a declaration of intention to abolish internal border controls, thus creating an experimental garden for the co-operation between the ten members of the European Community counted at that moment. Later, in 1990, these intentions were elaborated in what was to become the Convention implementing the Schengen Agreement.[46]

Despite the fact the primary purpose of the Convention implementing the Schengen Agreement is to facilitate the free movement of persons between member states of the EU by removing internal border controls, several measures have been introduced that focus on police and judicial co-operation. These measures were introduced to address concerns relating to crime and public security arising from the relaxation of border controls.[47] The Convention implementing the Schengen Agreement has been described as a landmark in the history of the regulation of international police co-operation in Western Europe.[48] In 1997, the Treaty of Amsterdam[49] formally integrated the Schengen *acquis* into the EU framework. These days, the substance of the Schengen Agreement is incorporated into the Treaty on the functioning of the European Union.[50]

As far as international co-operation in criminal matters is concerned, the Convention implementing the Schengen Agreement again enacted the principle of *ne bis in idem* in Arts. 54-58 – entitled 'Application of the *ne bis in idem* principle'. Its enactment in this Convention

45 The Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/13.

46 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/19.

47 I Bantekas, S Nash, *International Criminal Law* (2nd edn, Cavendish Publishing 2003) 236-237.

48 C Fijnaut, 'The Schengen Treaties and European Police Co-operation' (1993) 1(1) European Journal of Crime, Criminal Law and Criminal Justice 37.

49 Treaty of Amsterdam [1997] OJ C 340/1.

50 Art. 77(1)(a) of the Treaty on the functioning of the European Union stipulates that the European Union shall develop a policy with a view to ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders.

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was a landmark as regards multilateral international *ne bis in idem* based on international agreements. The Convention implementing the Schengen Agreement recognises it at the inter-state level.[51]

The key provision is Art. 54 of the Convention implementing the Schengen Agreement. It stipulates that 'a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party'. This provision of the Convention implementing the Schengen Agreement is considered the most advanced version of *ne bis in idem* at the international level and is applicable in Europe.[52] Its wide interpretation led member states of the EU to recognise not only each other's judicial decisions but also each other's criminal proceedings.[53] As a consequence, as noted by the Court of Justice of the European Union, the application of *ne bis in idem* supposes that the member states of the EU have mutual trust in their national criminal justice systems.[54]

Art. 54 of the Convention implementing the Schengen Agreement does not apply to multiple prosecutions in one state but is applicable only to a second prosecution in another Schengen state. The question is whether this provision could also apply in respect of administrative law proceedings. At first glance, the answer to this question would be negative. This legal provision was designed for criminal law purposes. The intended scope of its application is therefore restricted to the sphere of criminal law. On the other hand, in many member states of the EU, administrative law plays an important role in penalising certain types of conduct. It is conceivable that in one member state, certain types of acts are a matter of criminal law, whereas, in another state, the same acts fall under administrative law or both. Such differences on the national level could partially undermine the protection offered by Art. 54 of the Convention implementing the Schengen Agreement.[55] Moreover, Art. 54 of the Convention implementing the Schengen Agreement does not apply in respect of: (*i*) crimes committed in whole or in part in the territory of the second state to initiate the prosecution, (*ii*) crimes affecting 'essential interests' of state, and (*iii*) crimes that have been committed by the officials of the (second) state in the exercise of their duties.[56]

Regarding the application of the *ne bis in idem* principle in the perception of the Convention implementing the Schengen Agreement, application problems had to be resolved by the Court of Justice of the European Union. These were mainly answers to preliminary questions from the states participating in Schengen co-operation. The most fundamental application controversies are presented in the following sections.[57]

One of the application problems of the *ne bis in idem* principle is the temporal validity of the Convention implementing the Schengen Agreement. In the case of *Van Esbroeck*,[58] the Court of Justice ruled that the *ne bis in idem* principle must be applied to criminal proceedings

51 G Conway, *'Ne Bis in Idem in International Law'* (2003) 3 International Criminal Law Review 221.

52 B van Bockel, *The ne bis in idem Principle in EU Law* (Cambridge University Press 2016) 68.

53 D Chalmers, G Davies, G Monti, *European Union Law* (4th edn, Cambridge University Press 2019) 615.

54 *Hüseyin Gözütok and Klaus Brügge* – Joined Cases C-187/01 and C-385/01 (CoJEC, 11 February 2003) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=48044&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=6815758> accessed 17 September 2022.

55 B van Bockel, *The ne bis in idem Principle in EU Law* (Cambridge University Press 2016) 25.

56 Art. 55 of Convention implementing the Schengen Agreement.

57 L Klimek, *Judikatúra Súdneho dvora Európskej únie vo veciach trestných* [transl.: Case-law of the Court of Justice of the European Union in Criminal Matters] (Wolters Kluwer 2018).

58 *Leopold Henri Van Esbroeck* – Case C-436/04 (CoJEU, 9 March 2006) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=57331&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=162686> accessed 20 September 2022.

brought in a contracting state for acts for which a person has already been convicted in another contracting state even though the Convention was not yet in force in the latter state at the time at which that person was convicted, in so far as the Convention was in force in the contracting states in question at the time of the assessment of the conditions of applicability of the *ne bis in idem* principle by the court before which the second proceedings were brought. Art. 54 of the Convention must be interpreted as meaning that: (*i*) the relevant criterion for the purposes of the application of that article is the identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected; (*ii*) punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different contracting states to the Convention are, in principle, to be regarded as 'the same acts' for the purposes of Art. 54, the definitive assessment in that respect being the task of the competent national courts.

In the case of *Van Straaten*,[59] the Court of Justice ruled that Art. 54 of the Convention implementing the Schengen Agreement must be interpreted further as meaning: (*i*) the relevant criterion for the purposes of the application of that article is the identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected; (*ii*) in the case of offences relating to narcotic drugs, the quantities of the drug that are at issue in the two contracting states concerned or the persons alleged to have been party to the acts in the two states are not required to be identical; (*iii*) punishable acts consisting of exporting and of importing the same narcotic drugs and which are prosecuted in different contracting states party to that Convention are, in principle, to be regarded as 'the same acts' for the purposes of Art. 54 of the Convention, the definitive assessment in that respect being the task of the competent national courts. The *ne bis in idem* principle fails to be applied in respect of a decision of the judicial authorities of a contracting state by which the accused is acquitted for lack of evidence.

In the case of *Gaspariny and others*,[60] the Court of Justice focused on criminal prosecution for an offence that is time-barred. It ruled that the *ne bis in idem* principle applies in respect of a decision of a court of a contracting state made after criminal proceedings have been brought, by which the accused is acquitted finally because prosecution of the offence is time-barred. That principle does not apply to persons other than those whose trial has been disposed of in a contracting state. A criminal court of a contracting state cannot hold goods to be in free circulation in national territory solely because a criminal court of another contracting state has found, in relation to the same goods, that prosecution for the offence of smuggling is time-barred. The marketing of goods in another member state constitutes conduct which may form part of the 'same acts' within the meaning of Art. 54 of the Convention after their importation into the member state, where the accused was acquitted.

In the case of *Bourquain*,[61] the Court of Justice ruled that the *ne bis in idem* principle is applicable to criminal proceedings instituted in a contracting state against an accused whose trial for the same acts as those for which he faces prosecution was finally disposed of in

59 *Jean Leon Van Straaten versus Staat der Nederlanden* – Case C-150/05 (CoJEU, 28 September 2006) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=65194&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=164152> accessed 20 September 2022.

60 *Giuseppe Francesco Gasparini and others* – Case C-467/04 (CoJEC, 28 September 2006) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=65199&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=166750> accessed 20 September 2022.

61 *Criminal proceedings against Klaus Bourquain* – Case C-297/07 (CoJEC, 11 December 2008) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=75793&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=167704> accessed 20 September 2022.

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another contracting state, even though under the law of the state in which he was convicted, the sentence which was imposed on him could never have been directly enforced on account of specific features of procedure such as those referred to in the main proceedings.

In the joined cases of *Gözütok & Brügge*,[62] the consideration focused on the decision of the prosecutor. The Court of Justice ruled that the *ne bis in idem* principle also applies to procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by which the Public Prosecutor of a member state discontinues criminal proceedings brought in that state, without the involvement of a court, once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor.

The Court of Justice of the European Union faced the question of whether Art. 54 of the Convention implementing the Schengen Agreement should be applied when the decision of a court in the first state consists of discontinuing the prosecution without any adjudication on the merits of the case and on the sole ground that proceedings have already been initiated in another state. In the case of *Miraglia*,[63] the Court of Justice answered in the negative. It decided that the principle of *ne bis in idem* does not fail to be applied to a decision of the judicial authorities of one member state declaring a case to be closed after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another member state against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case.

In the case of *Turanský*,[64] the Court of Justice ruled that the *ne bis in idem* principle does not fail to be applied to a decision by which an authority of a contracting state, after examining the merits of the case brought before it, makes an order, at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings, where the suspension decision does not, under the national law of that state, definitively bar further prosecution and therefore does not preclude new criminal proceedings in that state in respect of the same acts.

Some difficulties in interpreting Art. 54 of the Convention arise out of the inherent complexity of the *ne bis in idem* principle generally; others are caused by the differences that exist between the systems of the criminal law of the Schengen states and therefore arise specifically in the context of the transnational application of the provision. Another issue is that the Convention does not provide for a mechanism for the resolution of positive conflicts of jurisdiction. For these reasons, *inter alia*, several initiatives have been brought. They aimed to strengthen the application of the *ne bis in idem* principle within the EU. In the Mutual Recognition Programme,[65] the *ne bis in idem* principle is included among the immediate priorities of the EU, in particular as regards final criminal judgments delivered by a court in another member state. Measure No. 1 of that programme recommends a reconsideration of Arts. 54-57 of the Convention implementing the Schengen Agreement.

62 *Hüseyin Gözütok and Klaus Brügge* – Joined Cases C-187/01 and C-385/01 (CoJEC, 11 February 2003) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=48044&pageIndex=0&doclang=en&mode=r eq&dir=&occ=first&part=1&cid=6815758> accessed 17 September 2022.

63 *Filomeno Mario Miraglia* – Case C-469/03 (CoJEC, 10 March 2005) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=54088&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=6816494> accessed 17 September 2022.

64 *Criminal proceedings against Vladimir Turanský* – Case C-491/07 (CoJEC, 22 December 2008) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=73224&pageIndex=0&doclang=en&mode=req&dir=&occ=first& part=1&cid=165537> accessed 20 September 2022.

65 Programme of measures to implement the principle of mutual recognition of decisions in criminal matters [2001] OJ C 12/10.

In 2003, was introduced a Draft Framework Decision on the application of the *ne bis in idem* principle.[66] It was introduced with the intention to replace and repeal relevant articles of the Convention. However, the proposed draft was not successful and has never been adopted.

## 5 THE EUROPEAN CONVENTION ON EXTRADITION: NE BIS IN IDEM IN THE TRADITIONAL SCHEME ON EXTRADITION

The basic multilateral treaty in Europe regulating extradition is the European Convention on Extradition[67] of 1957 and its additional protocols,[68] which represent a traditional scheme of extradition. It is the oldest of the conventions relating to penal matters prepared within the Council of Europe.

Extradition is normally subject to strict requirements. The principle of double criminality and the rule of speciality apply, and the offences must also be extraditable. The requested state may deny extradition with reference to the principle of *ne bis in idem*.[69] Its application points to the potential for an international rule.[70] As regards extradition proceedings, it is intended to prevent an individual from being prosecuted for the same offence in different states.[71] The European Convention on Extradition stipulates that '[e]xtradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences'.[72] As far as the word 'final' is concerned, this requires that all types of appeal have been exhausted.[73]

It should be noted that besides the European Convention on Extradition, other legislative documents have been adopted in the area of extradition that lay down *ne bis in idem* in a similar manner. It can be observed, for example, in the Agreement on the Simplification of Extradition of 1989, in the Convention on Simplified Extradition[74] of 1995, and in the Convention on Extradition in the European Union[75] of 1996.

66 Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the 'ne bis in idem' principle [2003] OJ C 100/24.

67 The European Convention on Extradition of 13 December 1957 <www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=024> accessed 19 September 2022.

68 The Additional Protocol to the European Convention on Extradition of 15 October 1975 <www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=086> accessed 19 September 2022; the Second Additional Protocol to the European Convention on Extradition of 17 March 1978 <www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=098> accessed 19 September 2022; the Third Additional Protocol to the European Convention on Extradition of 10 November 2010 <www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=209> accessed 19 September 2022.

69 R Cryer, H Friman, D Robinson, E Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2nd edn, Cambridge University Press 2010) 93.

70 G Conway, *'Ne Bis in Idem in International Law'* (2003) 3 International Criminal Law Review 243.

71 G Biehler, 'Procedures in International Law' (Springer 2008) 255.

72 Art. 9 of the European Convention on Extradition.

73 Explanatory report to the European Convention on Extradition.

74 Convention drawn up on the Basis of Art. K.3 of the Treaty on European Union on a simplified extradition Procedure between the Member States of the European Union [1995] OJ C 78.

75 Convention of 27 September 1995 drawn up on the Basis of Art. K.3 of the Treaty on European Union, relating to extradition between the Member States of the European Union [1996] OJ C 313.

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## 6 LEGISLATIVE INSTRUMENTS IN THE FIELD OF MUTUAL RECOGNITION OF JUDICIAL DECISIONS IN CRIMINAL PROCEEDINGS: NE BIS IN IDEM IN THE MODERN SCHEME OF CO-OPERATION IN CRIMINAL MATTERS

The scope of the *ne bis in idem* application is almost unlimited, and the EU legislators have adopted many legislative measures concerning this principle. An area of particular importance is the mutual recognition of judicial decisions in criminal proceedings.[76] Legislative measures regulating special mutual recognition measures include the *ne bis in idem* principle.

Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between member states[77] (hereinafter – Framework Decision 2002/584/JHA or the Framework Decision) obliges member states to execute the European arrest warrant on the basis of the principle of mutual recognition of judicial decisions. By providing for the automatic recognition of arrest warrants issued in member states of the EU, the Framework Decision uses surrender proceedings, which replaced and repealed extradition proceedings within the member states of the EU in proceedings focused on faster extradition, i.e., faster surrender of requested persons.[78] Probably the most important difference between the traditional proceedings of extradition before Framework Decision 2002/584/JHA is that there are now limited grounds that are applicable in case of surrender refusal. As noted, the Court of Justice of the European Union's confidence and trust in the judicial processes applied in other member states led to a presumption in favour of surrender.[79]

The system established by Framework Decision 2002/584/JHA is based on the principle of mutual recognition; it does not mean that there is an absolute obligation to execute each European arrest warrant.[80] The Framework Decision, in its core text, includes two sets of grounds for non-execution of the European arrest warrant.

First, Framework Decision 2002/584/JHA provides mandatory grounds for non-execution of the European arrest warrant. It stipulates that the 'executing judicial authority shall refuse to execute the European arrest warrant […] if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State'.[81] This provision is an expression of *ne bis in idem* as mandatory grounds for the non-execution of the European arrest warrant.

76 See, for example: L Klimek, *Mutual Recognition of Judicial Decisions in European Criminal Law* (Springer 2017).

77 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.

78 N Vennemann, 'The European Arrest Warrant and Its Human Rights Implications' (2003) 63 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 103.

79 A Łazowski, S Nash, 'Detention', in N Keijyer, E van Sliedregt (eds) *The European Arrest Warrant in Practice* (TMC Asser Press 2009) 40.

80 See, for example: I.B. – Case C-306/09 (CoJEU, 21 October 2010) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=83633&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=195121> accessed 20 September 2022; Melvin West – Case C-192/12 PPU (CoJEU, 28 June 2012) <www.curia.europa.u/juris/document/document.jsf?text=&docid=124464&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=195556> accessed 20 September 2022; *João Pedro Lopes Da Silva Jorge* – Case C-42/11 (CoJEU, 5 September 2012) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=126361&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=196017> accessed 20 September 2022.

81 Art. 3(2) of the Framework Decision 2002/584/JHA on the European arrest warrant.

Second, Framework Decision 2002/584/JHA provides optional grounds for non-execution of the European arrest warrant. It stipulates that the 'executing judicial authority may refuse to execute the European arrest warrant […] if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country'.[82] This provision is an expression of *ne bis in idem* as optional grounds for the non-execution of the European arrest warrant.

A number of application problems occurred, in particular, regarding the interpretation of the *ne bis in idem* in European arrest warrant proceedings. The Court of Justice of the European Union introduced case-law on their interpretation.[83]

As regards the case of *Mantello,*[84] the Court of Justice ruled that the concept of 'same acts' in Framework Decision 2002/584/JHA constitutes an autonomous concept of EU law. In circumstances such as those at issue in the main proceedings where, in response to a request for information made by the executing judicial authority, the issuing judicial authority, applying its national law and in compliance with the requirements deriving from the concept of 'same acts', expressly stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referred to in the arrest warrant issued by it and therefore did not preclude the criminal proceedings referred to in that arrest warrant, the executing judicial authority has no reason to apply the ground for mandatory non-execution provided for in the Framework Decision in connection with such a judgment.

As regards the application of Framework Decision 2002/584/JHA and the Convention implementing the Schengen Agreement, in the case of *Kretzinger*,[85] the Court of Justice ruled that the fact that a member state of the EU in which a person has been sentenced by a final and binding judgment under its national law may issue a European arrest warrant for the arrest of that person in order to enforce the sentence under Framework Decision 2002/584/JHA cannot affect the interpretation of the notion of 'enforcement' within the meaning of Art. 54 of the Convention implementing the Schengen Agreement.

A similar approach has been taken as regards other mutual recognition instruments, for example, in Framework Decision 2008/909/JHA on the mutual recognition of custodial sentences and deprivation of liberty,[86] Framework Decision 2008/947/JHA on mutual recognition of probation measures and alternative sanctions,[87] and Framework Decision 2005/214/JHA on the mutual recognition of financial penalties.[88] These instruments also

82 Art. 4(5) of the Framework Decision 2002/584/JHA on the European arrest warrant.

83 L Klimek, *Judikatúra Súdneho dvora Európskej únie v konaní o európskom zatýkacom rozkaze* [transl.: Case-law of the Court of Justice of the European Union in European Arrest Warrant Proceedings] (Wolters Kluwer 2018).

84 *Gaetano Mantello* – Case C-261/09 (CoJEU, 16 November 2010) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=84420&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=193474> accessed 20 September 2022.

85 *Criminal proceedings against Jürgen Kretzinger* – Case C-288/05 (CoJES, 18 July 2007) <www.curia.europa.eu/juris/document/document.jsf?text=&docid=62753&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=190793> accessed 20 September 2022.

86 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L 327/27.

87 Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions [2008] OJ L 337/102.

88 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [2005] OJ L 76/16.

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involve *ne bis in idem* – similar to the Framework Decision 2002/584/JHA – as a ground for the non-execution of individual mutual recognition measures.

## 7 CONCLUSIONS

The principle of *ne bis in idem* is one of the oldest recognised norms in western civilisation. During recent decades, it has – in European states – become a part of their constitutions as well as their criminal law systems. While in the past, crime had a primarily national dimension, these days, it has an international dimension. The Europeanisation of law occurred in criminal law as well, including in criminal proceedings. Consequently, the principle of *ne bis in idem* became a part of international legal documents.

The most important European legal documents on human rights define the principle of *ne bis in idem* as a human/fundamental right. The Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 7, introduced a new right – the 'Right not to be tried or punished twice'. In addition, the Charter of Fundamental Rights of the European Union, which is the first bill of rights developed explicitly for the EU, introduced the principle of *ne bis in idem* as the 'Right not to be tried or punished twice in criminal proceedings for the same criminal offence'. However, its understanding by the Charter has no additional significance. In principle, it is the same. Despite this, both the Convention and the Charter are applicable sources of *ne bis in idem* as a procedural guarantee in criminal proceedings in European states.

Even though the primary purpose of the Convention implementing the Schengen Agreement is to facilitate the free movement of persons between member states of the EU by removing internal border controls, several measures have been introduced that focus on police and judicial co-operation. As far as international co-operation in criminal matters is concerned, when the Convention implemented the Schengen Agreement, it again enacted the principle of *ne bis in idem* in Arts. 54-58, entitled 'Application of the *ne bis in idem* principle'. Its enactment in this Convention was a landmark as regards multilateral international *ne bis in idem.*

*Ne bis in idem* also occurs in extradition proceedings and surrender proceedings. Its operation under the European Convention on Extradition in the context of extradition points to the potential for a broader international rule. It is applicable to prevent an individual from being prosecuted for the same offence more than once in different jurisdictions. As regards the system established by Framework Decision 2002/584/JHA, there is no absolute obligation to execute each European arrest warrant since the principle of *ne bis in idem* can be applied. A similar approach has been chosen as regards other mutual recognition measures, for example, mutual recognition of custodial sentences, mutual recognition of probation measures and alternative sanctions, and mutual recognition of financial penalties.

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**Reform Forum's Note**

# JUDICIAL CONTROL OVER CRIMINALLY REMEDIAL MEASURES OF RESTRICTION IN KAZAKHSTAN: ANALYSIS AND EVALUATION OF A DRAFT LAW OF A NEW THREE-TIER MODEL

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***Abstract.*** *The article considers judicial and other guarantees in the selection, authorisation, and application of such criminally remedial measures of pre-trial restriction as detention (or arrest), home confinement, and bail. These limit the constitutional rights and freedoms of the suspect and are authorised by the investigating judge. The authors analyse the legislative regulation, legal statistics, and judicial authorisation of these preventive measures. They also demonstrate the ambiguous use of bail in the period before its transfer to judicial control. In order to increase its effectiveness and reduce the number of prisoners, it is proposed to separate property surety from bail and make it an independent measure of restraint, similar to the US experience regarding commercial surety, and change the current procedure for replacing detention with bail. The article deals with the issue of strengthening the control functions of the investigating judge when authorising home confinement as a preventive measure. In particular, the authors analyse the draft Law 'On amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on optimisation of criminal legislation with simultaneous correction of the Criminal Procedure and Penal Enforcement Codes' and offer their vision of further development of the norms of criminal procedure legislation of the Republic of Kazakhstan on judicial control.*

The authors propose to narrow the limits established by law for the application of various legal restrictions infringing on the rights and legitimate interests of suspects and preserve them only to the extent necessary to solve the public tasks of criminal proceedings.

***Keywords:*** *investigative judge, judicial control, restrictive measures, the enforcement of human rights and freedoms*

## 1 INTRODUCTION

Certain prerequisites for judicial control at the pre-trial stages of criminal proceedings originated in Kazakh customary law. These origins comply with trends in the development of modern criminal justice. In this regard, we need to highlight the fundamental research of Savely Lvovich Fuchs, who is a founder of the systematisation, generalisation, scientific understanding, and comparative legal analysis of the state and law of the Republic of Kazakhstan. In Chapter 5 of his book, 'Court and criminal proceedings in the 18th and first half of the 19th centuries' describing the main features of legal proceedings according to Kazakh customary law, Fuchs emphasised that it was not only courts that applied measures ensuring court appearance.[1] The measures of procedural coercion were also carried out by a special judicial envoy –c a 'yesaul'. Sent to the accused with a demand for satisfaction or to bring the latter to the court, yesauls worked together with judges ('sultans, biys'). Kazakh customary law testified to extremely wide powers of yesauls in the execution of procedural coercion. A common preventive measure of that time was 'the bailment of the accused to their fellow villagers', an analogue of the modern measure of restraint in the form of personal security.

The Kazakh customary law described by Fuchs indicates that the reasonable foundations of the administration of justice played an important role throughout the formation and development of the national criminal proceedings. In the post-Soviet criminal proceedings, the Habeas Corpus Act was introduced in relation to the mechanism for choosing measures of procedural coercion at the stage of pre-trial investigation. There is a variety of judicial approaches to the implementation of this function of judicial control. It is assigned to judges

1 SL Fuchs, Ocherki istorii gosudarstva i prava kazakhov v XVIII i pervoi polovine XIX V [Essays on the history of the Kazakh state and law in the 18th and first half of the 19th centuries] (edited by SF Udartsev, TOO 'Yuridicheskaya kniga Respubliki Kazakhstan'/OOO 'Universitetskii izdatelskii konsortsium 'Yuridicheskaya kniga' 2008).

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of general jurisdiction, specialised judges, or specialised investigative courts. Legislative regulation and investigative and judicial practice reveal institutional and legal proceedings arising from them.

In recent years, one of the important elements of judicial and legal reforms in the Republic of Kazakhstan has been the introduction of investigating judges in the format of specialised courts. Judges of the courts of the first instance should exercise judicial control over the observance of the rights, freedoms, and legitimate interests of persons in criminal proceedings. Since 2015, the successful functioning of this institution in Kazakhstan and the accumulated experience have confirmed the relevance and progressiveness of this step for the development of the criminal procedure doctrine in the context of ensuring the rights and legitimate interests of an individual. Since 2020, systematic measures taken in the country have become insufficient. These are associated with a conceptual revision of the functions of prosecutorial supervision, departmental procedural control, and judicial control at the stage of pre-trial investigation. In our opinion, their legislative implementation will entail several issues, including those that can give formalism and procedural rituality to the decisions of the investigating judge when authorising such preventive measures as detention, home confinement, and bail.

The study scientifically substantiates a set of theoretical conclusions, legislative proposals, and practical recommendations aimed at strengthening judicial control by the investigating judge to ensure the legality, validity, and motivation of procedural decisions and actions of criminal prosecution authorities when selecting measures of restraint to protect the rights and legitimate interests of persons subject to procedural coercion.

To achieve the above-mentioned objective, we solved the following tasks:

- To analyse legal statistics and generalise the application of detention, home confinement, and bail since the introduction of the institution of investigating judges authorising these preventive measures in the Republic of Kazakhstan;
- To study the legal framework for the regulation of procedures for the selection, authorisation, and application of these preventive measures, as well as substantiate proposals for their further improvement;
- To determine issues of the national law enforcement of election, judicial authorisation, and application of the preventive measures in question, as well as summarise, analyse, and propose possible ways to resolve them;
- To make legislative proposals for the implementation of international standards and principles to strengthen the guarantees of the rights and freedoms of suspects and other persons whose interests are limited by the application of the most stringent preventive measures;
- To conduct a comparative legal analysis of the Kazakh and foreign procedural and legal mechanisms of arrest, home confinement, and bail as preventive measures;
- To consider the relationship between judicial control and prosecutorial supervision in the application of detention, home confinement, and bail in the context of the implementation of a three-tier model of criminal proceedings.

## 2 THE BACKGROUND AND METHODOLOGY OF THE STUDY ON JUDICIAL CONTROL OVER PRE-TRIAL PROCEEDINGS IN CRIMINAL CASES

The fundamental scientific works on judicial control over pre-trial proceedings in criminal cases are as follows: I.Ya. Foinitsky's 'The course of criminal justice' (1910)[2] and S.L. Fuchs' doctoral dissertation 'Essays on the history of the Kazakh state and law in the 18th and first half of the 19th centuries' (1948).[3]

In the Republic of Kazakhstan, issues of judicial control were touched upon in the works of V.V. Khan,[4] S.A. Adilov,[5] K.T. Baltabaev,[6] E.I. Idirov,[7] B.H. Toleubekova,[8] etc.

At the level of PhD dissertations in the Republic of Kazakhstan, A.A. Amirgaliev conducted research on the topic 'Functions of judicial control over pre-trial criminal proceedings in the Republic of Kazakhstan'[9] and M.S. Abakasov on the topic 'Judicial control in criminal proceedings: international legal and national aspect'.[10]

It should be noted that the above-mentioned works did not affect the human rights aspect of judicial control over pre-trial proceedings – the problems of the institution of judicial control were considered by scientists from a different perspective.

The scientific novelty of the article is due to the very choice of a human rights perspective. For the first time in Kazakh legal science, the problems of ensuring the constitutional rights and freedoms of the individual by the investigating judge when applying measures of criminal procedural coercion against participants in criminal proceedings are revealed and disclosed.

To substantiate the theory of judicial control, the post-Soviet countries allow the opposition of institutional logic and human rights, which causes unjustified ideas about the high efficiency of the judicial mechanism, including when choosing measures of procedural coercion.[11] Even in countries with well-established criminal procedure systems, such as Germany, a special judicial control judge (Ermittlungsrichter) can be compared to a 'ticket inspector, letting the audience through or not, without knowing the content of the play being performed'.[12]

2 IYa Fojnickij, Kurs ugolovnogo sudoproizvodstva. [Course of criminal proceedings], Tom II. Izd. 3-e. - S-Pb.: Senatskaya tipografiya, 1910.

3 Fuchs (n 3).

4 VV Han, 'Powers of the investigating judge in the new model of the criminal process of Kazakhstan: essence and classification' (2014) 4 (41) Қазақстан Respublikasy IIM Almaty akademiyasynyң ғylymi eңbekteri 99-102.

5 SA Adilov, 'The legal status of the investigating judge in the criminal proceedings of the Republic of Kazakhstan' (Diss. …kand. yurid. nauk: 12.00.09. M., 2018).

6 KT Baltabaev, 'House arrest in criminal proceedings of the Republic of Kazakhstan' (Diss. …kand. yurid. nauk. - Karaganda, 2001).

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11 LV Golovko, 'The post-Soviet theory of judicial control in pre-trial criminal proceedings: an attempt of conceptual reconsideration' (2013) 9 Gosudarstvo i pravo 17-32.

12 LV Golovko, 'The Institute of Investigative Judges: Americanization by manipulation' <https://www.iuaj.net/node/1746> date accessed 16 Aug 2022.

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Kazakh law enforcement can change this paradigm of formal judicial control. In 2022, there will be a phased introduction of a different model that implies a 'specific' symbiosis of the functions of judicial control, prosecutorial supervision, departmental procedural control, and investigative activities.[13] The model is to coordinate the bodies of inquiry with the prosecutor in all cases of restrictions on constitutional rights and individual freedoms (the total pre-trial control of almost 50 procedural decisions and actions in criminal cases). The subsequent stages are as follows: the abolition of the procedural figure of the investigator; the adoption and procedural execution of key decisions in a criminal case by the prosecutor (on recognising a suspect and qualifying their act (similar to bringing charges); selecting preventive measures that do not require the sanction of the investigating judge (terminating the criminal case, drawing up an indictment, etc.); the initiation of a petition for the application of appropriate preventive measures by the prosecutor in relation to the investigating judge.[14]

The methodological basis of this study was the dialectical method of scientific cognition as the main method of objective and comprehensive analysis. Consequently, the research object and subject were considered not in isolation from each other but in conjunction with other legal and social phenomena within general patterns of development judicial control and measures of criminal procedural suppression. Special methods were selected based on the dialectical method of cognition.

In the course of the research, we used the following special methods: system-structural, formal-legal, and logical analysis; the expert assessment of relevant national laws and their application; the interpretation of legal norms; comparative-legal research; the constructive-critical analysis of conceptual approaches to the issues under study; the legal modelling of risks and costs related to the election of a prosecutor (the person conducting an investigation) and authorisation by the investigating judge of such preventive measures as detention, home confinement, and bail.

We were guided by the Constitution, laws and other regulatory legal acts, criminal procedure laws, resolutions of the Supreme Court, by-laws of the General Prosecutor's Office, and international legal acts generally recognised and ratified by the Republic of Kazakhstan, as well as strategic documents that determine the development of criminal justice (annual addresses of the President, concepts of legal policy, etc.).

To protect the rights and legitimate interests of an individual, it is crucial to implement Clause 3 of Art. 9 of the International Covenant on Civil and Political Rights of 1966 in the Kazakh criminal procedure legislation on the mandatory delivery of each detained suspect to the investigating judge. The implementation of this norm in investigative and judicial practice will effectively track every instance of illegal, unreasonable detention and groundless criminal prosecution and determine and stop the use of torture and other unlawful methods of pre-trial investigation against detained suspects in order to obtain confessions from them.

It is no less important to introduce a property guarantee into the system of preventive measures, separating it from bail and following the US experience regarding commercial surety.

13 'The project concept to the Law of the Republic of Kazakhstan. On amending and revising some legislative acts of the Republic of Kazakhstan on the introduction of a three-tier model with the separation of powers and areas of responsibility among law enforcement agencies, prosecutor's office and court' <https://online.zakon.kz/Document/?doc_id=32781342#pos=5;-120> date accessed 16 Aug 2022.

14 The draft Law of the Republic of Kazakhstan (2021), 'On amending and revising some legislative acts of the Republic of Kazakhstan on the introduction of a three-tier model with the separation of powers and areas of responsibility among law enforcement agencies, prosecutor's office and court' <http://advokatura.kz/wp-content/uploads/Proekt-zakona13042021181653-1.docx> date accessed 16 Aug 2022.

We also studied the draft Concept and draft Law of the Republic of Kazakhstan developed by the Prosecutor General's Office 'On amendments and additions to certain legislative acts of the Republic of Kazakhstan on the implementation of a three-tier model with the separation of powers and responsibilities among law enforcement agencies, the prosecutor's office, and the court'.[15]

## 3 PREVENTIVE MEASURES IN CRIMINAL PROCEDURE AND ITS INDICATORS IN THE REPUBLIC OF KAZAKHSTAN

The absolute indicators of preventive measures sanctioned in the Republic of Kazakhstan by investigating judges over the past six years (since the introduction of this party into criminal proceedings) and their scope in the structure of all seven preventive measures are presented in Table 1 below.

*Table 1*

| **Preventive measures** | **2015** | **2016** | **2017** | **2018** | **2019** | **2020** | **2021** |
|---|---|---|---|---|---|---|---|
| Bail | 16,217 **(44%)** | 13,902 **(53%)** | 4,731 **(20%)** | 1,430 **(7%)** | 1,284 **(5%)** | 1,013 **(4%)** | 760 **(3.5%)** |
| Home confinement | 249 **(0.6%)** | 261 **(1%)** | 367 **(1.2%)** | 655 **(3%)** | 974 **(4%)** | 1,543 **(6%)** | 1,202 **(5.5%)** |
| Detention | 10,132 **(28%)** | 11,072 **(42%)** | 15,689 **(70%)** | 9,957 **(46%)** | 10,619 **(42%)** | 12,069 **(50%)** | 11,587 **(53%)** |
| Preventive measures in total | 36,390 | 26,346 | 22,498 | 21,528 | 25,074 | 24,188 | 21,724 |

In the table above, preventive measures are ranked according to the degree of repressiveness and restrictions on the constitutional rights and freedoms of an individual. The least restrictive is ***bail***. This preventive measure encourages lawful behaviour and minimises interferences with the proceedings. Bail is a psychological and coercive measure rather than a repressive one. If compared with other preventive measures, the suspect's law-obedience does not depend on the nature and degree of restriction of constitutional rights to personal integrity and personal freedom. Despite the advantages of bail, there is a rapid decline in its performance in law enforcement in conformity with the above-mentioned statistics (11 times over six years). Bail was mostly used as a preventive measure in 2015 and 2016. The record is explained by the active promotion of this preventive measure by the prosecutor's office at that time. The Order of the Prosecutor General of the Republic of Kazakhstan 7/15 on the widespread use of bail as an alternative to arrest served as the basis for an artificial increase in statistical indicators during this period.[16]

Contrary to good intentions, the institutional resource of the supreme supervisory body has created favourable conditions for restricting the constitutional rights and freedoms of an individual. In pursuit of formal indicators, the Order made the investigating authorities and prosecutors superficially evaluate facts and evidence as grounds for the application of

15 One of our authors, Professor A Akhpanov, prepared an expert opinion on this bill for the Ministry of Justice of the Republic of Kazakhstan. It substantiates constructive-critical approaches, systematises possible risks and costs for law enforcement, and makes proposals for many non-controversial provisions, the legislator's adoption of which can significantly weaken judicial control over such preventive measures as detention, home confinement, and bail.

16 'The speech of the deputy of the Prosecutor General of the Republic of Kazakhstan on a briefing in the Service of central communications. Astana' <https://www.youtube.com/watch?v=Msl0kXqGQ8Q> date accessed 16 Aug 2022.

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bail. The amount of bail was reduced below the lower limit, and it replaced another measure of restraint by the nature of legal restrictions, i.e., a written undertaking not to leave and recognisance to behave. A formal bail did not achieve its purpose. In the period from 2017 to 2020, there has been a sharp decline in the use of bail (Table 1). Such indicators are due to the fact that the legislator transferred its authorisation from prosecutors to investigating judges in 2017. The judicial procedure for sanctioning bail, along with a prior decision with the prosecutor, strengthened the guarantees of the suspect's rights. However, this approach did not solve old problems but gave rise to new ones.

In this regard, we propose a comprehensive approach to eliminate the real obstacles to the use of bail. One of them is the principle of self-regulation of legal relations, which is embodied in the voluntariness of bail with due regard to the procedural position of the suspect (attitude to suspicion), their financial situation, and the confidence of the investigating authorities and the investigating judge in a high degree of probability that this preventive measure will ensure the proper behaviour of such a person. In addition, when authorising bail, it is important to consider the personal qualities and financial and property capabilities of the suspect. The amount of bail in a particular criminal procedure should be regarded as the most effective means to achieve the goals set when regulating their behaviour.

Christine S. Scott-Hayward and Henry F. Fradella conducted fundamental research on bail and its forms in the United States. They studied the historical forms and unsuccessful attempts to reform the bail system, as well as the issues of racial and social inequality in the justice system.[17] The legislative experience of foreign countries in the system of interim measures of restraint highlights such a form as commercial surety. This measure of restraint in terms of its procedural and legal mechanism is generally similar to bail. However, the guarantor is a special agent who monitors the proper execution of all orders and restrictions by the suspect, including ensuring their presence in court, which is more effective than the other measures. Commercial surety is well developed in the United States and has solved the problem of overcrowded prison populations in densely populated areas.[18] The variety of bail forms has broadened the scope of this preventive measure; therefore, most suspects seek bail to avoid detention. We believe that this positive experience can be useful for the Republic of Kazakhstan since the draft Legal Policy Concept until 2030 raises the issue of introducing property guarantees into the system of preventive measures, separating it from bail.[19]

In the context of strengthening the control functions of the investigating judge, the procedure for changing detention to bail is of great importance. In our opinion, the current legislation establishes an illogical procedure for such a replacement. Clause 8 of Art. 145 of the Criminal Procedure Code of the Republic of Kazakhstan (hereinafter – CrPC) provides that the obligation to execute a procedural decision on changing detention to bail with the release of a person rests with the head of the penitentiary institution, i.e., place of detention (a temporary detention centre or pre-trial detention centre). This decision is based on the verification of the fact that the pledger put bail to the deposit account, about which the investigator, prosecutor, and investigating judge are notified.

We propose a different procedure: documents confirming the payment of bail should be first provided to the investigator. After checking, the investigator sends them, together

17 CS Scott-Hayward, HF Fradella, *Punishing Poverty: How Bail and Pretrial Detention Fuel Inequalities in the Criminal Justice System* (University of California Press 2019).

18 TH Cohen, 'Commercial Surety Bail and the Problem of Missed Court Appearances and Pretrial Detention' <https://www.researchgate.net/publication/228226049_Commercial_Surety_Bail_and_the_Problem_of_Missed_Court_Appearances_and_Pretrial_Detention> date accessed 16 Aug 2022.

19 'The concept (project) of the legal policy of the Republic of Kazakhstan till 2030' (one of the developers of Section 4.10 of this Concept in the sphere of criminal procedural activities is Professor A.N. Akhpanov) <https://legalacts.egov.kz/npa/view?id=7553105> date accessed 16 Aug 2022.

with a cover letter, to the investigating judge and notifies the prosecutor. Subsequently, the investigating judge decides whether to satisfy the petition for changing the measure of restraint or to refuse to satisfy it. Their decision is represented by the relevant resolution.

Otherwise, there can be the forgery or revocation of a document confirming the deposit of bail or changes in the investigative situation in a criminal case, which eliminates grounds for the application of bail. An inspection can only be carried out by the person conducting pre-trial proceedings in the given criminal case and by no means by the head of the place of detention.

The next preventive measure sanctioned by the investigating judge is ***home confinement***. Compared to bail, there are no sharp fluctuations in its application in the statistical indicators presented in the table. The consistent and stable increase in the application of this preventive measure is due to the fact that the Republic of Kazakhstan has chosen a reasonable vector for the development of the legal system aimed at ensuring the priority of personal rights and freedoms, strengthening the competitiveness and equality of the parties to criminal proceedings, reducing the prison population and procedural economy, including through wider use of alternative measures of restraint. The application of home confinement as a preventive measure was influenced by the 2015 Project '10 Measures to Reduce the Prison Population',[20] as well as the measures taken by the General Prosecutor's Office of the Republic of Kazakhstan to introduce humanistic ideas into the activities of the criminal prosecution authorities. These are reflected in the Order of the Prosecutor General of the Republic of Kazakhstan of 9 April 2015 No. 1/15, aimed at significantly reducing the use of detention.[21] The amendments and additions made to the CrPC of the Republic of Kazakhstan in July 2018, which provide for the possibility of applying less severe preventive measures, also played a major role. If compared to detention (arrest), home confinement can be considered more humane, but it still significantly restricts the rights and freedoms of an individual. Therefore, it is important to strictly follow the procedures established by law for its selection, sanctioning, and application.

Considering international experience and the existing investigative and judicial practice, we propose to narrow the broad interpretation of Clause 2 of Art. 146 of the CrPC of the Republic of Kazakhstan, which provides for the application of 'one or more restrictions' to a person in respect of whom a measure of restraint in the form of home confinement is selected. It seems that the list of restrictions applied to the suspect should be defined in order to minimise the subjective selection of additional means to ensure this measure of restraint. The objective is not only uniform law enforcement but also reasonable limits of judicial control while limiting the rights of the suspect. We propose the exclusion of para. 7) of para. 2 of Art. 146 of the CrPC of the Republic of Kazakhstan in order to prevent an expansive interpretation of legal restrictions.

During the COVID-19 pandemic, home confinement has been aggravated by the fact that a person is also infringed on the right to health care in addition to the restriction of freedom. Thus, it is logical to enshrine in the criminal procedure legislation grounds and conditions allowing or restricting walking in certain places, sports activities outside the home, etc. In this regard, we can provide the following wording of Clause 1 of Art. 146 of the CrPC of the Republic of Kazakhstan:

> When authorizing a preventive measure in the form of home confinement, the investigating judge decides on the possibility of providing the suspect with time for

20 'The project concept. Ten measures to reduce the prison population. Astana' <https://www.zakon.kz/4591574-vystuplenie-zamestitelja-generalnogo.html> date accessed 16 Aug 2022.

21 Order of the Prosecutor General of the Republic of Kazakhstan 1/15 (9 April2015) 'On a major decrease in using detention' <https://online.zakon.kz/Document/?doc_id=39614359> date accessed 16 Aug 2022.

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walking and doing sports within two hours a day, with the right to leave the place of serving home arrest in agreement with the pre-trial investigation body.

In addition to the right to health protection, home confinement also limits the right to work. The loss of a job (the main source of income) casts doubts on the advisability of complete isolation from society. For remote employees, strict isolation is not always justified. The issues related to the life support of suspects, with their ability to continue offline labour activity under home confinement, require legislative regulation.

When authorising such a measure of restraint as home confinement, it is important to consider the suspect's identity, their activities, official position, the presence of dependents, and job as the only source of income. Taking into account the above and other circumstances, the court should allow them to continue labour activity. The remote format of labour relations excludes contact with other people and does not require leaving their residence, which is the best option during the COVID-19 pandemic and meets the interests of all parties to legal relations.

In the United States, home confinement as a measure of restraint is divided into three types, depending on the severity of serving conditions. At the first level of severity, the suspect is required to be at home only at a certain time. At the second level of severity, this person stays at home permanently but might be allowed to visit their place of work or study. At the third level of severity, the suspect stays at home all the time and can leave it only by the court order and visit medical institutions.[22] Such a differentiated application of home confinement can be useful for investigative and judicial practice since certain similar elements are already contained in the CrPC of the Republic of Kazakhstan.

There are some issues related to the electronic monitoring of the suspect's behaviour during the execution of such a preventive measure as home confinement. The scientists from the Old Dominion University of Virginia (USA), Randy Gainey and Brian Payne, conducted an experiment using various methods in order to study the effectiveness of an electronic bracelet and its effect on the quality of life of suspects. The experiment results were assessed on three levels and classified according to various criteria. In particular, they evaluated the impact of an electronic bracelet on personal life, work, discipline, drug and alcohol consumption, the level of shame from wearing the bracelet, restrictive aspects of the sanction, etc. Most respondents regarded this experience as less oppressive than detention. Furthermore, the electronic monitoring program helped some of them cope with self-destructive lifestyles.[23]

An important factor in regulating the measure of restraint under consideration is the rights of third parties who, due to family and other relations, live with a person serving house arrest. A favourable condition for ensuring the rights and freedoms of an individual guaranteed by the Constitution of the Republic of Kazakhstan is the fact that the legislator is obliged to obtain the written consent of persons living with the suspect (family members, landlords).[24] However, such third parties suffer the inconvenience caused by checks carried

22 JN Hurwitz, 'House Arrest: A Critical Analysis of an Intermediate-Level Penal Sanction' (1987) 135 (5) University of Pennsylvania Law Review 771.

23 RR Gainey, B Payne, 'Understanding the Experience of House Arrest with Electronic Monitoring: An Analysis of Quantitative and Qualitative Data' (2000) 44 (1) International Journal of Offender Therapy and Comparative Criminology 84-96.

24 'Rules for implementing such a preventive measure as house arrest (2014)', Joint Order of the Ministry of Internal Affairs of the Republic of Kazakhstan of 29 August 2014 No 564, the Prosecutor General of the Republic of Kazakhstan of 2 September 2014 No 86, the Chairman of the National Security Committee of the Republic of Kazakhstan of 4 September 2014 No 290, the Minister of Finance of the Republic of Kazakhstan of 11 September 2014 No 394 and the Chairman of the Agency of the Republic of Kazakhstan for Civil Service Affairs and Anti-Corruption of 12 September 2014 No 4. Registered by the Ministry of Justice of the Republic of Kazakhstan on 22 September 2014 No 9741 <http://adilet.zan.kz/rus/docs/V14C0009741> date accessed 16 Aug 2022.

out at any time of the day. In our opinion, a more effective solution to the problem would be the widespread use of electronic means of control (electronic bracelets). From the financial perspective, we recommend an additional condition to the CrPC of the Republic of Kazakhstan, according to which, when using electronic surveillance tools, the controlled person compensates the costs incurred in an amount of a fixed monthly calculation index. Compensation will reduce the cost of maintaining house arrest, save state budget funds, and encourage criminal prosecution authorities to apply this preventive measure more often. Such conditions of legal restriction will not violate the personal life of both the suspect and the persons living with them.

Many scholars concluded that the key factor influencing the final decision (the verdict of the court) is the preliminary conclusion, i.e., the very fact that a person is in custody. Moreover, its impact on an acquittal or termination of a criminal case is not so significant.[25] The increased degree of legal restrictions on an individual due to the use of a measure of restraint in the form of ***detention (arrest)*** entails the need to adjust the current mechanism for its authorisation.

In many countries, legal statistics on the use of pre-trial detention (arrest) as a measure of restraint show high rates, as evidenced by the study by Catherine Heard and Helen Fair from the Centre for Crime and Justice Research, University of London. They conducted their studies in ten countries and confirmed excessive arrest cases in the pre-trial stages of criminal proceedings.[26] The statistics we cited (Table 1) also demonstrate high rates of using arrest both in comparison with alternative preventive measures (bail, home confinement) and in the system of all preventive measures, which determines the scale of its repressiveness and negative consequences.

Positive trends in ensuring the rights and freedoms of an individual when applying a preventive measure (detention) are conditioned by the fact that over the years of independence, the Republic of Kazakhstan has ratified almost all key international legal acts in the field of human rights and implemented many of their norms into the national legislation. A number of such provisions laid the foundation of the state policy of democratisation and humanisation of criminal proceedings.

However, the dynamic development of social relations and the state of investigative practice require constant updating of the criminal procedure legislation to effectively protect the rights and freedoms of an individual when the investigating judge authorises detention (arrest). Even in the EU, the general standards and principles of regulation of pre-trial detention (arrest) are not properly fixed. According to the scientists from the Institute of Criminal Law and Criminology at the University of Leiden, Adriano Martufi and Christina Peristeridou, this situation causes many conflicts within the legislation of the EU countries, but this preventive measure is being sanctioned and applied. The authors critically assess the state of affairs and argue that the absence of a unified legal act entails significant restrictions on human rights.[27]

Detention should not be accompanied by actions that cause physical or mental suffering to suspects and those accused of committing crimes and held in special institutions. In order to exclude or minimise this impact, we propose to eliminate discrepancies between

25 MR Williams, 'The Effect of Pretrial Detention on Imprisonment Decisions' (2003) 28 (2) Criminal Justice 299-316 <https://www.researchgate.net/publication/249772159> date accessed 16 Aug 2022.

26 C Heard, H Fair, 'Pre-trial detention and its over-use' <https://prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf> date accessed 16 Aug 2022.

27 A Martufi, C Peristeridou, 'Pre-trial Detention and EU Law: Collecting Fragments of Harmonization within the Existing Legal Framework' <https://www.researchgate.net/publication/347950255_Pre-trial_Detention_and_EU_Law_Collecting_Fragments_of_Harmonisation_Within_the_Existing_Legal_Framework> date accessed 16 Aug 2022.

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Clause 3 of Art. 9 of the International Covenant on Civil and Political Rights and the CrPC of the Republic of Kazakhstan on the mandatory delivery of each detained suspect to the investigating judge. The implementation of this rule will effectively track every instance of illegal, unjustified detention and criminal prosecution and identify and stop the use of torture and other unlawful methods of pre-trial investigation against detained suspects.[28]

An important circumstance in the process of protecting the constitutional rights and freedoms of an individual when deciding whether to apply detention (arrest) as a preventive measure is the violation of the fixed deadline for the prosecutor to send materials confirming the legality, validity, and motivation of detention, as well as the need to extend it, to the investigating judge. The thing is that, in most cases, the investigating judge ignored violations of such deadlines when extending the terms of the arrest. Such facts were revealed by the monitoring group of the OSCE Office for Democratic Institutions and Human Rights (ODIHR) during the implementation of the project 'The judicial authorization of arrest in the Republic of Kazakhstan'.[29] In order to avoid unreasonable extension of the terms of arrest, which are often associated with the fact that the pre-trial authorities do not have time to collect evidence, it is necessary to officially record the time such applications were received and indicate them on the judicial authorisation materials.

The existing organisational and legal barriers, as well as departmental and institutional dependence on investigating judges, deprive them of the freedom to evaluate criminal cases based on their inner convictions. Thus, judges are not guaranteed true independence within the judicial system. The existing system makes the investigating judge follow the lead of the pre-trial investigation bodies and the prosecutor's office. It is necessary to overcome the prevailing stereotypes of the criminal prosecution authorities that detention is a convenient tool for conducting investigative actions and operational activities.

When checking materials justifying the need for arrest, the investigating judge should follow a certain algorithm. This will allow comprehending not only a criminal case but also checking the legality, validity, and motivation of the person's suspicion of committing such a criminal offence. The judge is obliged to check the substantive legal basis, i.e., the evidence of all the constituent elements of this criminal offence and other circumstances of proof, as well as the commission of the incriminated act by this particular suspect according to criminal case files. Then the investigating judge shall verify the validity of the evidence and facts of one or another criminal procedural basis for arrest, given in Clause 1 of Art. 136 of the CrPC of the Republic of Kazakhstan. In the end, it is necessary to investigate criminal procedural conditions for the application of detention (arrest), namely, the circumstances taken into account when authorising a measure of restraint (Clause 1 of Art. 138 of the CrPC of the Republic of Kazakhstan).

According to Art. 148 of the CrPC of the Republic of Kazakhstan, the investigating judge is authorised to consider a petition and make one of the following decisions: to authorise the arrest (including for up to ten days) or to deny this authorisation for arrest. In matters of deciding on the punishment, the example of the Code of Criminal Procedure of Ukraine is indicative. Art. 186 of the Code of Criminal Procedure of Ukraine provides that a petition for the application or change of a preventive measure is considered by an investigating judge, a court without delay, but no later than seventy-two hours from the moment of the actual detention of the suspect or the accused, or from the moment of receipt of the petition to the court, if the suspect or the accused is at large, or from the moment of presentation by the

28 The International Covenant on Civil and Political Rights (16 December 1966) <https://online.zakon.kz/Document/?doc_id=1010760#pos=0;0> date accessed 16 Aug 2022.

29 Analytical report 2011. The judicial authorization of arrest in the Republic of Kazakhstan, Warsaw <https://online.zakon.kz//Document/?doc_id=30983793#pos=5;-108> date accessed 16 Aug 2022.

suspect or the accused, or his/her defender to the court of the relevant petition.[30] The CrPC of the Republic of Kazakhstan contains a similar but more repressive provision: when there are no sufficient grounds for sanctioning detention for two months, the investigating judge may authorise it for up to 10 days (Clause 2 of Part 7 of Art. 148 of the CrPC of the Republic of Kazakhstan).

One of the progressive steps taken by the Republic of Kazakhstan to eliminate stereotypes and ensure the constitutional rights and freedoms of an individual in case of conflict with law is a gradual transition to a three-tier model of criminal proceedings, following the example of the OECD countries with a clear division of powers of the police, the prosecutor's office and the court.[31] The General Prosecutor's Office of the Republic of Kazakhstan has developed a draft Concept and a draft Law of the Republic of Kazakhstan 'On amending and revising some legislative acts of the Republic of Kazakhstan on the introduction of a three-tier model with the separation of powers and areas of responsibility among law enforcement agencies, prosecutor's office, and the court'. Its main idea is large-scale coordination of all the key procedural decisions affecting the rights and freedoms of a citizen with the prosecutor, as well as the adoption of intermediate and final decisions on a criminal case at all pre-trial investigation stages instead of the investigator and interrogating officer, including on preventive measures. It is predicted that the phased implementation of the three-tier model of criminal proceedings will solve the issues connected with the current separation of powers among the police, the prosecutor's office, and the court. In particular, when discussing the Concept of this model, it was proposed to exclude the direct appeal of the investigator to the investigating judge with a request to authorise a measure of restraint since the decision on selecting or applying a certain measure of restraint should be made by the prosecutor.[32] To fully implement this three-tier model, it is necessary to solve conceptual problems. If ignored, favourable conditions will be created for an even greater restriction of the rights and freedoms of an individual under the pretext of ensuring the rule of law.

From the viewpoint of ensuring the speed of investigation, there are doubts that it will be difficult to coordinate with the prosecutor numerous procedural acts of the investigation affecting the constitutional rights of citizens following from the Concept and the draft Law. There are obvious risks and time costs incurred by the investigator and the interrogating officer in order to coordinate the main procedural decisions and actions with the prosecutor:

- There is a significant decrease in the ability to perform the main task of collecting evidence through investigative and other procedural actions.
- Even if every settlement in the Republic of Kazakhstan has a full-fledged Internet connection, the duration of electronic approval will be affected by subjective factors influencing the prosecutor's decision.
- There is a preliminary approval of the draft decision in Word with the prosecutor (before it is added to the electronic database of prosecution authorities), which includes: internal coordination in the instances of the prosecutor's office; time for prosecutors to study the submitted materials or the criminal case a substantiate their decision; the right to demand and study additional materials; time to receive an oral or written explanation from the investigator and the interrogating officer, as a result

30 Criminal Procedural Code of Ukraine, updated <https://zakon.rada.gov.ua/laws/show/4651-17#Text> date accessed 16 Aug 2022.

31 'Kazakhstan in a new reality: time to act]. Nur-Sultan' <https://www.akorda.kz/ru/addresses/addresses_of_president/poslanie-glavy-gosudarstva-kasym-zhomarta-tokaeva-narodu-kazahstana-1-sentyabrya-2020-g> date accessed 16 Aug 2022.

32 'The proceedings of the International scientific conference (2 April 2021). A three-tier model of criminal justice as a guarantee ensuring the rights and freedoms of citizens. Almaty' <https://www.facebook.com/almatyadaldyqalany/posts/862890300956960> date accessed 16 Aug 2022.

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of which the investigative and procedural action is delayed, the parties to the process are repeatedly brought to the police, and investigators or interrogators are forced to execute the decision until agreed with the prosecutor.

- There is a heavy load on the prosecutor supervising the investigating authorities since about 300,000 criminal cases are processed annually. According to the Consolidated Report in Form 1-E of the Committee on Legal Statistics and Special Records under the General Prosecutor's Office of the Republic of Kazakhstan, 324,869 cases were under investigation in 2020, including 205,765 cases resolved (drafting an indictment and sending the case to court, terminating the case on non-exonerative grounds) and 119,104 criminal cases terminated on exonerative grounds.[33]
- About 50 actions and decisions will be coordinated for each of the criminal cases under investigation by the investigating authorities.[34]
- The number of prosecutors supervising the legality of the investigation is 1,482 employees (as of May 2021).

*Sample calculations:*

300,000 criminal cases * 50 decisions and actions on average in one criminal case (according to the current CrPC of the Republic of Kazakhstan + after the adoption of the draft law) = 15,000,000 approvals from the prosecutor and decisions made by the prosecutor himself;

300,000 criminal cases / 1,482 prosecutors = 202(202,4) cases per year or 17(16,8) cases per month per prosecutor;

202 cases * 50 decisions and actions = 10,100 decisions and actions in all cases per year;

10,100 decisions and actions per year / 246 working days = 41 decisions and actions per day or five decisions per hour, or 12 minutes per decision.

- Additional time to perform other functions related to the prosecutor's activities, as well as those that go beyond the scope of this area of supervision.

As a predictable result, the frontal coordination of most procedural decisions and actions with the prosecutor will significantly slow down the pre-trial investigation in criminal cases, practically paralysing it and redirecting human resources to overcome artificial barriers instead of performing the main function, i.e., a complete, comprehensive and objective study of the case circumstances. Thus, judicial control over pre-trial investigation will weaken due in part to the formal and ritual procedure for authorising criminally remedial measures of restraint. The investigating judge will rely on the prosecutor's filter, superficially assessing the evidence presented in support of their decision.

In addition, the procedure proposed by the Concept and the draft Law for the independent choice by the prosecutor (without accepting a criminal case for his own proceedings) of a restrictive measure and a personal petition to the investigating judge for its authorisation (detention, home confinement, and bail) might entail obvious risks and costs.

33 Analytical information (2020) presented in Form 1-E on legal statistics and special reports of the General Prosecutor's Office of the Republic of Kazakhstan <https://www.gov.kz/memleket/entities/pravstat/documents/details/54973?lang=ru> date accessed 16 Aug 2022.

34 The comparative table of amendments to the draft Law of the Republic of Kazakhstan (2021). On amending and revising some legislative acts of the Republic of Kazakhstan on the introduction of a three-tier model with the separation of powers and areas of responsibility among law enforcement agencies, prosecutor's office and court <http://advokatura.kz/wp-content/uploads/ST-na-19.02.21-g.13042021181707-1.docx> date accessed 16 Aug 2022.

This innovation may entail the following risks and costs that are destructive to the pre-trial investigation system:

- The violation of the consistency and logic of pre-trial investigation, when such amendments to the CrPC of the Republic of Kazakhstan infringe the fundamental principles of criminal proceedings, mix the basic functions and general conditions of production at this stage;
- The dissolution of traditional, well-established, and justified delimitations of such criminal procedural functions as investigation, departmental procedural control, prosecutorial supervision, and judicial control;
- The selective acquisition by the prosecutor of the functions of an investigator, interrogator, head of the investigative department and head of the body of inquiry;
- The violation of the rules of collection, verification and evaluation of evidence under the CrPC of the Republic of Kazakhstan by the person in charge of a criminal case, guaranteeing the observance of public interests (disclosure of the crime, exposing the guilty, proving suspicion and accusation), and protection and restoration of rights and legitimate private interests, the loss of motivation for evidentiary activities, lowering the level of personal responsibility for the investigation on the part of both persons involved and the prosecutor;
- The possibility of cognitive dissonance in the person responsible for the course and results of the criminal case being processed during a preliminary assessment of the evidence, including the evidence collected during investigative actions conducted by the prosecutor to justify the chosen measure of restraint;
- The exclusion of any personal responsibility of the prosecutor who made a procedural decision on a preventive measure without considering a criminal case for its legality and validity;
- The creation of conditions for corruption manifestations at the stage of pre-trial investigation in cases where the inner conviction of the prosecutor and the person conducting the investigation may not coincide in matters of choosing one or another measure of restraint.

As a result, there is a direct contradiction to Clause 3 of Part 1 of Art. 180 of the CrPC of the Republic of Kazakhstan. To obtain the right to conduct an investigation, the prosecutor shall issue a decision on accepting a criminal case into their proceedings.

The initiation of criminal proceedings is as follows: the definition of a specific official endowed by law with exclusive competence to conduct a pre-trial investigation in a specific criminal case to perform procedural, including investigative actions, in order to make procedural decisions; the personal responsibility of the person conducting criminal proceedings for compliance with procedural deadlines, ensuring the rights and legitimate interests of parties to criminal proceedings, etc.; the systematic verification of investigative versions of the prosecution and defence; the planning and organisation of pre-trial investigation; the development of tactics for specific investigative actions; adherence by the person conducting criminal proceedings to the rules, principles and logic of collecting, verifying and evaluating evidences; assessment by the person conducting a criminal case of the evidence collected on the basis of their inner conviction in conformity with Art. 25 of the CrPC of the Republic of Kazakhstan.

Thus, the selection of a preventive measure by the prosecutor without initiating criminal proceedings means the illegitimacy of their procedural decisions and actions. According to Clause 2 of Art. 9 of the CrPC of the Republic of Kazakhstan, they shall be recognised as illegal and cancelled.

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The Concept substitutes and confuses different notions. With its implementation, the prosecutor becomes a person who does not supervise the law but stands above the law. After all, such an arbitrary interference in the activities of an investigator or interrogator would entail criminal liability for any other person.

## 4 CONCLUSIONS

International standards and principles of the Habeas Corpus Act are mainly implemented by the national legislation of the Republic of Kazakhstan in the institution of criminal procedural coercion and measures of restraint. The procedure for selecting, authorising, and applying such criminally remedial measures of restraint as detention (or arrest), home confinement, and bail can be improved both from the standpoint of the public tasks of criminal justice and the private interests of parties to criminal proceedings.

The introduction of a three-tier model of criminal proceedings regarding preventive measures applied with the authorisation of the investigating judge can reduce the effectiveness of judicial control over the pre-trial investigation. The investigating judge can also introduce a formal and ritual procedure for sanctioning measures of criminal procedure restraint. The investigating judge will rely on the prosecutor's preliminary filter, superficially assessing the materials and evidence presented in support of this decision.

A well-balanced, selective, and systematic approach is required to transform the functions of investigation, departmental procedural control, prosecutorial supervision, and judicial control at the stage of pre-trial investigation so that permanent reforms do not affect the legal system, fundamental principles, and standards, do not violate the existing litigation practice, do not reject established legal traditions, and abandon the established procedural culture.

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Reform's Forum Note

# THE DEPOSIT GUARANTEE FUND OF UKRAINE: TOWARDS EU STANDARDS OF RIGHTS PROTECTION

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## ABSTRACT

*An effective deposit insurance system is commonly considered the strongest instrument for increasing confidence in banking systems, as well as for encouraging private investments in banking services. In developing relevant legislation and institutions in line with EU standards, Ukraine will ensure that its deposit guarantee system can be integrated with that of the EU. In light of the relevant legislation, we examine the EU's deposit guarantee system in general and with regard to its particular characteristics, namely: insured entity, compensation amount, legal*

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*terminology, and financing. Then, we compare those characteristics to those of Ukraine and assess the necessity and priority of their development. As a result, we first emphasise that individual entrepreneurs and legal entities, as well as individual entities, must be insured under the Deposit Guarantee Fund. Second, we argue that the current state compensation amount for deposits in case of bank insolvency is insufficient and suggest that it must be revised and increased. Third, we draw attention to the fact that Ukrainian banking and deposit guarantee legislation must be revised and integrated with relevant European legal terminology. Finally, we also analysed the particular aspects of financing for the European deposit guarantee system, especially the various means of investing free funds in the deposit guarantee system, which we thought could be useful to implement in Ukraine. Our results suggest distinct legislative and other empirical measures needed to improve the Ukrainian deposit guarantee system and generally consolidate it with that of the EU.*

***Background:*** *The deposit insurance system provides insurance for the deposits of individuals who have entrusted their money to banks. In the event of the insolvency of a banking institution, the deposit insurance system, to a greater or lesser extent, guarantees the payment of deposits to that institution's clients and protects the rights of other creditors involved in the insolvency proceedings. As a result of the banking sector crisis in Ukraine during 2014-2017, almost 100 banks were classified as insolvent. Therefore, the Deposit Guarantee Fund of individuals was subject to a huge burden, which exposed several problematic issues related to the protection of depositors' rights.*

***Methods:*** *To obtain reliable and valid conclusions, the author used comparative and analytical methods of research. These methods consist of the analysis and comparison of the provisions of EU and Ukrainian legislation in the field of the protection of depositors' rights.*

***Results and Conclusions:*** *The Ukrainian deposit guarantee system has significant differences from the relevant European system. First and foremost, this concerns the amount of guaranteed compensation for deposits in Ukraine. The author concludes that this deposit coverage amount was not reviewed during the period from 2012 to 2022, which does not contribute to the interest of depositors in keeping money in banking institutions. However, on 1 April 2022, during the period of martial law, Ukraine adopted Law No. 2180-IX 'On Amendments to Certain Laws of Ukraine on Ensuring the Stability of the Deposit Guarantee System for Individuals', which provides a full guarantee of individuals' deposits during martial law and three months after its termination, as well as increases the guaranteed deposit compensation to UAH 600,000. These changes will have positive consequences for depositors, but the author points out that in the context of these legislative changes, the state should provide support to the Deposit Guarantee Fund by writing off interest arrears to the Ukrainian Ministry of Finance, which has emerged due to the banking crisis in 2014-2017.*

*In addition, to preserve the liquidity of banks' assets, the author proposes to ensure that the Fund starts preparing banks for the management of their assets by evaluating and monitoring their status. Furthermore, the author emphasises the need for the harmonisation of the Ukrainian banking legislation with the requirements of Directives 2014/49/EU and 2014/59/EU. For this purpose, the guaranteed amount of reimbursement should be gradually increased to the equivalent of EUR 100,000, and guarantees should be extended to depositors who are legal entities. The relevant legislation must also be amended so that its terminology corresponds with that of the EU, the Deposit Guarantee Fund participants must be included in other credit institutions, and the Deposit Guarantee Fund must guarantee legal entities' deposits.*

## 1 INTRODUCTION

The system of protecting bank depositors' rights is a powerful tool for ensuring the stability of the banking system and financial service markets. It also stimulates confidence in banks and the attractiveness of deposits.

The deposit guarantee system acts as a kind of insurer in case of a banking crisis. Thus, if a bank becomes insolvent, the deposit guarantee system guarantees the repayment of deposits to relevant depositors, as well as protects the rights of other creditors involved in the procedure of insolvency.

D. B. Chekhovsky points out that an effective system of regulation and supervision is needed to prevent the emergence and unfolding of a banking crisis, ensuring timely detection and normal response to the emergence of problems in individual banks. Such a system should include the components of early identification of troubled banks, immediate supervisory influence, and the orderly liquidation of systemically important insolvent banks.[1]

In such a case, the deposit insurance system would prevent the emergence of a systemic crisis, as it would help avoid a massive outflow of funds from household deposits. In light of this, European Banking Union was established at the Summit of EU Member States on 29 June 2012 to ensure the financial stability of banks and banking systems of the EU member states after the global financial crisis of 2007-2009 and the European debt crisis of 2010-2011. Its creation was envisioned as the final stage of the formation of an economic and monetary union within the EU, which could allow the application of EU banking regulations for a more transparent, uniform, secure, and stable functioning of the common EU banking market.

During the last decade, Ukraine has been particularly involved in declaring its European and Euro-Atlantic orientation. A specific aspect of the European integration of Ukraine is the unification of its legislation, bringing it into conformity with the requirements of the EU. To comply with these requirements, Ukraine has even adopted the Law of Ukraine No. 1629-IV 'On the State Program for Adaptation of Ukrainian Legislation to the Legislation of the European Union' of 18 March 2004,[2] which states that the Ukrainian banking legislation relates to priority areas. Moreover, such amendments should take place within the framework of the Action Plan for the implementation of the Agreement on Association with the EU.

Therefore, there is a practical need for this article, which conducts a comparative legal analysis of the Ukrainian and the European deposit insurance systems and allows us to examine the distinct differences between them. In applying comparative legal analysis to the Ukrainian and European deposit insurance guarantee systems, we will focus on identifying their main differences and developing proposals to consolidate the Ukrainian system with European standards.

It is worth noting here some relevant works on the topic by Ukrainian authors. The aspects of responsibility for the violation of monetary obligations and protection of depositors' rights were analysed in the works of D. Chekhovsky, S. Naumenko, D. Khorunzhyi, and N. Yurkiv (analysed below). However, it should be noted that in these works, there was no determined comparison between Ukrainian and European deposit guarantee systems.

## 2 EXAMINATION OF THE STRUCTURE OF THE EUROPEAN BANKING SYSTEM

Today, in the EU member states, the operation of a deposit guarantee system is mandatory under Directive 94/19/EC on Deposit Guarantee Schemes. Moreover, each EU member state

1 DB Chekhovsky, 'Interaction between the Deposit Guarantee Fund and the National Bank of Ukraine in the financial rehabilitation of weak banks' (2014) 1 Chernihiv Scientific Journal of Chernihiv State Institute of Economics and Management Ser. 1 Economics and Management 114-122 <http://nbuv.gov.ua/UJRN/Chnch_ekon_2014_1_18> date of access 15 Nov 2022.

2 Law of Ukraine No 1629-IV 'National program of adaptation of Ukraine to the legislation of the European Union' of 18 March 2004 <https://zakon.rada.gov.ua/laws/show/1629-15#Text> date of access 15 Nov 2022.

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establishes and operates each system on its own. As a result, states using a deposit guarantee system on a voluntary basis transformed it and moved to a mandatory deposit guarantee system, although this was not always publicly funded. Such countries include Germany, France, and Italy.[3]

Before proceeding with the comparative analysis, it is necessary to examine the structure of the European banking system, which, as D. G. Khorunzhyi points out, represents the harmonisation of different practices on the part of national authorities of EU member states in order to prevent the growth of sovereign debts of states and macroeconomic destabilisation in EU countries.[4]

Prior to proceeding to the comparative analysis, we will examine the structure of the European banking system, which consists of the following elements:

**1. The Single Supervisory Mechanism**, which provides the transfer of certain powers for supervising the financial condition, activities of credit institutions, and their compliance with financial legislation from national authorities of EU member states to the European Central Bank.[5] The legal basis for the functioning of the mechanism is the Council Regulation (EU) No. 1024/2013 of 15 October 2013.

**2. The Single Resolution Mechanism**, enshrined in Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014, establishes uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010. This Regulation is applicable from 1 January 2016 and provides for the establishment of uniform rules for financial assistance to problematic and insolvent financial institutions, as well as uniform rules for insolvency proceedings.[6]

**3. The European Deposit Guarantee Scheme** is the third element of the European banking system, which envisages the creation of a pan-European deposit insurance system that could be resistant to economic crises and will not harm national economic processes. The creation of the system was initiated by the 'Report of the Five Presidents' of 22 June 2015.

The European Commission then submitted a proposal to amend the European Parliament and Council Regulation 'Amending the EU Regulation No. 806/2014 to create the European Deposit Insurance Scheme' on 4 November 2015. Subsequently, the European Deposit Guarantee Scheme found its consolidation and legal regulation in Directive 2014/49/EU of 16 April 2014 on deposit guarantee schemes.

In contrast to the initial two elements, the European Deposit Guarantee Scheme does not provide for the establishment of pan-European deposit insurance mechanisms with the

3 SG Naumenko, 'The genesis and peculiarities of the administrative and legal regulation of the bank deposit guarantee system in the most powerful countries' (2021) 1 Bulletin of Luhansk State University of Internal Affairs 190-199 <http://nbuv.gov.ua/UJRN/Vlduvs_2021_1_19. DOI: 10.33766/2524-0323.93.190-199> date of access 15 Nov 2022.

4 DG Khorunzhyi, 'Preventing banking crises: the experience of the European Banking Union' (2019) 6 Investments: Practice and Experience 64-70 <http://nbuv.gov.ua/UJRN/ipd_2019_6_13. DOI: 10.32702/2306-6814.2019.6.64> date of access 15 Nov 2022.

5 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (Single Supervisory Mechanism – SSM Regulation) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013R1024> date of access 15 Nov 2022.

6 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0806&qid=1647201202367> date of access 15 Nov 2022.

transfer of relevant powers in this area to them. It envisages the unification of the legislation of EU member states according to pan-European standards.

At the same time, within the framework of the European deposit insurance system, the possibility of creating a European Deposit Guarantee Fund, which shall be provided by EU members' national authorities with the powers to pay out and accumulate insurance costs, is being considered until 2024. Initially, the European Fund will carry out deposit guarantees together with national authorities, and the growth of the European Fund's share will be attained by reducing the share of national authorities.[7] From 2024, the powers of guaranteeing deposits will be fully transferred from the national authorities to the European Fund (the guaranteed amount of the deposits will remain EUR 100,000). The national authorities will administer payments from the European Fund to depositors only 'locally'.[8]

In describing the main differences between the Ukrainian and European deposit guarantee systems, first of all, we should note the list of individuals whose deposits are subject to enforceable compensation within the guaranteed amount. First, the Law of Ukraine 'On the System of Guaranteeing Natural Person Deposits' states that depositors are individuals, in particular, those who have concluded a contract for a bank account (bank deposit). In EU countries, the term 'depositors' also includes individual entrepreneurs and legal entities.[9] In our opinion, expanding the insured depositor list through the deposit insurance system will strengthen potential clients' confidence in the Ukrainian banking system and will contribute to its solvency.

Second, the enforced compensation amount under the Ukrainian deposits-guarantee legislation substantially differs from that of the EU. From 2012 to 2022, the deposit coverage amount remained unchanged at UAH 200,000. However, the Ukrainian hryvnia has been significantly devalued over this period. In particular, the inflation rate over the period of 2012 -2022 years was approximately 120%,[10] and in EUR equivalents, the amount of reimbursement decreased from about EUR 20,000 (according to the official exchange rate of the National Bank of Ukraine set on 21 August 2012)[11] to about EUR 6,500 (according to the official exchange rate of the National Bank of Ukraine set on 21 April 2022).[12]

However, due to the full-scale armed invasion of Ukraine by the Russian Federation and the imposition of martial law, on 1 April 2022, the Verkhovna Rada of Ukraine adopted Law No. 2180-IX 'On Amendments to Certain Laws of Ukraine on Ensuring the Stability of the Deposit Guarantee System for Individuals'.

This Law addresses a number of issues, particularly:

7 NY Yurkiv, 'On the approximation of banking legislation of Ukraine in the system of guaranteeing deposits to the requirements of the European Union. National Institute for Strategic Studies' (2019) <https://niss.gov.ua/sites/default/files/2019-11/analit-yurkiv-economics-6-2019-2.pdf> date of access 15 Nov 2022.

8 Djurdjica Ognenovich, 'Comparison with the Ukrainian deposit guarantee system for individuals' (2018) <https://www.fg.gov.ua/storage/editor/fotos/22_Djurdjica_DIS_DGF_Conference10oct20181_ukr.pdf> date of access 15 Nov 2022.

9 NY Yurkiv, 'On the approximation of banking legislation of Ukraine in the system of guaranteeing deposits to the requirements of the European Union. National Institute for Strategic Studies' (2019) <https://niss.gov.ua/sites/default/files/2019-11/analit-yurkiv-economics-6-2019-2.pdf> date of access 15 Nov 2022.

10 Consumer Price Index: summary table (2000-2022 years) <https://index.minfin.com.ua/economy/index/inflation/> date of access 15 Nov 2022.

11 Data from official National Bank of Ukraine exchange rate as of 21 August 2012 <https://bank.gov.ua/ua/markets/exchangerates?date=21.08.2012&period=daily> date of access 15 Nov 2022.

12 Data from official National Bank of Ukraine exchange rate as of 1 January 2022 <https://bank.gov.ua/ua/markets/exchangerates?date=01.01.2022&period=daily> date of access 15 Nov 2022.

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- Three months after the termination or cancellation of martial law, the Deposit Guarantee Fund will reimburse each depositor in full, including interest accrued at the end of the day before the date when the bank resolution procedure was launched.
- Three months after the termination or cancellation of martial law, the guaranteed amount of reimbursement will be increased to UAH 600,000.

Such steps usually have positive consequences for depositors and significantly increase the percentage of guaranteed deposits, but it should be noted that these innovations increase the pressure on the Fund, whose debt to the Ukrainian Ministry of Finance, according to the ministry, is about UAH 108 billion, for which the Deposit Guarantee Fund must pay UAH 62 billion in interest by the end of 2031.

Consequently, although the Deposit Guarantee Fund has repaid its debt to the NBU and there have been recent reports of early repayment of a part of its obligations to the Ministry of Finance of Ukraine. However, in the future, these successes will be complicated because, according to the Fund, there are just over UAH 1.1 billion worth of bankrupt banks' assets left.

However, according to the information posted on the Deposit Guarantee Fund website,[13] the Fund and the Ministry of Finance of Ukraine signed an agreement on the procedure for transferring funds from the Fund to the State Budget of Ukraine for the purpose of implementing Law No. 2180-IX 'On Amendments to Certain Laws of Ukraine on Ensuring the Stability of the Deposit Guarantee System for Individuals'. The agreement defines the procedure for repayment of the restructured debts of the Fund to the State on loans granted to it to overcome the consequences of the systemic banking crisis of 2014-2017. Under the terms of this agreement, the par value of the bonds would be repaid by July 2032 from the Fund's resources, which will exceed the amount needed to cover possible risks in the banking system. In the part corresponding to the accrued interest, repayment will be made through the recovery of losses from former owners and related persons whose activities have caused the insolvency of such banking institutions.

At the same time, according to paragraph 21 of the preamble of the European Parliament and Council Directive 2014/49/EU of 16 April 2014 on deposit guarantee schemes, the coverage level laid down in this Directive should not leave too great a proportion of deposits without protection in the interests both of consumer protection and of the stability of the financial system. Even so, the cost of funding DGSs should be taken into account. It is therefore reasonable to set the harmonised coverage level at EUR 100,000.[14] Thus, nowadays, at the current exchange rate of the Ukrainian hryvnia, the amount of the guaranteed UAH 200,000 compensation[15] (EUR 5,434) is insufficient, disproportionate, and not able to perform the guarantee effectively. Therefore, the guaranteed compensation amount must be revised and reasonably increased.

In light of this, the Verkhovna Rada of Ukraine, at a meeting on 30 June 2021, held a preliminary vote with further amendments regarding draft Law No. 5542-1. This draft Law enshrines an increase in the guaranteed compensation sum for individuals' deposits

13 Press release of 19 April 2022, 'Agreement on restructuring the Fund's debt to the State has been signed' <https://www.fg.gov.ua/articles/51196-pidpisano-dogovir-pro-restrukturizaciyu-borgu-fondu-pered-derzhavoyu-.html> date of access 15 Nov 2022.

14 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes Text with EEA relevance <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0049&qid=1647201293982> date of access 15 Nov 2022.

15 National bank of Ukraine currency exchange on 7 September 2022 – 1 Euro =36,28 UAH <https://bank.gov.ua/en/markets/exchangerate-chart> date of access 15 Nov 2022.

to UAH 600,000 from 2023.[16] However, as of February 2022, the draft Law has yet to be adopted.

A negative aspect of increasing the guaranteed compensation for the deposits and the development of the deposit insurance system in Ukraine is the current Deposit Guarantee Fund's debt to the Ministry of Finance of Ukraine of about UAH 108 billion, which arose as a result of the banking crisis in 2013-2016.[17] Indeed, more than UAH 62 billion of the aforementioned debt is creditor's interest, which is counted on a rising basis until 2031.[18]

Third, it should be noted that the Ukrainian and European legislations concerning deposit guarantee systems use different terminology. In fact, the terminology used in the Law of Ukraine 'On the System of Guaranteeing Natural Person Deposits' differs entirely from the definitions contained in the EU Directive 2014/49/EU. The common terms of both EU and Ukrainian acts are the following: 'deposit'; 'depositor'; 'Deposit Guarantee System for Individuals'. At the same time, the content of the meaning of those terms does not correspond to similar terms used in the Directive. Therefore, since the Constitution of Ukraine enshrines the European and Euro-Atlantic course of Ukraine, to unify the Ukrainian legislation with the European one, the specified terminology regarding the deposits guarantee system must be consolidated with EU Directive 2014/49/EU.

**Peculiarities of the financing of the deposit guarantee system**. Under Art. 10 (1) of the EU Directive 2014/49/EU, member states shall ensure that DGSs have adequate systems in place to determine their potential liabilities. The available financial means of DGSs shall be proportionate to those liabilities. Meanwhile, the sources of funding in the EU include regular contributions from participants (maximum 30% of payment obligations, payable in advance); special contributions (maximum 0.5% of deposits to be guaranteed); alternative funding mechanisms (not defined but allowed if necessary); public and private mechanisms.[19]

**Possibility of investing the funds of deposit guarantee systems**. Art. 4 of the Law of Ukraine 'On the System of Guaranteeing Natural Person Deposits' stipulates that the Deposit Guarantee Fund invests the available costs in the government securities and bonds of international financial institutions placed on the territory of Ukraine. At the same time, according to Art. 336 of the EU Regulation No. 575/2013, the free funds of the deposit guarantee systems should be invested in low-risk and diversified assets.[20] According to EU Regulation No. 575/2013, low-risk assets are securities of the following institutions: the European Central Bank, central national governments, regional and local authorities, state-owned enterprises, development banks with many participants, international financial institutions, and rated institutions, after a creditworthiness assessment is

16 Draft Law on Amendments to Some Laws of Ukraine on Ensuring the Stability of the Deposit Guarantee System for Individuals #5542-1 of 28 May 2021 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=72056> date of access 15 Nov 2022.

17 <https://www.mof.gov.ua/uk/news/derzhbiudzhet-2021_za_sichen-gruden_2021_roku_do_zagalnogo_fondu_nadiishlo_1084_trln_grn-3265> date of access 15 Nov 2022.

18 Press release of the Deposit Guarantee Fund of Individuals of 18 February 2021 <https://www.fg.gov.ua/articles/49121-fond-garantuvannya-dostrokovo-pogasiv-chastinu-borgu-pered-ministerstvom-finansiv-na-sumu-2-mlrd-grn.html> date of access 15 Nov 2022.

19 NY Yurkiv, 'On the approximation of banking legislation of Ukraine in the system of guaranteeing deposits to the requirements of the European Union. National Institute for Strategic Studies' (2019) <https://niss.gov.ua/sites/default/files/2019-11/analit-yurkiv-economics-6-2019-2.pdf> date of access 15 Nov 2022.

20 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 Text with EEA relevance <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0575&qid=1647201852658> date of access 15 Nov 2022.

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performed by the Institute of External Credit Assessments.[21] Consequently, expanding the range of directions for the Fund's investments will contribute to the strengthening of the deposit guarantee system and serve as an additional source of income for the core activities of the Fund.

In addition, the problems occurring in the functioning of the domestic system of individuals' deposit guarantees with respect to the current unstable financial and economic situations in Ukraine indicate the strong need for revision and substantial improvement of the relevant legislation. At the same time, as follows from the overall structure of the EU deposit guarantee mechanism, some functional components of its structure coincide to a certain extent with the problematic factors of the Ukrainian system. Therefore, the implementation of a similar deposit guarantee system in Ukraine could be a potential way to solve all or part of the problems described above.

## 3 CONCLUSIONS AND PROPOSALS

To sum up, the Ukrainian deposit guarantee system has significant differences from the European one. The general vector of Ukraine on its path to European integration involves the consolidation of the Ukrainian banking legislation with the European one. The deposit guarantee system must be based on the fact that depositors are the centre of banking system stability. Therefore, protecting the depositors' rights must be a priority within the professional activities of banks and authorised government bodies.

The guaranteed compensation of UAH 200,000 remained unchanged from 2012 to 2022, which did not correspond with the requirements of modern times and did not contribute to depositors' confidence in banks. The adoption of Law No. 2180-IX (1 April 2022), which provides a full guarantee of individuals' deposits during martial law in Ukraine and an increase of the guaranteed amount for deposits to UAH 600,000 after the end of martial law, will have positive consequences regarding the protection of depositors' rights. However, the Verkhovna Rada of Ukraine is currently considering draft Law No. 5542-1 of 28 May 2021 'On amendments to some laws of Ukraine on ensuring the stability of the deposit insurance system',[22] which provides an increase in the amount of guaranteed compensation to UAH 600,000.

The analysis of problems regarding the functioning of the deposit guarantee system in Ukraine and the differences between Ukrainian and European legislation in this sphere allows us to identify the following measures necessary to improve it.

**1. Restructuring the Deposit Guarantee Fund's debt obligations issued to the Ministry of Finance of Ukraine**

In 2019, the Deposit Guarantee Fund fully repaid its debt to the National Bank of Ukraine of UAH 25.6 billion, of which UAH 5.5 billion was interest.[23] Next, there currently remains

21 Djurdjica Ognenovich, 'Comparison with the Ukrainian deposit guarantee system for individuals' (2018) <https://www.fg.gov.ua/storage/editor/fotos/22_Djurdjica_DIS_DGF_Conference10oct20181_ukr.pdf> date of access 15 Nov 2022.

22 Draft Law on Amendments to Some Laws of Ukraine on Ensuring the Stability of the Deposit Guarantee System for Individuals #5542-1 of 28 May 2021 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=72056> date of access 15 Nov 2022.

23 Press release of the Deposit Guarantee Fund of Individuals of 18 February 2021 <https://www.fg.gov.ua/articles/49121-fond-garantuvannya-dostrokovo-pogasiv-chastinu-borgu-pered-ministerstvom-finansiv-na-sumu-2-mlrd-grn.html> date of access 15 Nov 2022.

an outstanding debt to the Ministry of Finance of Ukraine of nearly UAH 45 billion plus interest, totalling UAH 62 billion.[24]

In our opinion, the signing of the agreement between the Deposit Guarantee Fund and the Ministry of Finance of Ukraine on the procedure of transferring funds by the Fund to the State Budget of Ukraine for the purpose of implementing Law No. 2180-IX 'On Amendments to Certain Laws of Ukraine on Ensuring the Stability of the Deposit Guarantee System for Individuals' is not enough to ensure the effective operation of the Deposit Guarantee Fund of Ukraine.

We advise that the Ministry of Finance of Ukraine should write off the Fund's interest arrears; otherwise, this debt will block the further development of this institution and will put a brake on a possible further increase of the amount of guaranteed compensation for deposits, as well as on prospects for expanding guarantees for legal entities.

**2. Organisation of effective management and sale of insolvent banks' assets**

Currently, the Deposit Guarantee Fund has no authority to carry out effective monitoring of banks' assets. As a result, in the event of a bank insolvency proceeding, the Deposit Guarantee Fund is managing *ad hoc* assets of uncertain and often poor quality.

Therefore, it is necessary to grant the Fund the powers to begin preparing banks for the management of their assets in case of insolvency proceedings through the permanent assessment and monitoring of their condition.

We believe that the abovementioned measures can reduce the number of non-liquid assets of insolvent banks, which have usually been sold for 5-10% of their declared value.[25]

**3. Harmonisation of the Ukrainian banking legislation with the requirements of the EU, particularly those of Directives 2014/49/EU and 2014/59/EU concerning the following:**

- unification of the terminology of the Law of Ukraine 'On the System of Guaranteeing Natural Person Deposits' with the terminology of the Directive 2014/49/EU;
- gradually increasing the guaranteed amount of compensation for deposits to the amount equivalent to EUR 100,000;
- expanding the rights of the Deposit Guarantee Fund to invest free costs not only in domestic bonds but also in other low-risk assets;
- expanding the participation of other credit institutions in the Deposit Guarantee Fund;
- expanding the Deposit Guarantee Fund guarantees for deposits of legal entities and providing insurance of legal entities' deposits for UAH 200,000, with further increases.

24 Ibid.

25 'Prozorro.Sale' <https://prozorro.sale/auction/UA-EA-2020-06-12-000019-b> date of access 15 Nov 2022.

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Reform's Forum Note

# ADVOCACY OF COMPETITION IN THE WORLD AND UKRAINE: COMPARATIVE CHARACTERISTICS

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**Keywords:** advocacy of competition, analogy of law, analogy of legislation, competition law, self-regulation, economic and commercial activity, interaction of competitive bodies, advocacy of competition in conditions of war

## ABSTRACT

***Background:*** *The advocacy of competition is a modern civilisational mechanism of cooperation, which balances private and public interests in economic activity and realises the functions of state management and control of economic activity, ensuring reasonable distribution of public goods. Competition is a fundamental driving force that determines the course of economic processes and contributes to the growth of economic prosperity and innovation in society. Its provision, protection, and development are among the main priorities of state economic policy in general and competition policy in particular. The purpose of this article is a comparative legal analysis of the advocacy of competition in different countries. This study will also identify the peculiarities of the use of advocacy tools in these places.*

***Methods:*** *In studying the proposed problem, the following methods were used: general philosophical and general scientific (dialectical, systemic, formal-logical, etc.); universal (induction, deduction); special-scientific (formal-legal, comparative law); interpretation of the rules, etc. One of the main methods used is the comparative method for researching the common and distinctive features of the advocacy of competition in the EU, USA, Mexico, the Republic of South Africa, and Ukraine.*

***Results and Conclusions:*** *The results show that countries with advanced economies have approached advocacy of competition gradually after more than a century of anti-monopoly competition legislation. In post-transformational economies, we see the formation of competitive policy principles activated after independence and the transition to market-based business practices. The globalisation of international trade relations leads to the need to implement complex competition advocacy programs and unify norms at the level of individual states and unions. Advocacy of competition remains important as a tool of self-regulation of economic activity. The European vector of Ukraine's development caused the emergence of new mechanisms of interaction between the state, the individual, and society. Having chosen to strive for European integration, Ukraine began to build a new model of cooperation between all market participants, the introduction of which was based on the provisions of the Association Agreement between Ukraine, on the one hand, and the EU, the European Atomic Energy Community and their member states, on the other hand, using implementation mechanisms of both individual norms and entire institutions of public-private partnership. The implementation of competition advocacy mechanisms in Ukraine is applied using the mechanisms of the analogy of individual norms and tools of competition policy. The formation of new good competitive practices is connected with russia's war.*

## 1 INTRODUCTION

Competition is a fundamental driving force that determines the course of economic processes and contributes to the growth of economic prosperity and innovation in society. Its provision, protection, and development are among the main priorities of state economic policy in general and competition policy in particular.

Competition may be reduced significantly by various public policies and institutional arrangements as well. Indeed, restrictive private business practices are often facilitated

by various government interventions in the marketplace.[1] Advocacy of competition is any activity carried out by a competition authority to promote the values of the market environment by way of non-compulsory means.[2] The advocacy of competition as a vector of competition policy originated at the end of the twentieth century, particularly in the USA in the 1970s, as the USA was the leading country for anti-monopoly regulation. Since the mid-1980s, multinational donors and individual Western countries have spent substantial resources advising countries with centralised economic and political systems on legal reforms designed to promote economic and political liberalisation.[3] Advocating competition stipulates the enforcement of compulsory measures of competition policy and promotes the awareness of all market participants of the correct application of competition legislation. Advocating competition prevents the adoption of legislative acts, the provisions of which are contrary to competition rules.

Competition advocacy is seen as part of a state's competitive policy. Some scholars take into account the globalisation component of competition policy: 'Competition policy, today, is an essential element of the legal and institutional framework for the global economy. Whereas decades ago, anti-competitive practices tended to be viewed mainly as a domestic phenomenon, most facets of competition law enforcement now have an important international dimension'.[4] Therefore, the advocacy of competition is also becoming a global phenomenon. According to P. Buccirossi and others: '… the effectiveness of competition policy is also likely to depend on external factors: the quality of a country's institutions in general and its judicial system, in particular … the general quality of the institutions of a country creates an environment that affects the effectiveness of all public policies'.[5] Ensuring maximum transparency contributes to both a broader understanding of the importance of competition policy and the increase of public confidence in the activities of competition authorities. Advocacy attempts to convince the authorities not to take anti-competitive measures to protect certain groups of interests, which can harm the public interest.[6] Competition advocacy is an important tool for preventing further infringement of competition rules, as it promotes positive market practices. In this case, the activities of public organisations and business associations are of primary importance because they can explain good practices. The activities of state bodies that protect competition are more aimed at 'calling out' negative practices: do not do that because there will be sanctions. Such activity also has a high effect on competition advocacy.

Comparative legal analysis of competition advocacy tools is an important task for scientists in a globalised world. The globalisation of international trade relations leads to the need

1 *A Framework for the Design and Implementation of Competition Law and Policy* (The World Bank, OECD 1998) Chapter 6, at 93.

2 A decade of ICN activity: overview of the main achievements. EU Competition & Regulatory. Legal and policy developments at the EU level, 19-25 August 2011 <http://www.slaughterandmay.com/media/1591488/eu-competition-and-regulatory-newsletter-19-aug-25-aug-2011.pdf> accessed 19 March 2019.

3 For an overview of contributions of foreign donors to economic development, see 'Assessing Aid What Works, What Doesn't, and Why' (1998) World Bank policy research report <http://documents.worldbank.org/curated/en/262281468181493001/Assessing-aid-what-works-what-doesnt-and-why> accessed 5 March 2019' .

4 RD Anderson, WE Kovacic, AC Müller, N Sporysheva , 'Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreement, Current Challenges and Issues for Reflection' (2018) World Trade Organization Economic Research and Statistics Division. Staff Working Paper <https://www.wto.org/english/res_e/reser_e/ersd201812_e.pdf> accessed 29 March 2019.

5 P Buccirossi, L Ciari, T Duso, G Spagnolo, C Vitale , 'Competition Policy and Productivity Growth: An Empirical Assessment' (2010) 95(4) The Review of Economics and Statistics 1324-1336.

6 Ch Pleatsikas, DJ Teece, 'The Analysis of Market Power and Market Definition in the Context of Rapid Innovation' (2001) 19(5) International Journal of Industrial Organization 665-693.

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to implement complex competition advocacy programs and unify norms both at the level of individual states and unions. Currently, the issue of mutual influence and interaction of trade and competition policies is particularly relevant. Art. 9 of the WTO Agreement on Trade-Related Investment Measures clearly establishes this connection, where it provides for the consideration of provisions on investment policy and competition policy by the end of the century. In the preamble of the same Agreement, it is noted that certain investment measures may cause consequences that limit and distort trade. Two new initiatives – trade and environmental sustainability (sustainability) – were supported by the EU in the aspect of developing the competitive policy of states. In particular, these policies are related to the global challenges of climate change, as well as plastic pollution. Therefore, the main idea is to have agreed-upon rules of competition at the international level.

Advocacy is also viewed through the prism of self-regulation. Self-regulation of the advocacy of competition is implemented in those cases when there is no timely response of the state to the changes taking place, or it is necessary to apply other approaches that differ from the tools of direct management.[7] An example of self-regulation in trade activities is the agreement at the international level of the rules for regulating trade services, as well as unified rules for the supply of products for state and public needs. In addition, there are developments in the form of unified approaches to the regulation of relations in the field of public procurement.

In studying the proposed problem, the following methods were used: general philosophical and general scientific (dialectical, systemic, formal-logical, etc.); universal (induction, deduction); special-scientific (formal legal, comparative law); interpretation of the rules, etc. One of the main methods used is the comparative method for researching the common and distinctive features of the advocacy of competition in the EU, USA, Mexico, the Republic of South Africa, and Ukraine. The universal method of induction and deduction is used to determine advocacy tools present in the world. On the basis of formal legal and system functional methods, the competence of state bodies that protect competition is established. The system method helped to identify proposals for improving the advocacy of competition in Ukraine. The method of interpretation of the law is used to clarify the specifics of advocating competition in Ukraine.

## 2 THE EXPERIENCE OF STATES IN ADVOCACY OF COMPETITION

Each state has its own unique legal system. Despite the globalisation trends, advocacy of competition in different states has its own characteristics both at the level of state regulation and at the level of self-regulation. Important trends are the cooperation of competition authorities in the European region.

The formation of a socially-oriented economy provides the involvement of the whole spectrum of social regulation (economic, legal, moral, and ethical) in order to achieve the set goals – honest and fair competition in economic activity on the market and in the economic process regulation in the state.[8] State regulation of the competitive environment is a necessary tool for achieving a balance between public and private interests.[9]

7 O Bakalinska, O Belianevych, O Honcharenko, 'Advocacy of Competition in the Mechanism of State Regulation of the Economy' (2020) 11(1) International Journal of Financial Research 431

8 O Bakalinska, 'Fair competition as a form for implementation of the fairness principle in the economic activity' (2017) 2(4) Visegrad Journal on Human Rights 19.

9 O Redkva, O Haran, L Prystupa, 'Determinations of State Regulation of the Competitiveness of Modern National Economies' (2018) 4(4) Baltic Journal of Economic Studies 265-273 DOI: http://dx.doi.org/10.30525/2256-0742/2018-4-4-265-273.

Hetham Abu Karky shows that the International Competition Network (ICN) had an impact on members' legislation and that a substantial percentage of ICN members consider ICN-recommended practices when they draft their legislation, and this is an indication of the ICN's achievements in convergence upon substantive and procedural standards.[10] Hong Dae Sik considers the Korean experience of competition advocacy, given the scope of power granted to the Korea Fair Trade Commission (KFTC).[11]

The adaptation of Ukrainian legislation to EU rules and the implementation of EU competition law provisions into Ukrainian law actually began immediately after gaining independence. However, competition advocacy still requires significant effort and the development of good practices. The Antimonopoly Committee of Ukraine should pay more attention to competition advocacy as an element of preventing violations of competition rules. In the conditions of the legal regime of martial law in Ukraine, the competition department continues to work actively and cooperate with competition departments from other countries, in particular, the EU and the USA. Considerable attention is paid today to an important general issue – the application of sanctions to the aggressor state and its residents. The issue of competition protection is also relevant for business associations, which have faced new challenges: the formation of good competitive practices in the conditions of war.

An overview of competition advocacy systems, particularly in EU countries and the USA, allows us to identify the following groups of instruments for working with market actors:

1. Conducting seminars and conferences aimed at familiarising and explaining the norms of anti-monopoly legislation among representatives of both business and government.

2. Placing printed and electronic media of a comprehensive campaign that will provide both the clarification of the benefits of competition and the provision of analytical materials aimed at preventing violations of antitrust laws and legislation on advertising, as well as highlighting the results of activities of anti-monopoly bodies.

3. Edition of thematic collections, monographs, translations of foreign books, and articles that reveal the content and role of competition policy.

4. Support for the official site of the anti-monopoly agency on the Internet, periodic disclosure of the essential information on the activities of the anti-monopoly bodies through the site, and the modernisation and creation of sites for local authorities.

5. Interaction with public organisations, professional unions and associations, and the scientific community.

6. Interaction with state authorities and local self-government to take into account the comments and suggestions of the Committee aimed at ensuring competition during regulatory document preparation.

7. Establishment of appropriate Expert Councils.

8. Cooperation with academic institutions, such as scientific institutes and establishments of higher education, to train young specialists.

The introduction of sanctions against the aggressor state and its residents is a new requirement that requires comprehensive attention from the business community and

10 H Abu Karky, 'The Impact of the International Competition Network on Competition Advocacy and Global Competition Collaboration' (2019) 40(10) European Competition Law Review <https://ssrn.com/abstract=3473156 or http://dx.doi.org/10.2139/ssrn.3473156>.

11 DS Hong, 'Competition Advocacy of the Korean Competition Authority (December 13, 2013)' in TK Cheng, I Lianos, DD Sokol (eds), *Competition and the State* (Stanford University Press 2014 <https://ssrn.com/abstract=2819439> date of access 01 Sep 2022.

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competition agencies. Therefore, advocacy of competition in this aspect should play a role in forming 'a culture of behaviour of refusing any cooperation (direct, covert, circumvention of sanctions)' with russia, its residents, and those who cooperate with them.

### 3.1. THE EU

The coordinated competition policy of the countries of the EU is one of the cornerstones of European integration. Common rules on the regulation of competition issues were introduced in 1957, simultaneously with the creation of the European Economic Community, which was later transformed into the EU. Arts. 85-86 of the Treaty of Rome defined the basic rules regarding the prohibition of cartels (concerted actions aimed at eliminating competition) and abuse of monopoly (dominant) positions and defined their main types. The specified basic provisions are included in Arts. 101-102 of the Treaty on the Functioning of the EU. Accordingly, Art. 101 of the Treaty on the Functioning of the EU defined as incompatible with the internal market all agreements between economic entities, decisions of associations of economic entities, and concerted practices that may affect trade between member states and whose purpose or effect is obstruction or restriction – these are prohibited or a distortion of competition in the domestic market. In 1989, Regulation No. 4064/89 was adopted, which provided for obtaining a single permit from the European Commission for concentrations that, by their scale, could affect competition at the level of the entire community. This regulation was later replaced by Regulation 139/2004, which continued to improve the merger control mechanism.

Since the launch of the European Green Deal in 2019, the EU has intensified the issue of environmental and climate policies, which are supported and complemented by competition policy. Emphasis is placed on understanding fundamental problems. The Roadmap for a Sustainable EU Economy turns climate and environmental challenges into opportunities in all policy areas, enabling modern growth and making the transition fair and inclusive for all. The main task is to transform the entire European economy to carbon neutrality by 2050. For example, EU antitrust rules allow companies to jointly implement truly environmental initiatives.[12] Therefore, the advocacy of competition and the application of relevant instruments in the EU will be connected with the general aim of achieving a sustainable economy.

Today, a vivid example of the functioning of competition advocacy in the EU is the digital market. In particular, legislative initiatives have been developed to regulate and advocate competition, namely the Digital Markets Act (DMA). These provisions provide precautionary measures to regulate in detail the activities of large companies in the digital markets of high-tech goods and services. For example, the criteria for determining which platforms have a dominant position and which platforms have significant market power; a list of prohibited practices applicable to all such platforms and/or a case-by-case assessment of what behaviours should be prescribed; provisions allowing prohibited behaviour in certain cases and others. Therefore, advocacy of competition should help smaller companies in their respective markets and enable them to develop more effectively, taking into account the examples of regulation of large companies.

### 3.2. THE USA

The Federal Trade Commission (hereinafter – FTC/the Commission) is an independent competitive body that reports to Congress about its activities. These actions involve active

12 Competition policy brief, September 2021 <https://op.europa.eu/en/publication-detail/-/publication/63c4944f-1698-11ec-b4fe-01aa75ed71a1/language-en/format-PDF> date of access 01 Sep 2022.

and effective law enforcement measures; the promotion of consumer interests through the exchange of experience with federal and state legislative bodies and departments of the USA and international governmental institutions; developing strategies and research means through holding hearings, seminars, and conferences; creating practical and accessible educational programs for consumers and enterprises to review new technologies that appear on the world market.[13]

Conducting research, writing reports, advocacy law-making, and organising hearings are widely used methods to improve consumer welfare. The FTC implements various measures in addition to law enforcement and learning (trainings) to strengthen the protection of consumer rights. The agency conducts and co-organises conferences and seminars, during which experts and other interested parties can identify new and complex issues of protection of consumer rights and discuss ways to resolve them. The FTC also issues reports that analyse consumer protection problems and provides recommendations for their elimination. In addition, the FTC has the authority to comment on the principles of advocacy aimed at protecting consumer interests and draw attention to the results of empirical research on the role of consumers in decision-making processes to federal and state authorities. The Commission also provides advice on consumer rights protection during court hearings.

The Commission has exclusive authority (jurisdiction) to collect, analyse, and publish certain information about the trends in the development of the competitive environment and the impact of the level of competition on trade in the USA. The Commission uses this right to conduct public hearings to organise conferences and seminars to coordinate and conduct economic research on socially significant issues in the field of competition and then to publish reports on the results and conclusions of its activities. This right contributes to the advancement of competition principles, which is decisive in many areas of activity as a key component of the agency's strategy in the context of improving consumer welfare.

### *3.3. THE MEXICAN US*

In Mexico in 1992, the Federal Law on Economic Competition (FLES) was adopted, and the Federal Commission on Competition (hereinafter – the Commission/FCC) was established.[14] The law came into force in mid-1993. The task of the FCC was to protect and secure competition and free access to markets by preventing and eliminating monopolies, monopolistic activities, and other restrictions on the rational and adequate promotion of goods and services on the market. The creation of the FCC was part of the structural reform and economic changes that took place in Mexico from the late 1980s to the early 1990s when the Law on Competition was considered a natural addition to the privatisation, deregulation, and liberalisation processes that were taking place in the economy (Organization for Economic Co-operation). This resembles the situation in Ukraine in the 1990s. Reforms were also needed to enter the Free North American Trade Agreement (NAFTA) with the USA and Canada. Consequently, the country recognised that competition policy had to become an essential tool for improving the country's competitiveness and the welfare of society.

13 The Federal Trade Commission's Fiscal Year of 2011, Performance and Accountability report (PAR) <http://www.ftc.gov/opp/gpra/2011parreport.pdf> accessed 29 March 2019.'

14 Federal Law on Economic Competition (FLES) Mexican United States, Official Gazette of the Federation 24 December 1992 <https://unctad.org/Sections/ditc_ccpb/docs/ditc_ccpb_ncl_mexico_en.pdf> accessed 29 March 2019.

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### 3.4. BRAZIL

Brazil has a system of competition protection, which is formed of such institutions as the Secretariat for Economic Monitoring (SEAE) linked to the Ministry of Finance, the Administrative Council for Economic Defense (CADE), and the Secretariat of Economic Law (SDE), linked to the Ministry of Justice. They perform complementary roles enforcing Competition Law no. 8.884/94, enacted in June 1994. The SEAE and other agencies seek to demonstrate the value of competition in public authorities and civil society. The competition advocacy role performed by the SBDC has encompassed a variety of initiatives that ranged from an intensive campaign in the media to participating in task forces with different governmental bodies.[15]

### 3.5. THE SOUTH AFRICAN REPUBLIC

The activities of the South African Competition Commission were defined by the 1998 Competition Law No. 89, which entered into force on 1 September 1999 and reflected the orientation of the first democratic government in the South African Republic to strengthen the principles of competition due to the high level of concentration of the country's economy. The law contains provisions for the establishment of a Competition Commission, whose main task would be to investigate mergers and anti-competitive behaviour, in most cases with the participation of the Competition Tribunal. A Competitive Appeal Court has also been established, which has the right to consider any complaints regarding decisions taken by the Competition Tribunal.[16]

Let us take into consideration an example of advocacy and control of the Commission for such activities.[17] The purpose of the Commission was to raise awareness of abusive trading practices and to prevent government procurement violations by training government officials involved in government procurement; introducing training on falsifications during the bidding as part of the Academic course of study on Management Training along with the chain of supply to the Academy of Governmental State Service; advocacy for changing rules between participants, including the use of the Certificate of Independent Bid Determination established by the Commission for the public procurement process. The strategy of the advocacy activity of the Commission is aimed at raising awareness of the Law on Competition and the role of the Commission; the mobilisation of active participation of non-governmental organisations in the activities of the Commission, and support of voluntary interaction between business circles and the Commission; ensuring the compatibility of the Law on the competition with other norms of legislation (in this regard, the Commission interacts with government departments, sectoral inspectors and legislative bodies in accordance with its competence, depending on the existing or proposed legislative amendments).

Consequently, the advocacy of competition in the countries under consideration has both common and distinctive features. For the USA, which traditionally pays considerable attention to the development and protection of competition, the activities of the Federal Trade Commission are aimed at close cooperation with all target groups. Public relations

15 CM Considera, MT de Ara˙jo, 'Competition Advocacy in Brazil – Receipt Development' (2003) 16 Buletin Latino Amerikano de Competencia 77

16 Competition Commission and Competition Tribunal, Pretoria, South Africa, 'Ten years of enforcement by the South African competition authorities' (September 2009) <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/10year.pdf> accessed 8 March 2019.

17 ICN Advocacy Working Group, 'Advocacy Toolkit. Part I: Advocacy process and tools' (2011) Presented at the 10th Annual Conference of the ICN, The Hague <http://www.internationalcompetitionnetwork.org/uploads/ library/doc745.pdf> accessed 2 March 2019.

are an integral part of the Commission's competition policy. The criteria for assessing the effectiveness of advocacy measures are of interest. According to the statistics provided by the department on measures to support competition and the protection of consumers' rights, increasing requirements for the effectiveness of advocacy measures are obvious. The policy of advocating competition in the USA is simultaneously complex and flexible. The FTC report states that it is impossible to predict exactly what direction and in what volume the problematic issues may arise in the field of competition policy. Therefore, it is somewhat problematic to plan a specific number of seminars, conferences, notes, etc. But even if the goals were not achieved and the plan was not implemented for a certain reporting period (year), nevertheless, the scale of the work is appreciated due to its positive results.

Mexico focuses on regulatory issues in certain sectors where the economic policy does not always take into account the principles of a 'free' market. Therefore, there is a necessity to strengthen legislative support of competition policy in these sectors: there were changes to the Law on Competition, and there was the declaration of Commission Conclusions and General Recommendations. Due to gradual reforms in the pension system, the banking market, and the telecommunications and broadcasting market, the gradual achievement in the energy sector of Mexico's trade was positively attained. These achievements positively affected the competitiveness of national enterprises and the welfare of citizens, which made it possible to lower prices and use limited funds both by the state and by consumers.

In the South African Competition Commission, even though there is a special advocacy unit, the Commissioner and Deputy Commissioner are doing a very important job on advocacy, just like other executives and teams do. There are two main areas of the advocacy strategy raising public awareness of the Law on Competition and the Law on the role of the Commission, as well as mobilising the active participation of civic organisations in the work of the Commission and businesses supporting voluntary approval of this as well as establishing closer links and effective interaction with governmental and sectoral departments, as well as legislatures.

## 4 STATE POLICY OF ADVOCACY OF COMPETITION IN UKRAINE

Having chosen the direction of European integration, Ukraine began to build a new model of cooperation between all market participants, the introduction of which was based on the provisions of the Association Agreement between Ukraine, on the one hand, and the EU, the European Atomic Energy Community and their member states, on the other hand, using implementation mechanisms of both individual norms and entire institutions of public-private partnership. Chapter 10 of this Agreement (Arts. 253-261) is devoted to competition issues. Art. 256 of the Agreement provides for the further approximation of Ukrainian legislation to EU law and has a list of provisions of EU Regulations that must be implemented into Ukrainian legislation.

The implementation of competition advocacy mechanisms is based on the principle of the rule of law and is applied using the mechanisms of the analogy of individual norms and tools of competition policy, such as the Lianci Program, the reduction or increase of fines, depending on the intentionality of competitive actions. The application of the analogy is also connected with the lack of relevant experience in the application of the rules of competition law by state authorities – the Anti-monopoly Committee of Ukraine. That is why the majority of local acts of the Anti-monopoly Committee of Ukraine directly or indirectly use the analogy of law both in the process of law-making and in law enforcement. Legal regulation of competition in Ukraine is defined in the Constitution of Ukraine, international treaties, the Economic Code of Ukraine, laws of Ukraine, and by-laws.

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The Concept of the National Program for the Development of Competition for 2014-2024 does not define the concept of competition advocacy, but the ways and means of solving the problem in the field of competition development include: the improvement of state policy in the field of protection of economic competition, in particular through further harmonisation of legislation on the protection of economic competition with European legislation in the relevant field; the involvement of civil society institutions in the formation and implementation of anti-monopoly and competition policies.[18] The expected results include the formation of a positive attitude in society towards economic competition as a fundamental social value.

The Constitution of Ukraine consolidates the principle of state protection of competition in Ukraine. At the time of the independence declaration of the country, there were no legislative and regulatory acts regarding competitive relations. The first of them was the Law of Ukraine 'On Limiting Monopolies and Preventing Unfair Competition in Business Activity', adopted in 1992. This was the basic regulatory document in the system of law competition in Ukraine before the adoption of the Law of Ukraine 'On Economic Competition'. The competitive legislation of Ukraine is similar to that operating in other countries, due to which there are increasingly strong integration processes in the world and a globalised economy, which leads to the acceleration of the unification of rules of international trade and protection of competition. But there are certain differences stipulating the specifics of the economic and historical development of different countries and their positions in the ranking of international competitiveness. Art. 10 of the Economic Code of Ukraine (ECU) defines the main directions of the economic policy of the state, one of which is the anti-monopoly/competitive policy of the state. The anti-monopoly/competitive policy is aimed at creating an optimal competitive environment for business entities, ensuring their interaction on the conditions of preventing the manifestations of discrimination of some subjects by others, especially in the field of monopoly pricing and at the expense of reducing the quality of products and services, promoting the growth of the effective socially oriented economy.[19]

At the same time, there are urgent problems in working out a mechanism for the implementation of adapted legal provisions and creating appropriate conditions for the proper mechanism of their provision so that the adaptation of the legal system of Ukraine to the EU legal system takes place in full and in a qualitative manner.[20] In particular, the role of individual citizens and private companies as objects of competitive regulation is extremely important in the advocacy of competition.

In Western scientific literature, there is a point of view that the authorities must act in different ways in developing countries with transition economies. For example, initially, advocacy is advisable to diminish propaganda activity and gradually move toward competitive regulation, primarily focusing on the anti-competitive behaviour of market subjects and leaving research on vertical constraints and abuses of a dominant position for the future, when the culture of competition and the accumulated experience will allow for

18 On the approval of the Concept of the National Competition Development Program for 2014-2024: Order of the Cabinet of Ministers of Ukraine dated 19 September 2012 No 690 <https://zakon.rada.gov.ua/laws/show/690-2012-% D1%80?find=1&text=%D0%B7%D0%B0%D1%85%D0%B8%D1%81%D1%82#w1_7> accessed 10 October 2022.

19 Economic Code of Ukraine, 16 January 2003 <https://zakon.rada.gov.ua/laws/show/436-15> accessed 20 March 2022.

20 T Humenyuk, V Knysh, 'Problems of Development of the European Integration of Ukrainian Legislation (2014-2018)' (2019) 22(1) Journal of Legal, Ethical and Regulatory Issues <https://www.abacademies.org/articles/Problems-of-development-of-the-European-integration-of-Ukrainian-Legislation-2014-2018-1544> accessed 29 June 2019.

this.[21] Different arguments are put forward to support this point of view. Let us consider two of them.

First of all, to investigate the anti-competitive behaviour of private firms, the competition authority should have access to private information on these firms. In developing countries and countries with transition economies where the judicial system and the culture of competition need further strengthening, firms may refuse to provide such information in order to avoid punishment for competition violations. However, in practice, there is often no need for hidden information of that kind. Even if the information is not publicly available, it is easy to gather it indirectly through the analysis of their reporting, which the company submits to different public authorities. Regarding the last argument about comparatively easy access to information, it would be like this if all government agencies would cooperate with each other to exchange necessary information, which does not always take place. In practice, relations between regulatory bodies and the competition authority often require adjustments to establish more effective cooperation. Nevertheless, it must be recognised that access to the necessary information for propaganda is easier than to strategic information of private companies, especially in developing countries and countries with transition economies.

The second argument is that law enforcement authorities often refuse to initiate cases in competition spheres because the competition authority is not in force to fully provide evidence to initiate a case against an offender. Often, the system functions as an appellate instance (party), which pays more attention to the procedure rather than the merits of the case. In addition, the investigation usually takes considerable time, often several years, to resolve the matter.

In circumstances of that kind, the first step involves limitation within advocating competition propaganda. On the advice of Western experts, the authorities take considerable risks if they remain alone without appropriate levers of influence on competitive relations, jeopardising a broad field of activities to ensure the fulfilment of their functions, credibility, and stability in the country. In other words, the choice between different measures of competition policy and advocacy is a difficult task for the Anti-monopoly Committee of Ukraine during institutional alterations.

An important point is the development of institutional mechanisms of self-regulation in advocating competition because public associations are endowed with certain self-organising peculiarities, such as self-regulation.[22] The protection of consumer rights as an imperative serves as a kind of limitation for competition advocacy. The activity of self-regulatory organisations of business entities to support competition is a positive and relevant tool. In the internal documents of business entities and their associations, the policy of anti-monopoly compliance can be defined, which is a means of both self-regulation and competition advocacy. It should be noted that compliance policy is quite intellectually and materially expensive, requiring substantial analytical processes.

Today, for Ukraine, it is important to restructure the economy along military lines, i.e., to transition to a military-type economy. Such a system involves greater state intervention in the activity of economic entities. Therefore, new challenges arise for competition advocacy in the conditions of the legal regime of martial law. However, the main direction of the state's policy should remain – the development of competition and its comprehensive advocacy. At the same time, the imperative when advocating competition are prohibitions

21 AE Rodriguez, BC Malcom BC, 'Competition Policy in Transition Economies: The Role of Competition Advocacy' (1997) 23 Brooklyn Journal of International Law 365.

22 O Goncharenko, L Neskorodzhena, 'Self-regulation of culture: the role of public associations and electronic communication' (2018) 4 Herald of National Academy of Managerial Staff of Culture and Arts 123.

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against: cooperation with the companies of the aggressor state; activity in the aggressor state; cooperation with companies that work with counterparties from the aggressor state.

## 5 CONCLUSION

Countries with advanced economies have approached advocacy of competition gradually, after more than a century of anti-monopoly competition legislation. In post-transformational economies, the formation of competitive policy principles was activated after independence and the transition to market-based business practices. Initially, the competition policy was built on the mechanisms of coercion, realised only through the detection and fight against violations of legislation, and its objects were mainly business entities. The introduction of competition advocacy mechanisms in the practice of anti-monopoly/competitive agencies took place over ten to fifteen years. To date, advocating competition in countries with a post-transformation economy deserves some criticism. Competitive/anti-monopoly agencies should be more active in this matter. It is necessary to pay attention to the field of the advocacy of competition: it is necessary to identify the most economically important and significant elements for the development of the country. In this case, the competition/anti-monopoly departments should apply those actions for which they have sufficient confidence in their success.

In the process of socially-oriented economy development and formation of the competitive environment in Ukraine, an important task of the state is to create an environment in which formal institutions would prevail and ensure the rule of law in the country, the main criteria of which are: transparency, relative stability, absence of reversal of laws, openness, clarity, and the universality of law-making rules and procedures. Competition is a special institution that needs state support and adjustment not only in the form of anti-monopoly policy but also as the purposeful advocacy of competition in society. It is the advocacy of competition that promotes clarification of the norms of competition law and the formation of a competitive culture in society and creates a flexible, supportive structure for the development of competition. The formation of a competition advocacy program in Ukraine is to be aimed at creating such rules, regulations, and mechanisms for implementing a competitive policy that would allow the state to achieve high rates of economic development and social sustainability in society and to be coherent with the criteria for membership in the EU defined by the European Council (the Copenhagen criteria).

The implementation of competition advocacy mechanisms in Ukraine is applied using the mechanisms of the analogy of individual norms and tools of competition policy, such as the Lianci Program, and reduction or increase of fines, depending on the intentionality of competitive actions. The application of the analogy is also connected with the lack of relevant experience in the application of the rules of competition law by state authorities – the Anti-monopoly Committee of Ukraine. That is why the majority of local acts of the Anti-monopoly Committee of Ukraine directly or indirectly use the analogy of law both in the process of law-making and in law enforcement. New challenges are emerging for the protection of competition in the conditions of the legal regime of martial law.

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CASE NOTE

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Case Note

# PRELIMINARY JUDICIAL CONTROL OF AMENDMENTS TO THE CONSTITUTION: COMPARATIVE STUDY

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## ABSTRACT

***Background:*** *Genetically, constitutional control appeared in connection with the need to check the constitutionality of ordinary laws adopted by the parliament. A significant practice of the bodies of constitutional jurisdiction regarding preliminary or subsequent control overdraft laws/laws on amendments to the constitution was also gradually formed. This approach has both positive and negative sides. In Ukraine, a significant practice of the Constitutional Court of Ukraine has already been formed regarding the provision of conclusions on the compliance of draft laws on amendments to the Constitution of Ukraine to comply with its Arts. 157-158 (preliminary control). An assessment of the relevant national experience is impossible without a comparative approach and study of the experience of foreign countries.*

***Methods:*** *The present paper used the following methods of analysis and synthesis to examine the main approaches to the nature of the preliminary judicial constitutional control of amendments to the constitution and its variation (explicit and implicit): the system-structural method, which allowed us to give a structural description of the preliminary judicial constitutional control of amendments to the constitution, as well as to analyse the content of its variations (explicit and implicit), and the logical-legal method, which provided an opportunity to clarify the content of the legal positions of constitutional courts and supreme courts of foreign countries on the implementation of the preliminary judicial constitutional control of amendments to the constitution.*

***Results and Conclusions:*** *Theoretical and practical approaches to substantiating the nature of the preliminary judicial constitutional control of amendments to the constitution in foreign countries were developed and analysed.*

## 1 INTRODUCTION

Judicial review, also known as constitutional control, can be both preliminary (before an act enters into force) and subsequent (after such entry into force). Preliminary judicial review (control) is less common. Even less common is the judicial review of draft laws on amendments to the constitution, as well as adopted laws, before their promulgation. Such verification can be carried out if it is directly (explicitly) provided for by the constitution or legislation, and sometimes, it is carried out implicitly (indirectly) through the exercise of other powers of judicial authorities.

As noted by the Venice Commission, only in a few states does the constitutional court have the right to participate in the procedure of amending the constitution. Prior control is a rare procedural mechanism. Thus, this control cannot be considered a requirement of the rule of law (CDL-AD (2012)010, Opinion on the revision of the Constitution of Belgium, para. 49)[1].

Nevertheless, a significant practice of prior control has already been formed in those countries where such prior control is provided for. Ukraine belongs to this list. Therefore, our goal is a general overview and analysis of the accumulated practice of foreign countries in an attempt to uncover the positive and negative aspects of the preliminary control of laws on amendments to the constitution.

1 Opinion on the revision of the Constitution of Belgium: Adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012) <https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2012)010-e> accessed 20 September 2022.

## 2 PRELIMINARY CONTROL: GENERAL REMARKS

As stated in paras 51-57 of the Report of the Venice Commission 'On constitutional amendment',[2] in some countries, the Constitutional Court plays a formal role in the procedure for introducing constitutional amendments – for example, in Azerbaijan, Kyrgyzstan, Moldova, Turkey, and Ukraine. In Moldova, a proposal for a constitutional amendment can be submitted to the parliament for consideration only if it has received the support of at least four judges of the Constitutional Court (the Constitutional Court consists of six judges). The activity of the Constitutional Court in the amendment procedure is allowed under certain conditions. In Azerbaijan, the Constitutional Court must give its opinion before voting on the proposal if a change in the text of the Constitution is proposed by the Parliament or the President. In Turkey, the Constitutional Court intervenes in the process only at the request of the resident or one-fifth of the members of the parliament. It can check compliance with procedural requirements but not the content of the constitutional amendment.

The experience of such mandatory preliminary judicial review of constitutional amendment proposals is very diverse. On the one hand, there are examples of constitutional courts making valuable contributions that have improved and served as an example for subsequent parliamentary and public debates. On the other hand, there are also examples of prior court involvement making the amendment process overly rigid. This is especially true if any (even the most minor) change made after the court decision will mean that a revised version must be presented to the court again. The Venice Commission claims that this kind of prior judicial control is a severe limitation of the parliament – presenting the risk that some proposals will be excluded without even having a chance for democratic discussion (para. 195 of the Report 'On constitutional amendment', approved at the 81st plenary session (11-12 December 2009).

Preliminary judicial constitutional control of amendments to the constitution can be explicit or implicit. We will consider these two varieties in more detail.

## 3 EXPLICIT PRELIMINARY JUDICIAL CONTROL

Preliminary control is enshrined in the Constitution of the Republic of Kosovo, dated 9 April 2008. In accordance with Part 9 of Art. 113 of the Constitution, before sending additions to the Assembly, the Speaker of the Assembly sends the above-mentioned additions to the Constitutional Court to confirm that the above-mentioned additions do not reduce human rights and freedoms guaranteed by Chapter 2 of this Constitution.[3]

According to Art. 146 of the Constitution of Romania, the constitutional court must issue an opinion on initiatives to revise the Constitution. This article is correlated with Art. 148, which sets the limits of review.[4]

O. Boryslavska cites the example of the decision of the Constitutional Court of Romania in 2014 when it recognised a draft law as unconstitutional in part 26 of the relevant paragraphs (Constitutional Court of Romania, Decision 80/2014). The project was also criticised by

2 Report 'On constitutional amendment', adopted by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)001-e> accessed 20 September 2022.

3 Constitution of the Republic of Kosovo, Constitutions of the country of world: Republic of Serbia, Republic of Kosovo, Republic of Albania, Montenegro (OVK 2022) 175-176.

4 Constitution of Romania <https://www.presidency.ro/en/the-constitution-of-romania> accessed 20 September 2022.

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the Venice Commission (CDL-AD(2014)010. Opinion on the draft law on the review of the Constitution of Romania, adopted by the Venice Commission at its 98th Plenary Session (Venice, 21–22 March 2014), Strasbourg, 24 March 2014).[5] As a result, in Romania, the implementation of the relevant control caused serious state-legal conflicts.

The model operating in Moldova is similar to the Romanian one. Mandatory control of all draft laws on amendments to the Constitution is in effect there (subsection 1, part 1 of Art. 135 of the Constitution).[6]

As for Ukraine, its model of preliminary control over amendments to the constitution is similar to the Romanian and Moldovan ones, as it provides for checking the draft law for compliance with Arts. 157-158 of the Constitution of Ukraine.[7]

In 2008, the Constitutional Court of Tajikistan was granted the right of preliminary control over the project to amend the Constitution. At the same time, on 4 February 2016, the Constitutional Court of Tajikistan stated that

> The Constitutional Court of the Republic of Tajikistan came to the conclusion that the proposed changes and additions to the Constitution reflect the further process of democratisation of the political and social life of Tajik society, strengthening the legal protection of the person and are a continuation of the political and social, legal and judicial reform in the country. They are aimed at improving the norms of the Constitution and correspond to the world practice of introducing amendments and additions to the constitution, as well as the values and basic principles of the Constitution of the Republic of Tajikistan.[8]

One cannot fail to note the sublime style in which the approval of the corresponding project is expressed. Tajik authors (in particular, D. Elnazarov), on the other hand, claim that 'the legislator, expanding the scope of preliminary control by the Constitutional Court, thereby strengthened its role and prestige in ensuring the supremacy of the Constitution in the system of normative legal acts of the Republic of Tajikistan'.[9]

As a result of the 2015 constitutional reform in Armenia (Art. 168 of the Constitution), preliminary control by the Constitutional Court was provided for the approval of draft amendments to the Constitution.[10]

Preliminary explicit judicial constitutional control of amendments to the constitution exist in Azerbaijan. Arts. 153-154 of the Constitution of the Republic of Azerbaijan declare: 'The Constitutional Court of the Republic of Azerbaijan shall be requested in advance to give its opinion with respect to the changes to the text of the Constitution that are proposed by the Milli Majlis or the President of the Republic of Azerbaijan' and that 'The Constitutional

5 O Boryslavska, European model of constitutionalism: system-axiological analysis (Pravo 2018) 313-314.

6 Constitution of the Republic of Moldova <https://www.constcourt.md/public/files/file/Baza%20legala/constitutia_ro_22.05.17_ru.pdf> accessed 20 September 2022.

7 On the preliminary control over amendments to the Constitution in Ukraine, see H Berchenko 'Preliminary control over changes to the Constitution: legal positions of the Constitutional Court of Ukraine' (2019) 6-1 Law and Society 9-16; H Berchenko 'Reservation of the Constitutional Court of Ukraine as an element of the procedure for introducing amendments to the Constitution of Ukraine' (2020) 66 Actual Problems of Politics 118-123.

8 Resolution of the Constitutional Court of the Republic of Tajikistan dated 4 February 2016 <http://constcourt.tj/ru/qarorho/postanovlenie-po-predstavleniyu-madzhlisi-namoyandagon-madzhlisi-oli-respubliki-tadzhikistan-ob-opredelenii-sootvetstviya-proekta-izmenenij-i-dopolnenij-vnosimyh-v-konstitucziyu-respubliki-tadz> accessed 20 September 2022.

9 Ja Zalesny (ed), Constitutional Courts in Post-Soviet States: Between the Model of a State of Law and Its Local Application (Peter Lang Publishing 2019) Chapter IX.

10 Ibid, Chapter II.

Court of the Republic of Azerbaijan may not take decisions with respect to changes in the text of Constitution of the Republic of Azerbaijan that are adopted by referendum'.[11]

K. Makili-Aliev explains this provision as follows:

> In this way, the principle of separation of powers is ensured. If one of the two branches of government proposes a legislative initiative to change the Constitution of the Republic of Azerbaijan, a preliminary opinion from the body representing both the judiciary and the institution of constitutional control is mandatory. At the same time, the Constitutional Court itself does not have the right to initiate a similar issue, and it also does not have law-making powers. Moreover, if the initiative to change the constitutional norms comes from the citizens of Azerbaijan (that is, direct democracy), then the opinion of the Constitutional Court is not required'.[12]

Preliminary control is provided for in Part 3 of Art. 91 of the Constitution of Kazakhstan (as amended in 2007).[13] The check is carried out in relation to the entrenchment clause in Part 2 of Art. 91 of the same constitution: 'The independence of the state, unitary and territorial integrity of the Republic, the form of its government, the basic principles of the Republic's activity, established by the constitution, are unchanged'.

It is interesting that the law of 21 May 2007 No. 254, the entrenchment clause in Part 2 of Art. 91 of the Constitution was expanded due to the unamendability of the status of the president (Elbas). The Constitutional Council commented on it as follows:

> This constitutionally confirms the historical mission of Nursultan Abyshevych Nazarbayev as the Founder of the new independent state of Kazakhstan, who ensured its unity, the protection of the Constitution, the rights and freedoms of man and citizen; made, thanks to his constitutional status and personal qualities, a decisive contribution to the formation and development of sovereign Kazakhstan, including the constitutional values of the Basic Law and the fundamental principles of the Republic's activity'.[14]

As a result, through changes from 8 June 2022,[15] these provisions were excluded from the Constitution of Kazakhstan. In its conclusion, the Constitutional Council did not comment on this change at all,[16] which is very surprising.

The situation is very interesting: the changes affected the entrenchment clause, for compliance with which the project had to be checked. Such cases are also unique in foreign practice. Obviously, the Constitutional Council simply had nothing to say in this case. This shows that the previous control was mainly intended to legitimise what is beneficial to politicians. In the opposite case, when the political situation has changed, and changes have appeared

11 The Constitution of the Republic of Azerbaijan <https://stat.gov.az/menu/3/Legislation/constitution_en.pdf> accessed 20 September 2022.

12 Zalesny (n 14) Chapter III.

13 Constitution of Kazakhstan <https://www.akorda.kz/ru/official_documents/constitution> accessed 20 September 2022.

14 Regulatory Resolution of the Constitutional Council of the Republic of Kazakhstan dated 9 March 2017 No 1 <https://online.zakon.kz/Document/?doc_id=36772838> accessed 20 September 2022.

15 Constitutional Law of the Republic of Kazakhstan 'On amendments and additions to the Constitution of the Republic of Kazakhstan' (May 2022) <https://online.zakon.kz/Document/?doc_id=32834868&pos=7;-60#pos=7;-60> accessed 20 September 2022.

16 Conclusion of the Constitutional Council of the Republic of Kazakhstan dated 4 May 2022 No 1 'On verification of the draft Law of the Republic of Kazakhstan "On amendments and additions to the Constitution of the Republic of Kazakhstan" for compliance with the requirements established by paragraph 2 of Article 91 of the Constitution of the Republic of Kazakhstan' <https://online.zakon.kz/Document/?doc_id=32834868&doc_id2=33643774#pos=6;-106&sel_link=1008710906> accessed 20 September 2022.

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that cancel the previous ones, the Constitutional Council is simply silent, as if burying its head in the sand.

In Belarus, the Constitutional Court is also empowered to pre-control the draft amendment to the Constitution adopted by the parliament. This control is provided for in Art. 102 of the Law of 8 January 2014, nos. 124-3 'On Constitutional Judiciary',[17] where it is called 'obligatory preliminary'.

The implementation of preliminary control can end negatively for the constitutional court itself, leading to its dissolution. This is evidenced by the experience of Kyrgyzstan. In the Decree of the Provisional Government of the Kyrgyz Republic (dated 12 April 2010 no. 2) 'On the dissolution of the Constitutional Court of the Kyrgyz Republic', among other things, it is stated:

> Regarding all changes and additions made to the Constitution of the Kyrgyz Republic in 1996, 1998 and 2003 by referendum and aimed at strengthening the powers of the President of the Kyrgyz Republic, positive conclusions were given. By its actions, the Constitutional Court led to the destruction of the mechanisms of checks and balances existing in the 1993 Constitution...'[18]

At the same time, the institution of constitutional control itself was not abolished – in the Constitution of 27 June 2010,[19] the Constitutional Chamber of the Supreme Court was created instead.[20] Already in 2011, an amendment to the Constitution of Kyrgyzstan gave the Constitutional Chamber the authority to issue an opinion during the preliminary review of amendments to the Constitution.[21] In accordance with the current Constitution of Kyrgyzstan dated 5 May 2021, no. 59, the Constitutional Court was created again, and it also (clause 5, part 1, Art. 97) provides an opinion on the draft law on amendments and additions to this Constitution.[22]

Preliminary control was once stipulated as mandatory in the Law of the Russian Federation on Amendments to the Constitution of the Russian Federation of 14 March 2020 'On Improving the Regulation of Certain Issues of the Organization and Functioning of Public Power'. After the entry into force of this Law, the President of the Russian Federation submitted a request to the Constitutional Court of the Russian Federation regarding compliance with the provisions of Chapters 1, 2, and 9 of the Constitution of the Russian Federation, the provisions of this Law, which have entered into force, as well as compliance with the Constitution of the Russian Federation with the order of entry into force of Art. 1 of this Law (part 2 of Art. 3).

This control can be characterised as a preliminary material one since a substantive check of provisions that have not entered into force was carried out, as well as a preliminary procedural one, which is related to the assessment of compliance with the procedure for the entry into force of changes. In its conclusion, the Constitutional Court essentially provided an official interpretation of the introduced changes, explaining in more or less detail what

17 Law of the Republic of Belarus 'On constitutional legal proceedings' dated 8 January 2014 No 124-3 <https://etalonline.by/document/?regnum=h11400124> accessed 20 September 2022.

18 Decree of the Provisional Government of the Kyrgyz Republic of 12 April 2010 VP No 2 'On the dissolution of the Constitutional Court of the Kyrgyz Republic' <http://cbd.minjust.gov.kg/act/preview/ru-ru/202766/10?mode=tekst> accessed 20 September 2022.

19 Constitution of the Kyrgyz Republic: Adopted by referendum (popular vote) on 27 June 2010 <http://cbd.minjust.gov.kg/act/view/ru-ru/202913?cl=ru-ru> accessed 20 September 2022.

20 Zalesny (n 14) Chapter VII.

21 Y Roznai, Unconstitutional constitutional amendments (Oxford University Press 2017) 198.

22 Law of the Kyrgyz Republic dated 5 May 2021 No 59 'On the Constitution of the Kyrgyz Republic' <http://cbd.minjust.gov.kg/act/view/ru-ru/112215?cl=ru-ru> accessed 20 September 2022.

such changes mean and why they do not contradict Chapters 1, 2, and 9 of the Constitution of the Russian Federation.

The complimentary opinion of the Constitutional Court of 16 March 2020, nos. 1-3[23] was needed for greater legitimisation of the introduced changes. The relevant procedure was applied once, exclusively under this specific law, and was contained in the very law on amendments to the constitution.

> The key element in the project was to give the current president the right to ballot again in the elections for this position. Paradoxically, this project retained the limitation of holding the post of president for only two terms and even removed the word 'consecutive'.[24]
>
> W. Parlett argues that, from a comparative perspective, these amendments are underpinned by what is now called a 'populist' agenda that believes in the merits of personalised leadership claiming to act on behalf of 'the people'.[25]

The aforementioned conclusion of the Constitutional Court of the Russian Federation confirms the opinion that undemocratic regimes are inclined to use the institution of preliminary constitutional control when amending the constitution for political purposes in order to strengthen the 'legitimating effect' in the eyes of the public, as well as in the international arena. This case can be described as 'abusive judicial review' (according to D. Landau and R. Dixon).[26]

Another feature of preliminary control is its 'politicality'. I. Slidenko's remark is fair in terms of the fact that preliminary control is inherently political since it is installed in the procedure of adopting a law from the formal side.[27] In general, the politicisation of constitutional courts is a serious problem.[28] This is also confirmed by the practice of implementing the relevant authority in Ukraine, which is one of the few countries where such control is directly provided for.

It is also worth distinguishing such a type of preliminary control as the control of the adopted, but such that the law on amendments to the constitution has not entered into force.

In Hungary, as a result of the 2016 changes, the President of the Republic, before signing the Basic Law or an amendment to the Basic Law sent to him, if he finds that any

23 Conclusion of the Constitutional Court of the Russian Federation on the compliance with the provisions of Chapters 1, 2, and 9 of the Constitution of the Russian Federation of the provisions of the Law of the Russian Federation on the amendment to the Constitution of the Russian Federation 'On improving the regulation of certain issues of the organization and functioning of public authority', as well as on the compliance of the Constitution of the Russian Federation of the procedure for the entry into force of Art. 1 of this Law in connection with the request of the President of the Russian Federation dated 16 March 2020 N 1-3 <https://rg.ru/2020/03/17/ks-rf-popravki-dok.html> accessed 20 September 2022.

24 As Y Barabash, D Beinoravičius, and J Valčiukas stated in this regard, 'The "spiciness" of the situation lies in the fact that Putin himself proposed to clarify the "restrictive" provision in the Constitution, setting restrictions on one person to be the head of state for not just two consecutive terms but for two terms in general. And such a proposal was included in the draft constitutional amendments' (Y Barabash, D Beinoravičius, J Valčiukas, 'Invisible Constitution as an instrument of consolidation of nation and defence of democracy' (2022) 4(3) Insights into Regional Development 114).

25 W Partlett, 'Russia's 2020 Constitutional Amendments: A Comparative Perspective' (2020) 887 University of Melbourne Law School Legal Studies Research Paper Series.

26 D Landau, R Dixon, 'Abusive Judicial Review: Courts Against Democracy' (2020) 53 UC Davis Law Review 1313-1387.

27 I Slidenko, Phenomenology of constitutional control. Genesis, nature and positioning in the context of axiological, epistemological, praxeological, synergistic aspects (Istyna 2010) 141.

28 Iu Barabash, D Vovk "'Justices have a political sense": the Constitutional court of Ukraine's jurisprudence in politically sensitive cases' (2021) 2(18) Ideology and Politics Journal, 329-330; H Berchenko, A Maryniv, S Fedchyshyn, 'Some Issues of Constitutional Justice in Ukraine' (2021) 2 Access to Justice in Eastern Europe 134.

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procedural requirement set out in the Basic Law regarding the adoption of the Basic Law or the amendment of the Basic Law has not been complied with, he or she applies to the Constitutional Court with a request to consider this issue (Part 3 of Art. S).[29]

## 4 IMPLICIT PRELIMINARY JUDICIAL CONTROL

It is worth emphasising that, without being directly foreseen, the prospects for the implementation of preliminary control are reduced to two options.

The first option – preliminary control – is impossible in any form. An example of this is Croatia. In the Decision of the Constitutional Court,[30] representatives of one chamber of the parliament (Zupanijski dom) demanded to review the decision initiating changes to the Constitution. The court ruled that it is authorised to review the procedure for amending the Constitution, but only after its completion. Since the contested decision was only part of the procedure for amending the Constitution, the claim was rejected. The Constitutional Court noted that it is authorised to review only after the end of the procedure for amending the Constitution. The Constitutional Court does not have the authority to exercise preventive control.

The second option is that the Court can carry out preliminary control, so to speak, 'hiddenly', or indirectly, implementing its other powers implicitly. Prior control can be exercised implicitly if there is simply no special authority for the corresponding control over constitutional changes. It is 'integrated' into other powers of constitutional (supreme) courts. So, for example, before the changes of 2017, which we already wrote about above, the Constitutional Council of Kazakhstan carried out preliminary control on the basis of its authority to exercise its authority regarding the preliminary control of 'laws' (clause 2, part 1, Art. 72 of the Constitution).[31]

Another example of preliminary judicial constitutional control of amendments to the constitution is the experience of Canada. R. Albert notes that the Supreme Court of Canada has a long history of advising lawmakers through its review jurisdiction on how and whether to amend the constitution. In current practice, legislators refer to the Court on whether a draft law or a proposal to amend the Constitution is constitutional. Although the Court has the right to decline to answer, the Court generally agrees to give guidance to legislators, and legislators usually follow the Court's advice. Such a review is called Pre-Ratification Review.[32] Review of a constitutional amendment prior to ratification gives the Supreme Court of Canada considerable authority. This allows the Court to achieve the same result that foreign courts achieve when they invalidate properly adopted constitutional amendments.[33]

In the same way, appropriate control can be carried out during the judicial evaluation of the constitutional referendum. According to the Regulation on the holding of constitutional

29 Constitution of Hungary <https://www.constituteproject.org/constitution/Hungary_2016?lang=en> accessed 20 September 2022.

30 Decision Constitutional Court of Croatia no U-II/603/2001 of 28 March 2001 <https://www.edusinfo.hr/sudska-praksa/USRH2001B603AII> accessed 20 September 2022.

31 Regulatory Resolution of the Constitutional Council of the Republic of Kazakhstan dated 31 January 2011 No 2 <https://online.zakon.kz/Document/?doc_id=30923722> accessed 20 September 2022; Regulatory Resolution of the Constitutional Council of the Republic of Kazakhstan dated 9 March 2017 No 1 <https://online.zakon.kz/Document/?doc_id=36772838> accessed 20 September 2022.

32 R Albert, Constitutional Amendments Making, Breaking, and Changing Constitutions (Oxford University Press 2019) 223.

33 Ibid, 226.

referenda at the national level (CDL-INF (2001) 6-7 July 2001, para. P),[34] compliance with and implementation of the above rules should be subject to judicial control. It is carried out in the last instance by the constitutional court, if it exists, or by the supreme court. In particular, judicial control should be expressed and implemented in the judicial assessment of the procedural and substantive capacity of the draft texts submitted to the referendum, which should meet and be subject to preliminary evaluation criteria of judicial control.

In Ukraine, in the decision of 27 March 2000, the Constitutional Court of Ukraine actually carried out an implicit preliminary control of changes to the constitution, considering the Presidential Decree 'On Promulgation of the All-Ukrainian Referendum on People's Initiative' of 15 January 2000 and recognising two of six issues unconstitutional.[35] At the same time, such control, in fact, was wider than the formal requirements regarding the content, which are established in Art. 157 of the Constitution. In 2016, with the help of amendments to the Constitution, the Constitutional Court of Ukraine was empowered to provide an assessment of the constitutionality of issues proposed to citizens for a referendum on popular initiative. Potentially, this authority can also relate to the assessment of certain issues of a constitutional nature (by analogy with the situation in 2000). However, to date, the corresponding special authority has not ever been implemented.

Implicit prior control over the introduction of amendments to the constitution may also be somewhat related to the exercise of constitutional control over constitutional reform laws. Thus, Law No. 27600 (16 December 2001) of the Republic of Peru provided for constitutional reform. The constitutionality of this law was contested (due to the attribution of constituent functions to Congress). As J. Colon-Rios writes, in its decision, the Constitutional Tribunal of Peru (no. 014 -2002- AI/ TC, paras. 37, 129) defined the main content of the historical constitution in the provisions of the constitutional text, which recognises popular sovereignty, the republican and representative form of government, and the protection of fundamental rights. Among the arguments advanced in support of the law's constitutionality was that, to the extent that it requires Congress to respect the historic constitution, the law will not allow that body to create an entirely new constitutional order (i.e., to intrude on the jurisdiction of the constituent power).[36]

It is not necessary to involve judicial mechanisms for preliminary control. So, for example, in Luxembourg, there is a kind of preliminary check, which is carried out by the Council of State during the parliamentary procedure. Although its advisory opinions are not binding on the Chamber, they are usually followed.[37] In 1996, both chambers of the Federal Assembly declared the People's Initiative to amend the Constitution to be invalid due to the violation of the internationally recognised prohibition of gratuitous deportation.[38]

In Switzerland, the Federal Assembly declares a popular initiative for partial revision of the Federal Constitution wholly or partially invalid if the initiative violates the unity of form, unity of content, or binding provisions of international law. If the opinions of the Councils regarding the design of the initiative (or its separate part) for compliance with

34 CDL-INF(2001)010-ukr. Guidelines for Constitutional Referendums at National Level: Adopted by the Venice Commission at its 47th Plenary Meeting (Venice, 6-7 July 2001) in Ukrainian <https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(2001)010-ukr> accessed 20 September 2022.

35 Judgment of the Constitutional Court of Ukraine of 27 March 2000 No 3-рп/2000 (the case of the all-Ukrainian referendum at the people's initiative) <https://zakon.rada.gov.ua/laws/show/v003p710-00#Text> accessed 20 September 2022.

36 J Colon-Rios, *Constituent power and the law* (Oxford University Press 2020) 186.

37 X Contiades (ed), Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA (Routledge 2013) 253.

38 G Halmai, Perspectives of Global Constitutionalism. The Use of Foreign and International Law (Eleven International Publishing 2014) 36.

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the requirements differ, then the Council, which recognised compliance, must confirm its decision; otherwise, the initiative will be recognised as invalid.[39] Thus, non-judicial verification methods should not be underestimated or ignored.

## 5 CONCLUSIONS

If implicit (mediated) preliminary control over amendments to the constitution can be found in various countries, then explicit preliminary control over amendments to the constitution by constitutional courts or equivalent bodies is a post-Soviet trend (Ukraine, Moldova, Belarus, the Russian Federation, Kazakhstan, Tajikistan, Kyrgyzstan, Azerbaijan, Armenia) and post-socialist (Kosovo, Romania, Hungary).

Some of the mentioned countries started the path of democratisation (even in the presence of problems and difficulties), and some, on the contrary, avoided real democracy. A vivid example of the latter is the Russian Federation, in which the conclusion of the Constitutional Court in 2020 was aimed at legitimising the dictatorial changes to the 1993 constitution and the introduction of the so-called 'resetting' the presidential terms of the current president with the right to be re-elected.

At the same time, it is probably not useful to paint preliminary control itself with one colour. Its success and positive and negative sides are completely individual and depend on its model in a specific country and its context. So, to what extent is the presence of preliminary control over changes to the constitution necessary?

First of all, such control has all the same disadvantages as any preliminary control – it risks being political and always means interference in the political process. In conditions of a low level of quality of the work of the constitutional control body and dependence on the political majority, there is a risk of performing not the function of control, but the formal consecration of the changes needed by the authorities (as demonstrated by the practice of Kyrgyzstan, Kazakhstan, Tajikistan, and Russia). Another disadvantage, purely legal, is that preliminary control 'ties the hands' of the court in the future – once it has recognised the changes as constitutional in content, it loses the opportunity to later express material claims to such changes. At the very least, if such a situation arose, such claims would be much more difficult to make, as they would raise questions about the court's adherence to its own position and undermine legal certainty.

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Case Note

# THE IMPLEMENTATION OF THE PRINCIPLE OF JUDICIAL PROTECTION OF LOCAL SELF-GOVERNMENT RIGHTS IN THE NATIONAL COURTS' PRACTICE: THE UKRAINIAN EXPERIENCE

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***Keywords:*** judicial protection, local self-government rights, judicial practice, protection of local self-government rights

## ABSTRACT

***Background:*** *The article is devoted to the consideration of the principle of judicial protection of local self-government rights in the practice of the Supreme Court. The authors examined the constitutional and international legal guarantees of local self-government rights and emphasised that, compared to individual European states, Ukraine received the proper legal basis for the effective guarantee and protection of local self-government as an important institution of the democratic state. Attention is paid to the analysis of the principle of judicial protection of local self-government in Ukrainian and European scientific literature. It is emphasised that guaranteeing the effectiveness of the local self-government is one of the main purposes of judicial protection of local self-government rights. The article also considers certain problems related to the proper implementation of regulatory provisions on judicial protection. In particular, it emphasises the importance of substantiating the appeal to the judicial authorities specifically for the purpose of protecting the interests of the territorial community in legal relations with ate power. The authors also outline the problem of choosing a jurisdiction for the consideration of disputes in which local self-government bodies act as one party. It was determined that in terms of the right of a local self-governing body to apply to a court with a claim against another public authority in order to protect the rights and interests of the relevant territorial community, a certain practice has been formed. On the basis of the analytical research, certain categories of cases considered by Ukrainian courts in the context of the right to judicial protection of local self-government were identified and analysed. In particular, the cases of lawsuits by local self-government bodies to the Verkhovna Rada of Ukraine regarding the formation and liquidation of sub-regional administrative-territorial units were analysed; cases of claims of local self-government bodies to the Cabinet of Ministers of Ukraine regarding territorial transformations; cases of lawsuits between local self-government bodies. Special attention is paid to the practice of the prosecutor's appeal to the court in the interests of the state in the person of the local self-government body.*

***Methods****: The authors used comparative synthesis methods and information analysis. Actual empirical data are used to argue for the conclusions.*

***Results and Conclusions:*** *The authors draw conclusions about the implementation of the principle of judicial protection of local self-government rights in the practice of Ukrainian courts. Separate problems concerning the possibility of a local self-government body appealing to the courts are also analysed.*

***Keywords:*** *judicial protection; local self-government rights; judicial practice; protection of local self-government rights*

## 1 INTRODUCTION

Ukraine's achievement of independence and the development of statehood on a new basis led to the institutionalisation of local self-government in our country as one of the important institutions of civil society. According to scientists, its development is impossible without territorial communities and their self-organised structures.[1] That is, civil society cannot be

1 OV Batanov, VV Kravchenko 'Local self-government as an institution of civil society: municipal legal problems of interaction and functioning' (2018) 6 (6-7) Aspects of Public Administration 47.

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built without active members of territorial communities and local self-government bodies capable of taking responsibility for solving local issues.

Along with this, the constitutionalisation of local self-government as a separate public subsystem with broad powers required the introduction of legal means guaranteeing and protecting municipal rights and freedoms and the institution of local self-government in general. One of these means is judicial protection of local self-government rights. In particular, the issue of the protection of local self-government became relevant during the implementation of the decentralisation reform in Ukraine because the reform process involved expanding the functional and competent sphere of local self-government, increasing the responsibility of this subsystem of public authorities.

At the highest constitutional level, the Ukrainian legislator provided a legal basis for judicial protection of local self-government rights. Scientists believe that the wording of Art. 145 of the Ukrainian Constitution testifies to the legislator's definition of local self-government as one of several means for solving important local issues.[2] Moreover, the constitutional consolidation of local self-government guarantees, in particular, the possibility of judicial protection, is rightly recognised as providing local self-government with a sustainable character.[3]

Ukraine also ratified the European Charter of Local Self-Government (hereinafter - the Charter), Art. 11 of which contains guarantees of local self-government legal protection, authorising the latter to use means of legal protection to ensure the free exercise of their powers and respect for the principles of local self-government.[4] Adoption of the Law of Ukraine 'On Local Self-Government in Ukraine' also contributed to the establishment of an appropriate legal framework for the protection of local self-government rights in court. One of the principles of local self-government is the principle of local self-government judicial protection (Art. 4).

Therefore, a stable constitutional and legal basis for judicial protection of local self-government rights has been created in Ukraine. On the other hand, not all European countries with a stable democracy introduce this guarantee of local self-government. For example, the Constitution of the Netherlands does not contain any provisions on judicial protection of local self-government rights, although a separate chapter was devoted to the management of provinces and municipalities. The report of the Commission on the Implementation of Obligations by the Member States of the Council of Europe (Monitoring Commission) emphasised that in the Netherlands, there is no proper legal basis in the Constitution and legislation for local authorities to challenge the decisions of the central government in case of violation of the right to local autonomy.[5] A similar conclusion was drawn by the Monitoring Commission regarding Hungary in 2013. According to the results of the report, the Commission recommended applying effective means of legal protection that would give local authorities the power to file complaints to protect their rights.[6]

2 VYa Tatsii et al (eds), Constitution of Ukraine. Scientific and practical commentary (2nd edn, Kharkiv 2011) 973.

3 OV Batanov, 'The system of local self-government guarantees, problematic issues of the theory' (2004) 3 Scientific Works of the Odessa National Law Academy 152.

4 European Charter of Local Self-Government. Strasbourg, 15 October 11985, official translation. <https://zakon.rada.gov.ua/laws/show/994_036#Text> accessed 8 September 2022.

5 Monitoring of the application of the European Charter of Local Self-Government in the Netherlands / Committee on the Honoring of Obligations and Commitments by Member States of the European Charter of Local Self-Government (Monitoring Committee). Report CG(2021)41-05 prov 22 September 2021 54 <https://vng.nl/sites/default/files/2021-11/rapport-congres-lokale-en-regionale-overheden-rve-over-nederland.pdf> accessed 8 September 2022

6 Local and regional democracy in Hungary / Monitoring Committee. 25th SESSION Strasbourg, 29-31 October 2013 <https://rm.coe.int/168071910d> accessed 8 September 2022

## 2 THEORETICAL PRINCIPLES OF JUDICIAL PROTECTION OF LOCAL SELF-GOVERNMENT RIGHTS

In the scientific literature, the institution of judicial protection of territorial communities is comprehensively considered a specific right, a type of social management, etc.[7] The goal of legal protection is the restoration of the violated or contested right of local self-government and their unimpeded implementation.[8] The principle of judicial self-defence of local self-government bodies is also recognised as a legal opportunity for these legal entities to appeal to the court for the protection of their independence.[9] It is worth emphasising that self-defence is essential, that is, the ability of local self-government bodies to be defenders of the interests of the corresponding administrative-territorial unit's population. The problem of the need for proper judicial protection of local self-government rights is also considered in the context of delegated powers. Thus, scientists especially emphasise the need for local self-government bodies to be able to defend their rights in a court of law in the event of the state's improper performance of its obligations regarding the financial support of delegated powers.[10]

We see the main purpose of judicial protection of the rights of local self-government to consist of guaranteeing the effectiveness and reality of the institution of local self-government in a democratic state, in which the activity of public authorities is based on the principle of the rule of law. Note that when considering the problems of the proper implementation of the principle of the rule of law, scientists understand this principle in accordance with the substantive concept of the rule of law. This concept emphasises that the rule of law should include guarantees of human rights and freedoms in compliance with general principles of law. The existence of the institution of judicial protection of local self-government rights also contributes to guaranteeing the constitutional right to local self-government, bringing the activities of public authorities into the regime of constitutional legality.

The judicial protection of local self-government rights judicial protection is also recognised as a way of ensuring the constitutional right of citizens to local self-government.[11] In the conditions of the actual impossibility of the territorial community independently resolving issues of local importance (the implementation of the right to a local referendum has been blocked for several years due to the lack of special legislation and the state of war in the country also blocks other forms of local democracy), local self-government bodies should not only be expressions of the territorial community will but also act as subjects that can effectively protect the rights of the community in court.

In support of this, we can cite the legal position of the Constitutional Court of Ukraine expressed in case No. 1-9/2002 (on the protection of the labour rights of local council deputies). In this case, the court noted that with the adoption of the Constitution of Ukraine, the political and legal nature of local councils was fundamentally changed. They became representative bodies of local self-government, through which the right of territorial

7 YuS Pedko, 'Judicial protection of the rights and interests of local self-government' in VV Kravchenko et al (eds), Actual problems of the establishment and development of local self-government in Ukraine: monograph (Kyiv. 2007) 125.

8 Constitution of Ukraine (n 5) 1017.

9 J Jagoda 'Rechtsschutz der kommunalen Selbstverwaltung im polnischen Rechtssystem' (2010) 2 Silesian Journal of Legal Studies 81.

10 S Serohina, I Bodrova, A Novak, 'Delegation of State Powers to Local Self-Government Bodies: Foreign Experience and Ukrainian Realities' (2019) 9 (3) (28) Baltic Journal of European Studies 278.

11 Constitution of Ukraine (n 5) 1017.

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communities to independently resolve issues of local importance is exercised.[12] In view of this, we find it appropriate to consider the right to judicial protection of the rights of local self-government not only as a guarantee and a tool for protecting the rights of local self-government (the task of municipal bodies) but also as an obligation to protect the interests of the relevant community.[13]

The right of local self-government bodies to apply to the court for the protection of the territorial community interests, in particular, protection from the state and its bodies, is generally not denied in the literature.[14] At the same time, the realisation of the right to appeal to the court requires the fulfilment of an important duty – to justify that such an appeal protects the interests of the territorial community in legal relations with representatives of state power.[15]

Also, the practice of the prosecutor's appeal to the court in the interests of the state in the person of the local self-government body is interesting and debatable. In this category of cases, the initiative for the implementation of the principle of judicial protection of local self-government rights is taken by the prosecutor's office.

We would like to draw attention to the fact that in accordance with the Decision of the Constitutional Court of Ukraine dated 8 April 1999 No. 1-1/99, the prosecutor's office does not have the authority to represent the interests of local self-government bodies. However, we note that according to Art. 23 of the Law of Ukraine 'On the Prosecutor's Office', the prosecutor represents the legal interests of the state in the event of a violation or threat of violation of the state's interests if the protection of these interests is not carried out or is improperly carried out by a body of state power or a body of local self-government, as well as in the absence of such a body. Also, the relevant powers of the prosecutor are provided for by procedural norms, in particular, Art. 53 of the Code of Administrative Procedure of Ukraine,[16] Art. 54 of the Civil Procedure Code of Ukraine,[17] and Art. 54 of the Commercial Procedure Code of Ukraine.[18]

In general, in a similar practice, the court determines in each case whether the prosecutor's arguments regarding his/her right to appeal to the court in order to protect the interests of the state (territorial community) are justified or unfounded. Case No. 903/129/18[19] is interesting in this regard. The prosecutor's office appealed to the court in the interests of the

12 Decision of the Constitutional Court of Ukraine in the case on the constitutional submission of the Ministry of Internal Affairs of Ukraine regarding the official interpretation of the provisions of the second part of Article 28 of the Law of Ukraine 'On the Status of Members of Local Councils of People"s Deputies' (case on protection of labour rights of members of local councils) dated 26 March 2002 No 6-rp /2002. <https://zakon.rada.gov.ua/laws/show/v006p710-02#Text> accessed 8 September 2022.

13 Ya Bernaziuk, 'Appealing to the administrative court for the purpose of protecting the interests of the territorial community is an inalienable right of the local self-government body' (15 January 2020) Judicial and Legal Newspaper <http://bit.ly/2FOzLrG> accessed 8 September 2022.

14 R Kuybida, T Ruda, G Lysko, A Shkolyk, 'What local self-government employees need to know about courts: A practical guide for heads of local self-government bodies and legal services. The Swiss-Ukrainian project "Supporting decentralization in Ukraine"' (DESPRO K.: Sofia-A LLC 2012) 7.

15 The Law of Ukraine No 1697-VII 'On the Prosecutor's Office' of 14 October 2014 <https://zakon.rada.gov.ua/laws/card/1697-18> accessed 8 September 2022

16 Code of Administrative Procedure of Ukraine No 2747-IV (7 July 2005) <https://zakon.rada.gov.ua/laws/show/2747-15/card2#Card> accessed 8 September 2022.

17 Civil Procedure Code of Ukraine No 1618-IV (18 March 2004) <https://zakon.rada.gov.ua/laws/card/1618-15> accessed 8 September 2022

18 Commercial Procedure Code of Ukraine No 1798-XII of 6 November 1991 . Vol. 2. Iss. 49. pp. 170-173. оли становленим, закономих прав на справедливий судовий розгляд, зокрема права на доступ до суду<https://zakon.rada.gov.ua/laws/show/1798-12#top> accessed 8 September 2022.

19 Judgment of the Grand Chamber of the Supreme Court of 15 October 2019 No 903/129/18 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/85174593> accessed 8 September 2022

state in the person of the village council and asked the defendant to return the land plot from the lease to the territorial community. Two instances supported the plaintiff and obliged the defendant (tenant) to return the land plot to the village council.

In this case, we pay specific attention to the possibility of the prosecutor's office protecting the interests of the territorial community. The village council noted that it could not go to court because it did not have the funds to pay the court fee. The Supreme Court notes that the lack of funds to pay the court fee does not deprive the council of the opportunity to protect the interests of the territorial community. The very fact that the village council did not go to court speaks to the improper performance of its powers. And in his case, the Supreme Court emphasised the validity of the participation of the prosecutor's office in the protection of territorial community rights. As a result, the court confirmed the right of the prosecutor's office to appeal for the protection of territorial community rights.

In the literature, the problem of choosing the jurisdiction of disputes in which local self-government bodies act as one party is often raised.[20] At the same time, insufficient attention is paid to the analysis of the judicial practice of resolving disputes with the local self-government bodies' participation in the interests of the territorial community members. The practice of judicial review of these categories of cases in the context of the implementation of the principle of judicial protection of local self-government rights especially needs to be analysed. After all, a serious problem of both doctrinal and applied significance is the definition of the limits of this principle and the establishment of real opportunities for municipal institutions to challenge the decisions, actions, and inactions of state authorities, in particular, the high-level bodies. There is also the issue of determining disputes involving the participation of local self-government bodies that are not subject to consideration in the order of administrative proceedings or cannot be resolved in court at all.

## 3 JUDICIAL OPINIONS OF NATIONAL COURTS IN CASES CONCERNING THE PROTECTION OF LOCAL SELF-GOVERNMENT RIGHTS

Over the past several years, the judgments of national courts, especially the Supreme Court, have become a topic of scientific research and analysis. Undoubtedly, there are several thoughts, statements, and conclusions concerning municipal theory and practice, including the legal protection of local self-government rights, in judicial practice.

Moreover, it should be emphasised that certain practices have been formed concerning a local self-government body's rights to bring lawsuits against another local self-government body or body of state authority. Such claims concern decisions, actions, or inactions of public authorities in order to protect the rights and lawful interests of a territorial community. For instance, the right of local councils as representative bodies of local self-government to protect violated rights of territorial communities by means of a complaint against a body of state authority[21] or local self-government bodies[22] is recognised.

20 YaO Bernazyuk, 'Separate issues of demarcation of the subject jurisdiction of courts in cases involving local self-government bodies' (2018) 2 (49) Scientific Bulletin of the Uzhhorod National University; Series: Law 170.

21 Judgement of the Administrative Court of Cassation of 21 November 2018 No 504/4148/16-a (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/78165785> accessed 8 September 2022

22 Judgement of the Administrative Court of Cassation of 13 February 2018 No 666/8779/14-a (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/72287938> accessed 8 September 2022

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This research focuses on the practice of applying the principle of judicial protection of local self-government rights and highlights national court decisions. As a result, the authors suggest the following review of court cases.

### 3.1. Legal cases on suits of local self-government bodies to the Verkhovna Rada of Ukraine (hereinafter – the VRU) regarding the appeal of the Resolution of the VRU dated 17 July 2020 No. 807-IX 'About the formation and liquidation of districts' (hereinafter – Resolution No. 807-IX)

To start with, it should be mentioned that the adoption of this resolution resonated not only with researchers but with practicing lawyers due to the absence of special law on the regulation of administrative-territorial structures. This law should regulate the procedure of territorial transformations at the local and subregional levels. This determined the formation of court practice regarding the appeal.

Thus, in case No. 9901/276/20,[23] the city council emphasised the non-observance of the principle of proportionality and balance between adverse consequences for rights and interests and the aims of the act. Moreover, it was stressed that Resolution No. 807-IX was adopted without taking into account the interest of the plaintiff's community, in violation of regional policy principles.

However, the Cassation Administrative Court closed the case, arguing that the city council appealed the Resolution of the VRU on the grounds of its inconsistency with the Constitution of Ukraine and the regulatory procedure for its adoption (legislative procedure). The Court noted that the powers of the VRU regarding the organisation of the territorial system of Ukraine, including the formation and liquidation of districts, are not a form of implementation relevant to this body of administrative functions; therefore, it cannot be controlled by an administrative court. Thus, the Supreme Court actually determined for the city council that the dispute, in this case, is the object of judicial constitutional control and should be decided by the Constitutional Court of Ukraine.

This case is remarkable for the opinion of the judge,[24] who points out that the city council did not ask the court to determine whether the Resolution of the VRU complied with the Constitution of Ukraine or not. The city council applied to the court for recognition of Resolution No. 807-IX as illegal and invalid, specifically in the part that concerns the interests of the territorial community that it represented. In addition, the city council drew attention to the fact that the VRU resolved the territorial organisation of Ukraine issue by adopting a resolution rather than a law, violating procedure. We agree with this remark since the issues of the administrative-territorial structure of the country should be addressed by the law.

Also, the judge emphasised that a breach of the procedure of consideration and adoption of the act may lead to a violation of the rights and interests of those persons whose rights, freedoms and interests are affected by this normative legal act, and it affects the legality of such an act. According to the judge, the dispute was a public legal one, and the court in its decision did not take into account the arguments of the city council, nor did it investigate the issue of compliance with the procedure for registration, submission, review, and adoption of Resolution No. 807-IX.

23 Judgment of the Grand Chamber of the Supreme Court of 16 December 2020 No 9901/276/20 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/94194614> accessed 8 September 2022

24 Separate opinion of 16 December 2020 No 9901/276/20 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/94525437> accessed 8 September 2022

In case No. 9901/202/20,[25] the proceedings on the claim of the village council to the VRU on invalidation of Resolution No. 807-IX and on the claim of the district council on the recognition of illegal actions of the parliament in the part of district formation in the region were combined.

Reference to international legal standards in the field of local self-government is indicative in this case. The plaintiffs emphasised that Resolution No. 807-IX led to a change in the territorial boundaries of local self-government without taking into account the opinion of territorial communities, violating the requirements of Art. 5 of the European Charter of Local Self-Government. The Cassation Administrative Court, as a part of the Supreme Court, closed the proceedings in the case on the basis of Clause 1, Part 1, Art. 238 of the Code of Administrative Procedure of Ukraine because the review of Resolution No. 807-IX could not be carried out according to administrative proceedings.

As in the case mentioned above, the Supreme Court supported the views expressed in previous instances – the constitutional process of organising the territorial system of Ukraine, in particular, the formation and liquidation of districts, and the participation of the VRU in this process is not a form of implementation of the *body's administrative functions*. Therefore, it cannot be subject to the control of the administrative court jurisdiction. In fact, the VRU's arguments regarding the absence of a dispute between it and the plaintiffs regarding the implementation of their competence in the field of management, including delegated powers, were supported. At the same time, we consider that the court did not provide arguments as to why the exercise of authority and the adoption of a normative rather than an individual act aimed at changing the administrative-territorial structure of the country at the subregional level is not a form of exercising managerial functions. Also, in this case, the concept of 'a dispute that is not subject to consideration in the order of administrative proceedings to a wide extent' was applied. Therefore, in the opinion of the court, such disputes do not fall under the jurisdiction of administrative courts and are not subject to court examination at all. At the same time, the arguments presented in the judges' separate opinions are interesting and can be reduced to the following points.

Firstly, the plaintiffs, as local self-government bodies, are deprived of the opportunity to apply to the Constitutional Court of Ukraine with a constitutional complaint. This deprives them of the opportunity for judicial protection of local self-government rights and is a violation of Art. 55, Part 3 of Art. 125 of the Constitution of Ukraine (the right to challenge in court any decisions, actions, or inactions of state authorities, local self-government bodies, and officials). Secondly, the argument was expressed that the plaintiffs did not ask for recognition of the contested Resolution No. 807-IX as inconsistent with the Constitution of Ukraine, despite the reference in the statement of claim to the non-compliance of actions of the subject of power with the Constitution of Ukraine. Thirdly, the possibility of resolutions of the VRU being subject to judicial constitutional review does not automatically mean that these resolutions are excluded from judicial review in administrative proceedings.

It should be noted that local councils' arguments regarding the non-compliance of the Resolution No. 807-IX with the requirements of Art. 5 of the European Charter of Local Self-Government were not considered by the court at all. Ukrainian legislation lacks clarity in the mechanism for territorial communities' involvement in solving certain issues of the administrative-territorial system and protecting the territorial boundaries of local self-government. The need to take into account public opinion, particularly when changing borders and naming communities, was emphasised by the experts of the

25 Judgment of the Grand Chamber of the Supreme Court of 14 April 2021 No 9901/202/20 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/96669456> accessed 8 September 2022

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European Commission for Democracy through Law in 2015 when considering the draft amendments to the Constitution of Ukraine. The latter, in the Commission's opinion, should have been supplemented with a reference norm to the legislative provisions regulating the procedure for taking into account public opinion in the case of changes in an administrative-territorial system.[26]

In case No. 9901/411/19,[27] the plaintiff, the city council, contested the resolution of the VRU on changes in the administrative-territorial structure of the region and demarcation of the district. In particular, the plaintiff emphasised the procedural violations during the adoption of the resolution, as well as the failure to consider the needs of the region and its residents. At the same time, the Supreme Court, when considering the case, did not consider the interests of territorial communities but focused only on the problem of disputes that ware not subject to consideration in the order of administrative proceedings or were not subject to consideration at all. The court emphasised that subjects of power have the right to apply to the administrative court only in cases specified by the Constitution and Laws of Ukraine. Moreover, in the opinion of the court, such lawsuits can relate exclusively to disputes between authorities over the exercise of their competence in the field of public administration, in particular, delegated powers. Since Ukrainian legislation does not directly provide the possibility of appeals by local self-government bodies to resolutions of the VRU, the Supreme Court recognised the contested resolution as such that it cannot be considered by an administrative court at the request of a local self-government body. Furthermore, as in previous decisions, the court applied the concept of disputes that do not fall under the jurisdiction of administrative courts and that are not subject to judicial review at all.

In a separate opinion[28] to this decision, an important aspect was emphasised – local self-government bodies are representative bodies which are to exercise the right of the territorial community to independently resolve issues of local importance. A violation of a territorial community's rights means a violation of the members of these communities' rights, and the interests of members of territorial communities determine the content and direction of the activities of local self-government bodies. Therefore, the main task of the local self-government body is to protect the interests of members of territorial communities, in particular, by applying to the court. In this case, the right to appeal to the court becomes the responsibility of the local self-government body, without which the rights of local self-government become defenceless. Depriving local self-government bodies of the right to appeal to an administrative court in the interests of the territorial community distorts the nature and task of an administrative court. Also, according to the judge, any subject of public law has the right to bring a suit against any subject of authority to ensure the protection of the rights, freedoms, and interests of a man and citizen and other subjects in the field of public law relations. The only limitation is direct conflict with the law. We agree that the lack of alternative means of judicial protection of the territorial community's rights in this situation deprived the latter of the guarantees established by Art. 145 of the Constitution of Ukraine, Art. 11 of the European Charter of Local Self-Government, and provisions of national legislation.

26 Opinion on the amendments to the Constitution of Ukraine regarding the territorial structure and local administration as proposed by the working group of the Constitutional Commission in June 2015 endorsed by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015). Strasbourg, 26 October 2015, Opinion No 803/2015 5 <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)028-e> accessed 8 September 2022

27 Judgment of the Cassation Administrative Court of 24 December 2019 No 9901/411/19 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/86595152> accessed 8 September 2022

28 Separate opinion of 9 January 2020 No 9901/411/19 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/86828275> accessed 8 September 2022

This opinion is especially important in the context of the problem mentioned above – local self-government bodies are not the subjects of an appeal to the Constitutional Court of Ukraine with a constitutional complaint in accordance with Art. 52 of the Law of Ukraine 'On the Constitutional Court of Ukraine' dated 13 July 2017, No. 2136-VIII. At the same time, there are attempts to protect the rights of local self-government by other subjects of appeal. For example, in case No. 1-29/2020(475/20),[29] 50 People's Deputies of Ukraine tried to challenge the constitutionality of the provisions of the Law of Ukraine 'On Local Self-Government in Ukraine' and the orders of the Cabinet of Ministers of Ukraine, which approved the prospective plan for the formation of territories in the region and determined the administrative centres and the boundaries of territorial communities. The reasons for the refusal were formal and related to the insufficient justification of the non-compliance of the provisions of the contested acts with the provisions of the Basic Law of Ukraine. At the same time, the appearance of this constitutional submission indicates that local self-governments are searching for ways to protect their violated rights, as well as ways to exercise the right to judicial protection of the rights of local self-government in conditions of inefficient judicial administration.

### *3.2. Legal cases of suits of local self-government bodies to the Cabinet of Ministers of Ukraine (hereinafter – the CMU) regarding territorial transformations*

In the context of the changes in the territorial structure of Ukraine that took place in 2020, there is a category of cases in which the acts of the CMU regarding the approval of prospective plans for the formation of communities' territories are challenged. Thus, in case No. 640/24207/20,[30] the village council appealed to the court and asked it to recognise it as illegal and cancel the order of the MU on the approval of the prospective plan for the formation of territories in the region. The village council considered that its community was included in the united community illegally and in violation of the principles of legality and voluntariness. The plaintiff stated that the order of the CMU was adopted in violation of the Law of Ukraine 'On the Voluntary Unification of Territorial Communities' and emphasised the disregard for the community's opinion and the lack of consultation, as the plaintiff's community wanted to be part of a different united community than was provided for by the order of the CMU.

The court noted that the principles of voluntariness, transparency, and openness of the citizens' association are ensured, *inter alia*, by holding consultations with territorial communities. Thus, the evidence in the case did not confirm compliance with the principle of voluntariness, transparency, and openness of the citizens' association. Therefore, the court established their violation during the formation of the territory of the united community. The interests of the plaintiff's community were not respected. As a result, the court repealed the order of the CMU regarding the inclusion of the plaintiff's community in the united community.

However, the appeal court overturned the above-mentioned decision and pointed out that the Law of Ukraine 'On the Voluntary Unification of Territorial Communities' does not contain provisions regarding the mandatory obtaining of the consent of territorial communities to determine a certain configuration of capable territorial communities. In addition, the appeal instance noted that the CMU is not authorised to verify whether or

29 Judgment of the Grand Chamber of the Constitutional Court of Ukraine of 22 December 2020 No.1-29/2020(475/20) (Unified State Register of Court Decisions) <https://zakon.rada.gov.ua/laws/show/v096u710-20#Text: > accessed 8 September 2022

30 Judgment of the Sixth Administrative Court of Appeal of 09 November 2021 No 640/24207/20 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/101006416> accessed 8 September 2022

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not there was an agreement of territorial community representatives with the proposed configuration of territorial communities. Therefore, the village council remained part of that united community.

Case No. 640/12597/20[31] is similar in terms of the subject matter and outcome of the review. In this dispute, the village council was also contesting the order of the CMU to approve a prospective plan for the formation of territories in the region. However, it is necessary to pay attention to the argumentation expressed in the case.

The first instance also satisfied the demands of the plaintiff. Moreover, it pointed out the failure to take into account in the decree of the CMU the comments of national associations of local self-government bodies, which directly related to the rights of the plaintiff. The court also noted the absence of any evidence of the participation of local self-government body representatives during the development of the prospective plan for the formation of territories in the region.

The court found that the plaintiff had previously decided not to accept the proposal for unification with territorial communities, as provided for in the prospective plan. The court separately considered the lack of explanations from the representatives of the CMU regarding the neglect of the plaintiff's opinion. As a result, the court concluded that the principles of voluntariness, openness, and transparency were violated in the formation of a prospective plan for the formation of territories. In the opinion of the court, the decree of the CMU violated the rights of the territorial community (the plaintiff), as a result of which the court decided to exclude the plaintiff's community from the composition of the united community, as stipulated by the decree of the CMU.

The appeal instance overturned the decision since the order of the CMU did not directly affect and did not violate the rights of the territorial community. The appellate court pointed out that since the territorial communities in the process of unification are not bound by the provisions of the corresponding prospective plan and are not obliged to unite in accordance with the administrative-territorial configuration provided for by such a plan, the contested order did not create, change, and terminate the rights and obligations of the plaintiff in the field of public legal relations.

This motivational part of the judgment is subject to multiple interpretations. In his judgment, it was established that perspective plans are not mandatory for territorial communities, although they are approved by the decree of the CMU. At the same time, there was a decision of the local council to unite with another community, which was not provided for in the prospective plan. The question arises as to why the community should unite according to the approved plan, against its own interests, if a prospective plan is not mandatory. Moreover, there is also the question of how the community can protect itself and its interests in the process of consolidating the basic level of the administrative-territorial system.

In relation to this topic, there are several cases where the appellate instance was on the side of local councils, for example, case No. 640/15962/20.[32] This case is similar to the two mentioned above, but the position of the village council was also supported by the appellate

31 Judgment of the Sixth Administrative Court of Appeal of 7 April 2021 No 640/12597/20 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/96111221> accessed 8 September 2022

32 Judgment of the Sixth Administrative Court of Appeal of 27 May 2021 No 640/15962/20 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/104506126> accessed 8 September 2022

instance. The same situations appear in cases No. 640/13456/20[33] and No. 640/12763/20[34] – after the district administrative court's refusal, the appellate instance supported the side of local councils. Considering these cases, courts emphasised the need to observe the sequence of all stages of unification provided for by the Law of Ukraine 'On the Voluntary Unification of Territorial Communities'.

Courts also recognised the role of prospective unification plans as a 'primary basis for starting the procedure of such a voluntary unification'. The appeal courts in these cases also drew attention to the fact that Clause 13 of the Methodology for the Formation of Capable Territorial Communities (approved by the Resolution of the Cabinet of Ministers of Ukraine dated 8 April 2015 No. 214) provided consultations with authorised representatives of local self-government bodies and their associations, as well as business entities and their public associations during the formation of a prospective plan. Such consultations are a requirement of the 'principle of voluntariness, transparency and openness, and are therefore mandatory'. It should also be noted that the court emphasised the absence of a legal mechanism for the protection of territorial communities' violated rights 'if they consider their inclusion in the composition of a capable territorial community groundless'.

Attention also should be drawn to another important argument of the appeal courts in these cases. The CMU questioned the council's status as a participant in disputed legal relations and pointed out that the council lacked the right to appeal to the court. However, the appeal court did not agree with this statement, noting that the dispute is not competency-based,[35] and therefore the provision of Art. 18[1] of the Law of Ukraine 'On Local Self-Government in Ukraine' should not be applied. In this case, the local self-government body applied as a representative of the territorial community, acting in its interests to implement the functions assigned to it. Therefore, filing an administrative lawsuit was not a form of exercising the competence of a local self-government body that could not act as a subject of power and whose appeal to an administrative court is predicated on clear conditions. In this case, the local self-government body acted as a representative body of the territorial community to protect its violated rights.

In all three cases, there are still no decisions from the Court of Cassation. However, in August 2022, the Court of Cassation opened proceedings in case No. 640/15962/20, and in May and August, the deadlines for cassation appeals in cases No. 640/13456/20 and No. 640/12763/20 were renewed. Future judgments should serve as a basis for research into this category of cases.

Within the category of cases regarding the appeal of voluntary association processes, decision No. 120/2799/20-a[36] is notable. In this case, the village council appealed the actions

33 Judgment of the Sixth Administrative Court of Appeal of 30 December 2021 No 640/13456/20 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/102390840> accessed 8 September 2022

34 Judgment of the Sixth Administrative Court of Appeal of 30 December 2021 No 640/12763/20 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/97532055> accessed 8 September 2022

35 Part 1 of Art. 19 of the Code of Administrative Procedure stipulates that competence disputes are disputes between subjects of authority regarding the implementation of their competence in the field of public administration. In such cases, the court decides whether the competence of the defendant has been properly implemented and whether the competence of the plaintiff has been violated during the exercise of the powers of the defendant. In this case, the court noted that the dispute is not competency-based, since the local self-government body does not apply as a subject of authority, but as a representative of the territorial community.

36 Judgment of the Administrative Court of Cassation of 03 June 2021 No 120/2799/20-a (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/97393365> accessed 8 September 2022

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of a regional state administration regarding the inclusion of the plaintiff in the united community. This dispute again concerned the disagreement of one territorial community to be a part of another one, as provided for by the prospective plan. The prospective plan was drawn up by the regional state administration and was exactly what the village council was appealing. The case was considered in three instances, and the plaintiff's demands were met. The position of the courts was based on such provisions.

The courts established that the village council voluntarily united with certain territorial communities in 2016. In 2020, according to a prospective plan, the plaintiff's community was included in another united community. Therefore, the expression of the plaintiff's territorial community was not taken into consideration. The prospective plan envisaged a united community, contrary to the will of the residents of the communities that had united in 2016. The court also established procedural violations of the legislation on voluntary association.

The court noted that in this dispute, the village council (local self-government body) did not exercise management powers since, in such a legal relationship, the village council is subordinate to the defendant (state authority). In this case, the court, as in the two decisions mentioned above, indicated that under such conditions, the village council cannot exercise its powers but acts as a representative body of the territorial community, i.e., it protects its interests. The appeal to the court itself was not due to the requirement of the law but to disagreement with the actions of the state authority, which violated the interests of the territorial community.

Such judicial decisions assuredly add weight to the principle of judicial protection of local self-government rights. In this case, the courts unanimously protected the rights of the territorial community. In addition to violating the principle of voluntariness of the unification procedure, the court once again emphasised the ability of a local self-government body to protect the rights of a territorial community and ensured that right.

At the same time, in case No. 640/4296/20,[37] the local authority was given the opportunity to challenge the actions of the state authority only during the cassation appeal. It was the Supreme Court that provided an opportunity for the protection of the territorial community and applied the principle of judicial protection of local self-government rights. In this dispute, the local self-government body appealed to the court in order to challenge the control measures of the state body in the field of urban planning. However, the first and appellate instances refused to open proceedings. The courts noted that this dispute was not competency-based, and the law did not clearly define the right of the plaintiff to go to law. Therefore, the appeal of the local self-government body to the court was groundless.

However, the Supreme Court did not agree with this statement. The cassation instance noted the legal basis of the local self-government body's appeal to the court. It emphasised a number of judgments of the Supreme Court that had already expressed a stance regarding the right of a local self-government authority to appeal to an administrative court with a claim against another local self-government authority or state authority for the purpose of protecting the rights and interests of the relevant territorial community or the proper performance of its functions. It should be mentioned that the Supreme Court bases its position on the provisions of Arts. 3, 4, 11 of the European Charter of Local Self-Government. As a result, under the circumstances of this dispute, the Supreme Court came to the conclusion that the plaintiff's demands were met and, accordingly, there was the opportunity to protect the

37 Judgment of the Administrative Court of Cassation of 30 November 2020 No 640/4296/20 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/93217092> accessed 8 September 2022

territorial community's rights in court. The Supreme Court expressed a similar position in case No. 640/11699/19.[38]

### *3.3. Disputes between local self-government bodies*

In the context of the implementation of the right to protect local self-government, case No. 187/687/16-a (2-a/0187/7/16)[39] is remarkable. Residents of the territorial community appealed to the court to challenge the decision of their village council. The disputed decision concerned the unification of the plaintiffs' community with other territorial communities. The plaintiffs emphasised the absence of a procedure for public discussions on consent to the voluntary unification of territorial communities. The defendants, in turn, did not provide sufficient evidence of holding public discussions.

The case went through three instances, and the position of the plaintiffs (members of the territorial community) was supported. Courts noted, first of all, that the decision to unify a territorial community must be approved by the residents of the territorial communities that are to be united. Further, all the residents of those territorial communities must be informed about the public discussion. Informing the residents of territorial communities can be done in various ways (for example, through mass media such as television or radio; by sending personal letters by mail; using e-mail, etc.). Moreover, the Supreme Court expanded this guarantee that they would consider the interests of territorial communities during the unification process: it recognised that unification is possible only after a discussion and if the majority of the community expressed a desire for unification. Only under these conditions is it possible to make further decisions about unification.

The Supreme Court noted that if the rights of a territorial community are violated, any member of such a community has the right to appeal the relevant action or decision of an authority in court. Violation of the rights of local self-government leads to violation of the rights of every resident of the respective municipality. At the same time, the determining factor in such disputes is the plaintiffs' belonging to the relevant territorial community. It should be mentioned that in other categories of cases, for example, in the case of appeals against local council decisions on local tax benefits (Supreme Court Resolution dated 20 February 2019 in case No. 522/3665/17),[40] the issue of representation of a territorial community by one of its members emerged. At the same time, this representation is not always considered in favour of the plaintiff.

Undoubtedly, such a decision exposes the legal possibilities of protecting the rights of local self-government. Such conclusions provide real legal tools for residents of a community to protect local self-government directly. To a certain extent, such provisions of the court supplement and expand the protective rights of local self-government, which are provided for in Art. 11 of the European Charter of Local Self-Government and Art. 145 of the Constitution of Ukraine. It is significant that only local self-government bodies are listed as subjects of protection in the European Charter of Local Self-Government.

38 Judgment of the Administrative Court of Cassation of 09 December 2020 No 640/11699/19 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/93404743> accessed 8 September 2022

39 Judgment of the Administrative Court of Cassation of 11 August 2020 No 87/687/16-a (2-a/0187/7/16) (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/90898940> accessed 8 September 2022

40 Judgment of the of the Administrative Court of Cassation of 20 February 2019 No 522/3665/17 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/80167902> accessed 8 September 2022

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When analysing the principle of judicial protection of local self-government, attention should be paid to the dispute between two local self-government bodies (case No. 0440/6742/18).[41] The city council appealed to the executive body of local self-government, which was accountable to and under the control of the corresponding council. The essence of the dispute concerned the granting of advertising permits. The first and second courts refused to satisfy the claims of the city council on the grounds that there were no signs of illegality in the executive body's actions. The Supreme Court cancelled the court judgments in the previous instances and closed the proceedings.

The position of the cassation court was based on the assertion that one body of state power cannot file a lawsuit against another body because this constitutes a lawsuit by the state against itself. The court also added that the city council (plaintiff) did not prove a violation of the rights of the territorial community by the executive body. The reason for closing the proceedings was a violation of the rules of jurisdiction because the case did not belong to that jurisdiction according to the rules of administrative proceedings.

In the context of analysing the principle of judicial protection of local self-government, the following opinion in this case[42] is worth studying. It states that the court deprived the local self-government body of its constitutional right to appeal to the court for the protection of its rights when it closed the proceedings. It is emphasised that the Supreme Court did not provide a legal assessment of the previous decision regarding the presence or lack of a violated right of the local self-government body, taking into account the right to judicial protection of local self-government. This is why the issue of implementing the right of the local self-government body to apply to the court for the purpose of protecting the interests of the territorial community remains unresolved.

## 4 CONCLUSIONS

We consider it expedient to summarise the points we have mentioned above. We defined the first category of cases as lawsuits by local self-government bodies to the VRU. And here, it is worth emphasising that there are almost no precedents for local self-government bodies contesting acts of the VRU. The cases presented in this article are exceptions rather than standard practice. In this context, on the one hand, the possibility of a local self-government body appealing an act of the VRU appears to be positive, but on the other hand, based on the relevant judicial practice, the consequences of an appeal are usually negative. In the context of the VRU's approval of the new state administrative system, the position that it is not a public administration body and therefore not subject to appeal in an administrative court is not fully understood. In its Act, the VRU approves the new borders of the communities, thereby managing the territories. These decisions may affect the interests of community members. And the impossibility of appealing such a decision in court leads to the impossibility of full use of judicial protection of local self-government. In this way, the application of the principle remains open when challenging acts of the VRU that concern the interests of local self-government.

Regarding the challenge of the communities' and lawsuits' voluntary association with the Cabinet of Ministers of Ukraine, despite the established ideas and legislative norms of the

41 Judgment of the Administrative Court of Cassation of 26 October 2021 No 0440/6742/18 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/100593163> accessed 8 September 2022

42 Separate opinion of 28 October 2021 No 0440/6742/18 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/100679811> accessed 8 September 2022

communities' voluntary association, in practice, the process took place from top to bottom. The final map of capable, united communities was formed at the level of the Cabinet of Ministers of the Regional State Administration Ministry. We cannot unequivocally talk about both the direct participation of territorial communities and the consideration of their opinion in the process of forming long-term plans and then the approval of such plans by order of the Cabinet of Ministers. In fact, this was the cause of pending lawsuits against the Cabinet of Ministers. And here, the court practice was quite interesting. Sometimes, the courts proceeded from a formal point of view, established the absence of the unification procedure violation, and pointed to the legality of the Cabinet of Ministers' order. However, there are a number of decisions that established the illegality of the Cabinet of Ministers' order and the prospective plans of the Regional State Administration. As a rule, the violations related to the disregard for the community's opinion, the principle of voluntariness, and the absence of consultations. Unfortunately, the current legislation lacks a legal mechanism to protect the violated rights of territorial communities if they consider their inclusion in the composition of a capable territorial community to be unfounded.

Practice shows that it is mainly local councils that go to court to protect the rights of territorial communities. At the same time, a case where the interests of the community were defended in court by the relevant members of that community stands out as a cornerstone. And most importantly, the Supreme Court recognised their right and ensured the principle of judicial protection. In disputes involving local self-government bodies, a certain selectivity is observed in some places, especially when courts do not open proceedings in cases where municipal bodies appeal to the state. We can assume that in such cases, the courts do not fully consider the principle of judicial protection of local self-government and the need to ensure it.

However, if we examine the general picture of judicial practice, starting with administrative justice, then local self-government bodies, we see that thanks to the possibility of judicial appeal of the actions of the state, members of territorial communities received real methods of deterrence and protection. Cases in which the court tries to understand and provide an assessment in disputes regarding the formation of districts and communities demonstrate elements of positive practice. And in this way, territorial community rights are provided with judicial protection. When the court provides an opportunity for the local self-government bodies to sue the state bodies even via a formal approach, this seems like tangible progress.

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Case Note

# PROCEDURAL LAW ROLE IN THE INTERNATIONAL COMMERCIAL ARBITRATION: SOME REMARKS

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***Keywords:*** arbitration, autonomy of the parties, procedural law, lex loci arbitri, applicable law.

## ABSTRACT

***Background:*** One of the most important features of international commercial arbitration is the autonomy of the will of the parties to a foreign economic dispute. Such autonomy consists of the possibility of independence to resolve issues of a dispute between the parties to such a contract and those issues that already arise during arbitration proceedings. One of the most significant issues that are the subject of autonomy of the will is the choice of the rules of procedural law. In this note, we studied the procedural rules governing the activities of international commercial arbitration, which influence the course of arbitration proceedings, since the arbitral tribunal usually refers to them when determining the number of key issues, starting with questions about whether to refer the dispute to arbitration or not, whether to determine interim measures and also with respect to the arbitral award itself.

***Methods:*** This study was based on an analysis of Ukraine's national law and some doctrine; examples of implementation of the New York convention were analysed.

***Results and Conclusions:*** Although the parties' freedom of choice is a generally accepted principle of international commercial arbitration, it can usually be limited by the imperative norms and public order of a particular country. The trend of moving the international arbitration practice away from using *lex loci arbitri* was underlined. This trend reflects the avonomy of the parties and can also be considered a significant challenge of *lex loci arbitri*.

## 1 INTRODUCTION

Generally, arbitration proceedings take place in accordance with procedural law, commonly referred to as "lex arbitri". However, at a time when the parties did not choose their procedural law, the arbitration procedure was governed by the law of the venue of the arbitration proceedings.[1]

However, at present, it is widely accepted that the seat of arbitration, which is often chosen for a variety of reasons, such as convenience and the requirement of neutrality, does not necessarily lead to the fact that the arbitration procedure is governed by the law of that jurisdiction of the seat of arbitration. Since the choice of the venue of arbitration proceedings is carried out directly by the parties to a foreign economic dispute, arbitration institutions or arbitrators are often guided by reasons that are completely irrelevant to the arbitration procedure. [2,3]

Since the principle of autonomy of the will has received wide recognition in most national systems, this means that the conduct of arbitration proceedings is mainly regulated precisely on the principle of autonomy of the will. Although the parties are free to choose the right, the exercise of such a choice usually also depends on the venue of the arbitration proceedings.

1 Yann Guermonprez How do you determine the procedural law governing an International arbitration? https://www.fenwickelliott.com/sites/default/files/Arbitration%203%20-%20How%20do%20you%20determine%20the%20procedural%20law%20governing%20an%20international%20arbitration.pdf date of access 22 Jul 2022.

2 Redfern and Hunter, with Blackaby and Partasides, Law and Practice of International Commercial Arbitration, 4th Edition, 2004, P. 315.

3 Fouchard G, Goldman B, Savage J Fouchard, Gaillard, Goldman on international commercial arbitration. Kluwer Law International, 1999, P. 635

In general, the scope and content of procedural laws are not the same due to differences between arbitration laws of different countries. Thus, certain contradictions may arise in cases where such different procedural norms interact at any stage of the proceedings. In this regard, this article will analyse the question of how the parties should determine the applicable procedural law, a critical analysis of the role of autonomy of the will in the arbitration proceedings will be carried out, as well as the interrelationships that exist between procedural law, the autonomy of the will and the right of the place of arbitration. The question of how the choice of laws will be limited or otherwise regulated or depend on the law of the place where the arbitration differs between substantive and procedural law will also be considered.[4,5]

## 2 DISTINGUISHING BETWEEN APPLICABLE SUBSTANTIVE AND PROCEDURAL LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

On the one hand, the law applicable to the dispute's subject matter regulates the parties' substantive rights and obligations. On the other hand, procedural law regulates the procedure for conducting arbitration proceedings and the possibility of appealing an arbitral award. For example, the parties may choose French law to enter into their substantive agreement and English procedural law to conduct arbitration proceedings. In this case, the arbitrators will apply French law on the merits of the dispute and conduct proceedings in accordance with English law.[6]

The relationship between content and procedure as an important element of international commercial arbitration has been widely recognised. In fact, the parties may prefer that their original agreement or contract be governed by specific national law, although at the same time, they consider that the same right is improper for settling disputes that may arise from their substantive legal agreements. The distinction between the law applicable to the merits of the dispute and the law applicable to arbitration is supported by the views of scholars, according to which the arbitration proceedings may or should be free from the system of law governing the rights and obligations of the parties. In other words, substantive law regulates the essence of the rights and obligations of the parties, while procedural law regulates arbitration proceedings[7]. Separating the essence of the dispute from the procedure also assumes that the definition of each applicable law may be due to or determined by different approaches.[8]

Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd recognised for the first time that procedural law could be applied independently and without any connection with the substantive legal system. In this case, a contract was concluded between the English and Scottish companies, according to which the Scottish company had to carry out certain work in the factory of an English company in Scotland. The contract between these companies contained an arbitration agreement that did not specify the law to be

4 Bühring-Uhle Ch, Kirchhoff L, Scherer G Arbitration and Mediation in International Business, 1996, P. 89

5 Born G B International Commercial Arbitration: Commentary and Materials, 2d ed., Ardsley, NY: Transnational Publishers, 2001, P. 415

6 Chukwumerije O Choice of Law in Internation Commericla Arbitration https://digitalcommons.du.edu/cgi/viewcontent.cgi?Art.=1709&context=djilp date of access 22 Jul 2022.

7 Rubino-Sammartano M, Rubino-Sammartano M International arbitration law and practice. P. 281

8 Yann Guermonprez How do you Determine the Procedural Law Governing an International Arbitration? https://www.fenwickelliott.com/sites/default/files/Arbitration%203%20-%20How%20do%20you%20determine%20the%20procedural%20law%20governing%20an%20international%20arbitration.pdf date of access 22 Jul 2022.

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applied to the arbitration proceedings but stated the place of arbitration – London and the Scottish law to be applied on the merits of the dispute (substantive law). After the arbitration, the court ruled that the nature of the contract proves that English law is its proper right on the merits of the dispute, however, the law to be applied to regulate the arbitration procedure may differ from the right that the parties have chosen to apply when considering the dispute on the merits. In cases where the parties are unable to choose the right that will govern the arbitration proceedings, the proceedings are usually governed by the law of the country in which the arbitration proceedings are conducted.[9]

English courts managed to distinguish procedural law from substantive law. At present, the parties to the contract may, at their own discretion, determine the law to be applied in accordance with the merits of the dispute and the arbitration procedure. Since procedural law regulates arbitration procedure, and substantive law regulates the rights and obligations of the parties, there is a high probability that this issue will go beyond the different legal systems. Domestic laws applicable to arbitration proceedings may not regulate a party's rights and obligations. The separation of procedural law from substantive law expands the freedom of the parties to choose the right, and arbitration becomes more attractive to them in dispute settlement matters.

## 3 SCOPE OF APPLICATION OF PROCEDURAL LAW

Procedural law plays a very important role in arbitration proceedings. Some scholars have argued that procedural law regulates issues such as the autonomy of the will of the parties in making decisions on procedural issues during arbitration proceedings[10]. Such procedural issues directly include the arbitration proceedings themselves, the issues of proof, the appointment and recusal of arbitrators, the responsibility, and ethical standards of the arbitrators, as well as the form and content of the arbitral award. However, in some cases, procedural law also applies to matters relating to the interpretation and enforcement of an arbitral award, which necessarily includes methods for determining whether a dispute is subject to arbitration, settlement of conflicts arising from the law or rules applicable to the merits of the dispute, including quasi-material issues, including the issue of determining the remuneration of lawyers[11]. Furthermore, in this case, some scholars explain that arbitration is the result of agreements between the parties to a foreign economic dispute, and the arbitration agreement should be determined based on a set of legal norms.

On the other hand, some scholars argue that one of the features of international commercial arbitration is that its consideration usually takes place in a "neutral" country, where neither party to the contract resides and does not have the location of its business. Therefore, in practice, procedural law cannot be the same as the law that regulates substantive legal issues in a dispute.

In addition, in most cases, procedural law is defined as the law that governs the mandatory procedural elements of international commercial arbitration. National laws empower arbitration to exercise its powers, and the process of exercising such powers is reflected in procedural rules, which in turn demonstrate the ability of a particular country to resolve a dispute in a fair and effective manner.

9 Whitworth Street Estates (Manchester) Ltd v James Miller and Partners Ltd https://vlex.co.uk/vid/whitworth-street-estates-v-793191173 date of access 22 Jul 2022.

10 Dicey, Morris, The Conflict of Laws: A Review Ole Lando The International and Comparative Law Quarterly Vol. 47, No. 2, 1998, Pp. 394-408.

11 Mann F A 'Lex Facit Arbitrum', in International Arbitration: Liber Amicorum for Martin Domke, ed. Pieter Sanders, The Hague, Martinus Nijhoff 1967, P. 158.

Therefore, Jan Hermonpretz proposed that procedural law is likely to expand the definition and form of an arbitration agreement; determine whether the dispute can be referred to arbitration; the composition of the arbitral tribunal and any grounds for their recusal; the power of the arbitral tribunal to make decisions regarding their competence; temporary measures of protection; claims and objections to the claim; the form of arbitration proceedings; proceedings in the case of non-fulfilment of obligations; assistance of the national court in case of necessity during arbitration proceedings; the powers of arbitrators; the finality of the arbitral award, including its right in national courts of the location of the arbitration. The scholar fully supports this definition of procedural law since it best reflects the function of arbitration.

## 4 AUTONOMY OF WILL AND PROCEDURAL LAW

Generally, the parties to the arbitration proceedings are free to choose any procedural rules they wish to use to regulate the arbitration proceedings. The autonomy of the parties' will allow them to freely determine the procedural rules and rules of substantive law or develop their own rules of arbitration proceedings.

In addition to the New York Convention of 1958, which recognises this freedom, the European Convention on Foreign Trade Arbitration of 1961 also provides that in the event that the composition of the arbitration panel or the arbitration procedure did not comply with the agreement of the parties or, in the absence of such, did not comply with the provisions of Art. IV of this Convention, the arbitral award may be annulled, and this constitutes grounds for refusing to recognise and enforce such an arbitral award.

In support of the concept of autonomy of the will of the parties, it is quite appropriate to cite the practice of the Civil Court of Cassation, which in its decision, expressed its own vision on this issue. Thus, this decision states that paragraph 9.3 of Art. 9 of the contract of sale, concluded between PJSC "Rose Company" and Nuseed Serbia d.o.o., provides that two arbitrators must hold the meeting of the arbitral tribunal based on the text of this contract. In response to a letter from the Secretary General of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry regarding the respondent's obligation to inform the name and surname of the arbitrator appointed by the party from the proposed list, PJSC "Rise Company", for its part, proposed to appoint L. F. Vinokurova as an arbitrator by the Resolution on Amendments to the decision on the Adoption of the AU Case to the proceedings of the International Commercial Arbitration Court of July 9, 2015, the Ukrainian Chamber of Commerce and Industry determines that the case will be considered by a sole arbitrator appointed by the parties. The basis for issuing such a decision by the International Commercial Arbitration Court Chairman at the Chamber of Commerce and Industry of Ukraine is that both the plaintiff and the respondent appointed one person as an arbitrator in the case. During the arbitration proceedings, the parties to the dispute did not raise any objections to the inconsistency of the formation of the court's composition with their autonomy of the will. After the arbitration decision was made, PJSC "Rise" Company filed an application to the national court to annul such a decision, arguing that the arbitral tribunal decided not in accordance with the parties' agreement on the composition of the court. Such an application was satisfied by the courts of the first instance and appellate instance. Disagreeing with these decisions, the Civil Court of Cassation annulled them and dismissed the applicant's application for annulment of the arbitration decision on the grounds that the procedural behaviour of PJSC "Rise Company" which exercised its right to appoint an arbitrator, raised objections to the merits of the dispute during the arbitration proceedings, but did not refer to defects in the composition of the arbitral tribunal, and having received an unprofitable decision based on the results of the arbitration proceedings,

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used the withheld grounds to appeal in the state court the decision of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine, contains signs of abuse of law and does not comply with the principle of good faith.[12]

For a more detailed understanding of the relationship between the autonomy of the will of the parties to the dispute and the application of procedural norms, both the national legislation of foreign countries and international legal acts should be analysed.

Yes, according to Art. 1509 of the French Code of Civil Procedure (as amended in 2019), an arbitration agreement may, directly or with reference to arbitration rules or procedures, regulate the procedural procedure to be followed during arbitration proceedings. Whatever procedure is chosen, the arbitral tribunal guarantees the equality of parties and adheres to the adversarial principle. French arbitration law allows parties to choose procedural law to settle their international arbitration. The choice in favour of a national procedural rule is only one of the options that the parties may choose, as the parties may choose the procedural rule of any other arbitration institution. They may also choose foreign procedural law. [13]

Similar norms are contained in Art. 1042 of the German Code of Civil Procedure, where it is assumed that the parties to the arbitration proceedings should be treated equally. In exercising the imperative provisions of the applicable procedural law, the parties may settle the arbitration procedure at their own discretion or by reference to the relevant provision on the arbitration procedure. [14]

The beginning of the normative consolidation of the autonomy of the will of the parties in matters of the possibility of choosing a procedural right that will govern their dispute was the adoption of the Geneva Protocol of 1923. Thus, in Art. 2, it was noted that the arbitration procedure, including the formation of the composition of the arbitration, is governed by the will of the parties and the law of the country in whose territory the arbitration proceedings are conducted. A similar thesis is contained in Art. 1(c) of the Geneva Convention of 1927, which provides that the recognition and enforcement of an international commercial arbitration award are permitted provided that such award has been made in the manner prescribed for the transfer of cases to arbitration or in the manner agreed by the parties to the dispute in accordance with the law governing the arbitration procedure.[15]

Generally, it is considered that the phrase "in accordance with the law governing arbitration proceedings" means that the right that can be applied in accordance with the 1927 Convention is the "right of the seat of arbitration proceedings".

To circumvent the limitations specified in both the Geneva Protocol of 1923 and the Geneva Convention of 1927, the United Nations in 1958 adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This Convention became the embodiment of the principle of autonomy of the parties and full readiness to recognise the right of the parties to determine the procedural arbitration law. Art. V (1)(d) provides that if the composition of the international commercial arbitration or the arbitration procedure did not comply with the agreement between the parties or, in the absence of such, did not

12 Civil Court of Cassation decision https://reyestr.court.gov.ua/Review/79805738 date of access 22 Jul 2022.

13 https://ats.msk.ru/docs/paktika/Zakon_ob_arbitrazhe_v_Protcessualnom_kodekse_Frantcii.pdf date of access 22 Jul 2022.

14 German Code of Civil Procedure https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p3598 date of access 22 Jul 2022.

15 Geneva Convention of 1927 http://translex.uni-koeln.de/511300/_/protocol-on-arbitration-clauses-signed-at-a-meeting-of-the-assembly-of-the-league-of-nations-held-on-the-twenty-fourth-day-of-september-nineteen-hundred-and-twenty-three/ date of access 22 Jul 2022.

comply with the law of the State where the arbitration took place, then the recognition and enforcement of the arbitral award may be refused. After analysing this reason for refusing to recognise and enforce an international commercial arbitration award, it should be noted that the main aspect is cases where the composition of an international commercial arbitration or arbitration procedure did not correspond to the agreement between the parties, and secondary is the case when the composition of international commercial arbitration or arbitration procedure did not comply with the law of the State where the arbitration took place.

Based on the nature of the arbitration procedure, the parties to the dispute may independently determine the procedure or composition of the arbitration panel, provided that such determination is not prohibited by the *lex arbitri* rules. In accordance with the hierarchy of paragraph 1 (d) of Art. V of the New York Convention of 1958, *lex arbitri*'s provisions on these issues are subject to the parties' agreement and, in most cases, are not problematic since there is no conflict between these two rules. *Lex arbitri* on the tribunal's composition and the arbitration procedure is binding because the parties are not free to deviate from them.

Thus, the High Court of Justice (Wales), in the case of *Tongyuan International Trading Group v. Uni-Clam Limited*, noted that if the arbitration was conducted elsewhere that is not provided for by the arbitration agreement and the party to the dispute refused to participate in such proceedings, the other location of the arbitration will not affect the fairness of the proceedings or harm that party. The court argued that the wording of the arbitration agreement did not provide an opportunity to argue that the parties considered the venue of the arbitration to be critical.[16]

The fact that the derogation of the arbitral tribunal from the agreement of the parties concerning the forming of the composition of the arbitrators or the determination of the arbitration procedure (or, conversely, its deviation from *lex arbitri)* may justify the refusal to recognise or enforce a foreign arbitral award pursuant to Art. V (1) (d)) does not mean that courts may always refuse to recognise or enforce on this basis. According to the law of the Member States of the New York Convention of 1958, including Canada, the Netherlands, Hong Kong and Korea, deviation from these orders will result in a refusal to recognise or enforce an award if this deviation affects the integrity of the arbitration process as a whole.

This innovation made it possible to eliminate the shortcomings provided for in the Geneva Protocol of 1923 and the Geneva Convention of 1927, where the arbitration procedure shall be governed by the law of the seat of arbitration. However, it should be noted that the provisions of the New York Convention of 1958 apply only to the procedure for recognising and enforcing an arbitral award and do not apply to or regulate the conduct of arbitration proceedings.

Subsequently, to regulate trade issues that arose between the countries of Eastern and Western Europe, delegates from 22 countries on April 21, 1961, in Geneva adopted the European Convention on Foreign Trade Arbitration. The procedural arbitration law enshrined in the European Convention of 1961 is quite similar to the provisions of the New York Convention of 1958 since it provides that in the event that the composition of the court or the arbitration procedure does not comply with the agreement of the parties, or in the absence of such an agreement, the provisions of Art. IV of the Convention, the award of such arbitration may be invalidated and annulled and may also be grounds for refusing to recognise and enforce such an award.

16 Tongyuan International trading Group v. Uni-Clam Limited, High Court of Justice, England and Wales, 19 January 2001 http://newyorkconvention1958.org/index.php?lvl=notice_display&id=509&opac_view=6 date of access 22 Jul 2022.

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In Art. 19 of the UNCITRAL Model Law on International Trade Arbitration provides that, subject to the provisions of the applicable law, the parties may, at their sole discretion, agree on an arbitration procedure. In the absence of such an agreement, the arbitral tribunal may, in compliance with the provisions of this law, conduct arbitration proceedings as it considers necessary. Thus, in accordance with the UNCITRAL Model Law, when determining procedural arbitration law, preference is given to the parties to the dispute, and the arbitration itself plays only a supporting role in determining the procedure that may be applied.[17]

## 5 THE RIGHTS OF THE PARTIES TO CHOOSE THE PROCEDURAL LAW

For a long time, the concept that parties have the right to choose procedural law for their arbitration proceedings has acquired particular importance in the doctrine of international commercial arbitration. Regarding the possibility of applying the arbitration rules agreed by the parties, such a reference is a manifestation of dispositivity on the one hand and the realisation of the parties' autonomy on the other since the parties have the right to choose the applicable law independently.

The construction of the parties' choice of procedural law, which is specified in the UNCITRAL Model Law, can be considered the most important provision of this Model Law since it establishes the principle of autonomy of the parties, recognising the freedom of the parties to choose specific rules of arbitration procedure, as well as in general, guaranteeing the parties the freedom to develop rules in accordance with their specific needs and wishes. The parties are free to choose the rules they know, the number of arbitrators, the place of arbitration proceedings, and even the procedure in a completely different legal system. In practice, this means that the parties are free to choose the applicable law, the details of the arbitration proceedings, the time limits for submitting written evidence, and whether the arbitral award should contain grounds for an award or not. [18,19]

Despite the above, there are still some imperative rules, the effect of which the parties cannot exclude even by agreement. For example, in Art. 18 of the UNCITRAL Model Law provides that the parties should be treated equally, and each party should be given every opportunity to state its position.

Art. V(1)(d) of the New York Convention, which generally recognises the right of the parties to choose the relevant procedural law, considers that the recognition of an arbitral award may be refused if the arbitration cannot be conducted under the agreement of the parties. However, these provisions are among the most controversial, as it is not entirely clear whether the parties have the right to agree on procedures regardless of the imperative rules of the venue of the arbitration. In addition, Art. 19 of the Rules of Procedure of the International Chamber of Commerce 2021 provides for a similar rule, which also determines that when considering a case, the composition of the arbitration is guided by the Rules, and on issues not regulated by the Rules, by any rules established by the parties, and in the absence of such, by the rules established by the composition of the arbitration, with or without reference to the procedural rules of national law applicable to arbitration inaccuracy, as questions may

17 Defaultth UNCITRAL Law on International Trade Arbitration https://zakon.rada.gov.ua/laws/show/995_879#Text date of access 22 Jul 2022.

18 Should the Procedural Law Applicable to International Arbitration Be Denationalised or Unified - The Answer of the Uncitral Model Law https://heinonline.org/HOL/LandingPage?handle=hein.kluwer/jia0008&div=22&id=&page= date of access 22 Jul 2022.

19 A Guide to the UNCITRAL Model Law on International Commercial Arbitration. Legislative History and Commentary. By Howard M. Holtzmann and Joseph E. Neuhaus. Deventer: Kluwer in co-operation with the T. M. C. Asser Institute, 1989, P.564

arise as to whether the arbitration rule actually has priority or imperative provision with respect to the place of arbitration.[20]

## 6 CHOICE OF PROCEDURAL LAW

The principle of autonomy of the parties is currently recognised in almost all national arbitration laws, rules and conventions. Most foreign economic agreements contain arbitration agreements with a clearly defined law, according to which the principle of autonomy of the parties, the choice of the right of the parties, is usually applied by arbitrators.

However, most arbitration proceedings take place in a specific country, and sometimes, there may be no clear agreement on procedural law issues. [21]

In most cases, the parties include a general choice of law clause in a foreign economic contract, providing a right that will apply to their arbitration proceedings. On the other hand, the parties' determination of the procedural law governing their arbitration proceedings will entail the application of external conflict of laws, rules or presumptions. If the parties have not chosen the applicable procedural law, then a certain choice must be made for them, whether[22] this is provided in the arbitration agreement. The most likely or common choice is the right of the seat of arbitration. In other words, in most countries, it is recognised whether it is assumed that the arbitration law is the law of the country where such an arbitral tribunal is located. Another point of view is that lex arbitri is identical to the right chosen by the parties and is thus determined by their independent will. [23]

In addition, the parties are free to agree on a procedure to be followed by the arbitral tribunal during the conduct of the arbitration proceedings. In the absence of such an agreement, methods for determining procedural law become important. At present, the legislation on the definition of applied procedural law in international commercial arbitration is divided into two categories. One of them is the primacy of the parties' autonomy with a subsidiary provision that gives the right to determine a possible arbitrator. For example, the UNCITRAL Model Law states that in the absence of such an agreement, the arbitral tribunal may, subject to this law, conduct arbitration proceedings in the manner it considers necessary.[24]

In Art. 17 of the UNCITRAL Arbitration Rules 2012, Art. 1 of the Rules of the American Arbitration Association (hereinafter referred to as the AAA), and Art. 1494 of the French Code of Civil Procedure contain similar provisions according to which the priority status of an arbitrator is determined within the entire arbitration procedure. For example, Art. 1 of the Rules of the American Arbitration Association provides that any disputes concerning the AAA Rules apply shall be resolved exclusively by the AAA. By a written agreement, the parties may change the procedures set forth in the Rules and Regulations. After the appointment of an arbitrator, such changes may be made only with the arbitrator's consent.

20 Regulations of the International Chamber of Commerce 2021 https://iccwbo.org/content/uploads/sites/3/2021/03/icc-2021-arbitration-rules-2014-mediation-rules-russian-version.pdf date of access 22 Jul 2022.

21 International Commercial Arbitration: Cases, Materials, and Notes on the Resolution of International Business Disputes, Fondation Press, 1997, P.712

22 Gary B Born, International Commercial Arbitration: Commentary and Materials, 2d ed., Ardsley, NY: Transnational Publishers, 2001, P.165.

23 Tongyuan International trading Group v. Uni-Clam Limited, High Court of Justice, England and Wales, 19 January 2001 http://newyorkconvention1958.org/index.php?lvl=notice_display&id=509&opac_view=6 date of access 22 Jul 2022.

24 Mann-Long Chang, A Study of the Law Applicable to the Procedure in International Commercial Arbitrationhttp://www.zhongwang.com.tw/page.php?menu_id=70&p_id=77 date of access 22 Jul 2022.

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Art. 19 of the Law of Ukraine "On International Commercial Arbitration" also stipulates that subject to the provisions of this law, the parties may, at their discretion, agree on the procedure for consideration of the case by the arbitral tribunal. In the absence of such an agreement, the arbitral tribunal may, in compliance with the provisions of this law, conduct arbitration proceedings in a manner that it considers appropriate. The powers conferred on the arbitral tribunal include determining the admissibility, propriety, materiality, and significance of any evidence.

On the other hand, if there is no agreement by the parties to the dispute of the procedural rules of law, the applicable law is *lex loci arbitri*. The New York Convention of 1958 provides that if the composition of the arbitral body or the arbitration procedure did not comply with the agreement of the parties or, in the absence of such an agreement, does not comply with the law of the country in which the arbitration took place, then the recognition and enforcement of such arbitral awards is impossible.

This rule indirectly regulates the standard for applying various possible arbitration procedural rules and reveals the important role of *lex loci arbitri*. As noted above, even though different countries that are members of the New York Convention of 1958 may have a variety of legislative acts or rules that relate to the principle of choosing procedural rules applicable to arbitration procedure, there is still agreement to comply with the principle of autonomy of the parties.

The significant influence of procedural law on arbitration proceedings is why procedural law regulates issues related to arbitration proceedings. For example, issues such as the procedure for preparatory actions of arbitration proceedings, time limits, disclosure of information and other issues are usually significantly affected by the procedural law applicable in arbitration. The procedural issues arising during the arbitration proceedings are subject to procedural legislation.

Different national arbitration laws have different methods for determining the choice of procedural law that governs arbitration proceedings. Some directly allow the parties to choose procedural law, including foreign ones. For example, Art. 182 of the Swiss Federal Law on Private International Law establishes that parties may settle the arbitration procedure directly or by reference to the arbitration rules; they may also subordinate the arbitration procedure to their chosen procedural law. If the parties have not settled the arbitration procedure, it shall, if necessary, be established by the arbitral tribunal directly or by reference to the law or the arbitration rules.[25]

## 7 THE INFLUENCE OF THE SEAT OF ARBITRATION ON THE CHOICE OF PROCEDURAL LAW

As provided by most national arbitration laws, parties may choose the rules by which they intend to regulate arbitration proceedings. Autonomy of the will in the choice of procedural law is a natural consequence of their arbitration agreement when they choose the seat of arbitration and institutional rules to regulate arbitration. The parties' understanding of the law of the seat of arbitration, or any chosen institutional rules forms the basis for their expectation as to which arbitration proceedings take place.

In addition, there is a tendency to conduct international commercial arbitration in a "neutral country" where neither party resides or the location of their business. This means that in

25 Switzerland's Federal Code on Private International Law (CPIL) https://www.hse.ru/data/2012/06/08/1252692468/SwissPIL%20 in%20red.%202007%20.pdf date of access 22 Jul 2022.

practice, the law of the seat of arbitration (lex arbitri) is not the right that governs the subject matter of the dispute. However, in most cases, the law that usually regulates the conduct of international commercial arbitration should be considered the procedural law of the seat of arbitration.

Purely, in theory, the parties may choose national law to conduct the arbitration proceedings, if it is permitted by law and the public order of the seat of the arbitration. However, one party may argue that the chosen procedural law, which differs from the right of the seat of arbitration, should apply to the arbitration proceedings.

Anglian law supports the traditional theory that lex loci arbitri should properly regulate the arbitration procedure. It was noted that in the contract between Eurotunnel and Trans-Manche Link for the construction of the English Channel tunnel, there was an arbitration agreement in place, which stipulated that the international chamber of commerce would supervise the conduct of the arbitration in Brussels. The contract was concluded in London. In the distance, a dispute arose between the parties. Eurotunnel appealed to the English court for a temporary injunction to prevent the threat from Trans-Manche Link. The House of Lords ruled that the English court has the right to impose a temporary injunction, but this would be inappropriate because the parties agreed that in the event of disputes, the case should be considered in international commercial arbitration in Brussels in accordance with the Regulations of the International Chamber of Commerce[26]. It follows from the above that, nevertheless, the decisive word in the adopted lex loci arbitri as a procedural law for the conduct of arbitration belongs to the national court.

The England Arbitration Act 1996 established stricter restrictions on the possibility of settling arbitration proceedings by the procedural rules of another country if such proceedings are conducted in England. In addition, the provisions of this law shall apply even if the seat of the arbitration is outside of England, Wales or Northern Ireland or if the place of arbitration has not been determined or the suspension of the proceedings has been determined, authorising the enforcement of the arbitral award[27].

In accordance with the procedural (legal) theory of international commercial arbitration, arbitrage is a special form of administration of justice. The administration of justice is a function of the State, and if it allows the parties to go to arbitration and agrees in such cases to terminate the activities of their judicial institutions, it means that the content of the arbitration is to exercise a public legal function.

It is considered that arbitration is vested with rights and obligations only if a particular legal system gives it such powers. This point of view was supported by F. Mann, who argued that the State has the right to control arbitration and regulate any legal relations that arise in its territory. He believed that the term "international arbitration" was incorrect since any system of private international law is a system of national law, and each arbitration is a national arbitration. That is, it is subject to a certain system of national law. From this point of view, the legislative and judicial authorities of the seat of arbitration govern the arbitration process since the legal significance, and consequences of the arbitral process are the product of approval that is provided by the legal infrastructure of the seat of arbitration. The will of the parties, which is reflected in the arbitration agreement, can only be realised when permitted by the laws of the seat of arbitration.

In view of the foregoing, we can conclude that international commercial arbitrations may be governed by national law, which tends to affect both international and domestic arbitration.

26 http://expertdeterminationelectroniclawjournal.com/wp-content/uploads/2017/04/Channel-Tunnel-Group-Ltd-Anor-v-Balfour-Beatty-Construction-Ltd-v-Ors-1993-AC-334.pdf date of access 22 Jul 2022.

27 https://www.jus.uio.no/lm/en/pdf/england.arbitration.act.1996.portrait.a4.pdf date of access 22 Jul 2022.

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The procedural (jurisdictional) theory of arbitration is reflected in the law enforcement practice of domestic courts and international commercial arbitrations. The special role of arbitration in the selection of procedural rules of arbitration proceedings is recognised. Thus, in accordance with this decision, the defendant, an American manufacturer, to expand his business, acquired from a German citizen three enterprises that belonged to him and were established in accordance with the laws of Germany and Liechtenstein, along with all the rights to the trademarks of these enterprises. The agreement was signed in Austria and completed in Switzerland and contained clear guarantees of the plaintiff that all trademarks are unencumbered. There was a provision in this agreement according to which all disputes or claims arising out of a contract are subject to consideration in the international commercial arbitration of the International Chamber of Commerce in Paris, and the laws of the State of Illinois will govern this contract, its interpretation and enforcement.

Further, when it was discovered that the trademarks were associated with material encumbrances, the plaintiff offered to terminate the contract, and the defendant refused and filed a claim for damages in the district court, alleging certain fraudulent acts in relation to these trademarks. The District Court, as well as the Appellate Court, rejected the defendant's arguments, arguing that, in this case, the arbitration agreement could not be applied to the subject matter of the dispute. However, the U.S. Supreme Court noted that the arbitration agreement must be recognised in accordance with the clear provisions of the U.S. Arbitration Act, which provide that the arbitration agreement (as provided for in the present case) is valid, irrevocable, and enforceable, except as existing in law or in the right of equity to annul any contract.[28]

In the *Sapphire International Petroleums Ltd. v National Iranian Oil Company*, the sole arbitrator had no doubts that lex loci arbitri should regulate the arbitration proceedings.

Thus, in this case, the parties to the dispute agreed that a sole arbitrator would resolve any disputes arising from the contract. But during the consideration of cases, the defendant stated his objections to the formation of the composition of the arbitrators in this case. This arbitration award stated that the jurisdiction of the President of the Federal directly derives from Swiss case law, according to which the judicial authorities are responsible for selecting a sole arbitrator under the conditions specified in the arbitration agreement. as to whether the conditions established for such purpose have been met. The decision made in this way is a court decision and has the full force of the final court decision, except in cases where the law allows the presentation of an appeal to the highest instance. Although doctrine and case law recognise that an arbitrator may determine his own jurisdiction in matters relating to the validity of the arbitration agreement, such matters have not been previously considered in courts of general jurisdiction[29].

Thus, when analysing both the legislation and the law enforcement practice of both arbitrations and national courts of different countries, it remains rather uncertain, and in some cases even controversial, the question of the possibility of parties to foreign economic disputes choosing the rules of procedural law.

## 8 CONCLUSIONS

Traditionally, when the parties to a dispute do not choose the procedural law to conduct the arbitration proceedings, such a right is determined in accordance with the law of the venue of the arbitration proceedings. However, there are cases when the parties to the dispute can

28 Scherk v. Alberto-Culver Co. https://jusmundi.com/en/document/decision/en-sapphire-international-petroleums-ltd-v-national-iranian-oil-company-arbitral-award-friday-15th-march-1963 date of access 22 Jul 2022.

29 https://www.biicl.org/files/3940_1963_sapphire_v_nioc.pdf date of access 22 Jul 2022.

choose the rules of procedural law themselves that are not related to the right of location of the arbitration. After analysing the national arbitration laws of foreign countries, after the parties to the dispute have chosen the rules that will govern arbitration procedures, such a choice should be recognised and applied as far as possible and appropriate. In other words, although the parties' freedom of choice is a generally accepted principle of international commercial arbitration, it can usually be limited by the imperative norms and public order of a particular country.

At present, international arbitration practice is gradually moving away from the use of *lex loci arbitri*, provided that the intentions of the parties to a foreign economic dispute are clearly expressed in the legal rules for resolving specific combing issues that arise during arbitration proceedings. This trend reflects the avtonomy of the parties and can also be considered a significant challenge of lex loci arbitri.

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OPINION ARTICLE

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Opinion Article

# ESTABLISHMENT BY CONTRACT OF JUDICIAL METHODS OF PROTECTION OF CIVIL RIGHTS AND INTERESTS: THE UKRAINIAN EXPERIENCE

***Maryna Us***

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## ABSTRACT

***Background****: The issue of choosing an effective method of protection continues to be relevant not only in court but also in contractual practice. This is explained by the fact that in a number of legal systems, contracts act as a source of consolidation of protection methods. As a result, there is a need to define models (options) for the contractual establishment of protection methods and, at the same time, the limits of contractual freedom.*

***Methods****: Logical methods were used during the present research: analysis, synthesis, induction, and deduction. With the help of the system method, types of models of the contractual*

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*establishment of protection methods were studied. The historical-legal method made it possible to analyse the provisions of national legislation and approaches to establishing methods of protection from a historical perspective.*

***Results and Conclusions**: The provision in the law of the contract as a source of establishing methods of protection contributes to greater protection of rights holders and allows for timely and adequate responses to complications of legal relations and, as a result, complications of the subjective interests of their participants. The recognition of the freedom of participants in contractual relations in determining the methods of protection and reference to the dispositive basis in the relevant field corresponds to the modern European approach.*

***Keywords**: methods of judicial protection; violation of rights and interests; contract; limits of contractual freedom; models of securing methods of protection in the contract; an effective method of protection; judicial control over the fairness of the terms of the contract*

## 1 INTRODUCTION

Historically, there has been a constant complication and increase in the number of ways to protect civil rights and the interests that can be applied. This trend is associated with the complication of legal relations due to the expansion of their objective composition. As a result, the grounds for the disagreements of the parties in the performance of contractual obligations are diversified, and their subjective interests in the realisation of the respective rights are also complicated.

This situation draws our attention to methods of protection at the doctrinal level. Nevertheless, the issue of methods that have a contractual nature and their relationship with those established by law remains understudied. Also, the relevance of the selected issue is influenced by new approaches in legislation and judicial practice regarding the choice of methods of judicial protection in view of the law enforcement practice of the ECtHR.

## 2 SCIENTIFIC VIEWS AND THE LEGISLATIVE DIMENSION

In the scientific literature, there has not been a consensus regarding the extension of the principle of freedom of contract to illegal behaviour, in particular, the possibility of contractual establishment of methods of protection of civil rights and interests. Some scholars advocate for the position that the freedom to determine the rules of lawful behaviour by contract should be clearly distinguished from the freedom to determine the consequences of improper behaviour by contract, given the fundamental difference between them. Therefore, as a general rule, the consequences of misconduct must be established by law, and the discretion of the parties regarding such consequences can be allowed only as an exception and within the limits provided by the permitting norms.[1] Other researchers, on the contrary, evaluate the expansion of the boundaries of contractual freedom in the direction of protecting the rights and interests of participants in contractual relations positively.[2]

As for the legislative dimension of these issues, three main approaches can be distinguished.

1. *The concept of a closed list of methods of protection at the legislative level* – the holder of the

1 Y Popov, 'Freedom of Contract Regarding the Determination of The Consequences of Illegal Behaviour' (2008) 1 Pravo Ukrainy 133-136.

2 AV Luts, *Freedom of contract in the civil law of Ukraine* (Shckola 2004) 148.

violated (unrecognised, disputed) right (interest) can use the method of protection provided by the legal norm. That is, the choice of the method of protection here is limited to a legally defined circle of methods that are not subject to extended interpretation at the discretion of the interested parties, including by means of a contractual consolidation of the methods of protection. This concept, for example, is reflected in the Civil Code of the Republic of Lithuania, where Art. 1.138 provides for an approximate list of methods of protection and notes that rights are also protected by other methods provided by law. The same approach is characteristic of the Civil Code of the Republic of Moldova (Art. 16).

2. *The intermediate approach* is that the concept of a closed list does not take into account the whole variety of sources of civil law, which are not limited to the law as such. We must not forget such sources of law as contracts and the custom of business turnover. Moreover, the civil legislation of most European countries allows for the conclusion of unspecified contracts. A situation is not excluded when the methods of protection enshrined in legislation will turn out to be inconsistent with the essence of the rights from unspecified contracts or the nature of their violation, and therefore one of the main goals of the law, which is the protection of rights and interests, will not be achieved. That is, the methods of protection can be determined at the level of the law, contracts, or the custom of business turnover.

3. *The dispositive model of the system of methods of protection* lies in the fact that protection is allowed in ways that are not directly fixed but which do not contradict the legal order. An analysis of the Civil Code of the Czech Republic gives grounds for the conclusion that this model is enshrined in it (para. 13): the legislator does not even provide a general approximate list of defence methods, indicating only that a person can count on the fact that his or her case will be resolved in the same way as an identical claim; if the case was decided differently, the plaintiff must justify the difference between the circumstances of the cases. Likewise, the Civil Code of the Republic of Poland does not contain even an approximate list of methods of protection. At the same time, judicial practice has developed in such a way that any method of protection that does not contradict the legislation is considered admissible (in particular, Art. 91 of the Code states that an authorised person can carry out any activity aimed at preserving his right).

If we turn to the legislation of Ukraine, we can see a consistent movement from the concept of a closed list to the establishment of a dispositive model. Thus, the Civil Code of the Ukrainian SSR, which was in effect until 1 January 2004, did not allow the establishment of methods of protection in contracts. Later in para. 12 Part. 2 Art. 16 of the Civil Code of Ukraine of 2003 (hereinafter – the Civil Code), among the sources of determining judicial methods of protection, the legislator directly names contracts along with the law. Further, since the end of 2017, as a result of amendments to the Civil Code, it is assumed that the methods of protection can also be established by the court in cases defined by law. These rules are also reflected in the norms of the Civil Code devoted to binding legal relations: in case of violation of the obligation, the legal consequences established by the contract or the law will follow (Part 1 of Art. 611 of the Civil Code).

Therefore, in the civil legislation of Ukraine, there is a tendency to expand the permissible sources of determining the methods of protection. Today, it can be stated that the legislation of Ukraine is characterised by a dispositive model of the system of methods of protection. However, at the same time, one cannot fail to note the legislative inconsistency: Art. 20 of the Economic Code of Ukraine (hereinafter – the Code of Ukraine) in its current version does not correspond to the above-mentioned provisions of the Civil Procedural Code, since, although it enshrines a non-exhaustive list of them, it gives an indication that others may be established by the law.

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## 3 LAW ENFORCEMENT PRACTICE OF THE ECTHR

Due to the above-mentioned state of national legislation, until 2012, national courts mainly issued decisions on refusal to satisfy claims in cases where the claim was a method of protection not provided for by the current legislation. Back in 2004, the Supreme Court of Ukraine insisted that if the declared method of protection did not correspond to the established contract or law, then the court must reject the claim.[3]

After 2012, judicial practice showed a tendency to use methods of protection not enshrined in normative legal acts, with reference to the practice of the European Court of Human Rights (ECtHR), where effectiveness was defined as an integral component of protection. The impetus for this was primarily the Resolution of the Armed Forces of Ukraine of 21 May 2012 in case No. 6-20*ц*с11. The Supreme Administrative Court recognised the groundless refusal of the court of cassation to grant the claim on the grounds that the method of defence chosen by the plaintiff is not provided for by law. In the opinion of the Supreme Administrative Court, the court did not take into account that the legislative limitations of material legal methods of protection of a civil right or interest are subject to application in compliance with the provisions of Arts. 55 and 124 of the Constitution of Ukraine and Art. 13 of the Convention on the Protection of Human Rights and Fundamental Freedoms, according to which every person has the right to an effective method of legal protection that is not prohibited by law.[4]

Later, the corresponding approach was reflected at the legislative level. The legislator, having adopted the provisions of Art. 13 of the European Convention and the relevant ECtHR practice (for example, para. 145 of the ECtHR decision in the case of *Chahal v. the United Kingdom* of 15 November 1996; para. 75 of the ECtHR decision in the case *Afanasiev v. Ukraine* of 5 April 2005), in 1 Art. 5 of the Civil Procedure Code of Ukraine (hereinafter – the CPC) and Part 1 of Art. 5 of the Commercial Procedural Code of Ukraine (hereinafter – the ComPC of Ukraine) established a progressive provision that in the event that the law or contract does not determine an effective method of protection of a right (interest), the court may determine such a method of protection in its decision in accordance with the requirements set forth in the lawsuit that does not contradict the law. Also, Part 2 of Art. 5 of the Code of Administrative Procedure of Ukraine states that protection can be carried out in another way as long as it does not contradict the law and provides effective protection. It follows from the above that a person can protect his/her right (interest) in a way that is established either by law or by contract or is not established by either law or contract but is effective and does not contradict the law.

## 4 THE SIGNIFICANCE OF THE CONTRACT AS A SOURCE OF ESTABLISHING ETHODS OF PROTECTION

When entering into a contractual relationship, a person wants to be sure that the counterparty will fulfil its contractual obligations in a proper manner: in the manner specified by the contract, within the specified time, in the specified city, etc. As a result, in order to prevent or reduce the negative consequences for the creditor of non-fulfilment or improper fulfilment of obligations by the debtor, the parties to the contract are interested in agreeing in advance on

3 Resolution of the Supreme Administrative Court of 13 July 2004 in case No 10/732.

4 Resolution of the Supreme Administrative Court of 21 May 2012 in case No 6-20цс11 (*Unified State Register of Court Decisions of Ukraine*) <http://www.reyestr.court.gov.ua/Review/24704776> accessed 2 October 2022.

the unfavourable consequences that should occur for the violator in case of non-fulfilment (improper fulfilment) of the contractual obligation. That is, during the conclusion of almost any civil law contract, its participants usually stipulate different consequences of violation of the obligations accepted by each of them.[5] Such consequences represent the possibility of applying one or another method of protection.

Therefore, by defining judicial methods of protection in the contract, the parties to the obligation agree on the potential protection of their rights (interests) in court. The general objective of such an agreement is the prevention of violation and the protection of a subjective civil right (interest) in the event of its violation. Unlike other contractual provisions that regulate the behaviour of the parties in a normal situation and begin to operate after the contract enters into force (in some cases, from the moment determined by the parties themselves), any agreement that defines the structure of the protection of rights begins to 'work' only in case of violation (non-recognition or dispute) of subjective civil rights or legitimate interests of the party (parties) of the contractual relationship.[6]

The contractual provision of judicial protection methods is especially important when the legislator does not offer an effective legal protection mechanism within the framework of certain legal relations. A vivid example of this in Ukraine can be the imperfect legislative regulation of the construction of the preliminary contract in the Civil Procedural Code, which does not allow the effective protection of the rights of the party to the preliminary contract in the event that the counterparty evades the conclusion of the main contract.

In particular, in judicial practice, there are questions as to whether it is possible to legally demand the conclusion of the main contract by filing claims to recognise the main contract concluded on the terms established by the previous contract; to oblige the party to conclude the main contract; to recognise ownership of the subject of the main contract, etc. The Supreme Court has developed a practice of refusing to satisfy the claims outlined above, mainly because coercion to an agreement based on a previous contract, in the absence of the consent of the other party, is not provided for by law since for violation of the terms of the previous contract other legal consequences are foreseen, namely, compensation for damages. In addition, Part 3 of Art. 635 of the Civil Code stipulates that the obligation established by the preliminary contract is terminated if the main contract is not concluded within the period established by the preliminary contract. Termination of the obligation from the previous contract as a result of failure to conclude the main contract within the period established by the previous contract makes it impossible to induce the conclusion of the main contract in court, to fulfil the obligation, or to create the main contractual obligation as a legal basis for the acquisition of ownership rights to the property.[7]

The above shows that achieving the goal of the preliminary agreement (conclusion of the main agreement) based on the current wording of Art. 635 of the Civil Code is impossible, and the damages themselves, which are discussed in Part 2 of Art. 635 of the Civil Code, are quite difficult to prove in practice. The outlined legislative imperfection prompts the parties to the previous contract to provide for additional methods of protection in it, namely, fines or security payments, based on the security mechanism of a deposit for cases of evasion of the unscrupulous party from the conclusion of the main contract, which will contribute to the effective protection of the rights and interests of the other counterparty.

5 MA Rozhkova, *Means and Methods of Protection of The Parties to a Commercial Dispute* (Walters Kluwer 2000) 416.

6 Ibid.

7 Resolution of the Supreme Court of Ukraine of 14 November 2018 in case No 638/21295/15-ц̈с (*Unified State Register of Court Decisions of Ukraine*) <http://www.reyestr.court.gov.ua/Review/77870620> accessed 2 October 2022.

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The importance of legally unspecified means of protection also lies in the fact that the legislation of most European countries allows for the conclusion of unspecified contracts. A situation is possible wherein the methods of protection enshrined in legislation will turn out to be inconsistent with the essence of the rights in unspecified contracts or the nature of their violation, and therefore, one of the main goals of the law – the protection of rights and interests – will not be achieved.

Enshrining judicial methods of protection in the contract in advance ensures, as a rule, the protection of binding rights. However, there are cases when the contract regulates the methods of protection of absolute rights. This is because individuals can conclude a contract after the violation of such rights has already occurred. The corresponding contract is aimed exclusively at achieving the goal of the tort obligation – compensation or reimbursement for the damage caused to the victim. Thus, according to the general rule of Art. 1166 of the Civil Code, the damage caused to the victim is compensated in full. Meanwhile, Part 4 of Art. 1195 of the Civil Code allows for an increase in the scope and amount of compensation for damage caused to the victim by mutilation or other health damage. The parties can also agree on the method of compensation for damage (in monetary or other material forms), the procedure for compensation (instalment or postponement of performance), the termination of the delict obligation by their agreement if it does not contradict the mandatory norms of the law, etc.[8] Thanks to such agreements, legal certainty is achieved: the contract simultaneously acts as a 'specifier' of the legal relationship that arose as a result of the violation.[9] In such a case, the dispute is usually resolved without going to court or, conversely, after it, when the agreement on the means of protection is fixed in the settlement agreement of the parties to the dispute.

## 5 MODELS OF ESTABLISHING METHODS OF PROTECTION IN THE CONTRACT

Agreements on the establishment of methods of protection can hardly be considered a separate category of contracts. Provisions on the protection of the rights (interests) of counterparties are usually reflected in the main contract document. The corresponding rights and obligations have a secondary character compared to the constitutive rights and obligations that determine the essence of a particular contract. Defensive rights (rights to use defence methods) provide the creditor with a certain 'advantage' to its main contractual capabilities. If the method of protection is also a method of ensuring the fulfilment of the obligation (penalty, deposit, etc.), then the relevant provisions can be embodied in an independent contractual structure. Also, in cases where the methods of protection are aimed at protecting non-negotiable rights (that is, the contract was concluded after the violation, non-recognition, or dispute had already taken place), then such contracts should be classified as a separate type of contract not mentioned in the Civil Code.

The establishment of judicial methods of protection in the contract can take place according to three models: 1) transfer to the contract of the method of protection, which is fixed precisely for such a case of violation (non-recognition or dispute) at the legislative level; 2) specification in the contract of the legally proposed method of protection; 3) provision in the contract of such a protective structure, which is absent at the legislative level. Let us consider each of these options in more detail.

8 O Otradnova, 'Contracts Between Subjects of Tortious Obligations: Principles, Possibilities, Limits' (2012) 9 Pravo Ukrainy 174-184.

9 Resolution of the Cassation Civil Court of the Supreme Court of 1 March 2021 in case No 180/1735/16-ц (*Unified State Register of Court Decisions of Ukraine*) <http://www.reyestr.court.gov.ua/Review/95532945> accessed 2 October 2022.

If the method of protection is defined by law, it is applied automatically, and its designation in the contract is not required. Nevertheless, when this method of protection is transferred to the contract, the effect of the preventive function of the obligation law is strengthened: it is suitable both for the purpose of preventing the violation of the rights and interests of the creditor and for the purpose of subsequent protection.

The second model of contractual consolidation of the methods of protection is due to the fact that the need for contractual specification of the method of protection may follow from the legislative provisions. At the same time, the parties are guided by the opportunities provided to them by civil legislation, taking into account the dispositive nature of most norms of civil law. For example, when the amount of the penalty is established in the contract, the method of protection is specified, the construction of which is proposed at the legislative level.

However, the application of legal provisions to such methods of protection does not always seem unambiguous. Thus, in judicial practice, a significant number of issues arose in relation to the penalty, such as: the possibility of determining a fine in the form of a fixed monetary amount; the establishment of a penalty for violation of a non-monetary obligation; the simultaneous collection of a penalty and a fine for one and the same violation. Regarding the last item, it should be recalled that at one time, at the level of the Armed Forces of Ukraine, various court chambers expressed opposing positions with a slight gap in time.[10]

Within the framework of this contractual model, it is also worth determining whether the parties to the contract have the right to limit the use of any method of protection of rights or to provide for the use of only one method that is allowed by law for the corresponding contractual violation. The answers to these questions lie within the relationship between the contract and the law and relate to the limits of contractual freedom, which in itself requires a thorough separate analysis.

At the legislative level, the issue of the limits of permissible freedom, including the establishment of methods of protection in the contract, are regulated by Art. 6 'Acts of Civil Legislation and The Contract' and Art. 627 'Freedom of Contract' of the Civil Procedural Code. Part 3 of Art. 6 of the Civil Procedural Code states that the parties to the contract cannot deviate from the provisions of acts of civil legislation in the event of the existence of one of the following grounds: 1) if these acts explicitly state this; 2) if the binding nature of the provisions of acts of civil legislation for the parties follows from their content or from the essence of the relationship between the parties.

In the scientific literature, it has been repeatedly argued that civil law regulations rarely contain direct prohibitions. Most often, the binding nature of the provisions of acts of civil legislation for the parties follows from their content, which is established by analysing the relevant norm in each individual case using different methods of interpretation. Such an obligation is often evidenced by indications of the nullity of the deviation from certain legal provisions. Examples of this are the rule on the nullity of a deed, which cancels or limits liability for intentional breach of an obligation (Part 3 of Art. 614 of the Civil Code); the rule in Part 2 of Art. 661 of the Civil Code on the nullity of the provision of the contract regarding the release of the seller from liability or regarding its limitation in the event of a claim of the goods from the buyer by a third party; the prescriptions of Part 4 of Art. 698 of the Civil Code on the invalidity of restrictions on the rights of the individual buyer compared to the rights established by the Civil Code and legislation on the protection of consumer rights.

10 The current judicial position on this matter is given in the Resolution of the Supreme Court of Ukraine of 1 June 2021 in case No 910/12876/19 (*Unified State Register of Court Decisions of Ukraine*) <http://www.reyestr.court.gov.ua/Review/98524309> accessed 2 October 2022.

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The binding nature of acts of civil legislation for the parties can be ascertained even when the norm is formulated as imperative, although it does not contain direct prohibitions. For example, is it possible to establish in the contract the release of the debtor from compensation for damages, in other words, to exclude the use of the appropriate method of protection? It seems that an obstacle to this is the imperative rule on the obligation of the debtor to compensate for damages caused by the violation of the obligation (Part 1 of Art. 623 of the Civil Code). In other words, it seems that when solving this problem, the decision should not be based on the principle of freedom of contract since the presence of a contractual prohibition on the use of a method of protection grossly violates the balance of interests of the participants of the binding legal relationship. In the contractual procedure, it is lawful only to change the principle of full compensation, for example, by establishing that damages are compensated in some proportion or only real damages are subject to compensation.

A similar conclusion can be reached when answering the question of whether the application of a legal penalty can be excluded by the contract. Taking into account the fact that Part 2 of Art. 551 of the Civil Code only provides for the possibility of increasing or decreasing the legally established penalty (except for cases provided for by law), it is wrong to talk about the lawfulness of its contractual exclusion.

In the context of the imperativeness of the norms of the Civil Code, one cannot fail to mention the establishment of damages in a fixed amount in the contract. Until 2015, Part 5 of Art. 225 of the Commercial Code provided such opportunity (there is no such provision in the Civil Code). It established the right of the parties to an economic obligation by mutual agreement to determine in advance the agreed amount of damages in a fixed amount or in the form of interest rates, depending on the amount of the unfulfilled obligation or the terms of the breach of the obligation by the parties. The exclusion of the specified norm in 2015 indicates a tendency against these possibilities for the parties, even taking into account the principle of freedom of contract. The update of procedural and civil legislation at the end of 2017 also did not result in the return of the category of solid damages to the legislation.

It should be noted that even in the presence of the specified norm in the Civil Code, higher court authorities made decisions on the refusal to collect 'solid damages' (albeit in a smaller amount), which was motivated by the lack of a full composition of a civil offence, by which the courts understand illegal behaviour (action or inaction of a person); the harmful result of such behaviour (damages); the causal connection between the wrongful conduct and the damages; the guilt of the offender.[11]

However, responsibility must include the reality of negative consequences for the violator, and the state of the current legislation raises doubts about this. After all, it is common knowledge that proving the amount of damages (especially in the form of lost profits) has always been quite problematic. Establishing damages in a fixed amount in the contract is one of the ways to ensure the principle of guarantee of responsibility.[12]

The question of the imperativeness of certain civil law norms in judicial practice also arose within the framework of the institution of invalidity of transactions, namely, can the parties to a contract qualify the contract as invalid and foresee the consequences of invalidity (including nullity) at their own discretion. It was precisely such problems that had to be solved by the United Chamber (UC) of the Cassation Civil Court (CCC) of the Supreme Court of Ukraine within the framework of case No. 355/385/17. The Supreme Court quite rightly came to the conclusion that the interpretation of Arts. 215 and 216 of the Civil Code

11 I Spasbio-Fateeva, 'Contours of civil-law responsibility: review and critical analysis' in AG Didenko (ed), *Civil Law. Articles. Comments. Practice.*, Issue 50 (Almaty 2017) 130-131.

12 Ibid 130-131.

indicates that participants in civil relations cannot, at the level of a particular contract, qualify it as invalid (null or contested) or determine the legal consequences of the nullity of the deed. By agreement of the parties, only the legal consequences of the disputed deed can be changed.[13]

Taking into account the above, the following logical question arises: what if the contract specifies a method of protection in violation of mandatory legal rules (with the exception of contractual freedom), and the party to the dispute insists on the application of these contractual provisions, justifying the claim with them or, on the contrary, stating objections to claims with reference to the provisions of Art. 629 of the Civil Code on the binding nature of the contract?

Judicial practice is based on Art. 629 of the Civil Code, which establishes one of the foundations on which civil law is based – the binding nature of the contract. The addressees of this imperative are both the parties to the contract, who must fulfil their obligations, and the bodies of justice, which are entrusted with the function of enforcing the concluded contracts. Non-fulfilment of obligations established by the contract may occur in the event of: (1) termination of the contract by mutual agreement of the parties; (2) termination of the contract in court; (3) unilateral withdrawal from the contract in the cases stipulated by the contract and the law; (4) termination of the obligation on the grounds contained in Chapter 50 of the Civil Code of Ukraine; (5) invalidity of the contract (nullity of the contract or recognition of its invalidity on the basis of a court decision).[14] It follows from this that in order not to apply the contractual provisions on the method of protection, they must be qualified as null and void or declared invalid in a court of law.

However, case law has long been established in such a way that courts can simply ignore contractual provisions if they conflict with the law. A vivid example is the non-application of a penalty in an amount that exceeds the double discount rate of the National Bank of Ukraine (hereinafter – the NBU; the corresponding limitation is contained in the Law of Ukraine 'On Liability for Late Payment of Monetary Obligations'). At the same time, the penalty is awarded in the amount of the maximum limit specified in the law. That is, the court simply does not apply them without recognising the contractual provisions as invalid, without ascertaining their nullity (for the latter, there are no grounds in the example given), and without providing any justification in view of the norm of Art. 629 of the Civil Code on the binding nature of the contract.

From an applied point of view, the reluctance of the counterparty in such a situation to invalidate the contractual provision on the basis of Part 1 of Art. 203 of the Civil Code (the content of the deed cannot contradict acts of civil legislation) is often explained by the expiration of the statute of limitations for this requirement. Understanding that the specified term has been missed, the plaintiff in the statement of claim or the defendant in the response to the lawsuit (instead of filing a counterclaim) simply insists on the inconsistency of the provisions of the contract with the requirements of the law and expects the court to disapply them as contrary to the law. However, it should be emphasised that there is no provision in the law that would establish a rule for the court to ignore contractual provisions in the event that they contradict the legislative prescriptions. Therefore, under such conditions, a simple indication of the inconsistency of the content of the contract with the law is not enough.

13 Resolution of the Supreme Court of Ukraine dated 23 January 2019 in case No. 355/385/17 (*Unified State Register of Court Decisions of Ukraine*) <http://www.reyestr.court.gov.ua/Review/79472438> accessed 2 October 2022.

14 Resolution of the Cassation Civil Court of the Supreme Court of 23 January 2019 in case No 355/385/17 (*Unified State Register of Court Decisions of Ukraine*) < http://www.reyestr.court.gov.ua/Review/79472438> accessed 2 October 2022.

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Neglecting the relevant contractual provisions (provided that they are not void) requires additional reasoning, which is absent in court decisions.

As for cases where the binding nature of acts of civil legislation follows from their essence, this circumstance is not a logical conclusion of para. 2 Part 3 Art. 6 of the Civil Code. Such considerations are due to the fact that Art. 6 of the Civil Code is devoted to regulating the relationship between acts of civil legislation and the contract and not their correlation with the essence of the relationship between the parties. After all, the essence of these relations lies in their contractual nature.[15] Therefore, its application is possible only in the presence of any of the two previous grounds, that is, a direct instruction or if the binding nature of the provisions of the act of civil legislation follows from its content. This is exactly the path that was taken by the Slovak legislator, who stated in para. 2 (3) of the Civil Code that participants in civil law relations can regulate their mutual rights and obligations with a derogation from the law, if this is not expressly prohibited by law and if from the provisions of the law it does not follow that it cannot be avoided.

The third model of the contractual establishment of protection methods is the contractual establishment of such a protective structure, which is not provided for at the legislative level. At the same time, two options are possible here: 1) the method of protection is not typical for this type of violation; 2) the method of protection chosen by the parties, which is not mentioned at all in the current legislation (the so-called methods of protection 'invented' by the counterparties).

An example of the first option is a method of protection, such as recognition of the right. In Art. 392 of the Civil Code, it is fixed as having the right-affirming value in relation to the right of ownership. Recognition of the right of ownership is most often used as a classic method of protection in resolving property disputes, but this does not give grounds to assume the impossibility of its application in binding legal relations. In contractual practice, for example, there are cases when the recognition of ownership rights as a means of protection moves into the sphere of binding legal relations: in a construction investment contract, it is established in the form of recognition of the investor's ownership right to an object of unfinished construction, if there is a violation of this contract on the part of the developer (for example, violation of the terms of construction of the object). That is, despite the fact that contractual relations have formed between the parties, the dispute is resolved with the help of such a method of protection as the recognition of the right of ownership. At the same time, this method no longer has a right-affirming but rather a law-establishing character and is aimed at protecting rights that are binding in nature. The property rights of investors are a classic manifestation of the right of claim, which has a relative nature: the investor is opposed by the developer, whose duty is to ensure that the investor is granted the right of ownership of the relevant real estate in the future.[16]

The methods of judicial protection not mentioned in the Civil Code, which can be reflected in the contract, should include, for example, the recognition of the contract as terminated[17]

15 MM Sibilyov, *The Civil Code of Ukraine: A Scientific and Practical Commentary (Explanations, Interpretations, Recommendations Using the Positions of Higher Courts, the Ministry Of Justice, Scientists, Specialists*) (Vol 1: General provisions ed IV Spasbio-Fateeva, Series 'Comments and analytics', FOP Kolisnyk AA 2010) 320.

16 YV Mytsa, 'Property Rights of Construction Investors: Some Aspects of Legal Nature and Dynamics' in IV Spasio-Fateeva (ed), *Real Estate Law: through the Prism of Judicial Practice: A Monograph* (EKUS 2021) 71.

17 Resolution of the Supreme Court of Ukraine of 23 January 2019 in case No 372/3/16-цс (*Unified State Register of Court Decisions of Ukraine*) <http://www.reyestr.court.gov.ua/Review/79516582> accessed 2 October 2022.

and the recognition of the contractual debt as groundless.[18] In modern judicial practice, the methods of protection indicated here are most often considered permissible because the list of legally established methods of protection is not exhaustive, and the court can protect the right (interest) with an unspecified method of protection, if it is effective. Nevertheless, fixing such methods of protection in advance in the contract is also possible and expedient. However, law enforcement practice is not clear about the admissibility of claims for recognition if they relate to the legal assessment of disputed legal relations. On the one hand, the plaintiff is trying to achieve legal certainty and exclude possible disputes in the future, and on the other hand, requirements for a legal assessment of legal relations can lead to abuse of persons, when such a method of protection is used to legalise certain relationships or states and turn into 'competition' of court decisions that contain different (including mutually exclusive) legal assessments of the situation, or such an assessment (as one that allegedly has prejudicial significance) may affect the resolution of a legal dispute, the circumstances of which were not the subject of consideration in the case where the appropriate method of protection was used.

## 6 CONCLUDING REMARKS

The analysis of the application of contractual methods of protection allows us to assert that they must meet such a criterion as *lawfulness* (primarily the legally established limits of contractual freedom). As for *relevancy*, the test for this criterion is not required since, as was demonstrated above, the parties to the contract can choose a method of protection that is not typical for disputed legal relations. In turn, the criterion of *proportionality* must necessarily work for methods of protection that require contractual specification. It finds its manifestation, for example, in the provision of Part 3 of Art. 551 of the Civil Code on the right of the court to reduce the amount of fine. Requirements for compliance with the criterion of the *effectiveness* of the method of protection established in the contract are not contained in the current legislation. Moreover, as was mentioned above, neither the civil doctrine nor the law enforcement practice provides a justification for the non-application of contractual provisions by the court unless they are void or declared invalid in accordance with the procedure established by law.

It seems that in order for the courts not to follow the lead of the plaintiffs, whose contractual imagination can sometimes be impressive in its width (recognition of accounting documents as invalid, recognition of contractual periods as expired, etc.), in order to avoid going to court with claims that do not actually protect rights (interests), and are used, as it were, with a prejudicial purpose in other cases,[19] the criterion of effectiveness must be put forward, including those methods of protection that have a contractual nature.

At the same time, it can be clearly stated that if the contract provides for a method of protection, and the plaintiff has chosen another one and proved its effectiveness in contrast to the one established in the contract, then the court can apply the method of protection that the plaintiff insists on (of course, if it meets the criterion of propriety and does not contradict the law). This conclusion follows from Part 1 of Art. 5 of the Civil Code and Part 1 of Art. 5 of the Code of Civil Procedure. The same conclusion is contained in Item 1 of the 'Review of problematic issues of the application of certain provisions of the Civil Procedure Code of Ukraine by courts based on the results of meetings, seminars, round tables with local and

18 Resolution of the Verkhovna Rada of the Supreme Court of 26 October 2021 in case No 766/20797/18 (*Unified State Register of Court Decisions of Ukraine*) <http://www.reyestr.court.gov.ua/Review/101829988> accessed 2 October 2022.

19 Popov (n 1) 135.

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appellate courts' dated 10 July 2019.[20] These concise considerations regarding the criteria that must be met by the methods of protection established by the treaty can serve as a basis for further scientific research in the relevant direction.

Summarising the general points, we note that the provision in the law of the contract as a source of establishing methods of protection contributes to greater protection of rights holders and allows for the timely and adequate response to complications of legal relations and, as a result, complications of the subjective interests of their participants. The recognition of the freedom of participants in contractual relations in determining the methods of protection and strengthening the principles of dispositiveness in the relevant field corresponds to the modern pan-European approach. However, a simple indication of the possibility of enshrining methods of protection at the level of the contract in national legislation is clearly not enough. There is a need both for the development at the legislative level of general provisions on the methods of protection, which have a contractual nature and for the improvement of special provisions devoted to individual protective structures.

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20 'Review of problematic issues in the application of certain provisions of the Code of Criminal Procedure of Ukraine by courts based on the results of meetings, seminars, round tables with local and appellate courts' (10 July 2019) <https://supreme.court.gov.ua/userfiles/media/Ogljad_GPK_07_2019.pdf?fbclid=IwAR2GBTi07XJbvBTK2N3qdNFcL4BDnFaiB28p1rxtul96BwQ77zDk6-gH9bo> accessed 2 October 2022.

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