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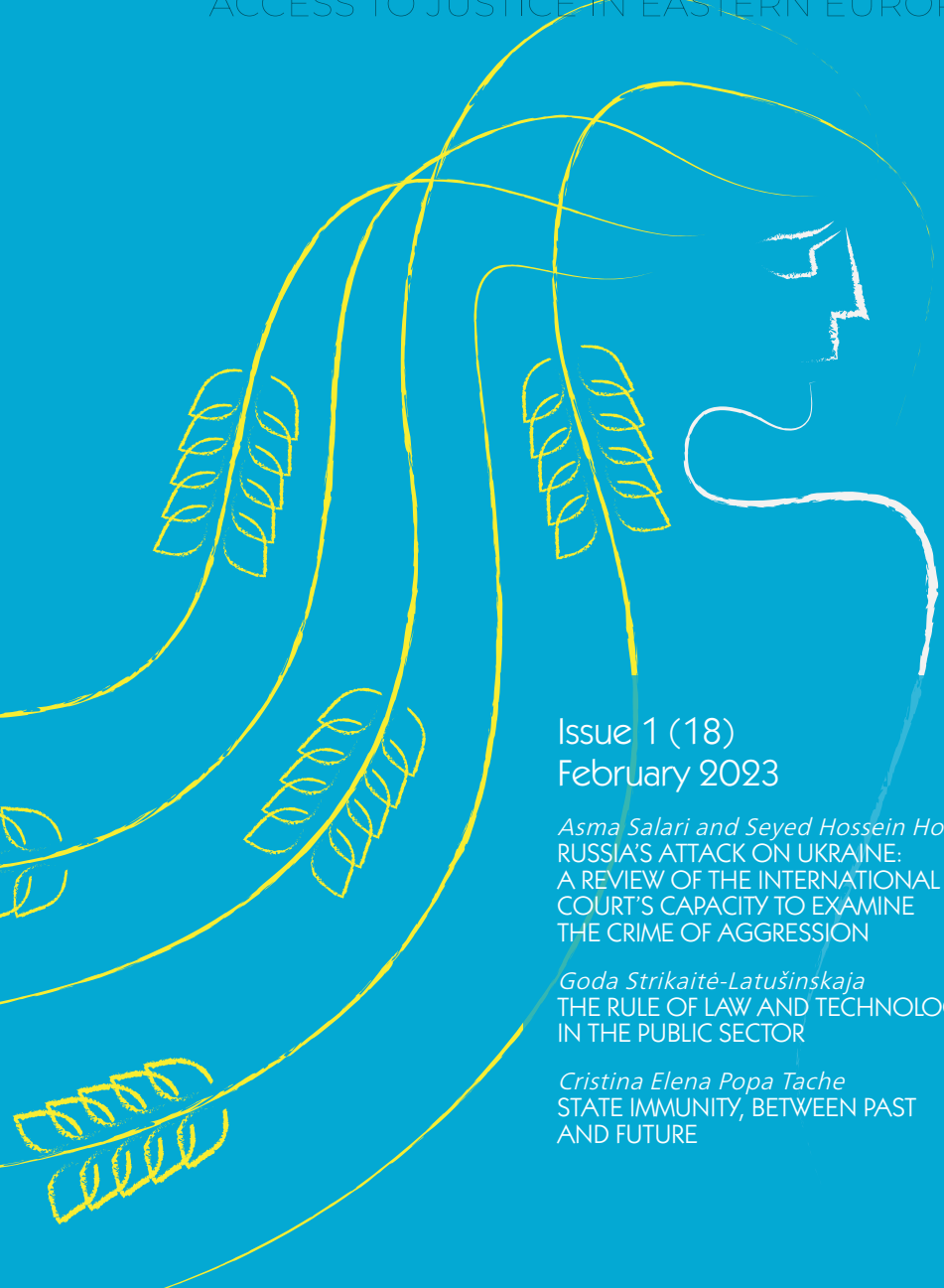

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TABLE OF CONTENTS

Access to Justice in Eastern Europe
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Editor-in-Chief's Note

ABOUT THE ISSUE 1 OF 2023

This issue features articles and notes by various authors on current legal topics.

I am proud to present articles from a diverse group of authors from Romania, Albania, Lithuania, Slovakia, Austria, and Kazakhstan. I deeply thank them for sharing their valuable research results with our readership. The values of the rule of law and human rights are shared by all civilized nations, and our unity in supporting them is as strong as our diversity. It is clear that no one in the world is immune to violations of rights, and it is our duty to stand strong and prevent further injustices whenever possible.

In AJEE, we stand with those who fight for their rights and freedoms. We firmly believe that speaking out against violations is crucial and that silence only enables further injustices. This is especially relevant in the field of research and scholarly publishing, where we rely on facts and arguments. That's why we show our solidarity with all who courageously stand up for equality and justice. We believe that everyone, regardless of gender or nationality, deserves to live in a world where their rights are respected and protected. Join us in standing up for what's right and making a difference in the world!

In light of the above, I am glad to announce among the articles in this issue, we have outstanding research related to the issues of the jurisdiction of the International Criminal Court in the case of Russian aggression against Ukraine. The article delves into the legal basis for Russia's actions, including anticipatory and collective self-defence, invasion by invitation, and the protection of the rights of the population of Donbas. The authors also suggest potential loopholes in countering Russia's actions. Don't miss the opportunity to read *Asma Salari and Seyed Hossein Hosseini's* article, *'Russia's Attack on Ukraine: A Review of the International Criminal Court's Capacity to Examine the Crime of Aggression*'.

The use of technology in the public sector promises to improve efficiency, transparency, cost-effectiveness, and speed but raises concerns about legal risks due to discrimination, the 'black-box problem, and cybersecurity issues. The EU institutions believe that while technology should be promoted, human rights must also be protected. In her article, *Goda Strikaitė-Latušinskaja* concludes that the rule of law must be upheld when implementing technology in the public sector and identifies potential risks in areas such as automated administrative orders, risk-assessment tool COMPAS, and robot judges. Don't miss out on this thought-provoking article, *'The Rule of Law and Technology in the Public Sector'*, which delves into the delicate balance between utilising technology in the public sector and protecting human rights. It's a must-read for anyone interested in the intersection of technology and the rule of law.

The shift in civil procedure towards a more cooperative and consensual approach is very important and is attracting scientists' attention worldwide. In the article by *Tetiana Tsuvina, Sascha Ferz, Agnė Tvaronavičienė, and Paula Riener*, the impact of these changes on current

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legal regulations and practices is investigated. The article looks at the role of settlement principles, case management, and court-related amicable dispute resolution procedures, such as conciliation, mediation, and amicable conciliation process, in promoting the consensual tenet in civil procedure. The authors distinguish and analyse these procedures and their unique features. This research is valuable for dispute resolution practitioners and researchers seeking to better understand how different court-related amicable dispute resolution procedures can be incorporated into legal regulation and practice.

The article written by *Iryna Soldatenko* argues that reducing corruption requires not only implementing anti-corruption policies but also building an anti-corruption culture that encourages people to reject corrupt practices at all levels of government. The author suggests that this can be achieved through better communication between the authorities and the public, which can be managed professionally to increase transparency. The article describes the role of communication in implementing anti-corruption strategies and presents the results of the 'Islands of Integrity ™' project, which was implemented in six communities in Eastern Ukraine in 2020. The research conducted in these communities showed a lack of public interest and confidence in official channels for information about local authorities, which leads to the spread of rumours and decreases public trust. The author argues that this situation requires a reform of communication strategies, mandatory information-sharing practices, and increased communication support for anti-corruption methodologies to reduce corruption risks and increase public control. I truly believe that the article *'Communication between the Government and the Public as a Factor in Lowering the Risk of Corruption*' helps us learn more about building effective communications and reducing corruption in Ukraine.

The growing influence of artificial intelligence in international arbitration poses a challenge to arbitrators as AI threatens to take over some of their fact-finding responsibilities. To maintain their demand in the market, the article written by young and promising author *Jurgis Bartkus* proposes a stricter application of the rule on the admissibility of written witness testimony as a solution to improve fact-finding. The article aims to show why AI is a better fact-finder than arbitrators, examine current practices in the application of the admissibility rule, and justify a stricter approach to the rule that would increase the quality of fact-finding and allow arbitrators to keep pace with AI. By adopting a stricter approach to the admissibility rule, international arbitration proceedings can exclude written witness testimony, leading to improved fact-finding and increased demand for arbitrators. Read this insightful article, *'Ai v. Arbitrator: How can the Exclusion of Evidence Increase the Appointments of the Arbitrators?'* to learn more.

The recent adoption of the Administrative Code in Romania in 2019 is analysed in the article written by *Cătălin-Silviu Săraru*, in which the author evaluates the Code's impact on the general regulation of public services and their alignment with the best practices in creating a good administration that can respond to the changing needs of citizens. The article examines the categories of public services at the EU level, the principles of organisation and functioning of public services in France, Germany, Italy, Spain, and the UK, and analyses the challenges and limitations in regulating local public services in Romania in comparison with the EU and best practices in comparative law. The conclusion of the article suggests using the findings from the research on the Administrative Code to improve the degree of administrative convergence with other EU member states. Please read the details in *'Regulation of Public Services in the Administrative Code of Romania: Challenges and Limitations*'.

In *Cristina Elena Popa Tache's* article, the subject of state immunity is examined, highlighting its growing importance and its journey from customary law to codification attempts. The article mentions the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property and the initiatives for the establishment of the European Court of State

Immunity. The article aims to emphasise the significance of comprehending state immunity and its exceptions using a scientific introspection method. Please read the details in *'State Immunity, Between Past and Future'*.

As usual, I would like to express my sincere gratitude to all the AJEE team who are working so passionately to deliver research results to the wider scholarly community through our academic publishing procedures.

The challenges of recent years have demonstrated the significance of teamwork, patience, and support, as well as the sharing of human values and the creation of a fair and inclusive society. These elements are crucial in overcoming difficulties and working towards a better future for all.

Slava Ukraini!

Editor-in-Chief

Prof. Iryna Izarova

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Ukraine

RESEARCH ARTICLE

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Research Article

RUSSIA'S ATTACK ON UKRAINE: A REVIEW OF THE INTERNATIONAL CRIMINAL COURT'S CAPACITY TO EXAMINE THE CRIME OF AGGRESSION

Asma Salari and Seyed Hossein Hosseini

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Keywords: *International Criminal Court; crime of aggression; preventive self-defence; intervention by invitation; remedial secession*

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Co-author contributed to developing the research idea and provided useful advices. **Competing interests:** The author declares that there are no conflicts of interest regarding the publication of this manuscript. Disclaimer: The author declares that his opinion and views expressed in this manuscript are free of any impact of any organizations.

ABSTRACT

Background: *24 February 2022 shall be remembered as a day on which the international law principle prohibiting the use of force was breached once again. This incident could come under scrutiny from several different standpoints. The present study looks at this occurrence via the lens of international criminal law and the occurrence of the crime of aggression and its examination by the International Criminal Court (ICC). This study aims to analyse whether the inclusion of the crime of aggression in the ICC Statute was symbolic and practically useless or whether it could move the international community one step closer to the end of impunity. To this end, the incidence of aggression as defined by the ICC Statute will be determined after an assessment of the justifications offered by Russia. Despite the prohibition entailed in Art. 15 bis (5) of the Statute, which has led the doctrine to rule in favour of the Court's lack of jurisdiction, a solution to this impasse must be sought.*

Methods: *This paper uses doctrinal methods, and its dominant theoretical perspective is positivism. It relies on an accurate description and analysis of Russia's invasion as aggression and the capacity of the court to deal with it. The authors has attempted to collect as much pertinent data as possible, analyse the same, and review the applicable and relevant legal instruments and literature. Other publications on this subject matter accepted the inability of the ICC to prosecute the Russian aggression. The novelty of this paper is its search for the few loopholes in the rules and judgments of the ICC to investigate this crime in Ukraine. As a result, recommendations are made to stop Russia's wrongdoing while also offering suggestions and answers. This would ultimately result in the protection of international law and the preservation of Ukrainian territory.*

Conclusions and Recommendations: *The Russian claims, namely, anticipatory and collective self-defence, humanitarian intervention, and intervention by invitation, cannot face the crucible of international law norms, and, as such, the attack is a flagrant violation of the UN Charter. Thereafter, the exercise of jurisdiction seemed challenging, bearing in mind that Russia and Ukraine are not members of the IC, that the situation was not referred to the Security Council, and that the declaration issued by Ukraine accepting the Court's jurisdiction entailed a number of limitations (being restricted to crimes against humanity and war crime). Nonetheless, a case could be made that the Court has some capacity to engage with the question of an act of aggression based on a study of the Court's jurisprudence regarding such declarations and the Trial Chamber's interpretation of the phrase 'occurrence of crime in the territory of the State Party', affirming a positive interpretation of Art. 15 bis (5) and confirming the possibility for the presence of Ukrainian secessionists in the decision to attack.*

According to the authors, the following recommendations merit attention: 1) the necessity of a teleological interpretation of the Statute's articles by the Prosecutor and the Member States Assembly's solemn efforts to amend and deal with jurisdictional burdens in the Court's competence to entertain the crime of aggression; 2) reviewing the possibility of establishing an ad hoc or hybrid tribunal via an agreement between Ukraine and the UN; 3) consistent state practice in not recognising the auto-proclaimed governments at Donetsk and Luhansk; 4) establishing Russia's civil liability and the payment of proper compensation by the same.

1 INTRODUCTION

The political climate in Crimea and two Eastern Republics in Ukraine was tumultuous in 2014. That year, an illegitimate referendum was held on 16 March in a portion of Ukrainian territory. The subject of that referendum was Crimea's annexation into Russia. The residents of the peninsula voted in favour of the decision. Despite the non-acceptance of this

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referendum and its result by the international community, the Crimean local parliament then ratified the outcomes, and the Russian military entered the area. Eastern Ukraine saw heightened tensions when persons of Russian descent who had received training and backing from the Russian military and were based in the Donbas area took control of government structures.[1] Later on, the Republics of Luhansk and Donetsk declared independence further to a referendum on 11 May 2014. Military campaigns by the Ukrainian government to re-establish control in these regions and the Russian backing of the separatists stoked the flames of the conflict. The Minsk Agreement was first signed on 5 September 2014 by officials of Russia, Ukraine, and the Organization for Security and Cooperation in Europe, together with Germany, Russia, and leaders of the separatist-controlled territories. But the dispute did not stop as a result of this agreement. Another 13-article agreement was agreed upon by the parties in February 2015, allowing Ukraine to reclaim control over its boundaries and proposing measures for the autonomy of the two Republics. The Second Minsk Agreement could not be implemented either, and. pursuant to a request by Ukraine to join NATO and the EU and subsequent skirmishes between that country and two Republics, Russia attacked Ukraine on 24 February 2022. This military campaign took place two days after Russia recognised the independence of the Donetsk and Luhansk Republics.[2] In the speech delivered by the Russian president, Vladimir Putin,[3] and the communique[4] submitted to the International Court of Justice (hereinafter the ICJ) by the Russian representative on the same day, the cause of action was claimed to be self-defence and defence of the above-said Republics based on an invitation of the heads of those two entities due to the genocide of Ukrainians with Russian ancestry. Considering Russia's veto powers, the Security Council was unable to make any meaningful decisions, and the General Assembly could not adopt any measures within the framework of the 'Uniting for Peace' resolution.[5]

Concurrent with these developments, reports were published by the Human Rights Watch[6] and Amnesty International[7] indicating the use of cluster munitions in residential areas in Kharkiv and attacks on civilians and protected premises such as hospitals and schools. Forty-three state parties to the International Criminal Court (hereinafter the ICC or the Court) referred the situation to the Prosecutor.[8] Subsequently, the Prosecutor

1 Donbas is an unofficial, historical, economic, and cultural region in Eastern Ukraine, comprised of the northern and central sections of the Donetsk province, the southern parts of the Luhansk province, and the eastern extremities of the Dnipropetrovsk Oblast province.

2 Prior to Russia, only Serbia, Venezuela, and Cuba had recognized the two Republics.

3 'Address by the President of the Russian Federation' (*President of Russia*, 24 February 2022) <http://en.kremlin.ru/events/president/news/67843> accessed 10 October 2022.

4 'Document (with annexes) from the Russian Federation setting out its position regarding the alleged "lack of jurisdiction" of the Court in the case' (*International Court of Justice (ICJ)*, 7 March 2022) <https://www.icj-cij.org/en/case/182> accessed 10 October 2022.

5 UNGA Res ES-11/1 'Aggression against Ukraine' (2 March 2022) UN Doc A/RES/ES-11/1.

6 'Ukraine: Cluster Munitions Launched Into Kharkiv Neighborhoods: Russian Forces' Indiscriminate Attacks May Amount to War Crimes' (*Human Rights Watch*, 4 March 2022) <http://www.hrw.org/news/2022/03/04/ukraine-cluster-munitions-launched-kharkiv-neighborhoods> accessed 10 October 2022.

7 'Russia/Ukraine: Invasion of Ukraine is an act of aggression and human rights catastrophe' (*Amnesty International*, 1 March 2022) <https://www.amnesty.org/en/latest/news/2022/03/russia-ukraine-invasion-of-ukraine-is-an-act-of-aggression-and-human-rights-catastrophe> accessed 10 October 2022.

8 Lithuania, Republic of Albania, Commonwealth of Australia, Republic of Austria, Kingdom of Belgium, Republic of Bulgaria, Canada, Republic of Colombia, Republic of Costa Rica, Republic of Croatia, Republic of Cyprus, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, Republic of France, Georgia, Federal Republic of Germany, Hellenic Republic, Hungary, Republic of Iceland, Ireland, Republic of Italy, Republic of Latvia, Principality of Liechtenstein, Grand Duchy of Luxembourg, Republic of Malta, New Zealand, Kingdom of Norway, Kingdom of the Netherlands, Republic of Poland, Republic of Portugal, Romania, Slovak Republic, Republic of Slovenia, Kingdom of Spain, Kingdom of Sweden, Swiss Confederation, United Kingdom of Great Britain and Northern Ireland. Japan, and North Macedonia.

initiated its investigations for war crimes, crimes against humanity, and genocide on 2 March 2022.

The Ukrainian government and many states endeavoured to benefit from legal and political movements of international bodies against this attack. For this purpose, the Committee of Ministers of the Council of Europe suspended the Russian Federation from its rights of representation in the Committee and in the Parliamentary Assembly of the Council,[9] the UN's Human Rights Council established an independent fact-finding commission, the Organization of Security and Cooperation in Europe (OSCE) used its 'Moscow Mechanism', the European Parliament put forth a proposal for an *ad hoc* international tribunal to prosecute the crime of aggression, and some petitions were filed before the European Court of Human Rights.[10] Jurists, too, have taken this matter under scrutiny from different standpoints, including the following: bringing to light Russia's underlying motives for the attack,[11] Russia's commitments under general and specific treaties,[12] reviewing the attack in light of international law principles,[13] analysing the Russian justifications for their actions[14] (mainly self-defence and humanitarian intervention), and the criminal implications of this attack. Scholars who studied the criminality of Russia's act all believed that a judicial review of aggression before the ICC is not possible.[15] The current authors was inspired to undertake the present study by focusing on the ICC's lack of competency. Every effort must be made to ensure that this devastating international crime[16] is not left unanswered, as it opens the door for additional wrongdoing, and a lack of response to it establishes a precedent for other derogations. In the past century, if jurists were to content themselves with *lex lata*, the principle of the prohibition to resort to force would never have been solidified as it is today, and international law norms would have remained undeveloped. Realistically speaking, the academic endeavours might not lead to instant, concrete outcomes and alleviate the pain suffered by the Ukrainians (for instance, even if the ICC is deemed competent, the institution of proceedings is contingent upon the accused being in the custody of the Court, which

9 Giulia Lanza, 'The Fundamental Role of International (Criminal) Law in the War in Ukraine' (2022) 66 (3) Orbis 426, doi:10.1016/j.orbis.2022.05.010.

10 Marika Lerch and Sara Mateos Del Valle, 'Russia's war on Ukraine in international law and human rights bodies: Bringing institutions back in' (*Think Tank European Parliament*, 8 April 2022) 1, 2, doi: 10.2861/685584 <https://www.europarl.europa.eu/thinktank/en/document/EXPO_BRI(2022)639322> accessed 10 October 2022.

11 David R Marples, 'Russia's war goals in Ukraine' (2022) 64 (2-3) Canadian Slavonic Papers 207, doi: 10.1080/00085006.2022.2107837.

12 Foundation Robert Schuman, 'Russia, Ukraine and international Law' (2022) 623 European Issues. <https://www.robert-schuman.eu/en/european-issues/0623-russia-ukraine-and-international-law> accessed 10 October 2022.

13 Maya Khater, 'The Legality of the Russian Military Operation against Ukraine from the Perspective of International Law' (2022) 3 (15) Access to Justice in Eastern Europe 107, doi.org/10.33327/AJEE-18-5.3-a000315.

14 James Green, Christian Henderson and Tom Ruys, 'Russia's attack on Ukraine and the jus ad bellum' (2022) 9 (1) Journal on the Use of Force and International Law 4, doi: 10.1080/20531702.2022.2056803.; Khater (n 15).

15 Iryna Marchuk and Aloka Wanigasuriya, 'The ICC and the Russia-Ukraine War' (2022) 26 (4) ASIL Insights 1 <https://www.asil.org/insights/volume/26/issue/4> accessed 10 October 2022; Ann Neville, 'Russia"s war on Ukraine: Investigating and prosecuting international crimes' (*Think Tank European Parliament*, 10 June 2022) 4 <https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2022)733525> accessed 10 October 2022; Claus Kreß, *The Ukraine War and the Prohibition of the Use of Force in International Law* (TOAEP 2022) 22; Patrick Butchard, *Ukraine Crisis: Recognition, military action, and international law* (*House of Commons Library*, 24 March 2022) 29 <https://commonslibrary.parliament.uk/research-briefings/cbp-9470> accessed 21 May 2022; Lerch and Mateos Del Valle (no 12) 4.

16 'To initiate a war of aggression … is not only an international crime; it is the supreme international Crime…', See 'International Military Tribunal (Nuremberg), Judgment and Sentences' (1947) 41 (1) American Journal of International Law 186, doi: 10.2307/2193873.

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Journal homepage http://ajee-journal.com

seems unlikely under the current circumstances, or other criminal courts might not be able to get involved in terms of other states' lack of cooperation, given the principle of immunity of heads of states), but it could increase the cost of war for Russia and reduce, to some extent, the intensity of hostilities against civilians and non-military objectives. Moreover, the ICC is at a very important juncture, and any act by it has an enormous impact in terms of its subjective and objective legitimacy since states have been unprecedentedly cooperative in terms of providing financial and technical support to the Court.[17] In return, they expect the Court to act differently. If the Court fails to make significant advances in this case, it will lose a huge part of its credibility. This would lead to a reduction in state support and less success in the Court's mission, i.e., putting an end to impunity. Furthermore, it might create a suspicion that the ICC is only able to intervene in crimes committed by nationals of the state parties or those belonging to states without enough clout to contradict the Court.[18]

This article aims to investigate the criminal dimension of the Russian attack on Ukraine through a teleological lens and particularly to analyse the occurrence of the crime of aggression. This confirmation is not only to establish the criminal responsibility of the perpetrators (which is important in itself and a point of concern of the present paper) but also affirms the civil liability of the aggressor state,[19] which could be expounded upon in the literature to follow. The next logical step after establishing the existence of aggression is to determine whether the Russian strike might be brought before the ICC as such. According to Art. 12(3) of the Court's Statute, Ukraine accepts the Court's jurisdiction over war crimes and crimes against humanity committed on its territory between 21 November 2013 and 22 February 2014 and thereafter without any time restrictions.[20] This is taken into consideration when examining the ICC's jurisdiction. These declarations are a requirement for the Court's competence.[21] In the descriptive-analytical method, upon reviewing international judicial decisions and documents and doctrine, an attempt is made to answer the following question: Does Russia's attack on Ukraine amount to the crime of aggression as defined by the Rome Statute and if so, what is the Court's capacity once faced with such an event? To answer the above inquiry, a decision should be made concerning the Court's competence *ratione materiae* under Art. 8 *bis* of the Statute. Furthermore, can the Court exercise jurisdiction in this specific situation? As a result, the arguments offered by Russia will be used to determine whether aggression occurred in accordance with the Statute's requirements. The next stage is to assess the Court's capacity to play a role against this crime in the attack on Ukraine.

17 Yvonne Dutton and Milena Sterio, 'The War in Ukraine and the Legitimacy of the International Criminal Court' *(Just Security*, 30 August 2022) <https://www.justsecurity.org/82889/the-war-in-ukraine-and-the-legitimacy-of-the-international-criminal-court/> accessed 10 October 2022, [2023] American University Law Review 15-6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4235675> accessed 10 October 2022.

18 Nuotio Kimmo, 'The war in Ukraine, the evolution of international criminal law and the crumbling of the rule of law in Russia' (2022) 103 (1,5) Defensor Legis: Suomen asianajajaliiton äänenkannattaja 319.

19 As Haque stated, since there can be no fully lawful attacks or truly legitimate targets in a war of aggression, Russia incurs state responsibility for all the damage caused by its internationally wrongful act of aggression and it must make full reparation for all injuries directly caused by the unlawful use of force, whether or not these injuries result from violations of international humanitarian law. See Adil Ahmad Haque, 'An Unlawful War' (2022) 116 American Journal of International Law 155, doi: 10.1017/aju.2022.23.

20 The latter was submitted to the registrar of ICC on 4 February 2015.

21 'Information for Victims Ukraine' (*International Criminal Court*, 2022) <https://www.icc-cpi.int/victims/ukraine> accessed 10 October 2022.

2 THE COURT'S JURISDICTION *RATIONE PERSONAE* REGARDING RUSSIA'S ACTIONS

Unlike other crimes mentioned in Art. 5 of the Statute, the crime of aggression is related to *jus ad bellum*. Despite the view expressed by some scholars who doubt the Court's standing for the judicial review of ambiguous cases of *jus ad bellum*[22] or those who question the legality of ascertaining the occurrence of aggression by a tribunal acting independently of the Security Council and its ensuing international relations implications,[23] nonetheless, this crime was defined in the Statute's Review Conference, and the Court had competence for its review starting from 17 July 2018. The first paragraph of Art. 8 *bis* provides the following definition of aggression:

> […] the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

The second part of the second paragraph of the same article defines 'act of aggression' as: 'using armed forces by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations'. The paragraph continues on to list various examples of aggression, such as an armed force invasion or attack on another state's territory, bombardment by the armed forces of a state against the territory of another state, or the use of any weaponry by one state against another state's territory. This is a narrow[24] working definition for the Court and has no bearing on general international law.[25] Moreover, the amendment to the Statute does not create a responsibility to prosecute aggression in domestic courts.[26]

Reviewing the commission of aggression by individuals at the ICC is contingent upon verifying that the act of aggression was perpetrated by a state. This act must have a particular character, gravity, and scale, which should be a manifest violation of the UN charter. According to Art. 46(2) of the Vienna Convention on the Law of Treaties, the 'manifest' requirement means being 'objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith [acting to the utmost extent possible in keeping with the provisions of the Convention as construed from its letter and spirit]'.[27] The 'manifest' proviso stated in the article does away with suspect cases. Besides, the mere satisfaction of one of the conditions of having the necessary character, gravity, and scale does not suffice.[28] Moreover, this condition paves the way for a limiting interpretation of armed

22 Carrie McDougall, *The crime of aggression under the Rome Statute of the International Criminal Court* (2nd ed, CUP 2021) 209-10, doi: 10.1017/9781108769143.

23 Bing Bing Jia, 'The crime of aggression as custom and the mechanisms for determining acts of aggression' (2015) 109 (3) American Journal of International Law 580, 581, doi: 10.5305/amerjintelaw.109.3.0569.

24 Claus Kreß, 'On the Activation of ICC Jurisdiction over the Crime of Aggression' in Pavel Šturma (ed), *The Rome Statute of the ICC at Its Twentieth Anniversary: Achievements and Perspectives* (Brill Nijhoff 2018) 64-5.

25 RC/Res.6 'The Crime of Aggression' (11 June 2010) RC/11, pt II, Annex III, 4. See also Art 10 of the Rome Statute of the International Criminal Court (17 July 1998).

26 Ibid 5.

27 Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publisher 2009) 367, doi: 10.1163/ej.9789004168046.i-1058.

28 See The crime of aggression Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression (RC/Res.6, Annex III, 2010) 7.

Access to Justice in Eastern Europe
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attacks as aggression.[29] The word 'character' refers to the nature of the act, to be determined by the actual intent of the perpetrator. To assess the gravity and scale, one could review the duration, extent, and instruments used.[30] The *mens rea* of the crime comprises knowledge of the circumstances, and knowing that the act violates the UN Charter is not a necessary condition.[31]

There is no question that the armed strike launched by Russia in the war under consideration in this study had notable seriousness and was conducted throughout a sizable portion of Ukrainian territory over the course of many months. The invasion and occupation of another state's territory, the bombardment of another state's territory, the blockade of the port of Mariupol and the Sea of Azov, an attack against the land, sea, or air forces of another state, and even the sending of armed bands, irregulars, or mercenaries (including the Syrian fighters or mercenaries from the 'Wagner Group') were carried out.[32] As a result, the criteria for character, gravity, and size are all satisfied. The question is whether this attack complies with or violates the rights guaranteed by the UN Charter, including the prohibition against the use of force. The main challenge to be resolved is not uncertainty regarding the definition but ambiguities associated with *jus ad bellum*.[33] Consequently, arguments put forth by Russia in justifying the attack should be studied in keeping with principles of international law so that a decision concerning the existence of aggression could be made.

3 RUSSIA'S JUSTIFICATION

Despite Russia's repeated attempts to link its actions to the international law violations committed by some western states during their illegal wars against Iraq, Libya, and Syria in the name of self-defence and the defence of human rights in the countries they attacked, any prior violations and breaches cannot negate or justify the current violations.[34] Hence, as mentioned earlier, in the statement issued by Putin and the document submitted by the Russian representative at ICJ, titles such as the self-defence of Russia and the self-proclaimed governments within the purview of Art. 51 of the UN Charter and humanitarian intervention against a claim of genocide could be inferred. The doctrine of Intervention by Invitation may also be analysed in light of the use of the term 'invitation' in the Russian president's statement. It goes without saying that the issue of the two Republics' claims to independence must also be taken into consideration when discussing collective self-defence and intervention by invitation. Only if these claims are corroborated, the attack is not a manifest violation of the Charter and could not be deemed as an act of aggression. Then, the Court shall be devoid of jurisdiction *ratione personae* to review the matter.

29 For instance, McDougal, Zimmermann and Freiburg do not consider armed attacks for humanitarian intervention as manifest violation of the Charter, given their nature. See Andreas Zimmermann and Elisa Freiburg, 'Articl 8bis Crime of Aggression' in Kai Ambos and Otto Triffterer, *The Rome Statute of the International Criminal Court: A Commentary* (3rd ed, Nomos Verlagsgesellschaft 2016) 602, doi:10.5771/9783845263571-581; McDougall (no 24) 162.

30 Zimmermann and Freiburg (no 31) 597.

31 Ibid 598.

32 Green, Henderson and Ruys (no 16) 6.

33 Carsten Stahn, *A critical introduction to international criminal law* (CUP 2019) 103.

34 Khater (no 15) 109.

3.1 Self-defence

The most important claim of Putin and the Russian representative is the self-defence of Russia and the self-proclaimed governments, with reference to Art. 51 of the Charter. In this scenario, self-defence, in the case of Russia, is anticipatory self-defence, and for the Republics, it is collective self-defence.

3.1.1 Anticipatory self-defence

The UN Charter forbade the use of force, and the only exceptions that were permitted were self-defence and a Security Council permission within the scope of the collective security paradigm. The ICJ's jurisprudence normally leans towards a restrictive interpretation of Art. 51 and requires an armed attack with significant[35] effect and extent for a justification under this Art.[36] since otherwise, how can one assess factors such as necessity and proportionality?

In a part of his statement, Putin mentions dealing with future threats against the existence and interests of Russia posed by Ukraine and NATO members as among the reasons for his military operations.[37] Putin's use of the word 'possible aggressors' implies that Russia has not been the target of an actual invasion by Ukraine or NATO countries. Putin's speech recalls George W. Bush's doctrine, which was incorporated in the US National Security Strategy on 20 September 2002.[38] In legal parlance, this points to an argument based on anticipatory self-defence. This doctrine is founded upon the *Caroline* affair and indicates the measures that are adopted by a state with the aim of destroying the infrastructure and capabilities of another state, which might, in the unforeseen future, attack the first state.[39]

There is little doubt that anticipatory self-defence has no standing in the Charter since *expressio unius est exclusio alterius*. Some might argue that later practice by states (either via acquiescence or estoppel) has implicitly modified the Charter and its obligations. This form of revision is permitted for the foundation texts of international organisations via various institutional actions and subsequent adoption by state parties.[40] While emphasising the existence of customary law on the use of force,[41] it seems improbable that the UN's practice and that of its state parties confirm implicit amendment of the Charter by accepting anticipatory self-defence. In *the Armed Activities on the Territory of the Congo Judgment*, the ICJ, in keeping with its previous judgment in *the Military and Paramilitary Activities in and*

35 *Oil Platforms (Islamic Republic of Iran v. United States of America)* [2003] ICJ Rep 161, para 51 (6 November 2003).

36 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, para 195 (27 June 1986); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 139 (9 July 2004); *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 41 (8 July 1996).

37 'The problem is that in territories adjacent to Russia, which I have to note is our historical land, a hostile "anti-Russia" is taking shape. Fully controlled from the outside, it is doing everything to attract NATO armed forces and obtain cutting-edge weapons. For our country, it is a matter of life and death, a matter of our historical future as a nation. This is not an exaggeration; this is a fact. It is not only a very real threat to our interests but to the very existence of our state and to its sovereignty'. See Address (n 4).

38 'US National Security Strategy 2002: V Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction' (*The White House President George W Bush*, 2002) <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss5.html> accessed 10 October 2022.

39 Zimmermann and Freiburg (no 31) 600.

40 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, p 22 (21 June 1971).

41 *Nicaragua v United States of America* (no 38) para 176.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

against Nicaragua, considered Art. 2(4) as the cornerstone of the UN Charter and stressed the fact that except for actions taken by the Security Council under Chapter VII, Art. 51 of the Charter may justify a use of force in self-defence only within the strict confines laid down there. Furthermore, Art. 51 does not allow using force by a state to protect perceived security interests beyond these parameters.[42]

Referring to criticisms raised to the Secretary General's 2005 report, which discussed anticipatory self-defence with regard to state parties' subsequent actions, the right to pre-emptive self-defence against an imminent and definite attack or known and impending assault is only partially recognised by state practice.[43] However, anticipatory self-defence lacks such a status.[44] The Security Council, too, treats these two types of defences differently and usually condemns anticipatory and not pre-emptive self-defence.[45] Russia has taken NATO's measures as a threat of an imminent armed attack, to which it could respond with an anticipatory use of defensive force. It is baseless because there was no evidence that NATO was about to launch an armed attack against Russia imminently. Prior to Russia's invasion, NATO Member Nations had relatively few military assets stationed along their eastern boundaries, and they had also avoided being drawn into a war with Russia after Russia had invaded. Moreover, Putin's use of the words '[A] military presence in territories bordering on Russia, if we permit it to go ahead, will stay for decades to come or maybe forever, creating an ever-mounting and totally unacceptable threat for Russia' did show the threat had not been imminent.[46]

Putin's resort to anticipatory self-defence is the result of such uncalled-for actions by states in previous cases; more than 45 countries attacked Iraq in response to unsubstantiated claims that it had a stockpile of chemical weapons. Such measures are indeed used as an excuse by other powers to resort to illegitimate acts in the following years.

At the end of this section, the ICJ's point in its order on 16 March 2022 is worth mentioning, where it stated: 'it is doubtful that the [Genocide] Convention, in light of its object and purpose, authorises a Contracting Party's unilateral use of force in the territory of another State for the purpose of **preventing** or **punishing** an alleged genocide'.

3.1.2 Collective self-defence

Another claim put forward by Russia is that in attacking Ukraine, it is defending the self-proclaimed governments in the Donbas region, relying on a treaty of reciprocal friendship, cooperation, and mutual assistance,[47] wherein Russia recently recognised them as independent states.[48]

According to the ICJ judgment, collective self-defence is only permissible if the victim state announces aggression against it after an armed attack, and this defence must be carried out

42 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, para 148 (19 December 2005).

43 Zimmermann and Freiburg (no 31) 600.

44 James Crawford, *Brownlie"s principles of public international law* (8th ed, OUP 2019) 725.

45 Compare Security Council Resolutions 233, 234, 235, 236 and 237 (1967) with Resolution 487 (1981). See 'Resolutions' (*United Nations Security Council*) <https://www.un.org/securitycouncil/content/resolutions-0> accessed 10 October 2022.

46 Green, Henderson and Ruys (n 16) 10, 11.

47 Document (no 6) paras 15-17.

48 Victor Jack and Douglas Busvine 'Putin recognizes separatist claims to Ukraine's entire Donbass region' (*Politico*, 22 February 2022) <https://www.politico.eu/article/vladimir-putin-russia-ukraine-donbass-separatist-recognition> accessed 10 October 2022.

in response to that victim's request while adhering to the basic rules regulating justifiable self-defence.[49] Furthermore, a reading of Art. 51 of the Charter and ICJ's opinion in *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case indicate that collective self-defence is a request for defence by a state against an armed attack.[50] Therefore, first, it should be proved that the two Republics in question are indeed states.

In the conflicts of 2014, the two Republics declared independence without the Ukrainian government's consent. Up to now, only Cuba, Venezuela, Serbia, and Russia have recognised these two entities as states. In classic international law, secession from the central government is illegal without its consent. But some legal professionals cite the 'safeguard clause' found in 'the Declaration on Principle of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations', which the International Court of Justice (ICJ) claims reflects customary international law.[51] Based on this clause, conditional secession is permissible and recognised for people devoid of the possibility to implement the right of internal self-determination and those who are subject to flagrant violations of human rights.[52] By virtue of this clause, only those states that respect the fundamental rights of their inhabitants and represent all ethnic or religious groups and minorities residing in their territories can benefit from the rights and prerogatives of safeguarding territorial integrity. In the current situation, the permanent representative of Russia to the UN emphasised that Russia cannot respect Ukrainian territorial integrity since ethnic Russians in eastern Ukraine are unable to exercise their right to self-determination.[53]

The right of conditional secession was reinforced after the ICJ's ruling in the *Kosovo* case and prompted some scholars to speak of the theory of 'Remedial Secession'. This theory has its roots in the principle of self-determination, previously accepted only for territories under colonial rule, occupied lands, and racist governments. Remedial secession is a right that develops when a state consistently and systematically violates the basic human rights of a subset of its inhabitants who are allowed to exercise their right to external self-determination. For those residents who use it by proclaiming independence, this is their only option. This is a right reserved for a minority who form the majority in a specific section of a state's territory, and their fundamental rights are breached to such an extent that it endangers their collective identity (made up of language, religion, and other distinct cultural elements). They have resorted to all other amicable mechanisms to settle the issue, and secession is their only and final solution.[54] The African Commission on Human and People Rights' decisions in the *Katanga* and *South Cameroon* cases and the Supreme Court of Canada[55] confirm the existence of this

49 *Nicaragua v United States of America* (no 38) paras 195, 196.

50 *Legal Consequences of the Construction of a Wall* (no 38) para 139.

51 *Nicaragua v United States of America* (no 38) paras 191, 193.

52 James Crawford, 'The Right of Self-Determination in International Law: The Development and Future' in Philip Aleston (ed) *Peoples Rights* (OUP 2001) 65; Simone Van den Driest, 'Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law' (2015) 62 Netherland International Review 340, doi.org/10.1007/s40802-015-0043-9; *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo* (Separate Opinion of Judge Yusuf) [2010] ICJ Rep 618, para 16 (22 July 2010).

53 'Statement and reply by Permanent Representative Vassily Nebenzia at UNSC briefing on Ukraine' (*Permanent Mission of the Russian Federation to the United Nations*, 23 February 2022) <https://russiaun.ru/en/news/230222un> accessed 10 October 2022. See also Document (n 5) para 19.

54 John Dugard and David Raič, 'The Role of Recognition in the Law and Practice of Secession' in Marcelo Kohen (ed) *Secession: International Law Perspectives* (CUP 2006) 109, doi: 10.1017/CBO9780511494215.006.

55 *Reference re Secession of Quebec*, Case No 25506 (Supreme Court of Canada, 20 August 1998) 2 SCR 217, paras 119-126.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

right under special circumstances and where flagrant and serious violations of human rights take place.[56]

First, there is disagreement about whether or not this right exists.[57] Even if one acknowledges its existence, the situation was not so dire that there were no alternative options to consider, even if the Ukrainian government had violated the human rights of the citizens of these two Republics and had not behaved as the representative of all ethnic groups. In the Second Minsk Agreement, mechanisms were incorporated to grant considerable autonomy to those entities. In the case of Kosovo, the Russian government itself deemed the right of secession appropriate only if all other endeavours to settle the issue bore no fruit and recognised it solely as a measure of last resort.[58] Moreover, it asserted:

> It is widely accepted that a population of a trust or mandated territory, of a non-self-governing territory, or of a present State, taken as a whole, undisputedly qualifies as a people entitled to self-determination. Whether, and under which conditions, an ethnic or other group within an existing State may qualify as a people, is subject to extensive debates.

Based on the estoppel rule, Russia cannot recognise the citizens of Donbas as a 'people' either because it believed that the term 'people' referred to the population of a state as a whole rather than sub-national groups and did not recognise the people of Kosovo as a people with the right to self-determination.[59]

Concerns for the protection of human rights are commendable, but maintaining international peace and security is more important. Although the atrocities committed in Kosovo and empowering that state for governing cannot be compared to the circumstances of the two Republics, once close to 100 states recognise the legality of secession of a part of the state legitimate without that state's consent and the ICJ, with a positive nod, deems the unilateral declaration of independence permissible,[60] the groundwork is laid for other secessionists to do the same.

In addition, and regardless of debates about the legality of secession, an entity may only assert its 'state' status if it satisfies the criteria listed in the Montevideo Convention. The two Republics have no distinct borders and are obviously reliant on Russia for the assertion of their sovereignty. As such, the conditions constituting statehood are absent, and so are the prerequisites for the legitimacy of state creation. The limited recognition by a handful of states confirms the invalidity of this so-called independence.

Even if one considers the two Republics as states, in what way were they subjected to an 'armed attack' by Ukraine, as meant by the ICJ? Moreover, how could the extent of the Russian attack on Ukrainian territory and its continuation for several months be justified under the founding pillars of self-defence, namely proportionality and necessity?[61]

56 *Katangese Peoples" Congress v Zaire*, Comm No 75/92 (ACHPR, 22 March 1995) IHRL 174, para 10; *Kevin Mgwanga Gunme et al v Cameroon*, Comm No 266/03 (ACHPR, 27 May 2009), para 188.

57 For scholars defending the existence of this right, see: Van den Driest (n 53) 337-40. Cf. Nicolas Brando and Sergi Morales-Gálvez, 'The Right to Secession: Remedial or Primary?' (2019) 18 (2) *Ethnopolitics* 107, doi: 10.1080/17449057.2018.1498656.

58 *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo* (Written Statement of the Russian Federation) [2009] ICJ Written proceedings, para 87 (17 April 2009).

59 Ibid para 81.

60 Separate Opinion of Judge Yusuf (no 54) para 84.

61 *Nicaragua v United States of America* (no 38) para 194; *Legality of the Threat* (no 38) para 41; *Oil Platforms* (no 37) para 43; *Democratic Republic of the Congo v Uganda* (no 44) para 147.

3.2 Humanitarian intervention of responsibility to protect

Referring to genocide in Ukraine and in defence of a people in pain for eight years because of it,[62] Russia mentions humanitarian intervention in one way or another as the other justification for its attacks. Regarding various viewpoints expressed by states[63] and bearing in mind the ICJ's opinion that the use of force could not be the appropriate method to respect human rights,[64] such interventions were rebranded as the 'responsibility to protect', according to which it is permitted to militarily intervene and breach the sovereignty of a state which itself violates human rights or is unable to preclude it from happening. In other words, other states with approval from the Security Council shall adopt prompt measures in collaboration with regional organisations to protect those people when peaceful mechanisms are ineffective, and the state is manifestly incapable of upholding its responsibility to protect its people against genocide, ethnic cleansing, war crimes, and crimes against humanity.[65] Such an intervention is not considered a new exception to the prohibition against the use of force and is only legitimate pursuant to an authorisation by the Security Council. Since the occurrence of those crimes is yet to be proved,[66] and there is no permission granted by the Council, this claim is also refuted.

3.3 Intervention by invitation

The Russian president and his representative, in the speech and the document submitted to the ICJ, respectively, refer to an invitation by the heads of the two self-proclaimed Republics.[67] This phraseology could be a reference to the legal institution known as an 'invitation to intervention' or military aid with the previous consent in hostilities short of an armed conflict.

In the law of resort to force as included in the UN Charter, there is no mention of an invitation to intervention, and the Institut de Droit International, in a 1975 resolution, first declared any invitation at any level of tension and to the benefit of any side of the conflict illegal.[68] However, this position changed in a subsequent resolution in 2009.[69] Hence, one can infer *ex contrario* from Art. 3 of the General Assembly's Definition of Aggression resolution,[70] the International Law Commission's opinion in interpreting Art. 20 of the Draft Articles on the

62 Document (n 5) para 19.

63 Crawford (no 46) 729.

64 *Nicaragua v United States of America* (no 38) para 268.

65 UNGA Res 60/1 'World Summit Outcome' (16 September 2005) UN Doc A/RES/60/1, para 139. See also UNGA 'Implementing the Responsibility to Protect, Report of the Secretary-General' (12 January 2009) 63rd session UN Doc A/63/677.

66 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* (Order) [2022] ICJ General List No 182, para 59 (16 March 2022). Green, Henderson and Ruys (no 16) 26 point that the lack of evidence is despite the constant monitoring of the situation in Ukraine by the Organization for Security and Cooperation for Europe and the UN Office of the High Commissioner for Human Rights, as well as various NGOs.

67 Document (no 6) para 16.

68 M Schindler, 'The Principle of Non-Intervention in Civil Wars: The Draft Report of The Institute of International Law' (Wiesbaden Session, 14 August 1975) Art 2 <https://www.idi-iil.org/app/uploads/2017/06/1975_wies_03_en.pdf> accessed 10 October 2022.

69 G Hafner, 'Present Problems of the Use of Force in International Law, Intervention by Invitation: The Draft Report of the 10th commission Institute de Droit international' (2009) 73 *Annuaire de l'Institut de droit international* 415 <www.idi-iil.org/app/uploads/2017/06/Hafner.pdf> accessed 10 October 2022.

70 UNGA Res 3314 (XXIX) 'Definition of Aggression' (14 December 1974) UN Doc A/RES/3314 XXIX.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Responsibility of States,[71] and confirmation in state practice[72] that intervention by invitation has legitimacy in international law.[73] Nonetheless, jurists disagree on the theoretical foundation of its legitimacy (such as a customary exception to the prohibition on resort to force, consent in the law of international responsibility, and the issue of its consistency with the principle of state sovereignty and territorial integrity given its specificity to the territory of one state).[74]

The legitimacy of such an invitation stems from a state's sovereignty and its authority over its territory within the confines defined by international law. Consequently, its authorised officials can act upon valid consent to neutralise insurgent groups who endanger the sovereign's stability.[75] Such consent could be transferred to another state on a case-by-case basis or through a treaty.[76]

In the judgment in the *Military and Paramilitary Activities in and against Nicaragua*, the ICJ, while confirming the state's discretion in asking for intervention from another state, does not recognise the same right for insurgents.[77] According to the majority of academics, a valid invitation from a representative of the government with the authority to exercise real sovereignty would be sufficient.[78] As stated previously, two self-proclaimed Republics could not be deemed as states, and their leaders lack any authority to invite foreign powers or give consent for military intervention in another state's territory. Even if these two entities are capable of exerting effective sovereign authority in an independent territory, an invitation to intervene by a puppet state who relies on foreign powers and asks for the same power's military presence cannot receive a legal stamp of approval.[79] Just like the Soviet presence in Hungry (1956) and Afghanistan (1979) and that of the US in Panama (1989) is legally questionable.

It is also important to note that an invitation to intervene should only be used against non-state actors on the territory of the state issuing it, not against another state on its own territory. Therefore, using that reason in the instance under consideration here is not appropriate. In light of the above, the Russian claims are not compatible with international law norms, and the attack on Ukraine is a blatant violation of the UN Charter and an instance of aggression, as mentioned in Art. 8 *bis* of the ICC Statute. This conclusion was confirmed by scholars[80] and 141 member states of the United Nations General Assembly.[81]

71 ILC 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (November 2001) 53rd Session, Supplement No 10 (A/56/10), chp IV E1, 72-75 <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 10 October 2022.

72 Georg Nolte, 'Intervention by Invitation' (*Max Planck Encyclopedia of Public International Law*, 2010) 6 <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1702> accessed 10 October 2022.

73 Malcolm N Shaw, *International Law* (8th edn, CUP 2017) 876. *See also* Yoram Dinstein, *War, Aggression and Self-Defense* (5th edn, CUP 2011) 119.

74 Laura Visser, 'May the Force Be with You: The Legal Classification of Intervention by Invitation' (2019) 66 *Netherlands International Law Review* 43, doi.org/10.1007/s40802-019-00133-7.

75 Hafner (no 71) 415.

76 Dinstein (no 75) 122-3; Crawford (no 46) 743.

77 *Nicaragua v United States of America* (no 38) para 246.

78 Shaw (no 75) 876-8.

79 Dinstein (no 75) 121.

80 Haque (no 21) 155; Green, Henderson and Ruys (n 16) 27; Butchard (n 16) 26; Kreß (no 17) 13.

81 UNGA Res ES-11/1 (2 March 2022).

4 ICC'S EXERCISE OF JURISDICTION

Once the Court's jurisdiction *ratione personae* is confirmed, the next step is reviewing its jurisdictional competence. As a general provision and by virtue of Art. 12 of the Statute, a precondition for the Court's jurisdiction is the referral of the matter by a member state or the Security Council or issuance of a declaration by a non-member state. Crimes committed on a member state's territory or by its nationals are the focus of this referral. Furthermore, according to Art. 15 *bis*, paragraph 5, the Court lacks jurisdiction over crimes committed by nationals of non-member states or those that occurred on their territory.

In the present case, the governments of Russia and Ukraine are not members of the ICC, and the Security Council has not referred the current situation to the Court for review. The only resort available for the Court's jurisdiction is the declarations issued by Ukraine per Art. 12(3) of the Statute. Ukraine first issued a declaration on 9 April 2014 and accepted the Court's jurisdiction for crimes against humanity and war crimes committed on its territory from 21 November 2013 to 22 February 2014. Later on, it accepted ICC's jurisdiction for the same crimes starting from 20 February 2014 onward by a declaration dated 8 September 2015, with no time constraints.

At first glance, these two declarations could only be used as a foundation for the Court to examine war crimes and crimes against humanity that were committed in Ukrainian territory starting in 2014, including during the Russian attacks against Ukraine. Since the crime of aggression is not expressly mentioned in these documents, the Court lacks jurisdiction in this area. However, the practice reflected in the Rules of Procedure and Evidence, positions adopted by the Prosecutor and the Court's Chambers, indicate otherwise.

Per Art. 44 of the Court's Rules of Procedure and Evidence, the Registrar shall inform the state concerned that the declaration under Art. 12, paragraph 3, has, as a consequence, the acceptance of jurisdiction with respect to the crimes referred to in Art. 5, the provisions of Part 9, and any rules thereunder that would apply to state parties. Court's jurisdiction is no longer limited to the crimes designated in the declaration of acceptance as issued by a non-member state. The Pre-Trial Chamber in the *Gbagbo* case considers the *raison d'être* of Art. 44 of the Statute to be the following: 'Rule 44 of the Rules was adopted in order to ensure that States that chose to stay out of the treaty could not use the Court "opportunistically"'. In fact, there were worries that the language of Art. 12(3) of the Statute would enable states that are not parties to the Statute to utilise the Court as a political instrument by choosing to accept the exercise of jurisdiction over certain crimes or specific parties to a dispute.[82]

Hence, the Court is not limited to the issued declaration, and this document only grants the jurisdictional ability to the Court concerning a situation. Similarly, from a temporal standpoint and according to the Court's Appeals Chamber, the Court's judicial review is not limited to the crimes committed[83] since the ICC serves the purpose of deterring the commission of crimes in the future and not only of addressing crimes committed in the past.[84] As a result, the Chamber will decide the relevant timeline of the inquiry, if it is approved, based on the Prosecutor's Request, the supporting documentation, and the claims made by the victims under Art. 15 of the Statute. Consequently, the relevant timeframe of the investigation, if authorised, will be determined by the Chamber on the basis of the Prosecutor's Request and the supporting materials, as well as the victims' representations

82 *Situation in the Republic of Cote d'Ivoire in the Case of the Prosecutor v Laurent Gbagbo*, Case No ICC-02/11-01/11-212 (ICC Pre-Trial Chamber I, 15 August 2012) para 59.

83 *Situation in the Republic of Cote d'Ivoire in the Case of the Prosecutor v Laurent Koudou Gbagbo*, Case No ICC-02/11-01/11 OA 2 (ICC Appeal Chamber, 12 December 2012) para 80.

84 Ibid para 83.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

under Art. 15 of the Statute.[85] Hence, the lack of reference to the crime of aggression in the declaration issued by Ukraine is not an impediment to the Court's exercise of jurisdiction, and the attack also fits temporally within the timeframe of the declaration (2014 onward).

Extension of the Court's jurisdiction to the crime of aggression based on the Ukrainian 2015 declaration does not contradict Art. 121(5) of the Statute, whose provisions are underlined in the member states' statement at the time of implementing the 2017 amendment.[86] That paragraph prohibits the exercise of the Court's jurisdiction on member states who have not ratified the Kampala Summit amendment. This paragraph, which applies only to member states, ensures their sovereignty and permission to undertake international commitments as set out in the Statute. A majority vote, not a consensus, was used to amend the definition of an international crime, which affects those who confronted differing normative provisions in the founding treaty at the time of admission. Consequently, the Statute requires their consent for the implementation of new rules. By explicit reference in the Statute, this matter is related to member states and is not applicable to a non-member such as Ukraine, which has been aware of these alterations and has authorised the Court to examine the matter after amendments in the definition of aggression.

Regardless of the Ukrainian government's declaration as the jurisdictional basis, the Trial Chamber's position in the *Myanmar* case could be counted as a jurisdictional foundation to review the Russian attack. Based on the principles of good faith, beneficial effect and given the customary status of the principle of territorial jurisdiction, the Court interpreted Art. 12(2)(a) of the Statute in such a way that, in case the commission of a cross-border crime in the territory of a non-member state has affected member states, then just like domestic courts, the ICC shall have jurisdiction to review the matter. In the eyes of the Court, the states, by drafting Art. 12(2)(a), did not intend to limit the Court's jurisdiction solely to crimes that were committed in the territory of member states.[87] It goes without saying that the occurrence of aggression has significant ramifications for the international community as a whole and particularly for those states who receive refugees and displaced persons.

The main burden against a judicial review of the Russian aggression before the Court is paragraph 5 of Art. 15 *bis* of the Statute, which states: 'In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory'. As mentioned earlier in the introduction, upon referring to this provision and with no further explanation or justification, the doctrine unanimously declares the Court's lack of jurisdiction and moves on to seek other paths in the prosecution of aggression. Those substitute mechanisms are either not completely practical or, if realised, suffer from several shortcomings. We shall not delve into the pros and cons of those mechanisms; however, some cursory points are mentioned hereunder. The establishment of a new tribunal calls for states' consent which is not easy to acquire. Furthermore, in addition to financial costs, it could be criticised as an instance of exceptionalism. Moreover, a newly-constituted court would not have any advantages over the Court in terms of taking custody of the accused individuals.[88] Proceedings before national courts also require criminalisation and acceptance of universal jurisdiction in national laws.

85 *Situation in the Republic of Cote D'Ivoire*, Case No ICC-02/11-14-Corr (ICC Pre-Trial Chamber III, 15 November 2011) para 15.

86 ICC-ASP/16/Res.5 'Activation of the jurisdiction of the Court over the crime of aggression' (14 December 2017) 16th Session, para 2.

87 *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar,* Case No ICC-01/19 (ICC Pre-Trial Chamber III, 14 November 2019) paras 56-62.

88 In the ICC, where the states are committed to cooperation in remanding the accused to the Court, their performances in the *Omar al-Bashir* and *Kenyatta* cases were far from satisfactory. See Dutton and Sterio (n 19) 11-3.

These two requirements exist in countries such as Germany, Poland, and Lithuania, but even then, courts, in effect, limit themselves to low-level criminals. Besides, given the political implications of a judicial review of aggression committed by a state, there remains little incentive for national proceedings in other jurisdictions, even when the two requirements mentioned earlier are available.[89] Moreover, bringing the case before Ukrainian courts would question the realisation of the principle of a due and impartial process.[90] The above observations all indicate that strengthening the Court's mechanism and an amendment to its provisions (if need be) are the best strategy. Needless to say, other options must also remain on the table.

We must now turn to paragraph 5 of Art. 15 *bis*. Relying on a negative interpretation of Art. 121(5) of the Statute, many scholars believe that Art. 15(5) shares the same phraseology, and therefore it must be interpreted the same way.[91] A positive interpretation of Art. 15(5) means that the Court does not have jurisdiction over non-member nationals or crimes committed on the territories of those states. On the other hand, a negative interpretation expands the limitations on the Court's jurisdiction. In such a case, the Court is only permitted to take the matter under review when both the state of the accused and the state wherein the act has been perpetrated are member states and have acquiesced to the exercise of jurisdiction. Put simply, a mere link between the crime of aggression with a non-member state negates the Court's jurisdiction even toward a member state.

Among the justifications put forth by the proponents of negative interpretation are Art. 34 of the Vienna Convention on the Law of Treaties[92] and the Monetary Gold principle. Upon a comprehensive analysis of the arguments of the opponents and proponents, McDougal concluded that a positive interpretation of this paragraph is correct. Among these reasons is that the Court's Statute does not repeal Art. 34 of the Vienna Convention since it does not create obligations for third parties, and it is solely a mechanism for the exercise of extant rights and legal prosecution of individuals.[93] According to the Monetary Gold Principle, an international tribunal cannot pronounce upon a matter wherein the interests of a non-consenting third-party state are at issue. It must be noted that there is no precedent indicating the inapplicability of this principle in international criminal tribunals whose jurisdiction is not exercised over states.[94] Further confirmation in rejecting negative interpretation is that one cannot give more weight to the will of a state in not committing to an obligation compared to that of another state that puts its territory and nationals within the jurisdiction of the Court.[95] Consequently, if the Court's competence is justified due to the Ukrainian declaration, the fact that Russia is not a member state does not preclude a future proceeding.

Once this obstacle is overcome, the problem to be resolved is that aggression is committed by high-level officials, and when the accused are Russian officials, how can the Court initiate its judicial process given the prohibition entailed in paragraph 5 of Art. 15 *bis*? Since the aim of this article and many legal proposals provided is not that they be fully implemented, and the real intent is the maximisation of international pressure on the aggressor, the Prosecutor can commence its investigations in light of the fact that per Art. 8 of the Statute, a person accused of the crime of aggression is an individual who effectively controls or directs the

89 Kimmo (no 20) 316.

90 Lanza (no 11) 434-5.

91 Stefan Barriga and Niels Blokker, 'Conditions for the exercise of jurisdiction based on state referrals and proprio motu investigations' in Claus Kreß and Stefan Barrriga (eds), *The Crime of Aggression: A commentary* (CUP 2017) 658, 659.

92 A treaty does not create either obligations or rights for a third state without its consent.

93 See McDougall (no 24) 290.

94 Ibid 299.

95 Ibid 300.

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political or military actions and is significant in planning, provision, commencement, or implementation of an aggressive act. The word 'person' does not mean that only 'one' individual is responsible for the commission of aggression.[96] Footnote 1 attached to the second Element of Crimes adopted concerning the crime of aggression and related to the leadership requirement confirms that '[w]ith respect to an act of aggression, more than one person may be in a position that meets these criteria of exercising such degree of control'.[97]

Therefore, given the possibility of the multiplicity of the accused of the act of aggression, one can initiate the investigation under the improbable (and yet not impossible) assumption that there are East Ukrainian secessionists (who are Ukrainian nationals) among the high-ranking decision-makers because their presence is advantageous due to their familiarity with the region. If upon further review, it became apparent that there were not any non-Russian individuals among the high command, the Chamber would issue proper injunctions. Regardless of the media impact, once the Russian dossier enters the Court's agenda for several months, any injunction or ruling would inevitably include opinions concerning various aspects of the jurisdiction (subject matter, temporal, territorial, personal). Although an injunction indicating a lack of jurisdiction will be issued due to the non-existence of personal jurisdiction, the judicial review and verification of the matter from a subject-matter jurisdiction standpoint by the only permanent and international organ in charge of criminal wrongful actions is a unique achievement. Doubtless, such an opinion will resonate with the international community.

The present justifications and use of the Court's precedent are not provided with the aim of proving the Court's ability to review the Russian act of aggression. The author of the present paper could have opted for the easiest way and repeated the provisions of paragraph 5 of Art. 15 *bis* to substantiate the Court's lack of competence. Yet, this paper endeavours to use analogy and refer to different actions adopted by the Court to take a step, however small, to safeguard humanity and the international community[98] and react in its own way against a derogation of the norms of *jus cogens*.

5 CONCLUSIONS

The Russian attack on Ukraine brought attention once again to the strengths and weaknesses of international law's ability to respond to violations of the use-of-force prohibition principle. Reviewing the potential for a judicial process to evaluate that attack in light of the crime of aggression was motivated by the establishment of the ICC, in particular the ratification and implementation of the aggression resolution that inspired much optimism for proponents of peace and justice. To that end, this attack should satisfy the requirements specified in the definition of aggression. Moreover, the Court must be granted competence to adjudicate the matter. The Russian claims, namely, anticipatory and collective self-defence, humanitarian intervention, and intervention by invitation, could not face the crucible of international

96 See Zimmermann and Freiburg (no 31) 591.

97 RC/Res.6 (n 26) Annex II, Amendments to the Elements of Crimes for Article 8bis, Elements, para 2, fn. 1 qtd. in ibid.

98 Karim AA Khan QC, 'Statement of ICC Prosecutor, Karim AA Khan QC, at the Arria-Formula meeting of the UN Security Council on "Ensuring accountability for atrocities committed in Ukraine"' (*International Criminal Court*, 27 April 2022) <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-arria-formula-meeting-un-security-council-ensuring> accessed 10 October 2022, 'This is a time when we need to mobilize the law and send it into battle—not on the side of Ukraine against the Russian Federation or on the side of the Russian Federation against Ukraine, but on the side of humanity to protect, to preserve, to shield people who are children, who are women and who are men, who have certain basic rights'. Qtd. in Lanza (no 11) 435.

law norms, and as such, the attack is a flagrant violation of the UN Charter. Thereafter, the exercise of jurisdiction seemed challenging, bearing in mind that Russia and Ukraine are not members of the ICC, that the situation was not referred to the Security Council, and that the declaration issued by Ukraine accepting the Court's jurisdiction entailed a number of limitations (being restricted to crimes against humanity and war crime). Nonetheless, a study of the Court's jurisprudence regarding such declarations and also the Trial Chamber's interpretation concerning the phrase 'occurrence of crime in the territory of the State Party' is necessary. Affirmation of a positive interpretation of paragraph 5 of Art. 15 *bis* and acknowledging the possibility that the Ukrainian secessionists can play a role in decision-making creates a capacity for the Court to act. Even if the actions of the ICC do not lead to a trial for aggression with the Russian perpetrators present, it imposes substantial international pressure on them. Additionally, confirmation by the Court that an act of aggression has occurred carries a lot of weight.

During this examination, it is impossible to deny that the states themselves are the primary reason why violence continues unpunished under international law. The adoption of conflicting political stances in numerous wars and subjective interpretation have made it possible for each aggressor to present its own explanation and understanding of state activity contrary to incontestable international law standards. On the other hand, states, as principal subjects of international law, impose innumerable restrictions on the exercise of the Court's jurisdiction and create undue limits by including the word 'manifest' next to violation of the Charter when defining aggression. All of these measures have minimised the Court's capacity to adjudicate and punish those who commit this crime.

In such a context, if the Prosecutor and Court also adopt a restrictive mindset, criminal investigations to be carried out in this incident should be limited to war crimes and crimes against humanity, and the violations of Russia's commitments under the following instruments would remain unexamined: the UN Charter and the prohibition of the resort to force enshrined therein; specific undertakings under paragraphs 1 and 2 of the Budapest Agreement and part II of Section A of the Declaration on Principles Guiding Relations among Participating States adopted as the final act of the Conference on security and cooperation in Europe, according to which resorting to threat or use of force against the territorial integrity or political independence of Ukraine is advised against; the Second Minsk Agreement, which acknowledges Ukrainian sovereignty over its land and borders. Overall, the article defining aggression in the Statute is not merely symbolic and without effect. This notwithstanding, it also faces serious limitations, which came to the fore in light of the Russian aggression against Ukraine. It seems all venues to counter the Russian actions must be pursued, namely:

1. The necessity of a teleological interpretation of the Statute's articles by the Prosecutor and the Member States Assembly's solemn efforts to amend and deal with jurisdictional burdens in the Court's competence to entertain the crime of aggression;

2. Reviewing the possibility of establishing an *ad hoc* or hybrid tribunal per an agreement between Ukraine and the UN;

3. Consistent state practice in not recognising the auto-proclaimed governments at Donetsk and Luhansk;

4. Establishing Russia's civil liability and payment of proper compensation by the same.

Access to Justice in Eastern Europe
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Research Article

THE RULE OF LAW AND TECHNOLOGY IN THE PUBLIC SECTOR

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ABSTRACT

Background: *Technology promises the provision of public services to be more efficient, transparent, cheaper, and faster, but current issues associated with various technologies, such as, inter alia, discrimination, the 'black-box' problem, or cybersecurity issues raise concerns about potential legal risks. Accordingly, the question of whether democracies survive potential threats to legal norms arises. Various EU institutions express the position that we must promote technological applications but, at the same time, ensure adequate protection of human rights. However, sometimes this line is very thin – thus, it is necessary to examine how, and which technological applications should be applied in the public sector in order not to violate human rights requirements. The analysis of the proper assurance of the principle of the rule*

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of law where certain technologies are implemented in the public sector will help to answer the questions of whether the chosen legal regulation in the implementation of these functions of the state is appropriate and whether the chosen method of technology integration complies with the principle of the rule of law.

Methods: *The following methods were used in the article to research potential modern technology risks to the rule of law principle. The systematic method was useful when interpreting the mutual interaction of legal norms. With the help of this method, systemic connections with other legal norms and other sources of law were assessed. With the help of the teleological method of legal interpretation, the goals and objectives of the rule of law principle were determined. The comparative method was used to study the experience of foreign countries regarding various aspects of technology in the public sector.*

Results and conclusions: *The paper concludes that the supremacy of the rule of law must be ensured when applying any kind of technology in the public sector. The paper also concludes that different rule of law elements might be at risk in certain areas of the public sector where technologies are incorporated, such as automated administrative orders, the risk-assessment tool COMPAS, and robot-judges.*

1 INTRODUCTION

Technology is evolving so rapidly that not only can we hear the Fourth Industrial Revolution[1] being constantly discussed, but the potential new issues of the Fifth Industrial Revolution[2] are already being debated. Considering that each industrial revolution has brought great social change and created many opportunities, and this one is deemed to be the largest in terms of its scale, rate of spread, and potential for further development, it is of vital importance to regulate the use of technology and to anticipate the legal risks that might accompany this revolution without hindering sustainable technological development. It is worth mentioning that innovations are being particularly encouraged in the public sector. Back in 2016, the European Commission noted that digital public services reduce the administrative burden on businesses and citizens by making interactions faster, more convenient, and cheaper.[3] In addition, in 2018, the Digital Strategy European Commission set the goal of moving to a digital transformation administration.[4]

However, in its 2018 communication, the Commission emphasised that, on the one hand, we have to boost the EU's technological and industrial capacity, but on the other hand, we have to ensure an appropriate ethical and legal framework based on the EU's values.[5] In October 2020, the European Parliament adopted a resolution on a Framework of Ethical Aspects of Artificial Intelligence, Robotics and Related Technologies that recommends that the European Commission propose a legislative action to harness the opportunities and

1 K Schwab, *The Fourth Industrial Revolution* (Crown Publishing Group 2017).

2 MS Noble, et al, 'The Fifth Industrial Revolution: How Harmonious Human–Machine Collaboration is Triggering a Retail and Service [R]evolution' (2022) 98(2) Journal of Retailing 199-208.

3 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Eu eGovernment Action Plan 2016-2020 Accelerating the digital transformation of government', COM/2016/0179 final.

4 European Commission 'Digital Strategy – A digitally transformed, user-focused and data-driven Commission', COM\2018\7118 final.

5 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions 'Artificial Intelligence for Europe', COM/2018/237 final.

Access to Justice in Eastern Europe
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benefits of artificial intelligence but also to ensure the protection of ethical principles.[6] In October 2021, the European Commission presented a proposal for the Artificial Intelligence Act, where it was stated that:

> In light of the speed of technological change and possible challenges, the European Union is committed to strive for a balanced approach. It is in the Union's interest to preserve the European Union's technological leadership and to ensure that Europeans can benefit from new technologies developed and functioning according to Union values, fundamental rights and principles.[7]

While we can see that various European institutions encourage increasing integration of technology in the delivery of public services, it is not clear to what extent technological intervention in traditional ways of providing public services is considered 'European'. Therefore, it is necessary to investigate how and what kind of technologies should be applied in the public sector so that human rights requirements are not violated.

Regardless of the fact that there is no one definition of what the rule of law is, it is deemed a mechanism that helps to identify, whether human rights are properly guaranteed in different states. In the context of the spirit of the rule of law, the question arises as to whether the various integrations of technology into public sector decision-making processes pose a risk to the proper enforcement of this principle. The rule of law can be deemed as some sort of a minimal standard that has to be met before implementing technology in the public sector.

2 WHY THE RULE OF LAW?

'Everyday issues of safety, rights, justice, and governance affect us all; everyone is a stakeholder in the rule of law'.[8]

Technology develops rapidly and embraces notions such as internationalisation and globalisation. Traditional law, for the most part, can be slow to react to technological developments and is also predominantly confined to national borders.[9] Indeed, the scale at which technologies are developing is not limited to national borders, so, accordingly, national law is not sufficient enough to cope with the upcoming global, international issues. Meanwhile, the rule of law, although it is essentially applied in national law, is recognised internationally.

Art. 2 of the Treaty on the European Union states that: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'.[10] Accordingly, the preamble to that document states that the member states confirm their attachment to the principles of liberty, democracy, respect for human rights

6 European Parliament resolution of 20 October 2020 with recommendations to the Commission on a framework of ethical aspects of artificial intelligence, robotics and related technologies (2020/2012(INL)), OJ C 404, 63–106.

7 Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain union legislative acts, COM/2021/206 final.

8 The World Justice Project Rule of Law Index 2021 (World Justice Project 2021) <https://worldjusticeproject.org/sites/default/files/documents/WJP-INDEX-21.pdf> accessed 26 September 2022.

9 S Greenstein 'Preserving the rule of law in the era of artificial intelligence (AI)' (2022) 30 Artificial Intelligence and Law 291–323.

10 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union adopted on 13 December 2007, Official Journal C 326, 26/10/2012.

and fundamental freedoms, and the rule of law.[11] It is clear that the rule of law is one of the fundamental principles of the EU. This is of extreme importance because the EU was formed based on this principle – it reflects European values, aspirations, and essence. As a consequence, adherence to this principle is of vital importance for the functioning of the EU, and risks to the breach of the rule of law in one country could have a direct effect on it. Another important aspect is that Europeans strongly support the principle of the rule of law. Eurobarometer 508 on Values and identities of EU citizens shows that 82 per cent of respondents agreed on the independence of judges and equality before law, as well as on the right to a fair trial, and in addition, 79 per cent were against discrimination,[12] etc.

Of course, the rule of law is as relevant as ever these days – in the past few years, we have faced global risks, such as the COVID-19 crisis or Russia's invasion of Ukraine, which highlighted the importance of the principle. However, in the context of these sudden and manifest events, it is also important to evaluate not-so-obvious ones – the emerging issues that might have a direct effect on the principle of the rule of law – such as, for example, the use of technologies in the traditional ways of delivering public services. As the European Commission emphasises, a vibrant, forward-looking EU's transition to a greener, more digital, and more socially just society needs to continue being built on firm foundations.[13] To conclude, the main reasons why the rule of law is deemed a good indicator to evaluate the effects of technologies in the public sector are the following:

1. It is a fundamental principle based on which the EU is founded;
2. Citizens in every member state strongly support the rule of law principle;
3. As technology is developing very quickly, the law is lagging behind – thus, the rule of law is a good threshold that shows how well human rights are ensured;
4. The mechanisms proposed by national law alone are not enough to face global issues caused by the use of technology.

3 TECHNOLOGIES IN THE PUBLIC SECTOR

Technologies that will shape the European economy and society can be divided into ones that are enabling, such as artificial intelligence, big data analytics, quantum, and high-performance computing, internet of things, NextGen internet and infrastructure, cloud computing, digital platforms, distributed ledger technology, and high-impact applied ones, such as advanced robotics, autonomous mobility, smart cities, additive manufacturing, virtual and augmented reality, digital energy innovation and sustainability, digitally enabled biotechnologies, advanced materials.[14] It is likely that due to the extremely wide application possibilities of technologies, more and more functions will be delegated to them in the future.

For a long time, the legal field was untouched or barely touched by technology. However, we can see a tendency toward introducing more and more technological applications into the daily lives of lawyers. Now it is even being predicted that legal institutions and lawyers will

11 Ibid.

12 N Becuwe, O Baneth, 'Special Eurobarometer 508 on Values and Identities of EU citizens' Publications Office of the European Union, 2021.

13 European Commission Communication from the Commission to the European Parliament, the Council, the European Economic and Social committee and the Committee of the Region 'Rule of Law Report 2022', COM(2022) 500 final.

14 European Commission, Directorate-General for Communications Networks, Content and Technology, Shaping the digital transformation in Europe, Publications Office, 2020, 10.

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change more radically in less than two decades than they have over the last two centuries.[15] Machine learning systems can already predict judicial decisions as accurately as human lawyers, extract key terms from agreements, identify significant documents in litigation bundles and in due diligence exercises, and forewarn organisations of impending legal risks.[16] What is interesting is that, at first, the private sector was deemed to be in the lead when talking about the application of innovations, but lately, the use of technology has been especially encouraged in the public sector.[17] Of course, one of the reasons the public sector is attractive to the deployment of technology is the amount of data accumulated, which is the driving force behind technology. However, this sector is more bureaucratic and requires more caution to ensure the quality of services, as this has a direct impact on people's trust in the state in general.

Technology promises services in the public sector will be cheaper and delivered faster in a more efficient manner. It offers to reduce operational and labour costs and increase the effectiveness and quality of services. It is also believed that technology integration would contribute to greater transparency and that, eventually, it will lead to increased trust. On the other hand, technology in its current development is linked to algorithmic biases, cybersecurity issues, the 'black-box' problem, and accountability issues. Bearing in mind this dualism, how do we decide what kind of technology intrusion in the provision of public services is acceptable? In the following section, the article will discuss three different examples of technological incorporation in the public sector: automated administrative orders, the risk-assessment tool COMPAS, and robot-judges. Each of them is characterised by different technological intrusions in classical ways of delivering public services.

3.1 Automated Administrative Orders18

'Anything that can be automated will be automated'.[19]

Making decisions about specific individuals is an integral part of the functions of many public sector institutions, and the possibilities offered by algorithms are increasingly recognised in the process of making such decisions. Governments all around are increasingly using automated decision-making systems in their administration.[20] One of the topics currently widely discussed in both doctrine and jurisprudence is the use of algorithmic tools in administrative procedures not only to assist in making such decisions (leaving the final

15 R Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford University Press 2017).

16 R Susskind, D Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts, Updated Edition* (Oxford University Press 2022) 32-32.

17 See, for example, L Vesnic Alujevic, F Scapolo *The Future of Government 2030+: Policy implications and recommendations,* (Publications Office of the European Union 2019); European Commission 'White Paper on Artificial Intelligence – A European approach to excellence and trust', COM/2020/65 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'A European strategy for data', COM/2020/66 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Shaping Europe's digital future', COM/2020/67 final.

18 For more on automated administrative orders, see J Paužaitė-Kulvinskienė, G Strikaitė-Latušinskaja, 'Automated Administrative Order in the Context of the Code of Administrative Offences' in M Doucy, M Dreyfus, N Noupadia (eds), *Changements démocratiques et électroniques dans l'action publique locale en Europe: REvolution ou E-volution? Democratic and Electronic Changes in Local Public Action in Europe: REvolution or E-volution?* (Kultura: Institut Francophone pour la Justice et la Démocratie 2022) 387-405.

19 S Zuboff, *In the age of the smart machine. The future of work and power* (Basic Books, Inc 1988).

20 R Calo, DK Citron, 'The Automated Administrative State: A Crisis of Legitimacy' (2021) 70(4) Emory Law Journal 797-846.

decision to the official) but also as a substitute for the final decision.[21] Starting 1 January 2019, the amendments to the Code of Administrative Offences of the Republic of Lithuania, which introduced one of the first examples of automation in the public sector in Lithuania – the automation of administrative orders – came into force.[22]

The institute of an administrative order in Lithuania was introduced more than a decade ago.[23] Simply put, an administrative order is (in the presence of a set of certain conditions) an offer to voluntarily pay a fine equal to half of the minimum fine imposed for an administrative offence committed by the person. The initiation of this institute was conditioned by the observed tendency that, in most cases, the severity of the imposed administrative penalty and the amount of the fine were being disputed rather than qualification, circumstances, guilt, or the fact of the violation.[24] After assessing the possibilities of modern technologies and good international practice, it was decided to simplify the processes of bringing administrative liability for offences of road traffic rules by taking advantage of the opportunities offered by algorithms. It was established that for certain administrative offences – an exhaustive list was introduced, stating that this applied only to administrative offences captured in pictures or video footage and the ones that are recorded by fixed or mobile recording systems, for example, speeding or parking offences – an administrative order will be automatically formed in the Register of Administrative Offenses.

When it comes to automation, it should be noted that there are different degrees to be applied, the main indicator being the degree of human control in the process. For example, the scale fluctuates from no automation, where all the tasks are being carried out by a human being, to full automation, where all the tasks are fully delegated to algorithms. The following provisions indicated in the explanatory memorandum to the relevant amendment law show that it was chosen to completely eliminate the role of an officer and to apply full automation in the abovementioned cases: 1) the human factor will be eliminated when protocols for administrative offences will be created automatically; 2) it is suggested that the administrative order and other procedural documents be automatically created in the Register of Administrative Offences, meaning procedural documents would be filled in automatically using the software; 3) protocols of administrative offences or notifications of a possible administrative offence are created in the Register of Administrative Offenses automatically, i.e., in such cases, administrative offences are initiated without the presence of an official.[25]

21 B Green, 'The Flaws of Policies Requiring Human Oversight of Government Algorithms' (2022) 45 Computer Law & Security Review; A Coiante, 'The automation of the decision-making process of the public administration in the light of the recent opinion by the Italian Council of State regarding the draft of regulations concerning the modalities of digitalization in the public tender procedures' (2021) 2(1) European Review of Digital Administration & Law 239-248.

22 Code of Administrative Offences of the Republic of Lithuania, Official register of legal acts TAR, No XII-1869, 2015.

23 On 1 January 2011, the relevant amendments were made to the Code of Administrative Violations of the Republic of Lithuania that was in force at that time; see Law amending articles 302, 226, 232, 2321, 239, 2393, 241, 2411, 2461, 2462, 2467, 249, 259, 260, 261, 262, 282, 313 and the twenty-third section of the Code of Administrative Offences of the Republic of Lithuania, supplementing the code with articles 2571, 2601, 2602, twenty-third1 and twenty-third2, Official gazette Valstybės žinios, 2010, no 142-7257, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.386939> accessed 7 October 2022.

24 Explanatory memorandum to Law amending articles 30^{2}, 226, 232, 232^{1}, 239, 239^{3}, 241, 241^{1}, 246^{1}, 246^{2}, 246^{7}, 249, 259, 260, 261, 262, 282, 313 and the twenty-third section of the Code of Administrative Offences of the Republic of Lithuania, supplementing the code with articles 257^{1}, 260^{1}, 260^{2}, twenty-third^{1} and twenty-third^{2}, Official gazette Valstybės žinios, 2010, no. XIP-1839, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/TAIS.367360?jfwid=-1ddupcv4di> accessed 7 October 2022.

25 Explanatory memorandum to the draft law amending Articles 33, 38, 417, 424, 569, 573, 575, 589, 590, 595, 602, 610, 611, 612, 669, 682 and 686 of the Code of Administrative Offences of the Republic of Lithuania, 10 October 2018, no. XIIIP-2672, <https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/95ca5ce0cc7411e8a82fc67610e51066?jfwid=3eixg5pyz> accessed 7 October 2022.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

3.2 Risk-Assessment Tool COMPAS

Another field of the public sector where algorithms are used is to help judges of criminal courts. In the United States of America, it is becoming commonplace that 'pretrial risk assessment algorithms' are being consulted when setting bail, determining the duration of prison sentences, and contributing to decisions concerning guilt and innocence. Such systems form a behavioural profile of the accused by mathematically calculating the relation of different factors.[26] For example, in some jurisdictions in the United States, judges use an automated decision-making software COMPAS ('Correctional Offender Management Profiling for Alternative Sanctions') that uses historical data to decide which convicted defendants are most likely to re-offend. The software, developed by Northpointe Inc., a private company, takes into account 137 responses to a questionnaire, either answered by the defendant or based on information from criminal records. The questions are quite diverse, ranging from the ones that seem to be directly related to the likelihood to re-offend (for example, about prior felony offence arrests, parole breaches) to ones less connected to it (such as, for example, who the offender was raised by or how often he or she was bored).[27] The algorithm then rates how likely a person is to commit a repeat offence on a scale from 1 (low risk) to 10 (high risk), and the judge may decide to detain the person.

However, a few concerns in connection to the use of this system have already arisen. First of all, as already mentioned, the COMPAS software was designed by a private company; thus, the algorithm operation processes are protected under intellectual property rights (in *State of Wisconsin v. Loomis*, it was indicated that the developer does not disclose how the risk scores are determined or how the factors are weighed in COMPAS, because it is a trade secret).[28] Accordingly, neither litigants nor courts can review how the algorithms function to further explore their accuracy and fairness. Secondly, concerns have been raised that the COMPAS software is subject to racial discrimination. It has been observed that the system was less likely to generate a positive score for African American litigants than for white litigants. The COMPAS software was found to misclassify African American defendants as 'high risk', considering them twice as likely to re-offend as their white counterparts. Correspondingly, the wrong assumptions were made vice versa – white defendants were rated as lower risk but re-offended at twice the rate.[29] To conclude, the discriminatory effects of the algorithm used in the COMPAS were revealed. As correctly pointed out by the European Commission for the Efficiency of Justice, these tools can reproduce unjustified and already existing inequalities in the criminal justice system concerned; instead of correcting certain problematic policies, technology may end up legitimising them.[30] Thirdly, even though judges can reject the COMPAS conclusion, it is not clear whether and, if so, how much they tend to rely on the recommendation of the software and how much they tend to deviate from it.

The final important aspect to discuss when analysing the COMPAS software is *State v. Loomis*, where the decision to sentence a defendant to six years' imprisonment and five years of extended supervision for a crime was partly made by the software. What is interesting is that the Supreme Court of Wisconsin concluded that COMPAS is merely one tool available to a court at the time of sentencing, and a court is free to rely on portions of the assessment

26 Greenstein (n 10) 291-323.

27 See <https://mineracaodedados.files.wordpress.com/2017/01/sample-risk-assessment-compas-core.pdf> accessed 2 October 2022.

28 State of Wisconsin v Loomis (2016) 881 N.W.2d 749 (Ann Walsh Bradley J) ('Loomis'). Cert denied, 137 S Ct 2290 (2017).

29 J Dressel, H Farid, 'The accuracy, fairness, and limits of predicting recidivism' (2018) 4(1) Science Advances.

30 See The European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment, adopted by the CEPEJ during its 31st Plenary meeting, Strasbourg, 3-4 December 2018.

while rejecting other portions. If used properly with an awareness of the limitations and cautions, it does not violate a defendant's right to due process, according to the court.[31] However, a question arises as to whether the use of the COMPAS or similar software to assist courts, even considering that the judges retain the discretion to make the final decision, is in line with the principle of the rule of law.

3.3 Robot-Judges

The pandemic has accelerated the shift into an online environment, as well as the implementation of certain technologies in courts worldwide. In more than 160 countries, hearings have now been conducted remotely, largely by video.[32] It can be said that it is unlikely that post-pandemic court systems will remain the same as they were before; however, remote court hearings are just a beginning and far from a revolution in court services. States will have to decide to what extent will the technological intrusion in court systems be justified because, in a world where we are used to getting all the services and goods with the click of a few buttons, our administration of justice is becoming cumbersome.

In general, technology can affect the work of courts in two broad ways. On the one hand, there is automation and improving various processes – using systems to improve, refine, streamline, optimise, and turbo-charge traditional ways of working. On the other hand, there is a transformation – using technology to allow us to perform tasks and deliver services that would not have been possible, or even conceivable, in the past – doing new things rather than old things in new ways.[33] In the European Commission study on the use of innovative technologies in the justice field, good practices among member states currently in place are those that concern areas such as, *inter alia*, anonymisation of documents (e.g., court decisions); speech-to-text and transcription; introduction of chatbots for strengthening the access to justice and public services; and Robot Process Automation for increasing efficiency and minimising errors in repetitive tasks.[34] In addition, the European Council notices that artificial intelligence systems in the justice sector may in the future be capable of performing increasingly complex tasks, such as analysing, structuring and preparing information on the subject matter of cases, automatically transcribing records of oral hearings, offering machine translation, supporting the analysis and evaluation of legal documents and court/tribunal judgments, estimating the chances of success of a lawsuit, automatically anonymising case law, and providing information via legal chatbots.[35]

Another area of technology use in courts that is receiving more and more attention in jurisprudence is whether to delegate fundamental rule-making powers to artificial intelligence systems.[36] The discussion of robot-judges was particularly fostered after the

31 *State of Wisconsin v Loomis* (2016) 881 N.W.2d 749 (Ann Walsh Bradley J) ('Loomis'). Cert denied, 137 S Ct 2290 (2017).

32 Susskind, Susskind (n 17).

33 R Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2019) 33-36.

34 European Commission, Directorate-General for Justice and Consumers, 'Study on the use of innovative technologies in the justice field: final report', Publications Office, 2020.

35 Council Conclusions 'Access to justice – seizing the opportunities of digitalisation' 2020/C 342 I/01, OJ C 342I, 2020, 1-7.

36 See, for example, M Richard, A Solow-Niederman, 'Developing Artificially Intelligent Justice' (2019) Stanford Technology Law Revie, 242-289; ADD Reiling, 'Courts and Artificial Intelligence' (2020) 11(2) International Journal for Court Administration 8; RW Campbell, 'Artificial Intelligence in the Courtroom: The Delivery of Justice in the Age of Machine Learning' (2020) Colorado Technology Law Journal 323-350; C Coglianese, D Lehr, 'Regulating by Robot: Administrative Decision Making in the Machine-Learning Era' (2017) 105 Georgetown Law Journal, U of Penn, Inst for Law & Econ Research Paper No. 17-8; J Deng, 'Should the Common Law System Be Intelligentized?: A Case Study of China's Same Type Case Reference System' (2018) Georgetown Law Technology Review 223.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Estonian Ministry of Justice asked to design a robot-judge to resolve small disputes up to €7,000.[37] The idea is that parties to a dispute would be able to upload related documents to a specialised court platform, where artificial intelligence would make a judgment that could later be appealed to a human judge. Another example fuelling the discussion on robot-judges, is China's Same Type Case Reference System (STCRS) program.[38] The STCRS program aims to reduce the backlog of judges as well as to improve the quality of the decision-making process. Artificial intelligence programs act as legal researchers, analysts, and decision-makers. It is claimed that they do this by conducting legal research more efficiently than human researchers, providing statistical analysis of prior analogous cases, generating judgments, and writing decisions. What is important is that a human judge is still in the loop and retains the possibility to reject any part of the STCRS process and manually complete such tasks.[39] To sum up, as of now, the STCRS program is an assistant to a judge in China and does not (yet) attempt to take his or her place. The final decision rests with the judge.

In light of these examples, it is worth mentioning that the current European approach embedded in various soft law sources of different EU institutions is that the use of technology to make final judgments in courts, at least at this stage of technological development, is not encouraged.[40] However, here lies another potential legal problem, requiring an analysis of the symbiosis of law and psychological sciences – to what extent is the judge independent in situations where artificial intelligence tools suggest a certain way of solving a case, and how much does he or she tend to deviate from such a suggestion? Although this discourse is not the subject of this article, legal scholars are invited and highly encouraged to explore it, as the conclusions obtained can be extremely valuable in determining the trust level of technology integrated into the courts.

Even though robot-judges are still at the level of debate, as we have no practical examples, there are scholars asking whether we as a society will ever be willing to delegate fundamental rule-making powers and assign assertion of the legitimacy of the state to such non-human entities,[41] and others discussing the STCRS program in China believe that even if the STCRS programs look like pre-artificial-intelligence judicial assistants, they may hide a gradual substitution of machines for judges. The program's existence and potential capacity to complete advanced, abstract thinking and analysis can go even further – ultimately, these programs can help replace judges in simple, non-controversial cases.[42] Talking more generally, some scholars claim that looking further ahead, a legal system without courts as we know them, wherein contractual disputes, tort claims, and criminal allegations are all posed and 'adjudicated' entirely by machine without the involvement of any human lawyers whatsoever, is possible.[43] For example, Richard Susskind suggests the idea of a certain rule being implemented, saying that if a machine predicts a court finding in favour of the claimant with a probability greater than, for example, 95 per cent, that finding should be deemed an

37 E Niiler, 'Can AI Be a Fair Judge in Court? Estonia Thinks So' (*WIRED*, 24 March 2019) <https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/> accessed 1 September 2022.

38 T Kadam, 'China's AI-Enabled 'Smart Courts' To Recommend Laws & Draft Legal Docs; Judges To Take Consult AI Before Verdict' (*The EurAsian Times,* 16 July 2022) <https://eurasiantimes.com/chinas-ai-enabled-smart-court-to-recommend-laws-judges/> accessed 5 September 2022.

39 Deng (n 37) 223.

40 See, for example, Council Conclusions 'Access to justice – seizing the opportunities of digitalisation' 2020/C 342 I/01, OJ C 342I, 2020, 1-7; European Parliament resolution of 20 October 2020 with recommendations to the Commission on a framework of ethical aspects of artificial intelligence, robotics and related technologies (2020/2012(INL)), OJ C 404, 63-106.

41 RW Campbell, 'Artificial Intelligence in the Courtroom: The Delivery of Justice in the Age of Machine Learning' (2020) Colorado Technology Law Journal 323-350.

42 Deng (n 37) 33.

43 Richard, Solow-Niederman (n 37) 242-289.

official resolution made by the court, is thinkable.[44] In addition, commenting on Brazil's backlog of 100 million cases, he suggests that usually, it is better to have these cases disposed of by opaque predictive systems that would faithfully issue decisions consistent with judges of the past instead of waiting for a decision by a human judge that will never become.[45] As discussions over the robot-judges and their independence grow, an analysis of whether it will not put the rule of law in danger is required.

4 WHY THE RULE OF LAW MIGHT BE IN DANGER

Despite the fact that the rule of law can be deemed one of the most important principles globally in general, the definition of it varies throughout different legal systems and contexts. In fact, it is getting harder and harder to define it, as the phrase is being used in many different ways. The phrase has become chameleon-like, taking on whatever shade of meaning best fits the author's purpose. But without a clear definition, the rule of law is in danger of coming to mean virtually everything so that it may, in fact, come to mean nothing at all.[46] Nevertheless, the essence of this principle is best revealed by analysing the main elements it encompasses. According to the World Justice Project, the rule of law encompasses the following four universal principles:

1. The government and its officials and agents are accountable under the law;
2. The laws are clear, publicised, stable, and fair and protect fundamental rights, including the security of persons and property;
3. The process by which laws are enacted, administered, and enforced is accessible, efficient, and fair;
4. Justice is delivered in a timely manner by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.[47]

It should be noted that the Organisation for Economic Co-operation and Development, for example, distinguishes the same four elements when describing the notion of the rule of law.[48] Subsequently, within the framework of this article, the rule of law will be deemed a principle encompassing the four abovementioned universal principles, the totality of which reveal its essence. In the following passages of the article, it will be analysed whether the universal elements of the rule of law principle mentioned above are at risk when applying technologies in certain areas of the public sector: automated administrative orders, the risk assessment tool COMPAS, and robot-judges.

The main idea of the first of the four universal principles of the rule of law consists of is accountability. The principle says that all persons, including the government and private actors, are accountable under the law. However, if systems start making decisions that traditionally were delegated exclusively to officials, are we not risking that there will be an 'accountability deficit'? This risk can be perceived in the first example of the use of technologies in the public sector – automated administrative orders. Who will be responsible if, for

44 Susskind (n 34) 287.

45 Ibid 290.

46 R Stein, 'Rule of Law: What Does It Mean' (2009) Minnesota Journal of International Law 250.

47 The World Justice Project Rule of Law Index 2021 (World Justice Project 2021) <https://worldjusticeproject.org/sites/default/files/documents/WJP-INDEX-21.pdf> accessed 26 September 2022.

48 See, for example, OECD *Government at a Glance 2021* (OECD Publishing 2021); OECD *Government at a Glance 2019* (OECD Publishing 2019).

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

example, the algorithm generates a discriminative administrative order? We should also bear in mind that the issuance of administrative orders, at least in Lithuania, has for years been a discretion only police officers had. Civil servants have a special place in the Lithuanian legal system when they perform duties in the civil service and carry out public administrative activities. Accordingly, a person seeking to become a statutory civil servant is subject to certain qualification requirements, *inter alia*, the requirement of an impeccable reputation. Consequently, it is questionable whether the functions of civil servants can be delegated to systems in general. Bearing in mind the current level of technological development, the use of algorithms could only assist the officer, but the final decision (and, therefore, the responsibility) should be at the officer's discretion.

What is more, the Constitutional Court of the Republic of Lithuania repeatedly emphasised that the civil service system must function in such a way that not only responsibility is established for violations committed in the civil service but also that persons who have committed violations in the civil service are actually brought to justice.[49] In general, civil servants are liable for official misconduct that arise from a failure to perform the duties of a civil servant or from an improper performance due to the fault of the civil servant. Thus, it is not clear,what kind of accountability this entails and who bears it in the event that the principles and/or duties of civil servants are violated by an algorithm? For example, when an automated administrative order with offensive content is sent, can we hold the algorithm responsible? Probably not, since algorithms have neither intentions nor morals. Let us say a police officer breaches the law – he or she could be fined, receive a warning, or even be fired, whereas when we talk about automated administrative orders, there is no such thing as personal responsibility. The algorithm has the rights of a police officer but no obligations. Unfortunately, as we know, algorithms and other technologies discriminate, and technical failures or cases of a cyber security breach are also not ruled out. In the context of such legally significant risks, the following questions arise: is the interpretation of the Constitutional Court that a person should be held personally responsible for violations committed in public service properly ensured? Won't the further development of technology in the public sector, in the long run, eliminate responsibility for violations committed when performing duties of public administration? Coming back to the universal principle of the rule of law and the requirement to be able to hold public officials legally responsible, the question of how we perceive algorithms that perform the functions (that were exclusively reserved for the discretion of the official) requires further discussion. To conclude, there is a risk that the fundamental principle of accountability might be in danger.

The second universal principle of the rule of law is about fundamental rights and just law. According to the World Justice Project, eight elements should be borne in mind: equal treatment and the absence of discrimination; effective guarantees to the right to life and security of person; due process of law and rights of the accused; effective guarantee of freedom of opinion and expression; effective guarantee of freedom of belief and religion; freedom from arbitrary interference with privacy; effectively guaranteed assembly and association and fundamental labour rights.[50] This set of rights was chosen according to their relation to the flourishing of the rule of law and good governance, and non-discrimination is definitely one of the most important of them. However, technology-based decision-making tools may not be reliable in ensuring adequate protection of this right. When analysing the software COMPAS case, it was emphasised that racial disparities were discovered in the software's determinations. Let us not forget other important aspects, such as the 'black-box'

49 Ruling of 18 13 August 2007, no 33/04 and ruling of April 2019, no 11/2017-5/2018 of the Constitutional Court of the Republic of Lithuania.

50 The World Justice Project Rule of Law Index 2021 (World Justice Project 2021) <https://worldjusticeproject.org/sites/default/files/documents/WJP-INDEX-21.pdf> accessed 26 September 2022.

problem – meaning that regular people, judges, and even the creators of the software are not able to explain and understand how it works, as the system teaches itself and mutates independently. What is more, such software often enjoys the protection of intellectual property law. Another important aspect not yet examined is reliance on decisions made by such software when a human being is still in the loop and retains the discretion to make the final decision. The same problem could indeed be relevant when we talk about automated administrative orders – they can also have a discriminatory effect that we might not be aware of. And in that case, the results are not even being reviewed by a human being. To conclude, we must be able to check whether the technology is discriminating; otherwise, we put this element of the rule of law at risk of being breached.

The openness of government is the third universal principle of the rule of law. It regulates whether enough information is shared by the government (also the quality of it), whether people have effective tools to hold the government accountable if needed, etc. In the framework of this article, important aspects of this principle are the right to information and the ability to complain regarding the provision of public services. When a decision is made by a system, how can citizens be in possession of relevant information to challenge such a decision? What about the requirement that the law should provide access to justice and, secondly, that court processes should be fair? To challenge a decision made by a public decision-maker, it is essential to understand how and why a certain decision was made. When we talk about robot judges, it is still not clear how they will make decisions and how we will be able to challenge them. Also, the previously-discussed problems of a 'black-box' and a trade secret are still not resolved. From the perspective of a person wanting to challenge a decision made by a robot-judge, it is simply not fair. This is important to consider with an example like the risk assessment tool COMPAS and can even be relevant when talking about automated administrative orders.

The final universal principle concerns accessible and impartial justice. Can we consider the robot-judge – created based on existing technological developments and with the existing potential problems, as analysed in this article – as being in accordance with these principles? What about the requirement for a judge to be independent? Relying on a suggestion or especially delegating the decision-making function to software that the judges are unable to understand and test poses a risk to a judge's independence. After all, judges would not accept or tolerate relying on expert evidence if the expert were not required to provide qualifications or demonstrable expertise, an explanation of reasoning or methodology, and assurance of the reliability of their evidence.[51] Also, the impartiality of a judge requires fairness and equal treatment of all persons: without being biased or prejudiced. Lack of transparency (as already mentioned, often resulting from protection under trade secrets) is not in line with a judge being impartial in cases, especially when software – used either to counsel a judge or to take over the decision-making function – is using data that reflect bias and might have discriminatory effects. Of course, over the years, many cases in which the judges were biased have been disclosed, and it would not be fair to tolerate one standard for judges but demand the systems to be completely unbiased. However, the scale when we have single biased judges and when we enable an entire system to act on behalf of the state in the public sector that potentially might be discriminatory differs dramatically. To conclude, the potential for as yet unresolved risks, such as algorithmic discrimination, the 'black-box' problem, and a lack of openness in terms of operation principles pose a risk to the universal principle of the rule of law that requires justice to be delivered by representatives of certain qualities.

51 M Zalnieriute, F Bell, 'Technology and the Judicial Role' in G Appleby, A Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2021).

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

To conclude, before enabling any kind of use of technology in the public sector, all four boxes of the rule of law components (universal principles) have to be ticked, and the supremacy of the rule of law must be ensured. Only then can we have a system we can trust – the system we have been building for some time now.

4 CONCLUSIONS

The rule of law is one of the fundamental principles of the EU, the notions of which are very highly supported in all member states. Even though it is limited to the borders of states, it is recognised internationally, and adherence to it in a Member State has a direct impact on the EU itself. In addition, it contains all the necessary principles that allow us to consider the state as one in which law reigns. The totality of all the aspects mentioned above makes the rule of law a proper measure to evaluate the effects of the use of technology in the public sector.

When the exclusive right of a police officer to give administrative orders is being delegated to the algorithm without a subsequent opportunity to review it, the universal principle of the rule of law that the government and its officials and agents are accountable under the law is at risk of being breached: according to current regulations, algorithms have no accountability for violations committed in the performance of civil service functions.

The software COMPAS was proved to be discriminatory. Other aspects specific to this case, such as the 'black-box' problem, the legal protection under the intellectual property law, and the tendency to rely on a decision made by an assistive tool, showed that this type of software might put the principle of the rule of law in jeopardy in terms of the notion that fundamental human rights must be properly protected.

When talking about applying certain technology in the public sector, the inability to understand how certain technologies work due either to a lack of knowledge or a lack of relevant information being disclosed is not in line with the third universal principle of the rule of law. A person trying to challenge such a decision is put in an unfavourable position, and the right to a fair trial is not properly ensured.

The final universal principle of the rule of law that justice is delivered by representatives with certain qualities, especially the notion that they should be independent and impartial, might be in danger when software makes a suggestion or a decision, as it is impossible to test it or understand how it came to the conclusion it did, what kind of data was used, and what impact it had on a judge's final decision

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Research Article

COMMUNICATION BETWEEN THE GOVERNMENT AND THE PUBLIC AS A FACTOR IN LOWERING THE RISK OF CORRUPTION

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ABSTRACT

What seems necessary to reduce corruption is not the imposition of anti-corruption policies, which has an influence, but the building of an anti-corruption culture to envisage rejection of corrupt practices both on the personal and at any level of state or local government. The public control of authorities, the request for which is formed by the anti-corruption culture,

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can be realised via well-running communications between the authorities and the public and their professional management. The authorities lacking transparency increases both the risks of corrupt practices and the faith in institutions being lost. The article describes the role communications have in implementing steps to get out of the loop of particularism and presents a plan for the implementation of the anti-corruption strategy in the field of public administration by Alina Mungiu-Pippidi. The role of communications in the implementation of Robert Klitgaard's anti-corruption methodology based on the corruption formula is also presented: C = M + D-A /T, where M stands for monopoly, D is for discretion, and A/T is for accountability/transparency. The author presents the results of the 'Islands of Integrity ™' anti-corruption project, implemented by the United Nations Recovery and Peacebuilding Program and funded by the EU. In 2020, the 'Islands of Integrity ™' anti-corruption methodology was implemented in six communities of the Luhansk and Donetsk oblasts (East part of Ukraine). The author of the article was involved in sociological research conducted in six communities of the Luhansk and Donetsk oblasts (April-July 2020), which revealed a lack of public interest and confidence in the official channels to inform the population about the activities of local authorities. Local residents prefer to receive information about the activities of local authorities from informal channels of communication (including from local government officials) than from official sources. This leads to the spreading of rumours and defamation, which enhances the decline in the level of public trust. The reason for this is the low professional level of communications management, the lack of research on the media preferences of local residents, and, as a consequence, the inefficient communication activities of local authorities. This state of things requires an immediate reform of the communication strategies local authorities are currently using. Moreover, mandatory practices of informing the population about all actions of the authorities should be introduced, especially regarding the activities that are vulnerable to corruption. This will reduce the corruption vulnerability of local authorities to ensure communication support for anti-corruption methodologies and foster public control. In this article, the author will turn to the matter of building effective communications between the government and the public in Ukraine and determining the necessary conditions to reduce the risk of state corruption practices by means of communications.

1 INTRODUCTION

Despite the *coup d'état* in Ukraine in 2014, corruption still permeates all spheres of public life in Ukraine – from everyday corruption to machinations at local and higher levels of government. According to a 2018 snapshot of public opinion published in Dzerkalo Tyzhnja weekly on 24 August 2018, Ukrainians see corruption as the root of all their problems: 92% believe that 'because of corruption, money ends up in the pockets of people in power'; 88% say 'corruption leads to the impoverishment of the population' and 'undermines the country's economy'.[1] Another change of government in Ukraine in 2019 – the new president and government did not make things better. A year and a half later, at the end of 2020, corruption was still among the top three bugbears for Ukrainians.[2] Considering corruption to be one of the main problems in the country, people shift responsibility for what is

1 Tetjana Nikitina, 'Hope and Faith Without Responsibility, or Sociological Diagnostics of Ukrainian Society' (*Dzerkalo Tyzhnja*, 24 August 2018) <https://zn.ua/ukr/SOCIUM/nadiya-ta-vira-bez-vidpovidalnosti-abo-sociologichna-diagnostika-ukrayinskogo-suspilstva-286321_.html> accessed 20 September 2022.

2 Kyiv International Institute of Sociology, 'Press Releases and Reports Assessment of the Situation in Ukraine and Perception of Parties and Politicians: October 2020' (*Kyiv International Institute of Sociology*, 19 October 2020) < https://kiis.com.ua/?lang=eng&cat=reports&id=973&page=1 > accessed 20 September 2022.

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Journal homepage http://ajee-journal.com

happening to the authorities,[3] disclaiming responsibility both for controlling the authorities and for traditional everyday corruption practices that they perceive as permissible from the standpoint of law and morality. Liberation of society from corrupt practices will not be effective in the establishment of anti-corruption culture, which implies the formation of

> anti-corruption ideas and moral and legal culture, which is expressed in a negative attitude towards corrupt activities; anti-corruption standard of behavior and active citizenship; values and abilities associated with legal and moral and ethical norms; the ability to find constructive approaches to solve problems of illegal activities.[4]
>
> It is not the imposition of anti-corruption policies, which also has an influence, but the building of an anti-corruption culture to envisage rejection of corrupt practices both on the personal and at any level of state or local government that seems to be a necessary measure in reducing corruption. How can the public hold authorities accountable, a demand which will be formed by anti-corruption culture? The top tool of public control is well-running communications between the authorities and the public.

According to the results of polls conducted by sociological groups in Ukraine, Ukrainians consider corrupt government officials to be the country's top issue. Studying the successful experience of fighting corruption in different countries, one can see that all cases are imperfect. Success stories range from classic cases such as Singapore and Hong Kong, China,[5] to more recent examples of progress such as Colombia, Georgia, Indonesia, Malaysia, Philippines, Qatar, and Rwanda.[6] The progress achieved by anti-corruption programs in those countries does not mean the eradication of corruption, but an improvement to a different extent – a change in attitudes towards corruption practices, a decrease in scale in all or individual social spheres, the building of a new anti-corruption culture, and the enhanced communication between the authorities and the public. *The research goal* is to look into forming effective communications between the government and the public in Ukraine and determining the necessary conditions to reduce the risk of state corruption practices through communications. *The research tasks* are to review the anti-corruption methodologies of Alina Mungiu-Pippidi and Robert Klitgaard and identify forms of communication that are important for the implementation of these methodologies (the theoretical part of the work). The author of the article was involved in online sociological research conducted in six communities of the Luhansk and Donetsk oblasts (April-July 2020) and analysed 2,683 respondents' responses. The results are presented in the empirical part of the paper.

2 METHODS: HOW TO EXIT THE CIRCLE OF PARTICULARISM WITH THE HELP OF COMMUNICATIONS

Corruption has been part of scientific discourse since the late 60s, although the subject started enjoying significantly increased popularity among researchers in the 2000s. There is a steadily growing number of interdisciplinary studies of corruption, research, training centres and programs, and individual projects in international organisations, including in Ukraine.

3 Kyiv International Institute of Sociology and USAID, 'Corruption in Ukraine: Perceptions, Practices, Attitudes' (*Ukraine Crisis Media Center*, 28 February 2019) <http://ucmc.org.ua/uk/2658-2> accessed 20 September 2022.

4 IV Klymenko, 'The formation of the future police officer's anticorruption culture in the system of higher educational institutions of the Ministry of Internal Affairs of Ukraine' (2017) 37 Problems of Modern Psychology: Collection of research papers of Kamianets Podilskyi Ivan Ohienko National University, GS Kostiuk Institute of Psychology at the National Academy of Pedagogical Science of Ukraine, Kamianets Podilskyi: Aksioma 131-141.

5 Robert Klitgaard, *Controlling Corruption* (University of California Press 1988).

6 Robert Klitgaard, *Addressing Corruption Together* (OECD 2015).

Having a common object of research, scientists focus on the study of its various aspects – influence on legitimacy, connection with democracy, involvement of politicians (political scientists), behavioural elements of corruption, factors of corrupt situational behaviour (psychologists), informal networks for the exchange of corrupt practices (sociologists), etc. It should be noted that the topic of communications and their role in the building/suppression of state corruption as a subject of analysis is not presented in modern studies. The works by Alina Mungiu-Pippidi, Robert Klitgaard, Oksana Gus, Monica Bauhr, and Marcia Grimes are closest to the topic of the given research.

Mungiu-Pippidi's research focuses on different contexts stipulated by governance regimes in the implementation of anti-corruption methodologies. Each of these contexts requires a different approach to anti-corruption. Thus, Mungiu-Pippidi sets out three types of governance regimes – particularism (a method of social organisation, which is characterised by a systematic distribution of common goods NOT in common and uniform grounds for all, which reflects the detrimental division of power in such societies) with a low level of tolerance for corruption (patrimonialism regimes), competitive particularism with a low level of tolerance for corruption in society (competition for power privileges among several groups), and ethical universalism (liberal democracy), which is the opposite of corruption. To correctly diagnose corruption in each individual country, Mungiu-Pippidi proposes to apply an individual qualitative strategy, first determining whether corruption is the norm or an exception for this society and what is the nature of corruption. Also, according to the same author, many anti-corruption initiatives fail because they are inherently non-political, while the majority of corruption in post-communist developing countries is of a political nature.[7]

After diagnosing particularism, it is necessary to determine the degree of openness/closeness of the system. Closed particularism generates more dissatisfaction with the system, so it is more vulnerable to open confrontation that destroys the entire system. Open and flexible particularism has more chances to withstand where the system allows representatives of any group of society to adapt to its rules. This is a more complicated form for changing the attitude of the public towards corruption by communicative strategies since there are, albeit formal, mechanisms to ensure the responsibility of civil servants.

Mungiu-Pippidi lists steps to exit the circle of particularism, which we see as an implementation plan for an anti-corruption strategy in public administration.[8] Let us set out the role communications have in the implementation of those steps:

A) *Organising/self-organising those who lose to the system as a result of corruption.* The change agents here are active citizens, journalists, trade unions, and independent media to implement aggressive communication strategies with the following key messages: 'system-society', 'them-us', 'rich-poor', etc., with a complex of communication tools and technologies. The role of communications at this stage is to create a revolutionary critical mass through communicative practices to promote a change in the form of governance and foster a new form of governance.

B) *The institutionalisation of the norms of honesty and criteria of justice achieved as a result of particularism destruction, making them a part of public policy.* Regardless of whether the criteria turn into regulations or are adopted at the level of civil servants' professional ethics, they must become the criteria to control high-ranking officials and politicians, with the results published and made available to the public. At this stage, communications have an informational and educational role in forming the broadest possible public anti-corruption culture with zero/low tolerance for corruption and demand for politicians with a high level

7 Alina Mungiu-Pippidi, 'Corruption: Diagnosis and Treatment' (2006) 17 (3) Journal of Democracy 86.

8 Ibid 97.

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of anti-corruption culture. At this stage, it is important to form an anti-corruption culture on a personal level to support the preciousness of turning down corruption in public life.

The matter of anti-corruption programs for local governments is still relevant. Ukraine has many opportunities both to create its anti-corruption programs supported by international organisations and implement already successful methods for the prevention and eradication of corrupt practices. Anti-corruption grassroots initiatives will not be successful with government agencies unless they gain support from higher management levels in government. Conversely, there is a chance to implement anti-corruption programs in government agencies only if officials of different levels are interested. To support this thesis, there is a practical case regarding the implementation of 'Islands of Integrity' (discussed below) – an anti-corruption methodology rolled out in 2019-2020 in Ukraine. The local administrations of the Luhansk and Donetsk oblasts (eastern Ukraine) were participants in the project to implement the anti-corruption methodology.[9] Local administrations that expressed interest and truly wanted to identify corruption vulnerabilities of their administrations to reduce them were active learners when the methodology was taught and implementers on the local level. They received obvious positive changes in the performance of local administrations and attracted investments for local projects. The formal participants in the project (the management/employees not truly interested but were obliged to participate in the project to comply with the terms of cooperation with a donor organisation or the requirements of the Law on Decentralization of Government Agencies) did not change the situation for the better. Moreover, one of the project participants, a deputy mayor in a district administration, was held legally accountable for corruption.[10]

C) *The obligation to submit income and assets declarations for public sector employees.* The role of communications to accompany this step is both in the technical provision of tools for social monitoring and access to information about the income and property of public officials, which should also be supported by the law on compulsory disclosure of income and implemented in social communications for the purpose of social control. Modern monitoring systems are ensured via information technologies, and the function of social control is possible and available not only to law enforcement agencies but also to media, public organisations, and any interested citizens.

D) *Public monitoring of the distribution of public benefits and budget.* The role of communications in the implementation of the step is to ensure the technical capability for exercising social control and monitoring of public procurement, allocation of resources via the Prozzoro electronic procurement system, holding biddings, regular public reports, and public voting in the distribution of the public budget by local governments. We see technical and public communications as having equal value in ensuring the progress of the anti-corruption strategy.

As far as we can see, communications support the entire cycle of changing a patrimonial society to competitive particularism and further – the achievement of universalism through the acceptance of the value of transparency and accountability. A special role in the implementation of communicative support of this process is assigned to professional communicators – public information officers, public relations professionals, and sociologists.

9 United Nations Development Programme (UNDP), 'Final Reports on the Implementation of the Anti-Corruption Strategy Project' (*UNDP Ukraine*, 28 April 2021) <https://www.ua.undp.org/content/ukraine/uk/home/library/recovery-and-peacebuilding/final-reports-on-the-implementation-of-the-project-to-develop-the-anti-corruption-strategy.html> accessed 20 September 2022.

10 T Kotenko, 'Na Habari popavsia mer prifrontovogo mista Kreminna na Luhanshini' (Glavcom, 10 November 2020)< https://glavcom.ua/news/na-habari-popavsya-mer-prifrontovogo-mista-kreminna-na-luganshchini--717275.html > accessed 24 January 2023.

3 COMMUNICATIONS IN PREVENTING GOVERNMENT VULNERABILITIES TO CORRUPT PRACTICES (BASED ON ROBERT KLITGAARD'S ANTI-CORRUPTION METHODOLOGY)

In another anti-corruption methodology developed by Klitgaard, communications also play an important role in diagnosing and preventing government vulnerabilities to corrupt practices. One of the main assumptions in developing the methodology is that most people are honest by nature if the system allows them to thrive within the law. Except for the corrupt ones who use the system for personal gain, there are potentially honest public officials who are willing to fight corruption and improve the performance of their organisations (and themselves), provided they can receive due recognition and reasonable monetary incentives. Another assumption is that people will behave with integrity, provided that the system rewards such behaviour and limits the opportunities and temptations to abuse their position for personal gain.[11]

This is also the main message of Klitgaard, MacLean-Abaroa, and Parris in their book *Corrupt Cities – A Practical Guide to Treatment and Prevention*:[12] we must focus our anti-corruption strategies on changing the context in which individuals live and work and not only focus, as most strategies do and fail, on changing people through legal and moral pressure.

People are prone to corrupt behaviour when they think they will gain more than they lose because the reward is high and the risk of being caught is low, and even if caught, the fines are soft. People tend to engage in corrupt activities when they work in organisations that give them monopoly power over a product or service, the right to decide whether someone gets that product or service, or how much, and they have no rules of accountability and transparency, wherein others can see how they make their decisions. This is the context that breeds corruption. Klitgaard describes this through his famous formula C = M + D-A / T, where M stands for performance monopoly, D stands for discretion, and A/T is for accountability/transparency.

It is true that different people may react differently to the temptations suggested by the context and that many people do not engage in corrupt activities, even if the temptations are there. The important idea, though, is that the more temptations the context provides, the more likely we are to face corrupt practices. The given anti-corruption methodology uses those concepts to diagnose the vulnerability of local governments and identify priority areas for attention. The solutions follow the same conceptual framework that was used in the diagnostics:

- Breaking monopoly by increasing competition in the sector
- Reduced discretion in decision-making by establishing and enforcing clear rules/procedures
- Strengthening accountability and transparency mechanisms for operations/service delivery through effective information and data management
- Increasing the likelihood of being caught and punished by establishing effective control mechanisms
- Reducing the relative value of gain versus loss by creating incentives/motivation for effective and honest behaviour

11 Klitgaard (n 6).

12 Robert Klitgaard, Ronald MacLean-Abaroa and H Lindsey Parris, *Corrupt Cities: A Practical Guide to Cure and Prevention* (ICS Press; World Bank Institute 2000).

Access to Justice in Eastern Europe
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When determining the role of communications in each step of diagnosing the vulnerability to corruption in public officials, we claim it as the one that ensures the transparency of the government's activities, manifested in the accessibility of public control to all individuals, especially the ones exercising social control – journalists and public organisations. We also note the importance of motivating public officials, which consultants and communicators can undertake, regarding the feasibility and relevance of an anti-corruption strategy to be developed by local governments in order to build public trust in the government:

- in a crisis, it is of particular importance how effectively the government spends public budgets and how effectively and transparently it makes decisions
- anti-corruption programs play an important role in matters related to the reputation of local governments, especially since the territorial communities are small, most of their residents know each other
- anti-corruption reputation is important in relationships with donors and foundations that want to be sure that money is spent efficiently, transparently, and for the purpose intended
- the anti-corruption strategy and efforts of local government to implement anti-corruption programs are of great importance for voters since we often see how local government officials lose trust after corruption scandals
- anti-corruption strategies complement socio-economic development strategies to a great extent, reinforcing the implementation of those priority tasks that the community has identified – it is very difficult to create an attractive socio-economic environment for investors, for the tourism business, for the implementation of logistics projects, if donor or community funds are spent ineffectively or wasted.

4 THE 'ISLAND OF INTEGRITY™' METHODOLOGY: THE UKRAINIAN EXPERIENCE

As part of the United Nations Recovery and Peacebuilding Program, a project funded by the EU was launched in October 2018 with the main goal of restoring good governance and promoting reconciliation in crisis-hit communities in the Donetsk and Luhansk oblasts of Ukraine. The project supports the effective restoration of governance by eliminating and preventing corruption in municipal public services, increasing honesty, transparency, accountability, and efficiency with the 'AC Islands of Integrity™' (hereinafter – Islands of Integrity) anti-corruption methodology.

The Islands of Integrity anti-corruption methodology was developed by Ronald MacLean Abaroa, the mayor of La Paz (Bolivia), who served as mayor for four terms, and Ana Vasilache (Romania) – FPDL founder – as part of Klitgaard's scientific concept, with the goal of spreading the successful anti-corruption experience worldwide. The methodology envisages the active participation of government leaders, managers, and employees, as well as other stakeholders, in the process of diagnosing activity lines and making anti-corruption decisions.

The Island of Integrity methodology has been successfully applied in 30 local governments in 11 CEE / SEE countries – Albania, Bosnia and Herzegovina, Croatia, Georgia, Kosovo, Macedonia, Montenegro, Poland, Republic of Moldova, Romania, and Serbia, as well as in Latin America (El Salvador, Guatemala, Honduras, and Nicaragua) and Africa (Nigeria). It received international recognition in 2011 thanks to the UN Public Service Prize and is included in the anti-corruption programs of many other international organisations, such

as Partners Global, World Bank, Open Society Foundations, International Anti-Corruption Academy (IACA), and the Hague Academy of Local Government. In May 2016, coordinated by the UNDP Istanbul Regional Center and after completing a one-year course, 'AC Islands of Integrity ™ – Anti-Corruption Training', facilitators from Georgia, Moldova, and Ukraine received their 'anti-corruption practitioner' qualification. Among them are two Ukrainian specialists – Halyna Kravchenkova and Oleksiy Soldatenko, the author of the paper.

The Islands of Integrity Anti-Corruption Methodology project had already been implemented in 2019 In Ukraine in Novopskov of the Luhansk oblast and in 2020 in six communities of the Luhansk and Donetsk oblasts (Eastern Ukraine), which became possible due to the UNDP Recovery and Peacebuilding Program (UN RPP). In those communities, the managers formed working groups involving representatives of local governments, who, under the guidance of a facilitator, performed a number of steps to diagnose corruption vulnerabilities in the main activity lines of the local government and develop solutions to minimise the consequences in communities. Those steps were as follows: to conduct a general diagnosis using the Klitgaard corruption formula: C = M + DA/T; to carry out in-depth diagnostics of three activity lines that were most sensitive to corruption and identified at the first stage of work; to develop a plan to minimise corruption vulnerabilities of the identified activity lines and offer them for discussion to the local community – journalists and representatives of public organisations. The final stage in the implementation of the Anti-Corruption Methodology is the development of the Anti-Corruption Strategy and its implementation as authorised by the local governments. It should be noted that only three communities out of seven that took part in the project in 2019-2020 in Ukraine adopted the developed anti-corruption strategy and claimed success in solving anti-corruption tasks (Novopskov Municipality, Shulhinka Village Council, Troitsky Village Council of the Luhansk oblast). The other four communities stopped at the stage of developing an anti-corruption strategy. We should note the motivation of the employees of the three named municipalities and the management responsible for making decisions, which contributed not only to conducting corruption diagnostics of the activities of local authorities but also to taking steps to reduce the identified corruption vulnerabilities.

It is also necessary to mention the issues identified in the course of conducting the sociological survey in the participant communities regarding the transparency and information openness of local governments, which is one of the essential conditions for holding the authorities accountable. From 15 April to 5 May 2020, there was an online survey organised and conducted among 582 residents of the Troitsk amalgamated territorial community, 430 residents of the Belovodsk amalgamated territorial community, 436 residents of the city of Kreminna, 400 residents of the Krasnorichensk amalgamated territorial community of the Luhansk oblast; 448 residents of the Kurakhiv amalgamated territorial community of the Donetsk oblast (15-26 June 2020), and 387 residents of the Shulhynka amalgamated territorial community of the Luhansk oblast (13-29 July 2020). All the respondents were over 18 years old. The survey was devoted to determining the level of information openness and transparency of the activities of local governments as perceived by residents of local communities during the implementation of the project. The reports on the survey are included in the reports of the practitioners on the implementation of the Islands of Integrity anti-corruption methodology in Ukraine. The reports were prepared and published as part of the UNDP Recovery and Peacebuilding Program and funded by the EU.[13]

The lack of information was noted by the residents of all the amalgamated territorial communities along precisely those activity lines that were identified in the course of general diagnostics by local governments as vulnerable to corruption. Conversely, the activity lines

13 UNDP Ukraine (n 10).

Access to Justice in Eastern Europe
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for which local residents have enough information are not included in the list of activity lines vulnerable to corruption during the general diagnostics by representatives of local governments (Figure 1).

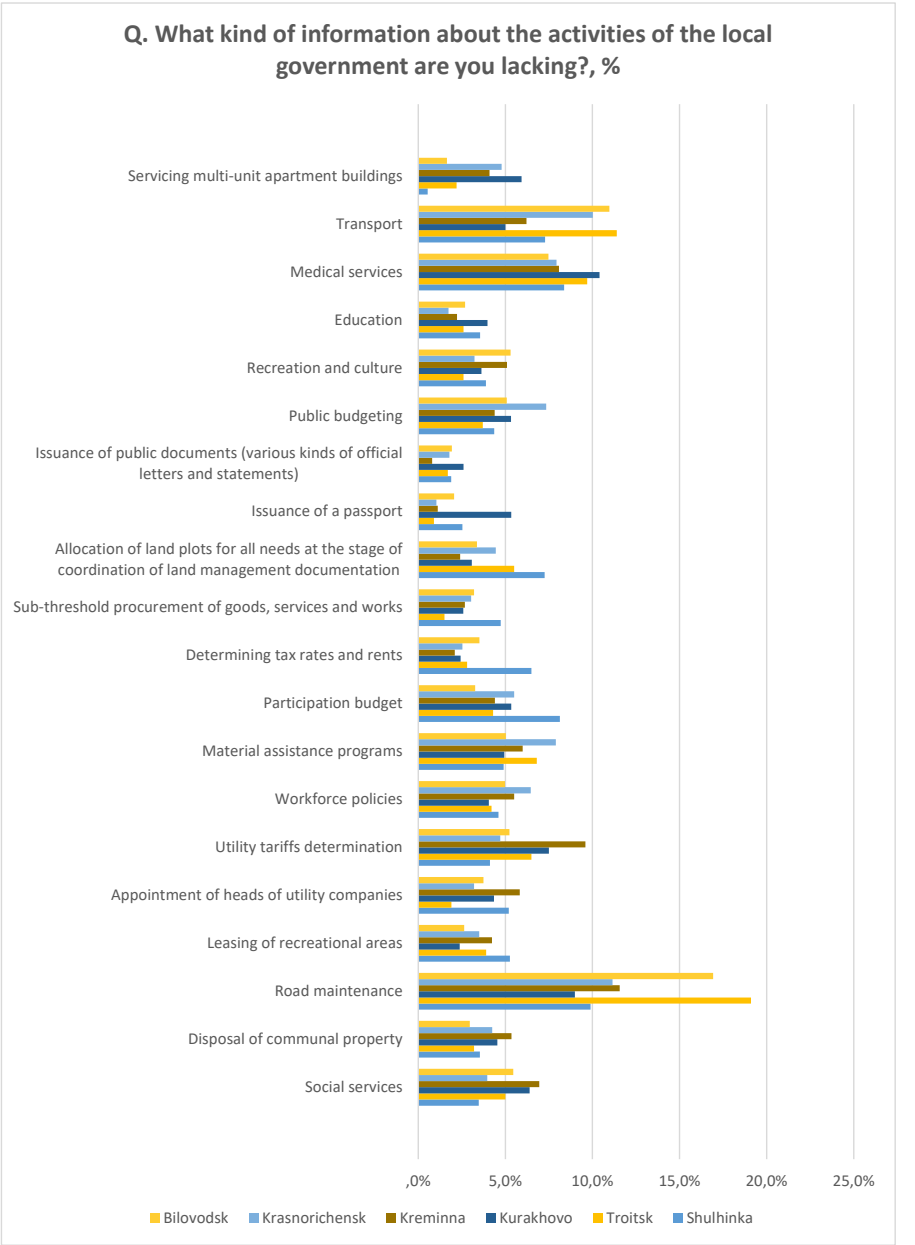

Figure 1. Distribution of responses by communities and activity lines of local governments

The community residents assessed their level of satisfaction with the information openness of local governments, their accessibility, and the availability of feedback as follows (Figure 2).

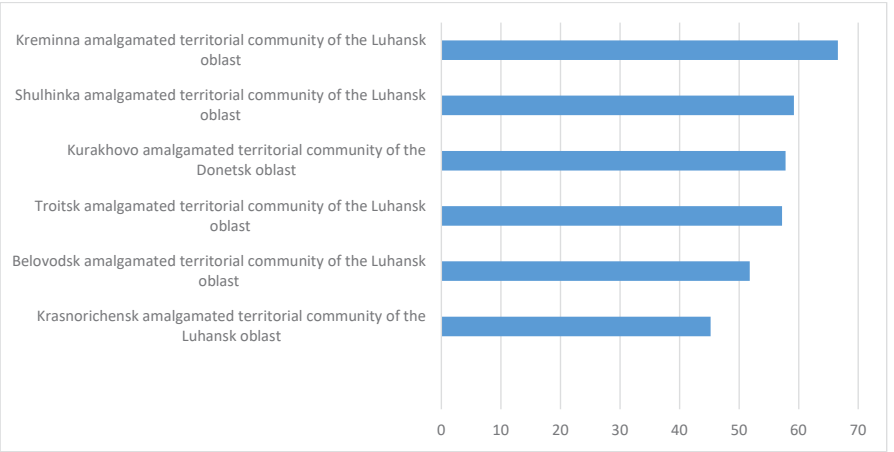

Figure 2. The level of satisfaction with the information openness of local government

Speaking of ensuring the openness and accessibility of information from local authorities, one cannot but mention the channels of communication between the authorities and the public. To ensure effective communication, it is necessary to study the possibilities and preferences of citizens in obtaining information and using the pertinent information channels. In the course of the sociological survey, the data revealed that only in one of the six participant communities, the official website of the local government is a channel for obtaining information about its activities for community members (the city of Kurakhovo, 57.5% of respondents mentioned the municipality website as the main source of information on the activities of the local government). In the remaining five, estimates of the popularity of that information source among the population are no greater than 21%. At the same time, social networks are preferred as the main source of information about the activities of the local government (more than 50% in all communities) in communities with predominantly young populations. In Figure 3, the preference for receiving information about the activities of the local government from local administration officials is highly ranked, as well as from friends and acquaintances, rather than from official sources – government websites, local newspapers, or social media. The reason for this may be either a lack of trust in official information or being oblivious of official information resources being in place (Belovodsk, Troitsk, and Kurakhovo local administrations have official websites with up-to-date information) or the low credibility of those information sources. In both cases, information programs are needed to promote the official channels of communication with the government and build trust in those communication sources.

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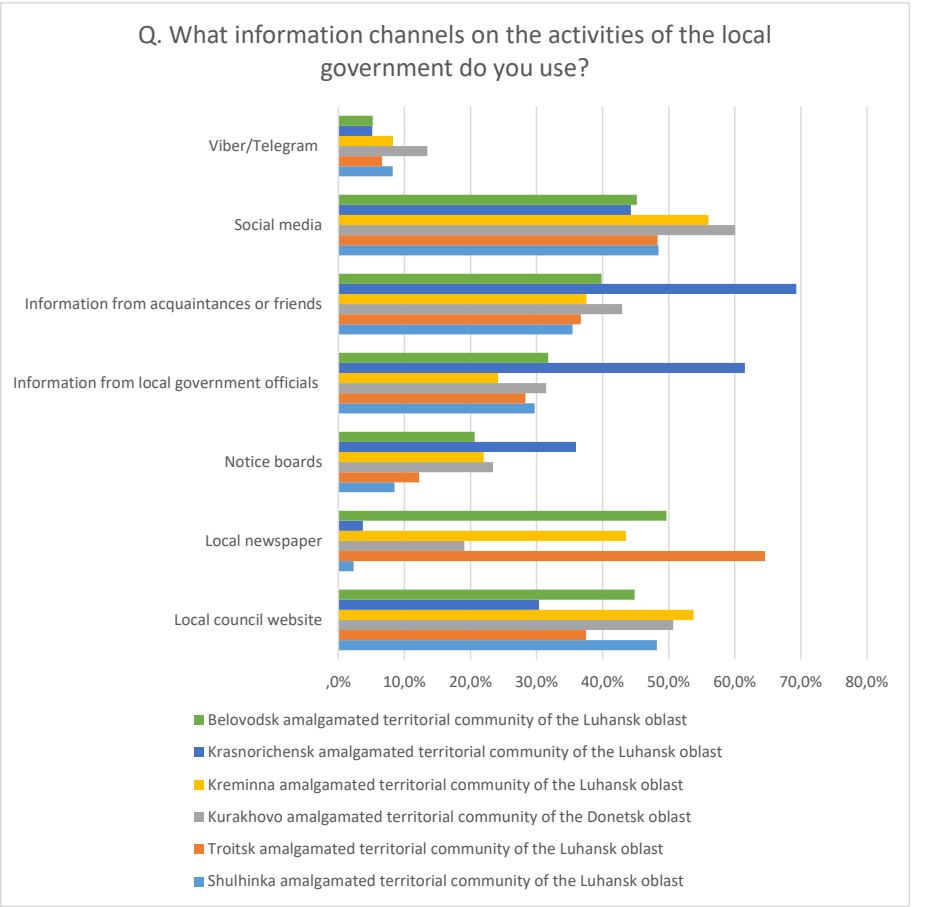

Figure 3. Information channels on the activities of the local government

5 RESULTS AND CONCLUSIONS

Without information transparency for authorities, the risks of implementing corrupt practices and the building of distrust in the institution of power as a whole increase. A sociological study conducted with the participation of the author of the article in six communities of the Luhansk and Donetsk oblasts (April-July 2020) revealed a lack of interest and confidence in the official channels of informing the population about the activities of local governments. Local residents prefer to receive information about the activities of local governments from local officials rather than from official sources. The reason for this is the low communication activity of local governments, especially in areas with preferences for personal communication among local residents. This leads to rumours and defamation being spread, which further exacerbates the distrust of the government. Such a state of affairs calls for an immediate reform of the communication strategies local governments are using and the introduction of mandatory practices of informing the population about all actions of the public authorities, especially in activities that are vulnerable to corruption. This will reduce the corruption vulnerability of local governments and ensure communication support for anti-corruption methodologies and social control.

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Research Article

ARBITRARINESS PREVENTION IN THE CONTEXT OF ACHIEVING THE EFFICIENCY OF THE RULE OF LAW

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Keywords: *freedom, human dignity, rule of law, rule of law checklist, arbitrariness prevention, abuse of authority prevention, access to constitutional justice.*

ABSTRACT

Background: *Countries of Western political and legal tradition and former socialist countries of Central and Eastern Europe need further arbitrariness prevention in order to establish the rule of law both logically and taxonomically: idea (ideal) – prerequisite (guarantee) – achieving the efficiency of the rule of law. They also require practical application, which reflects the priorities of national interests based on freedom and respect to human dignity. The article contextualises arbitrariness prevention as an applied instrumental concept, essential for bringing the rule of law to the state, which allows the prevention of undue public authorities' intervention in the process of their discretionary powers in particular spheres of human life. It also seeks the most appropriate approach to its use in combination with other standards and requirements in order to assess and summarise real daily practices of the rule of law existing in many modern societies and states. Functional application of arbitrariness prevention as a means of legal reasoning to access constitutional justice is substantiated. Concentration on the enhancement and implementation of the current Ukrainian mechanism to provide the monitoring of power use by the state and human immunity from arbitrary actions of the state authorities is gaining a real practical value. It is extremely relevant under the conditions of court control over the constitutionality of the state intervention in social and other types of human rights.*

Methods: *Research on arbitrariness prevention in the international and national political and legal context is based on the definition of the rule of law derived from the provisions of the dialectic correlation of natural law and the positivist legal approach. The potential of the latter approach for the provision of sufficient restriction of the power is also very important. Historic, hermeneutic, systemic, structural, axiological, and instrumental approaches promote arbitrariness prevention as a particular specific idea (ideal), which consolidate the advance of social and legal thought as well as the practices of public authority functioning. They also contribute to its superposition over state arbitrariness as a permanently active and clear requirement, instruction and conceptual component, principal rule (sub-rule), and commonly shaped standard, as well as one of non-disputable prerequisites and guarantees of a counter to malpractice of discretionary powers. In this article the theoretical and comparative generalisation of the traditions of the perception of the rule of law proves and confirms, on the ground of therelevant constitutional provisions, and specific court decisions resulted in quite clear reasoning in favour of their implementation in the real legal order and provided a person the possibility of exercising their guaranteed right to appeal to the court against the actions of the state within the scope of the activities of the Constitutional Court of Ukraine.*

Results and conclusions: *The content and meaning of arbitrariness prevention are presented. They reflect the value-normative potential of the rule of law and serve as the basis for the development of the entire set of national constitutional and legal structures, current legislation, mechanisms and procedures for its objective evaluation. The legal positions of the Constitutional Court of Ukraine regarding the introduction of the mechanism of ensuring control over the use of power by the state and protecting people from arbitrary actions of authorities as well as its subordination to achieving the effectiveness of the rule of law are examined in the given article.*

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1 INTRODUCTION

The promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and the building of effective, accountable and inclusive institutions at all levels are some of the global goals in the area of justice.[1] The last annual report of the human rights organisation Freedom House 'Freedom in the world 2022. The Global Expansion of Authoritarian Rule', shows the strengthening of power by authoritarian leaders and the acceleration of attacks on democracy and human rights. The high probability of the trend of autocracy overtaking democracy as a governance model is stressed. A significantly large number of countries at bordering and disputed territories of the former USSR have been demonstrating the deterioration of their indicators[2] since records began. The state of political rights and civil freedoms is monitored. In 2021 Ukraine's score according to 100-point scale of the report was 61, an improvement of its previous indicator of 60. Thus, it still remains partially free together with the countries which are considered free regarding their respective level for political rights and human freedoms, despite the fact that their established democratic standards are being questioned and destroyed. At the same time, Ukraine has also ranked with some non-free countries.[3]

In the report, published on February 24, 2022, democratic authorities claimed to be ready to collaborate in order to resist authoritarian abuses and support human rights defenders fighting for freedom around the world. Determined to move to a new stage of the expansion of the European Union (hereinafter the EU), the entire Ukrainian people are on the line of democracy defence with the motto 'Freedom or death'.[4] They are absorbed by the support for their EU membership and prognoses about Russia's war against Ukraine.[5]

In the last of twelve forecasts by American philosopher, political economist, and professor at Stanford university, Francis Fukuyama, on the results of the so called Russian invasion, we find some confidence that Russia's defeat makes it possible 'for new freedom to be born'.[6] It will also prevent the decline of global democracy.

This year presents quite new challenges (compared to the anti-values on which Putin's authoritarianism rests) that have arisen on Ukraine's way to ensure democracy level growth in the process of the EU extension to the east for the EU member-states. They include such questions as:

(1) Is there an independent judicial system in Ukraine?

(2) Is proper administration of justice in civil and criminal cases ensured?

(3) Is there any protection against the unlawful use of physical force, as well as freedom from war and unrest?

1 'The 17 Goals' (*The Global Goals*, 2015) <https://www.globalgoals.org/goals/16-peace-justice-and-strong-institutions> accessed 30 April 2022.

2 Freedom House, *Freedom in the World 2022: The Global Expansion of Authoritarian Rule* (Freedom House 2022) <https://freedomhouse.org/sites/default/files/2022-02/FIW_2022_PDF_Booklet_Digital_Final_Web.pdf> accessed 30 April 2022.

3 'Countries and Territories' (*Freedom House*, 2022) <https://freedomhouse.org/uk/node/183> accessed 30 April 2022.

4 V Valle, 'Wake Up, the World! Ukraine is On the Defence Line of Democracy' (*Ukrajinsjkyj Interes*, 6 March 2022) <https://uain.press/articles/prokinsya-svite-ukrayina-na-liniyi-oboroni-demokratiyi-1553643> accessed 30 April 2022.

5 'Russia is headed for a complete defeat in Ukraine. – claims American philosopher, political economist, professor at Stanford University Francis Fukuyama in his article published on American Purpose. – There is no space for compromise acceptable for both Russia and Ukraine, taking into account the losses they have had at this stage'. See F Fukuyama, 'Preparing for Defeat' (*American Purpose*, 10 March 2022) <https://www.americanpurpose.com/blog/fukuyama/preparing-for-defeat> accessed 30 April 2022.

6 ibid.

(4) Do laws, policies and practices guarantee equal treatment of different sectors of society?[7]

There are views on limiting the supremacy of power (arbitrariness) and ensuring adequate protection against it.[8] They included with the aspirations to consider:

> The evolution and the state of the art of the rule of law in the EU is gained with the help of the evaluation of the progress that has been made since the beginning of democratic reforms in Central and Eastern Europe as well as the analysis of the latest trends in the deviations from the rule of law and open opposition to liberal and democratic values in some EU member-states. It helps draw attention to the variety of new available mechanisms to strengthen the rule of law in the EU and assess its potential for achieving steady positive changes in this direction.[9]

In this case, the focus is shifted from the formal possibility to be protected from authoritarian arbitrariness to the opportunity to be secured from it with the help of procedural guarantees of justice based on shared convictions of the highest human values and dignity.

2 THEORETICAL SUBSTANTIATION OF THE SIGNIFICANCE OF ARBITRARINESS PREVENTION AND ITS PRACTICAL APPLICATION

Systematic research in the area of the rule of law, which is treated as an invaluable outcome of the states sharing and promoting European values is gaining relevance and topicality nowadays.

This trend can be explained by the tough times for democracy all over the world, lack of confidence that the adoption of obligations to be guided by the rule of law delivers sufficient warnings against repeating the sad experience of totalitarianism or authoritarianism. Even though they are currently condemned by the electorate, the fear is that that 'people's ability to learn the lessons of history is limited'.[10]

The attempt to study deep basics for the substantiation of the rule of law,[11] its equivalents, traditionally represented by the German Rechtsstaat (in some sources – Rechtsstaatlichkeit) and the French Etat de Droit,[12] as well as the examination of theoretical and practical issues connected with the implementation of this principle as a preventer of infringements

7 'Freedom in the World 2022: Ukraine' (*Freedom House*, 2022) <https://freedomhouse.org/uk/country/ukraine/freedom-world/2022> accessed 30 April 2022.

8 N Arajärvi, 'The Core Requirements of the International Rule of Law in the Practice of States' (2021) 13 (1) HJRL 180, 185, 189.

9 A Engelbrekt, A Moberg and J Nergelius (eds), *Rule of Law in the EU: 30 Years After the Fall of the Berlin Wall* (*Swedish Studies in European Law*, Bloomsbury Publishing 2021).

10 E Hobsbaum, 'Level of Post-Communist Disaster is Not Understood Outside of Russia' (2004) 12 Svobodnaya mysl'-XXI 3.

11 A Dicey, *Basics of State Law of England (Introduction to the Study of the Law of the Constitution): Introduction to the Law of English Constitution (OV Poltorackaya tr, Publication of LF Panteleev 1891)* 152; T Bingham, 'The Rule of Law: The Sixth Sir David Williams Lecture' (*University of Cambridge*, 16 November 2006) <https://www.cpl.law.cam.ac.uk/sir-david-williams-lectures/rt-hon-lord-bingham-cornhill-kg-rule-law> accessed 15 April 2022; S Holovatyi, *The Rule of Law*, pt 1 *From an Idea – to a Doctrine* (Pheniks 2006); B Tamanaha, *The Rule of Law: History, Politics, Theory* (A Ishchenko tr, Kyiv-Mohyla Academy 2007).

12 S Holovatyi, *The Rule of Law*, pt 3 *Ukrainian Experience* (Pheniks 2006); S Holovatyi, ' "The Rule of Law" Doesn't Work: Explanatory Note on the Text of the Document of Venetian Commission 'Report on the Rule of Law', which was accepted on 86th plenary meeting on 25–26 March 2011 (CDL-AD (2011)003re)' (2019) 11 Law of Ukraine 41–2.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

and disproportionate restriction on human rights[13] in law-making and law-enforcement activities,[14] resulted in almost unconditional acceptance of the significance of arbitrariness prevention. (in other words – prohibition of arbitrariness, avoidance of arbitrariness, counteraction to arbitrariness and public powers abuse (prevention of power abuse) conscientiousness of public authorities (the conscientious implementation by public authorities of the powers granted to them)).

In the vein of modern trends, closely connected with the European integration processes and ECtHR and ECJ, and concurrent consolidation of the rule of law ideal, value or principle commonly applicable for any national legal system,[15] arbitrariness prohibition is advocated, in authors' comments in Reports on the Rule of Law, adopted by the European Commission "For Democracy through Law" (The Venice Commission) (hereinafter Report CDL-AD(2011)003rev),[16] in the translation-interpretation based on and developed from this Report of specific research "Rule of Law Checklist".[17]

The interpretation of the existing constitutional principle of the rule of law (developed by Thomas Bingham and based on the consensus of a sufficient list of components of the rule of law as well as the same components of the "Rechtsstaat" concept, which are not only formal but substantive or material - materieller Rechtsstaatbegriff)[18] crucially impacts the current state and further role of arbitrariness prohibition in both international and national court rulings as well as international legal documents. Bingham's vision of the volume and consequences of this principle application (his explanation made with the help of the series of eight sub rules) appears to be so 'adequate', inspires confidence that 'more brilliant minds'[19] 'could offer some better additional sub-rules or save the quantity'[20], and is prophetic, in that it still serves the basis for:

(1) Legality, including transparent, grounded, explained subordinate and democratic procedure of giving legal force to acts of law;

(2) Legal certainty;

13 Akademiia Folke Bernadotta (FBA), *User's Manual for Assessment of Following of the Rule of Law in Public Administration* (FBA, Sida 2016) <https://fba.se/contentassets/fa15ae1001e945e5bff1ef839006ff16/users-guide-ukrainian.pdf> accessed 30 April 2022; E Tseller, R Kuibida and R Melnyk, *Discretion of Administrative Organs and Judicial Control of its Implementation* (Project) (Pravo-Justice, EU 2020) <https://court.gov.ua/userfiles/media/new_folder_for_uploads/sud4857/zvit_dyskreciia.pdf> accessed 30 April 2022.

14 P Rabinovych and others, *The Principle of the Rule of Law: Theoretical and Practical Issues* (Proceedings of Lviv Laboratory of Human and Citizen Rights, Research and Essays, Spolom, 2016); V Smorodynskyi, 'Constitutional justice in the framework of the Rule of Law' in *Mutual Outcomes of the European Commission 'For Democracy Through Law' and the Bodies of Constitutional Justice and Interpretation Problems in Constitutional Justice: Proceedings of International online conference, Kyiv, 25 June 2020* (BAITE 2020) 303; T Slinko, L Letnianchyn, L Bairachna and Ye Tkachenko, 'The Rule of Law in the Legal Positions of the Constitutional Court of Ukraine' (2022) 1 (13) AJEE 165.

15 M Koziubra (ed) *Rule of Law Checklist at National Level: case of Ukraine* (EU, Research Center for the Rule of Law and its Implementation in Ukraine NaUKMA 2021) 16, 18.

16 Holovatyi (n 13, 2019).

17 S Holovatyi (tr, comment), *European Commission "For Democracy Through the Law" (Venice Commission) Rule of Law Checklist. Commentary. Glossary* (USAID 2017) <https://newjustice.org.ua/wp-content/uploads/2017/09/Rule_of_Law_Checklist_UKR.pdf> accessed 30 April 2022.

18 European Commission "For democracy through the law" (Venice Commission), 'The Rule of Law: Report accepted on 86th plenary meeting, 25–26 March 2011' (2011) 10 Law of Ukraine 177; European Commission "For Democracy Through the Law" (Venice Commission), 'The Rule of Law: Report accepted on 86th plenary meeting (CDL-AD(2011)003rev), Venice, 25–26 March 2011' (2019) 11 Law of Ukraine 28.

19 Bingham (n 12).

20 ibid.

(3) Arbitrariness prohibition;

(4) Access to justice provided by independent and impartial courts, including those performing judicial supervision of administrative activities;

(5) Respect for human rights;

(6) Non-discrimination and equality before the law.[21]

The complexity of the constitutional principle of the rule of law, enrolment of the closely interrelated absolute components (according to some other ideas – heterogeneous sub-principles/requirements,[22] defining sub-principles/criteria), and principles varying on the context basis,[23] influence the practical aspect of the Rule of Law checklist to assess its state in a particular country (in the updated translated version it is named as 'the Rule of Law checklist for particular state'),[24] detailed sample texts.[25]

This, in its turn, generates some common arguments to develop each particular component or "ingredient" of the rule of law.

Concern that '"the rule of law" does not work' (or even more the attempt to understand and explain the content of recently strange for domestic theory and practice English term "the Rule of Law"),[26] as well the attempt "to measure the unmeasurable", are inevitably accompanied with some theoretical reasoning on it as 'a doctrine, principles, institutions and procedures, vitally important for the protection of a human against state arbitrariness and human right to dignity'.[27] The scientists support the possibility of real efficiency in the rule of law enshrined in the Constitution of Ukraine, taking into account the introduction and development of a domestic project directed towards a further refinement of 'the system of clear rules of law guaranteeing the right to dignified equal and fair conduct as well as the right to appeal to an independent court to everyone according to fair procedures'.[28]

One of the versions of this project known as "*The Rule of Law at the National Level*" *("National Checklist")* and approved as a complex and detailed tool for practical measurement of the rule of state law, both in law-making and law-enforcing activities,[29] stipulates the list of the main components of the rule of law and their elements with the highest priority specifically for Ukrainian conditions: legality, legal certainty, equality before the law, equality (non-discrimination), appropriateness (proportionality), prevention of abuse of power, and access to justice. In this key, the approach to the interpretation of one of them, namely the prevention of abuse of power and changes, special attention is paid to the detailed theoretical component concerning the restrictions of discretionary power of public authority, as well as the system to prevent their abuse.

21 Venice Commission (n 19, 2019).

22 M Koziubra, 'The Rule of Law and Ukraine' (2012) 1/2 Law of Ukraine 30.

23 In order to examine the rule of law as a *legal principle*, Serhii Holovatyi had to show the process of this principle formation and reveal its content in universal (global), regional (European) and national (Ukrainian) contexts. See SP Holovatyi, 'The Rule of Law: Idea, Doctrine, Principle' (DPhil (Law) abstr thesis, Legislation Institute of The Verkhovna Rada of Ukraine 2008) 4.

24 Venice Commission (n 19, 2011) 183–4; ibid (2019) 36–8.

25 Holovatyi (n 18) 15–46.

26 Holovatyi, (n 13, 2019) 82.

27 Koziubra (n 16) 21.

28 ibid.

29 ibid.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

'This system must operate efficiently in practice. It should not be just declarative. It should stipulate the achievement of the state of inevitability of punishment for unlawful use of discretionary powers.'[30]

From the viewpoint of an outside observer, and following the support and promotion of varied ideas of the rule of law by the academic community and "expert community of development" (World Bank, International Monetary Fund, etc.), Professor at University of Iowa, Paul Gowde, suggests it is defined as:

> The normative principle of political state regulation according to which coercive power in the first weaker rule of law should be used in line with the rules, which provide the one for whom this power is executed with the opportunity to bring the power bearers to justice on reasonable grounds. According to the second stronger version of the rule of law, these rules should be justified on all the reasonable grounds compatible with the equality of all men [31]

It is concurrently compatible with the explanations of scientists in social studies regarding the incorporation of a standard-valuable component into the content of the rule of law.[32]

Gowde's recognition of this strategy (concept), commonly known as the transition to the rule of law according to the Bottom-up principle ("The Rule of law from Below"[33]), allows concentration within this strategy on 'the promoting of equal rights in order to win the commitment of the people who are subject to these rights, and on the institutions, needed to coordinate the efforts to put this commitment into effect'[34] as well as a focus on the development of a new strategy to measure the rule of law. It can be represented by an experimental one-dimensional scale of the rule of law, which is applied to the local context or to a more comprehensive array of data respectively.[35]

Thus, consecutive analysis of arbitrariness prevention as an idea (ideal) and obligatory condition (guarantee) to achieve the efficiency of the rule of law in international and national political and legal contexts is still relevant and topical.

3 RESEARCH AIM AND METHODS OF ARBITRARINESS PREVENTION AND ITS MANIFESTATIONS

Examination of arbitrariness prevention aimed at its contextualisation as the concept of applied purposes, which is essential for bringing the rule of law to the state and to prevent excessive public authority interference when exercising their discretionary powers in certain spheres of human life, will open opportunities for seeking the most appropriate ways for its use in combination with the other standard requirements for the need for generalisation and evaluation of real daily practices of the rule of law in many modern societies and states. Extensive review of functional purposes of arbitrariness prevention as the mandatory condition and guarantee for the achievement of rule of law efficiency as well as the means of legal reasoning to access constitutional justice in Ukraine appears to be of the highest relevance and topicality.

30 M Koziubra (ed) *Rule of Law Checklist at National Level: Case of Ukraine* (Research Center for the Rule of Law and its Implementation in Ukraine NaUKMA 2020) 5–6, 105–19; Koziubra (n 16) 115–29.

31 P Gowde, *The Rule of Law in the Real World* (Pravo 2018) 29.

32 ibid.

33 A Buyse, K Fortin, B Leyh and J Fraser, 'The Rule of Law from Below – A Concept Under Development' (2021) 17(2) Utrecht Law Review 1.

34 Gowde (n 32).

35 ibid 31.

The definition of the rule of law based on the provisions of dialectical correlation of natural law and positivist law approaches as well as the way in which it manifests in the context of legal restrictions of power and its exact opposite - despotic rule - serves the ground for the contextualisation of arbitrariness prevention.[36] The provisions of histori, hermeneutic, system, structural, axiological, and instrumental approaches promote the prevention of arbitrary mercenary or groundless power execution as a specific idea (ideal). It has incorporated the achievements of social and legal thought and practice of public authority operation and functioning. The exaltation of this idea over 'a specific social regulator (not legal and normative) – state arbitrariness'[37] is quite possible. Theoretical discourse devoted to arbitrariness prevention, which always represents active and clear requirements, guidance, conceptual components, principal rules (sub-rules), and commonly shaped standards appears quite prospective. This feature is one of the indisputable conditions and guarantees for the efficiency of the rule of law.

The consistency of the concept interpretations is achieved as a result of theoretical and comparative generalisation of the traditions of rule of law perceptions in different legal systems, attention to constitutional provisions[38], and the studies of specific court rulings. They link rule of law content with real daily practices of the restrictions of public authorities and independent control over its execution. When the statement of its essential qualities (in other words of the key structural elements, positive aspects[39] (benefits)[40], core features, and characteristics) gets its reflection in the interpretation of the rule of law in some dimension ("keys", contexts or senses), the reasoning in favour of relevant control (monitoring) tools gets its special value. However, it happens only in case of studies of the rule of law itself as a procedural and processional one. It is claimed that from the viewpoint of the general public, but not theoreticians, formal elements of the rule of law are subordinated to procedural elements. The latter include court independence and procedural rights.[41] Under the terms of martial law in the territory of Ukraine more attention is paid to the procedural elements of preventing the restrictions of the constitutional right of all persons to judicial protection[42] rather than the requirements of the rule of law for the restrictions of the power rule (arbitrariness).

36 CH Mcllwain, *Constitutionalism: Ancient and Modern* (Cornell University Press 1947, Great Seal Books 1958) 21.

37 Smorodynskyi (n 15) 308.

38 The rule of law acquires quite practical value, taking into account the innovations of the constitutional justice reform in 2016 concerning the amendments to the provisions of Article 129 of the Constitution of Ukraine: its initial version stipulated that "administering justice the judges are independent and subject to the law only", while the version of the Law of June 2, 2016 №1401-VIII reads: "the judge administering justice is independent and should find guidance in the rule of law". See Constitution of Ukraine No 254 k/96-BP of 28 June 1996 (as amended of the Law of Ukraine No 1401-VIII of 2 June 2016) [2016] Vidomosti of the Verkhovna Rada 28/532.

39 According to Thomas Bingham, Joseph Raz has commented on the trend to use the rule of law as the compressed description of positive aspects of any political system, while John Finnis has described the rule of the law as "the term used to denote the state of healthy legal system". See Bingham (n 12).

40 J Raz, 'The Law's Own Virtue' (2019) 39 (1) OJLS 1.

41 J Waldron, 'The Concept and the Rule of Law' (2008) 43 (1) Georgia Law Review 9.

42 'Peculiarities of Administering Justice at the Territory under Martial Law' (*Supreme Court*, 4 March 2022) <https://supreme.court.gov.ua/supreme/pres-centr/news/1261727> accessed 30 April 2022.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

4 ARBITRARINESS PREVENTION IN THE LIGHT OF CLASSICAL CONCEPT (DOCTRINE) OF THE RULE OF LAW AND THE ADVICE OF THE VENICE COMMISSION

The last annual report of the human rights organisation Freedom House 'Freedom in the world 2022. The Global Expansion of Authoritarian Rule'43 contains unexpectedly relevant and topical content for Ukrainian political and legal realities since we are talking about the current level of the provisions, principles, democratic paradigm and liberal regime of government in the country, which had totalitarianism not so long ago.

Since the very beginning of the full-scale Russian invasion on February 24, 2022, Ukraine, together with the rest of the countries of Eastern Europe and the whole world (whose governments adopted the expression "to be Ukrained", to mean when you are Russia and you invade a country and the response is humiliation on a global forum) have been working on ensuring the protection and resumption of political and civil rights to counter the manifestations of aggression and genocide. Ukraine responds to the call to become 'a promising example of the rule of law in dark times'.[44] 'Its effort to strengthen its own potential'[45] in order to 'start a chain reaction of the rule of law and help the rest of the world to find its own way' is a proven fact.[46]

In order to examine the ongoing trends in the rule of law in the countries of the world according to the indicators of ensuring the context based on the constitutional provisions for both private and public autonomy of human rights (as per the indicators of World Justice Project (WJP) Rule of Law Index)[47] and other data[48], as well as to assess the state of the rule of law in practice in the national political and legal contexts[49], or to draft the list of other important issues for its enhancement indicators[50], the tools containing the most important content (and as a result the whole concept of the rule of law by authoritative English scientist representing the constitutional approach, Albert Dicey) are used.

This concept was presented in 1885 in his fundamental work.[51] The meaning of the existing constitutional principle of the rule of law and its brief discussion as per eight rules (sub-rules) were presented in the speech of Sir David Williams.[52] Later on, other meanings attributed to the constitutional principle of the rule of law by the most outstanding lawyers and judges of modern times were included in the pages of a short book.[53]

Under the rapprochement of the leading legal systems, accompanied by the strengthening of mutual influence of the theoretical positions of the founders of the constitutional principle of

43 Freedom House (n 2).

44 Gowde (n 32) 21.

45 ibid.

46 ibid.

47 Ukraine itself took the 74th position out of 139 countries of the world according to the WJP Rule of Law Index in 2020-2021 having improved its position by five. See World Justice Project (WJP), *Rule of Law Index 2021* (WJP 2021) <https://worldjusticeproject.org/sites/default/files/documents/WJP-INDEX-21.pdf> accessed 30 April 2022.

48 J Beqiraj and L Moxham, 'Reconciling the Theory and the Practice of the Rule of Law in the European Union Measuring the Rule of Law' (2022) 14 HJRL 139.

49 Koziubra (n 31) 114; Koziubra (n 16).

50 FBA (n 14); Tseller, Kuibida and Melnyk (n 14).

51 Dicey (n 12).

52 Bingham (n 12).

53 T Bingham, *The Rule of Law* (Penguin Books 2011).

the rule of law, specific interpretations, "sensitive" from the viewpoint of the institution value, including the Council of Europe, the role of the occurrence of the provisions (components) important in terms of this principle efficiency, the perception of the aforementioned standards is growing greatly. It should be stressed that each of them can be concurrently applied to different legal and political situations. The specific features caused by the real implementation of the idea of weakening the authority, which gets priority in combination with other typical rule of law components, gradually become the object of empirical studies and contribute to the development of modern control (monitoring) tools. They still can be applied to the process of implementation of institutional, procedural and political practices of the rule of law in different contexts.

According to the second sub-rule of the constitutional principle of the rule of law by Thomas Bingham, full rejection of the application of free judgement of the state authorities as outlined by Albert Dicey appears to be quite disputable. Attention is drawn to the fact that the true proof of his opinions is confirmed only by the existence of specific regularity:

> The wider and less specified the powers are, being based on the free judgement and delegated to the official or judge, the wider range of subjectivity and possible arbitrariness opposed to the rule of law is.[54]

According to one out of six aspects, the rule of law (3) Prohibition of arbitrariness, which was presented by The Venice Commission in Report CDL-AD(2011)003rev, 'discretionary powers are needed for performing some specific tasks in modern complicated societies'.[55] At the same time, as required by the provisions derived from the ideas by Thomas Bingham, 'they should not be administered in an arbitrary way'.[56] Moreover, their administering in such a way 'gives opportunity to make essentially unfair, unjustified and irrational, even despotic judgements, incompatible with the principle of the rule of law'.[57]

The specific research prepared on the basis of the report in order to develop and refine its findings, approved by the Venice Commission at its 106th Plenary meeting, presents a checklist of the questions to be used for the assessment of the compliance with the rule of law. With their help, we may receive answers shedding light on the efficiency of the prevention of the abuse of authority in a specific society. The sample tests of this research by the Venice Commission contained such questions as 'Does the public government guarantee the counter to the arbitrariness and abuse of the authorities (détournement de pouvoir)?'[58] It urges confirmation of the interpretation of the rule of law as:

> The set of principles, institutions and procedures (which are similar but not always identical). Since the experience and traditions of the lawyers from different countries of the world (characterised by different political and economic systems) prove their importance for the protection of a human against arbitrary power of the state and give a person an opportunity to possess their human dignity,[59] as well as readiness to introduce and apply such principles, institutions and procedures.

When the efficiency of the prevention of power abuse is studied, this issue concerns principal provisions for:

54 Bingham (n 12).
55 Venice Commission (n 19, 2019) 31.
56 ibid.
57 ibid.
58 Holovatyi (n 18) 25.
59 ibid 92.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

> Administering power which leads to clearly unfair, unjustified irrational and despotic decisions. It should be treated as the breaching of the rule of law as well as the wildness of the executive authorities while administering discretionary power contradicting the rule of law. That is why, in order to provide some protection from the arbitrariness, legal acts should identify the extent of each discretionary responsibility and power. [60]

The Ukrainian national legal system guarantees the provision as follows: 'discretionary power abuse should be subject to court or any other independent control, while the available legal tools should be clear and precise'.[61] Relevant duties connected with the reproduction of such provisions in the legislation are still granted to the state.

In general, sample tests as well as the whole investigation, called by the author 'The Rule of Law Checklist', use the prevention of discretionary power abuse as the basic principle for the restriction of pubic power and its independent control. It is aimed at the practical application of the need for the assessment of the state of the rule of law in specific countries, rather than a factor for decision-making.

5 PROPOSALS OF THE CONSTITUTIONAL COURT OF UKRAINE REGARDING NATIONAL CONTROL TOOLS FOR ACHIEVING THE EFFECTIVENESS OF THE RULE OF LAW

At the same time, the interpretation of the restriction of the government institution powers (even in case of the lack of its final term identifier) are actively disputed in 'significantly different systems of state and law'[62] of former socialist countries of Central and Eastern Europe. At first they are used for the value of the exact implementation of the laws and are supported by daily social practices. The arrival of the opportunity to agree upon the universal components of the rule of law, as well as Rechtsstaat/Etat de Droit and other traditions of the restriction of government institutional power, allows the formulation of the requirement for arbitrariness prohibition when it becomes the content component or practical aspect of relevant concepts (doctrines).

Being combined with some other criteria (parameters), however, prescribed by the Rule of Law Checklist to the prevention of power abuse, the restriction of institutional power is being used as a delicate tool to assess the state rule of law, especially in countries where many people identified this principle, if not with the rule of law then at least with the principles of a legal state.[63] Anticipating the arrival of 'common approaches to the basics which will define the face of the national legal system'[64] and being aware that the rule of law requires its implementation in law-making and law-enforcing activities at the state level, providing some mechanisms for ensuring control over state power use and human protection against arbitrary actions of the state authorities,[65] some countries claim the rule of law to be a normative ideal. Every legal system should strive to it.

60 ibid 25.

61 ibid.

62 Venice Commission (n 19, 2019) 28.

63 V Veremko, 'Standard for the Main Principle: The Standards for the Rule of Law are Set: now in Ukrainian' *Zakon i Biznes* (Kyjiv 1–7 July 2017).

64 ibid.

65 Decision No 1-p/2018 in Case No 1-6/2018 (Constitutional Court of Ukraine, 27 February 2018) <https://zakon.rada.gov.ua/laws/show/v001p710-18> accessed 30 April 2022; Decision No 6-p/2019 in Case No 1-152/2019(3426/19) (Constitutional Court of Ukraine, 20 June 2019) <https://zakon.rada.gov.ua/laws/show/v006p710-19> accessed 30 April 2022.

It should be treated as a universal and integral legal principle containing such components as the principle of legality, the principle of separation of powers, the principle of popular sovereignty, the principle of democracy, the principle of legal certainty, and the principle of a fair trial.[66] In order to support the ruling of the Constitutional Court in June 2019 and January 2020, the awareness of the necessity to implement the rule of law into law-making and law-enforcing activities and restrict government authority power in their arbitrary actions with 'priorly regulated and announced rules'[67] is subordinated to the main purpose of the rule of law. These rules enable us 'to foresee the measures to be taken in a specific legal relationship', [68] as well as the opportunity of the subject to enforce the law. A person will get the opportunity 'to forecast and plan their actions and to expect predictable results.'[69] The main purpose of the rule of law is the restriction of state power and ensuring against the arbitrary interference of the state and its authorities in specific spheres of human life.[70]

It should be noted that the principle of the rule of law guaranteed by the Constitution of Ukraine[71] actually stipulates, quite acceptable from the viewpoint of a person, a guaranteed right to appeal the state actions in the court, and state obligations not to take discretionary actions.[72]

The specific features of judicial control over the constitutionality of state interference in human social rights, defined by the Judge of the Constitutional Court of Ukraine Vasyl Lemak, were set in view of the fact that the rulings on social rights actually concern the redistribution of resources, which are always limited. In this case primary attention should be paid to balancing out the individual interests of every person which can be arbitrarily infringed as a result of an unacceptable reduction of standards caused by meeting the taxpaying public's interests. [73]

Lemak asserts the necessity of singling out a set of criteria to evaluate the constitutionality of state interference in human social rights in order to 'provide the law-maker or government having constitutional authority with the possibility to regulate the process of exercising social rights',[74] and doing it 'non-arbitrarily'.[75] According to the Judge of the Constitutional Court, the law-maker

> 'Can regulate the volume and mode of the exercise of social rights. However, he is not able to deny them or restrict their content in critical and discretionary ways. Thus, arbitrariness is prohibited by the means selected for regulation'.[76]

Their trial and testing are inevitable from the viewpoint of their constitutionality. For this purpose, rationality and proportionality tests in their classical formulation provide a sufficient

66 Decision No 1-p/2020 in Case No 1-5/2018(746/15) (Constitutional Court of Ukraine, 23 January 2020) <https://zakon.rada.gov.ua/laws/show/v001p710-20> accessed 30 April 2022.

67 Decision No 6-p/2019 in Case No 1-152/2019(3426/19) (Constitutional Court of Ukraine, 20 January 2019) <https://zakon.rada.gov.ua/laws/show/v006p710-19> accessed 30 April 2022.

68 ibid.

69 ibid.

70 ibid.

71 Constitution of Ukraine (n 39) pt 1 art 19, pt 2 art 55, pt 3 art 8, 56.

72 Decision No 1-p(II)/2021 in Case No 3-333/2018(4498/18) (Constitutional Court of Ukraine (Second Senate), 7 April 2021) <https://zakon.rada.gov.ua/laws/show/va01p710-21> accessed 30 April 2022.

73 Dissenting Opinion of the Judge of the Constitutional Court of Ukraine V Lemak concerning the Decision of the Constitutional Court of Ukraine (Second Senate) of 7 April 2021 No 1-p(II)/2021 <https://zakon.rada.gov.ua/laws/show/na01d710-21#n2> accessed 30 April 2022.

74 ibid.

75 ibid.

76 ibid.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

legal and methodological basis for the rulings of the Constitutional Court of Ukraine in cases of constitutional complaints. The testing of other means to infringe other human rights should also take place. This way the directionality of arbitrariness prevention as the standard requirement for the respect and assertion of human rights, and its subordination to the achievement of fair balance of private and public interests is continuously confirmed.

The Ruling of the Constitutional Court of Ukraine of June 2020 stresses the importance of exercising the first component of the Ukrainian rule of law formula as the foundation of the national constitutional system. According to which "the rule of law in Ukraine" is acknowledged at both international and national levels. While the precise definition of the second component, taking into account 'the imperative nature of its efficiency, is still sought'.[77]

First, this definition deals with 'the set of national institutions, mechanisms and procedures mandatory for the person's ability to possess human dignity and protect themselves against the state (its authorities and officials) arbitrary actions' 2020).[78] It actually promotes the idea of instrumental application of arbitrariness prevention and its practical combination with some other standard requirements for the needs of the rule of law state assessment in Ukraine.

6 CONCLUSIONS

Belonging to the contemporary world and being under significant challenges and threats requires the efficiency of democratic and legal traditions and institutions. That is primarily explained by the need for the restoration and promotion of the appropriate respect for human dignity in the countries where traditions of authoritarian or totalitarian states are still rather strong. They are complete opposites to the constitutional provisions of both private and public autonomy of human rights. The solution is achieved due to the efforts of Albert Dicey, Thomas Bingham and other outstanding philosophers, lawyers and judges of modern times. It is based on the awareness of the ideal and value or constitutional principle of the rule of law. It is derived from the actualisation and concretisation of arbitrariness prevention being combined with other typical principle components. Gradually, it contributes to an up-to-date control and monitoring toolkit directed towards the provision of its practical applicability. It requires the concentration of the existing mechanisms of providing control over the use of power by the state and human protection against arbitrary actions of the state authorities. It does not contradict the arguments in favour of this mechanism subordination to the requirement for arbitrariness prevention in the context of the perception of the rule of law as some normative ideal. Each legal system should strive towards it. It is also treated as the universal and integral principle of law. In the definition of one of the components of the Ukrainian formula of the rule of law as the foundation for the national constitutional system, the Constitutional Court of Ukraine, taking into account the imperative nature of the efficiency of the rule of law principle, refers to the set of national institutions, mechanisms and procedures mandatory for the person's ability to possess their dignity and protect themselves against the arbitrary actions of the state (its authorities and officials).

77 Decision No 5-p (II)/2020 in Case No 3-189/2018(1819/18) (Constitutional Court of Ukraine (Second Senate), 18 June 2020) <https://zakon.rada.gov.ua/laws/show/va05p710-20> accessed 30 April 2022.

78 ibid.

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Research Article

REGULATION OF PUBLIC SERVICES IN THE ADMINISTRATIVE CODE OF ROMANIA: CHALLENGES AND LIMITATIONS

Cătălin-Silviu Săraru

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ABSTRACT

Background: *In 2019, in Romania, a legislative event of special importance took place – the adoption of the Administrative Code. The scientific problem addressed in this article refers to the way in which the recently adopted Code realises the general regulation of public services respecting the best practices in order to create a good administration that is flexible and adaptable to the constantly changing needs of citizens today.*

Methods: *This article investigates how the general regulation of public services in the Administrative Code is realised, taking into account the trends manifested in the field at the EU level and in comparative law. The categories of public services with which the EU operates*

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(services of general economic interest, non-economic services, and social services of general interest) and the concept of universal service are highlighted. Then, the principles of organisation and functioning of public services in France, Germany, Italy, Spain, and the UK are investigated. In a separate section, the challenges and limitations in the regulation of local public services are analysed critically against the Administrative Code of Romania, starting from the regulation of the EU and the good practices observed in comparative law.

Results and Conclusions: *At the end of the article, I proposed we use the observations resulting from research on the Administrative Code to increase the degree of administrative convergence with the other member states of the EU*

Keywords: *public service, administrative law, Administrative Code, EU, comparative law*

1 INTRODUCTION

The scientific problem addressed in this article refers to the way in which the recently adopted Administrative Code in Romania realises the general regulation of public services, respecting the best practices in order to create a good administration that is flexible and adaptable to the constantly changing needs of citizens in the 21st century. In order to research this topic, the article uses a complex structure, focusing on the following scientific aspects:

- underlining the need to codify the administrative law norms in Romania and highlight the steps taken to adopt the Administrative Code;
- research into public services in EU legislation to unravel the typology and features of regulated public services and how the principle of the priority of EU law over national law is respected (provided by Art. 148 (2) of the Constitution of Romania).
- analysis of key elements of public services in comparative law in France, Germany, the UK, Spain, and Italy to observe regulatory trends and examples of good practice.
- critical research into the challenges and limitations in the regulation of public services through the Administrative Code in Romania, starting from the regulation of the EU and from the good practices observed in comparative law.
- conclusions regarding the aspects that should be improved in the general regulation of public services through the Romanian Administrative Code.

The article deals with a topic of maximum novelty, highlighting for the first time aspects regarding public services in the Romanian Administrative Code, which was recently published in the context of EU regulations and comparative law.

The objective of the research is to see how the regulation of public services in the Romanian Administrative Code responds to the modern challenges launched at the level of the EU and in states with experience in providing services of general interest.

In the present research, I have used the comparative method, the historical method, and the logical method. I considered that only by interweaving these methods can we answer the essential questions of any research: *When? How? Why? Quo vadis?* Through the comparative method, I analysed the doctrine, jurisprudence, and legislation of the member states in the EU. Using the principle of functionality, I tried to identify the substance of the legal rights and obligations recognised and imposed in different systems. With the help of the historical method, I analysed the institution from an evolutionary perspective. Legal logic was used in the legal reasoning to find solutions adapted to the needs of citizens.

2 ADOPTION OF THE ADMINISTRATIVE CODE IN ROMANIA

Romania adopted the Administrative Code through the Government Emergency Ordinance No. 57/2019,[1] which entered into force on 5 July 2019. Romania thus joined the countries that have an administrative codification.

In Romania, until the adoption of the Administrative Code, the legal norms that formed the branch of administrative law, unlike other branches of law that were codified (the norms of the civil law are systematised within the Civil Code, the norms of the civil procedural law within the Code of Civil Procedure, the norms of the criminal law within the Criminal Code, the norms of the criminal procedural law in the Code of Criminal Procedure, the norms of the labour law in the Labor Code), were found in disparate normative acts and not in a unitary code that would ensure unity and cohesion based on common principles, the unity of the regulatory method, and the precision and clarity of the rules.[2]

The adoption of the Administrative Code represents a legislative event for Romania of great importance, and we appreciate, along with other authors, that it will stimulate interest and also motivate other states where we find the same natural concerns regarding systematising the legislation.[3]

The adoption of an Administrative Code in Romania was a goal for over 100 years, underlined by the great theorists from the interwar period: Paul Negulescu, Anibal Teodorescu, and Constantin G. Rarincescu. Administrative coding has a long-standing tradition in European countries. Thus, many countries have imposed general administrative codifications: Austria – 1925, Belgium – 1979, Denmark – 1985, Germany – 1976, Hungary – 1957, the Netherlands – 1994, Poland – 1960, Portugal – 1991, and Spain – 1958.[4]

In France, there is no single, general administrative code, but the subject of administrative law is codified in several codes, including the *Code des communes,* the *Code du domaine de l'Etat,* the *Code de l'expropriation pour cause d'utilité publique,* the *Code général des collectivités territoriales,* the *Code général de la propriété des personnes publiques,* and the *Code de justice administrative*.

Recently, at the EU level, the Research Network on EU Administrative Law – (ReNEUAL) has elaborated the draft of the *ReNEUAL Code of administrative procedure of the European Union*.[5] The project was presented in the plenary of the European Parliament and was the basis of the European Parliament Resolution of 15 January 2013, which asked the European Commission to present a proposal for an act on the administrative procedure of the EU [2012/2024(INL)].

The codification of the norms that regulate the action of the public administration presents an undeniable advantage for citizens, who will find regulated in a single normative act all the rights and obligations that fall within the content of the legal relation of administrative law.[6]

1 Published in the Official Gazette, Part I No. 555 of 5 July 2019.

2 C-S Săraru, Administrative Law in Romania (ADJURIS – International Academic Publisher 2019) 25-27.

3 NT Godeanu, 'Aspects regarding the impact of the Administrative Code on the specialized central public administration in Romania. Special attention to the Ministry of National Education' (2018) 8 Juridical Tribune – Tribuna Juridica (Special Issue) 213.

4 C-S Săraru, European Administrative Space – recent challenges and evolution prospects (ADJURIS – International Academic Publisher 2017) 110.

5 HCH Hofmann, JP Schneider, J Ziller, DC Dragos, Codul ReNEUAL de procedura administrativa a Uniunii Europene (Universul Juridic 2016).

6 Săraru (n 5) 26.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

The administrative codification, as expressed in the literature, must ensure in a unitary conception: the rational organisation of the entire specialised apparatus of the public administration in order to increase its efficiency; the precise establishment of the rights and obligations of civil servants and of their responsibility for the acts of service; citizens' knowledge of their rights and obligations as subjects of legal relationships with the public administration.[7]

The doctrine also highlights the difficulties raised by the codification of administrative law:[8]

- the diversity and heterogeneous nature of the matters that constitute the object of regulation of administrative law;
- the large number of competent public authorities to publish administrative rules;
- the multitude of normative texts that regulate the activity of the public administration;
- the specific of the public administration, the main object of regulation of the administrative law, which is in a continuous state of transformation in order to be able to face the new challenges of social reality.

After 1990, the concerns for administrative codification determined the elaboration in 2000-2003 by specialists in the field of public administration within the Regional Training Center for Continuing Public Administration in Sibiu, in collaboration with the Academy of Civil Servants in Germany of two draft codes: the *Administrative Code*, which regulates matters of substantive law, and the *Code of Administrative Procedure*, which contains aspects of contentious and non-contentious procedure. These projects were subsequently analysed within the Institute of Administrative Sciences 'Paul Negulescu' (the Romanian national section of the International Institute of Administrative Sciences) and then within working groups set up over time by the relevant ministry (the working groups for the finalisation of the draft of the Administrative Code and the elaboration of the draft of the Administrative Procedure Code constituted by the Order of the Minister of Regional Development and Public Administration No. 2394/2013). In 2008, the Government approved *the preliminary theses of the draft Administrative Procedure Code* through Government Decision No. 1360/2008,[9] and recently, *the preliminary theses of the draft Administrative Code* were approved by Government Decision No. 196/2016.[10] Unfortunately, we find that these codes have not been adopted so far, although they are required by theorists and practitioners of administrative law.

The Administrative Code adopted for the first time in Romania in 2019 regulates the general framework for the organisation and functioning of public administration authorities and institutions, staff status within them, administrative responsibility, and public services, as well as some specific rules regarding public and private property of the state and of the administrative-territorial units.

The Administrative Code was not free of criticism. Among the issues contended by critics were the politicisation of the public servants working in public administrations, the promotion of the 'governing program' of the ruling party among the sources of legality for the whole public administration alongside laws and secondary legislation, and the granting

7 IM Nedelcu, 'Considerații privind necesitatea adoptării unui Cod de procedură administrativă cu trimiteri la instituții juridice civile' (2006) 2 Revista de Științe Juridice 116; M Anghene, 'Necesitatea codificării normelor de procedură administrative' (1973) 11 Revista Română de Drept 62; L Vișan, 'Necesitatea codificării normelor de procedură administrative' (2005) 2 Revista de Drept Public 71.

8 V Vedinaș, Drept administrativ (9th edn, Universul Juridic 2015) 79; Săraru (n 5) 26.

9 Published in the Official Gazette, Part I No. 734 of 30 October 2008.

10 Published in the Official Gazette, Part I No. 237 of 31 March 2016.

of special pensions for mayors and members of city councils and the limitation of liability of public servants for illegal administrative acts.[11]

3 PUBLIC SERVICES IN THE LEGISLATION OF THE EU

Public services are enshrined in the *acquis communautaire* and legal literature at the level of the EU under the name of services of general interest.[12] The legislation of the EU refers to three categories of services of general interest: *services of general economic interest*, *non-economic services*, and *social services of general interest*.

Art. 14 of the Treaty on the Functioning of the European Union (TFEU) emphasises the place occupied by the **services of general economic interest** within the common values of the Union, as well as their role in promoting social and territorial cohesion of the Union. The EU and the member states ensure the functioning of these services, within the limits of their competences and within the scope of the treaties, on the basis of principles and conditions that allow them to carry out their missions.

The Protocol No. 26 'On services of general interest' in the TFEU specifies in Art. 1 the common values of the Union within the meaning of Art. 14 of the TFEU:

- the essential role and the wide discretion of national, regional, and local authorities in providing, commissioning, and organising services of general economic interest as closely as possible to the needs of the users;
- the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social, or cultural situations;
- a high level of quality, safety, and affordability, equal treatment, and the promotion of universal access and of user rights.

The *Charter of Fundamental Rights of the EU*[13] shows in Art. 36 that the Union recognises and respects access to services of general economic interest, as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

Services of general economic interest are provided for a fee (e.g., postal services). They are subject to European competition and internal market rules, according to the provisions of the Commission staff working document: 'Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest'.[14] If it is necessary to protect the access of citizens to some basic services, derogations from these rules may apply.

In Art. 2 of Protocol No. 26, it is noted that the provisions of the Treaties do not affect the competence of the member states regarding the provision, commissioning, and organisation of non-economic services of general interest. These services are not subject to specific European rules on competition and the internal market. There are such non-economic services – police, justice, and compulsory social security systems.

11 DC Dragoș, R Vornicu, 'Tendencies and Developments in Romanian Administrative Law' in J-B Auby (ed), The future of administrative law (LexisNexis 2019) 155.

12 D Focșăneanu, C Șuța, C Tatu, M Popescu, 'Serviciile publice. Consideraţii asupra legislaţiei şi practicii comunitare în domeniu, în contextul elaborării proiectului codului administrati' (2011) 1(28) Revista Transilvană de Ştiinţe Administrative 32.

13 Published in OJ C 326, 26.10.2012.

14 Brussels, 29 April 2013 SWD (2013) 53 final/2.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
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The EU carries out, in the pursuit of its objectives, numerous policies which are either in its exclusive competence or are performed as common or supportive one in relation to the member states.[15] One of the most important policies of the EU is the social policy regulated by the TFEU in Title X of Part III. An important role in the realisation of social policy is played by social services of general interest, which can have both an economic and a non-economic character. The development of the concept of social services of general interest was achieved at the level of the EU through two Commission Communications: COM (2006) 177 final of 26 Aril 2006 'Implementation of the Community Lisbon program: Social services of general interest in the European Union' and COM (2007) 725 final of 20 November 2007 'Services of general interest, including social services of general interest: a new European commitment'.[16] Social services of general interest respond to the needs of vulnerable citizens and are based on the principle of solidarity and equal access. These include social security systems, employment services, social housing systems, etc.

In 2011, the European Commission adopted the Communication 'A Quality Framework for Services of General Interest in Europe'.[17] The Commission's approach to providing a quality framework was based on three strands of action: first, increasing clarity and legal certainty regarding the EU rules that apply to these services; second, providing the tools that enable member states to ensure that citizens have access to essential services and reviewing the situation on a regular basis; third, promoting quality initiatives in particular for social services which address particularly important needs.

EU law uses the concept of universal service when setting the requirements designed to ensure that certain services are made available to all consumers and users in a member state, regardless of their geographical location, at a specified quality and, taking account of specific national circumstances, at an affordable price (Communication from the European Commission 'A Quality Framework for Services of General Interest in Europe').

The EU has adopted regulations establishing a specific set of rules for the provision of universal service in all member states as an essential component of market liberalisation of service sectors, such as electronic communications, post, and transport. These regulations include, for example, Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services.[18]

4 PUBLIC SERVICES IN COMPARATIVE LAW

At the beginning of the 20th century, under the influence of industrialisation, urbanisation, and trade union movements, the role of the state often shifted from an authoritarian and repressive one to that of a social actor and service provider. In France, the *Ecole du service publique* is represented by Léon Duguit, Gaston Jèze, and Roger Bonnard, who conceived of the state as the whole of public services.[19]

In French law, a distinction operates between the public service and the activity of general

15 T Malatinec, J Kyjovský, 'European Grouping of Territorial Cooperation – a legal form supporting cross-border cooperation in the European Union' (2019) 9(1) Juridical Tribune – Tribuna Juridica 261.

16 Focşăneanu, Şuţa, Tatu, Popescu (n 13) 34.

17 Brussels, 20 December 2011 COM (2011) 900 final.

18 Universal Service Directive published in Official Journal L 108, 24/04/2002, as amended.

19 L Duguit, Traité de droit constitutionnel (3rd edn, Ancienne Librairie Fontemoing & C 1927); G Jèze, Les principes généraux du droit administratif (3 volumes): vol. 2 – La notion de service public, reedited (Dalloz 2004); R Bonnard, Précis de droit administratif (4th edn, Librairie générale de droit et de jurisprudence 1943).

interest.[20] Thus, for example, the management of the private domain (including financial holdings) or the maintenance of churches by public authorities are simple activities of general interest, while hospitals or universities perform services of public interest.[21]

Louis Roland lays down certain rules (principles) that apply only to the public service: *the principle of continuity* of provision, *the principle of equality* which prohibits discrimination between users of the service, *the principle of adaptability* to the current needs of users, and the *principle of neutrality,* which shows that those who provide the public service must refrain from communicating their own political and social opinions.[22]

The French legislation and doctrine operate the distinction between the public services of an economic, commercial character (the provision of public utility services against a tax) and non-economic public services (the public judicial service, the public order assurance service through the police, etc.). The management of public services of economic character can be delegated, usually to private operators through concession contracts or through a mixed economy company.[23] The French Constitutional Council has shown that the national public services which have their basis of existence in the provisions of a constitutional nature ('*services publics constitutionnels*') cannot be subject to privatisation (*Décision n° 86-217 DC/18 septembre 1986, Loi relative à la liberté de communication; Décision n° 87-232 DC/7 janvier 1988, Loi relative à la mutualisation de la Caisse nationale de crédit agricole; Décision n° 96-375/9 avril 1996, Loi portant diverses dispositions d'ordre économique et financier*). However, in recent case law, it is appreciated that the sovereign function achieved by the constitutional public services can be broken down into core functions and annexe functions of a technical nature, which may be entrusted to private persons (*Décision n° 2002-461 DC/29 août 2002, Loi d'orientation et de programmation pour la justice*). Thus, for example, the Constitutional Council has recognised that Art. 49 of the Law 'On guidance and programming for justice' (*Loi n° 2002-1138 du 9 septembre 2002 d'orientation et de programmation pour la justice, Journal officiel de la République française n° 211 du 10 septembre 2002*), which allows the entrustment to the private environment of the tasks of electronic supervision of the persons under judicial control, takes into account only 'the technical benefits removable from the sovereignty functions' (*Décision n° 2002-461 DC/29 août 2002, Loi d'orientation et de programmation pour la justice*). The same is true in the case of Art. 53 of the Law 'On immigration' (*Loi n° 2003-1119 du 26 novembre 2003, relative à la maîtrise de l'immigration, au séjour des étrangers en France et à la nationalité, JORF n° 274 du 27 novembre 2003*), which allows the entrustment to the private environment of the armed transport of the detained persons in/from the detention centres (*Conseil Constitutionnel,* **Décision n°** *2003-484 DC/20 novembre 2003, Loi relative à la maîtrise de l'immigration, au séjour des étrangers en France et à la nationalité*).

In the UK, the model of agencies with managerial autonomy was imposed starting with Thatcher's government, but under the tutelage of the various ministries and local authorities through which the public services were managed. The agency model, specific to the British administration, is based on the development of a strong and competitive private sector as a basis for the provision of quality public services. Without this competitive private sector, the agency model would not be possible. The agency model favours efficiency in providing services, intertwines the areas of service provision with political authority, and highlights non-governmental actors as service providers.[24]

20 P Weil, Le droit administratif (15th edn, Presses Universitaires de France 1992) 62-64.

21 Ibid, p. 62.

22 Ibid, p. 63.

23 J-C Ricci, Droit administratif (13th edn, Hachette 2019) 101,102.

24 Săraru (n 3) 27.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

In the UK, the distinction is made between economic public services and non-economic public services. Through the Deregulation and Contracting Out Act 1994, ministers were empowered to adopt an order regulating the contractual delegation of public economic services.[25] In addition, Art. 71 (1) of this act stipulated the functions that could not be outsourced: a) exercising the jurisdictional functions; b) the attainment or restriction of individual freedoms; c) limitation of the exercise of the property right; d) legislative and regulatory functions. The distinction between core functions and annexe functions is discussed in the doctrine.[26] Thus, for example, one author points out that nothing prevents the management of the trade register or civil status from being entrusted to the private sector.[27]

In Germany, Forsthoff speaks for the first time in 1938 of the extension of the role of the state from the authoritarian function, which was initially exclusive, to that of a public service provider in which the social responsibility of the state is emphasised.[28] Thus, under the imperative of the 'welfare clause', the administration will set up municipal public utilities and public transport corporations and provide social and cultural services.

In time, the German doctrine distinguished between *Hoheitverwaltung* (administration as authority) and *Betriebsverwaltung* (administration as enterprise), a distinction similar to that between public functions and public services with which Italian and Spanish doctrine operate.[29] Through the *Hoheitverwaltung*, the royalist functions (*jus imperii*) of the state are realised, which are traditionally non-delegable (public security, defence, etc.). *Betriebsverwaltung* designates those activities that are usually carried out under private law and are outsourced. The German Fundamental Law explicitly prohibits the outsourcing of public functions exercised by *Hoheitverwaltung* (Art. 33 para. 4 of *Grundgesetz für die Bundesrepublik Deutschland*, GG).

In practice, the distinction was made between the core public functions, through which the exercise of power is performed by the public authority, and the annexed functions, understood as technical activities that can be outsourced to the private environment. Thus, for example, it was considered that 40% of the functions of a prison could be entrusted to the private sector without contravening the provisions of Art. 33 para. 4 of the Fundamental Law, such outsourcing being lawful as long as it has no direct connection with the conditions of execution of a court sentence – *Strafvollzug*.[30] Likewise, it was allowed to outsource the non-military fixed communications system of the Ministry of Defense.

In Germany, the contracting of public action is very advanced, allowing for the conclusion of some contracts of public law by which to replace the provisions of an administrative act.[31] Thus, the Law on the Federal Non-Contentious Administrative Procedure (*Verwaltungsverfahrensgesetz des Bundes* – VwVfG) of 25 May 1976 dedicates one of its parts (Part IV, Arts. 54-62) to public law contracts. The law shows in Art. 54 the fact that 'a law report in the field of public law can be founded, modified or cancelled by a public law contract (öffentlich-rechtlicher Vertrag), except for the rules of contrary law. In particular,

25 S Arrowsmith, The Law of Public and Utilities Procurement (Sweet & Maxwell 1996) 26, 27; M Freedland, 'Privatising Carltona; Part II of the Deregulation and Contracting Out Act 1994' (Spring 1995) Public Law 21.

26 P Cossalter, B du Marais, La private finance initiative (Institut de la Gestion Déléguée 2001) 40-42.

27 Freedland (n 26) 21, 23.

28 E Forsthoff, Die Verwaltung als Leistungsträger (Kohlhammer 1938) 25.

29 FG Falla, 'El concepto de servicio público en derecho español' (1994) 135 Revista de Administración Pública 12

30 C Wagener, 'Privatisierung im Justizvollzug – Ein Konzept für die Zukunft' (2000) 5 Zeitschrift für Rechtspolitik 169.

31 Săraru (n 3) 31.

the administrative authority may, instead of enacting an administrative act, conclude a public law contract with the person to whom the administrative act was intended'.

We note that the German Länder legislation in the field of public services is heterogeneous. Thus, in some Länder, it is forbidden to delegate the functions destined to achieve 'social welfare', such as waste management and treatment, and in others, the prohibition to entrust the private sector with sanitary and social activities, such as water distribution, is regulated. A trend observed in the Länder is to establish the local holding companies that allow financial compensation (*Querverbund*) for profitable and unprofitable public service activities.[32]

In Spain, the doctrine and the legislation (*Ley 7/1985, del Reguladora de las bases del régimen local* – 'RBRL', Boletín Oficial del Estado No. 80/3.04.1985 and then *Ley 7/2007, del Estatuto Básico del Empleado Público*, Boletín Oficial del Estado 13 April 2007) made a distinction between the public functions that involve the exercise of authority in order to achieve the general interests of the state and the local authorities (such as the functions of budgetary control and economic-financial management, accounting and treasury) and public services[33] comprising activities normally performed under private law and which are outsourced.

The management of the public services of a commercial character can be realised by delegation to the private environment through a contract of management of the public service. The category of public service management contracts comprises four forms of indirect management of public services: concession, *concierto*, interested management, and the mixed economy company (Art. 156 of *Ley 13/1995 de contratos de administraciónes públicas – LCAP, BOE 119, de 19 de mayo de 1995*). Regarding the limits on which the outsourcing of public services can be performed, the Law 'On public administration contracts' No. 13/1995 (LCAP) provides in Art. 63 that 'the state can indirectly manage, through the conclusion of contracts, all the services within its competence that have an economic content that allows them to be exploited by private entrepreneurs and which are not subject to the exercise of (exclusive) sovereign rights'.

Lately, at the level of the Spanish public authorities, there has been a tendency to adopt a 'contractual system' that will allow for the conclusion of partnerships between the public sector and the private sector regarding the management of public services of a commercial nature.[34]

In Italy, the legislation (Arts. 357 and 358 of the Italian Criminal Code) and the doctrine operate a distinction between the public functions that carry out non-delegable activities and the public services that include delegable activities. In the Italian doctrine, it has been appreciated that the public functions represent all the activities destined to perform the essential functions of the state (justice, public security, defence), while the public services are those activities that the state undertakes in order to achieve social welfare.[35]

The Italian legislation indirectly operates a distinction between core public functions and annexe functions. Thus, Legislative Decree No. 112/1999 (*Riordino del servizio nazionale della riscossione, in attuazione della delega prevista dalla legge 28 settembre 1998, n. 337*, *Gazzetta Ufficiale n. 97 del 27 aprile 1999*) opened the possibility of delegating by decennial concession of the functions annexed for collecting the taxes of any kind of companies.

32 G Marcou, 'Les modes de gestion des services publics locaux en Allemagne et le problème de l'ouverture à la concurrence' (1995) 3 Revue française de Droit administrative 476.

33 Falla (n 30) 12, 13; AK Frasquet, 'La necessaria concreciòn del contrato de gestiòn de servicios públicos. Espacial referencia al ámbito municipal' (1999) 279 Revista de Estudios de la Administración Local y Autonómica 177-211.

34 CC Marín, 'El nuevo contrato de colaboración entre el sector público y el sector privado' (2006) 132 Revista española de Derecho Administrativo 609-644.

35 U Pototschnig, I pubblici servizi (Casa Editrice Dott. Antonio Milani 1964) 169.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

At the local level in Italy, Legislative Decree No. 267/2000 'Regarding the unique text of the laws on the organization of local entities' (*Testo unico delle leggi sull'ordinamento degli enti locali – T.U.E.L., Gazzetta Ufficiale della Repubblica Italiana n° 227/28.09.2000*) operates a distinction between industrial activities (delegable) and non-industrial activities (non-delegable).

In Italy, the process of contractualising administrative action is very advanced, with some German influences being felt.[36] Thus, Law No. 241/1990 'Regarding the administrative procedure and the right of access to administrative documents' (*Legge 241/90 Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi* come *modificata dalla legge 15/2005 e dal decreto legge 35/2005*) allowed the conclusion of agreements (*accordi con gli interessati*) that determine the content of an administrative decision or to replace it (Art. 11), similar to the provision in German law.

5 CHALLENGES AND LIMITATIONS IN THE REGULATING OF PUBLIC SERVICES THROUGH THE ADMINISTRATIVE CODE IN ROMANIA

The Administrative Code adopted in Romania in 2019 consecrates Part VIII of the general regulation of public services. Over time, the diversity and specificity of public services have imposed a sectoral approach[37] through special legislation that contains specific rules for each service.

Thus are, for example, the Law 'On community services for public utilities' No. 51/2006,[38] Government Ordinance No. 71/2002 'Regarding the organization and functioning of the public services for the administration of the public and private domain of local interest',[39] the Law 'On the water supply and sewerage service' No. 241/2006,[40] the Law 'On the public lighting service' No. 230/2006,[41] the Law 'On sanitation services of localities' No. 101/2006,[42] the Law 'On the public transport services for persons in the administrative-territorial units' No. 92/2007,[43] the Law 'On the public service of thermal energy supply' No. 325/2006,[44] and the Law 'On electricity and natural gas' No. 123/2012[45] regulating the distribution services of electricity and natural gas. In the face of this multitude of special laws regulating various types of public services, the doctrine demanded common organisation and functioning principles through a general regulation. The Administrative Code has the role of responding to this wish.

At the level of the EU, as we have shown above, a functional approach was chosen regarding the definition of public services, the central element being represented by the notion of 'general interest'. In the Romanian doctrine, taking into account the practice of the EU, it was recommended to use a functional approach in the definition of public services in the draft of Administrative Code so as to ensure a uniform and easy application of the norms to

36 Săraru (n 3) 36.
37 Focşăneanu, Şuţa, Tatu, Popescu (n 13) 38.
38 Republished in the Official Gazette, Part I No. 121 of 5 March 2013, as subsequently amended.
39 Published in the Official Gazette, Part I No. 648 of 31 August 2002, as subsequently amended.
40 Republished in the Official Gazette, Part I No. 679 of 7 September 2015.
41 Published in the Official Gazette, Part I No. 517 of 15 June 2006.
42 Republished in the Official Gazette, Part I No. 658 of 8 September 2014
43 Published in the Official Gazette, Part I No. 262 of 19 April 2007, as subsequently amended.
44 Published in the Official Gazette, Part I No. 651 of 27 July 2006, as subsequently amended.
45 Published in the Official Gazette, Part I No. 485 of 16 July 2012, as subsequently amended.

be adopted at the European level in this field.[46] The Administrative Code takes into account these observations and defines the public service in Art. 5, letter kk) as the activity or the set of activities organised by a public administration authority or by a public institution or authorised/delegated by it in order to satisfy a general need or a public interest regularly and continuously.

The structures responsible for the provision of public services are set up by the central public administration authorities by means of normative acts in the case of public services of national interest, by the authorities of the local public administration, and by administrative acts in the case of public services of local interest (Art. 589 of the Administrative Code). Respecting the principle of symmetry of legal acts, the termination of public services will be done by the public authorities that established them in the situation where the service no longer responds to a need of public interest by an act of the same level as the one by which it was established, following public consultation (Art. 595 of the Administrative Code).

The Administrative Code regulates the specific principles applicable to public services that were previously deduced from the doctrine. Thus, Art. 580 (1) of the Administrative Code shows that the setup, organisation, and delivery of public services are carried out in accordance with the principles of transparency, equal treatment, continuity, adaptability, accessibility, responsibility, and the provision of public services to quality standards. We note that the enumeration of the legislative text lacks a very important principle underlined by the French[47] and Romanian[48] legal doctrine, namely the *principle of neutrality*, which shows that those who provide the public service must refrain from communicating their own political, social, and political opinions – public services are organised and function to serve general interests, not merely interests for the benefit of some.

A special merit of the Administrative Code is that it establishes for the first time the principle of providing high-quality public services and establishes the obligation for public administration authorities and bodies providing public services to comply with the quality and/or cost standards established for public services.

Another positive aspect is the consecration through Art. 583 of the Administrative Code of the obligation to comply with the EU legislation on services. Thus, it is shown that 'the establishment of the component activities, the mission, the award procedure, the compensation, as the case may be, and the provision of public services are carried out in accordance with the standards and requirements established by the relevant legislation of the European Union applicable in the Member States'. This has been implemented to emphasise the principle laid down in Art. 148 (2) of the Constitution of Romania of the priority of the law of the EU over the contrary provisions of the internal laws, in compliance with the provisions of the act of accession.

In Art. 586, the Administrative Code operates the distinction between activities of general interest and public services, having as a criterion the fact that the public service character of an activity or of a set of activities is recognised by normative acts.

The normative act by which a public service is regulated must, according to Art. 587 of the Administrative Code, contain at least the following elements: the activity or activities constituting the respective public service; the objectives of the public service; the type of

46 Focşăneanu, Şuţa, Tatu, Popescu (n 13) 38.

47 J-P Colson, Droit public économique (3rd edn, Librairie générale de droit et de jurisprudence 2001) 107-111; J Fougerouse, Le droit administratif en schémas (Ellipses Édition Marketing SA 2008) 32-39.

48 C Manda, D Banciu, C Manda, Administraţia Publică şi Cetăţeanul. Structuri. Autorităţi. Informaţie publică (Technical Publishing House 1997) 73-74; M Văraru, Tratat de drept administrativ român (Editura Librăriei Socec & Co. 1928) 94-103.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

public service; the public service obligations, if applicable; the structure responsible for providing the public service; the management modalities; the sources of financing; the ways of monitoring, evaluating, and controlling the way of providing the public service; the sanctions; the quality and cost standards if they are established according to the law; other elements established by law.

In the Romanian legal doctrine prior to the entry into force of the Administrative Code, it was stressed that in order to harmonise with the legislation and practice at the level of the EU, it was necessary to introduce into the Romanian legislation the concepts of services of general economic interest and non-economic services of general interest.[49] The Administrative Code, in a positive approach, achieves this distinction between the two categories of services.

The services of general economic interest are defined by the Administrative Code in Art. 584 (1) as 'the economic activities that are carried out in order to satisfy a/some needs of public interest, which the market would not provide or would provide under other conditions, in terms of quality, safety, accessibility, equal treatment or universal access, without public intervention, for which the public administration authorities establish specific public service obligations'. The economic character of a public service is determined by the nature of the activities related to the service and by the way in which the activities are provided, organised, and financed.

The non-economic services of general interest are defined by the Administrative Code in Art. 585 as 'activities that are not economic in nature and are carried out in order to satisfy one/some needs of public interest directly by an authority of the public administration or by the bodies providing public services under its monitoring and control or mandated by it'.

Unfortunately, the Administrative Code does not contain general rules regarding the regulation of social services of general interest, although this would have been imposed, given the neglected importance of this sector and its role in the EU strategies that promote sustainable development and social progress. Thus, the TFEU refers in Title X of Part III to the Social Policy, which shows that the Union and the member states have as objectives the promotion of employment and the improvement of living and working conditions, allowing these to be harmonised in conditions of progress, adequate social protection, social dialogue, and human resources development that will foster a high and sustainable level of employment and combat exclusion.

Currently, in Romania, the field of social services of general interest is reserved only for the subsequent sectoral legislation, as in the Law 'On social assistance' No. 292/2011.[50] According to the provisions of Art. 27 (1) of Law No. 292/2011, social services represent the activity, or the set of activities realised to respond to social needs, as well as to the special needs of an individual, family, or group in order to overcome difficult situations, to prevent and combat the risk of social exclusion, to promote social inclusion, and to increase the quality of life.

Equally important are the medical services, which, unfortunately, are not mentioned in the Administrative Code. Health care is the main element of the social sphere and is of particular interest for ensuring human security as a determining factor in the quality of life of the population and the quality of medical services received.[51]

In Art. 590, the Administrative Code shows the modalities of management of public services: a) direct management; b) delegated management.

49 Focşăneanu, Şuţa, Tatu, Popescu (n 13) 38.

50 Published in the Official Gazette of Romania No. 905/2011 of 20 December 2011, as subsequently amended.

51 O Shevchuk, N Matyukhina, O Babaieva, A Dudnikov, O Volianska, 'The human right to security in the implementation of the concept of the "right to health protection"' (2021) 11(3) Juridical Tribune – Tribuna Juridica 536.

Direct management can be carried out by an authority of the public administration, by the structures with or without legal personality of it, or by the companies with integral social capital of the state or of the administrative-territorial unit established by the authorities of the public administration or other legal persons of private law, as the case may be, in compliance with legal provisions (Art. 591 (2) of the Administrative Code).

Delegated management is the management mode by which the provision of the public service is performed on the basis of a delegation act and/or authorisation from the competent public administration authority, in compliance with the provisions of the law on public procurement, sectoral procurement, and the concession of services, or by the bodies providing public services other than those that carry out direct management [a]Art. 592 (1) of the Administrative Code,.

The provision of services of general economic interest may be performed in accordance with Art. 593 (1) of the Administrative Code.

Unfortunately, the Administrative Code does not make the distinction between the core public functions, through which the exercise of power is performed by the public authority, and the annexed (accessory) functions, understood as technical activities that can be outsourced to the private environment, although the social reality demands this. Currently, references to the essential functions of exercising the prerogatives of the sovereignty of the state are carried out summarily in the Constitution (Title III – *Public authorities*). However, beyond these, it is often very difficult to make a distinction between the core functions and the accessory functions that guide the universal phenomenon of the 'privatisation' of public services. In the absence of such a distinction, it remains to establish empirically (legal and administrative practice) and doctrinally the criteria according to which some functions auxiliary to the sovereign functions may be entrusted by delegation to the private environment in order to increase the efficiency in the public activity.

Another negative aspect is that the Administrative Code does not provide general quality standards for universal services. The Code only indicates the compulsory existence of specific quality standards in the sectoral legislation for each public service separately (Art. 587 of the Administrative Code). The absence of general quality standards for the universal service determines a heterogeneity of solutions approached by the specialised legislation in the absence of a reference standard.

Finally, we note that, unlike Germany or Italy, the Administrative Code of Romania does not regulate the possibility of concluding agreements (contracts) that determine the content of an administrative decision or which are substituted in the matter of performing public services. The contract has the advantage that it is a more flexible instrument than the unilateral administrative act, allowing for individual solutions adapted to the needs of citizens.[52] Through such an administrative contract, priority is given to negotiation techniques, and the responsibility regarding the realisation of the public interest is externalised.

6 CONCLUSIONS

The emergence of the Administrative Code has meant progress, bringing stability, clarity, coherence, and legitimacy by unifying the legislation on public administration.[53] The Administrative Code facilitates the division of the roles and the collaboration between

52 C-S Săraru, Contractele administrative. Reglementare. Doctrină. Jurisprudență, (Bucharest: CH Beck 2009) 367.

53 Dragoș, Vornicu (n 12) 156.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
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the public and private actors in the realisation of public services, being an instrument of flexibility and of adaptability for the legislation, allowing it to react to the ever-changing economic and social environment. The regulation of public services in the Administrative Code of Romania generally takes into account the recent trends observed in the regulation in the fields of EU law and the comparative law of the European countries with legal-administrative traditions in the provision of public services.

However, there are some gaps in the regulation of the Administrative Code, as we have shown above, regarding the lack of regulation of the category of social services of general interest and the distinction between the core public functions through which the exercise of power is performed by the public authority and the annexe functions that can be outsourced to the private environment. By outsourcing, the traditional administrative structures are placed between hierarchy and market. The purpose of outsourcing is to improve the way public activities serve the interests of citizens. Further, the Administrative Code does not provide general quality standards for universal services and does not regulate the possibility of concluding agreements that determine the content of an administrative decision or which may be substituted. In order to increase the degree of administrative convergence between the member states of the EU, we consider it imperative to modify the Administrative Code in order to include these aspects.

The way in which the public services in a state are regulated shows the degree of democratisation, of being open to the needs of citizens, and of building the future administrative law based on the qualitative and quantitative increase of the intervention of the public power and the need to share the general interest between the state and the private actors – companies, associations of public utility, etc.[54]

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Research Article

IMPLEMENTATION AND PROTECTION OF THE RIGHT TO GENERAL WATER USE IN UKRAINE: MAIN THEORETICAL PROBLEMS AND CERTAIN ASPECTS OF JUDICIAL DISPUTE RESOLUTION

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Summary: 1. Introduction. – 2. Ensuring the implementation of the right to general water use. – 3. Features of using coastal protection strips as a prerequisite for implementing the right to general water use. – 4. The practice of resolving disputes regarding the right to protect general water use in Ukraine and abroad. – 5. Concluding Remarks.

Keywords: *environmental rights of citizens, the right to use water, the right to general use of nature, the right to general water use, water fund land, the use of coastal protection strips, judicial practice regarding protection of the right to general water use, court decisions on the removal of obstacles to exercise the right to general water use, on the termination of a lease agreement on the water object.*

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ABSTRACT

Background: *The extraction and use of natural resources are reasons for environmental problems all over the world. The article examines one environmental right – the right to general water use, and its interrelation with the use of coastal protection strips (water fund lands), as well as specific problems of judicial practice in terms of protecting this right. There is a direct or indirect interrelation between utilised natural objects when confirming the environmental rights of citizens at the level of current national legislation, who are given the opportunity to use natural resources to meet their own needs and be in a harmonious state with the environment as much as possible. Such an interrelation is also reflected in cases of general water use, which is impossible without involving the use of water fund lands, namely coastal protective strips.*

Methods: *With the help of scientific methods, the article uses and analyses international acts, data of international organizations, conclusions of scientists, and legal scientific literature. The legal regulation for using coastal protection strips as a prerequisite for exercising the right to general water use has been investigated within the framework of a systemic approach, as well as analysis and synthesis.*

Results and Conclusions: *It is concluded that the lack of physical access to water bodies and non-compliance with the requirements regarding the proper water quality in water bodies, unfortunately, does not allow for the implementation of the right to general water use either properly or without harming the life and health of citizens.*

It is noted that in most instances, the result of court case consideration regarding protection of the right to general water use was the refusal to satisfy the claims due to the lack of reasoning and proper argumentation by the claimants, and to hold the decision against them. Claimants have to overcome a number of difficulties in order for their evidence to be recognised by the court as reliable and well-founded. The presence of certain deficiencies in the normative legal acts regarding the right to general water use plays a major role in this process.

In order to solve the aforementioned problems and improve water legislation, appropriate proposals in the form of changes and additions to the general provisions of the Water Code of Ukraine have been argued and proposed.

1 INTRODUCTION

While implementing the right to general use of nature, the principle stipulated in the Rio Declaration on Environment and Development[1] is carried out with the assumption that the care of people occupies a central place in order to ensure sustainable development. They have the right to a healthy and fruitful life in harmony with nature (principle 1). Unconditionally, the harmony of a human with nature is maintained as a result of deliberate human intervention on the environment when using natural resources and engaging in sustainable development activities. As noted in paragraph 10 Annex of the 7th Environment Action Programme 2020 – 'Living well, within the limits of our planet' Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union

1 Rio Declaration on Environment and Development' in United Nations, Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3–14 June 1992) (United Nations 1993) vol 1, 3 <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf> accessed 20 July 2022.

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Environment Action Programme 2020 'Living well, within the limits of our planet'[2]: to live well in the future, urgent, concerted action should be taken now to improve ecological resilience and maximise the benefits environment policy can deliver for the economy and society, while respecting the planet's ecological limits.

The right to general use of natural resources is one of the rights stipulated by the current legislation of Ukraine, which is provided to citizens in the course of their life activities to satisfy their own vital needs without excessive impact on or interference in the surrounding natural environment. The existence of an interrelation between natural objects and their influence on each other and on the life and health of people creates the need to minimise the anthropogenic impact on the environment, which has been repeatedly noted at the general theoretical scientific level.[3] The extraction and use of natural resources are reasons for environmental problems all over the world.[4] It is emphasised that economic development, social justice and environmental health are the three dimensions of sustainability and directly related to the use of natural resources. Sustainable use of natural resources requires the correct relationship between the minimisation of the impact on the environment and the promotion of long-term use of resources, while maximizing relevant social favorable conditions.[5]

According to paragraph d) part 1 of Art. 9 of the Law of Ukraine "On Protection of the Natural Environment"[6], every citizen of Ukraine has the right to the general and special use of natural resources. According to part 2 of Art. 38, the legislation of Ukraine guarantees citizens the right to general use of natural resources to meet vital needs (aesthetic, health, recreational, material, etc.) free of charge, without appropriating these resources to individuals, and granting appropriate permits, excepting restrictions stipulated by the legislation of Ukraine. That is, when exercising such a right, natural resources are used to meet the corresponding needs in compliance with the specified requirements, with the minimum possible negative impact and without restrictions that would not allow such an opportunity to be implemented regarding certain circumstances.

Therefore, the relevance of the chosen topic consists of the consolidation of opportunities at both the national and international legislative levels, allowing relevant entities to properly exercise the right to use natural resources, based on the rationality of intervention in the surrounding natural environment and care for the harmonious interaction of human and nature. Studying the regulatory and legal basis, scientific positions, and judicial practice, allow us to form conclusions for improving each of the identified areas of research.

2 Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 'On a General Union Environment Action Programme 2020 "Living well, within the limits of our planet" <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013D1386> accessed 20 July 2022.

3 Vitalii Pashkov and Maryna Trotska, 'Natural environment as component of public health: some aspects of its legal regulation' (2019) 72(2) Wiad Lek 261; Vitalii Pashkov, Maryna Trotska and Liudmyla Leiba, 'Factor of natural curative resources in context of legal regulation of medical rehabilitation' (2019) 61(1) Acta Balneol 49; Alla Sokolova and Maryna Cherkashyna, 'The legal regulation of the use of natural healing resources: the theory and practice of disputes resolution' (2021) 2(10) AJEE 144.

4 H Muilerman and H Blonk, Towards a sustainable use of natural resources (Stichting Natuur en Milieu 2001) 3 <https://ec.europa.eu/environment/enveco/waste/pdf/muilerman.pdf> accessed 20 July 2022.

5 Jennifer Bansard and Mika Schröder, 'The sustainable use of natural resources: the governance challenge' (IISD, 15 April 2021) 2–3 <https://www.iisd.org/system/files/2021-04/still-one-earth-natural-resources.pdf> accessed 20 July 2022.

6 Law of Ukraine No 1264-XII of 25 June 1991 'About protection of the surrounding environment' <https://zakon.rada.gov.ua/laws/show/1264-12#Text> accessed 20 July 2022.

2 ENSURING IMPLEMENTATION OF THE RIGHT TO GENERAL WATER USE

Before examining the regulatory and legal basis within the defined sphere of relations, let us note that in the list of environmental terms used by the European Environment Agency, the term water use is defined as the utilisation of water by end users for a specific purpose within a territory, such as for domestic use, irrigation or industrial processing.[7] In turn, according to part 1 of Art. 47 of the Water Code of Ukraine,[8] general water use is carried out by citizens to meet their needs (swimming, boating, recreational and sport fishing, drinking water for animals, taking water from water bodies without the use of structures or technical devices and from wells etc.) free of charge, without securing water bodies objects by individual persons and without the appropriate permits. The importance of the specified right is confirmed by the constant regulatory and legal improvement for its implementation (for example, the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Ensuring Unobstructed Access of Citizens to the Coast of Water Bodies for Public Water Use"[9]), as well as existing judicial practice at national and international levels.

That is, the right to general water use is connected to the definition of the right to general nature use, which is stipulated by the provisions of the Law of Ukraine "On the Protection of the Natural Environment" and is reflected through certain types of activities that are related to the satisfaction of relevant needs in compliance with specified requirements. Moreover, it is necessary to consider the specifics of such activity, for example, in accordance with part 2 of Art. 16 of the Law of Ukraine "On the Animal World"[10]: amateur and sport fishing is carried out in water bodies of general use within the limits of free catch established by law.

Before focusing on the needs, the satisfaction of which is the basis for the right to general water use, let us pay attention to the objects that are involved in their implementation. As a general rule, the right under investigation is carried out on water bodies (part 1 of Art. 47 of the Criminal Code of Ukraine). Certain types of rights to general water use are exercised on so-called general water objects (part 2 of Art. 16 of the Law on "Animal World", Art. 26 of the Law on "Fish Farming, Industrial Fishing and the Protection of Aquatic Bioresources"[11]). It should be emphasised that the concept of a water body is stipulated in Part 1 of Art. 1 of the Water Code of Ukraine, and there is no definition of a general water object in the specified laws and code. Meanwhile, the detailing of the procedure for exercising the right to general water use should be stipulated by subordinate legal acts – the rules to general water use, which determination belongs to the authority of the relevant councils (paragraph 7, part 1, Art. 9 and paragraph 3, part 1, Art. 10 of the Water Code of Ukraine). Such documents are being developed, namely, for example, in paragraph 1 of the Water Use Rules on the territory of the Korostyshiv City Council,[12] it is assumed that general water use can be carried out both on water objects of general water use and on water objects that are not of general use and do not require permissions.

7 'Glossary: List of environmental terms used by EEA' (European Environment Agency, 10 April 2017) <https://www.eea.europa.eu/help/glossary/semide-emwis-thesaurus/water-use> accessed 20 July 2022.

8 Code of Ukraine No 213/95-BP of 06 June 1995 'Water code of Ukraine' <https://zakon.rada.gov.ua/laws/show/213/95-%D0%B2%D1%80#Text> accessed 20 July 2022.

9 Law of Ukraine No 233-IX of 29 October 2019 'On the introduction of amendments to some legislative acts of Ukraine on ensuring unhindered access of citizens to the coast of water bodies for public water use' <https://zakon.rada.gov.ua/laws/show/233-20#Text> accessed 20 July 2022.

10 Law of Ukraine No 2894-III of 12 December 2001 'About Fauna' <https://zakon.rada.gov.ua/laws/show/2894-14#Text> accessed 20 July 2022.

11 Law of Ukraine No 3677-VI of 08 July 2011 'About fishery, industrial fishing and protection of water bioresources' <https://zakon.rada.gov.ua/laws/show/3677-17#Text> accessed 20 July 2022.

12 Judgment of the Korostyshiv city council No 362 of 18 May 2012 'Rules of water use on the territory of the Korostyshiv city council' <https://www.korostyshiv-rada.gov.ua/rehuliatorna-polityka/52-rishennya-miskoji-radi-za-2012-rik-2> accessed 20 July 2022.

Access to Justice in Eastern Europe
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Depending on the specific type of general water use, it is implemented either on all water bodies, or on water bodies of general use, etc. Therefore, taking into account the relevance of this issue at the legislative level, it would be appropriate to define the signs and concepts of "general water body".

Regarding the understanding of the needs related to the implementation of such activities, as noted in separate sources, the UN Watercourses Convention was the first water-related agreement introducing the term 'vital human needs', which has been defined as 'sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation'.[13] Accordingly, it is entirely appropriate to assume that the use of the above term in relation to human needs is intended to focus on the most pressing needs – to prevent starvation or death from lack of water.[14]

In addition, if we refer to the provisions of the legislation of European countries, for example, in part 1 of Art. 22 Law on water rights,[15] part 1 of Art. 32 Water Law[16] envisages the possibility of using relevant waters by anyone within the limits of the specified legislation. Paragraph 8 of the Water Act[17] establishes the general use of water. In turn, part 2 of Art. 32 of the Water Law indicates that the appropriate use of water serves to meet personal, domestic or agricultural needs, without using special technical devices, as well as for recreation, tourism, water sports and, under the conditions determined by separate provisions, recreational fishing.

It is prohibited to put restrictions on general water use, including restrictions on swimming and boating, recreational and sport fishing, and mooring to the shore in daylight due to the presence of land plots of coastal protective strips (beach zone) used by legal entities or individuals, except in cases stipulated by law (part 2 of Art. 47 of the Criminal Code of Ukraine). Relevant provisions are also contained in part 2 of Art. 49 Law on water rights. However, at the level of current legislation, there are cases in which such a right may be limited. Thus, part 1 of Art. 45 of the Water Code of Ukraine states that in the case of low water, the threat of epidemics and epizootics, as well as in other cases stipulated by law, the rights of water users may be limited, or the conditions of water use may be changed in order to ensure the protection of people's health and in other state interests. For example, part 5 of chapter II "Safety requirements for beaches, places of mass recreation of people on water bodies" on the Rules for protection of people's lives on water bodies of Ukraine[18] stipulates that the restriction, termination or prohibition of the use of water bodies for swimming, mass recreation of people, using small-sized/small vessels, engaging in relevant sports, tourism, or other recreational purposes is established according with the requirements of

13 International Law Commission, Draft articles on the law of the non-navigational uses of international watercourses and commentaries thereto and resolution on transboundary confined groundwater: Text adopted by the International Law Commission at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 222) (United Nations 2005) 110 <https://legal.un.org/ilc/texts/instruments/english/commentaries/8_3_1994.pdf> accessed 20 July 2022.

14 UN Watercourses Convention: Online user's guide (2012) art 10.1.1 <https://www.unwatercoursesconvention.org/the-convention/part-ii-general-principles/article-10-relationship-between-different-kinds-of-uses/10-1-1-vital-human-needs/> accessed 20 July 2022.

15 Law of the Swiss Confederation (Nidwalden) of 30 April 1967 'Law on water rights (Water Rights Law)' <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC083159> accessed 20 July 2022.

16 Law of the Republic of Poland of 20 July 2017 'Water Law' https://www.fao.org/faolex/results/details/en/c/LEX-FAOC181663> accessed 20 July 2022.

17 Law of the Republic of Austria of 16 October 1959 'Water Act 1959' <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC089407> accessed 20 July 2022.

18 Order of the Ministry of internal affairs of Ukraine No 301 of 10 April 2017 'Rules for protecting people's lives on water bodies of Ukraine' <https://zakon.rada.gov.ua/laws/show/z0566-17#Text> accessed 20 July 2022.

the Water Code of Ukraine - with mandatory notification of people through mass media, by installing special information signs and other methods.

Having considered a complex of issues related to challenges and threats to the national security of Ukraine in terms of ensuring the state's water security, taking into account the high level of risks for water bodies caused by significant pollution and depletion etc., the Council of National Security and Defense of Ukraine determined the main areas of activity for state power and local self-government bodies.[19] In particular: improvement of normative legal acts on ensuring the safety and quality of drinking water intended for human consumption; improvement of the procedure for keeping state records of water use, as well as control over the condition of water objects; ensuring proper control over compliance with the requirements of environmental legislation by enterprises that discharge wastewater into water bodies that are sources of drinking water supply; and development of measures aimed at ecological improvement of rivers, etc.

Therefore, when implementing the researched right, the proper condition of water bodies during their use is of great importance. In particular, the use of a water object is the process of using water in production for the purpose of obtaining products, for the economic and drinking needs of the population, the needs of hydropower, fish farming, water and air transport, for people's recreation, the organisation of beaches, places for mass recreation of people, the use of floating facilities, arrangement of water attractions, places for sports, physical and recreational activities, and places for amateur and sport fishing, etc. (paragraph 3, section "General Provisions" of the Rules for the Protection of People's Life on Water Bodies of Ukraine). Paragraph 11 section 1 "Safety requirements for beaches, places of mass recreation of people on water bodies" among other things, states that during the arrangement of beaches and places of mass recreation of people on water bodies, the following requirement must be observed: the water must meet the requirements of current sanitary standards.

Starting January 1, 2017, in accordance with the order of the Cabinet of Ministers of Ukraine of January 20, 2016 No. 94-r On recognition of acts of sanitary legislation, acts of sanitary legislation issued by central bodies of executive power of the Ukrainian SSR as having lost their validity and as not applicable on the territory of Ukraine, their officials who approved sanitary, sanitary-hygienic, sanitary-anti-epidemic, sanitary-epidemiological, anti-epidemic, hygienic rules and regulations, state sanitary-epidemiological standards and sanitary regulations are recognised as having lost their validity, including SanPiN 4630-88 "Sanitary rules and norms for the protection of surface waters from pollution". SanPiN 4630-88 determined the hygienic requirements and standards of water quality depending on the economic purpose of the reservoir and regulated various types of economic activity that could lead to pollution of surface reservoirs since the water quality standards in reservoirs consist of a set of permissible values of indicators of its composition and properties, within which the health of the population, favorable conditions for water use and the ecological well-being of the water body are reliably ensured. Unfortunately, there is still no legislative act to establish hygienic requirements and water quality standards for surface reservoirs, which will inevitably lead to catastrophic environmental consequences over time.

Thus, paragraph 1.5 of the Sanitary Rules and Norms for the Protection of Surface Water from Pollution states that: water bodies for economic, drinking and cultural and domestic purposes are considered polluted if the indicators of the composition and properties of water at the points of water use have changed under the direct or indirect influence of economic activities or domestic use and have become partially or completely unsuitable for water use by the population.

19 Judgment of the National Security and Defense Council of Ukraine of 30 July 2021 'About the state of water resources of Ukraine' <https://zakon.rada.gov.ua/laws/show/n0049525-21#Text> accessed 20 July 2022.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
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Therefore, the deterioration of the state of water in water bodies can be the result of various activities, but for a person who wants to exercise the right of general water use it will not be of significant importance, since regardless of the type of activity, if the water in the water body does not meet the specified requirements, a person will not be able to fully exercise this right.

Therefore, it is appropriate to turn to the analysis of regulatory legal acts, the prescriptions of which determine the competence of state bodies and local self-government bodies in the researched area. Thus, the provisions of the water legislation establish that the control over the use and protection of water and the reproduction of water resources is entrusted, for example, to the relevant bodies of local self-government (Art. 8-1, Art. 9, Art. 10 of the Water Code of Ukraine) and state authorities (chapter II "State management and control of water use and protection and reproduction of water resources"), but the specified provisions are of a general nature, without establishing specifically defined powers of these bodies within the outlined issues. At the legislative level, namely in the Water Code of Ukraine, it would be appropriate to clearly establish the algorithm of actions for the relevant bodies with the definition of the scope of their control and response when certain offenses are detected.

The introduction of the proposed additions should be considered expedient, especially considering the current provisions of the laws of Ukraine: On Local Self-government in Ukraine,[20] namely Art. 33, which emphasises that local self-government bodies exercise control over ensuring unobstructed and free access of citizens to the coast of water bodies and islands for public water use in accordance with the law and the Law of Ukraine On Local State Administrations,[21] where Art. 21 states that local state administrations exercise control over ensuring unobstructed and free access of citizens to the coast of water bodies and islands for general water use in accordance with the law. Thus, the proposed additions to the Water Code of Ukraine should be recognised as necessary, given that this code is the main normative legal act in the sphere of regulating water relations.

In turn, in order for this right to be properly implemented, it is necessary to have access to the coast of water bodies on land plots of coastal protection strips that have the appropriate legal regime. Having the right of general water use in the absence of proper access to the coast of water bodies in any of its manifestations makes it impossible to use.

Both rights and freedoms provide for rights to natural resources and land. As for freedoms, it is the right to maintain access to natural resources and land, as well as their management and use, which are necessary to satisfy the rights to health, an adequate standard of living and participation in cultural life. These freedoms also include, for example, the right to be free from certain interference, namely from the destruction of water bodies and their pollution, etc.[22] Taking into account the complex aspects when using natural resources in general, in this case in particular, is important in understanding possible consequences as a result of interference in their functioning, awareness of how such activity can negatively affect each object, and their existence as a whole as components of the natural environment. In particular, according to paragraph 17 of the preamble Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community

20 Law of Ukraine No 280/97-BP of 21 May 1997 'About local self-government in Ukraine' <https://zakon.rada.gov.ua/laws/show/280/97-%D0%B2%D1%80#Text> accessed 20 July 2022.

21 Law of Ukraine No 586-XIV of 09 April 1999 'About local public administrations' <https://zakon.rada.gov.ua/laws/show/586-14#Text> accessed 20 July 2022.

22 Sofia Monsalve Suárez, The right to land and other natural resources (December, 2015) <https://www.researchgate.net/profile/Sofia-Monsalve-Suarez/publication/308631743_The_right_to_land_and_other_natural_resources/links/57e9343d08aeb34bc08fc44f/The-right-to-land-and-other-natural-resources.pdf?origin=publication_detail> accessed 20 July 2022.

action in the field of water policy,[23] it is noted that since the balance of vulnerable aquatic ecosystems located in closed seas or in bays or near coasts and estuaries is strongly affected by the quality of inland waters flowing into them. Accordingly, vulnerability of these systems should be taken into account by a coherent and effective water policy. The value of water reveals its greatest and special importance, first of all for our society, both as a whole and in terms of guaranteeing social functions relating to wealth and health and all areas of economic activity, as well as the (potential) economic usefulness of resources (chemical substances, metals, minerals, nutrients) and, accordingly, the hydroelectric energy.[24]

3 FEATURES OF USING COASTAL PROTECTIVE STRIPS AS A PREREQUISITE FOR IMPLEMENTING THE RIGHT TO GENERAL WATER USE

The glossary of terms from The Coastal Zone Management Unit defines a coastal strip as a zone directly adjacent to the waterline, where only coast related activities take place. Usually this is a strip of some 100m wide. In this strip, coastal defense activities take place and there may be restrictions to land use.[25]

According to Art. 60 of the Land Code of Ukraine "Coastal protective strips"[26] it is noted that coastal protective strips are established to protect against pollution and clogging, and to preserve the water content of surface water bodies along seas and rivers, as well as around reservoirs, lakes and other bodies of water. Within the limits of the above-mentioned waterways, citizens are provided with free and unhindered access to sea bays, sea coasts, estuaries and islands in inland sea waters within the beach zone. It is indicated that such access is provided to the shores of reservoirs, rivers and islands for the implementation of general water use, except for certain lands: lands of protection zones, sanitary protection zones, zones with a special regime regarding land use, as well as certain land plots, where the specified objects and structures are located (objects of increased danger; linear, hydrometric and hydrotechnical structures); boarding houses, sports facilities, rehabilitation facilities, sanatoriums and other medical and health facilities, and children's health camps, which have the documents required by law for the relevant facilities and the implementation of the relevant activities; and objects of cultural heritage and objects of the nature reserve fund.

According to Part 1 of Art. 1 of the Water Code of Ukraine: the beach zone is a part of the coastal protective strip along the seas, around sea bays and estuaries adjacent to the water cut, with a regime of limited economic activity. In turn, in paragraph 3 of the Rules for the protection of human life on water bodies of Ukraine, a beach is a land plot of coastal territory adjacent to a water body and intended for people's recreation.

Therefore, taking into account the above prescriptions, we can come to the conclusion that a "beach" can be provided for all water bodies and intended for people's recreation, and a "beach zone" is related to seas, sea bays, and estuaries with a regime of limited economic activity. Considering the essence and meaning of the above concepts, there is an urgent need

23 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32000L0060> accessed 20 July 2022.

24 'The value of water. Multiple water for multiple purposes and users: Towards a future proof model for a European water-smart society' (WssTP, 25 January 2017) 4 <http://www.suschem.org/highlights/new-wsstp-strategic-innovation-and-research-agenda-published> accessed 20 July 2022.

25 'Glossary of Terms' (Coastal Zone Management Unit, 2020) <http://www.coastal.gov.bb/document-repository/glossary-of-terms> accessed 20 July 2022.

26 Code of Ukraine No 2768-III of 25 October 2001 'Land code of Ukraine' <https://zakon.rada.gov.ua/laws/show/2768-14#Text> accessed 20 July 2022.

Access to Justice in Eastern Europe
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to enshrine in the Water Code of Ukraine the concept of "beach" and the peculiarities of the legal regulation of relations with this object.

In contrast to the above, the Water Code of Ukraine contains provisions on determining the legal regime of beach zones. Thus, it has been established that the boundaries of coastal protection strips and beach zones are indicated in land and urban planning documentation and are marked by executive authorities and local self-government bodies with informational signs. Information about the boundaries of coastal protection strips and beach zones is entered into the State Land Cadastre as information about land use restrictions (Art. 88 of the Water Code of Ukraine).

Within the boundaries of populated areas, local executive bodies and local self-government bodies allocate and arrange beach areas for unobstructed and free use (Part 15, Art. 88 of the Water Code of Ukraine).

In addition, within the beach zone of the coastal protective strips, it is prohibited to build any structures except hydraulic, hydrometric and linear, as well as engineering and technical works, fortification structures, fences, border signs, border crossings, and lines of communications (Part 3 of Art. 90 of the Water Code of Ukraine).

That is, at the level of the current legislation, the question is about unhindered and free access of citizens within the beach zone to the coasts of seas, sea bays, estuaries and islands in inland sea waters and the banks of rivers, reservoirs, and islands for public water use.

When studying the possibility of implementing the right to general water use, it is necessary to pay attention to one more aspect, namely the ratio of terms used to define the objects of legal regulation. As it was already emphasised, we are talking about terms that are actively used in water legislation: "water bodies", "water bodies of general use", and "places of mass recreation of the population on water bodies".

Let us dwell on the characteristics of the prescriptions regarding the last object. In accordance with the Resolution of the Cabinet of Ministers of Ukraine of March 6, 2002 No. 264 "On Approval of the Procedure for Accounting of Places of Mass Recreation of the Population on Water Bodies"[27] it was established that mass recreation places include land plots for organised recreation on islands, coastal protective strips of water facilities, as well as places for recreational and sport fishing in the winter. The document also emphasises that these places are subject to constant maintenance by emergency and rescue services. Thus, we are talking about certain territories, their location, and composition (in particular, recreational and sports fishing sites in the winter) - and their features are highlighted. The competence of local self-government bodies regarding the characterisation of these places, as well as the mandatory coordination of them with the competent state bodies and the recording of places of mass recreation of the population in special documents is more than sufficient.

Limiting the access of citizens in any way (including by putting fences or other structures) to the coast of water bodies on the land plots of coastal protection strips that are in use by citizens or legal entities, as well as charging a fee, is the basis for termination of the right to use land plots of coastal protection strips by court decision (paragraph 2, part 4, Art. 60 of the Land Code of Ukraine; Art. 88 of the Water Code of Ukraine).

In addition, it is necessary to pay attention to Part 1 of Art. 61 of the Land Code of Ukraine and Part 1 of Art. 89 of the Water Code of Ukraine, which note that coastal protective strips are a nature conservation area with a regime of limited economic activity. It is prohibited to

27 Resolution of the Cabinet of Ministers of Ukraine No 264 of 06 March 2002 'About approval of the Procedure for accounting for places of mass recreation of the population on water bodies' <https://zakon.rada.gov.ua/laws/show/264-2002-%D0%BF#Text> accessed 20 July 2022.

carry out the relevant types of activities which are provided for in Part 2 of Art. 61 of the Land Code of Ukraine in coastal protective strips along rivers, around reservoirs and on islands.

Thus, the report on the strategic environmental assessment of the city target program for the development of the information and communication sphere of Kyiv city for 2022–2024 determines that the current state of small water bodies in the city causes concern, because many are clogged - the coastal protective strips of water bodies are littered with unauthorised landfills of domestic and construction waste.[28] It is prohibited to erect fences or other structures that prevent citizens from accessing the banks of rivers, reservoirs, and islands in coastal protective strips, except for cases stipulated by law (Part 5, Art. 61 of the Land Code of Ukraine). For example, allocating and granting the ownership or rental use of land plots on the Dnieper floodplain leads to the impossibility for citizens to gain free access to the water area and their limited movement in the 100-meter coastal protective strip.[29]

Therefore, at the legislative level, if the conditions are observed, it is possible to realise the right to general water use and having access to the water object. In particular, there must be physical access to the water object itself, and the waters in such an object must be suitable to exercise such a right. In this case the requirements regarding limited economic activity within the coastal protection zone must be met.

4 PRACTICE OF RESOLVING DISPUTES REGARDING PROTECTING THE RIGHT TO GENERAL WATER USE IN UKRAINE AND ABROAD

Before analysing court decisions within the outlined issues, it should be noted that in the current legislation of Ukraine, it is possible to resolve certain disputed situations outside of court proceedings. In particular, according to paragraph 14 part 1 Art. 33 of the Law of Ukraine "On Local Self-Government in Ukraine"[30], under the authority of the executive bodies of village, rural and city councils there are delegated powers to ensure unhindered and free access of citizens to the coast of water bodies and islands for general water use in accordance with the law. According to part 3 of Art. 158 of the Land Code of Ukraine, among others, local self-government bodies resolve land disputes within the territory of territorial communities regarding land use restrictions. That is, there is a possibility of solving disputed issues within the defined sphere without going to court.

In turn, analysing judicial practice regarding the outlined issue, it can be noted that there are certain cases that were considered by the courts regarding the illegality and cancellation of relevant decisions, as a result of which the right of citizens to general water use was violated, the elimination of obstacles to general water use[31] (although the courts refused to satisfy the claims due to the groundlessness of the claims).

28 Anna Tretjjakova, Ghennadij Marushevsjkyj and Nadija Redjkina, Report on the strategic environmental assessment of the City target program for the development of the information and communication sphere of the city of Kyiv for 2022–2024: Project (KNDU NDIRoM 2021) 27 <https://dsk.kyivcity.gov.ua/files/2021/4/30/ZvitCEO.pdf> accessed 20 July 2022.

29 Ibid 11.

30 About local self-government in Ukraine (n 20).

31 Case No 297/807/20 (Berehivskyi raion court of Zakarpatska oblast, 14 May 2020) <https://reyestr.court.gov.ua/Review/89439103> accessed 20 July 2022; Case No 133/2348/19 (Koziatynskyi city-raion court of Vinnytsia oblast, 04 February 2020) <https://reyestr.court.gov.ua/Review/87529538> accessed 20 July 2022; Case No 495/9608/19 (Bilhorod-Dnistrovskyi city-raion court of Odessa oblast, 13 July 2020) <https://reyestr.court.gov.ua/Review/90345757> accessed 20 July 2022; Case No 141/983/13-ц (Orativskyi raion court of Vinnytsia oblast, 21 November 2013) <https://reyestr.court.gov.ua/Review/35767855> accessed 20 July 2022; Case No 160/5771/20 (Dnipropetrovsk circuit administrative court, 19 February 2021) <https://reyestr.court.gov.ua/Review/95271667> accessed 20 July 2022.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
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Examining judicial practice in more detail, we can come to the conclusion that quite often persons that fall into certain circumstances in which the right to general water use is violated do not turn to the relevant authorities to properly record the manifestations of such an offense nor take action aimed at restoring this right. Of course, to prove the fact of violation of such a right, a sufficient amount of evidence must be collected to prove the commission of an offense with reference to the norms of current legislation.

Analysing the circumstances of the case in which the court ruled in favor of the claimants and satisfied the claim,[32] it can be noted that the violation of the right to general water use took place due to the actions of the relevant city council, as a result of which changes were made to the document that regulated the issue at the local level regarding access to the water body. In connection with this, the general access of citizens and the plaintiff personally to the beach area was actually eliminated, and access to the water body was limited. Having these factual circumstances of the case and relying on the relevant provisions of the current legislation, which regulate the powers of local self-government bodies and the procedural features of making such decisions, the claimant proved in court the illegality of the defendant's actions and, accordingly, the violation of the right to general water use. Analysing all the circumstances of the case, the court concluded that in this case the disputed decision violated the rights and interests of the claimant as a member of the territorial community (resident) of the city.

In turn, with regard to other court decisions in which the courts refused to satisfy the claims due to their groundlessness, the arguments related to proving certain circumstances, which, according to the claimants in various cases should have convinced the court of the existence of obstacles which did not allow them to carry out general water use. In particular, in most cases, attention was focused precisely on the performance of certain actions by the relevant entities which were given water bodies for use under certain conditions, or on the inaction of bodies authorised to take specific actions, as a result of which, according to the claimants, their rights to general water use were violated.

In addition, there is foreign case law, for example, the decision of Newhaven Port and Properties Ltd, R (on the application of) v East Sussex County Council & Anor (25 February 2015)[33] and Blundell v Catterall (7 Nov 1821)[34] which, among others, related to the resolution of issues related to the implementation of opportunities pertaining to access to the coast of the relevant water bodies.

In particular, for example, in the case Newhaven Port and Properties Ltd, R (on the application of) v East Sussex County Council & Anor (25 February 2015) Edwin Simpson acted for Newhaven Town Council in its attempt to register a sandy beach within Newhaven harbour as a village green, from the public inquiry all the way to the Supreme Court. The Supreme Court held that the use by local people was not 'as of right' because it was implied as permitted by the by-laws in force in connection with the land, and such registration would in any event have been incompatible with the statutory purposes of the port.[35] In turn, as regards the Blundell v Catterall case (7 Nov 1821), this early English case concluded that the public has no use rights in privately owned wet-sand areas.[36]

32 Case No 310/4071/16-a (n 31).

33 Newhaven Port and Properties Ltd, R (on the application of) v East Sussex County Council & Another (Supreme Court of the United Kingdom, 25 February 2015) <https://www.supremecourt.uk/cases/uksc-2013-0102.html> accessed 20 July 2022.

34 Blundell v Catterall (Court of the King's Bench, 7 November 1821) <https://vlex.co.uk/vid/blundell-against-catterall-802230897> accessed 20 July 2022.

35 Newhaven Port and Properties Ltd, R (on the application of) v East Sussex County Council & Anor (n 34).

36 David W Owens and David J Brower, Public use of coastal beaches (Sea Grant Publication 1976) 292 <https://www.govinfo.gov/content/pkg/CZIC-gc57-2-n6-1976/pdf/CZIC-gc57-2-n6-1976.pdf> accessed 20 July 2022.

That is, in the absence of access to the coast of water bodies on land plots of coastal protection strips, the right of citizens to general water use is limited, which cannot be properly implemented.

5 CONCLUDING REMARKS

As a result of developing the norms of environmental legislation at the national and international levels, judicial practice, and general theoretical scientific provisions in the spectrum of the right to general water use, it is possible to come to certain conclusions. The state of Ukraine guarantees its citizens environmental rights defined by the legislation. Basic environmental rights include the right to general use of natural resources, in particular the right to general water use. Any citizen has the right to access and use water bodies according to the law. These rights are regulated in detail in a number of environmental legislative acts. Accordingly, a certain legal basis for ensuring the rights of citizens is currently provided for in the environmental (in particular, water and land) legislation of Ukraine. These rights are guaranteed. Thereby, there are reasons to seek the environmental rights provided for in the law by applying to the court. The functioning of courts regarding protection of environmental rights given the judicial reform acquires significant importance.

Until recently, citizens have mostly not gone to court to protect their environmental rights, there were only rare cases of judicial review of such cases.

Recently, there has been an increase in the number of appeals by citizens to the courts, including on the investigated problems, and the number of cases under consideration is also increasing. But it should be emphasised that claimants have to overcome a number of difficulties in order for their evidence to be recognised by the court as reliable and well-founded. In most cases, the lack of proper argumentation from claimants leads to the adoption of a decision not in their favour. Having certain deficiencies in regulatory legal acts plays an important role in this process. Therefore, the legislator should pay attention to the need to improve legislation in terms of ensuring the implementation of the environmental rights of citizens, namely their implementation of general water use.

Taking into account the importance of the Water Code of Ukraine in the modern period as a foundation of water legislation, which establishes the goals and directions of water relations regulation, relevant proposals are argued for improving water legislation – making changes and additions to this code.

Thus, it is expedient to introduce additions to the general provisions of the Water Code of Ukraine regarding the formulation of objects of legal regulation of general water use, namely "water object of public use", "places of mass recreation of the population on water objects", and "beach". In addition, there is a need to determine the relationship between the specified terms and those already established in the code – "water body", "beach zone", and "coastal protective strip".

Also, an addition should be made to chapter II "State management and control in the field of water use and protection and reproduction of water resources" regarding a clear definition of the powers of local self-government bodies and state bodies regarding control in the researched area. In addition, there is a need to classify types of general water use rights depending on the purpose of use (for example, bathing, boating, recreational and sport fishing, etc.). Accordingly, for certain types of use, it is necessary to establish unequal legal regimes. The differences between the mentioned regimes should be reflected in the code.

Identified problematic issues must be resolved, especially considering that the observance of the environmental rights of citizens is one of the leading principles according to which the

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state environmental policy of Ukraine are implemented (the Law of Ukraine "On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the Period Until 2030").[37]

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37 Law of Ukraine No 2697-VIII of 28 February 2019 'About the Basic principles (strategy) of the state environmental policy of Ukraine for the period till 2030' <https://zakon.rada.gov.ua/laws/show/2697-19#Text> accessed 20 July 2022

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Research Article

STATE IMMUNITY, BETWEEN PAST AND FUTURE

Cristina Elena Popa Tache

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ABSTRACT

Background: *State immunity, a subject rarely encountered in the East, is being brought to light more and more often lately. In the process of being detached from customary law, it has been subject to several attempts at codification. These attempts appear to have been overtaken by developments in doctrine, which demonstrates the existence of potentially delicate situations of public international law. In this context, we recall the United Nations Convention on Jurisdictional Immunities of States and their Property*

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(New York, December 2004), which has not yet entered into force.[1] *In this context, we also note the initiatives for the establishment of the European Court of State Immunity contained in the European Convention on State Immunity of 1972 and its Additional Protocol, which has never been operational.*[2]

Methods: *This article aims to take stock of the status quo of the doctrine of state immunity in international law as a whole by highlighting the existing normative aspects in relation to the problems of implementation.*

Results and Conclusions: *The arguments and conclusions are intended to underline the importance of understanding the reality, in particular, of how this doctrine works together with its exceptions. The method of scientific introspection based on primary and secondary data from scientific journals, books, documents, expert opinions, and other publications has been used to develop this article.*

1 INTRODUCTION

State immunity has gone through several stages of conceptual evolution over time, which were marked by the parallel evolution of other branches of law, such as human rights, for example. Although state immunity includes inalienability under international law, it can lead to impunity from jurisdiction in cases where certain human rights recognised as a peremptory norm of general international law (*jus cogens*) have been violated.[3] This demonstrates the existence of exceptions.

This topic, considered taboo during the communist period, has been left almost untouched by theory and practice in Eastern Europe, although it is encountered and debated globally. Whether or not this shortcoming is closely related to access to justice is not yet clear. In the past and still today, it has been and continues to be important to understand what state immunity is and when and where it can be claimed – knowledge that serves to reduce the likelihood of risks in relations with a particular state or state entity. Today, there is no state

1 For signatory parties and status of proceedings, see 'Status of Treaties' (*United Nation Treaties Collection*, 2004) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en> accessed 26 January 2023. Reservations and declarations were made by Finland, Iran, Italy, Liechtenstein, Norway, Saudi Arabia, Sweden, and Switzerland. Switzerland stressed that, in accordance with General Assembly resolution 59/38 adopted on 2 December 2004, it is understood that this Convention does not cover criminal proceedings and, as a matter of interpretation, Switzerland considers that Art. 12 does not cover the issue of pecuniary compensation for serious human rights violations allegedly attributable to a state and committed outside the state of the forum. Switzerland also stated that the Convention is to be interpreted without prejudice to developments in international law in this regard (see Switzerland's statement of interpretation). Sweden stated that, in its interpretation, the Convention does not apply to military activities, including the activities of armed forces during armed conflict, under international humanitarian law, nor does it apply to activities undertaken by the military forces of a state in the exercise of their official functions. It was also noted that the express mention of heads of state in Art. 3 should not be interpreted as suggesting that the immunity *ratione personae* which other state officials might enjoy under international law might be affected by this Convention.

2 Jörg Polakiewicz, 'The Contribution of the Council of Europe to State Immunity through its Conventions and the Case Law of the European Court of Human Rights' in Committee of Ministers of the Council of Europe, *State Immunity under International Law and Current Challenges: Seminar on the occasion of the 54th meeting of the Committee of Legal Advisers on Public International Law (CAHDI), Strasbourg (France), 20 September 2017* (Public International Law and Treaty Office Division CoE; DLAPIL 2017) 18 <https://rm.coe.int/final-publication-state-immunity-under-international-law-and-current-c/16807724e9> accessed 26 January 2023.

3 Selman Özdan, 'State Immunity or State Impunity in Cases of Violations of Human Rights Recognised as Jus Cogens Norms' (2019) 23 (9) The International Journal of Human Rights 1521, doi: 10.1080/13642987.2019.1623788; Adrian Corobană, 'Non-Recognition of States as a Specific Sanction of Public International Law' (2019) 9 (3) Juridical Tribune 591.

outside public international law, and nation-states evolved into Westphalian states in the 17th century through the exercise of territorial integrity and sovereignty.

State immunity is a doctrine of international law invoked mainly by way of legal process exceptions, whereby a state claims that a particular court or tribunal does not have jurisdiction over it or to prevent the enforcement of a foreign judgment or order against any of its property. The counterparty may be another state or state entity, or even an individual or legal entity, as the case may be.[4] These situations are encountered, for example, in international investment arbitrations in cases of awards made in favour of foreign investors seeking enforcement of such awards against the state that has breached the applicable investment treaty. In this area, the invocation of state immunity comes very close to the invocation of the act of state on account of the complexity of the legal relationships. Some details of the *Yukos SARL v. OJSC Rosneft Oil Company (Yukos)* case[5] can be presented in this context. Its legal actions to enforce the arbitral award were brought in the Netherlands, the UK, and the US by subsidiaries of the GML shareholder group, which held approximately 70% of Yukos shares. The former Yukos shareholders asked a London judge in October 2022 to allow enforcement of the record $50 billion award against Russia, using, among other reasons, grounds relating to the Russian-Ukrainian war, in that the sanctions on Russia have the increased potential to cause the Russian Federation to withdraw its assets from the UK, perhaps even from many areas or sectors globally.[6] An application has been made to the High Court in London to lift a 2016 temporary stay on the enforcement of the judgment in the UK. This strategy also comes in the wake of a November 2021 ruling by the Dutch Supreme Court which upheld almost the entirety of the judgment that Russia must pay damages.[7] State immunity exceptions will again be raised by Russia before the English courts.[8] Initially, in *Yukos*, the issue was whether English jurisdiction could extend to the transaction of the original parties, which were foreign companies once associated in a single holding company group. In the debate at the time, issues such as: 1) identifying whether there is a more general principle in English law that the courts will not adjudicate on foreign sovereign state transactions; 2) whether the doctrine will not apply to foreign state acts which violate clearly established rules of international law or are contrary to English principles of public policy or where there is a serious breach of human rights; 3) whether judgments may be to the effect that state immunity does not preclude the possibility of domestic courts referring to international law when determining the legal obligations of their own governments under such rules; and 4) in the same proceedings, whether judgment could be given under section 35A of the Senior Courts Act 1981, which demonstrates that in foreign

4 For the practical application aspects of state immunity, see the expert opinion of lawyers: David Caps and Lianne Sneddon, 'State Immunity: an Overview' (Ashurst, 18 June 2019) <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---state-immunity--an-overview> accessed 26 January 2023.

5 Case No 2005-04/AA227 *Yukos Universal Limited (Isle of Man) v The Russian Federation* (UNCITRAL, PCA, 18 July 2014) <https://pca-cpa.org/en/cases/61> accessed 26 January 2023, was decided in 2014 in favour of Yukos.

6 Katharine Gemmell, 'UK Court Restarts Yukos Award Suit Against Russia' (*Bloomberg*, 26 October 2022) <https://www.bloomberg.com/news/articles/2022-10-26/uk-court-restarts-50-billion-yukos-award-suit-against-russia?leadSource=overify%20wall> accessed 26 January 2023.

7 The decision of the Dutch Supreme Court was given in the case ECLI:NL:HR:2021:1645, *Russian Federation v Veteran Petroleum Ltd, Yukos Universal Ltd and Hulley Enterprises Ltd*, decision available in Dutch here: Case No 20/01595 ECLI:NL:HR:2021:1645 (Supreme Court of the Netherlands, 5 November 2021) <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:HR:2021:1645> accessed 26 January 2023.

8 Enforcement of the arbitral award proved very difficult. The shareholders of the former Yukos company sought enforcement of assets of the Russian Federation located on the territory of the UK. *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2012] EWCA Civ 855 <https://newyorkconvention1958.org/index.php?lvl=notice_display&id=1182&opac_view=6> accessed 26 January 2023. Rosneft is the Russian company that absorbed all Yukos' assets.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

state-to-state relations, the terms of conditions will be varied in the English courts even if the transaction had been decided in the courts of the foreign jurisdiction.[9]

In conclusion, in order to understand from the outset the matter of state immunity, we note how, although state immunity is a doctrine of international law, it applies according to the law applicable to the proceedings, i.e., *lex fori*. As the case law has demonstrated and will continue to demonstrate, a court that must adjudicate on a defence of immunity will refer to its own national law or to the law of the seat, if it is in arbitration, for example. The party interested in resolving disputes of this kind should familiarise itself with both the national law of the chosen place of resolution of any disputes and the law of the place where the assets are located, which is usually the place of the state or state entity.

Each state is therefore able to consolidate its domestic law in accordance with its own political and economic interests and in accordance with all the treaties to which it is or decides to be a party. How? We will look at a few points of view in this paper.

2 CONCEPT, DOCTRINE, PRINCIPLE, OR RULE OF PROCEDURE?

Before moving on to the specific analysis, it is useful to try to frame state immunity as precisely as possible. Sometimes referred to as a 'concept', sometimes as a 'doctrine' or 'principle', state immunity has been defined in several ways. In practice, it has often been said to be a procedural rule, which is natural in the case of its applicability to specific cases: 'State immunity *is a procedural rule* going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement'.[10]

The occasional use of the phrase 'principle of state immunity' stems from the fact that state immunity is considered a pedestal of international law built on the principle of the sovereign equality of states, and which Art. 2, para. 1 of the Charter of the United Nations establishes as one of the fundamental principles of the international legal order.[11] A group of rules of public international law are referred to as principles because of their importance as well as their role in international legal regulation.

In reality, we cannot discuss the differences between principles and doctrines in this case because, as we shall see, state immunity is a doctrine that has its principles. A doctrine is a single important rule, a set of rules, a theory, or a principle that is widely followed in a field of law. It is formed via the continuous application of legal precedents. Calling something a doctrine usually means at least one of two things: that it is very important to a field of law or that it provides a comprehensive way to resolve a certain type of legal dispute.[12]

9 For details, see Zia Akhtar, 'Act of State, State Immunity, and Judicial Review in Public International Law' (2016) 7 (3) Transnational Legal Theory 354, doi: 10.1080/20414005.2016.1225358.

10 Hazel Fox, *The Law of State Immunity* (OUP 2002) 525; see *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, paras 24, 44 <https://publications.parliament.uk/pa/ld200506/ldjudgmt/jd060614/jones.pdf> accessed 26 January 2023.

11 UN, Charter of the United Nations (1945) <https://www.un.org/en/about-us/un-charter/full-text> accessed 26 January 2023. According to Article 2, 'The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. (1) The Organization is based on the principle of the sovereign equality of all its Members'.

12 See 'Wex Legal Encyclopedia' (*Legal Information Institute; Cornell Law School*, September 2022) <https://www.law.cornell.edu/wex/doctrine> accessed 26 January 2023. The definition is provided by the Wex Definitions Team, a group of Cornell Law Students organised and supervised by LII Original Content Collections Manager Nichole McCarthy to provide enhanced definitions of important legal terms to aid the general public in understanding those terms.

It has been noted that the doctrine of state immunity has been divided into two main doctrines, namely, the doctrine of absolute immunity (this is a 19th-century approach to sovereign immunity which provides that states may be plaintiffs but not defendants in the national court of other states) and the doctrine of restrictive immunity (this is a 20th-century approach to sovereign immunity, which provides that acts of states are divided into acts of sovereign authority *acta jure imperii*, i.e., governmental activities of the state, and acts of governing authority *acta jure gestionis,* i.e., commercial acts of the state).[13] The doctrine of absolute immunity still applies today in some jurisdictions, such as China and Hong Kong.[14] In China, there are still problems connected with the enforcement of foreign judgments, for example, in the field of investment arbitration. China does not have a national law on ISDS,[15] and legal rules dealing explicitly with ISDS are extremely rare. Interested parties should consult Chinese law applicable to arbitration in general. Theorists are of the opinion that Chinese arbitration institutions are on a knife edge between a bright future and a dead end. ISDS is currently under debate in China, and success will depend on the outcome.[16] Such innovative initiatives could help the Beijing Arbitration Commission attract global attention in a positive way.[17] While states are frequently involved in various disputes and arbitration, we can observe that no uniform rules on state immunity have been formed at the international level. The doctrine of absolute immunity is hard to overcome.

Until 2015, the Russian Federation was considered one of the few remaining strong protagonists of absolute immunity. Since 2015, it has addressed the restrictive (functional) doctrine of state immunity with the adoption of the new federal law. In theory, the following reasons were put forward among others: protection of the commercial interests of private parties *vis-à-vis* foreign states (an issue that comes after attempts to enforce the *Yukos* ruling); protection of human rights; and specific features of the new 2015 law and existing case law in relation to foreign states under Russian jurisdiction.[18]

13 See Hazel Fox, 'Privileges and Immunities of the Head of a Foreign State and Ministers', in Ivor Roberts (ed), *Satow's Diplomatic Practice* (6th edn, OUP 2009) 171, doi: 10.1093/law/9780199559275.001.0001; Ernest Toochi Aniche, 'A Critical Examination of the British Municipal Court Rulings on Cases of International Immunity: Revisiting the Imperatives of Politics of International Law' (2016) 2 (1) Cogent Social Sciences <http://dx.doi.org/doi:10.1080/23311886.2016.1198523> accessed 26 January 2023.

14 According to it, any proceedings against foreign states are inadmissible unless the state expressly agrees to waive immunity.

15 Investor-state dispute settlement (ISDS) or investment court system (ICS). Among the causes of dispute are mainly the violation of the standards of treatment that should be given to the international investments – see Cristina Elena Popa (Tache), 'International Investment Protection in Front of the States Role in Crisis Times to Managing Disputes' (2020) 10 (3) Juridical Tribune 456.

16 Manjiao Chi, 'The ISDS Adventure of Chinese Arbitration Institutions: Towards a Dead end or a Bright Future?' (2020) 28 (2) Asia Pacific Law Review 279, doi: 10.1080/10192557.2020.1856309; See generally Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP 2015) doi: 10.1093/law/9780198744412.001.0001.

17 For details, see Xi Zhang, 'Announcement on Public Comments on the Beijing Arbitration Commission/Beijing International Arbitration Center International Investment Arbitration Rules (Draft for Comment)' (BAC, 11 February 2019) <http://www.bjac.org.cn/news/view?id=3369> accessed 26 January 2023.

18 Vladislav Starzhenetskiy, 'Russian Approach to State Immunity: If You Want Peace, Prepare for War?' in Regis Bismuth and others (eds), *Sovereign Immunity Under Pressure: Norms, Values and Interests* (Springer International Publishing 2022) 53. It is useful to analyse the whole current body of jurisprudence for a more complete approach. See Bohdan Karnaukh, 'Territorial Tort Exception? The Ukrainian Supreme Court Held that the Russian Federation Could Not Plead Immunity with regard to Tort Claims Brought by the Victims of the Russia-Ukraine War' (2022) 3 (15) Access to justice in Eastern Europe 165, doi: 10.33327/AJEE-18-5.2-n000321.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

In terms of the restrictive doctrine, economic development has spurred states to participate in various ways in global trade activities.[19] This has led to a distinction being made between sovereign and commercial acts. Immunity was triggered only in respect of acts arising from the exercise of sovereign power, so states could not invoke immunity for commercial activities or over commercial assets.

Despite these developments, neither the theory nor the relevant case law has moved state immunity into an area of legal certainty, as it can be seen how it continues to remain an unresolved part of international law. Until then, in order to analyse the level of risk in relations with a particular state or state entity, interested parties will turn to the applicable laws from state to state to determine whether and to what extent a state is entitled to claim immunity.

Without going further here into the discussion between the possibility of states being immune from suit on the basis of governmental functions, but not in the case of commercial acts, it can be said that if the doctrine of absolute immunity were chosen as a preferred practice of the majority of states, then the fight will remain on the shoulders of domestic law. As in the *Yukos* case mentioned above, some national courts must decide that state immunity does not exclude the possibility for these national courts to refer to international law when determining the legal obligations of their own governments under such rules.

With regard to the principles of the doctrine of state immunity, two main principles have been noted: the *ratione personae* principle, which confers immunity to serving government officials (i.e., the head of state/government) for both official and private acts, and the *ratione materiae* principle (i.e., functional immunity) for official acts made during the term of office by former government officials.[20] Some states extend state immunity as a matter of goodwill or comity, while others have codified this doctrine in their jurisdictional regulations.[21]

We have seen that the doctrine of state immunity prohibits a national court from trying or enforcing claims against foreign states. The definition has always been closely related to sovereign immunity, although they cannot be confused. More concisely, sovereign immunity means that a state cannot be subject to the law of another state.

To demarcate certain differences, the doctrine of state immunity is not to be confused with the foreign act of state doctrine. The latter is a rule of private international law invoked procedurally under the public policy exception, which courts should use to promote the modest goal of international uniformity when faced with the manifest impossibility of proper application of foreign public law.[22] Or, put another way, such an exception would be controversial if the doctrine existed to protect foreign state sovereignty in public international law because, as the state immunity cases show, public international law is undecided whether one state can disregard another's sovereignty in order to uphold certain fundamental values.[23]

19 The main source of English law on state immunity is the State Immunity Act 1978, which gives effect to the restrictive doctrine. United Kingdom, State Immunity Act 1978 c 33 [1978] 17 ILM 1123 <https://www.legislation.gov.uk/ukpga/1978/33> accessed 26 January 2023.

20 For an extensive analysis, see Malcolm N Shaw, *International Law* (5th ed, CUP 2003) doi: 10.1017/CBO9781139051903; or Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2011) 21 (4) European Journal of International Law 815, doi: 10.1093/ejil/chr065.

21 James E Berger and Charlene Sun, 'Sovereign Immunity: A Venerable Concept in Transition?' (2011) 27 (2) International Litigation Quarterly 57.

22 Marcus Teo, 'Public Law Adjudication, International Uniformity and the Foreign Act of State Doctrine' (2020) 16 (3) Journal of Private International Law 361, doi: 10.1080/17441048.2020.1846257.

23 See *Jurisdictional Immunities of the State (Germany v. Italy, Greece Intervening)* [2012] ICJ Rep 99 (3 February 2012) <https://www.icj-cij.org/en/case/143> accessed 26 January 2023, cf *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet* (No 3) [2000] 1 AC 147 <http://www.uniset.ca/other/cs5/2000AC147.html> accessed 26 January 2023, apud Teo (n 23).

In general, it has been noted how the act of state doctrine absolves state action from judicial review by a foreign court. However, the trends promoted by theorists are directed towards the fact that courts should develop a doctrine that allows for judicial activism when wrongs are committed by states which breach the customary international law.[24] This direction appears natural in the context of the instability of the precise meaning of state immunity.

In concrete terms, state immunity is a rule of law arising from the sovereign equality of states. Like any system of law, public international law is made up of legal rules. State immunity can be defined as a norm of international law, a general rule of conduct, codified or not, created by states as subjects of international law, which regulates international law relations concerning immunity between them and is recognised as binding. It is procedurally activated by way of exceptions invoked in certain cases relating to: 1) judicial immunity – lack of state jurisdiction in the court of a foreign state; 2) immunity from prior claims; 3) immunity from enforcement of a foreign judgment; 4) immunity of state property (it is the legal regime of inviolability of state property located in the territory of a foreign state); 5) immunity from the application of foreign law in relation to transactions involving the state.[25] These immunities operate independently, without any link between them, although in practice, there may be some links on a case-by-case basis.

From the definitions presented, it follows that state immunity has, both from a theoretical and from a jurisprudential perspective, an oscillating evolution of its typology, which has led and continues to lead to different interpretations.

3 DEVELOPMENTS AND POSSIBILITIES

Since we are discussing state immunity as a classical subject of international law, the thread of scientific research inherently leads to the identification of a possible similarity with the regime of other subjects of international law. For example, do international organisations have similar immunity or not? Or, how is the natural person, the individual, affected?

The doctrine of state immunity, developed on the dogmatism of a state-centric perspective, 'has unduly underestimated and irresponsibly neglected the position of the human person in international law'.[26] Here, too, much of state immunity has centred on its relationship with *jus cogens*. Even if we consider the arguments concerning the protection of human rights, we find that it cannot be said that there have been no disagreements between the principle of state immunity and *jus cogens* rules, and issues have generated some debate. In theory, it has been argued that state immunity has been excessively formalistic and dissociated from the truth of human rights protection; and, last but not least, it has been argued that it has separated substantive prohibitions from procedural commitments by creating an unbridgeable line between them.[27]

International organisations, for example, do not enjoy state immunity unless an express immunity has been granted to them by statute, such as, in the UK, the International

24 Akhtar (n 10).

25 Serhij Kravtsov, 'The Definitive Device of the Term "International Commercial Arbitration"' (2022) 12 (3) Juridical Tribune 364.

26 *Jurisdictional Immunities of the State* (n 24) Dissenting opinion of Judge Cançado Trindade, para 181. The case of Germany v Italy was brought before the International Court of Justice in 2008 by Germany, which claimed that its sovereign immunity was violated before Italian courts.

27 Riccardo Pavoni, 'Human Rights and the Immunities of Foreign States and International Organizations' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (OUP 2012) 75, doi: 10.1093/acprof:oso/9780199647071.003.0004.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Organisations Act (1968).[28] Similarly, the United Nations, the Council of Europe, the North Atlantic Treaty Organisation, and the World Trade Organisation are protected by legislation granting them immunity.

In the exercise of immunities, both states and international organisations will follow the logic set out below. Of course, there is a wealth of discussion on all specific immunities, but this article aims to open the door to further research and debate on this dense subject. Theorists have noted how through the theory of normative hierarchy, *jus cogens* norms prevail over non-precedential norms in international law. Human rights norms, some of which are considered *jus cogens* norms, theoretically go beyond the principle of state immunity. Therefore, the jurisdictional immunity of the state must be abandoned when the state violates certain human rights that are considered *jus cogens*.[29] The same can be argued for international organisations. There is also a general view that states and high-ranking state officials cannot be exempted from criminal proceedings before foreign courts when they violate *jus cogens* norms by invoking state immunity. In the hierarchy of norms of international law, the principle of state immunity ranks below *jus cogens* norms, and this is clearly established.[30]

However, if the analysis of responsibilities becomes simpler, difficulties arise in establishing rights, i.e., in determining the set of immunities specific to these situations for each subject of international law. I will simply note that there has always been an inspirational transfer from the state to international organisations and vice versa.

The content of the rules of international law is made up of the rights and obligations with which states and other subjects of international law are endowed. By working together, subjects of international law realise their rights and comply with their obligations under the rules of international law. International relations governed by the rules of public international law become legal relations under international law. By entering into such relationships, subjects of international law realise their rights and obligations.

State immunity has the characteristics of a dispositive rule of international law, which means that there is the possibility of regulation at state level. All rules of international law are binding, but in the case of dispositive rules, the states concerned may conclude treaties, which lay down other rules and act in accordance with them, and this will not constitute a breach of law if it does not prejudice the rights and legitimate interests of other states. For states with a monist system, international law will apply to the strict extent of the international rules in force.

We have seen that state immunity is closely linked to the inalienability of certain rights. From this perspective, we can discuss in a logical exercise the possibility of regulating the immunity that states have at the domestic level. While the issue may seem simpler from this angle, controversy may arise over the possibility for one subject of international law to require another subject of international law to change its own regulations. To get closer to the truth, we will turn to the legal archaeology of the theory. In the past, the issue was viewed through the prism of the right of defence, the right of conservation and the right

28 United Kingdom, International Organisations Act 1968 c 48 <https://www.legislation.gov.uk/ukpga/1968/48> accessed 26 January 2023. According with Chapter 48: 'An Act to make new provision (in substitution for the International Organisations (Immunities and Privileges) Act 1950 and the European Coal and Steel Community Act 1955) as to privileges, immunities and facilities to be accorded in respect of certain international organisations and in respect of persons connected with such organisations and other persons; and for purposes connected with the matters aforesaid'.

29 Özdan (n 4).

30 Rosanne van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) 316.

of jurisdiction.[31] In the 1930s, specialists of that time were discussing whether or not it was possible for one state to impose on another state to change its laws.[32] At that time, there were two opinions: 1) one which held that the sovereign state could not allow others to interfere in its affairs and that foreign states were not entitled to ask another state to change its laws; and 2) another opinion according to which states, being in a state of increasing interdependence, could be asked to change the laws of a state which no longer corresponded to modern ideas.[33]

Analysing the work of the theorists of the 1900s, we can say that nothing is new, and there are no essential changes. Thus, in his lectures, George Meitani analyses possible answers to the question: can a sovereign state be called before the court of another foreign state? And then, as now, it was observed that the state could do two kinds of acts: political and non-political.[34] For the first category, the example was given of a case in which a Frenchman travelling in Russia was harmed by unjustified searches. On his return to France, he summoned the Tsar of Russia to appear before the French courts in his capacity as head of the Russian state. The French courts declared that they had no jurisdiction and found that the Tsar and the Russian authority had acted under their high right of surveillance and police.[35] For the second category of acts, the doctrine of those times, it is my pleasure to reproduce the views of the time according to which it can happen that the state also does acts that a private individual would do.[36] In this respect, it was noted that, by the fact that the state can do such acts, it very often happens that conflicts arise between representatives of the state and private individuals, in which case the question arises of the competence of foreign courts to judge such cases. Although one part of the doctrine continued not to admit this possibility, in view of the equality of states, the other part considered that, while in the first case, it was not recognised that foreign courts could interfere in the administration and policy of another state, when it comes to acts which the state would perform as a private individual, there is no danger of foreign courts intervening and investigating the lawsuits which would arise between the state and private individuals.[37]

The analysis has been to the effect that states, in these cases, are not acting in an authoritative capacity but are acting in a manner binding on the other parties as private individuals and that their independence cannot be raised as a shield under which they can ignore the claims of their creditors.[38] The remark is an exceptional one and has significance for the terminology of state immunity. We see here that it used to be called 'independence' and was used by states as a shield when their liability was triggered. These differences were considered restrictions on state independence and that is how they were treated at the time, i.e., they were substantial exceptions to the rule of state immunity. Meitani remarked that it was permissible, however, that for real property actions, foreign courts were competent to judge these actions since the jurisdiction of the state extended over the whole territory, but the question was how these

31 See, for example, League of Nations, 'International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, signed at Brussels, April 10th 1926, and Additional Protocol, signed at Brussels, May 24, 1934' <https://treaties.un.org/pages/showdetails.aspx?objid=0800000280166914> accessed 26 January 2023.

32 George Meitani, *Curs de Drept International Public* (AlT Doicescu 1930) 90.

33 Henry Bonfils and Paul Fauchille, *Manuel de Droit International Public (droit des gens)* (2nd edn, A Rousseau 1898) 248, 262.

34 Meitani (n 33) 92, 93.

35 George Meitani, Străini în fața tribunalelor (București 1908) 93, 94, quoting Georges Bry, Précis Élémentaire De Droit International Public (Recuel Sirey 1910) 90.

36 Meitani (n 33) 93.

37 Meitani (n 36) 94, note 2.

38 Robert Piédelièvre, *Précis De Droit International Public, Ou, Droit Des Gens,* vol 1 (Nabu Press 2012) 266. Book published before 1923, France. The manuscript has been reconstituted and republished following serious damage. It was republished by Nabu Press on 22 February 2012, although there have been other editions republished by other publishers.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

judgments could be enforced. Could the foreign state intervene in the territory of the other state and execute that state, seize its property or put it up for sale? The distinctions were made in the case of whether to enforce the judgment on the territory of the foreign state or to enforce it on the territory of the state that gave the judgment. There was unanimity in recognising that enforcement could not be carried out by a foreign authority in the territory of another state, the matter being left to the discretion of the state, which had to agree to be enforced. In this context, the importance of the role of diplomatic channels in resolving such situations was indicated. In the second case, where there is a judgment to be enforced in the territory of the state whose court has given the judgment and where there is state property in that territory on which enforcement could take place, some authors have argued that enforcement could take place on movable or immovable property in that territory. 'To invoke the principle of independence in order to evade the obligations taken, is not to invoke a rule of *jus gentium*, but to abuse a great idea in order to place oneself above the law'.[39]

Therefore, we see state immunity as it was called over 100 years ago: 'a principle of state independence'.

In cases where the state accepted the jurisdiction of a foreign court, this was called accession and could be achieved: 1) by express accession, i.e., when the state expressly recognised this jurisdiction by a convention (this is what we call today: the arbitration clause, for example); and 2) tacit accession, i.e., when it is called upon before foreign courts, the state, instead of invoking the plea of lack of jurisdiction receives to be judged before these courts or, when the state directs itself its action before a foreign court.[40]

From this historical description, we noted that exceptions to state immunity were called 'restrictions on the principle of state independence' or state sovereignty. Some authors have distinguished between restrictions on state sovereignty and international servitudes, distinguishing them.[41] Meitani, however, was convinced that all these restrictions were, in reality, international servitudes, arguing that by these servitudes, we must understand any conventional restriction placed on the territorial sovereignty of the state in favour of another state.[42]

On the other hand, immunity from jurisdiction comes with its own history. We recall in this context two relevant cases: 1) *The Schooner Exchange v. McFaddon & Others*, in which the US Supreme Court in 1812 dismissed on the basis of the immunity of the French state the claim of the plaintiffs claiming a property right in a French fleet vessel in Philadelphia);[43] 2) High Court of Admiralty, *The Charkieh Case* (6200.), 1873 March 18, 19, 20, 21; May 7, a case in which Sir Robert Phillimore refused to grant immunity to the Kediv of Egypt on the ground that jurisdictional immunity is inextricably connected with the exercise of public functions and dignities and the performance of sovereign public acts and not private acts.[44]

39 Ibid.

40 Meitani (n 33) 95.

41 Amedee Bonde, *Traité Élémentaire De Droit International Public* (Dalloz 1926) 236.

42 Meitani (n 33) 96, citing 3. Johann Caspar Bluntschli, *Le Droit International Codifie Par M Bluntschli* (Librairie de Guillaumin et Cie 1881) art 353. Meitani notes Bluntschli's idea that these servitudes should be perpetual, but realistically asks 'what can be perpetual in the world?' and argues that 'many such restrictions or servitudes were provided for by various treaties which today are no more'.

43 The *Schooner Exchange v McFaddon & Others [1812] 11 US* (7 Cranch) 116 <https://supreme.justia.com/cases/federal/us/11/116> accessed 26 January 2023, is a United States Supreme Court case on the jurisdiction of federal courts over a claim against a friendly foreign military vessel visiting an American port. The court interpreted customary international law to determine that there was no jurisdiction.

44 *The Charkieh* (6200) [1873] LR. 4 A & E 59 <http://uniset.ca/other/cs2/LR4AE59.html> accessed 26 January 2023. According to the judgment, Jurisdiction of the Court to entertain a Suit of Damage instituted against a Vessel belonging to the Khedive of Egypt - Sovereign Prince - Maritime Lien - Proceedings in Rem - Waiver of Privilege.

In the historical analysis, mention should be made of the attempts of the Institute of International Law to address the problem of non-uniform practices. Thus, in 1891 the Institute drafted rules on the jurisdiction of courts over claims against other states, which proposed to not cognisable actions based on sovereign acts committed by a particular state.[45] Then followed the history of the efforts that led to the United Nations Convention on Jurisdictional Immunities of States and their Property, adopted by the General Assembly on 2 December 2004.

We have also found identified a number of old treaties that contained these kinds of restrictions or servitudes and which, although abrogated, may be a source of inspiration for modern treaties that may include or regulate exceptions to state immunity, as we say today. Examples: 1) the prohibition of fortification of cities such as Dunkirk after the Treaty of Utrecht, 1713 and Antwerp after the Treaty of Paris, 1814 and London, 1831 (negative easements such as not to do certain acts, not to fortify certain cities, not to have too large an army or fleet, and positive easements); 2) the Treaty of London 1867, which provided for the demolition of the fortifications of Luxembourg; 3) the Treaty of Versailles, which required Germany to reduce its army, navy, and air force, etc.; 4) the negative easements in the treaties concluded by various states with the Ottoman Porte concerning Christian worship; 5) the positive easements concerning the right to use the roads of a state, the right to police and tax a foreign territory or the right to establish customs and postal services; 6) the Treaty of St Germain signed on 10 September 1919 by the representatives of Austria and the diplomatic representatives of 17 states, which provided in Art. 60 that Romania consents to the insertion in a subsequent treaty of provisions designed to protect the interests of inhabitants differing by race, language or religion from the majority; or 7) other restrictions that could be placed on the independence of states resulting from the perpetual neutrality of some states.[46]

We have seen how in older doctrines, state immunity was considered one of the principles/attributes of state independence, stemming from sovereignty. States that faced the communist/socialist period defined sovereignty as meaning its independence without any limits, i.e., without restrictions.[47] Historical reality has been seriously disregarded, and the works of great specialists have been put to the test of destruction out of an overzealousness that has led nowhere. The theorists of that era could not express themselves freely, although, in their works, one can see the intelligence, diplomacy and ideological battle that forced them to expose their arguments. Eastern theorists believed that when the Western literature discussed relative sovereignty, it was, in fact, discussing the subjection of sovereignty to all sorts of limitations that could be brought about by the conclusion of international treaties, which would reduce the freedom of action of states.[48] It is understood that state immunity (especially) was also one of the attributes of sovereignty. It was felt that transferring some attributes of sovereignty to the competence of supra-state international bodies or organisations would make sovereignty itself a meaningless notion.[49]

45 Institute of International Law, 'Draft International Regulations on the Competence of Courts in Suits Against Foreign States, Sovereigns, or Heads of States' in James Brown Scott (ed), *Resolutions of the Institute of International Law dealing with the Law of Nations: with an historical introduction and explanatory notes* (OUP 1916) art 5: 'Actions brought for acts of sovereignty are not cognizable, nor acts arising out of a contract of the plaintiff as an official of the State, nor actions concerning the debts of the foreign State contracted through public subscription'.

46 For details, see Meitani (n 33) 98-101.

47 Grigore Geamănu, Dreptul International Contemporan (Didactica e Pedagogica 1965) 112.

48 Marek Stanislaw Korowicz, 'Some Present Aspects of Sovereignty in International Law' in Hague Academy of International Law, *Collected Courses*, vol 102 (Springer 1961) 108, 109, doi: 10.1163/1875-8096_pplrdc_A9789028613928_01.

49 See Comitetul Central al Partidului Comunist Român, *Declarație cu privire la poziția Partidului Muncitoresc Romîn în problemele mișcării comuniste și muncitorești internaționale: adoptată de Plenară Lărgită a CC al PMR din aprilie 1964* (Politică 1964) 32, 33.

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The analysis of the historical evolution of state immunity can continue to help us understand the reality, as there is some historical material that is somewhat unexplored due to difficulties in identifying the terminology used. There is now a trend in various states towards substantial exceptions to the immunity rule; in particular, a state may be sued when the dispute arises from a commercial transaction entered into by a state or other 'non-subterranean activity' of a state.

1) the European Convention on State Immunity, signed in Basel on 16 May 1972 and currently in force in eight states: Austria, Belgium, Germany, Luxembourg, the Netherlands (for the European Netherlands), Switzerland, and the UK. Five of these (Austria, Belgium, the Netherlands, Luxembourg, and Switzerland) are also parties to its Additional Protocol, which establishes the European State Immunity Tribunal (the special tribunal never became operational);[50]

2) the United Nations Convention on State Immunities and Property, adopted by the General Assembly on 2 December 2004, which has not yet entered into force but is said to reform and harmonise their rules and exceptions.[51]

Until then, at the domestic level, the signatory states themselves can normatively reinforce the inalienability of their values/assets. State immunity is, after all, by definition, a set of inalienabilities.

4 CONCLUSIONS

It can be deduced that state immunity has a long way to go before it becomes a norm of international law. The first step towards this goal is to have a thorough knowledge of the historical path so that we can then have a modern doctrine, harmonised as far as possible at the international level by multilateral consensus on the subjects of international law.

Against this background, it is natural that various issues arise concerning the limits of competence and restrictions. However, state protection under state immunity ultimately means protecting individual states and their supervisory institutions in many cases where they act unlawfully but together or in parallel with other states and have been shown to affect the chance of injured parties to obtain compensation.[52] An example is the recent decision of the International Court of Justice in the case of Germany and Italy with the intervention of Greece, where the principle of immunity was invoked to protect the German government from paying reparations for what Germany itself has admitted were flagrant crimes committed during World War II.[53] The ruling is judged by experts to be technically correct, but whether it does full justice to the situation is another question.[54]

In the face of imprecise regulations, interested parties resort to contracts in which they insert immunity waivers, called waivers, under certain very precise conditions, among which we

50 Council of Europe, European Convention on State Immunity (16 May 1972) ETS No 074 <https://rm.coe.int/16800730b1> accessed 26 January 2023. For details, see 'Chart of signatures and ratifications of Treaty 074' (*Council of Europe Traty Office,* 2023) <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=074> accessed 26 January 2023.

51 United Nations, Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004 UNGA Res 59/38) <https://undocs.org/en/A/RES/59/38> accessed 26 January 2023.

52 Akhtar (n 10).

53 *Jurisdictional Immunities of the State* (n 24) Press release 2012/7. The Court holds that the action of the Italian courts in denying Germany the immunity to which the court has held that it was entitled under customary international law constitutes a breach of the obligations owed by the Italian State to Germany.

54 James Crawford, 'Interview with Magda Karagiannakis, Barrister and Academic, State immunity, war crimes and human rights (Melbourne, 24 September 2012)' (2014) 26 (1) Global Change, Peace & Security 85, doi: 10.1080/14781158.2013.808992.

can mention: the inclusion of the waiver in all transaction documents; it must be accepted by all states or state entities that may be a party to the transaction or that own assets relevant to the transaction; and it must be an express and clear waiver of both immunity from suit and immunity from execution. States may also, by unilateral acts such as waiver, voluntarily abandon certain rights such as immunity from jurisdiction or enforcement.[55]

State immunity is an evolving feature of legal personality. Legal personality also includes the capacity to enforce its own rights as well as to bind other entities to fulfil their obligations under international law. For example, this means that a subject of international law should be able to: (1) make claims before international and national courts and tribunals to exercise its rights; (2) have the capacity or power to become a party to international conventions that are legally binding under international law, e.g., treaties; (3) enjoy immunity from jurisdiction before foreign courts, e.g., immunity for acts of state; (4) be subject to obligations under international law and have the right to create rules of international law. Subjects of international law do not have the same rights, obligations, and capacities. The International Court of Justice states in its 1949 Advisory Opinion on 'Reparation for Injuries Suffered in the Service of the United Nations' that subjects of law in a legal system are not necessarily identical in the nature or extent of their rights.

All are old, and all are new, and specialists can work together to find the most realistic and best suited solutions.

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55 See Dumitra Popescu, *Public International Law: University course* (Universitatea Titu Maiorescu 2006) 37.

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Research Article

AI V. ARBITRATOR: HOW CAN THE EXCLUSION OF EVIDENCE INCREASE THE APPOINTMENTS OF THE ARBITRATORS?

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ABSTRACT

Background: *The present article was prompted by the growing influence of artificial intelligence in international arbitration. Artificial intelligence poses a challenge to the arbitration market since its advantages make it inevitable that in the future, it will take over some of the arbitrator's fact-finding functions. Accordingly, the question arises as to how arbitrators can improve fact-finding and, consequently, maintain their demand in the arbitration market. This article*

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analyses in detail one of the alternatives for such an improvement – a stricter application of the rule on the admissibility of written witness testimony.

Objects: *The article sets out the following objectives: (1) to uncover why artificial intelligence could be considered a better fact-finder than the arbitrator; (2) to identify how arbitrators apply the rule on the admissibility of written witness testimony in international arbitration proceedings; (3) to justify a different application of the latter admissibility rule that both improves the quality of fact-finding and, accordingly, allows arbitrators to keep pace with artificial intelligence.*

Methods**:** *The article is grounded in the doctrinal legal research method since it will examine three legal sources: 1) the widely applicable IBA Rules on the Taking of Evidence in International Arbitration; 2) the arbitral tribunal's awards; (3) legal scholarship. The research additionally uses an economic analysis of law as well as an interdisciplinary approach, which reveals certain psychological phenomena related to decision-making in arbitration.*

Results and Conclusions: *The application of the rule of admissibility of written testimony of a witness in international arbitration leads to various negative consequences in the fact-finding process. For arbitrators to keep pace with artificial intelligence in the fact-finding process and increase their demand in the arbitration market, it is necessary to adopt a stricter approach to the latter admissibility rule. This approach leads to the exclusion rather than the evaluation of written witness testimony in international arbitration proceedings.*

1 INTRODUCTION

The Fourth Industrial Revolution and the associated developments of information technology are affecting many areas of our lives, such as economics, medicine, business, etc. This new revolution is evolving at a much faster pace, has a much greater impact, and affects a much larger number of countries, economies, and industries around the world than its predecessors.[1]

This revolution inevitably affects the legal system and its most integral part – dispute resolution institutions. International arbitration is no exception in this respect. Various litigation forums, such as international arbitration, have been impacted by these upheavals in both positive and negative ways. Probably one of the most promising consequences is the use of artificial intelligence (hereinafter AI) in dispute resolution. For example, China already has digital courts presided over by an AI judge.[2] Meanwhile, in Estonia, technology is being developed to enable AI to resolve disputes concerning up to €7,000.[3] Although we still cannot clearly predict how AI will affect the fact-finding and the decision-making process in international arbitration, it is clear that the influence of AI in this respect will continue to grow.[4]

The increasing influence of AI should be a not-so-pleasant message for arbitrators. After all, arbitrators are market participants who try to maximise their benefits. Arbitrators acting in the market for arbitration services have a clear interest in reappointments in

1 For more details, see K Schwab, Ketvirtojo pramonės revoliucija (Vaga 2017) 11-3.

2 GH Kasap, 'Can Artificial Intelligence ('AI') Replace Human Arbitrators? Technological Concerns and Legal Implications' (2021) 2 Journal of Dispute Resolution 1.

3 ibid 1.

4 See M Waqar, 'The Use of AI in Arbitral Proceedings' (2022) 37 (3) Ohio State Journal on Dispute Resolution 353-4.

future arbitration cases.[5] Meanwhile, the impact of AI in the decision-making process may inevitably lead to a reduction in arbitrators' appointments, workload, and, ultimately, fees for arbitration services. Although AI is not in a position to take over an essential part of the fact-finding functions of arbitrators, at least for the time being,[6] the rapid development of information technology will oblige any arbitrator to ask the following question: how will he/she be able to maintain his/her service supply in the arbitration market?

The main purpose of this article is to argue that one way to improve the fact-finding process, maintain the demand for arbitrators in the market, and prevent the entrenchment of AI is to adopt a stricter approach towards the rules on the admissibility of evidence. More specifically, this research focuses on specific admissibility rules, i.e., the admissibility of written testimony of a witness who was not examined during the arbitration hearing. The generally accepted version of this rule is set out in Art. 4(7) of the widely applicable IBA Rules on the Taking of Evidence in International Arbitration (hereinafter IBA Rules[7]):

> If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.

Accordingly, the article analyses the possible improvements in the application of this admissibility rule and how these improvements could maintain market demand for arbitrators' services.

2 AI v. ARBITRATOR

Before the analysis of the admissibility of evidence in international arbitration, this section briefly describes why AI can be considered a superior fact-finder. In other words, this section tries to provide some reasons that could lead to an increase in the demand for AI and a decrease in the demand for arbitrators in the future arbitration market.

The reasons for the increase in demand for AI can be very diverse. For example, arbitrators, like any other human beings, have limited working hours. In contrast, AI can work essentially without interruption. Also, AI can store and organise significantly larger amounts of information in its memory than humans. Since the analysis of these causes could be the subject of separate research, this article focuses on only one group of causes that is inextricably linked to the arbitration process, i.e., cognitive biases in the evidentiary process.

Arbitrators, like any other human beings, are affected by cognitive biases in the decision-making process, which can be defined as systematic and predictable deviations from the axioms of rational decision-making.[8] Cognitive errors have been identified primarily in psychology. One of the greatest contributions in this field has been made by Nobel Laureate D. Kahneman. In his book *Thinking, Fast and Slow*, Kahneman distinguishes between two systems of thinking: System 1, which is characterised by intuitive, fast, emotional, and unconscious decision-making, and System 2, which is characterised by slower, calculating,

5 RA Posner, How Judges Think (Harvard UP 2008) 127-8. Also see B Guandalini, Economic Analysis of the Arbitrator's Function (Kluwer Law International 2020) 327-8.

6 M Piers and C Aschauer 'Administering AI in Arbitration' in R Nazzini (ed), Construction Arbitration and Alternative Dispute Resolution: Theory and Practice Around the World (Informa Law from Routledge 2022) ch 5, 65-6.

7 International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration: Adopted by a Resolution of the IBA Council 17 December 2020 (IBA 2021) <https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b> accessed 20 October 2022.

8 E Zamir and D Teichman, Behavioral Law and Economics (OUP 2018) 22.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

logical, but time-consuming and effort-intensive decision-making.[9] System 1's strong influence on our decision-making and the laziness of System 2 produces a variety of sometimes unconscious decision-making errors, including cognitive biases.

At first glance, it may seem that lawyers are able to avoid or at least identify various cognitive errors. This is not true. Various empirical studies have shown that lawyers are prone to make various cognitive errors in the decision-making process. Unjustified overestimation of certain information, prejudices, life experience, personal traits, etc., have a significant impact on both the lawyer and people without any legal training. Arbitrators are no exception in this respect.[10]

Cognitive biases can manifest themselves in many different ways. Due to the limited scope of the research and the multitude of biases, the article focuses on two cognitive biases, namely the confirmation bias and the framing bias. These biases were also chosen because of their direct impact on the evidentiary process.

Firstly, confirmation bias is the tendency of decision-makers to bias the information in favour of a previously formed opinion or belief. As is pointed out in the legal scholarship: 'People not only look for confirmatory evidence, they also tend to ignore disproving evidence, or at least give it less weight, and to interpret the available evidence in ways that confirm their prior attitudes'.[11]

This bias also has a significant impact on the arbitration process. For example, Richard C. Waites and James E. Lawrence, in their article 'Psychological Dynamics in International Arbitration Advocacy', reach the following conclusion:

A typical arbitrator concludes the initial phase with a single dominant story in mind. In fact, researchers have determined that a sizeable percentage of arbitrators have established a clear leaning by the end of the opening statement (prior to any exposure to witnesses or evidence). This would mean that for most arbitrators, the actual arbitration presentation is a process of filtering through the evidence to test their individual hypothesis about the case – to either confirm or to alter their original notion of what the case story really is.[12]

The influence of this bias is also identified by other authors. For example, E. Sussman argues that one of the consequences of this bias is the strong influence of previously formed opinions or beliefs in the decision-making process.[13]

Secondly, there is the framing bias. This bias usually manifests itself in the fact-finder' tendency to place more faith in the clear and convincing presentation of information than in the content of the information provided. In other words, the factual history, rather than the credibility of evidence, determines the fact-finder's decision in a particular instance.

A good example of this bias is a study by psychologist Solomon Asch. Participants were given

9 D Kahneman, Mąstymas, greitas ir lėtas (Eugrimas 2016) 33-47.

10 J Hornikx, 'Cultural Differences in Perceptions of Strong and Weak Arguments' in T Cole (ed), The Roles of Psychology in International Arbitration (Kluwer Law International 2017) ch 4, 75; F Schauer, 'The Role of Rules in the Law of Evidence' in C Dahlman, A Stein and G Tuzet, (eds), Philosophical Foundations of Evidence Law (Virginia Public Law and Legal Theory Paper Series, OUP 2021) ch 5, 15; RA Posner, Jurisprudencijos problemos (Eugrimas 2004) 174, 178.

11 Zamir and Teichman (n 9) 59.

12 RC Waites and JE Lawrence, 'Psychological Dynamics in International Arbitration Advocacy' in RD Bishop and EG Kehoe (eds), The Art of Advocacy in International Arbitration (2nd edn, JurisNet LLC 2010) ch 4, 109.

13 E Sussman, 'Biases and Heuristics in Arbitrator Decision-Making: Reflections on How to Counteract or Play to Them' in T Cole (ed), The Roles of Psychology in International Arbitration (Kluwer Law International 2017) ch 3, 59-63.

character descriptions of two individuals: A: intelligent – industrious – impulsive – critical – stubborn – envious; B: envious – stubborn – critical – impulsive – industrious – intelligent. Both A and B have identical character traits, the only difference being the order of the traits. The following conclusion was drawn from the participant's assessment of the personalities of A and B:

> The impression produced by A is predominantly that of an able person who possesses certain shortcomings which do not, however, overshadow his merits. On the other hand, B impresses (most subjects) as a 'problem' whose abilities are hampered by his serious difficulties. [...] [S]ome of the qualities (*e.g.*, impulsiveness, criticalness) are interpreted in a positive way under Condition A, while they take on, under Condition B, a negative color.[14]

As can be seen, the participants did not base their decision on the character traits, which were identical, but on how these traits were presented.

The influence of framing bias can also be seen in arbitration proceedings. Sussman highlights the influence of this bias on arbitrators' decision-making and points out:

> Arbitrators should isolate the facts in their own thinking in order to step back from the influence a better framed story might have on them. [...] Counsel, of course, should use their skills to the best of their ability and present their story in the most favorable light and in a manner most likely to have the psychological impact they desire.[15]

Accordingly, irrelevant evidence which is presented coherently and clearly can have a much greater impact on the decision-making process than evidence that is genuinely relevant to the case but is inconsistently presented.

Are these two cognitive biases also inherent in AI? The answer to this question is quite simple – no. Unlike humans, AI is able to assess all the information in an unbiased manner, i.e., without the undue influence of the evidence presented in advance or the consistency of the story based on the evidence. It is precisely this aspect that gives AI a significant advantage in the arbitration market over an arbitrator. The latter point is also made by co-authors B. A. Garner and A. Scalia in the introduction to their book *Making Your Case: The Art of Persuading Judges*:

> While computers function solely on logic, human beings do not. All sorts of extraneous factors – emotions, biases, preferences – can intervene, most of which you can do absolutely nothing about (except play upon them, if you happen to know what they are).[16]

While we can agree with this quote on the point that, unlike computers, humans are prone to make all sorts of cognitive errors, the part of the quote that says that we cannot do anything about it is incorrect. One way of reducing the significance of these biases is to apply the admissibility rules. A possible solution will be described below.

3 THE ADMISSIBILITY OF EVIDENCE IN INTERNATIONAL ARBITRATION

This study further substantiates how the application of the rule of admissibility of written witness testimony could avoid the above-mentioned cognitive biases. However, before proceeding to a critical analysis of the latter admissibility rule, it is first necessary to elaborate on two aspects: (1) the general framework of admissibility of evidence in international

14 J Wistrich, C Guthrie and J Rachlinski, 'Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding' (2005) 153 (4) University of Pennsylvania Law Review 1266.

15 Sussman (n 14) 57.

16 BA Garner and A Scalia, Making Your Case: The Art of Persuading Judges (West Group 2008) XXIII.

Access to Justice in Eastern Europe
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arbitration (see part 3.1.); (2) the established practice of application of the rule of admissibility of written witness testimony (see part 3.2.).

3.1 The general framework of admissibility of evidence in international arbitration

The admissibility rules in international arbitration can be summarised in two words: arbitrator's discretion. The issue of admissibility of evidence is left exclusively to the discretion of arbitral tribunals unless the parties agree otherwise.

The latter conclusion is supported by various arbitration law sources. For example, Art. 19(1) of the UNCITRAL Model Law on International Commercial Arbitration (hereinafter Model Law) establishes the principle of party autonomy: 'Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings'.[17] In the absence of an agreement between the parties, Art. 19(2) of the Model Law becomes applicable:

> Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Substantially identical provisions are contained in the rules of arbitration proceedings – for example, see Art. 27(4) of the UNCITRAL Arbitration Rules,[18] Art. 19 of the ICC Arbitration Rules,[19] and Art 36(1) of the ICSID Arbitration Rules.[20] In addition, Art. 9(1) of the IBA Rules contains identical provisions: 'The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.'

Unlike the Model Law or the rules of arbitration procedure, the IBA Rules directly establish specific admissibility rules (see, for example, Art. 9(2) and (3) of the IBA Rules, as well as the already mentioned Art. 4(7) of the IBA Rules). Nevertheless, both the IBA itself and the legal scholarship recognise that the application of admissibility rules depends on the broad discretion of arbitrators.[21]

Since it is particularly rare for the parties themselves to agree on the application of specific admissibility rules,[22] the application of the admissibility rules most of the time is left to the discretion of the arbitrators. Accordingly, in this respect, the key question concerns how arbitrators exercise this broad discretion granted by various sources of arbitration law.

17 UNCITRAL Model Law on International Commercial Arbitration 2006 <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> accessed 20 October 2022.

18 UNCITRAL Arbitration Rules 2021 <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration> accessed 20 October 2022.

19 ICC Arbitration Rules 2021 <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration> accessed 20 October 2022.

20 ICSID Arbitration Rules 2022 <https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf> accessed 20 October 2022.

21 IBA Working Party and IBA Rules of Evidence Review Subcommittee, 'Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration' (International Bar Association, 2010) 25 <https://www.ibanet.org/MediaHandler?id=DD240932-0E08-40D4-9866-309A635487C0> accessed 20 October 2022; P Ashford, The IBA Rules on the Taking of Evidence in International Arbitration: A Guide (CUP 2013) 146.

22 WW Park, 'The 2002 Freshfields Lecture – Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion' (2003) 19 (3) Arbitration International 289.

The answer to the latter question may vary widely depending on the situation of each arbitration case where the admissibility of evidence is at issue. Nevertheless, legal scholarship allows us to distinguish a general approach of arbitral tribunals, i.e., the liberal approach towards the admissibility of evidence. This approach is characterised by legal scholarship in the following way:

> […] tribunals nearly always adopt a flexible approach to admissibility of evidence; it is unlikely that a party will be prevented from submitting evidence that may genuinely assist the arbitral tribunal in establishing the facts, should they be disputed.[23]

Other scholars also confirm this view, stating that: 'Arbitration tribunals will admit almost any evidence submitted to them in support of parties' position, they retain significant discretion in the assessment and the weighing of the evidence'.[24]

Therefore, the general approach to the admissibility of evidence can be characterised as follows: arbitrators will generally accept all the evidence submitted by the parties, but arbitrators will retain a wide margin of discretion in deciding on the weight to be accorded to the evidence submitted by the parties.[25]

3.2 The admissibility of written witness testimony

Part 3.1 revealed the arbitrators' general approach to the admissibility rules; thus, it is now time to turn to the specific rule of admissibility of written witness testimony.

As already mentioned, the universal version of this rule is enshrined in Art. 4(7) of the IBA Rules:

> If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise.

One of the main reasons for this rule is the exercise of the party's right to question a witness. If a witness fails to appear, the party forfeits this right, and the arbitrators are left only with the witness's written testimony. In addition, such evidence should be declared inadmissible, not only because the opposing party loses the right to cross-examine the witness but also because neither the party nor the arbitrators have any way of ascertaining the accuracy of written evidence. Cross-examination is often described as 'beyond any doubt the greatest legal engine ever invented for the discovery of truth'.[26] Meanwhile, in the absence of a witness, parties lose this legal mechanism which leads to a high risk of overestimation of such testimony.

As is clear from the wording of Art. 4(7) of the IBA Rules, the mere absence of a witness is not sufficient to disregard the witness testimony. To declare the testimony of witnesses inadmissible, the arbitral tribunal has to establish two circumstances: (1) there is no valid reason not to appear for testimony; (2) there are no exceptional circumstances. Without

23 N Blackaby et al, Redfern and Hunter on International Arbitration (6th ed, OUP 2015) 378.

24 J Lew, L Mistelis and S Kröll, Comparative International Commercial Arbitration (Kluwer Law International 2003) 561.

25 Additionally, see S Saleh, 'Reflections On Admissibility of Evidence: Interrelation Between Domestic Law and International Arbitration'(1999) 15 (2) Arbitration International 155.

26 JH Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of all Jurisdictions of the United States and Canada (2nd edn, Little Brown 1923) 27.

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going too much into the content of the latter two circumstances, in this respect, it is important to note that the IBA Rules do not provide an answer as to what constitutes 'valid reason' or 'exceptional circumstances' and leave the determination of these circumstances to the discretion of arbitral tribunals.[27]

However, when there is no valid reason for the absence of a witness, and there are no exceptional circumstances, Art. 4(7) of the IBA Rules makes it quite clear that arbitral tribunals '[...] shall disregard any Witness Statement [...]'. Nevertheless, the case law of arbitral tribunals is moving in a different direction. It is quite clear that in practice, arbitral tribunals follow the liberal approach and, as a consequence, tend not to declare such evidence inadmissible but rather to give it appropriate weight in light of other factual circumstances of the case. This approach is well described in one UNCITRAL arbitration case:

> The Tribunal considers that the general principle to be applied is that, where written direct testimony is submitted with a memorial as evidence on which the relevant party relies, the witness in question should be offered for oral examination at the witness hearings unless the opposing party states that his or her presence is not required. Where a party fails or refuses to produce any such witness the written testimony will not be ruled inadmissible, but the Tribunal is likely to attach little or no weight to the written testimony concerned to the extent that it is not corroborated by other documentary or witness evidence.[28]

Therefore, when arbitral tribunals apply Art. 4(7) of the IBA Rules, tribunals tend to follow the above-mentioned liberal approach. In other words, arbitral tribunals tend not to declare the written testimony of a witness inadmissible but rather decide to admit the evidence and then give it an appropriate, usually lesser, evidentiary weight.

4 THE STRICTER APPROACH TOWARDS THE ADMISSIBILITY OF EVIDENCE IN INTERNATIONAL ARBITRATION

Part 3 of the article highlighted both the general approach to the admissibility of evidence in international arbitration and the application of rules regarding the admissibility of written witness testimony. Part 4 will provide critical observations. First of all, part 4 reveals why the approach taken by the arbitral tribunal should be considered flawed (see part 4.1.). Secondly, it explains why arbitrators should apply the rule regarding the admissibility of written witness testimony more strictly and responds to possible counter-arguments against the proposed application (see part 4.2.).

4.1 Problems related to the status quo of admissibility of written witness testimony

At first glance, the arbitrator's decision not to exclude evidence but to give it weight sounds reasonable. After all, even if a party did not have the opportunity to question the witness at the hearing, this does not necessarily mean that the evidence is unreliable and cannot be useful to the case. Nevertheless, the latter approach and its application completely overlook

27 ND O'Malley, Rules of Evidence in International Arbitration: An Annotated Guide (Informa Law from Routledge 2019) 136.

28 SD Myers Inc v Government of Canada (First Partial Award) (UNCITRAL, 13 November 2000) <https://www.italaw.com/cases/969> accessed 20 October 2022. Also, see Case ARB/94/2 Tradex Hellas SA v Republic of Albania (ICSID, 24 December 1996, 29 April 1999) <https://www.italaw.com/cases/1110> accessed 20 October 2022.

the fact that arbitrators, unlike AI, make various cognitive errors during the fact-finding process. Arbitrators who decide to evaluate the written witness testimony run a high risk of overestimating the value of such evidence due to cognitive biases. This risk will be illustrated by reference to two cognitive biases which have already been described above (see part 2).

Firstly, if a witness's testimony is not excluded, confirmation bias can influence the arbitrator's decision-making process in a variety of ways. Some possible examples:

(1) arbitrators will be inclined to overvalue the written testimony if it is consistent with the arbitrators' preconceived, but not necessarily correct, views on the outcome of the case. In such a case, this bias will tend to lead arbitrators to exaggerate the importance and relevance of such evidence;

(2) arbitrators will tend to overestimate the value of testimony if the written testimony is submitted at the beginning of proceedings. In such a case, there is a strong likelihood that this evidence will have a significant impact on the formation of a preconceived position, which will be very difficult to influence by the evidence presented later in the arbitration;

(3) arbitrators will tend to overestimate the value of the testimony if the arbitrator feels sympathy towards the witness. For example, the arbitrator likes the witness's experience, character, writing style, and presentation of ideas, or the arbitrator and the witness have similar cultural, political, or social status. In these instances, the arbitrator will be inclined, even unconsciously, to favour the testimony of such a witness.

Secondly, the framing bias also increases the risk of over-evaluating the written testimony. The framing bias would occur if the party providing the written testimony of a witness were able to present this evidence together with a cogent, coherent, and illustrative factual story supported by other evidence. In such instances, there is a strong likelihood that the arbitrator will base its decision not on the content of evidence constituting the coherent story but on the fluidity of the presentation of information, including the written testimony which corroborates that story. Accordingly, the coherent and illustrative but not necessarily true story will inevitably invoke the framing bias, and hence, arbitrators may not even notice the unreliable nature of the written testimony.

Thirdly, the risk of the latter cognitive errors is even higher in arbitration proceedings due to several additional reasons:

(1) arbitrators are mostly lawyers, and a legal background does not provide knowledge of assessing facts, i.e., knowing how to determine the weight or credibility of the evidence. In law faculties, one usually will not find courses focused on the study of fact-finding. All of this is usually left to the field of legal practice rather than legal education. Accordingly, the legal education of an arbitrator per se will rarely help to avoid mistakes in the determination of facts;

(2) the main criterion for choosing an arbitrator is not the arbitrator's ability in the fact-finding process. Often, one of the main criteria for selecting an arbitrator is his/her legal knowledge or experience in the relevant business sectors.[29] In contrast, an arbitrator's ability to dissociate himself from cognitive biases or his ability to properly assess the facts are usually unreasonably not considered as criteria for assessing a person's ability to arbitrate a case;

29 Latham & Watkin, Guide to International Arbitration (Latham & Watkin 2014) 8 <https://www.lw.com/admin/Upload/Documents/Guide-to-International-Arbitration-May-2014.pdf> accessed 20 October 2022; 'How to Select an Arbitrator' (International Centre for Settlement of Investment Disputes) <https://icsid.worldbank.org/node/20541> accessed 20 October 2022.

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(3) arbitration law usually allows to appoint as arbitrator a person with no legal training at all. For example, in disputes with a specific field of expertise, it is often advisable to appoint an expert in that specific field who may not have a legal background.[30] Although rare, in practice, there have been cases where a person without a legal background but with specific knowledge and experience in arbitral proceedings has been appointed as the president of the arbitral tribunal.[31] Legal education, although it does not *per se* provide practical experience in fact-finding, at least acquaints a person with the essence of court proceedings, the rules of evidence, and other procedural rules, which help to understand and, in some cases, avoid various errors in the evidentiary process. In contrast, an arbitrator without legal training is often even more susceptible to various errors related to the overestimation of the weight or reliability of evidence.

Therefore, the arbitrators' tendency not to exclude but to evaluate the written witness testimony creates fundamental problems for the decision-making in arbitration proceedings. Failure to exclude evidence creates a significant risk of two cognitive biases. This risk prevents arbitrators from assessing the evidence impartially and objectively. In turn, this inevitably has a negative impact on accurate decision-making in the arbitration process.

4.2 The stricter approach toward the admissibility of written witness testimony

The tendency of arbitral tribunals not to exclude written witness testimony opens a risk of various cognitive biases. This tendency gives a clear advantage to AI, whose decision-making, as mentioned above, is not subject to various cognitive errors. Inevitably, the admissibility of such evidence and the consequential occurrence of various cognitive errors will create additional conditions for future growth in the demand for AI in the arbitration market. Thus, we should pose ourselves the question: how can arbitrators avoid these cognitive biases in the evidentiary process? Part 4.2 of the article will further argue that one way to reduce the impact of these cognitive biases is a stricter application of the admissibility rule established in Art. 4(7) of the IBA Rules. In other words, arbitrators should exclude, rather than evaluate, the written witness testimony under the conditions set out in Art. 4(7) of the IBA Rules. Detailed arguments in support of this approach are set out below.

Firstly, the inadmissibility of written witness statements would be consistent with a linguistic interpretation of Art. 4(7) of the IBA Rules. Art. 4(7) of the IBA Rules does not state that '[…] the Arbitral Tribunal may disregard any Witness Statement […]' or '[...] the Arbitral Tribunal could disregard any Witness Statement [...].' On the contrary, Art. 4(7) of the IBA Rules expressly provides that, under certain conditions, the arbitral tribunal should disregard the written testimony of a witness, i.e., '[...] the Arbitral Tribunal shall disregard any Witness Statement [...]'.

Secondly, the arbitrators' decision to exclude written testimony reduces the risk of confirmation bias and framing bias. The exclusion of testimony will avoid confirmation bias because:

(1) excluded written testimony will not be able to influence or support the arbitrators' preconceived views on the outcome of the case;

30 JM Waincymer, 'Procedure and Evidence in International Arbitration' (Kluwer Law International 2012) 278.

31 J Fry, J Beechey and S Greenberg, The Secretariat's guide to ICC arbitration: A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration (International Chamber of Commerce 2012) 157.

(2) the timing of the submission of eventually excluded written testimony in proceedings will be irrelevant; and

(3) the character, social status and other aspects of the witness will also be irrelevant.

As far as framing bias is concerned, the strict application of the admissibility rule immediately prevents the use of the testimony for the party's story about the facts of the case. In other words, the party's representatives will not have the opportunity during the proceedings to "wrap" the written testimony into a coherent, factual story of the case.

Accordingly, the decision to exclude written witness testimony, at least in some respects, puts the arbitrators and the AI on an equal footing. As mentioned above, by deciding to exclude written testimony, arbitrators avoid an evaluation of such evidence and thus avoid two cognitive biases that are often present in arbitration proceedings. In this instance, the evaluation of written testimony by the arbitrator is not conditioned by either confirmation or framing biases. Hence, at least in this respect, arbitrators, as participants in the arbitration market, are in no way inferior to AI.

While there are advantages to a stricter approach to the admissibility of evidence, it must be acknowledged that this approach is open to a number of criticisms. The two main counter-arguments against a stricter approach are: (1) the exclusion, rather than the evaluation, of written witness statements, threatens to exclude relevant and material evidence; (2) even if the written witness statements are excluded, it will inevitably influence the arbitrators' decision-making process. The following two points will explain why these counter-arguments should not replace a stricter approach towards the admissibility rule.

Firstly, the exclusion, rather than the evaluation, of written witness statements threatens to exclude relevant and material evidence. Unfortunately, this threat is unavoidable. If arbitrators decide to take a stricter approach to the admissibility of evidence, we will inevitably be faced with cases where relevant evidence is excluded.

Nevertheless, the latter does not justify abandoning a stricter approach for several reasons:

(1) it is doubtful whether we will ever find a legal rule whose application does not have negative consequences. For this reason, it is not rational to expect an ideal and always correct result from the admissibility rules;

(2) we must choose the lesser of two evils, i.e., on the one hand, by choosing to exclude evidence, we risk excluding potentially relevant evidence, and on the other hand, by choosing not to exclude evidence, we risk misleading the arbitral tribunal. The written testimony of a witness who has not been cross-examined at the hearing is practically impossible to verify in arbitration proceedings. As a rule, it will usually be unreliable evidence, and the admissibility of such evidence, due to the cognitive errors made by the arbitrators, leads to an even greater risk that we should not be willing to take;

(3) as mentioned above, written witness testimony will usually be unreliable evidence since without questioning the witness on the content of his/her testimony, neither the parties nor the arbitrators will be able to ascertain the accuracy of the testimony.

Accordingly, if we look at this problem not in terms of a particular case but in terms of all cases in general, the negative consequences of excluding evidence would be significantly less than in cases of non-exclusion. This point has been made by F. Schauer:

> […] a rule-based approach to evidence may produce frequent epistemic suboptimalities when it excludes genuinely probative evidence [...]. But, analogously, the suboptimality of such decisions, even when aggregated, may be less than the suboptimality, in the aggregate,

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> of fact-finding by decidedly suboptimal decision-makers, whether they be judges or members of a jury.[32]

Secondly, the arbitrator's ability to ignore inadmissible information. The content of inadmissible evidence influences the arbitral tribunal. An arbitrator who is familiar with the content of relevant evidence, even if eventually that evidence is declared inadmissible, will often not be able to ignore this inadmissible but relevant information. This problem, both for judges and arbitrators, has been confirmed by various empirical studies.[33] Accordingly, sceptics of a stricter application of admissibility rules might reasonably ask: why exclude written witness testimony at all if it still influences the arbitrator's decision-making process?

Legal scholarship offers several solutions to this problem. For example, some authors suggest replacing the judge who has accessed the inadmissible information, although authors themselves acknowledge that such a method would be rather costly.[34] Meanwhile, some jurisdictions address this problem by providing that the admissibility of evidence is to be decided by a different judge at the initial stage of proceedings.[35]

However, an often-overlooked solution to this problem is to pay more attention to the rules of admissibility of evidence. In other words, another way of addressing this problem is the adversarial process, during which the parties raise questions about the admissibility of evidence.[36] Arbitrators who, during an adversarial process, hear parties' questions and arguments on the inadmissibility of written testimony will inevitably take note of the dangers of such evidence and, once it has been excluded, will be able (at least in some cases) to distance themselves from the content of testimony.

Ultimately, the exclusion of testimony will result in the exclusion of testimony from the arbitration file altogether. Consequently, the arbitrators will not consider such testimony during their assessment of evidence and will not consider or rely on such evidence during the writing of the final award. The exact opposite situation exists when the arbitrators decide not to exclude but to assess the written testimony. In this instance, the party will continue to rely on the testimony, and the arbitrators will examine its relevance during the final evaluation of evidence and describe it in the final award. It is quite clear that in the latter case, the written testimony will have a significantly greater impact on the arbitral tribunal than the testimony which would be immediately excluded from the case file.

Therefore, the strict approach towards the admissibility rule should not be undermined by frequent counter-arguments, i.e., the risk of exclusion of relevant evidence and the incapability of arbitrators to ignore inadmissible information. This leads to the conclusion that one of the more effective ways for arbitrators to distance themselves from the two cognitive biases is to adopt a stricter approach to the admissibility rules. The latter approach, at least in this respect, would allow arbitrators to avoid cognitive biases and thus improve the quality of fact-finding. This approach, among other things, in the near future would allow the arbitrators to maintain a higher demand for their services in the arbitration market.

32 Schauer (n 11) 22.

33 For example, see E Peer and E Gamliel, 'Heuristics and Biases in Judicial Decisions' (2013) 49 (2) Court Review 114; Wistrich, Guthrie and Rachlinski (n 15) 1251; Sussman (n 14) 50.

34 B Nunner-Kautgasser and P Anzenberger, 'Inadmissible Evidence: Illegally Obtained Evidence and the Limits of the Judicial Establishment of Truth' in V Rijavec, T Kereteš and T Ivanc (eds), Dimensions of Evidence in European Civil Procedure (Kluwer Law International 2016) ch 5, 201-2.

35 For further details, see A Juozapavičius, 'Duomenų (įrodymų), gautų pažeidžiant teisę, naudojimo neleistinumas Lietuvos baudžiamajame procese' (Daktaro disertacija, Vilniaus universitetas 2012) 100.

36 For further details, see RA Posner 'An Economic Approach to the Law of Evidence' (1999) 51 Stanford Law Review 1498.

5 CONCLUSIONS

In contrast to AI, arbitrators make various cognitive errors in the decision-making process. Two cognitive biases relevant to the arbitration process have been identified in this research: (1) the confirmation bias, which is manifested by the fact-finder's tendency to bias the evaluation of information towards the decision-maker's pre-existing opinions or beliefs; (2) the framing bias which is manifested by the fact-finder's tendency to base his/her decision on the framing rather than the content of presented information.

The analysis of various arbitration law sources suggests that arbitral tribunals tend to adopt a liberal approach towards the admissibility of evidence. The latter approach leads arbitrators to generally accept most of the evidence submitted by the parties. This approach is also reflected in the application of Art. 4(7) of the IBA Rules: arbitral tribunals are not inclined to exclude the written witness testimony but rather try to give such testimony an appropriate, usually lesser, evidentiary weight.

The liberal approach of arbitral tribunals to evaluate and not exclude the written testimony opens up a significant risk of confirmation bias and framing bias in the decision-making process. The latter cognitive biases create the risk that arbitrators, even unconsciously, overestimate the value of written testimony in arbitration proceedings. Such a risk could be eliminated if the arbitral tribunals adopt a stricter approach towards the admissibility rule and consequently decide not to evaluate but to exclude the written testimony. Stricter application of the admissibility rule avoids the confirmation and framing biases and, at least in this respect, puts the arbitrators and the AI on an equal footing in the fact-finding process.

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Reform Forum's Note

FEATURES OF PUBLIC ADMINISTRATION ENSURING SECURITY UNDER THE LEGAL REGIME OF MARTIAL LAW IN UKRAINE

Oleh Ilnytslyi and Natalia Ilkiv

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Keywords: *military administration, management of budget funds, restriction of individual rights and freedoms, abuse of authority*

ABSTRACT

Background: *The functioning of the state apparatus under the legal regime of martial law causes significant changes in both the organisational and procedural nature of public administration.*

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Methods: *The results of research on the functioning of the state apparatus under the conditions of the legal regime of martial law and practice materials in the form of published statistical and journalistic reports from open sources of information were processed using general scientific and special research methods.*

Results and Conclusions: *As a result of this research, the following recommendations were formulated in the adaptation of public administration: the need to introduce clear distribution and definition of the competences of military and civil administration bodies, as well as the definition of further control mechanisms when granting an additional scope of powers to military and civil administration bodies under martial law conditions; 'revisions' regarding justification for the exercise of such powers; the implementation of restrictive measures of the legal regime of martial law should take place in a clear, legally defined sequence, taking into account the presence of a legitimate goal of their introduction with special attention to the issue of proportionality between the introduced restrictions and the results of their implementation to achieve the same goal; use of alternative means of communication with citizens with transparent (accessible) presentation of information to establish social dialogue and understanding between governing bodies and citizens; institutionalisation of such means of communication.*

1 INTRODUCTION

1.1 Ontological foundations of scientific interest

The beginning of the full-scale military aggression of the Russian Federation with the support of Belarus led to the restructuring of the public administration system following the new challenges of ensuring the protection of the sovereignty and territorial integrity of Ukraine, ensuring its economic and information security as the most important functions of the state and the affairs of the entire Ukrainian people as per para. 1 of Art. 17 of the Constitution of Ukraine. Today, this constitutional provision is filled with real content, as every citizen of Ukraine or anyone who is legally present on its territory has felt the value of the state as the only mechanism capable of ensuring against external physical threats, the priority and generality of the public interest in preserving state sovereignty against threats of military invasion. The experience gained by Ukrainians and the Ukrainian state should ideally never be needed in the future, but it cannot be forgotten or ignored. The public administration system undergoes a 'crash test' of its ability to function and fulfil its tasks and purpose in the most difficult conditions in recent history. The situation's dynamics require quick decision-making, which objectively cannot be sufficiently substantiated and calculated; therefore, their implementation is not always indisputably clear and effective. However, considering the duration and importance of such measures, certain general recommendations should be developed, which would become universal limits for avoiding the most acute unfair attacks on the sphere of private interests of a person. In the end, this will justify the real goal and expected result of this military confrontation – preserving and developing a sovereign and independent, democratic, social, and lawful Ukraine.

1.2 Research methodology and source base

The need for scientific research and the formation of generalisations on the indicated issues is determined by a war that has lasted for more than nine months in the territory of one of the largest European states, which determines the military confrontation between the liberal values of established and new democratic regimes and preserves latent or obvious

autocracies with terrorist-criminal characteristics. In these conditions, the resources and capabilities of the former initially appeared more limited since the defined limits of the state's intervention in the sphere of human rights, freedoms, and interests, its service function, and the management procedures adjacent to bureaucracy significantly influence the choice of forms and methods of confrontation. On the other hand, the opposite camp has practically unlimited human, material, and technical resources, which are mobilised in a forced manner for the needs of waging war.

For a long time, as part of a combination of our academic and human rights research, we have been working on the problems of the response of the public administration system to threats in the conditions of the legal regime of martial law and its changes in connection with this. A coalition of public organisations, the Ukrainian Helsinki Human Rights Union, with the support of the Czech organisation of People in Need Ukraine, within the framework of the SOS Ukraine initiative, prepared a series of analytical reports on ensuring security and law and order under martial law in communities outside of hostilities. The empirical results of these studies became the source base for theoretical generalisations, which formed the basis of the proposed article.[1]

As of today, not enough time has passed, and there are no open sources of information or other organisational opportunities to offer a truly coherent scientific study. However, we are sincerely convinced that voicing the relevant problems and jointly searching for their solution (within the limits allowed by the requirements of protection against the use of information against the security of the state and its citizens) is one of the elements of building a system of public administration resistant to military challenges, and therefore ensuring stability for each of us.

Given the specifics of the topic, goal, and task, a dialectical approach is the basis of the research. The system method was used to establish the content and determine the forms and methods of management in these specific conditions following the regulatory framework. The formal-dogmatic method made it possible to analyse the state's regulatory and legal framework and reveal the functional orientation of the system of protection of the rights and interests of individuals with the participation of subjects of power and their technical and legal perfection. Several other general scientific research methods were also used, in particular: analysis, historical-legal, comparative-legal, and others.

At the same time, the theoretical approaches and the authors' scientific conclusions were substantiated through the wide application of legal practice materials and journalistic reports.

2 SECURITY AS A SPHERE OF PUBLIC ADMINISTRATION IN THE CONDITIONS OF THE LEGAL REGIME OF MARTIAL LAW

The concept of security among the tasks of the public administration apparatus has turned from a declarative guarantee into an instinctive need for every person under Ukraine's jurisdiction. Accordingly, its normative and legal significance has acquired new aspects.

The new version of the Law of Ukraine 'On National Security' dated 21 June 2021 revealed this concept through the protection of state sovereignty, territorial integrity, democratic constitutional system, and other national interests of Ukraine from real and potential threats (para. 1.9 of Art. 1). In the category of such interests, the Law included the vital interests of

1 Ukrainian Helsinki Human Rights Union, 'Security and Order Under Martial Law in Non-Combatant Communities: Analytical Report' (*Ukrainian Helsinki Human Rights Union*, 28 October 2022) <https://helsinki.org.ua/publications/bezpeka-ta-pravoporyadok-v-umovakh-voyennoho-stanu-v-hromadakh-poza-boyovymy-diyamy/?fbclid=IwAR1AjtWrAr2zH4JNBQ9nhFniUX2zWptXB9pFLYGDxTRaPnDi-FhRHrae8Ls> accessed 22 November 2022.

Access to Justice in Eastern Europe
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a person, society, and the state, the implementation of which ensures the state sovereignty of Ukraine and its progressive democratic development, as well as safe living conditions and the well-being of its citizens (para. 1.10 of Art. 1), connected with the concept public safety and order (para. 1.3 of Art. 1).

Applying such a broad normative aspect, the Ministry of Development of Communities and Territories of Ukraine and the Minister of Internal Affairs of Ukraine presented the development of the national concept of 'Safe Community', which will provide for the security needs of each community, taking into account its peculiarities and specifics. According to this concept, the objects of security are defined as: security of public services, security of infrastructure, security in family and home, security of business, the safety of work, security of leisure time, and security of the natural environment.[2]

As we have the opportunity to consider these ideas, military aggression continues against all the mentioned aspects of ensuring security, creating a physical threat by influencing a wide range of needs, interests, and spheres of social existence. All this presupposes a fundamental restructuring of institutions and procedures of social management by state and other government institutions.

3 FEATURES OF THE INSTITUTIONAL STRUCTURE OF LOCAL GOVERNANCE UNDER THE CONDITIONS OF THE LEGAL REGIME OF MARTIAL LAW

According to para. 1 of Art. 4 of the Law of Ukraine 'On the Legal Regime of Martial Law' dated 12 May 2015 (hereinafter, the Act of Martial Law) in the territories where martial law has been imposed to ensure the operation of the Constitution and Laws of Ukraine and ensure, together with the military command, that the introduction and implementation of measures of the legal regime of martial law, defence, civil protection, public safety and order, the protection of critical infrastructure, the protection of the rights, freedoms and legitimate interests of citizens, temporary state bodies, and military administrations, may be formed.

The decision on the formation of military administrations was made by the President of Ukraine at the request of regional state administrations or military command.

In the event of a decision on the formation of district or oblast military administrations, their status is acquired by district or oblast state administrations, respectively, and the heads of districts or oblast state administrations acquire the status of heads of the respective military administrations.

Accordingly, taking into account the introduction of martial law in Ukraine from 05:30 on 24 February 2022 (Decree of the President of Ukraine No. 64/2022 dated 24 February 2022, approved by Law of Ukraine No. 2102-IX dated 24 February 2022, Presidential Decree No. 68/2022 dated 24 February 2022 'On the Formation of Military Administrations'), regional military administrations were formed to implement the Act of Martial Law to exercise leadership in the field of defence, public safety, and order.

Also, corresponding district military administrations were formed based on existing district-state administrations. Military administrations of settlements, districts, and regional military administrations exercise their powers during martial law and 30 days after its termination or cancellation.

2 Ministry of Internal Affairs of Ukraine, 'The Ministry of Internal Affairs presented the project of the national concept "Safe community"' (*MIA portal*, 7 October 2022) <https://mvs.gov.ua/news/mvs-prezentuvalo-projekt-nacionalnoyi-koncepciyi-bezpecna-gromada> accessed 22 November 2022.

According to para. 7 of Art. 4 of the Act of Martial Law, direction, coordination, and control over the activities of regional military administrations in matters of defence, public safety, and order, the protection of critical infrastructure, and the implementation of martial law measures are carried out by the General Staff of the Armed Forces of Ukraine, and in other matters by the Cabinet of Ministers of Ukraine within its powers. The duality of subordination to the highest body of civil and military command indicates a complex system of powers of these bodies, which according to Art. 15 of the Act of Martial Law not only duplicates the powers of the relevant local state administrations (Art. 119 of the Constitution of Ukraine and the Law of Ukraine 'On Local State Administrations') and local self-government bodies, taking into account the features established by this Law, but also exercises powers in the field of security, for example, regarding the introduction and implementation of measures of the legal regime of martial law; providing assistance to the owners of apartments (houses) in their reconstruction in case of damage as a result of hostilities, acts of terrorism, or sabotage; organising and participating in activities related to mobilisation training and civil protection; assistance to the State Border Service of Ukraine in maintaining the appropriate regime at the state border; the establishment of enhanced protection and ensuring, in cooperation with relevant business entities, the stable functioning of important objects of the national economy, and objects that ensure the livelihood of the population, etc.

One of the important aspects of effectively implementing one's activities is establishing communication between management bodies and citizens. The information space has become a full-fledged front and battlefield due to the implementation of various types of subversive informational and psychological operations. To ensure countermeasures, military administrations as local governing bodies use the information resources of the relevant local state administrations, on the basis of which they are formed, publicising the normative acts adopted in the process of exercising their own powers (following the example of the Lviv Regional Military Administration):

- communal local printed and electronic mass media (regarding the latter, there is a problem with conveying regional information since public broadcasting is broadcasted in the single news marathon mode, which does not allow it to be fully used for communication to local governing bodies);
- holding conferences, presentations, and press events, including in official media centres;
- official sites;
- pages in social networks of both the body itself (https://www.facebook.com/LvivskaODA; https://www.instagram.com/lviv_oda/) and its managers (https://www.facebook.com/maks.kozytskyy; https://www.instagram.com/kozytskiy.official/);
- telegram channels of the body (https://t.me/people_of_action) and the chief or profile managers (https://t.me/kozytskyy_maksym_official)

At the same time, the Act of martial law provides for several forms of managing a settlement within the relevant community under martial law:

- the continuation of the activity of elected local self-government bodies in the regime of the scope of powers of the legal status of martial law; or
- the formation of military administration of settlements within the territories of territorial communities, in which village, settlement, city councils and/or their executive bodies, and/or village, settlement, city mayors do not exercise the powers assigned to them by the Constitution and laws of Ukraine, as well as in other cases provided for by this Law. In the latter case, the military administrations of settlements concentrate in their own hands the entire scope of powers to ensure the management of the corresponding administrative-territorial unit, combining the functions of representative and local executive bodies of executive power and local self-government.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

4 CHANGES IN THE SYSTEM OF MANAGEMENT OF BUDGET COSTS UNDER THE CONDITIONS OF THE LEGAL REGIME OF THE MARTIAL LAW

Unlike the measures of the legal regime of martial law listed in Art. 8 of the Act of Martial Law, changes in the management of budget funds are applied based on the discretion of the state to ensure proper management in conditions of threats to national security and territorial integrity and are determined precisely by the functioning of the state to repel these primary dangers.

The main changes were related to ensuring the efficiency of decision-making in the budget process and expanding the powers of executive authorities, which received the legal opportunity to strengthen the 'manual management' of budget funds. Thus, the Cabinet of Ministers of Ukraine and executive bodies in the execution of local budgets were authorised to redistribute expenditure amounts within budget allocations, transfer budget allocations, or carry out distribution or redistribution of transfers without agreement with committees or relevant commissions of representative bodies; norms regarding medium-term budget planning, as well as reporting to representative bodies and their involvement in making relevant decisions, etc., have been suspended.

Such powers unequivocally determine the self-limitation by representative bodies of their constitutional budgetary and legal powers. Without denying the validity of the specified changes and their legal purpose, at the same time, one should remember the principle of proportionality, which should be ensured by the effectiveness of control mechanisms or the reassessment of the specified decisions, considering the actual situation in the territories where hostilities are not taking place.

For example, the Lviv City Council authorised the executive committee of the Lviv City Council during the martial law in Ukraine to redistribute expenses, which led to an increase in the approved budgetary appointments of the main managers of budget funds within the general and special funds, in addition to the own revenues of budget institutions, for a total amount which would not exceed 50,000,000 hryvnias with the approval of the Standing Committee on Finance and Budget Planning (Resolution of the Lviv City Council of 24 February 2022 No. 2133 'On Amendments to the Budget of the Lviv City Territorial Community for 2022'). However, the practice of implementing this authority, and especially the validity of its application in today's conditions of 'non-frontline' Lviv, is the cause of sharp disputes between the mayor and deputies.

Approaches to the sources of financing relevant expenses in the field of security have also changed. According to paras. 5, 6, 6-1 of part 1 of Art. 87 of the Budget Code of Ukraine (hereinafter, BC) expenditures on national defence (except for measures and works on mobilisation training of local importance), law enforcement activities, ensuring state security, and civil protection of the population and territories (except for measures specified in clause 16 of part one of Article 91 of the BC), ensuring the functioning of institutions and establishments of the Armed Forces of Ukraine, other military formations formed in accordance with the laws of Ukraine, law enforcement agencies, the Security Service of Ukraine, civil defence agencies that are state-owned belong to the expenses that are carried out from the State Budget of Ukraine, taking into account the state-oriented sovereign nature of the corresponding functions of the body.

At the same time, the development and formation on the basis of the Law of Ukraine 'On National Resistance' of the system of territorial defence, voluntary formations of territorial defence, and the resistance movement led to the formal and actual active involvement of budgetary resources of local self-government in the financing of measures and work on territorial defence and mobilisation training of local significance (p. 17 para. 1 of Art. 91 of the BC, para. 1 of Art. 23 of the Law of Ukraine 'On National Resistance').

For the consolidation of financial resources for the purposes of security and defence, Law No. 2390-X of 9 July 2022 established that during the period of martial law and to repel the armed aggression of the Russian Federation against Ukraine, ensuring national security, measures of territorial defence, support of local infrastructure, and social protection of the population, local self-government bodies, local state administrations, military-civilian administrations, or military administrations (if they are formed) may make decisions on spending, as an exception to the provisions of the second part of Art. 85 of the BC, expenditures not assigned to the relevant local budgets by this Code, and expenses for maintaining budgetary institutions simultaneously from different budgets. Such expenditures are made by providing an inter-budgetary transfer from the relevant local budget.

Within the framework of the study of relevant budget programs of local budgets, the purchase of fuel and lubricants for the transportation of personnel of volunteer formations and for the performance of their functions, special clothing, ammunition, equipment for members of volunteer formations, acquisition of items, materials, equipment, and inventory is envisaged. At the same time, the law limits the directions of spending from local budgets (weapons, ammunition, dual purpose purchases), and the activity of communities in the development and provision of territorial defence varies due to the limited financial resources of the revenue part in the conditions of martial law.

5 APPLICATION OF CERTAIN LIMITATIONS IN THE ORDER OF IMPLEMENTATION OF MEASURES OF THE LEGAL REGIME OF MARTIAL LAW

One of the tasks of military and civil administration bodies under martial law is the introduction and implementation of martial law measures, determined on the basis of Art. 8 of the Act of Martial Law in accordance with the Decree of the President of Ukraine.

From the first days of hostilities and the active offensive of the occupying forces, the development of the civil defence system began with the aim of increasing the level of defence of social institutions by identifying and neutralising internal dangers, as well as restraining the advance of troops from the outside. The operative measures were the restriction of freedom of movement and the movement of vehicles, both from the standpoint of strengthening the rules for crossing the state border and the boundaries between administrative and territorial units.

Art. 33 of the Constitution of Ukraine stipulates that everyone who is legally present in the territory of Ukraine is guaranteed freedom of movement, free choice of place of residence, and the right to freely leave the territory of Ukraine, except for restrictions established by law. A citizen of Ukraine cannot be deprived of the right to return to Ukraine at any time.

In accordance with this, the Law of Ukraine 'On the Procedure for Departure from Ukraine and Entry into Ukraine of Citizens of Ukraine' dated 21 January 1994 No. 3857-XI determined that a citizen of Ukraine has the right to leave Ukraine, except for the cases provided for by this Law, and come to Ukraine (para. 1 of Art. 1); citizens of Ukraine cross the state border of Ukraine at checkpoints across the state border of Ukraine upon presentation of one of the documents specified in Art. 2 of this Law; rules for crossing the state border of Ukraine by citizens of Ukraine are established by the Cabinet of Ministers of Ukraine in accordance with this Law and other Laws of Ukraine (to date, this Procedure is approved by the Resolution of the Cabinet of Ministers of Ukraine dated 27 January 1995 No. 57) (Art. 3). Art. 6 of the specified Law establishes grounds for temporarily restricting the right of citizens of Ukraine to leave Ukraine.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

According to para. 13, part 23 of the Procedure (as amended by Resolution of the Cabinet of Ministers of Ukraine No. 383 dated 29 March 2022) on the departure of children under the age of 16, accompanied by one of their parents, grandmother, grandfather, adult brother, adult sister, stepmother, stepfather, or other persons authorised by one of the parents in a written application certified by the body of guardianship and care, is carried out without the notarised consent of the other parent and in the presence of a passport of a citizen of Ukraine or a birth certificate of a child (in the absence of a passport of a citizen of Ukraine) or documents containing information about a person, on the basis of which the State Border Service will allow the crossing of the state border. At the same time, in the case of the introduction of a state of emergency or martial law on the territory of Ukraine, the decision to grant permission to leave Ukraine to a male person who accompanies a child who has not reached the age of 16 is taken, considering the accompanying person's membership in the list of categories of persons who are exempt from military service and mobilisation, if they have supporting documents. This norm has two problems that exist today.

First of all, this is the problem of virtually uncontrolled crossing of the border by children under the age of 16 in the first days of the war, which led to the appearance of a significant number of lonely Ukrainian children in the territory of European states. They become potential victims of illegal acts or involved in the commission of crimes due to their high degree of social vulnerability.[3]

Secondly, in accordance with the provisions of the Law of Ukraine 'On Military Duty and Military Service' dated 25 March 1992 No. 2232-XI, men who are fit in terms of health and age 18 to 60 years are conscripted and may be called up for military service during mobilisation is carried out in the manner specified by this Law and the Law of Ukraine 'On Mobilization Training and Mobilization'. Art. 23 of the Law of Ukraine 'On Mobilization Training and Mobilization' contains a list of categories of people who are not subject to conscription for military service during the mobilisation of conscripts. However, more people want to cross the border than the categories listed in the above regulations for both objective and subjective reasons.

According to the statistics of the Western Regional Administration of the State Border Service of Ukraine, more than 2,750 criminals who tried to illegally cross the border of Ukraine were detained within the borders of Lviv, Volyn, Zakarpattia, and Chernivtsi during the first six months of hostilities on the borders with the EU and the Republic of Moldova. During the same period, more than 19,000 people were refused border crossing due to problems with documents and more. In total, in 2022, more than a thousand criminal proceedings were opened for illegal border crossings. 462 persons were detained after reporting suspicion of committing a criminal offence. So far, the court has sentenced 145 of them.

On the western border, more than two thousand documents with signs of forgery were found at checkpoints. These include those that allowed men aged 18 to 60 to cross the state border. These are, in particular, certificates with signs of forgery, birth certificates of children, and various other certificates. Almost 170 fake passports were found.[4]

3 Julia Dauksza and Anastasiia Morozova, 'Dzieci z Ukrainy: samotne w Europie' (*FRONTSTORY.PL*, 30 Aug 2022) <https://frontstory.pl/dzieci-ukraina-uchodzcy-wojna-nieletni-opieka-europa-lost-in-europe/?fbclid=IwAR1uevgjlNC3pNg4reWUgjM3dgY2OVRwj66csIUsLHiRZaW5okuIRhnM42I> accessed 22 November 2022.

4 Roman Pavlenko and Antonina Kostyk, 'Two Men Even Swam across the River. How Fraudsters are Caught at the Border and What Awaits Them' (*Tvoe misto (City of You)*, 18 August 2022) <https://tvoemisto.tv/exclusive/kilka_cholovikiv_navit_zagynulo_yak_uhylyanty_probuyut_peretnuty_kordon_ta_skilkoh_vzhe_zatrymaly_136131.html> accessed 22 November 2022.

At the same time, for a long time, the issue of limiting the right to cross the border has been of significant public interest and is a source of governmental and parliamentary initiatives for both professions (for example, regarding travel abroad for IT workers, business trips for employees of individual economic entities who are not familiar with the state secrecy under guarantees of return), as well as categories of persons who have permission to live abroad, if family members live abroad, by marital status, etc. One of the arguments for such proposals is the restoration of pre-war business activity, the promotion of Ukraine's position abroad, the attraction of private foreign investments, and the disproportionate severity of today's restrictions.

According to the position of the National Agency of Ukraine for the Prevention of Corruption, the Presidential Decree on the introduction of martial law only quotes the Constitution verbatim, allowing for the possibility of restrictions on the ban on travel abroad under martial law in the future, but does not itself contain the necessary direct ban on travel. The regulation of the departure of men abroad under martial law during the last eight months has become a source of corruption schemes and risks. From the beginning of the war until 1 April, there were letters and clarifications from the State Border Service of Ukraine on the basis of which men were prohibited from travelling abroad, and after 1 April, changes were made to the procedure for crossing the border, approved by the Cabinet of Ministers, where norms appeared that, on the one hand, introduce certain permissions, and on the other, certain prohibitions. But this contradicts the Constitution and the Act of Martial Law, which requires bringing this mechanism into compliance with the requirements for protecting individual rights.[5]

From the first days of the military invasion of the territory of Ukraine, a night-time curfew and a special light masking regime were introduced. The regulatory basis for such a decision is the Procedure for the implementation of measures during the introduction of curfew and the establishment of a special regime of light masking in certain areas where martial law has been imposed, approved by the Resolution of the Cabinet of Ministers of Ukraine dated 8 July 2020 No. 573.

The introduction of a curfew and the establishment of a special light masking regime is carried out only in the presence of a real threat to the life and safety of individuals and the interests of society or the state, as well as to ensure public order. In the territory where the curfew has been introduced, it is forbidden to stay on the streets and other public places during the specified period of the day for persons without issued passes, as is the movement of vehicles. To ensure control over the implementation of measures during the introduction of the curfew, a pass system is created, and passes are issued to individuals at the commandant's decision (in agreement with the military command).

During the curfew, entry/exit to/from the territory where the curfew is imposed is carried out only through the checkpoints designated by the commandant's office – a reinforced checkpoint temporarily installed at the entry/exit to/from the territory where martial law has been imposed, and a curfew has been introduced, where places for checking persons, vehicles, baggage and cargo, positions of firearms and military equipment, places for rest and ensuring the vital activities of personnel performing tasks at the roadblock are established.

The establishment of checkpoints in the first days of the offensive of the occupying forces was spontaneous in nature, which led to the stoppage of traffic, including problems with the prompt delivery of military transport, equipment, and personnel of the Armed Forces

5 National Agency for the Prevention of Corruption, *Corruption schemes and risks when leaving Ukraine under martial law* (National Agency for the Prevention of Corruption 2022) <https://nazk.gov.ua/wp-content/uploads/2022/10/Koruptsiy-ni_shemy_ta_ryzyky_pid_chas_vyi-zdu_z_Ukrai-ny_v_umovah.pdf> accessed 22 November 2022.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

of Ukraine. That is why this issue was resolved by order of the Lviv Regional Military Administration of 3 March 2022 No. 5/22 'On the Organization of Temporarily Reinforced Checkpoints (checkpoints) on the Territory of Lviv Region', and on 4 March 2022 by order No. 7/22 'On the Settlement Issue of Arbitrarily Established Roadblocks on the Territory of Lviv Region' mandated district military administrations to settle this issue locally. Thus, at the beginning of Russia's full-scale aggression against Ukraine, 544 checkpoints were set up in the Lviv region, and in March, their number was reduced to 100 and later to 30.

The organisation of peaceful gatherings, rallies, marches, and demonstrations, as well as sports, educational, cultural-educational, religious, entertainment, and performative mass events under martial law, is possible only under exceptional circumstances and only under the condition of their written approval. For approval to hold the event, the organisers must apply to the executive bodies of the city, town, and village councils no later than five working days before the day of the event, i.e., the application principle of freedom of peaceful assembly and mass events was replaced by a permissive one. In addition, the event organisers must ensure that the mass event participants observe public order; the availability of first aid equipment; mandatory compliance with fire safety rules and the involvement of fire and rescue units. In the event of an air alarm, the mass event should be stopped immediately, the participants should be notified of the air alarm, and their evacuation should be ensured.

If mass events are held on the premises of relevant institutions, it is mandatory to have equipped shelters in accordance with the number of event participants or to have the possibility to place them in vault facilities located near the place of mass institutions.

By order of the head of LOVA dated 19 March 2022 No. 27/22 in connection with the need to prevent the commission of criminal and administrative offences and ensure the protection of public safety and order in the territory of Lviv region, it was prohibited from 19 March 2022 for the period of the legal regime of martial law to subjects management of all forms of ownership of trade of alcoholic and low-alcohol beverages (including beer) in the territory of Lviv oblast from 9:00 p.m. to 10:00 a.m. and a decree to heads of city, town, and village councils of Lviv oblast to impose restrictions on the trade of alcoholic and low-alcohol beverages (including beer) during the period of martial law. Radical and categorical prohibitions were negatively perceived in the communities as disproportionate, as they led to the loss of a significant source of income by trade establishments without corresponding compensation for the price paid for the license for the right to sell alcoholic and low-alcohol beverages. Today, Ukraine declares the responsibility of the aggressor state for such losses and damage, but there are no real compensation mechanisms nor any possibility of recovery.

5 CONCLUSIONS

The conditions of a functioning state apparatus under the legal regime of martial law led to significant changes in both the organisational and procedural nature of public administration. At the same time, the current practice allows for the formulation of certain general recommendations regarding the specified changes:

1) the need to introduce a clear distribution and definition of the competences of military and civil administration bodies in matters of security under martial law, as well as the definition of additional specific control mechanisms when granting an additional scope of powers to military and civilian administration bodies under martial law, 'revisions' regarding the validity of carrying out such powers;

2) the introduction of restrictive measures of the legal regime of martial law must take place in a clear, legally defined sequence, considering the existence of a legitimate purpose for their introduction; however, special attention should be paid to the issue of justice – ensuring proportionality between the introduced restrictions and the results of their implementation to achieve the same goal;

3) the use of alternative means of communication with citizens regarding the legal regime and restrictions of martial law with the transparent (accessible) presentation of information with the aim of establishing social dialogue and understanding between governing bodies and citizens, the institutionalisation of such means of communication as normatively defined ways of operationally proving the content of management decisions.

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WRIT PROCEEDINGS IN CRIMINAL CASES: A COMPARATIVE LEGAL STUDY OF KAZAKH LEGISLATION

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ABSTRACT

Background: *Over the past decade, the criminal process of Kazakhstan has undergone significant modernisation, during which many new institutions have been implemented, prescribed, and introduced into national legislation, one of which is writ proceedings in criminal cases.*

The institution of writ proceedings in the criminal process of Kazakhstan is a type of simplified proceedings that can be applied to criminal offences and criminal cases of minor gravity. One of the main characteristics of writ proceedings is the possibility of considering a criminal case in court without the participation of the accused.

Methods: *The article uses system-structural, formal-logical, comparative-legal, and dialectical research methods. Currently, law enforcement officers have a number of questions regarding the effectiveness of writs in criminal proceedings. In response, the authors of the article offer a constructive and critical approach to solving problems and reject the untenable, irrational, and radical methods presented by some Kazakhstani scientists and practitioners. Moreover, the analysis of successfully tested foreign legislation, in which institutions similar to writ production are actively used, has shown the effectiveness of their application. A comparative legal study of the legislation of Switzerland and Japan was also conducted.*

Results and Conclusions: *In the article, the authors propose to consider a set of measures to improve the institution of writ proceedings in the criminal process of the Republic of Kazakhstan.*

1 INTRODUCTION

The development of Kazakhstan's legislation, including criminal procedure, has been carried out in accordance with the values, industry objectives, and needs of law enforcement as determined by state program documents and international standards and principles, which include: the Concept of Legal Policy of the Republic of Kazakhstan until 2030 and the National Development Plan of the Republic of Kazakhstan until 2025, approved by the Decree of the President of the Republic of Kazakhstan from 15 February 2018, No. 636. The priority directions of these documents containing the vectors of development of Kazakhstan for the coming years are defined as: ensuring the rule of law and the fairness of the law; high-quality national legislation; improving mechanisms for protecting the rights and freedoms of citizens; focusing on the result and the interests of citizens and society; maximum approximation of the legal system and practice of personal protection to international standards.

Since the beginning of 2018, a previously unknown institution of writ proceedings has been introduced into the criminal process of the Republic of Kazakhstan as a type of special proceeding.[1] Writ proceedings in criminal cases are one of the types of simplified proceedings, along with protocol proceedings on criminal offences, procedural agreements (transactions), cases of private prosecution, the trial of the case in a shortened order, and confiscation before sentencing (*in rem*). It should be noted that in the Kazakh civil process, there is a similar institution of writ proceedings. Writ proceedings are simplified types of proceedings that also affects the timing and process of investigating the circumstances in a civil case.

In accordance with Art. 134 of the Civil Procedure Code of the Republic of Kazakhstan, a court order is issued on indisputable claims for the recovery of money or the recovery of movable

1 Criminal Procedure Code of the Republic of Kazakhstan No 231-V of 4 July 2014 <https://adilet.zan.kz/eng/docs/K1400000231> accessed 28 November 2022.

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property from the debtor. A court order is an act of a judge, issued and announced by the judge alone based on the filed application of the recoverer. The peculiarity is that the debtor and the recoverer are not invited to the courtroom, and the trial as such is not conducted.[2]

At the same time, writ proceedings in criminal matters have their own characteristics and grounds for the application. In accordance with the norms of the Criminal Procedure Code of the Republic of Kazakhstan (hereinafter referred to as the CPC of the Republic of Kazakhstan), the grounds for consideration of a criminal case in the order of writ proceedings are:

1) the offence must have signs of an act of minor public danger (criminal offences and crimes of minor gravity);
2) the collected evidence must establish the fact of a criminal offence and the person who committed it;
3) the suspect does not dispute the collected evidence of his guilt in committing a criminal offence, agrees with the qualification of his act and the amount of damage (harm);
4) the sanction of the committed offence is one of the types of the main punishment is a fine, including mandatory additional punishment in the form of deprivation of the right to hold a certain position or engage in a certain activity if the sanction establishes the exact term of deprivation of this right;
5) the participants in the process have agreed to the consideration of the case in the order of writ proceedings without examining the evidence, summoning them, and participating in the judicial review (at the stage of the main trial).

A positive aspect of Kazakhstan's experience is the consideration of a criminal case in a fairly short time, without the summons and participation of the defendant, the victim, and other participants in court. Some foreign sources also mention that one of the advantages of simplified forms of pre-trial criminal proceedings is the possibility of access to simplified judicial proceedings, in which, even in small cases, the likelihood of judicial errors is prevented, even excluded, the correction of which would otherwise result in proceedings taking an unreasonably long time to complete. [3]

Yet, there are still doubts among Kazakhstani lawyers about the necessity of this type of simplified production. Their arguments fall into two groups. The first is that the non-participation in the writ proceedings of the defendant, the victim, and other persons during the consideration of a criminal case in court is regarded by them as a deviation from para. 1 of Art. 14 of the International Covenant on Civil and Political Rights of 1966, which obliges everyone to ensure access to justice and public consideration by the court of a criminal case.[4] The arguments of the supporters of this position are justified by the fact that during the writ proceedings, a trial *in absentia* is conducted, and the fundamental principles of the criminal process are not respected – the defendant's right to defence, the presumption of innocence, access to justice, and others.

2 Civil Procedural Code of the Republic of Kazakhstan No 377-V of 31 October 2015 <https://adilet.zan.kz/eng/docs/K1500000377> accessed 28 November 2022.

3 Soni Parul, 'Summary Trials' (Law Times Journal (LTJ), 20 November 2018) <https://lawtimesjournal.in/summary-trials> accessed 28 November 2022.

4 International Covenant on Economic, International Covenant on Civil and Political Rights (adopted 16 December 1966 UNGA Res 2200 (XXI) A) (ICCPR) <https://undocs.org/en/A/RES/2200(XXI)> accessed 28 November 2022; Abaj Rahmetulin, 'Modernizing law, approaching standards' *Kazahstanskaya pravda* (Nur-Sultan, 22 September 2017) <https://kazpravda.kz/n/moderniziruem-pravo-priblizhaemsya-k-standartam> accessed 1 October 2022.

> We believe that the arguments are not sound since the criminal procedural mechanism of writ proceedings guarantees its cancellation and unconditional return to the standard main trial with certain objections of the convicted person, in particular, his disagreement on any ground except for the amount of the fine imposed by the court. At the same time, all the rights of the defendant in the face-to-face trial are fully respected.

The results of our research provide the basis for a proposal to the legislator on the transition from writ proceedings to the main trial, bypassing the intermediate stage of pre-trial investigation. In addition, correspondence proceedings are possible only with the consent of the suspect and the victim and the clarification of their rights, obligations, and legal consequences of the application of writ proceedings. Further, the scope of writ proceedings is narrowed by the minimum penalty in the form of a fine. No one disputes the fate of the institution of writ production in Germany, Switzerland, Estonia, or other European countries.

The second group is determined by the departmental interests of the investigative bodies and the court. For the investigating authorities, they are associated with the formation of favourable statistical indicators, and for the court – the installation of mandatory execution of punishment in the form of a fine. We regard this approach of state bodies as radical, where the guillotine is recognised as the best remedy for headaches. It seems that the solution to the problem lies in moving away from the policy of artificial performance indicators and repressive criminal proceedings.

> As shown by a scientific study we conducted in 2018-2021 when preparing a dissertation for the degree of Doctor of Philosophy (PhD), the use of the institute of writ proceedings in investigative and judicial practice revealed several problems requiring legislative regulation and adjustment of law enforcement activities.

Firstly, there is the late execution by the convicted person of the criminal penalty imposed by the court in the form of a fine. In most cases, as evidenced by our survey of 117 criminal cases considered by the courts, a person does not have a real opportunity to pay their fine on time and in full due to low levels of income and increasing inflation.

Secondly, a lengthy investigation was carried out to improve the belated decision-making by the body carrying out pre-trial proceedings on the application of writ proceedings after a number of investigative actions when the guilt of the suspect and other circumstances of the case were actually proved.

Our analysis of investigative and judicial practice revealed similar cases. For example, after registering the reason in the Unified Register of Pre-Trial Investigations, the criminal case was initially considered in the order of a standard inquiry, within which:

- a separate instruction has been sent to establish the location of a potential suspect;
- there is a restriction on travel outside Kazakhstan on the basis of the Unified automated system 'Berkut';
- a subscriber number has been established for the affiliation and places of operation of the based stations.

The bodies of inquiry took measures to establish the location of the person involved in the criminal offence and used additional resources. The request stated that if the location is established, there is a need to take him to the police for investigative actions. Thus, the body conducting the inquiry carried out a complex of investigative and other procedural actions, the totality of which indicates the absence of such parameters of writ proceedings as the procedural economy and the evidence of a criminal offence. At the end of the initial stage of the inquiry, the suspect's petition for consideration of the case in the order of writ proceedings was accepted.

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This practice directly contradicts the original idea of the adoption by the Kazakh legislator of the institution of writ proceedings since its main goals are, first of all, to accelerate the timing of the pre-trial investigation, simplify the procedural form of production, and minimise the number of investigative and procedural actions, as well as the maximum convergence of the moments of committing a criminal offence, and the imposition of criminal punishment. In this case, there can be no question of any procedural economy; more likely, procedural excesses take place.

Thirdly, there is the absence of many other acceptable benefits for the offender when deciding on the application of writ proceedings. At the moment, criminal cases within the framework of writ proceedings provide only one privilege for the guilty person – *in absentia* – while saving the time of the participants in the process (the case is considered in court without the direct participation of the defendant, victim, and other persons).

> Fourth, there is an incomplete and unclear procedure for explaining the rights and obligations of the suspect and the legal consequences of the application of writ proceedings by the bodies conducting pre-trial proceedings.

The purpose of the research conducted by the authors is to formulate scientific recommendations that are in demand in practice, on the basis of which it is possible to increase the effectiveness of the institution of writ proceedings in criminal cases, as well as to develop appropriate proposals for further improvement of criminal procedural legislation.

2 METHODOLOGY OF THE STUDY

In this article, the authors have studied and summarised the experience of countries in which there is an analogue of the Kazakhstan institute of writ production. The article uses system-structural, formal-logical, comparative-legal, and dialectical research methods. In determining the subject of this work, the authors considered it necessary to conduct a comparative legal study of the institute of writ proceedings in criminal cases.

The Swiss Experience.[5] The main justification for the differentiation of legislation, including in the direction of simplification, is that not every preliminary investigation is carried out with the same degree of effort, costs, and expenses, and the execution of punishments must meet the requirements of effective law enforcement, including the need for fast and efficient methods of proceeding, which should also be economical.

Art. 352 (1) of the Swiss Code of Criminal Procedure requires recognition or other sufficient establishment of facts for a summary punishment order to be appropriate.[6] If the subject of the offence does not agree with this procedural procedure, **he has the right to bring his objection (or 'rejection' of the act)** to the decision within ten days. Nevertheless, in judicial practice, the accused rarely bring their objections, often due to insufficient awareness of their right to do so.[7]

At the same time, all these problems can lead to errors in decisions on summary punishment (analogous to writ proceedings). This was confirmed by a study of judicial errors, although it should be noted that most of the decisions on the imposition of penalties in a simplified manner relate to minor offences with minor sanctions.

5 Swiss Criminal Procedure Code of 5 October 2007 <https://www.fedlex.admin.ch/eli/cc/2010/267/en> accessed 28 November 2022.

6 Laura Macula, 'The Potential to Secure a Fair Trial Through Evidence Exclusion: A Swiss Perspective' in S Gless and T Richter (eds), *Do Exclusionary Rules Ensure a Fair Trial? A Comparative Perspective on Evidentiary Rules* (Springer Nature 2019) 15, doi: 10.1007/978-3-030-12520-2.

7 Gwladys Gillieron, 'Wrongful Convictions in Switzerland: A Problem of Summary Proceedings' (2013) 80 (4) University of Cincinnati Law Review 1145.

Art. 161 of the Swiss Code of Criminal Procedure establishes the norm according to which the public prosecutor, at the stage of the investigation, must interrogate the accused about his **personal circumstances** if it is expected that the accused will be charged or an order to impose a simplified punishment is issued or if it is necessary for other reasons.

In Switzerland, punishment can be imposed in the form of a fine, a monetary fine in the amount of no more than 180-day penalty units, or imprisonment for a period of no more than six months. A fine can always be imposed in conjunction with other types of punishments. The decision to issue an order on summary punishment (writ proceedings) is made directly by the prosecutor. If the prosecutor considers that the investigation is over, he must approve a simplified punishment order or send a written notification to the participants of the process about the prosecution or the termination of the criminal case. In accordance with Swiss law, the parties are given a period during which they can file petitions for additional evidence.

The decision not to apply the punishment order is not subject to appeal and cancellation. It should be noted that the approach of the Kazakh legislator is similar in this part. Thus, in accordance with part 2 of Art. 629-4 of the CPC of the Republic of Kazakhstan, the court's decision to return the case to the prosecutor is not subject to appeal or review.

If the accused agreed with the victim's civil claim, this fact is recorded in the order on summary punishment (writ proceedings). **Claims that are not accepted by the accused must be submitted for civil consideration.**

A written refusal of the decision on summary punishment may be submitted to the prosecutor within ten days. If a reasoned refusal is not filed, the ruling becomes the final decision on the case. Then the prosecutor sends the case to the court of first instance.

The court decides on the legality of the order or its rejection. If a refusal is filed, the public prosecutor **must collect additional evidence necessary** to assess the refusal.

If the decision on a simplified punishment is invalid, **the court must cancel it** and return the case to the state prosecutor for a new pre-trial trial.

A person who has been negatively affected by a legally binding court decision has the right to request a review in cases determined by law.

A petition for reconsideration of the case in favour of the convicted person **may also be filed after the expiration of the statute of limitations for consideration of the case.**

Thus, the Swiss experience rationally establishes a balance of private and public interests and ensures the right of the accused to a criminal trial and access to justice by securing a sufficiently flexible procedural mechanism for appealing a punishment order.

The possibility of considering the amount of damage caused to the injured party in the framework of civil proceedings is very interesting for Kazakh legislation, which significantly differs from the Swiss approach. Today, in accordance with the CPC of Kazakhstan, the suspect himself must file a petition for consideration of his case in writ proceedings and is obliged to compensate the damage caused to the person.

The Japanese Experience. The main investigative body is the police (criminal police officers). At the same time, there are accelerated judicial proceedings and simplified pre-trial proceedings. In each of the above-mentioned proceedings, the key decisions are made by the judge.

Moreover, in the case of the application of simplified proceedings, the provisions of the law reasonably provide for a mechanism for the transfer of the case to ordinary proceedings. So, within 14 days, a person who has committed a crime and has received a notification about

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the consideration of a criminal case in a simplified manner has the right to file a petition for the consideration of a criminal case in the usual manner.[8]

Table 1

Swiss experience	The decision on the application of writ proceedings is made by the prosecutor	Personal circumstances are being clarified	May challenge the amount of damage in a civil order	When filing a complaint, the court may return the case to the prosecutor for pre-trial proceedings	The penalty is a fine and six months of imprisonment
Kazakh experience	The accused petitions the investigative body for the application of writ proceedings	The pre-trial investigation body explains to the suspect the right to consider the case in court in the order of writ proceedings	Is obliged to compensate for the damage	When submitting a petition for disagreement with the decision, in addition to the amount of the fine, the court directs the case to pre-trial proceedings	The penalty is a fine and deprivation of holding certain positions or engaging in certain activities

If the accused has not been notified of the simplified procedure of criminal proceedings, then within four months from the date of the application, the prosecution is terminated, and an appeal may be filed against this court decision.

It would be fair to note that 80% of all criminal cases in Japan are dealt with in a simplified manner.[9]

3 INSTITUTE OF WRIT PROCEEDINGS IN THE CRIMINAL PROCEDURE LEGISLATION OF THE REPUBLIC OF KAZAKHSTAN

Based on the analysis above, it should be noted that from 1 January 2018 to the present, the institute of writ production in the Republic of Kazakhstan has not yet realised its universally recognised potential[10] in European countries. One of the key problems, it seems to us, is the legislative imperfection, as well as the lack of understanding of the law enforcement officer of the possibilities of applying the new institution in practice.

3.1 Procedure for Imposing and Enforcing Punishments in Criminal Cases Considered in Writ Proceedings

> One of the practical problems referred to by Kazakhstani lawyers is the non–fulfilment or untimely execution of criminal punishment by convicts. We believe that it is in this direction that it is necessary to significantly change conceptual approaches, changing not only the procedure and increasing the methods of execution of criminal punishment in the form of a fine but also the types of punishments that could be imposed by the court against the subject of the offence in cases of writ proceedings.

8 Penal Code of Japan (Act No 45 of 1907) <https://www.japaneselawtranslation.go.jp/en/laws/view/3581/en> accessed 28 November 2022.

9 Hiroshi Oda, *Japanese Law* (4th edn, OUP 2021).

10 German Code of Criminal Procedure 'Strafprozeßordnung – StPO' (as published on 7 April 1987) <https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html> accessed 28 November 2022.

According to the current CPC of the Republic of Kazakhstan, the procedure for paying a fine can be appealed by a convicted person only at the stage of execution of the sentence. To implement such a right in special norms, appropriate additions should be made to the articles of Chapter 51 of the CPC of the Republic of Kazakhstan, as well as flexible mechanisms for the payment of fines (deferral and instalments) or, if it is impossible to pay a fine, the appointment of an alternative type of punishment – community service.

In writ proceedings, a sanction for committing a criminal offence is applicable – as the main penalty, a fine, including mandatory additional punishment – deprivation of the right to hold a certain position or engage in a certain activity (for the period of deprivation of this right precisely established by the CPC of the Republic of Kazakhstan).

To remove obstacles to a more active application of writ proceedings, it is advisable to study the issue of the reception of the German legislative regulation of cases of postponement and instalment payment of a fine imposed by the court. On the basis of Section 360 (2) of the Code of Criminal Procedure of the Federal Republic of Germany, **a postponement or interruption of the execution of this type of punishment** is allowed by court order.[11]

Art. 475 of the CPC of the Republic of Kazakhstan contains the universal right of the court to instalments and delay of the fine applicable to all types of proceedings. But this rule is applicable **only at the stage of execution of the sentence**. In the framework of writ proceedings in criminal cases, this general rule is not effective. To do this, the court needs to start proceedings at the stage of execution of the sentence. For timely response to the facts of non–payment of a fine or their prevention, we propose to **introduce a similar rule of a special nature** in the chapter on writ proceedings (as, for example, for conciliation proceedings when concluding a procedural agreement in the form of a plea bargain – Part 5 of Art. 625 of the CPC of the Republic of Kazakhstan). It is recommended to introduce this rule at the stage of clarifying the rights of the suspect when applying writ proceedings. At the same time, the suspect is obliged to submit documents confirming his difficult financial situation (salary, property loan agreement, guardianship, availability of dependents, certificate of the amount of deductions to the pension fund, taxes, etc.).

The prosecutor, in his decision on the consideration of a criminal case in the order of writ proceedings, may also **indicate 'personal circumstances'**, including:

- marital status;
- financial situation;
- whether the suspect has dependents;
- the proposed schedule for the repayment of the fine within a reasonable time, acceptable both from the standpoint of the defendant and the convicted person and from the point of view of the court;
- legal consequences of non–payment or late payment of the fine – multiple increases in its size and replacement of the fine by the court in the order of execution of the sentence for criminal punishment in the form of community service (free of charge).

Also, if the prosecutor has reasonable doubt about the solvency of the suspect, then this is indicated in the decision for the court to apply a delay or instalment payment of a fine or the application of an alternative penalty to a fine in the form of community service.

The court examines these documents together with the materials of the criminal case and makes an appropriate decision on the case in this part.

11 Lyazzat Nurlumbayeva, 'Writ Proceedings in Criminal Proceedings in Germany' (2020) 5 Bulletin of the Institute of Legislation and Legal Information of the Republic of Kazakhstan 207.

Access to Justice in Eastern Europe
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If, during the granted period of deferral or instalment payment of the fine, the facts of systematic delay or non-payment of part of the amount are recorded, then appropriate measures may be applied for evasion of punishment. One of them at the stage of execution of the sentence may be multiple increases in the amount of the fine by the court or the replacement of the fine by the court for community service.

It is also proposed to introduce **other benefits for those convicts who are willing to pay the amount of the fine** within a short time after receiving the relevant court decision.

The above-mentioned proposal is currently actively used in other branches of law. The payment of a fine 'at a discount' is considered in the form of reduced proceedings for certain types of administrative offences. Thus, the right to pay an administrative fine in the amount of 50% of the total amount can be used within seven days from the date of notification of the person about the offense committed.

This option is applicable if the person who committed a criminal offence complies with the following conditions: recognition of the fact that he committed the act; consent to the suspicion (accusation) put forward against him; non-contesting the evidence collected in the case and the qualification of the act; consent to pay a fine of 50%.

We believe that the introduction of flexible and rational alternative solutions in the application of writ proceedings will solve the problem of evasion of convicts from the execution of punishment and will ensure compliance with the principle of the inevitability of criminal punishment.

3.2 Conditions for the allocation of elements of criminal offences to be considered in the order of writ proceedings

In Kazakhstan, the grounds for consideration of a criminal offence in the order of writ proceedings are: the presence of the main penalty in the form of a fine; the establishment of the fact of the commission of the act by the suspect; the suspect does not dispute the available evidence of his guilt; agrees with the nature and amount of damage (harm); petitions for consideration of the case by order.

At the same time, it should be noted that there are several obvious inconsistencies with the European experience of using similar institutions. For example, a punishment order in Switzerland is applied for minor offences, but the existence of additional punishment is not provided for by the Criminal Procedure Code of this country. In this context, Kazakhstan's experience raises more questions than answers.

According to the authors of the article, the universal criteria for the introduction of less complex forms of pre-trial criminal proceedings are the following signs of the circumstances of a criminal case: evidence of the actual side of the act; clarity of the legal qualification of a criminal offence; ease of establishing its circumstances. In earlier studies, the authors justified the need to introduce such definitions as 'evidence of a criminal offence' and 'beyond a reasonable doubt'[12] into the criminal procedure legislation.

12 Arstan Akhpanov and Lyazzat Nurlumbayeva, 'Criteria for the Definition of "Obviousness" of Criminal Offenses' (2019) 4 Bulletin of the Institute of Legislation and Legal Information of the Republic of Kazakhstan 65.

3.3 The problem of clarifying the rights and obligations of the subject of criminal offences in cases of writ proceedings

An analysis of judicial practice in the Republic of Kazakhstan showed that police officers, in accordance with para. 3 of the regulatory decree of the Supreme Court of the Republic of Kazakhstan 'On consideration of criminal cases by writ of procedure' dated 29 November 2018 No. 17, developed a standard form of explaining the rights of a suspect when considering a criminal case by order. This is set out in a document entitled 'Protocol of clarification of the conditions for consideration of a criminal case in the order of writ proceedings'.

One of the significant drawbacks of this document is its unsystematic design, cluttered with complex legal turns and direct copying of the legislative text. For example:

> A fine is a monetary penalty imposed within the limits provided for by this Code, in an amount corresponding to a certain number of monthly calculation indices established by the legislation of the Republic of Kazakhstan and in force at the time of committing a criminal offense, or in an amount multiple of the amount or value of a bribe, the amount of money transferred or the value of transferred property, the value of stolen property, the amount of income received or the amount of payments not received to the budget. Compulsory payment to the victims' compensation fund provided for in Articles 98-1, 98-2 of the Criminal Code of the Republic of Kazakhstan, procedural costs, as well as the possibility of exemption in whole or in part from payment of procedural costs, on the imposition of a fine when a court passes a guilty verdict, the amount of the fine, established by part three of Article 55 of the Criminal Code of the Republic of Kazakhstan and the sanction of the incriminated article of the criminal law, the order of execution of the fine, recognition of a convicted person under a sentence in writ proceedings who does not have a criminal record on the grounds provided for in parts two and paragraph 2) Part three of Article 79 of the Criminal Code of the Republic of Kazakhstan, the procedure for reviewing the verdict and other issues of importance in the writ proceedings.

It seems that the wording clearly makes it difficult for suspects to understand their rights when deciding on the transition from ordinary investigation to writ proceedings. We propose to consolidate in practice a clearer formulation of the key aspects of the conditions, grounds, procedure, and consequences of the application of writ proceedings.

4 CONCLUSIONS

1. According to the results of the study, the authors of the article propose to introduce a set of rules to provide an accessible explanation to the suspect about the possibility and grounds for the use of the institution of writ proceedings: 'You have the right to refuse to participate in court when considering a criminal case in the order of writ proceedings. You retain the right to access justice and the right to be heard in court'.

2. When investigating a criminal case in the usual (ordinary) manner and proving guilt due to the conduct of all urgent and subsequent investigative actions by the body conducting the pre-trial investigation, it is unacceptable to use the institution of writ proceedings. Otherwise, prerequisites are created for the appearance of corruption risks caused by the transition to the regime of writ proceedings with a simplified procedural form and minimal legal consequences in those cases for which there were no criteria of **evidence, simplicity, and clarity**.

3. It is proposed to adopt a set of legislative measures in terms of improving the institution of writ proceedings, as well as the possibility of presenting preferences to the convicted person in case they send a petition for consideration of a criminal case by order:

- introduce an alternative type of punishment in cases considered by order in the form of community service. Thus, if it is impossible to pay the fine, the subject of the offence can execute the punishment;
- by analogy with the experience of Switzerland, it is necessary to fix the norm according to which the body conducting the criminal process, at the stage of pre-trial investigation, is obliged to interrogate the suspect and collect information concerning his 'personal circumstances' (characteristics from the place of work, information about the financial situation, the presence of dependents in the custody of the suspect and other information);
- to fix the possibility of paying the suspect a halved fine if he voluntarily makes the payment within seven days from the date of receipt of the court order;
- to establish the possibility of payment of a fine with a delay or by instalments for up to one year if the convicted person at the stage of pre-trial investigation filed a corresponding request for a delay or instalment of the execution of the sentence;
- to provide for a norm according to which the payment of a fine cannot be deferred or instalment for convicts who are in arrears in other criminal cases with the application of a fine, as well as in case of systematic delay or non-payment of part of the amount at the stage of execution of a sentence in a criminal case, the replacement of a fine for community service may be applied to the convicted person.

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CONCEPTS AND FEATURES OF ADMINISTRATIVE CONTRACTS THROUGH THE PRISM OF REGULATORY PROVISIONS AND JUDICIAL PRACTICE IN UKRAINE

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Summary: 1. Introduction. – 2. Theoretical approaches to the definition and classification of administrative contracts. – 3. The definition of administrative contracts and their types in Ukrainian legislation. – 4. The definition

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and characteristics of administrative contracts in the laws and judicial practice of other countries. – 5. Characteristics of administrative contracts in the decisions of national courts. – 6. Conclusions.

Keywords: *Forms of Public Administration, Administrative Contract, Features of Administrative Contract, Types of Administrative Contracts, Jurisdiction of an Administrative Court.*

ABSTRACT

Background*: The article provides information on how the definition of an administrative contract was developed in Ukraine. Initially this concept was enshrined in the Code of Administrative Proceedings of Ukraine (hereinafter - the Code). Before the adoption of the Code, that is, until 2005, this phenomenon had been studied fragmentarily in the legal literature. We can name only a few authors who made attempts to investigate the issues of defining an administrative contract in order to identify its features and types comprehensively. Theoretical approaches to the definition and classification of administrative contracts are presented, and their main characteristics are outlined. It is noted that the subject structure of these contracts determines that in connection with the fulfilment of their conditions, each of the parties achieves the desired goal: the representative of the government strives for socially significant results, and the individual - for the satisfaction of private interests. The definition of an administrative contract fixed in the Code of Administrative Proceedings of Ukraine was analysed and it was concluded that it is suitable for the purposes of applying the procedural law. The article also examines the issue of whether compromise agreements belong to the category of administrative agreements.*

Methods*: At the beginning of the study, theoretical approaches to defining administrative contracts and the identification of their features and classification are presented and differences in the positions of Ukrainian researchers studying the relevant issues are outlined. Subsequently, the legislative definition of the administrative contract is analysed and it is determined whether it is based on the theoretical developments presented above. The court decisions interpreting the normative provisions establishing the features and types of administrative contracts are summarised and we discovered whether Ukrainian judges turn to research sources in order to make such an interpretation and substantiate their positions. Consistent study of the theoretical developments, normative documents, and practical cases of applying the rules concerning administrative contracts allowed us to reach certain conclusions, which will be useful both to research scholars in the field and representatives of authorities who apply the specified rules.*

Results and Conclusions*: Examples of court decisions are given, which consider the features of administrative contracts in the context of determining the judicial jurisdiction of disputes arising as a result of their conclusion, execution or termination. The position stated in these decisions is supported, according to which the contract cannot be considered administrative if it is concluded in accordance with the rules of civil or economic legislation. Disagreement was expressed with the statement that in the case of concluding an administrative contract, one of its parties, namely a subject of power, must necessarily perform management functions in relation to the other party, and arguments are given to support such disagreement. The need to define an administrative contract, establish the grounds and general procedure for its conclusion, execution and termination are substantiated in the Law of Ukraine "On Administrative Procedure".*

1 INTRODUCTION

The forms of activity that are at the disposal of the public administration are so diverse that in-depth scientific studies could be devoted to distinguishing their types, clarifying the nature and functional purpose of each of them. The most difficult thing as a result of such studies is to create an absolute list of universal forms necessary in practical terms, which is determined by the specificity of the choice of means that public administration subjects use to implement the powers granted to them.

However, there are at least three forms that have attracted the attention of researchers and which, according to our observations, are used by government officials in most cases. These are the adoption of (1) regulatory and (2) individual acts, as well as (3) conclusion of an administrative contract. Comparative studies of the essence of the mentioned forms can be especially interesting, cause it is possible to both compare their features and establish differences in order to reach conclusions about the feasibility and effectiveness of using one or another means to achieve a defined goal.

According to their characteristics, the two first forms of public administration appear to be similar – the adoption of normative and individual acts. Since their use is associated with the unilateral manifestation of the will of a subject of power, aimed at the performance of tasks, and which consist of the "ordering" of social relations with (a) an undefined range of participants (the adoption of normative acts) or (b) a clearly established range of participants (adoption of individual acts).

The conclusion of an administrative contract is significantly different from the adoption of a regulation or an individual act. The application of this form assumes that the subject of power, which, as a rule, is a binding party to the contract, exercises its powers through the implementation of the agreements prescribed by it. It is also important that potential participants of an administrative contract cannot be forced to enter into it; voluntary participation in relevant relations, as well as mutual interest in their (relationship) formation, are important attributes of this means of public administration. Even the subject of power, for whom the law establishes the possibility of entering into contractual relations for the performing of the prescribed functions, in the vast majority of cases has the right to act at its discretion, choosing between concluding a contract or adopting an act.

The specificity of the form of public administration under consideration explains the emergence of scientific publications by foreign researchers. They raise the issue of features and types of administrative contracts and discuss the prospects of concluding them instead of using the traditional "tools" of administration – the adoption of regulations and individual acts.[1]

In Ukraine, for a long time, administrative activities were associated with unilateral actions by representatives of the authorities, without taking into account positions of those persons at whom these actions were directed. Therefore, the first scientific works devoted to the study of the characteristics of administrative contracts and the identification of criteria for their classification appeared only in the early 2000s.[2] At the time of their implementation, the normative legal acts contained almost no rules that would authorise the holders of power

1 G Langrod, 'Administrative Contracts: A Comparative Study' (1955) 4 (3) AJCL 325; KM Hayne, 'Government Contracts and Public Law' (2017) 41 (1) MelbULawRw 155; JA Mattar, 'Naturaleza y justicia de los contratos administrativos' (2019) 30 ReDAE 27; JCF Rivas, '¿Es la licitación pública la regla de general aplicación en contratación administrativa?' (2020) 31 ReDAE 93.

2 KK Afanasiev, 'Administrative Contract as a form of State Administration (Theoretical and Legal Aspect' (PhD (Law) thesis, National University of Internal Affairs 2002); SS Skvortsov, 'Administrative Contract as a Means of Management Activity' (PhD (Law) thesis, National University of Internal Affairs 2005).

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to implement their functions through the conclusion of contracts. The last circumstance led to the fact that the theoretical achievements represented in these works could not be implemented into practical activity.

In 2005, the Code of Administrative Proceedings of Ukraine was adopted, in which the definition of an administrative contract was established for the first time. It prompted scientists to further develop the problem of the use of this form of public administration by subjects of power; lawyers tried to provide recommendations regarding the improvement of the already existing legal definition and worked on the development of criteria for their (contracts) classification.[3]

Note that the legislative definition of an administrative contract was put into circulation for the purpose of applying the rules of the Code of Administrative Proceedings of Ukraine, primarily those that outline the jurisdiction of administrative courts. The latter is confirmed by the fact that in the new edition of the Code 2017, in addition to the characteristics of the specified contracts, the legislator fixed information on their types, and this, without any doubt, contributed to solving the problem of choosing a court of appropriate jurisdiction for disputes arising from contractual relations with the participation of subjects of power.

The regulatory and legal documents of Ukraine, which establish the powers of public authorities, currently do not have a similar definition, nor do they establish rules on the procedure for concluding, executing, or terminating administrative contracts. This approach does not correlate with what the parliamentarians of other countries demonstrate. For example, in the Federal Republic of Germany, provisions regarding the features of administrative contracts, as well as rules regarding their content, procedure for execution or invalidation, are presented in the Law "On Administrative Procedures".[4] In Ukraine, a similar law has already been adopted by the Verkhovna Rada but it has not yet entered into force, and the administrative contract is not mentioned at all.[5] We hope that the practical application of the national law on administrative procedures will make it possible to form a staunch stand regarding the expediency of placing in its text provisions the characteristics of administrative contracts, their types, grounds, and general procedure for conclusion, as well as the procedure for execution and termination.

In this study, an attempt was made to harmonise theoretical approaches to determine the essence of administrative contracts with the position of the legislator, which can be traced in the relevant normative definition, and the conclusions of judges, which were reflected in the decisions in cases about the conclusion, execution, termination or cancellation of administrative contracts. In our opinion, this will contribute to the emergence of such universally binding rules on administrative contracts, which will encourage subjects of government to more frequently resort to the appropriate form of administration.

3 OM Iliushyk, 'The Use of Administrative Contracts in the Activities of Law Enforcement Agencies' (PhD (Law) thesis, National Lviv Polytechnic University 2013); AM Hud, 'The Administrative Contract as a form of Contractual Regulation of Administrative-Legal Relations' (PhD (Law) thesis, National University of Bioresources and Environmental Management of Ukraine 2019); ZhV Zavalna, *Conceptual Principles of Contractual Regulation of Administrative and Legal Relations* (Mriia 2010).

4 Administrative Procedure Act of Germany 'Verwaltungsverfahrensgesetz (VwVfG)' of 25 May 1976 <https://www.gesetze-im-internet.de/vwvfg/BJNR012530976.html#BJNR012530976BJNG001002301> accessed 01 September 2022.

5 Draft Law of Ukraine No 3475 'On Administrative Procedure' of 14 May 2020 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=68834> accessed 01 September 2022.

2 THEORETICAL APPROACHES TO THE DEFINITION AND CLASSIFICATION OF ADMINISTRATIVE CONTRACTS

The study of a legal phenomenon should begin with the formation of its definition. It is difficult to disagree with the fact that a balanced definition in law is the result of active and sometimes long scientific debate.

The definition of an administrative contract in Ukraine has a slightly different history. Initially this concept was enshrined in the Code of Administrative Proceedings of Ukraine (hereinafter - the Code). Before the adoption of the Code, that is, until 2005, this phenomenon had been studied fragmentarily in the legal literature. We can name only a few authors who made attempts to investigate the problems of defining an administrative contract to reveal its features and types comprehensively.

Thus, in 2002, the thesis research "Administrative contract as a form of state administration (theoretical and legal aspect)" was defended.[6] In this work, an attempt was made to form a definition of an administrative contract, to determine its features and prospects for use in the activities of public authorities. The dissertation seems to have become an important step in the development of this problem. At the same time, at the date of its implementation, the normative legal acts contained almost no rules that would authorise the power bearers to implement their functions through the conclusion of contracts. This led to the fact that the theoretical developments presented in the work could not be used in practice.

After the adoption of the Code, scientific works devoted to the study of administrative contracts appeared, in which the authors tried to provide recommendations for improving the already existing legal definition and developing criteria for their (contracts) classification.

Let us recall the monograph and thesis for obtaining the scientific degree of Doctor of Legal Sciences by Zhanna Zavalna (2009–2010) .[7] It is noteworthy that the scientist was previously engaged in research in the field of civil law: her PhD thesis was devoted to the problems of regulating relations arising in connection with the conclusion and execution of a civil law agreement – a publishing contract.[8] Then a series of scientific articles, two monographs and, finally, a thesis appeared, in which Zh. Zavalna considered the issue of an administrative contract.

The significance of this problem, in our opinion, lies in the fact that the knowledge of a scientist in the civil law sphere became the foundation for investigations in the administrative law sphere. However, such knowledge led to the fact that Zh. Zavalna determined, as an inevitable result of her research, the clear boundary between public and private agreements. And here the shortest way was chosen: the researcher differentiated the specified agreements based on their subject composition.

Thus, in her works, Zh. Zavalna claims that administrative contracts are concluded only between public authorities and their "... subject is actions determined by the administrative and legal status of the parties and aimed at streamlining, establishing, changing or terminating managerial relations..." .[9] They include agreements between (a) local self-government bodies on the redistribution of powers, (b) local self-government bodies on the redistribution of

6 Afanasiev (n 6) 19.

7 Zavalna (n 7) 360; ZhV Zavalna, 'Administrative Contract: Theoretical Foundations and Applications' (DrSc (Law) thesis, National University of Internal Affairs 2010).

8 ZhV, Zavalna, 'Publishing Contract as a Type of Author's Contract' (PhD (Law) thesis, Koretsky Institute of State and Law of National Academy of Science of Ukraine 2002).

9 Zavalna (n 11) 7, 14.

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budget funds, (c) territorial communities or local self-government bodies on the use of local budget funds, and (d) local executive authorities and local self-government bodies on the implementation of joint programs, formation of joint bodies and organisations. As examples, the scientist also cites (a) agreements with the participation of state authorities concluded as a result of the application of the Law "On Stimulating the Development of Regions" and (b) agreements on cooperation and interaction of law enforcement agencies during operational and other joint activities.[10]

While this publication does not intend to support the discussion about the essence of administrative contracts, we consider the above position to be devoid of sufficient arguments. It leads to an artificial reduction of significance and calls into question the effectiveness of concluding administrative contracts as a form of public administration. Moreover, this position forces us to perceive administrative law as a set of norms that exclusively provide for the needs of subjects of power: such subjects are not given the opportunity to interact with an individual to build mutually beneficial relations with him or her; they (public authorities) are empowered and, accordingly, the forms of their activity are based on a unilateral expression of will, which, for the most part, deprives an individual of the "right to vote".

The point of view of Zh. Zavalna became a subject for scientific discussions. In more recent publications, one can observe critical and well-argued comments on the definitions and features of the administrative contract formulated by the scientist.

Thus, Victoria Bila in her thesis 'Administrative contract in the activities of the State Tax Service of Ukraine' (2011) and 'Legal forms of public administration in Ukraine' (2020) does not include the participation of subjects of power in them as inherent characteristics of administrative contracts. The scientist claims that the features of these agreements are their purpose, which is to achieve socially significant results and the branch affiliation of the legal relations that arise in connection with their conclusion. Next, V. Bila offers two main criteria for the classification of administrative contracts – (1) their legal properties and (2) their functions in the mechanism of administrative and legal regulation. In the first case, the scientist distinguishes normative and individual contracts, in the second – law-making, aimed at the realisation of rights, and tort.[11]

The point of view presented above, in our opinion, is balanced and at the same time progressive. However, we see that the distinction between the so-called tort administrative contracts remains debatable. We refer to agreements, the conclusion of which, according to national laws, is possible in a situation where an individual who has committed an illegal act admits his or her guilt, guarantees to refrain from violations in the future, and therefore the state, represented by the relevant authorities, is ready to conclude a compromise agreement with him or her. As a result of the latter, there are negative consequences for the wrongdoer in the form of unquestioning execution of the decision on recovery, but the amount of penalty may be minimal or the violator, for example, will not be considered a person who has already been prosecuted.

Similar agreements were included in the Tax Code of Ukraine.[12] Currently, the relevant norms are kept in the Customs Code of Ukraine.[13]

10 ibid 20.

11 VR Bila, 'Administrative Contract in the Activities of the State Tax Service of Ukraine' (PhD (Law) thesis, National State University Tax Services of Ukraine 2011); VR Bila, 'The Legal Forms of Public Administration in Ukraine' (DrSc (Law) thesis, National Aviation Univirsity 2020).

12 Tax Code of Ukraine No 2755-VI of 2 December 2010 <https://zakon.rada.gov.ua/laws/show/2755-17> accessed 01 September 2022.

13 Custom Code of Ukraine No 4495-VI of 13 March 2012 <https://zakon.rada.gov.ua/laws/show/4495-17> accessed 01 September 2022.

Why are there doubts about such agreements belonging to the category of administrative contracts? A compromise agreement actually ends the proceedings in the case of prosecution, it can be classified as a type of individual act because it decides the "fate" of a specific individual. In addition, it will not be correct to claim that by entering into such an agreement, the public authority exercises its functions in the field of combating illegal acts. If it is assumed that the authority is authorised to monitor the observance of universally binding rules and, in the event of their violation, to stop illegal acts with subsequent prosecution of the guilty party, then the means that ensures the implementation of these functions is the adoption of an individual act, which imposes additional obligations on a private person and does not grant him or her any rights in any way, while an administrative contract provides for the corresponding rights and obligations for its participants.

In view of this, the following intermediate conclusion can be proposed: Ukrainian legal scholars currently demonstrate somewhat different positions regarding the concept, features and, accordingly, types of administrative contracts. Although unanimous in the fact that the party to such contracts must be a subject endowed with power, who through their (contracts) conclusion directly exercises this power, some lawyers question the possibility of private individuals participating in such contracts. They explain their hesitation by the fact that a contract with the participation of a private individual provides primarily for the satisfaction of the interests of this person, and not for the achievement of a socially significant result.

In our opinion, an administrative contract with the participation of an individual is quite likely. Moreover, it is an extremely effective means of solving issues arising in the process of public administration. However, the subject composition of this contract determines that, in connection with the fulfilment of its terms, each of the parties achieves the desired goal: a representative of the government strives for socially significant results, and an individual for the satisfaction of private interests.

3 DEFINITION OF ADMINISTRATIVE CONTRACTS, THEIR TYPES IN UKRAINIAN LEGISLATION

In the original version of the Code of Administrative Proceedings of Ukraine 2005, an administrative contract was defined as a bilateral or multilateral agreement, the content of which consists of the rights and obligations of the parties arising from the authoritative managerial functions of the subject of authority, which is one of the parties to the contract.[14]

It should be admitted that the cited normative definition is not comprehensive, and even somewhat confusing. However, even in this form, it fulfilled its main purpose: from its content, it was possible to draw conclusions about the characteristics of the considered contracts. Among them there are the following: 1) administrative contracts are agreements with the participation of subjects who are granted the right to perform management functions by law (in particular as a result of their delegation); 2) the conclusion of contracts is aimed at the implementation of the specified functions by the subjects of power; and 3) the right to conclude administrative contracts, as well as their essential conditions, must be clearly set out in the law.

From the given definition (as well as from the text of the Code in the 2005 edition) information about the types of administrative contracts did not follow despite the laws in force at the time describing agreements with the above characteristics. In legal sources,

14 Code of Administrative Proceedings of Ukraine No 2747-IV of 6 July 2005 <https://zakon.rada.gov.ua/laws/show/2747-15> accessed 1 September 2022.

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some of these agreements were called functional and managerial. They were concluded on the basis of the laws 'On local state administrations'[15] and 'On local self-government in Ukraine'[16] between bodies of executive power and self-government bodies, and they were related to the implementation of joint programs or redistribution (delegation) of powers. Agreements between government entities and private individuals, the rules of which, for example, were defined in the Law 'On Public-Private Partnership', could also be considered administrative contracts.[17]

In the new edition of the Code of 2017, the definition of an administrative contract is established, which is significantly different from the one proposed by the Code of 2005. Now the legislator focuses on the fact that the administrative contract: 1) is concluded exclusively on the basis of the law; 2) may take the form of an agreement, protocol, memorandum, etc.; 3) is a joint legal act; 4) can be concluded both between subjects of authority and with their participation (the latter provides for the possibility of entering into an agreement by a private individual); 5) is based on the mutual will of the parties; and 6) defines their (the parties') rights and obligations in the public legal sphere.[18]

Also, in the updated Code, the types of administrative contracts are indicated, the criterion for distinguishing which, as it seems, is the purpose of their conclusion. Among them there are contracts: a) on the delimitation of competence or on the procedure for interaction between subjects of power; b) on the delegation of public-authority management functions; c) on redistribution or pooling of budget funds; d) those concluded instead of individual acts; and e) those concluded to resolve issues of administrative services provision.

In summary, we note that the legislative definition of administrative contracts is clearly progressing. Its current version gives a clear idea of the characteristics of such contracts and even offers information on their types. It can be argued that the separation of the latter is the result of the use of the considered form of administration by the public authority.

We allowed ourselves to express the assumption that the list of types of administrative contracts given in the Code is not exhaustive. However, in our opinion, this cannot in any way complicate the application of the rules of this procedural law, since the normative establishment of the characteristics of the investigated agreements still plays a decisive role.

Note that the legislative definition of an administrative contract was put into circulation for the purpose of applying the rules of the Code of Administrative Proceedings of Ukraine, primarily those that outline the jurisdiction of administrative courts. Other legal documents, including those establishing the powers of public administration subjects, still do not contain similar definitions, as well as lack rules on the procedure for concluding, executing or terminating administrative contracts. However, in our opinion, it would be correct to enshrine the relevant concept precisely in the acts, the prescriptions of which are addressed to the specified subjects.

15 Law of Ukraine No 586-XIV 'On Local State Administrations' of 9 April 1999 <https://zakon.rada.gov.ua/laws/show/586-14> accessed 1 September 2022.

16 Law of Ukraine No 280/97-BP 'On Local Self-Government in Ukraine' of 21 May 1997 <https://zakon.rada.gov.ua/laws/show/280/97-%D0%B2%D1%80> accessed 1 September 2022.

17 Law of Ukraine No 2404-VI 'On Public-Private Partnership' of 1 July 2010 <https://zakon.rada.gov.ua/laws/show/2404-17> accessed 1 September 2022.

18 Code of Administrative Proceedings of Ukraine (as amended of 3 October 2017) (n 18).

4 DEFINITIONS AND CHARACTERISTICS OF ADMINISTRATIVE CONTRACTS: FOREIGN EXPERIENCE

In this regard, the experience of other European countries, in particular Germany, seems interesting. Provisions regarding the characteristics of administrative public-law contracts (as drafted by the German legislator), as well as the rules regarding their (contracts) content and the procedure for execution or invalidation, are presented in the German Federal Law 'On administrative procedures' (German Law).[19] Incidentally, in the Law of Ukraine 'On Administrative Procedure', which is currently being actively discussed by scientists,[20] there are no rules regarding an administrative contract.

The following stems from the content of the provisions of the German Law:

1. All its general provisions are suitable for the regulation of relations related to the conclusion, execution or termination of public-law contracts, with the exception of cases when special rules are in effect, listed in Part IV of the German Law entitled 'Public-law contract'. If the German law leaves any issue regarding the specified contracts unsettled, then the rules of the Civil Code shall be applied in addition.

This approach seems reasonable: all subjects of public administration are oriented to the same rules regarding the use of the researched tool; these rules are concentrated in one act, which is convenient both for the representative of the government and for a private individual who, according to German law, can be a party to a public-law contract.

2. The German Law states the following: 'A legal relationship in the field of public law may be based on, changed or terminated by a contract (a public law contract), if this does not conflict with legal norms' (sentence 1 § 54). Therefore, if the law does not clearly define the means to be used by the subject of power in certain situations, then recourse to a public law contract is permissible.

3. Further, the following rule is specified in the German Law: 'In particular, an administrative body may, instead of issuing an administrative act, enter into a public law contract with a person in respect of whom an administrative act would otherwise be issued' (sentence 2 § 54). Thus, another case of using a public law contract is its conclusion instead of issuing an administrative act.

It should be noted that the last of the cited rules only looks like it provides extremely broad powers for the public authorities to choose to enter into a contract instead of issuing an act. After all, the following paragraphs of the German Law establish only two cases when such a replacement is permissible. Thus, the contract can be concluded instead of the act, if there is a gap in the law or its norm is insufficiently defined. At the same time, the elimination of uncertainty through the conclusion of a public law contract (called a settlement agreement in the German law) is possible if the subject of power is convinced that it is expedient, and at the same time acts in compliance with the rules established for the exercise of discretionary powers (§ 55). Otherwise, a public law contract is used instead of an administrative act if the party negotiating with the administrative body undertakes a counter-obligation, the fulfilment of which '...will serve for the administrative body to fulfil its public tasks' **(§ 56).** This latter is called a mutual performance contract in German law.

Returning to the national regulatory provisions, we remind you that in the current version of the Code of Administrative Proceedings of Ukraine, one of the types of administrative

19 VwVfG (n 8).

20 IV Boiko and others, 'Administrative procedure: European standards and conclusions for Ukraine' (2019) 10 (7) JARLE 1968–75.

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contracts is defined as one that is concluded instead of issuing an individual act. For the purposes of applying the procedural law, it is sufficient to indicate the existence of a similar type of contract. The rules intended for entities that exercise their authority through the conclusion of administrative contracts, should be more specific. In other words, similar to the prescriptions of the German Law, in order to prevent abuses by representatives of the authorities, the national rules on the powers of the latter should contain a clear list of situations in which it is permissible to carry out the corresponding substitution.

Acquaintance with the legislation of France and achievements of the French administrative-contractual theory leads to several conclusions. The scope of the considered contracts (according to French terminology, administration contracts or public contracts) is quite diverse. They are concluded for the purpose of managing public services (agreements on concession, lease, management), regulation of various types of property relations (agreements on supply of goods, use of public property, provision of assistance), provision of services and conducting research (agreements on services and research), and also for the provision of public loans (agreements on state and municipal loans).

The French legislator defines these contracts in several acts. For example, one is enshrined in the Public Procurement Code (Code de la Commande Publique).[21] According to Article L2 of the Code, contracts concluded at the discretion of the buyer (authorised body) to meet his or her needs for works, supplies or services with one or more economic operators are considered public. Article L6 of the same Code, which is a fundamental part of the determination of competent jurisdiction in the event of litigation, establishes the criteria that should be taken into account when deciding whether a certain contract is public. The first – organic – consists of the fact that the party to such a contract must be a legal entity under public law. The other – material – involves the assessment of the object of the contract in each specific case.

French courts, through their practice, have developed criteria that harmoniously complement those laid down in the Code. According to their position, in order to qualify a public contract, attention should be paid to: a) its subject composition - one of the contract participants must be a legal entity under public law or another person empowered to enter into a contract; b) its purpose, which is to satisfy the public interest; c) its subject, which must be related to activities of public interest; and d) the presence in the contract of conditions that go beyond common law. Regarding the last criterion, French courts specify that a legal entity under public law, being a party to a contract, has exclusive powers, for example, to terminate it unilaterally, to provide instructions during the execution of the contract, and to apply sanctions against the other party. The other party to the contract, according to the judges, can only be guaranteed 'financial balance'.[22]

The experience of legal regulation of an administrative contract in the Republic of Latvia seems interesting. As in Ukraine, this experience (unlike the experience of Germany and France does not have an extensive history. However, we believe that the approaches developed by our Latvian colleagues regarding the regulation of relevant relations can be successfully implemented in Ukrainian legal reality.

An administrative contract, according to Article 12 of the Latvian Law on the State Administrative System, is only one of four types of public law contracts, which also include a delegation contract, a participation contract, and a cooperation contract.[23] According to the

21 Public Procurement Code of France 'Code de la commande publique' of 01 April 2019 <https://www.legifrance.gouv.fr/codes/id/LEGITEXT000037701019> accessed 1 September 2022.

22 P Tifine, 'Droit administratif français Pt 4 Chap 2 Les contrats administratifs' (2013) 4645 Revue générale du droit <www.revuegeneraledudroit.eu/?p=4645> accessed 01 September 2022.

23 State Administration Structure Law of the Republic of Latvia 'Valsts pārvaldes iekārtas likums' of 06 June 2002 <https://likumi.lv/ta/en/en/id/63545> accessed 1 September 2022.

general conditions, all contracts of public law must be concluded in writing in accordance with the requirements of civil legislation and in compliance with the restrictions established by laws or other regulatory acts. The above-mentioned Law also provides that other Latvian laws can define the types of public law contracts and contain rules regarding their conclusion, performance and termination.

Along with these general provisions, the Law on the State Administrative System contains a separate Chapter X dedicated specifically to administrative contracts. Thus, Article 79 of the Law defines an administrative contract as an agreement between state institutions and private individuals regarding the specification, change, termination or definition of administrative legal relations. The administrative act remains an independent legal document even if it was included in the contract.

An administrative contract is concluded on behalf of a state body by an institution or an authorised official who has the authority to do so. Issues that belong to the competence of the relevant state body constitute its subject; the contract must be aimed at the implementation of competence within the limits of legal norms that regulate such implementation.

Administrative contracts in accordance with Article 80 of the Latvian Law on the State Administrative System are concluded: a) for the purpose of terminating a legal dispute, especially in the case when a legal process has already started; and b) if applicable legal norms grant the state institution freedom of action regarding the issuance of administrative acts, their content, or actual actions. The conclusion of an administrative contract is not allowed if the form of the contract does not meet the principles of regulation of specific legal relations, especially if the contract contradicts the principles of state administration or disproportionately restricts the rights of private individuals or creates unjustified obstacles in their implementation.

Article 81 of said Law establishes requirements for the content of administrative contracts. The obligations assumed by the contractual parties must be comparable: the obligations of state institutions must comply with the law, and the obligations of private individuals must be clearly formulated, while their implementation must lead to the fulfilment of the tasks assigned to the other party to the agreement – a state institution.

In the case of non-fulfilment (improper fulfilment) of the terms of the administrative contract by one of the parties, the other party has the right to demand its fulfilment (proper fulfilment) in court, which is regulated by the norms of the Administrative Procedure Law of the Republic of Latvia.

The administrative procedural law of the Republic of Latvia was adopted on October 25, 2001; its text combines the rules of administrative procedure and administrative proceedings.[24] Section C of this law is devoted to administrative proceedings, the task of which, among other things, is the consideration and resolution of disputes caused by the conclusion, execution and/or termination of public law contracts, with the aim of protecting the rights of private individuals – alleged participants in such contracts – from violations by state institutions and their representatives.

In conclusion, we express a not unreasonable hope that the introduction of the Ukrainian law on administrative procedure, the provisions of which are similar in content to the provisions of the above-mentioned German, French and Latvian laws, will contribute to the formation of a staunch position on the expediency of placing in its text information about the characteristics of administrative contracts and their types, the grounds and general procedure for conclusion, as well as the procedure for their execution and termination.

24 Administrative Procedure Law of the Republic of Latvia 'Administratīvā procesa likums' of 25 October 2001 <https://likumi.lv/ta/en/en/id/55567> accessed 1 September 2022.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

5 CHARACTERISTICS OF THE ADMINISTRATIVE CONTRACT IN DECISIONS OF NATIONAL COURTS

As noted above, the legislative definition of an administrative contract was put into circulation for the purpose of applying the rules of the Code of Administrative Proceedings of Ukraine, primarily those that outline the jurisdiction of administrative courts. Therefore, when resolving the question of whether disputes arising from contractual relations involving subjects of authority belong to a certain jurisdiction, Ukrainian judges establish and study the characteristics of the relevant contracts. If the judges ascertain the presence of signs of an administrative contract, the dispute shall be considered according to the rules of administrative proceedings; the absence of such signs requires the application of civil procedural or commercial procedural rules.

The Grand Chamber of the Supreme Court is authorised to provide the final answer to the question of which court of jurisdiction has the right to resolve a conflict of a certain type.

As an example, let us consider one of the decisions in which the Grand Chamber, in order to clarify the court's jurisdiction, analysed the characteristics of the contract, the conclusion of which led to the emergence of a dispute.[25]

According to the details of the case, an individual appealed to the administrative court with a statement of claim for the recognition of the actions of the executive committee of the city council (executive committee), the inaction of the passenger carrier for servicing city bus routes (the carrier) as illegal, and compensation for the moral damage caused. The claims are based on the fact that for two years, the plaintiff, a disabled person, and his grandchildren, whose caregiver he is, faced obstacles when trying to use the right of preferential travel in city transport. In this regard, the plaintiff appealed to the defendants: the executive committee, with a statement about the illegality of the refusal to transport a preferential category of citizens on public city routes; and the carrier, with a request to provide information about the reasons for its transportation of citizens.

The first-instance court established the circumstances by which the plaintiff substantiated part of his claims, namely: the executive committee provided an answer, prepared without complying with the requirements of the law, and the carrier did not provide any response to the request. Taking into account the stated facts, the court recognised the actions of the executive committee as illegal and dismissed the other claims. In particular, the court argued for the refusal to satisfy the request to declare the carrier's inactivity illegal because the latter is not the administrator of the information requested by the plaintiff.

The appellate court reviewed the decision of the court of first-instance, as a result of which it annulled the part of the refusal to satisfy the claim for recognition of the carrier's inaction as illegal. Based on the analysis of the provisions of the Law of Ukraine 'On Access to Public Information', the court of appeal came to the conclusion that the information requested by the plaintiff is public and that the carrier has an obligation to provide an answer to the submitted information request.[26] In addition, the appellate court partially satisfied the demand for recovery of funds from the defendants to compensate for the damage caused to the plaintiff by their illegal actions (inaction).

25 Case No 180/1560/16-a (180/3464/16-a) (Supreme Court of Ukraine, 8 April 2020) <https://zakon.cc/court/document/read/88952209_9222c713> accessed 1 September 2022.

26 Law of Ukraine No 2939-VI 'On Access to Public Information' of 13 January 2011 <https://zakon.rada.gov.ua/laws/show/2939-17> accessed 1 September 2022.

Disagreeing with the decision of the appellate court, the carrier filed an appeal, in which it was noted that this court violated the rules of subject jurisdiction. According to the complainant, the dispute between the carrier and the plaintiff does not belong to the jurisdiction of the administrative courts and should be resolved in civil proceedings. This is justified by the fact that the contract for the transportation of passengers on a public city bus route has a civil-law or economic-law nature, depending on its subject composition. Therefore, on the conviction of the carrier, satisfying the claims against the carrier, the appellate court mistakenly assumed that the contract, on the basis of which the latter provided transportation services, is administrative, and therefore the contested decision should be cancelled in this part and the proceedings closed.

Having checked the case materials and the arguments presented in the cassation appeal, the Grand Chamber of the Supreme Court came to the conclusion that the appeal cannot be upheld. Thus, in accordance with Clause 5 of Part 1 of Article 4 of the Code of Administrative Proceedings of Ukraine, administrative procedure should be understood as the activity of administrative courts regarding consideration and resolution of administrative cases in the manner established by this Code. At the same time, an administrative case is considered to be a public-law dispute submitted for resolution by an administrative court, i.e., a dispute in which at least one party a) performs public-authority management functions, including the performance of delegated powers; b) provides administrative services on the basis of legislation; and c) is the subject of an election process or a referendum process. In other words, public legal disputes are characterised by the fact that at least one of their participants is the state, its representative, or another subject of power which acts to satisfy the public interest.

At first glance, in the analysed case, the body of local self-government – the executive committee of the city council, whose actions are contested by the plaintiff - is seen as the subject of authority. However, the participation of a subject of authority in a dispute does not always give it a public character. An indispensable condition for the qualification of a dispute as a public-law one is to establish that the specified entity exercised public-authority management functions in disputed legal relations.

Taking into account that the legal ties between the participants in the disputed legal relationship in this case arose as a result of the conclusion by two of them of a contract on the organisation of the transportation of passengers on a public city bus route (a contract on the organisation of the transportation of passengers), their nature can be clarified by referring to the Law of Ukraine 'On Road Transport' (Law) .[27]

According to Article 7 of the Law, the duty to ensure the organisation of passenger transportation on public city bus routes is entrusted to the executive body of the council, which represents the interests of the relevant territorial community. It is also established that local self-government bodies form a network of city bus routes for public use and, within the limits of their powers, control compliance with legislation in the field of road transport in the relevant territory (Article 6 of the Law).

The analysis of the cited legislative provisions gives grounds for asserting that local self-government bodies, in particular in the form of executive bodies of local councils, perform public-power management functions in legal relations regulated by the specified Law. At the same time, it is important to note that the obligation to ensure the organisation of regular passenger transportation on public bus routes is performed by executive authorities and local self-government bodies by concluding contracts with motor carriers. It is also noteworthy that the conditions to be reflected in such contracts are defined in Article 31

27 Law of Ukraine No 2344-III 'On Road Transport' of 5 April 2001 <https://zakon.rada.gov.ua/laws/show/2344-14> accessed 1 September 2022.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

of the Law. Incidentally, one of these conditions is the establishment in the contract of the amount and procedure for compensating the expenses of the automobile carrier as a result of the transportation of preferential passengers. This is convincing evidence of the fact that the passenger transportation contract is administrative.

The legislator paid special attention to the issue of preferential travel on public routes, since the right to such travel is guaranteed by the state to the most vulnerable categories of citizens. This can be cited as another argument that refutes the arguments of the cassation appeal about the private-law nature of the disputed legal relationship in the analysed case. Thus, according to Article 37 of the Law, preferential transportation of passengers is provided by motor carriers that transport passengers on public bus routes. It is forbidden to refuse preferential transportation of passengers, except in the cases provided for by law - unreasonable refusal entails responsibility.

In view of the above, we can conclude that the contract on the organisation of passenger transportation is characterised by features identified in the Code as those inherent in administrative contracts, and therefore, the legal relations that arose in connection with its conclusion and execution are of a public nature.

Concluding the analysis of the judgement of the Supreme Court adopted in this case, we focus on one more interesting aspect. The public nature of disputed legal relations and the specifics of the functions performed by the carrier both cause additional duties to be imposed on it, which are usually not fixed by the legislator for business entities, and it regards the obligation to provide information upon information requests. As a general rule, the law refers to the administrators of public information, which is provided upon information requests, the subjects of power. However, according to Article 13 of the Law of Ukraine 'On Access to Public Information', business entities possessing information of public interest are equated to such administrators. Obviously, information on the reasons for the economic entity's regular passenger transportation on public routes may be of interest to a wide range of people. Thus, as a result of the conclusion of the contract by the business entity on the implementation of the specified transportation, it acquires new obligations in the public legal sphere, which are not established in the contract itself.

Sometimes courts face the problem of determining whether a dispute arising from contractual relations belongs to administrative jurisdiction, even when the parties to the contract are exclusively subjects of power. This can be confirmed by the analysis of the decision of the Supreme Court dated November 13, 2019, in which the latter, acting as a court of cassation, stated that the courts of the first and appellate instances erroneously considered the case in accordance with commercial procedure rules.[28]

Based on the facts of this case, the Novgorod-Siversk District Council of Chernihiv Region (district council) appealed to the commercial court with a claim in which it requested the recovery of a debt from the Novgorod-Siversk City Council of Chernihiv Region (city council). The claims are based on the defendant's improper fulfilment of the obligations under the contract on the provision of another subvention in terms of the transfer to the district budget of the subvention for the provision of social services to persons living in the city of Novgorod-Siverskyi and being served by the regional social service centre of the district council.

The lawsuit was partially satisfied by the decision of the court of first instance, which was left unchanged by the judgement of the appellate commercial court. Disagreeing with the position of the courts, the defendant filed a cassation appeal demanding the annulment

28 Case No 927/152/19 (Supreme Court of Ukraine, 13 November 2019) <https://reyestr.court.gov.ua/Review/86241652> accessed 1 September 2022.

of their judgements. The arguments of the appeal state the following: a) the dispute arose due to the improper execution of the administrative contract on the provision of another subvention, the subject of which is the transfer of relevant funds from the general fund of the city budget; b) disputed legal relations are regulated by the norms of public law; and c) the case must be resolved in accordance with administrative proceedings.

In the course of reviewing the arguments of the appeal and providing an assessment of the correctness of the application of the norms of law by the courts of previous instances, the Supreme Court proceeded from the following considerations. The criteria for delimitation court jurisdiction are the subject structure of legal relations, the subject of the dispute, and the nature of disputed substantive legal relations. In addition, these criteria can be a direct indication in the law of the type of court proceedings, according to the rules of which a certain category of cases is considered.

One of the essential features of public-law disputes is the sphere of their occurrence – public-law relations, i.e., social relations regulated by the norms of public law, the content of which is the mutual rights and obligations of their participants in various areas of society, in particular in relation to the implementation of public authorities.

Article 1 of the Budget Code of Ukraine (BC of Ukraine) outlines the scope of regulation of this normative legal act, which covers relations that arise in the process of drawing up, considering, approving, and implementing budgets, reporting on their implementation, and monitoring compliance with budget legislation.[29] In addition to the above, this area includes the issue of responsibility for violations of budget legislation, and formation and repayment of state and local debt. Based on the prescriptions of Article 93 of the BC of Ukraine, a local council can transfer funds for the implementation of individual expenditures of local budgets to another local council in the form of an inter-budgetary transfer to the corresponding local budget. The transfer of funds from one local budget to another is carried out on the basis of the decisions of the relevant local councils, adopted by each of the parties, and after concluding an agreement between them.

We also note that according to Article 1 of the Civil Code of Ukraine, civil law regulates personal non-property and property relations (civil relations), based on legal equality, free expression of will, and property independence of their participants. Civil legislation does not apply to property relations based on administrative or other authority subordination of one party to another, nor to tax and budget relations, unless otherwise established by law.[30]

Based on the legal provisions cited above, the Supreme Court concluded that the contract on the provision of another subvention is a public law contract, since its conclusion is regulated by the norms of budget legislation and provides for the duties of the city council to provide a subvention from the city budget to the district budget.

Then the Supreme Court specified its conclusion and strengthened it with additional arguments, stating the following: the claimant, that is a local self-government authority, acted in disputed legal relations with the participation of another local self-government authority not as a subject of economic activity but as a subject of governmental powers, and a dispute arose between these bodies regarding their implementation of their management functions in the budgetary sphere on the basis of the concluded administrative agreement for the redistribution of budget funds. Therefore, the courts of the first and appellate instances erroneously resolved this dispute according to economic proceedings. It must be

29 Budget Code of Ukraine No 2456-VI of 8 July 2010 <https://zakon.rada.gov.ua/laws/show/2456-17> accessed 1 September 2022.

30 Civil Code of Ukraine No 435-IV of 16 січня 2003 <https://zakon.rada.gov.ua/laws/show/435-15> accessed 1 September 2022.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

resolved according to administrative proceedings as arising from the performance of an administrative contract.

In one of the above-mentioned parts of our research, attention is drawn to establishing the features of an administrative contract, which is concluded by public authority instead of issuing an individual act, including regard towards foreign experience. Based on this, it is considered appropriate to analyse the courts' practice of resolving disputes that arise in connection with the conclusion of administrative contracts of the specified type, and ascertain whether there are problems with the delimitation of court jurisdictions regarding the resolution of these disputes.

We suggest to refer to the Supreme Court`s decision of December 23, 2019, which was adopted as a result of the review of the administrative case on the claim of an individual to the Department of Urban Planning and Land Relations of the City Council involving the association of co-owners of an apartment building as the third party, on recognition as illegal and invalid the protection contract for the monument of cultural heritage as well as its annulment. The claims in this case are motivated by the defendant's lack of competence to enter into the contested contract.[31]

Disagreeing with the decisions of the first and appellate courts, which satisfied the claim, the third party filed an appeal to the Supreme Court. The demands of the cassation appeal to cancel the contested court decisions and terminate the proceedings in the case are based on the violation of the rules of subject jurisdiction by the courts that adopted them.

The Supreme Court rejected the arguments of the appeal about the existence of grounds for closing the proceedings in the case in view of the following: in accordance with Article 54 of the Constitution of Ukraine, the state ensures the preservation of historical monuments and other objects of cultural value.[32] All owners of monuments or bodies (persons) authorised by them, regardless of the forms of ownership of these objects, are obliged to conclude a protection agreement with the relevant body for the protection of cultural heritage (Article 23 of the Law of Ukraine "On the protection of cultural heritage"). The specified agreement establishes clear requirements for the preservation of historical monuments and other objects of cultural value, and the procedure for its conclusion is approved by the Cabinet of Ministers of Ukraine.[33]

Taking into account the content of the legislative provisions regulating disputed relations, the Supreme Court reached a conclusion about the administrative legal nature of the disputed contract. It argued that the protection agreement is an act with the participation of the subject of authority and the owner of the cultural heritage monument, which determines their mutual rights and obligations in the field of state management of cultural heritage protection. The latter derives from the management functions of the subject of authority, which is a party to this contract. The protection agreement is concluded by the cultural heritage protection authority instead of issuing an individual act, which obligates the owner to ensure the preservation of the monument. The Supreme Court also emphasised that this contract does not resolve the issue of ownership of a cultural heritage object but establishes the regime of its use.

We consider it necessary to note one more specific feature of the studied type of administrative contract. First of all, we should remind you that in accordance with the prescriptions of Clause

31 Case No 806/1536/18 (Supreme Court of Ukraine, 23 December 2019) <https://reyestr.court.gov.ua/Review/86552104 > accessed 1 September 2022.

32 Constitution of Ukraine No 254 k/96-BP of 28 June 1996 <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80> accessed 1 September 2022.

33 Law of Ukraine No 1805-III 'On Protection of Cultural Heritage' of 8 June 2000 <https://zakon.rada.gov.ua/laws/show/1805-14> accessed 1 September 2022.

16, Part 1, Art. 4 of the Code of Administrative Proceedings of Ukraine, an administrative contract is based on the consent of its parties. At the same time, the autonomy of the will of potential participants of an administrative contract is significantly limited compared to the almost unlimited freedom to enter or not enter into contractual relations of a private legal nature. It is clear that for the subject of authority, the conclusion of an administrative contract is often both its right and its duty. However, in the facts of the case we considered, it is noteworthy that the obligation to conclude an administrative contract is assigned by law to a person who is not endowed with any authority.

The criteria developed by the Grand Chamber of the Supreme Court for distinguishing administrative contracts from private legal contracts do not always appear to be indisputable. You can verify that this statement is correct from the results of the analysis of the decision of the Supreme Court dated February 27, 2019.[34]

According to the details of the case described in the resolution, an individual appealed to the administrative court with a statement of claim, in which he asked to declare the contract between the local self-government body and a private legal entity invalid. The subject of the disputed contract was the cooperation of its parties, aimed at carrying out work on the renewal or maintenance of the transport and operational characteristics of a locally important road. Repair works were to be carried out by a private legal entity under the conditions of their financing by the local self-governing body.

The court of first instance rejected the claim. The appellate court annulled the decision of the court of first instance and terminated the proceedings, noting that this dispute does not belong to the jurisdiction of the administrative court, since the disputed contract is not administrative.

The Grand Chamber of the Supreme Court, being the cassation instance, made a decision supporting the appellate court, not seeing any signs of an administrative contract in the cooperation agreement mentioned above. Referring to the legislative definition of an administrative contract, the Grand Chamber noted the following in its resolution:

1. In order to refer a dispute arising from contractual relations to the jurisdiction of an administrative court, it is not sufficient to establish that one of the parties to the relevant contract is a subject of authority.

2. Contracts concluded according to the rules of civil or commercial legislation cannot be considered administrative contracts.

3. An administrative contract assumes that there are relations of authority and subordination between its parties; this fact distinguishes it from a civil or economic contract, in which the parties are legally equal, free to express their will, and property independent.

4. If the subject of authority in disputed legal relations does not perform managerial functions in relation to another participant in them, then the dispute arising from these relations does not have the public-law features established by the Code of Administrative Proceedings of Ukraine, which means that it does not fall under the jurisdiction of an administrative court.

To date, the positions of the Grand Chamber of the Supreme Court presented above are taken into account by judges: when characterising contracts in the context of determining judicial jurisdiction, judges refer to them in their decisions.[35] In our opinion, not all of them

34 Case No 814/1375/17 (Supreme Court of Ukraine, 27 February 2019) <https://reyestr.court.gov.ua/Review/80427376> accessed 1 September 2022.

35 Case No K/9901/29462/19 (Supreme Court of Ukraine, 12 March 2020) <https://reyestr.court.gov.ua/Review/88150261> accessed 1 September 2022.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

are indisputable, and therefore some can become the subject of an interesting scientific discussion.

Thus, the first and second positions do not cause any doubts. They found their justification in numerous publications, the authors of which combine their science and judges experience[36].

Regarding the 'viability' of the third and fourth positions, we will express some warnings. They are interconnected and, in general, consist of the fact that a contract can be considered administrative and one of the parties performs administrative functions in relation to the other party, even in the relations that arose as a result of its (contract) conclusion. We agree that in certain situations the parties to the contract under consideration may be in a state of "power-subordination". However, this is rather the exception than the rule. After all, the very nature of contractual relations excludes it. If subordination is preserved, then why conclude a contract? In this case, it makes sense for the subject of authority to use another form of administration - to adopt an individual act.

For our study, it will not be superfluous to follow whether the given positions of development were found in the following decisions of the Supreme Court. For example, let us outline the resolution of May 5, 2022.[37]

The said resolution describes the conflict situation that arose as a result of the termination of the operation of the family-type children's house. The relevant order was adopted by the head of the local state administration. The parents-educators appealed to the administrative court with a statement of claim to declare the order illegal and to cancel it. The court of first instance satisfied the claims in full; the appellate court did not agree with the court of first instance, cancelled its decision and adopted a new one – on the refusal to satisfy the claims.

The claimant filed a cassation appeal, in which they claimed that the appellate court made its decision without taking into account the fact that the family-type orphanage operated on the basis of the order of the head of the local state administration on its formation, as well as the agreement between the administration and the foster parents on the organisation of its activities. According to the complainants, there were no grounds for unilaterally terminating the mentioned agreement. Therefore, the order to terminate the operation of the orphanage was illegal and subject to cancellation.

The Supreme Court, deciding this case, came to the conclusion that the adoption of the order on the termination of the operation of the orphanage should be preceded by an assessment of compliance by the parent-educators with the terms of the agreement on the organisation of its activities. This conclusion was also based on the fact that this agreement is an administrative contract by its nature and purpose. In this context, the Court in its resolution listed the features inherent in administrative contracts and projected them onto the agreement that was the subject of the case under investigation.

Thus, the Supreme Court noted that: a) the legal authority is a mandatory participant in an administrative contract; b) it is concluded on the basis of the law, i.e., the the legal authority is authorised to enter into relevant contractual relations by the law itself, and not by a bylaw; c) the content of the contract consists of mutual rights and obligations of the participants in

36 NB Pysarenko, 'Demarcation of the Jurisdiction of Courts Regarding the Resolution of Disputes Involving Subjects of Authority' (2011) 4 Law of Ukraine 59; O Kibenko and V Urkevych, 'Approaches of the Grand Chamber of the Supreme Court to determining the jurisdiction of disputes' (*Judicial and Legal Newspaper*, 24 March 2020) <https://sud.ua/ru/news/blog/164290-pidkhodi-velikoyi-palati-verkhovnogo-sudu-do-viznachennya-yurisdiktsiynosti-sporiv?fbclid=IwAR1AR7wlP-2E1DG2-pku6YtNanHFpyvTn2ieUdnMIn4Ru5Fi_ZRYF0U-OQ004> accessed 1 September 2022.

37 Case No K/9901/1416/21 (Supreme Court of Ukraine, 05 May 2022) <https://reyestr.court.gov.ua/Review/104191364> accessed 1 September 2022.

the public legal sphere, namely, those rights and obligations that, according to the Court, are determined not by reaching an individual agreement between the parties but by taking into account legislative prescriptions; d) the operation of the contract leads to the occurrence of legal consequences in the form of the emergence, change or termination of relations forming the subject of administrative law; e) the purpose of concluding a contract must be to satisfy public interests; and e) rules on the content of an administrative contract and the procedure for concluding it should be concentrated in the norms of administrative law.

As we can see in the previous court decision, the general features of administrative contracts are presented; that is, those that can be used to identify any agreement involving subjects of power. They have also been clarified, with a focus on their most important (contract) characteristics.

It should also be noted that in the resolution dated May 5, 2022, the Supreme Court no longer speaks about the subordination of the parties to the administrative contract. It emphasises the fact that the content of the agreement on the organisation of the activities of the orphanage is the rights and obligations of the participants, which arise from the powerful management functions of the defendant. It also claims that their (participants') obligations are not private law, since they ensure the implementation of the powers of the district state administration and are aimed at satisfying the interests of children, not the parties to the agreement.

Summarising, we note that the defining feature of administrative contracts is that they are concluded by public authorities in order to implement the powers granted to them. To this feature, we can add that the right to exercise authority through entering into contractual relations must be expressly provided for in the law. Similarly, in the law regulating public-legal relations, rules regarding the procedure for conclusion, execution and termination of the contracts under consideration should be fixed. The rest of the features (for example, the participation in an administrative contract of a private person who seeks to satisfy his own interests, or the subordination of such a person to another ruling party to the contract) should be isolated and studied in specific cases; they cannot be recognised as inherent in all administrative contracts without exception.

6 CONCLUSIONS

1. Administrative contracts (like any other contracts) are concluded voluntarily after the parties have reached agreement on all their essential terms, are of equivalent nature, and provide for mutual responsibility of the parties.

The constitutive feature of administrative contracts is that they are concluded by public authorities in order to implement the powers granted to them. The fact that the right to exercise power by entering into contractual relations must be expressly provided for in the law can also be mentioned as an indispensable feature of these contracts. Similarly, the law regulating public-law relations should establish rules regarding the procedure for concluding, executing and terminating these contracts. It makes sense to single out other signs and studies in specific cases - they cannot be recognised as inherent in all administrative contracts without exception.

2. The legislative definition of an administrative contract was put into circulation for the purposes of applying the rules of the Code of Administrative Proceedings of Ukraine; primarily those that outline the jurisdiction of administrative courts. Normative legal documents establishing the powers of subjects of public administration still do not include such definitions, neither do they contain most of the regulatory provisions necessary for the

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

proper use of the considered form of administration. It would be correct to fix the relevant information in acts, the prescriptions of which are addressed to the specified entities. We are confident that the implementation of the Law 'On Administrative Procedure' will contribute to the formation of a staunch position on the expediency of placing in its text the provisions regarding the characteristics of administrative contracts, their types, grounds and general procedure for conclusion, as well as the procedure for their execution and termination.

3. According to the function in the mechanism of administrative and legal regulation, scientists propose to distinguish between law-making contracts aimed at the realisation of rights and delict administrative contracts. There is no objection to the separation of contracts establishing rights and those aimed at the realisation of rights. For further discussion, we leave the issue of distinguishing the so-called delict contracts among administrative contracts. After all, the latter do not foresee that their participants have corresponding rights and obligations.

4. Types of administrative contracts are named in the Code of Administrative Justice of Ukraine, one of which is defined as one that is concluded instead of issuing an individual act. For the purposes of applying procedural law, it is enough to indicate the existence of a similar type of contract. The rules addressed to entities exercising their powers through the conclusion of administrative contracts should be more specific. In order to prevent abuses by government officials, the rules on their powers should include a clear list of situations in which it is permissible to carry out the appropriate replacement.

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Case Note

MEANS OF PROOF IN CRIMINAL PROCEEDINGS IN THE SLOVAK REPUBLIC – NEW CHALLENGES

Adrián Vaško and Libor Klimek

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Keywords: *execution of evidence, evidence, means of proof, criminal proceedings, criminal law*

ABSTRACT

Background: *Turbulent technological progress in the 21st century has caused the emergence of a number of new possibilities, especially technical in nature, and allowed for new means of proof*

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as evidence. Legal regulation of criminal law in the Slovak Republic is responding to this trend, and progressive approaches to evidence which reflect the current level of development of science and technology are gradually being introduced. This article focuses on current challenges in the field of legislation regulating the issue of evidence in criminal proceedings.

Methods: *Legal comparison, content analysis of websites, functional analysis of legal acts, and analysis of the decisions courts were used to process the research data.*

Results and Conclusions: *Current legislation on executing evidence in criminal proceedings in the Slovak Republic requires modification. There is especially the need to reflect on the current state of economic and dynamic technological progress in the 21st century. The recent list of evidence means in S. 119(3) of the Code of Criminal Procedure is not complete but does not automatically reject the use of other means of evidence. Discussions on how to proceed are currently taking place within the professional public. We believe that in the near future criminal law must respond adequately and enable the use of evidence obtained by new technologies such as satellites, GPS, GLONASS, dashcams, vehicle software, communication technologies, location tracking, etc. Of course, the final word will always be given to the court, which will assess whether such evidentiary information is admissible and effective, or what "weight" it will have in deciding on a particular criminal case.*

1 INTRODUCTION

The aim of this article is to approach the issue of evidence in criminal proceedings in the Slovak Republic, and at the same time point out the need to accept new modern means of evidence. We evaluate the above from the theoretical level of legality, admissibility and effectiveness, as well as a reference to the legal regulation de lege lata. After such an examination, we came to the conclusion that, in the area of evidence, it is necessary to respond to technological development, incorporate its results into legislation, and enable the use of individual means in the evidence process.

The applicable legal regulation in the Slovak Republic regulates the issue of evidence in criminal proceedings in a separate legal norm – the Code of Criminal Procedure.[1] This law entered into force on 1 January 2006 and, due to its complexity, has the character of a Code. It is a general regulation, according to which the procedure at various stages of criminal proceedings is regulated. We also consider other legal regulations containing the standards of criminal procedural law as the sources of criminal procedural law.[2]

Criminal proceedings are supposed to create conditions and prerequisites for the procedure of the law enforcement agencies (police officers, prosecutors) and courts so that crimes are properly detected, their perpetrators are fairly punished according to the law, and the proceeds of crime are taken away - while guaranteeing fundamental rights and freedoms of natural persons and legal persons (S. 1 of the Code of Criminal Procedure).

In criminal proceedings, a substantive decision is made on an event that has already occurred, regardless of the time from the commitment of the act until the decision itself. Law enforcement agencies (LEAs) usually do not register the commitment of an act immediately after such act. Instead, the agencies subsequently find out whether the act has taken place, whether it is a criminal offence, and who the perpetrator is. If LEAs perceived the act when it

1 Code of Criminal Procedure No 301/2005 Coll 'Trestný poriadok' of 24 May 2005 (as amended 01 December 2021) <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2005/301/20221201> accessed 1 October 2022.

2 J Ivor, P Polák a J Záhora, *Trestné právo procesné* (Wolters Kluwer 2017) Zv 1, 22.

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was committed, the agencies can be excluded from performing acts in criminal proceedings due to bias towards the subject matter (S. 31(1) of the Code of Criminal Procedure). The LEAs and courts recognise the act by reconstructing it with the use of evidence (mediating facts). This special procedure is strictly regulated by the Code of Criminal Procedure and is usually referred to as taking of evidence.[3]

2 TAKING OF EVIDENCE

It is not possible to ensure the fulfilment of the purpose of criminal proceedings without a process of executing the evidence. Executing the evidence has a decisive and irreplaceable place, as well as importance in fulfilling the purpose of criminal proceedings. It is the main element influencing various stages of criminal proceedings, and its results directly determine what the final decision will be and who shall issue the final decision.

A reliable finding of the facts is a condition for a correct, convincing and fair decision in a particular criminal case. Such a finding constitutes the fundamental role in the process of executing the evidence. Executing the evidence can therefore be described as the main element of criminal proceedings as a whole.[4]

As the aim of executing the evidence, we can indicate the knowledge of the complete complex of essential facts important for the decision on the next procedure in the proceedings, or for issuing a substantive decision. Executing the evidence is an indispensable part of every criminal procedure and is carried out at every stage. It is irreplaceable, as it is the only way to enable the LEAs and the court to obtain documents for both the further course of proceedings and the decision.[5]

In terms of theory, executing the evidence (as a process) can be divided into specific stages (steps):

- Searching for evidence
- Executing and documenting the evidence
- Inspection
- Assessment

In addition to national legislation and case law, designated international standards must be accepted in the assessment of evidence in criminal proceedings. We focus primarily on the Convention for the Protection of Fundamental Human Rights and Freedoms, as amended by the Protocols and Additional Protocols of 04/11/1950, which entered into force in the Czechoslovak Republic on 18/03/1992.

The decisions of the European Court of Human Rights (ECtHR) must also be taken into account.

The Convention in relation to criminal proceedings, inter alia, guarantees the right to a fair trial (Art. 6(1)) and the right of the accused to prove guilt in a lawful manner (Art. 6(2)). The course, scope and other requirements for executing the evidence are not regulated by the expressis verbis.

It is a universally accepted and admitted principle that the process of legal regulation of evidence is the exclusive competence of States Parties to the Covenant and that there is no obligation to accept a particular evidence system. Such a concept is desirable, taking into account the diversity of the rules of evidence in continental law and the common law system.

3 ibid 403.

4 V Mathern, *Dokazovanie v československom trestnom práve* (Obzor 1984) 5.

5 J Ivor a kol, *Trestné právo procesné* (Iura Edition 2010) 419.

The ECtHR leaves to national law and the courts the assessment of questions relating to the admissibility of evidence, the assessment of evidence by national courts, the relevance of evidence, truthfulness, and probative value.

The ECtHR has exclusive competence to decide whether the criminal proceedings as a whole were fair in accordance with Article 6 of the Convention.

3 EVIDENCE IN CRIMINAL PROCEEDINGS IN THE SLOVAK REPUBLIC

Evidence in criminal proceedings is regulated in Title 6 of the Code of Criminal Procedure (Ss. 119-161). It can be defined as the procedure of the LEA and the court regulated by law, or other persons involved in searching, securing, executing and evaluating information important for the knowledge of factual circumstances relevant for the decision on guilt and punishment, as well as for any further procedure within the proceedings.[6]

All facts important for criminal proceedings for a decision in a specific matter form the subject of executing the evidence. The subject of executing the evidence is strictly individual in each criminal case.

In executing the evidence, its limits are set on a case-by-case basis. The Code of Criminal Procedure determines the range of circumstances in the provision of S. 119(1) Circumstances to be Proved. In criminal proceedings, it is necessary to prove in particular:

- Whether the act which has the particulars of a criminal offence has really occurred.
- Whether the act was committed by the accused and on what motives.
- Seriousness of the offense, including the causes and conditions of its commission.
- Personal circumstances of the perpetrator to the extent necessary to determine the type and extent of the punishment and the imposition of a protective measure and other decisions.
- The effect and amount of the damage caused by the offense.
- The proceeds of a criminal act and the means of committing it, its placement, nature, status and cost.
- Property relations for the purpose of withdrawing the proceeds of crime.

Property relations, drawing up a property profile, and searching, documenting and verifying the scope and location of the proceeds of crime in are, this context, ascertained and carried out by a police officer or designated authority according to a special regulation (S. 119(2) of the Code of Criminal Procedure).

In relation to the characteristics of executing the evidence, it is appropriate to outline the concepts of evidence and means of proof.

In the provision of S. 119(3) of the Code of Criminal Procedure, the legislator defines the evidence as: "It shall be possible to use as evidence anything that may contribute to properly clarifying the matter and that has been obtained in a lawful manner from the means of evidence or under special law."

The characteristic of the evidence in question reflects the principle that only facts obtained in accordance with the law may be used to prove guilt and impose a penalty.

The admissibility or inadmissibility of evidence is also affected by a specific stage of criminal proceedings and individual provisions of the Code of Criminal Procedure. Unusually, the issue of admissibility of evidence is regulated by other legislation, such as Civil Code

6 Ivor, Polák a Záhora (n 4) 404.

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No. 40/1964 Coll. (as subsequently amended) and the Offences Act No. 372/1990 Coll. (as subsequently amended). In the context of the admissibility of evidence in criminal proceedings, it is also necessary to respect the requirements arising from the decision-making activities of national and international courts and international treaties. The legal order of the Slovak Republic does not accept precedent law but, despite the statement above, the legal framework affecting the form, scope and manner of evidence is co-created by the jurisprudence of national courts, the Constitutional Court of the Slovak Republic, as well as the ECtHR.

The material value of evidence resulting from the manner and form of securing it must be assessed at each procedural stage. Acceptable evidence for bringing the accused to trial may not be admissible for bringing charges, etc.

The LEAs and the court in criminal proceedings acquire important knowledge necessary to properly clarify the matter using the means of evidence.

The Code of Criminal Procedure regulates the means of evidence in S. 119(3). "The means of evidence shall include, in particular, interrogation of the defendant, examination of witnesses and expert statements, verification of the testimonies on the scene, an identification line up, re-enactment, investigation attempts, examination, things and documents materially relevant for criminal proceedings, notification, and particulars obtained using information and technical means or means of operational and search activities."

In the aforementioned provision of the Code of Criminal Procedure, the legislator provides a comprehensive list of evidence. Other sources of evidence that may reflect current technological progress of the 21st century are not automatically excluded.

However, it is indispensable that such 'new' means of proof provide lawfully obtained evidence. In accordance with the provision that everything that can contribute to the clarification of the matter can serve as evidence, it is possible to consider, for example, satellite technologies, GPS, GLONASS and dashcams.

Ensuring the adversarial nature of criminal proceedings has resulted in the introduction of the possibility for the parties to procure evidence separately. This possibility can be found in S. 119(4) of the Code of Criminal Procedure. The parties shall then also bear the costs associated with obtaining the evidence. The State shall reimburse the accused for the costs incurred in cases of acquittal pursuant to S. 285 (a, b or c) of the Code of Criminal Procedure. [7]

For the sake of guaranteeing basic human rights and freedoms, a necessity is the provision of S. 119(5) of the Code of Criminal Procedure: "Evidence obtained by means of unlawful duress or threat of duress cannot be used in the proceedings with the exception of the case when it is to be used as evidence against a person who has used duress or threat of duress." At this point, we note that the Constitution of the Slovak Republic, as amended, does not contain specific provisions regarding the definition of the right to a fair trial.[8]

7 Explanatory Report to the Act No 301/2005 Coll 'Trestný poriadok' of 26 May 2004 <https://www.epi.sk/dovodova-sprava/Dovodova-sprava-k-zakonu-c-301-2005-Z-z.htm> accessed 1 October 2022. LIT36207SK - the last version of the text.

8 Constitution of the Slovak Republic No 460/1992 Coll 'Ústava Slovenskej Republiky' of 1 September 1992 (as amended of 1 January 2021) <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1992/460/20210101> accessed 1 October 2022.

4 ADMISSIBILITY AND LEGALITY OF EVIDENCE

According to a number of experts (e.g., Šimovček, Ivor), the concept of admissibility of evidence is often identified with the concept of legality of evidence. We accept the view that these are interrelated concepts and their strict distinction in practice is not always feasible.

In principle, the legality of evidence is understood more narrowly than the admissibility of evidence. It follows from the foregoing that not all evidence obtained unlawfully is inadmissible. In this context, inadmissible evidence is not automatically unlawful. The concept of inadmissibility encompasses not only inadmissibility resulting from unlawful evidence, but also the inadmissibility determined by the source of the evidence used, as well as the inadmissibility resulting from the formal reason for the temporal limitation in the submission of evidence by individual parties to the court.[9]

The legal theory characterises the admissibility of evidence in particular by:

- Compliance with the basic principles of criminal proceedings, the rules of the Code of Criminal Procedure and sources of evidence
- Compliance with the basic principles of criminal procedure, the rules of the Code of Criminal Procedure and the methods, means and procedures applied in obtaining information that constitutes the content of the evidence itself.[10]

The rules for the admissibility of evidence are set out by prof. Záhora, while respecting the following conditions in the process of searching for and executing the evidence:

- Knowledge of the origin of the source of evidence, or evidence information, the possibility of verifying and confirming it
- Competences of individual entities of criminal proceedings in the procurement of evidence
- Identification of persons who are the sources of the evidentiary information
- Respecting the general provisions of criminal procedure rules in the processes of searching for and carrying out individual evidence
- Respecting procedures for fully and accurately fixing the evidence information procured.[11]

In connection with the issues of legality and admissibility of evidence, we also consider it necessary to mention the "Fruits of the Poisonous Tree Doctrine". The doctrine is applied primarily in US criminal law when dealing with the effectiveness of evidence. [12]

As stated by Tlapák and Navrátilová, the Fruits from a Poisonous tree Doctrine does not belong to continental law, although, currently in the legal profession and especially in the Czech Republic, there is a discussion on its applicability. There are two groups of views in principle. The first group agrees that not all illegality automatically implies the inadmissibility of evidence, and therefore there are also "fruits from a poisonous tree" that can be used in executing the evidence. One of the decisive arguments is the acceptance of the wording of the Code of Criminal Procedure that anything that can contribute to the clarification of the matter can be used as evidence. The second group of views is based on the opinion that the evidence obtained in breach of procedural law, as well as the evidence derived from it, is ineffective. [13]

The current jurisprudence in the Czech Republic in assessing the inadmissibility of evidence is defined by two basic theories:

9 I Šimovček, 'Prípustnosť dôkazov v trestnom konaní' V Záhora J (zost) *Teoretické a praktické problémy dokazovania: Zborník príspevkov z celoštátnej konferencie s medzinárodnou účasťou konanej dňa 15 Decembra 2008* (Bratislavská vysoká škola práva 2008) 255.

10 Ivor (n 7) 443.

11 J Záhora and others, *Dokazovanie v trestnom konaní* (Leges 2013) 116.

12 A Nett, *Plody z otráveného stromu* (Masarykova Univezita 1997) 9.

13 J Jelínek a kol, *Dokazování v trestním řízení v kontextu práva na spravedlivý proces* (Leges 2018) 226–7.

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- The theory of conflicts of interest and values
- Proportionality test

The theory of conflicts of interest and values examines effectiveness based on the value of evidence. The value of evidence is formed by the seriousness of the evidence, legality, and truthfulness, credibility, and according to the decisions of the Supreme Court of the Czech Republic.[14]

The case of the proportionality test compares the degree of interference with the rights of persons and the possibility of fulfilling the objective pursued. The seriousness of the offence to which the execution of evidence relates shall also be taken into account. It's a three-step test. First, the appropriateness of the intervention is assessed, then the necessity of the intervention and, finally, the adequacy of the intervention.[15]

The Code of Criminal Procedure works with the concept of legality. A specific means of proof is permissible under the law and is obtained by the procedure of the LEAs and the court in accordance with the provisions of the relevant legislation.

Evidence in respect of which the illegality was committed, as well as any evidence obtained on the basis thereof, shall be deemed as unlawful evidence.

Evidence obtained by unlawful interference with the constitutional rights of natural persons is inapplicable in criminal proceedings, as it does not respect the conditions set in S. 119(3) of the Code of Criminal Procedure.[16]

According to Šimovček, if we accept the possibility that not all illegally obtained information is excluded as evidence from criminal proceedings, it is necessary to establish criteria of admissibility. Illegal evidence could be divided into two groups:

- Absolutely inadmissible
- Relatively inadmissible

In cases of absolute invalidity, ex officio must be taken into account. In the event of relative inadmissibility, the evidence may be admitted, in particular, taking into account minor violations of the law and its high probative value.

Based on the analysis of the ECtHR's decisions, we can conclude that the Convention on the Protection of Human Rights and Fundamental Freedoms does not regulate the process of executing the evidence, but rather covers some aspects of it. The admissibility of evidence has been identified by the ECtHR on several occasions as an issue that falls within the exclusive competence of specific national entities and is not dealt with in the Convention.

The provisions of Art. 6(1) of the Convention do not specify conditions for the admissibility of evidence and the ECtHR is responsible for determining whether the proceedings as a whole were fair. It should be noted that, although the ECtHR does not examine the admissibility of evidence, it has ruled several times that the use of concrete evidence violated the right to a fair trial in relation to a particular accused person.[17]

For better illustration, we present selected ECtHR decisions:

The case of Schenk v. Switzerland, 12/07/1998, the ECtHR stated that Art. 6 of the European Convention does not set the rules on the admissibility of evidence and therefore this area is

14 Nett (n 14) 46.

15 Jelínek (n 15) 229–30.

16 Záhora (n 13) 113.

17 N Mole a C Harby, *Právo na spravodlivý proces: sprievodca na aplikáciu čl. 6 európskeho dohovoru o ľudských právach* (Informačná kancelária Rady Európy 2006) 49.

subject to national regulation. It is not for the ECtHR to decide what means of proof should be admissible, but whether the criminal proceedings as a whole were fair or the rights of the defence were respected.[18]

The ECtHR in the cases of Khudobin v. Russia, Klass and others v. Germany does not exclude the possibility that, at a preparatory stage and where the nature of the offence so requires, resources of the anonymous whistleblower type may be used as evidence. However, the subsequent use of those resources by the conviction court is acceptable only in cases where there are sufficient safeguards against abuse, a clear and predictable procedure for approval, and both implementation and control of special investigative methods.[19]

Recently, we can observe in the decisions of the ECtHR a tendency to move away from favouring the preservation of absolute protection of fundamental human rights and freedoms towards emphasising the public interest and its protection.

Prof. Svák commented on these tendencies and, as he states, it is obvious that it has resulted in a more precise determination of the limits of legitimate interference with the right to privacy, favouring national remedies in cases of violation of this right and an extensive interpretation of the content of the right to privacy.[20]

Extensive interpretation has become the basic interpretative rule in the interpretation of the right to privacy. The right to privacy includes the right to private life, the right to a family house, the inviolability of a dwelling, as well as the protection of correspondence.

The statements above also apply to the interference of competent entities with the right to privacy regulated in Art. 8 of the Convention. According to its provisions, invasions of the right to privacy are permissible subject to the conditions stipulated. State authorities may interfere with this right in cases where the interference is in accordance with the law, and it is necessary in a democratic society in the interests of national security, public safety, the economic well-being of the state, the prevention of disorder or crime, or the protection of health, morals or the rights and freedoms of others.[21]

The interference of public authorities with the right to privacy is, in the context of the above, assessed by the ECtHR from three fundamental points of view:

- Legality
- Legitimacy
- Proportionality

By legality we mean that the right to privacy may be limited only on the basis of the law (Art. 8(2) of the Convention). Legislation must be accessible and predictable.[22]

Article 8(2) of the Convention also provides an answer to the question of the requirement of legitimacy. The reasons for the interference of state authorities in the right to privacy are given above. The assessment of legitimacy shall assess the consistency of the measures implemented with the permissible objective.

18 Schenk v Switzerland App no 10862/84 (ECtHR, 12 July 1988) <https://hudoc.echr.coe.int/eng?i=001-57572> accessed 1 October 2022.

19 Khudobin v Russia App no 59696/00 (ECtHR, 26 October 2006) <https://hudoc.echr.coe.int/eng?i=001-77692> accessed 1 October 2022; Klass and others v Germany App no 5029/71 (ECtHR, 6 September 1978)

20 J Svák, *Ochrana ľudských práva* (Eurokódex 2011) Zv 2, 393.

21 Council of Europe, *European Convention of Human Rights* (ECtHR 2013) Art 8 <https://www.echr.coe.int/Pages/home.aspx?p=basictexts/convention> accessed 1 October 2022.

22 J Svák, *Ochrana ľudských práva (z pohľadu judikatúry a doktríny štrasburských orgánov ochrany práv)* (2 rozš vyd, Eurokódex 2006) 584–5.

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The proportionality of interventions by public authorities must be preserved between the right to privacy and the choice of means of intervention provided for by law in pursuit of a legitimate objective. Choosing these means is at the discretion of the state; however, they must always pursue a legitimate goal and are they limited by laws against any unlawful invasion of the right to privacy, if necessary and in accordance with the rules of a democratic society.

Interference with the right to privacy can therefore only take place if the requirements of legality, legitimacy and proportionality are met.

5 CONCLUDING REMARKS

In our opinion, the current legislation on executing evidence in criminal proceedings in the Slovak Republic requires modification. Discussions on how to proceed are currently taking place within the legal profession. One group of opinions favours keeping an exemplary list of evidence in the Code of Criminal Procedure, while new "modern" means of evidence can be used and it is not necessary to specify them in the Code of Criminal Procedure. The second group of views prefers the basic idea that, in the future, only facts obtained from the means of evidence explicitly mentioned in the Code of Criminal Procedure should be considered as evidence. In this context, it is proposed to delete the possibility of obtaining evidence in criminal proceedings under "other laws". Another group of experts inclines to support the views of prof. Jelínek, a prominent criminal law expert from the Czech Republic. He proposes, inter alia, that a provision be included in the general provisions on executing the evidence that only scientifically valid means capable of acknowledging the facts may be used as means of proof and that their credibility can be confirmed by existing scientific methods. This solution would eliminate the speculation as to whether, for example, coffee fortune-telling or psychic reasoning can be used as evidence. Furthermore, they consider it appropriate to list the means of proof exhaustively. The professor thinks that such legislation would undoubtedly be more appropriate from the point of view of both defence and respect for legal certainty. He also supports his claim by arguing that some means of evidence are not modified at all in criminal proceedings (odour traces, lie detector, microalloys, DNA analysis). The use of these means of proof is dealt with in the case-law of the courts.[23]

We believe that in the near future criminal law must respond adequately and enable the use of evidence obtained by new technologies such as satellites, GPS, GLONASS, dashcams, vehicle software, communication technologies, location, etc.

Of course, the final word will always be given to the court, which will assess whether such evidentiary information is admissible and effective, or what "weight" it will have in deciding on a particular criminal case. Which view will ultimately prevail and what the legislation will look like, it is currently impossible to say due to how dynamic the development in this area is, and the impact of the legislator is neither negligible nor irreplaceable. We believe that the legal public should find consensus on the issue of evidence in criminal proceedings and consequently promote this view in an appropriate way so as to be reflected in concrete subsequent legislation.

23 Jelínek (n 15) 19.

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Note

LEGAL TERMINOLOGY: CHALLENGES OF ENGLISH-UKRAINIAN TRANSLATION

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ABSTRACT

Background: *Ukraine's decision to choose a pro-western trajectory of development has brought about new challenges, among which are problems in the approximation of a national legal*

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system with EU law. To overcome these challenges, we must develop a well-grounded scientific approach to dealing with the translation of legal terminology, paying special attention to the classification of legal terminology and the difficulties that translators often face. The results of the present study indicate that English-language legal discourse needs further research and development. The process of translating a legal text presents a number of challenges related to the peculiarities of legal language, the linguistic and cultural disparities between the source language and the target language, the divergent legal systems, and different linguistic traditions. A special role is played by difficulties brought on by the legal nature of terms and differences in national legal systems.

Methods: *In this article, the authors use a comparative-analytical method, together with continuous sampling of the databases and dictionaries of English-Ukrainian legal terminology via a qualitative method.*

Results and Conclusions: *Lexical-semantic transformations and methods are proposed to address linguistic challenges. These are techniques such as transcoded borrowing, calquing, analogue replacement, descriptive and explanatory translation, modulation, concretisation, generalisation, addition, and omission. These methods help to preserve the meaning of terminological units with a possible replacement of their structure. From our perspective, the most expedient solutions for translating linguistically challenging terms are calquing, descriptive translation, and addition. These methods preserve the semantic meaning of the original term and reproduce it as clearly as possible in the target language. The article emphasises the necessity for further advancement in a specific direction on the subject of English-language legal discourse and the exploration of novel approaches to the problem of translating English-language legal terminology.*

Keywords: *term, legal term, legal terminology, legal translation, difficulties of translation.*

1 INTRODUCTION

Legal terminology depends not only on the traditions of a state's legal system but on the direction of a state's development and its foreign policy. Due to globalisation processes and ties with foreign partners, it is foreign relations that contribute to the emergence of a large number of various legal texts that require high-quality translation to ensure effective international collaboration. Currently, Ukraine is undergoing rapid development in foreign relations, aiming at becoming a member state of the European Union and joining the NATO alliance in order to gain the support of international partners in the Russian-Ukrainian war. The legal side plays an important role in the development of foreign policy; therefore, high-quality legal translation of legal texts, in particular English-language ones, is gaining momentum. Translation of legal texts was and continues to be an integral part of the interaction between peoples, playing a significant role in today's interconnected world. The legal text of the original and the translated text must maintain the unity of terminology, but there are still differences in many terms, which are caused, in particular, by the legal nature of the terms themselves and differences in national legal systems. Therefore, the topic of legal features and the difficulties of their translation require thorough research.

A number of studies have been conducted in the sphere of English and Ukrainian legal terminology, as evidenced by the works of such scientists as N. Artikutsa, G. Vynokur, S. Holovaty, S. Hrynev, E. Derdi, F. Doner, V. Karaban, and many others. Recent research into the topic is focused on the structural-semantic characteristics of legal terminology in translation (V. Zgurska), the search for the Ukrainian-English equivalents of translation (L. Schvelidze, P. Melnyk, Yu. Baklazhenko), the linguacultural features of the translation of legal terms (N. Sheverun, H. Leitsus, Y. Mozgova), etc.

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The relevance of our research lies in the need to study English-language legal terminology and its translation into Ukrainian. Taking into account the rapid strengthening of Ukraine's foreign policy ties and the acute geopolitical situation, the study of the peculiarities of English-language legal documents and the difficulties that might arise when translating terms into Ukrainian is an important aspect of the professional training of a translator.

The purpose of our article is to provide an overview of the definitions, features, and classifications of a legal term as a subject of study, explain the nature of typical difficulties that arise during legal translation from English into Ukrainian, and suggest some of the ways to overcome them.

2 LEGAL TERMS: DEFINITION, FEATURES, AND CLASSIFICATION

Terminological vocabulary occupies a prominent place in the vocabulary of any developed language. It is the result of many years of research, is continuously being replenished with new units, and represents the achievements of intensive development. The basic concepts of terminology help us understand the details of specific vocabulary as a conceptual system that reflects scientific concepts, special names in scientific fields, categories of additional terms, subgroups of the vocabulary of the literary language, and artificially formed vocabulary layers.

In the monograph *Ukrainian Terminology: Complex Linguistic Analysis*, M.O. Vakulenko describes the basic task of terminology as the study of norms and regularities of the formation and the development and functioning of terminological units in a specific field of human activity. Vakulenko claims that this science uses statistical and analytical research methods.[1] In the context of research, terminology can be understood in different ways:[2]

- terminology as the science of a term (in this sense, the term 'terminology' is becoming increasingly popular);
- terminology as a professional vocabulary consisting of all the words of a certain language (English terminology, Ukrainian terminology);
- terminology as a special vocabulary that serves a certain direction of activity and development of science or technology (legal terminology, etc.).

The analysis of theoretical concepts of the problem of terminology shows that there is no single and adequate definition of the concept of 'term'. Due to this complexity, in linguistics, there have been many different attempts to define this concept.[3] This word was coined in ancient times. In Latin, it meant 'border'. In the Middle Ages, it acquired the meaning of 'designation' or 'definition'. The nomination of the word '*terme*' – 'word' – is found in the Old French language as well.[4]

In foreign terminology, 'term' is also interpreted ambiguously. English researchers Greenough and Cartridge compare a term with mathematical signs and formulas that are not included in the vocabulary of the language. The French scientist E. Gilbert wrote about terms as elements of a special scientific language which are not characterised by clarity and logic. J. Vandries and J. Smith equate the terms with jargon.[5]

1 MO Vakulenko, *Ukrainian terminology: complex linguistic analysis* (Foliant 2015).
2 TR Kyyak., AM Naumenko, OD Oguy, *Translation studies* (Kyiv University Publishing and Printing Center 2008).
3 AS Dyakov, TR Kiyak, ZB Kudelkou, *Basics of term formation* (KM Academia House 2000).
4 TI Panko, IM Kochan, HP Matsyuk, *Ukrainian terminology* (Svit 1994).
5 ibid.

As part of our research, it is worth considering what exactly is meant by a legal term in the context of legal linguistics. According to N.V. Artikutsa, a *legal term* expresses a concept from the legal sphere of social life and has a definition in legal literature (legislative acts, legal dictionaries, scientific and legal works).[6]

In Ukrainian science, the approach to the study of a term at the theoretical level can be found in the works of T. Secunda, who defines the main features of a term.[7] It is interesting to compare these features with the features of a legal term, which can be found in L.L. Besedena's research.[8]

Table 1. Comparison of features of a general term and legal term

No	*Main features of a term (according to T. Secunda)*	*Features of a legal term (according to L.L. Besedena)*
1	easy-to-understand nature	accuracy and availability of the definition
2	exact correspondence to the essence of the scientific object	use of words and expressions in a narrower or special meaning compared to their meaning when used in general literary language
3	unambiguous nature (only one meaning should be associated with each term)	tendency to unambiguity
4	flexibility, that is, the potential to create terms derived from it	derivative ability
5	'good-sounding' nature	brevity and conciseness
6		systematicity
7		linguistic correctness
8		neutrality
9		stability, well-established nature

We can see from these two approaches to defining the features of a term that a legal term by its nature inherits the features of a scientific term, but the emphasis is placed on such specific aspects as 'availability of the definition', 'systematicity', 'linguistic correctness' (especially preciseness), and 'stability'. This is explained by the features of legal discourse, where a legal term operates, which dictates the necessity to use the term in a very precise meaning with paramount correctness in the established system. Any ambiguity may lead to undesirable consequences that might directly (or indirectly) affect the users of that terminology (say, in court, it might lead to long-lasting litigation, disputes over obligations, types of enforcement measures, etc.)

The large encyclopaedic legal dictionary divides legal terms into three groups according to the 'understandability' feature:[9]

1. General terms, the main feature of which is use in everyday life and comprehensibility for people who speak a certain language, e.g., *a claim, a lawyer, Criminal Investigation Department*.

6 NV Artikutsa, *Language of law and legal terminology: a study guide for students of legal specialties of higher educational institutions* (Stylos 2004).

7 Panko (n 5).

8 LL Besedena, 'To the problems of regulating the terminology of legislation' (2011) 4(7) Scientific Notes of the Institute of Legislation of the Verkhovna Rada of Ukraine 162-167.

9 DS Azarov, VI Akulenko, YA Aleksanrov, *Big encyclopedic legal dictionary* (Legal Opinion 2012).

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2. Special legal terms with a special legal meaning and which are understandable only to specialists in legal professions, e.g., *prosecution, allegation, testimony*.

3. Special technical terms reflecting a special field of science – economics, linguistics, jurisprudence, etc. (these terms should be understandable to a lawyer who is also a specialist in another field), e.g., *the manufacturing costs, supranational law*.

A.Y. Kovalenko offers a classification based on the division of terms by structure:[10]

1. Simple words consisting of one word: *the infringement, the law, the legislation*;

2. Complex words consisting of two or more words written together or with a hyphen: *wage-earner, fact-finding, cross-border*.

3. Phrasal terms consisting of several components: *the Great Powers, separation of powers, unrestricted authority*.

O.A. Lysenko also divides legal terms according to linguistic indicators. This refers to the nature of semantic relations between lexemes:[11]

- genus and species relations (*a lawyer – an attorney*);
- synonymous (*legislation – law – jurisprudence*);
- antonymous (*prosecution – defence; licit – illicit*).

Before starting work on legal translation, one should pay attention to features of legal discourse, which has its own peculiarities apart from the general features of scientific discourse.

In legal discourse, it is typical to use proper names to accurately name organisations, places, documents, other objects, etc. Proper names can, in turn, be divided into toponyms (*the Hellenic Republic; the Federal Republic of Germany*), ergonyms as names of international agreements (*Helsinki Final Act*), and ergonyms as names of institutions, organisations and representative bodies (*the Council of Europe*).

Legal discourse also demonstrates widespread use of the Latin language, which for a long time was the main source of terms used in documents (for example, *mutatis mutandis* – with the necessary changes; *inter alia* – among other things; *in absentia* – in one's absence).

The language of international law is official, which requires the use of complex adverbs (words with affixes -at, -in, -after, -before, -with, -by, -above, -on) to avoid the repetition of names of things in the document (e.g., *hereinafter, thereafter,* etc.).

The use of linguistic clichés is one of the features of the language of the law. It consists of the fact that in the language of a lawyer, there are constituent legal terms that act as a single whole: *in accordance with, in compliance with, in line with, in pursuit of, in conformity with, in keeping with.*

In legal English, there is a historical tendency to combine two or three synonyms (such combinations of words are called doublets or triplets) to convey what is usually a single legal concept: *the terms and conditions*, *law and order, legal and valid.*

These features of legal discourse, along with the characteristics of a legal term, should be taken into account when translating legal terms. However, even with that knowledge, translators face many difficulties, which will be explained in the next section.

10 AY Kovalenko, *General course of scientific and technical translation* (Inkos 2001).

11 OA Lysenko, VM Pyvovarov., LM Sidak, *Ukrainian language (for legal studies)* (National Law University named after Yaroslav the Wise 2014).

3 DIFFICULTIES OF LEGAL TERMINOLOGY TRANSLATION

Difficulties in the translation of legal terminology are determined by a complex set of reasons, which can be attributed to the following factors.

One of the most difficult challenges, and, unfortunately, the one a translator most often faces, is the absence of equivalents of a terminological unit in the language of translation. For example, the terms *felony* and *misdemeanour* have no equivalents in Ukrainian criminal law. These categories of crime are translated as фелонія, місдимінор (i.e., as calques from the English words). However, we often come across other variants (typically outside the scope of legal discourse, for example, when rendering legal terms in literary discourse). For example, Context Reverso proposes such variants of translation as злочин *(crime),* тяжкий злочин *(severe crime),* and кримінальний злочин *(criminal crime)*.

Another challenge that needs to be addressed is the polysemy of the original term, when a terminological unit of legal discourse has several meanings and not always similar ones, e.g.:

evidence –

1. information that gives a reason for believing something or proves something: *There was not enough evidence to prove him guilty;*

2. an indication or trace which can make a person come to the conclusion that something may have happened: *The room bore evidence (i.e., showed signs) of a struggle.*[12]

Sometimes the ambiguity of a terminological unit or terminological phrase of a particular branch of law appears not only within the wide limits of this branch of law but also within the same text, which means there is contextual dependence in the translation of a terminological unit or phrase. Ideally, neither the meaning of the term nor its translation should depend on the context.

E.g., *There are two types of criminal law: substantive and procedural. Substantive law is the body of law that defines criminal offences and their penalties. Substantive laws which are found in the various penal codes, govern what people legally may or may not do. Examples of substantive laws are those that prohibit and penalize murder, rape, robbery, and other crimes.*[13]

In this example, '*substantive law*' – матеріальне право *(Ukr.)* – is to be understood as a system of laws, and '*a substantive law*' – матеріально-правовий закон *(Ukr.)* – as a rule or formulation that prescribes what a person may or may not do.

The next kind of difficulty is related to the belonging of terminological units to different national legal systems and therefore to different legal terminological systems. Generally, taking into account the degree of proximity of legal systems and languages, it is possible to identify four situations that may affect translation difficulties:

1) legal systems and languages are closely related, for example, in Spain, France, Denmark, and Norway – the problem of translation in this case is solved quite simply;

2) legal systems are closely related, but the languages are not – special difficulties during translation do not arise, for example, when translating Dutch laws in the Netherlands and French laws;

3) legal systems are different, but the languages are related; the difficulties of translation are more significant, and the main difficulty is the translation of 'false

12 AS Hornby, *Oxford advanced learner's dictionary of current English* (Oxford University Press 1992).

13 RM Bohm, KN Haley, *Introduction to criminal justice* (McGraw-Hill Companies 2002).

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friends of the translator' – *faux amis* – for example, when translating German legal texts into Dutch and vice versa;

4) the two legal systems and languages are unrelated; the difficulties increase significantly, for example, when translating English common law texts into Chinese.

A translator should bear in mind that English-Ukrainian legal translation falls within the last, most difficult category. Thus, in the countries of the Anglo-American legal family (the UK, the USA, and others), the main source of law is the rule formulated by judges and expressed in court precedents, i.e., the Anglo-American legal family belongs to precedential law. The modern legal system of Ukraine, on the contrary, was based on legal concepts and principles characteristic of the Romano-Germanic type of legal system, and therefore it relies on a codified system of rules and principles. These differences between the two systems and languages cause difficulties in the translation of concepts used in them.

Differences in the cultures of countries and peoples are another source of difficulties that arise during the translation of legal texts. Culture is defined as a 'semiotic system' and a 'system of meanings' or information encoded in the behavioural potential of members of society and includes knowledge, beliefs, morals, art, laws, and customs acquired by a person as a member of society. The translator must take into account all the details of culture during the translation of legal literature. One of the related challenges is the problem of conveying the content of legal realities (e.g., *King's clemency (UK), Lord Chief Justice (UK))*.

The challenge of choosing the right variant from the suggested translations requires deep knowledge on the translator's part. For example, the translation of the word *delinquency* accounts for 11 variants: – порушення *(угоди, закону);* проступок, правопорушення, злочин*;* злочинність, делінквентність *(особливо неповнолітнього);* акт делінквентної поведінки*;* невиконання обов'язків*;* прострочення*;* затримка погашення*;* заборгованість. It is the translator's understanding of the original term and the context of its use that will contribute to its correct translation. Another lexical difficulty is a differentiation of the broad and narrow meaning of the word within one terminological field (for example, the word 'body' acquires highly specialised meanings – *corpse; contingent; corpus; collection (of evidence); complex (of materials, documents, etc.); the main part (of a document))*.

Since English is an analytical language and Ukrainian is a synthetic language, translation includes using a variety of transformational constructions for the translation of phrases, which is also a significant challenge from the point of view of both rendering the meaning and the form of utterance (as, in some cases, it is very important to maintain a relatively similar length of text),

E.g., *crime figures* – статистичні дані про злочинність*; assassination attempt* – замах на вбивство з політичних мотивів*; court of judiciary* – суд.

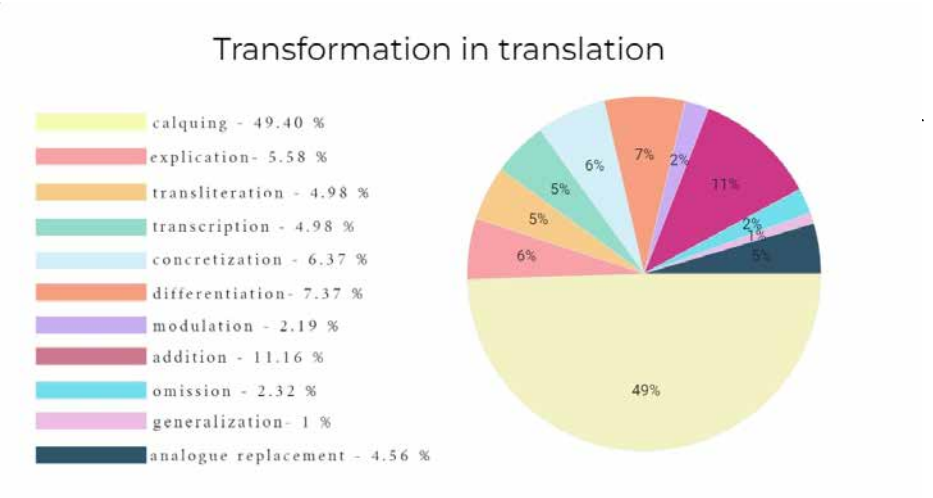
There are also the peculiarities of the formation of terms-phrases which should be taken into account during translation. The most difficult ones are terms based on metaphor, metonymy and euphemism, or metaphoric expression, e.g., '*to attack confession*' means not to physically attack but try to refute the defendant's confession of guilt.

The significant influence of the Latin language on the formation of English legal terminology and the loss of the connection between legal and general language is another challenge, which sometimes requires consulting a Latin dictionary (e.g., *malum in se* – an offence that is evil or wrong due to its own nature irrespective of statute)

The next difficulty is the presence of a significant number of abbreviations. When translating these, it is necessary to know how they are deciphered: *A/O (arresting officer) – a police officer*

who made an arrest; L.K.A. – the last known address, ECtHR – European Court of Human Rights; ECHR – European Convention on Human Rights.

It has been established that when translating, a translator should strive for equivalence, bearing in mind the harmonisation and approximation of terminologies.[14] Translating legal terms is a challenging task that requires deep insight into the problem and the consolidation of previously applied methods and approaches.



On the basis of the analysis of databases and scientific literature, we suggest the following methods for translating legal terms and legal terminology.

1. Use the methods of transliteration or calquing if the lexical unit of the source language is not available in the translation language – transcription (e.g., *know-how – ноу-хау*), calquing (e.g., *credit limit – кредитний ліміт, corporation tax – корпоративний податок, legitimism – легітимізм*). Calquing of legal terms can be complete or partial, often accompanied by elements of transcription or transliteration combined with the transformation of complex composites. According to our research, 49.4% of legal terms were translated using this method.

2. Convey the meaning of the term via descriptive translation (explication). When using a descriptive translation, it is necessary to ensure that the word combination in the translated language clearly and thoroughly reproduces all the main features of the term that is denoted by the word in the original language. Before using this method of translating neologisms, it is necessary to fulfil the preliminary condition of correctness during the translation of neologisms – to make sure that there is no translated counterpart in the translated language so as not to produce terminological doublets in the translated language. It was found that 5.58% of the analysed terms were translated using this method – e.g., *franchisee – франчайзі (набуває права використання торгової марки); franchiser – франчайзер (продає право використання торгової марки); reversion – зворотний перехід прав до попереднього власника; право викупу закладеної або відчуженої за борги нерухомості.*

14 Yu Baklazhenko, 'Ukrainian-English Translation of Legal Terms: A Case Study of Insignificant Cases and Small Claims' 2021 1(9) Access to Justice in Eastern Europe 232-242. DOI: 10.33327/AJEE-18-4.1-n000055

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3. Use an analogue replacement, i.e., translating with understandable words for the target language in cases where the term does not exist in the target language – e.g., *predatory pricing – демпінг* (*штучне заниження цін*); *retailer – ритейлер/підприємство роздрібної торгівлі*. An important feature of this method of translation is comprehensibility since the term is translated using words that are actively used in the target language. However, there are also disadvantages to this method. In particular, as L.K. Latyshev points out, there is a risk of 'national-cultural assimilation' of legal systems, which is considered an unacceptable phenomenon for legal translation. This method was used in the translation of 4.56 % of the terms.

4. Specify the meaning of the term so that the recipient understands it – e.g., *right of derogation – the right to withdraw from one's obligations*. In this case, the method of specification is used to precisely outline the tasks of one of the parties in the event of release or waiver of obligations. Therefore, the phrase '*right of derogation*' was translated not simply as the right to cancel but as the right to withdraw from one's obligations; that is, when translating, it is specified which cancellation is referred to in the translated term. Application of the concretisation method will help to reproduce the semantics of the English term during translation into Ukrainian. This method occurred in 6.37 % of the translations; e.g., *settlement* – мирна угода*; fee simple* – Право успадкування без обмежень*; environmental law* – Правові норми *з* охорони навколишнього середовища.

5. Generalise the meaning of the term for the sake of its comprehensibility by the recipient. For example, the name of the body, the 'Grand Chamber', when translated, is usually reproduced as the 'Great Chamber'; thus, we observe the generalisation of the meaning of the adjective 'grand' – important, majestic, grandiose –, which, when translated, is transferred to the more general 'great', which does not add expression to the name of the judicial body. Since the legal text should not allow for inaccuracies in interpretation, generalisation is used only in certain cases (in our set of analysed terms, it appears in only 1% of the translations). However, such a transformation is appropriate when transferring terminological units that have both a borrowed equivalent in the target language and a concept close in content in the native language – e.g., *nonjusticiable dispute – судовий розгляд; creeping nationalisation – темпи націоналізації.*

6. Add translation of implicit elements of the content of the original. Often, this transformation is used during translation to prevent distortion of the content in the translation language – e.g., *non-members of the organisation are invited to the conference as observers – Країни, що не є членами організації, запрошуються для участі в конференції в якості спостерігачів.* The method of addition is used in 11.16% of the translations.

7. Omit grammatical constructions or lexical units in order to avoid phenomena that are not characteristic of the target language but, at the same time, preserve the meaning of the term. Omission is used to eliminate redundancy; the desire to avoid phenomena that are not inherent in the language of translation; the intention to avoid stylistic load; the ability to compress the text to eliminate excessive 'inflating'.[15] The method is used only in 2.32% of the translations – e.g., *to set aside – знехтувати; to give evidence – свідчити; the right to authorise the communication to the public of the work – право дозволяти оприлюднення твору.*

8. Use modulation, i.e., the replacement of a word or phrase of the original language with a word or phrase of the translation language, the meaning of which can be derived logically from the original meaning. In practice, we are talking about substitutions within the framework of relations: cause – effect, process – result, part – whole, subject of activity – tool – product of activity, subject – its function – its property, etc. Thus, changing the structure of the term

15 OM Volchenko, VV Nikishyna, 'Grammatical transformations in English-Ukrainian artistic translation' (2015) 54 Scientific notes of the National University 'Ostroh Academy' 252-254.

becomes quite possible, as modulation is often used for composites of legal terminology. This method was observed in 2.19% of terms translations – e.g., *bread-and-butter* – дохід, заробіток; *destruction* – скасування; *drug trafficking* – контрабанда наркотиків.

9. Differentiate individual units of special vocabulary that can mean both broader and narrower concepts when rendering in Ukrainian – e.g., *the custody and other legal measures shall be as provided in the law of that state – Взяття під варту та інші подібні заходи здійснюються згідно із законодавством даної держави.* In the translation of the sentence, the word 'law' was translated as '*законодавство*' (Eng. equivalent – 'legislation') since the sentence refers to a set of laws, not to one law as a regulatory legal act, which has a narrower meaning. In the same case, 'law' means a system of laws and other legal acts adopted by the highest bodies of the state and regulating the relations of society. Therefore, the choice of the translator was very successful.

10. Use various resources for translation, for example, official literature where the required terms have already been used.

11. Constantly improve and replenish knowledge of the topic on which the translator works, pay attention to legal phenomena and peculiarities of the English-language legal discourse, and explore ways of their reproduction in the Ukrainian language.

5 CONCLUSIONS

In the course of our research, the lexical-semantic features of English-language legal terminology were determined, which included the wide use of proper names, a large number of borrowed expressions from the Latin language, the use of complex adverbs and archaisms, and a tendency to clichés and stereotypes, as well as the use of triplets and doublets. The study outlined the most common groups of difficulties in the translation of legal English-language terminology: the lack of an analogue of terms in the language of translation, the ambiguity of the terms, difficulties associated with the legal features of countries and cultural differences, and the dependence of terms on legal systems, as well as difficulties caused by differences in linguistic systems and individual features of language development, for example, the significant influence of the Latin language on English. During the research, ways to overcome translation difficulties using lexical-semantic methods and transformations were proposed. The most appropriate of them are calquing, descriptive translation, and addition. These methods help preserve the semantic meaning of the source language and reproduce it as clearly as possible in the target language. A promising direction of research is the search for new ways to overcome lexical difficulties during the translation of legal texts from English into Ukrainian.

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Review Article

THE ROLE OF THE UNITED NATIONS AS A DEFENDER OF HUMAN RIGHTS: A VIEW FROM ALBANIA

Ferit Baça and Adriana Anxhaku

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Keywords: *United Nations, human rights, security, peace, war*

ABSTRACT

Background: *Every millennium, decade, and century, as well as every passing day, humanity wakes up with a dream of a 'new world', a world without wars and bloodshed. Despite this thousand-year-old dream, wars and their devastating consequences hang menacingly over humanity's head like the sword of Damocles. For this reason, wars have been and will remain a key focus of researchers and philosophers. By studying the numerous causes and consequences*

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of war, the necessary measures to guarantee security and peace worldwide can be determined. Although human society strides towards prosperity, the likelihood of war has not diminished but continues to threaten, with unparalleled ferocity, the existence of human life, peace, and security. The numerous agreements and treaties, both bilateral and multilateral, between different states have only temporarily avoided the outbreak of conflicts and wars. Therefore, the concepts of peace, defence, and the prevention of war remain at the centre of research today. Research works in these fields are geared towards a universal idea: 'the protection of basic human rights'.

Methods: *This paper's research methodology involves analysing data on the role of the UN as a defender of freedom and human rights. To achieve this, an extensive literature review was conducted. The review covers literature sources in both Albanian and foreign languages, written by well-known authors and provides a large amount of information and thoughts on the topic under consideration. The authors of some of the used works include Thomas Hobbes, Jean Jacques Rousseau, Immanuel Kant, John Locke, Brian Tamanaha, Alexis Tocqueville, and Servet Pëllumbi. The research was conducted step-by-step and argument-by-argument using the logic of reasoning and the analysis of ideas. The relevant research works relate to the UN's role as a provider and guarantor of human rights and freedom.*

Results and conclusions: *In the opinion of the UN, the concept of democracy is closely related to the concept of protecting peace, freedom, and human rights. This is also the reason why the UN cannot remain indifferent in the face of cases of violation of freedoms and human rights under the pretext of respecting 'state sovereignty'. The UN is today's most important and powerful organisation for protecting human freedoms and rights, world peace, and international security. Based on the above discussion, a democratic society is nothing but the result of new relations between the power and freedom of an individual. 'Human rights and freedoms' do not constitute a mere bureaucratic formula but a request of the people for the development of the society in which they live. They resemble a 'spiral' that has only ascended since various theorists first presented their ideas on 'human rights'. Infringement on human rights would simultaneously mark the infringement and the end of democracy itself.*

1 INTRODUCTION

Following the First World War, many countries saw the need to dismantle their colonial systems. The Versailles Conference, also known as *'The Conference of Many World Affairs'*[1] held in 1919 in Paris, supported the basic idea of US President Woodrow Wilson regarding the right of people to national self-determination. The purposes of the peace conference urged several controversies that led to the outbreak of the Second World War, like adding fuel to the fire. However, one of the most significant decisions made by England and the United States at this conference was the creation of the League of Nations and the adoption of its Charter to avoid another devastating world war. Thus, the initial goal of this organisation was to unite peace-loving countries and promote international peace and understanding. Its main goals, however, were to maintain peace and international security and develop international cooperation. The fact that the League of Nations took no action to maintain peace in the cases of Japanese aggression against China in 1932, Italian aggression against Abyssinia in 1935, and Italian aggression against Albania in 1939 demonstrated that it was plagued by contradictions and problems among the world's great powers, despite all of its goals and programs for peace and security. One of the factors that accelerated the outbreak

1 Ferit F Baça, *Institutions and International Organizations* (Edlora 2012) 58.

of the Second World War was the solidification of feelings of nationalism and militarism in the lives and societies of some of the most developed countries during the 1920s and 1930s, particularly in Germany, Italy, and Japan.

The end of the Second World War was tragic because approximately 62 million people died during its course, accounting for nearly 2.5% of the world's population. People were dissatisfied with the wars and did not see the end of the Second World War as an event that would eventually bury the militant aspirations of militaristic circles in every corner of the globe. As a result of this ongoing concern, the war-winning allies began to plan another international organisation to prevent future wars from breaking out. Established in 1945, the UN was and is the world's largest and most powerful international organisation.[2] The primary goal of its establishment is to preserve international peace and human rights.

The purpose of this paper is to analyse the role of the UN in human rights protection and its importance in conflict management and resolution. The paper aims to deepen the knowledge of freedom and justice, without which people's aspirations for a democratic society and state cannot be realised.

2 HUMAN RIGHTS AND THE UNITED NATIONS

The UN organisation was founded on the free political will of sovereign nations, with universal goals of common interest compiled by the experience of human society in international relations, particularly the bitter experiences of regional and world wars and conflicts. As stated in the Charter, its goals and objectives began to be implemented as a guardian of global peace and security. However, during the Cold War, the UN's human dimension primarily included freedom of life, work, gender equality, race, protection of children's rights, the fight against poverty, the abolition of humanitarian catastrophes and diseases, the abolition of hunger in poor countries, shelter, the prevention and punishment of wars, crimes against humanity, genocide, racism, ethnic and religious intolerance, and so on.

The human dimension of the UN has grown enormously since the fall of the Iron Curtain and the end of the Cold War. As a result, the UN has gained a much broader and more significant role in promoting democracy worldwide. Currently, the UN considers the concept of democracy to be inextricably linked to the preservation of peace and security, as well as economic, social, and humanitarian developments. When it comes to preserving human rights in accordance with the mission and principles of the UN Charter, the UN cannot be barred from intervening under the name of 'state sovereignty protection'.

According to Art. 2 (two) of the Charter, the Security Council, in accordance with the principles of Chapter VII, authorises its structures to intervene without limitation in cases of aggressive actions that violate or limit the internationally recognised rights of people and sovereign countries. Thus, when it comes to phenomena or actions that endanger international peace, two dimensions of the law serve as guides:

- The human dimension is for the protection of human, racial, and gender freedoms
- The right of people to self-determination

However, it has been observed that totalitarian regimes, governmental groups that control the work and the assets of their countries and people, and trafficking and terrorist structures are hidden and attempt to act beyond national sovereignty, citing the principle of non-intervention in internal affairs, based on the argument of national right and the principle

2 ibid 95.

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that internal affairs are not subject to international law. 'The idea that the human being has natural rights that no human or nation can adopt and that he cannot eliminate was compiled centuries ago by modern naturalism's jurisprudence, whose father is John Locke'.[3] According to Locke, the true state of man is not the civil state but the natural state, that is, the state of nature in which people are free and equal, whereas the civil state is an artificial creation with no purpose other than to allow for the greater development of freedom and natural equality.[4]

It is still significant that humanity has made progress on the path to good. Nonetheless, it is necessary to recall the evolution of the French Revolution, which was nothing more than a moral attitude of humanity, as Kant would constantly emphasise. The source of Kant's enthusiasm, or, as he puts it, the symbol of humanity's moral attitude, was the emergence on the historical stage of the 'right that a nation has not to be hindered by other forces for issuing a civil constitution which was called good'.[5] Kant defined a civil constitution as 'a constitution by natural human rights, such that those who obey the law must also establish the laws'.[6]

3 HUMAN RIGHTS – THE FOUNDATIONS OF THE UNITED NATIONS ORGANISATION

Philosophical ideas are built on the foundations of previous philosophers' views. Thus, in Rousseau's ideas, we find shared perspectives and critical attitudes toward Hobbes and other previous philosophers. Various philosophers have proposed protection and survival structures related to nature and human protection techniques in response to the Hobbesian hypothesis that man is a wolf to man. These structures include various systems and rules aimed at limiting his aggressive nature, as well as other structures endorsing cooperative activities and actions and human solidarity as new human values.

The Hobbesian concept expressed in the term 'natural state of man' is especially notable at a time when it is found in Rousseau's work as 'natural right'. But, according to Hobbes, what is a natural right? Neither less nor more, he believes that: 'the natural right of every man is the freedom to use it as he wishes, to preserve his nature, and to do everything based on his judgment and reason, considering it the most appropriate instrument for this purpose'.[7] This definition is also the key to better understanding the concept of natural right, which states that 'man is free to act according to his will'.[8] According to this description, the 'free man' of modern society will constantly be at the forefront of the war with the country with which he has also signed his social contract for the situation and conditions in which he and his family will build their lives. This code will now serve not only as a thermometer for measuring a society's democracy but also as an indicator of the ups and downs or even of a democratic society's 'turning back'. According to this idea, if the state severely restricts human rights and freedoms, we are dealing with a monarchist or dictatorial state. Thus, fear will appear among the people in such states, and it serves to suppress the brave and those with personal ambitions in a despotic state.[9]

3 John Locke, *Second Treatise of Government* (IPLS & Dita2000 2005) 81.

4 ibid 61.

5 Immanuel Kant, *Towards Everlasting Peace* (Dritan 2004) 54.

6 ibid 54.

7 Thomas Hobbes, *Leviathan* (IPLS & Dita2000 2000) 48.

8 ibid 55.

9 Ferit Baça, 'The Importance of Balance of Power in a Free and Democratic Society' in N Callaos and others (eds), *IMCIC 2022: Proceedings of the 13th International Multi-Conference on Complexity, Informatics and Cybernetics, 8-11 March 2022, Virtual Conference* (International Institute of Informatics and Cybernetics 2022) vol 1, 81-5 <https://doi.org/10.54808/IMCIC2022.01.81> accessed 8 January 2023.

As Rousseau stated, 'Giving up freedom means giving up your humanity, your rights, and even your responsibilities; there is no compensation.'[10] Rousseau inextricably linked his concepts of freedom and democracy with the establishment of a state governed by the rule of law, which is, above all, the result of the general will, where the general will is the will of the sovereign, the people. For him, the only legitimate essence of the obligation remains the agreement of all members of society, or, in other words, the free engagement of those who choose to respond voluntarily to the joint obligation. He was known as the spokesman for democracy and the rule of law. Rousseau supported direct legislative voting. And if the laws are the result of a general sovereign will, then every individual is the true author of these laws, and as a result, we can say that every man obeys himself. However, an ideal democracy will never exist.

> In a country with widespread democracy, the individual acquires several privileges guaranteed by the democratic regime, such as the right to free speech, the right to vote, the determination of age to benefit from this right, the right to gender (in some countries, this right was granted only to men and later extended to women), the right to work, the right to eight hours of work, ordinary leave, and the right to raise salaries and other annual perks.[11]

Based on the preceding evidence, we can conclude that the relativity of freedom is highly dependent on the historical development of society. This level provides a solid foundation from which they emerge not only in theory as concepts but also in practice, in everyday life, as applications of human rights and freedoms. 'The set of human rights and liberties is the foundation of a society and the essence of democracy in a developed society'.[12]

Natural rights shaped the conditions for the emergence of natural laws. Hobbes was a philosopher who studied natural laws and their transformation by natural rights. Natural law, he underlined,

> 'is a norm, a general rule based on reason, according to which man is forbidden to do that which destroys his life, deprives him of the means of preserving it, and neglects the one that serves to preserve life as well as possible'.[13]

As a result, Hobbes informs us that the need to find and establish rules is based on logic. When it comes to the distinction between them, he points out that natural rights have at their core the freedom to perform or not perform a deed, whereas the law states and marks as mandatory one of both. It is recognised that everyone has the right by nature to act according to their desire and will, but at the same time, a human being seeks to live in peace with others, which constitutes the basic law of nature for the pursuit of peace. As a result, human life can be summarised as life in search of peace and its preservation in all of its forms, beginning with the principle that peace is a common human good.

Just as it is difficult to determine the boundaries between the beginning and end of a colour spectrum when observing the spectrum of light, there are differences between Rousseau's and Hobbes' views, in addition to commonalities. According to Rousseau, 'natural human rights provide him with the necessary vital privileges as well as the opportunity to choose his sovereign that his free life provides'.[14] One's freedom ends where the other's freedom is violated by being free in the actions he performs. Through this freedom, man expresses thoughts, judgments, votes, and the establishment of laws, but justice and usefulness are inextricably linked. Rousseau introduces us to the first agreements that, according to him, are born in the nucleus of society, which is the family, the earliest of all societies, and which

10 Jean-Jacques Rousseau, *Social Contract* (4th ed, Luarasi UP 2008) 92.

11 Alexis de Tocqueville, *Democracy in America* (Fondacioni Sopros & Kristalina 2002) 9.

12 Servet Pëllumbi, *The Globalistics: A Philosophical Reflection for an Era* (Dudaj 2009) 167.

13 Hobbes (n 8) 56.

14 Jean-Jacques Rousseau, *Origins of Inequality Between People* (Almera 2008) 105.

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has been aptly described as a natural society. The first rule of the family is to look after each member until he can look after himself. For a man to become a master of himself, he must be aware of his actions, responsibilities, and rights and be able to distinguish between good and evil.

When it comes to human rights and natural laws, one of the most important is the rule of law. 'The text of this regulation states that if a human rights contract is written, it must be applicable and inclusive. When we think of justice, we think of it as a constant desire to give everyone what is rightfully theirs. By always following the norms, we confirm that we have done right and with reason.'[15] As a result, justice does not rise against reason but rather acts by it. Natural laws always take precedence over human conscience and desire. That is why they force us to limit our desires because not all of them can be fulfilled. Natural laws are eternal and unchangeable. In contrast to this phenomenon, phenomena of human origin, which include man's qualities and virtues such as arrogance, ingratitude, injustice, pride, and favouring the privileged, can neither be lawful nor permanent. Above all, the concept of human rights, which is the essence of a society's democracy, is revealed in Rousseau's philosophical concepts.

In addition to Hobbes' and Rousseau's ideas on human rights, the ideas of many other philosophers of the time began to emerge, which were widely reflected not only in their books with philosophical content and subjects but also in many national and international organisations. These ideas influenced the creation of the Universal Declaration of Human Rights, which was approved by the United Nations General Assembly on 10 December 1948, as well as the constitutions of the most developed countries in Europe and the United States. The entire human universe would already recognise human rights and liberties as values. In his book entitled 'Towards Everlasting Peace', written in 1795, Kant expressed the importance of the creation of a federal organisation of European republican states that should be based on two fundamental principles:

- In every state, the civil constitution must be republican
- International law should be based upon the federalisation of free states

That said, he later expressed doubts and reservations when he underlined, 'The creation of a powerful European federation, even if theoretically it was able to end the wars between its members, was practically impossible'.[16] Kant's ideas on freedom and human rights, notably as expressed in his essay 'Towards Everlasting Peace', are worth considering. He was a passionate defender of human rights. According to Kant, human rights and the concept of everlasting peace are interdependent and reciprocal. Kant's definition also serves as a dividing line between a democratic and a totalitarian society.

According to a historical analysis of the evolution of freedoms and human rights, the achievement of a progressive goal marks a turning point in development while failing to achieve its results in regression. They are currently acting as a barrier to the development of democracy, not just as a concept but also as a real asset in human society. When compared to someone born half a century ago, people today have several advantages. Children, minors, the disabled, the blind, miners, sailors, and other social groups have different statuses. Women, who make up half of the world's population, have even more rights codified in national and international laws and conventions.

15 Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) 27.
16 Kant (n 7) 54.

4 ALBANIA'S PARTNERSHIP WITH THE UNITED NATIONS AND THE EUROPEAN UNION IN DEFENCE OF HUMAN RIGHTS AND PEACE

Every nation has faced crises in its history that have endangered its existence, including Albania. For example, the Albanian people have experienced deep socio-economic crises. A very severe one was that of 1997. The changes to the political system in 1990 brought about the establishment of political pluralism but also misunderstandings about freedom and the quick enrichment of individuals within a short time in a dishonest manner.

The displaced population, without income and means of production, benefited from a favourable law (Law No. 7501), which appropriated lands to the old owners. The ensuing circumstance led to incessant conflicts between the old and new owners. The savings and income of a large portion of the population were stolen by pyramid schemes, which were created by people with the desire and propensity for quick and dishonest enrichment. A severe socio-economic crisis quickly erupted due to the theft of the majority of the population's wealth. People who had been robbed in large numbers spontaneously took to the streets to protest against the government for having taken advantage of and supported the great national fraud.

This social-economic crisis in Albania marked the country's most serious and deepest crisis, which turned into complete anarchy. On the one hand, the so-called 'democratic' government was unable to govern, and on the other hand, the people could no longer tolerate the government. Production, economics, and social and cultural life were interrupted. The country resembled a sick man in his last days. In these difficult moments, the UN, in cooperation with the EU, carried out a rescue intervention. They organised decisive operations by sending armed forces to secure the country and supply the population with the most necessary food items.

Albania's serious social-economic crisis was accompanied by a tense Balkan situation and the role of eastern and Russian-oriented regions. Slobodan Milosevic launched an obvious genocide and cleansing campaign against non-Slavic populations in the legacy countries of the former Yugoslavia. These actions led to wars between nations. The EU did not remain indifferent to these tragic developments in the Balkans, which were considered a 'powder keg' but offered the so-called 'Association Stabilization Process'. This process brought the Balkan countries closer to the EU than they had ever been.

Following the fall of the Berlin Wall and the end of the Cold War, the UN gained a much broader and more important human dimension in the promotion of democracy around the world. As a result, democracy was closely linked to the preservation of peace and security, as well as socio-economic and humanitarian developments. From a principled and legal point of view, the UN cannot be limited and hampered by the concept of 'state sovereignty' when it comes to the protection of rights that ensure the fulfilment of the principles of the UN Charter.

The inclusion of Albania in the Partnership for Peace initiative marked a watershed moment in the country's democratic transformation. Albania is a country with high security and productivity and is a protector of peace in the world. An important field of study in this regard is understanding international laws and conventions that are relevant to peacekeeping forces, as well as collaboration with various governmental and non-governmental organisations. Several peacekeeping exercises have taken place in Albanian territory. The largest was the multinational exercise 'Eagle of Peace', which took place in Biza in July 1996.

Albania participates in all peacekeeping operations under the Partnership for Peace. Since 1997, an Albanian armed forces unit has been attached to the ALTHEA peacekeeping force

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(SFOR) in Bosnia and Herzegovina in support of German peacekeeping troops. Another sub-department contributed to peacekeeping operations in Afghanistan alongside Turkish forces. When an internationally recognised country's independence is violated, the UN Charter grants the UN the authority to intervene to protect it. It sets things in motion and engages a specific military force in order to quickly resolve the conflict through peacekeeping operations. The Security Council has authority and control over the peacekeeping mission. Peacekeeping operations rely on the willingness of UN member states to support them financially and logistically. The UN has made it possible to avoid or end conflict situations by imposing economic sanctions on the aggressor state. Economic sanctions are imposed on a state if talks to resolve disputes fail, and the UN has established a special court to adjudicate war crimes. As a result, the UN is a significant international security organisation.

5 CONCLUSIONS

At the establishment of the UN, its founders embodied in the Founding Status people's desire for peace and security. The need for peace, freedom and human rights gave rise to the need to establish a network of centres of international organisations, feeding capillaries of the UN that provide services to ensure security, education, and peace. In this regard, the contributions of the thinkers and philosophers of our time in protecting peace and preventing war are well known. The UN is a structure with an economic, political, military, cultural, and technical-scientific character that works in accordance with the common will and is ideal for realising its goals and objectives through intensive cooperation between the states that make it up. Today, UN organisations constitute a useful and convenient communication forum for the representatives of states in the form of meetings for the discussion of problems that, for one reason or another, have not been resolved. The UN today serves as a necessary and indispensable arena for communication among all states, particularly between those that may be in a state of conflict with each other. It does so by offering mechanisms for intermediate discussions instead of murderous war and the roar of cannon shells. These mechanisms for discussions lead to the conclusion emphasised by Winston Churchill long ago that negotiations are better than war.[17]

Today, it is a well-known practice to create joint peacekeeping forces of the UN and international and regional organisations. In Albania's socio-political crisis of 1997, the UN, in cooperation with European partners, offered the Albanian state and people protection from the consequences of a savage civil war and the establishment of order and peace. Likewise, the UN has sent peacekeeping forces to protect the independent state of Kosovo, which continues to be threatened by the invasion intentions of the current Serbian government. This threat of invasion is a continuation of the instigated war started by the Milosevic regime, which organised the disappearance and violent displacement of nearly one million indigenous Albanians in Kosovo from their land. In conclusion, this study has highlighted the roles of the UN in defence of peace and guarantee of freedom and human rights.

17 Baohui Zhang, 'China and India: Better Jaw-Jaw Than War-War' (*RSIS*, 21 July 2020) 148 Commentary <https://www.rsis.edu.sg/rsis-publication/rsis/china-and-india-better-jaw-jaw-than-war-war/#.Y8kgE3ZByUl> accessed 8 January 2023; Shashi Tharoor and David Huebner, 'INTERVIEW: Of Novels and Nations: A Diverse Life in a Diverse World' (2002) 24 (3) Harvard International Review 78 <http://www.jstor.org/stable/42762844> accessed 8 January 2023.

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PERSPECTIVE ARTICLE

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Perspective Article

THE IMPLEMENTATION OF CONSENSUAL TENET IN MODERN CIVIL PROCEDURE: AN EUROPEAN APPROACH OF COURT-RELATED AMICABLE DISPUTE RESOLUTION PROCEDURES

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Keywords: *civil procedure, amicable dispute resolution, court settlement, conciliation, amicable conciliation process, mediation, court-related mediation*

ABSTRACT

Background*: This article explores the global changes in the orientation of civil procedure from competitive and adversarial towards more cooperative and consensual models. It aims to identify the reflection of mentioned tendencies in the valid legal regulation and practice of modern civil procedure. The consensual tenet in the civil process is analysed from the perspective of civil procedure goals, settlement principle, and case management as an effective tool for implementing the latter in practice. The authors explore the court-related amicable dispute resolution procedures to see the similarities and differences.*

Methods: *Research commenced with a review of the existing scientific literature, a brief historical analysis, and a document analysis concerning changes in civil procedure orientation towards less competitive and more cooperation-grounded resolution of civil disputes. This research was followed by the comparative study of court-related amicable dispute resolution procedures with examples in particular legal jurisdictions like Austria, Lithuania, and Ukraine.*

Results and Conclusions: *Vital changes in the perception of civil procedure regarding the widely accepted need to foster settlements in civil disputes, and an analysis of the most commonly used procedures as court conciliation and court mediation, were presented in this paper. The authors distinguish and analyse three court-related amicable dispute resolution procedures – conciliation, mediation, and the amicable conciliation process, emphasising their peculiarities and features. This research assists dispute resolution practitioners and researchers interested in better understanding how different court-related amicable dispute resolution procedures can be implemented in legal regulation and practice.*

INTRODUCTION

Today, there is no considerable doubt that amicable settlement of various disputes is essentially more effective, sustainable, less expensive, and less time-consuming than formal adversarial third-person decision-making processes like litigation processes in court. Over the years, the necessity to promote amicable solutions-oriented methods has been widely recognised and is already reflected in legal science and practice.

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In the second half of the 20th century, the success of the access to justice movement in Europe[1] and the ADR movement in the USA[2] caused a shift from the 'legal centralistic' approach, which identifies a court as the 'centre of dispute resolution',[3] to the more 'legal pluralistic approach', according to which the variety of the alternative (amicable, appropriate) dispute resolution procedures, as well as courts, are recognised as parts of a single dispute resolution system.[4] At the core of the trend are rethinking of the goals of civil justice and more practical consideration of the efficiency of the civil justice system and rational usage of judicial resources.

For many years, an adversarial model of civil justice with an independent and impartial judge, who trials the case and makes a decision, was considered a dispute resolution paradigm. It was misleadingly hyped as a 'fight for justice'.[5] Till the second half of the 20th century, this approach caused such negative tendencies as too costly, timely, and complicated civil proceedings.[6] Under these circumstances, it seems evident that the only classical adversarial principle, which is at the heart of civil justice, cannot solely provide the effectiveness of the judiciary, and new approaches and concepts should be found for the justice sector.

With time, the strict 'trial versus settlement' trope[7] in civil justice turned out to be more of a hindrance than a help. In this regard, one of the more recent trends in civil procedure is the strengthening of the consensual tenet, which can be seen at different levels: the general one – that appears in the transformation of the goals of civil procedure, its principles, and tasks of a judge, and the more concrete one – resulting in the integration of the amicable dispute resolution methods to the proceedings (sometimes even in a mandatory form) and the extension of the judicial case management powers, connected with the facilitating of the amicable dispute resolution and taking some measures for those parties, who do not want to cooperate, etc. From a more global perspective, these tendencies can be explained not only by the inefficiency of civil procedure but also by the success of access to justice movements within its ADR component. The latter shows that consensual tenets in civil procedure can produce satisfactory results both from the parties' and society's perspectives, reducing the costs of litigation (financial and emotional),[8] guaranteeing the reasonable time of a trial, providing the practical usage of the judicial resources, and foster the trust into the legal system and finally into the market.[9]

1 M Cappelletti and B Garth, 'Access to Justice: The Worldwide Movement to Make Rights Effective' (1978) 27 (2) Buffalo Law Review 181; M Cappelletti, 'Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement' (1993) 56 (3) The Modern Law Review 282.

2 F Sander, 'Varieties of Dispute Processing' in AL Levin and RR Wheeler (eds) *The Pound Conference: Perspectives on Justice in the Future (Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 7-9 April 1976, St. Paul, Minn)* 111; F Sander and M Hernandez Crespo, 'A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse' (2008) 5 (3) University of St Thomas Law Journal 665.

3 J Lande, 'Getting the Faith: Why Business Lawyers and Executives Believe in Mediation' (2000) 5 (137) Harvard Negotiation Law Review 147.

4 M Galanter, 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law' (1981) 13 (19) Journal of Legal Pluralism 1.

5 R von Jhering, *Der Kampf ums Recht* (18 aufl, Manz 1913).

6 A Zuckerman, 'Justice in Crisis: Comparative Dimensions of Civil Justice' In A Zukerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (OUP 1999) 2, doi: 10.1093/acprof:oso/9780198298335.003.0001.

7 JJ Prescott and KE Spier 'A Comprehensive Theory of Civil Settlement' (2016) 91 (1) New York University Law Review 59.

8 TF Bathurst 'The Role of The Courts in the Changing Dispute Resolution Landscape' (2012) 35 (3) UNSW Law Journal 871.

9 Recital 4, 5, 8 of the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR) [2013] OJ L 165 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0011> accessed 1 December 2022.

What impact did such changes in the general understanding of civil procedure orientation bring into the court halls? Nowadays, in most countries, general rules of litigation are widely supplemented with specific regulations in regard to settlements. In some jurisdictions, parties to a dispute are encouraged to search for mutually acceptable solutions out of court; in others, the legal regulation of civil procedure provides an opportunity to use settlement-oriented procedures within a court system. The most popular and widely used court-connected options are conciliation and mediation. Even though these procedures are common and known to legal practitioners, a deeper look into the concepts, procedure, and role of the assisting party for a better understanding and a self-evident use is necessary and timely.

Court-related amicable dispute resolution procedures, which are implemented in the civil procedure as a sign of putting into practice the principles of cooperation and settlement, provide the object of the research. This research aims to explore the practice of implementing the social and civil procedure ideas regarding court assistance in settling. The article comprises two main parts, which develop the topic coherently and logically. In the first part of the research, the authors precisely analyse the main trends related to the promotion of parties' cooperation and settlements in civil procedure. The second part of the article is devoted to disclosing the theoretical background for the particular forms of court-related amicable dispute resolution procedures – conciliation, mediation, and the amicable conciliation process.

2 MODERN CIVIL PROCEDURE: FURTHER STEPS TOWARDS PROMOTION OF COOPERATION AND CONSENSUALITY

2.1 Goals of Civil Justice in a Contemporary World: Problem Solving v. Case Proceeding

The vision of the goals of civil justice varies in different jurisdictions and has a lot to do with the roots of civil justice in national legal cultures. At the same time, we can see some convergence processes in this direction, at least in the European region, caused by the relatedness of the international standards of access to justice and fair trial10 and the tendency of the approximation of the national civil justice, at least in some aspects in the EU area.[11] In a broad sense, the two main goals of civil justice are the following: individual dispute resolution (dispute resolution goal) and the implementation of social goals, functions, and policies (policy implementation goal).12 These two goals co-exist and are enshrined in different ways in the national civil procedural legislation.

Despite the classical view, we can also find other approaches and nuances in defining the goals of civil procedure. One such approach is trying to explain whether and to what extent courts should be understood as places of complex problem solving or they only need to focus on the procedural issues of conducting a trial and making the judgment within the most

10 Art 6 of the Council of Europe, *European Convention of Human Rights* (ECtHR 2013) <https://www.echr.coe.int/Pages/home.aspx?p=basictexts/convention> accessed 1 December 2022; Art 47 of the European Union, Charter of Fundamental Rights (CFR) [2000] OJ C 326/02 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> accessed 1 December 2022.

11 M Storme (ed), *Approximation of Judiciary Law in the European Union* (Kluwer Law International 1994); M Storme, 'A Single Civil Procedure for Europe: A Cathedral Builders' Dream' (2005) 22 Ritsumeikan Law Review 87.

12 A Uzelac, 'Goals of Civil Justice and Civil Procedure in the Contemporary World: Global Developments – Towards Harmonisation (and Back)' in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014) 6.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

appropriate spending of time and costs.[13] For this purpose, two goals – problem-solving and case proceeding – are opposed. According to the first approach, the goal of civil procedure is understood as solving a conflict (dispute) in the most appropriate way. It means that a judge should try to facilitate the settlement and help parties solve their problem in the most effective and appropriate way. The second approach, which is, for instance, defined primarily in the CPC of Ukraine, is connected with the view that a judge should, first of all, manage the case, protect the violated right, and resolve a dispute instead of trying to solve a problem which is an essence of a dispute.

These two approaches have their pros and cons. While the first one seems to be more people-oriented, it is evident that it requires more time and the unique skills of a judge who facilitates the settlement. Also, it may face a resource problem (financial, human resources, etc.) and presupposes good communication between courts and professional peacemakers (mediators, conciliators, etc.). At the same time, it can bring better 'win-win' results if it works in practice. From this perspective, amicable dispute resolution in courts can be seen as a way to find an adequate and comprehensive solution to a problem within the most appropriate procedure. Lord T. Bingham wrote in his essential book about the rule of law in this regard that the justice system refers not only to the judicial guarantees of a fair trial but also to alternative ways of dispute resolution, which are better to call 'appropriate' (additional) ways of resolving disputes, because they allow choosing the most optimal way to resolve a dispute, considering the specifics of the latter, whereas courts should be associated with the last institution to apply when the other mechanisms do not bring the desired results.[14]

The second approach is more classical and connected with the needs of a court to hear the case providing minimal fair trial standards. In this case, the attention is focused on the minimal standards of procedural justice rather than on the results of the trial: if all the procedural requirements are met, the goal of civil justice, which is the effective protection of rights and freedoms, is reached. Thus, a judge focuses on the process rather than on the results of the trial and problem-solving. On the one hand, this approach is more utilitarian because it allows a judge to focus on some rules of civil procedure and to give a certain quality to the civil process, especially considering the fact that not all the parties of a dispute in a court have it as a goal to find a way to resolve a problem amicably. On the other hand, such an approach is geared towards an adversarial and 'win-lose' solution. For this reason, in many cases, we can observe the dissatisfaction of both parties with the court judgment in spite of providing high-quality procedural standards, which causes appeals and increases the spending of the parties' resources (time, money, psychological, etc.).

In the civil procedural literature, it is emphasised that the case proceeding approach has prevailed in national civil procedure systems.[15] This is obvious because the mere essence of civil justice, the goal of which is primarily to protect the rights and freedoms of individuals, presupposes an effective management approach that can provide everybody with access to justice and fair trial standards. At the same time, scientists highlighted that both ideas are worth attention and that civil justice should balance between these two goals.[16] However, the recent research and reforms of civil justice in the European region show a drift from the

13 Ibid 25.

14 T Bingham, *Rule of Law* (Penguin 2011) 85-6; See V Komarov and T Tsuvina, 'International Standard of Access to Justice and Subject of Civil Procedural Law' (2021) 28 (3) Journal of the National Academy of Legal Sciences of Ukraine 200, doi: 10.37635/jnalsu.28(3).2021.197-208.

15 See in context of different countries: A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014) 53-4, 74, 119, 218, 161, 180.

16 Uzelac (n 16) 25-6; Ch Koller, 'Civil Justice in Austrian-German Tradition: The Franz Klein Heritage and Beyond' in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014) 53.

case proceeding to the problem-solving approach in civil procedure as a global tendency. It seems like settlement and amicable dispute resolution are considered a 'proper concern for civil justice'[17] in many jurisdictions.

The originator of the Austrian CPC, Franz Klein, emphasised in the 19th century that civil procedure is supposed to be a quick, simple, and inexpensive way of dealing with a social evil that affects the parties involved and also the general public, costs the parties time, money, and nerves, and harms the economy and burdens the legal community.[18] Though there is no specific article in the CPC of Austria dedicated to the goals of civil procedure, 'restoration and preservation of legal peace' are considered to be an essential task of civil procedure in literature.[19] Thus, the CPC of Austria considers the court trial as the *ultima ratio*. Before that, an out-of-court settlement could be reached, above all, by reaching a settlement agreement within the meaning of Art. 1380 ff ABGB.[20] It looks like the approach is a balanced one.[21]

> Art. 2 of the CPC of Lithuania has a direct notion of the consensual tenet, identifying the goal of civil procedure. It states that
>
> [t]he purposes of civil procedure are to defend the interests of those persons, whose material subject rights or interests protected by laws are violated or contestable, to properly apply laws upon court hearing of civil cases, passing and enforcing judgments, as well as to restore juridical peace between or among the parties of a dispute, to clarify and develop law.

However, in Lithuanian legal science, the concept of judicial peace differs from the concept of social peace. Judicial peace refers to the final court decision that obtained legal force and is no longer an object of the appeal.[22] Judicial peace is not the same as social peace, which covers the restoration and sometimes even further development of the relations between the parties to the dispute.[23] In spite of these facts, judges can take an active part in facilitating dispute settlement. It should be added that both court-approved settlement agreements and court decisions on the matter potentially mean the restoration of judicial peace between the parties. In the case of court approve ment, settlement agreements gain *res judicata* effect and, after the designated time for appeal, can never be challenged again. After all, there are two ways to protect the rights of individuals and interests protected by law and restore legal peace. Undoubtedly, the rights of the person will be protected, and judicial peace will be restored both when the case is decided in court and when a settlement agreement is concluded.[24] Thus, social peace, based on mutual agreements rather than on an imposed decision, is, in fact, almost impossible in litigation, as the judge fulfilling his primary duty (passing a

17 T Allen, *Mediation Law and civil Practice* (2nd edn, Bloomsbury Professional 2018) 1; I Izarova, 'Civil Procedure Reform During the Period of Ukraine's Independence: New Goals and Principles' in Yu Prytika and I Izarova (eds) *Access to Justice in Conditions of Sustainable Development: to the 30th Anniversary of Ukraine's Independence* (Dakor 2021) 43-4, 55.

18 GE Kodek and PG Mayr, *Zivilprozessrecht* (5th edn, Facultas 2021) 34.

19 WH Rechberger and D-A Simotta, *Grundriss des österreichischen Zivilprozessrechts: Erkenntnisverfahren* (9 aufl, Manz 2017) 9; HW Fasching, *Lehrbuch des österreichischen Zivilprozeßrechts: Lehr- und Handbuch für Studium und Praxis* (2 aufl, Manz 1990) 36.

20 Rechberger and Simotta (n 23) 11.

21 Koller (n 20) 53.

22 V Vėbraitė, 'Šalių sutaikymas civiliniame procese' (Daktaro disertacija, Vilnius University 2009) 94; R Simaitis, 'Teisminis sutaikymas' (2004) 52 Teisė 92.

23 A Tvaronaviciene and N Kaminskiene, 'Teisminės mediacijos taikymas administracinėje justicijoje' in V Sinkevičius and L Jakulevičienė (eds), *Lietuvos teisė 2019: esminiai pokyčiai* (Mykolo Romerio universitetas 2019) 33. doi: 10.13165/LT-19-01-04.

24 V Nekrošius, 'Civilinio proceso tikslai: nustatyti tiesą ar sutaikyti šalis?' in *Civilinio proceso pirmosios instancijos teisme reforma Baltijos jūros regiono valstybėse ir centrinėje Europoje, 2004 m rugsėjo 16-19 d* (Vilnius universiteto leidykla 2005) 14, cited from: Vėbraitė (n 26) 94.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

legally binding decision) is more concerned with finding the material truth than with finding a balance between the different interests of the parties. Still, the systemic analysis of legal norms of the CPC of Lithuania proves that there are many signs that settlement of the case by mutual agreements between the parties is an important goal, although established implicitly.

Taking into account the above-mentioned considerations, in our opinion, the judicial policy should perceive the problem-solving approach identifying the litigation as only an '*ultimum remedium*'.[25] It does not mean that the primary goal of a court should be problem-solving instead of case proceedings. This means that these two goals should be balanced, and the judicial policy should be built in a two-step approach, according to which parties should try to use all possibilities for an amicable dispute resolution before filing a suit. Only if these fail can parties litigate as a last resort.

2.2 Principle of Settlement in Civil Procedure

The problem-solving approach cannot be implemented without modifying the catalogue of principles of civil procedure, where the settlement principle should take a prominent place. The ELI/UNIDROIT Model European Rules of Civil Procedure (ELI/UNIDROIT Rules, 2019) proposes an interesting approach in this regard.[26] The document unified the best European practices in the civil justice area and is meant to be used as a tool for further national reforms of civil justice.[27] This document identifies proportionality, cooperation, and settlement as the new principles of modern civil justice.

The settlement principle is set out in Rules 9-10. Its essence can be summarised as follows: parties, their lawyers, and judges should cooperate in seeking the parties' consensual dispute resolution during a trial. The ELI/UNIDROIT Rules distinguish the role of the parties from their lawyers (Rule 9) and the court's role (Rule 10) in bringing this maxim to life. The parties must 'cooperate in seeking to resolve their dispute consensually, both before and after proceedings begin'. Besides this, parties should work on reducing the number of contested issues before the adjudication, even if a settlement cannot be reached for the dispute as a whole. It is interesting that the ELI/UNIDROIT Rules obliges the lawyers to inform parties about the consensual dispute resolution opportunities and help the parties choose the most appropriate one, as well as to ensure the usage of mandatory ADR methods (if any were prescribed by national law). This notion emphasises the active role of lawyers in the promotion of consensual dispute resolution as a part of legal advice and legal aid. It symbolises the shift from the pure 'struggle' approach of civil litigation to the client-oriented approach, concentrating on the best clients' interests, which can be reached within the 'win-win' solution during the consensual dispute resolution procedures. In this regard, we agree with T. Allen that 'a settlement mindset developed within the culture which accepts that settlement processes are a proper integral part of civil justice will make major changes to the practice of law and judging, which will upset the traditionally minded, but may well be welcomed by those who seek redress to civil claims'.[28]

Courts also play a significant role in the realisation of this principle. A judge is obliged to facilitate the settlement during the period of the trial, especially but not only during the pre-

25 Uzelac (n 16) 12.

26 European Law Institute (ELI) and International Institute for the Unification of Private Law (UNIDROIT), ELI/UNIDROIT Model European Rules of Civil Procedure: From Transnational Principles to European Rules of Civil Procedure (OUP 2021) doi: 10.1093/oso/9780198866589.001.0001.

27 Ibid 1.

28 Allen (n 21) 21.

trial procedure and possibly the case management conferences, and provide the parties with information about different consensual ADR methods. Moreover, the function of a court can vary: judges can participate in the settlement procedure and help with reaching settlement agreements and drafting them or even mediate the dispute.[29]

As we can see, a correlation can be found between the three-dimensional obligation of the three main actors in the courtroom:

- the obligation of the parties to cooperate with each other to reach a settlement;
- the obligation of the lawyers to inform parties about the opportunities for such a settlement;
- the obligation of the court to facilitate the settlement during the trial.

The principle of settlement or its interpretations, promoting a dialogical interaction between judges and parties,[30] is also recognised in some jurisdictions. For example, in Belgium, there is a principle of consensualism.[31] The principle of promoting consensual conflict resolution (*Förderung einer einvernehmlichen Lösung*) is identified in the Austrian civil procedural literature as well. Examples of this principle can be found *ibidem* in the attempt at reconciliation provided for in matrimonial proceedings (Art. 460 para. 7 CPC of Austria) and in the various provisions on court settlement (Art. 204 CPC of Austria) with reference to suitable institutions for out-of-court conflict resolution, in particular, mediation. The civil process is also intended to help resolve private conflicts in order to avoid further litigation. Therefore, the opportunity for dialogue and rational discourse should also be given. The legislator has thus provided for oral proceedings between the parties and an attempt at settlement in the preparatory hearings (Art. 258 para. 1.4 CPC).[32] In Lithuania, the principle of settlement is very important but not explicitly established in legal regulation. Even though the principle of settlement is not listed in Chapter II of the Code of Civil Process 'Principles of civil process', a systematic analysis of the content of the whole code shows that the possibility to settle is an integral part of civil justice. In addition, it is widely promoted by various procedural incentives, including a partial refund of paid stamp duty (Art. 80 para. 8) or free assistance in settling by the conciliator or mediator (Art. 231 para. 1). In Ukraine, the principle of settlement is not recognised in the national legislation (Art. 3 of the CPC of Ukraine), but, as we will see further, judges have powers to strengthen amicable dispute resolution in particular cases.

In summary, taking into account strengthening the consensual tenet in civil procedure, the settlement principle should be recognised as one of the prominent aspects of modern civil procedure. The settlement principle is closely related to the court's duty to attempt a reconciliation between the parties. Thus, in national legal regulation, these principles rarely are listed together with such classical principles of civil procedure as competitiveness, dispositiveness, publicity, etc. However, the principle of settlement is established implicitly by determining the duty of the judges to reconcile parties or attempt to do so, the obligation to provide information, and additional procedural incentives promoting the idea of settlements.[33]

29 ELI/UNIDROIT Model (n 30) 38-9.

30 Ibid 39.

31 CH van Rhee, 'Introduction' in CH van Rhee (ed), *Judicial Case Management and Efficiency in Civil Litigation* (Intersentia 2007) 5.

32 Kodek and Mayr (n 22) 73.

33 See further ELI/UNIDROIT Model (n 30) 38-9.

Access to Justice in Eastern Europe
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Journal homepage http://ajee-journal.com

2.3 Judicial Case Management and Amicable Dispute Resolution

The implementation of the problem-solving approach and settlement principle in civil procedure needs effective practical instruments. One such instrument is active judicial case management, which is a widely known concept aimed at ensuring an optimal correlation between the parties' and the court's activity in civil procedure.[34] In the literature, two types of judicial case management are distinguished: *procedural (organisational)*, which is connected with the procedural standards of the trial and covers the powers of a court within an effective organisation of court proceedings, and *substantive (material)*, which deals with the powers of a court on the merits of the case.[35] We will focus on the procedural part of judicial case management, which is correlated with the idea of an active or 'managerial'[36] judge, recognised in Recommendation No. 84/5 of the Committee of Ministers of the Council of Europe on the principles of civil procedure designed to improve the functioning of justice (Principle 3).[37]

In the European civil procedure tradition, the roots of judicial case management are connected with the reform of civil procedure conducted by Franz Klein and the adoption of the CPC of Austria (*Zivilprozessordnung*, 1895),[38] even though this term was not mentioned in its text. The Austrian model of civil procedure at that time shifted the focus from the autonomy of the parties to the authority of a judge to effectively manage the court proceedings and oblige the parties to use civil justice resources with due care and diligence. Such a view was caused by the recognition of the fact that civil procedure serves not only the parties of the particular case but also 'the public good', executing the public goal (*Wohlfahrtsfunktion*) of civil procedure.[39]

The modern understanding of judicial case management was introduced in the English Civil Procedural Rules (CPR, 1998) adopted as a result of Lord Woolf's reform of civil procedure in England.[40] After enshrining this concept in the CPR, judicial case management became a trend in many other European jurisdictions, having become a distinctive feature of the convergence between the English civil procedure and civil law countries' civil procedure.[41] According to N. Andrews, the essence of case management in civil litigation in England is that the court system in general and the judges in each particular case regulate the content and course of proceedings;[42] that is, they are responsible for the efficient organisation of the civil process. Rule 1.4 of the CPR obliges a court to further the overriding objective by

34 CH van Rhee (n 35) 2; CH van Rhee, 'The Development of Civil Procedural Law in Twentieth Century Europe: From Party Autonomy to Judicial Case Management and Efficiency' in CH van Rhee (ed), *Judicial Case Management and Efficiency in Civil Litigation* (Intersentia 2007) 13; J Lande, 'Shifting the Focus from the Myth of "The Vanishing Trial" to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution from Marc Galanter' (2005) 6 Cardozo Journal of Conflict Resolution 191.

35 B Allemeersch, 'The Belgian Perspective on Case Management in Civil Litigation' in CH van Rhee (ed), *Judicial Case Management and Efficiency in Civil Litigation* (Intersentia 2007) 82; ELI/UNIDROIT Model (n 30) 91-2.

36 D Menashe, 'The Manager-Judge and the Judge-Manager: towards Managerial Jurisprudence in Civil Procedure' (2019) 94 (2) North Dakota Law Review 440.

37 Committee of Ministers of the Council of Europe, Recommendation No R (84) 5 On the Principles of Civil Procedure Designed to Improve the Functioning of Justice (28 February 1984) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804e19b1> accessed 1 December 2022.

38 CH van Rhee (n 35) 2.

39 Ibid 3, 11, 13.

40 H Woolf, *Access to justice: interim report to the Lord Chancellor on the civil justice system in England and Wales* (Lord Chancellor's Department 1995).

41 CH van Rhee (n 38) 20.

42 N Andrews, *English Civil Procedure. Fundamentals of the New Civil Justice System* (OUP 2003) 333; CH van Rhee (n 35) 2.

actively managing cases, which includes: (a) encouraging the parties to cooperate with each other in the conduct of the proceedings; (b) identifying the issues at an early stage; (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others; (d) deciding the order in which issues are to be resolved; (e) encouraging the parties to use an alternative dispute resolution procedure if a court considers that appropriate and facilitating the use of such procedure; (f) helping the parties to settle the whole or part of the case; (g) fixing timetables or otherwise controlling the progress of the case; (h) considering whether the likely benefits of taking a particular step justify the cost of taking it; (i) dealing with as many aspects of the case as it can on the same occasion; (j) dealing with the case without the parties needing to attend at court; (k) making use of technology; and (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.[43]

Furthermore, according to the ELI/UNIDROIT Rules, the court's general active case management duty is the main task within the principles of proportionality, cooperation, and settlement.[44] In this regard, Rule 4 states that a court is responsible for active and effective case management, ensuring that parties enjoy equal treatment and monitoring whether parties and their lawyers comply with their responsibilities.[45] A more detailed description of judicial case management can be found in Rules 47-49, which enshrine, on the one hand, the obligation of the parties to conduct carefully during the litigation in order to secure procedural expedition,[46] and, on the other hand, judges' duty to control the court proceedings at all stages and monitor the fulfilment of the obligations by the parties using the active powers of a court, including the possibility to make case management orders.[47] Rule 49 of the ELI/UNIDROIT Rules identifies as one of the case management powers the power of the court to encourage parties to take active steps to settle their dispute or parts of their dispute and, where appropriate, to use alternative dispute resolution methods.

By its virtue, judicial case management determines the set of the court's discretionary powers during the proceedings on managing the time and process of trial according to principles of proportionality and cooperation aimed at the implementation of the goals of civil justice and ensuring effective dispute resolution. In the structure of case management, different groups of powers can be distinguished. They can be summarised as follows: (a) judicial time management (organisation of the case management conferences, providing the procedural calendar); (b) powers, connected with the selection of the particular type of proceedings (forms, tracks) according to which the case should be trialled; (c) powers, connected with the consolidation and separation of the claims and identifying issues of the case; (d) powers, which help to establish the facts of the case (making different orders, connected with the evidence, requiring the participators of the trial to appear in person, etc.); (e) powers, connected with the facilitation of an amicable dispute resolution, including the usage of ADR methods; (f) powers on the management of the court costs; (g) powers to take different measures for violation of the procedural rules or procedural abuses.[48]

The drift to the conciliatory approach in modern civil procedure can be seen in the implementation of the particular judicial case management powers connected with the

43 Civil Procedure Rules, pt 1 Overriding Objective <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01> accessed 1 December 2022.

44 ELI/UNIDROIT Model (n 30) 43.

45 Ibid.

46 ELI/UNIDROIT Model (n 30) 128.

47 ELI/UNIDROIT Model (n 30) 130-5.

48 See: T Tsuvina, 'Case Management Concept: Foreign Experience and Prospects for Implementation in Ukraine' (2020) 1 Juridical Scientific and Electronic Journal 75 <https://doi.org/10.32782/2524-0374/2020-1/18> accessed 1 December 2022; T Tsuvina, 'The Rule of Law Principle in Civil Procedure: Theoretical-Practical Approach' (DPhil (Law) thesis, Yaroslav Mudryi National Law University 2021) 381-408.

Access to Justice in Eastern Europe
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facilitation of amicable dispute resolution in the national civil procedure rules.[49] These can differ in practice depending on the national traditions and the development of the ADR in the particular state. For example, the managerial function of a court can be executed within Sander's model of the 'multi-door courthouse',[50] where a court administers an effective usage of the ADR out of and within the court procedure. Under these circumstances, we can see what M. Galanter identified as 'the strategic pursuit of a settlement through mobilizing the court process',[51] which in practice can bring the settlement principle and the consensual tenet in civil procedure into life. The most common functions of a court in this regard can be summarised depending on the degree of interference of a judge as follows: a) the right or the duty of a court to ask the parties whether they wanted to use any ADR methods (mediation, conciliation, etc.) at the pre-trial conference, preparatory hearing, or during the whole period of the trial; b) the right of a court to direct the parties to mediation (conciliation or other means of consensual ADR) with the parties' right to decline this proposal or without such right; c) the judge's power to apply certain procedural sanctions for refusing to use consensual ADR methods or its abuse; d) the judge's power to conduct the conciliation procedure; e) the judge's power to conduct the mediation procedure.

These court powers can be seen in different variations in the national civil procedural legislation. In particular, in Austrian civil procedure, judicial case management is connected primarily with the principle *ex officio* (*Offizialmaxime/Amtsbetrieb,* Art. 178 of the CPC of Austria) and the principle of cooperation (*Kooperationsgrundsatz*, Arts. 178, 182, 183, 371 of the CPC of Austria). As to the specific case management powers connected with amicable dispute resolution, the CPC of Austria requires a judge to take measures for the settlement of a dispute (Art. 204 para. 1 of the CPC of Austria) and try to facilitate (*ex officio*) an amicable dispute resolution or particular issues of the case at any stage of oral hearing with the possibility to record the content of the settlement in the minutes of the hearing on the request of the parties (Art. 204 para. 1 of the CPC of Austria). The special provisions in terms of case management can be seen within the context of the proceedings in matrimonial matters. In particular, in divorce proceedings, a court shall attempt reconciliation at the beginning of the oral hearing as well as at the other stages (Art. 460 para. 7 of the CPC of Austria). Special norms about the cooperation principle and/or conciliatory function of a judge within the case management are also enshrined in the Non-Contentious Proceedings Act, which states that if there is a possibility of an amicable settlement agreement, a court may pause the proceedings if it does not violate the parties of public interests (Art. 29 (1) of the Non-Contentious Proceedings Act). Special procedural provisions allow the court to take measures to participate in an initial discussion on mediation or conciliation procedure in order to safeguard the best interests of the child, provided that this does not endanger the interests of a party whose protection the proceedings serve or unreasonably prejudice the interests of the other parties (Art. 107 of the Non-Contentious Proceedings Act).

In the Lithuanian CPC, there is no direct notion of case management, but the principle of cooperation is recognised, as in Austria, as one of the principles of civil procedure, according to which a court should cooperate with the participators of the trial, taking measures for examination of the case (Art. 8). Regarding the special conciliatory powers of the judge, they

49 See for example Art 80 para 8, Art 231 para 1, Art 228 para 1, Art 376 para 2 of the CPC of Lithuania; Art 12 para 5.1, Art 197 para 2.2, Art 201-205, Art 211 para 5 CPC of Ukraine, but ediator (Art. 231 para 1). Code of Civil Procedure of the Republic of Lithuania No IX-743 'Civilinio proceso kodeksas' of 28 February 2002 <https://e-seimas.lrs.lt/portal/legalActEditions/lt/TAD/TAIS.162435> accessed 1 December 2022; Code of Civil Procedure of Ukraine No 1618-IV of 18 March 2004 <https://zakon.rada.gov.ua/laws/show/1618-15#Text> accessed 1 December 2022.

50 Sander (n 6) 111.

51 M Galanter, 'World of Deals: Using Negotiation to Teach About Legal Process' (1984) 34 (2) Journal of Legal Education 268.

are identified in a general manner as a duty of a court to hold a preparatory hearing (if it considers that a settlement can be reached in the case or if the law obliges a court to take steps to reconcile the parties) (Art. 228 para. 1) and the duty of the chairman of a court session to take conciliation measures during the hearing of the case (Art. 159 para. 1). The judge also can recommend that parties enter court mediation (Art. 231 para. 1) or even impose mandatory court mediation (Art. 231 para. 1). The judge can always conduct conciliation. In this case, the judges are mediators – they can also mediate even in cases in which they were commissioned as a judge (Art. 231 para. 1). As was mentioned earlier, judges have a right to imply mandatory mediation, and this decision is left purely to their discretion and belief that such a move may be effective and lead to settlement. In family cases, a court is obliged to be even more active. For this purpose, 'a court must undertake measures to reconcile the parties, stream to protect rights and interests of the children' (Art. 376 para. 2). In divorce proceedings, a court shall take measures to reconcile the spouses and shall have the power to set a time limit for the spouses to reconcile (Art. 384), but in these cases, a judge should be passive and not take any active steps, merely providing time for the parties to reconcile.

Even though the CPC of Ukraine does not contain special notions about judicial case management, it incurs the court's duty to manage the course of the trial, maintaining objectivity and impartiality (para. 5.1 Art. 12 of the CPC of Ukraine). At the same time, in Ukrainian literature, this duty remains poorly researched because the publications devoted to judicial case management have appeared only in recent years.[52] The duty to facilitate the settlement of a dispute by reaching an agreement between the parties is recognised as a separate obligation of a court but not as a part of the general duty to manage the case (para. 5.1 Art. 12 of the CPC of Ukraine). This duty is detailed by the concrete powers at different stages of the trial. In particular, during the pre-trial session, a judge should find out whether the parties wish to conclude a settlement agreement, conduct an out-of-court settlement of the dispute through mediation, refer the case to arbitration, or apply to a court for settlement of the dispute with the participation of a judge (para. 2.2 Art. 197 of the CPC of Ukraine). This last option is a special kind of conciliation during the pre-trial procedure held by a judge who trials the case (Arts. 201-205 of the CPC of Ukraine). During the consideration of the case on the merits, a court has an obligation to facilitate the reconciliation of the parties (para. 5 Art. 211 CPC of Ukraine). The peaceful settlement agreement can take place at any stage of the trial and during the enforcement procedure (Art. 207 of the CPC of Ukraine). Also, the Ukrainian CPC *de facto* emphasises the role of the parties in the consensual dispute resolution in civil procedure, stating that the parties shall take measures for the pre-trial settlement of the dispute by mutual agreement or in cases where such measures are mandatory according to the law (para. 1 Art. 16 of the CPC of Ukraine). But, in fact, there are no cases in which the pre-trial settlement procedure is mandatory, and there are no effective measures to react to the parties' non-cooperative behaviour except to take into account such behaviour when distributing the court costs between the parties (para. 3.4 Art. 141 of the CPC of Ukraine). That is why *de facto*, the settlement principle looks more like an obligation of a court to facilitate the settlement of a dispute than an obligation for parties and their lawyers to cooperate on the amicable dispute resolution.

As we can see, judicial case management power can be used differently in connection with amicable dispute resolution. At the same time, the most interesting and prominent of them is the power of a judge to conduct special consensual procedures, like mediation

52 See I Izarova, V Vibrate and R Flejszar, 'Case Management in the Civil Court Procedure: a Comparative Study of the Legislation of Lithuania, Poland and Ukraine' (2018) 10 Law of Ukraine 131-4, doi: 10.33498/louu-2018-10-129; Tsuvina (n 52) 75; Tsuvina (n 52, thesis) 381-408; I Izarova, Yu Prytyca, T Tsuvina and B Karnaukh, 'Case Management in Ukrainian Civil Justice: First Steps Ahead: Gestión de casos en la justicia civil de Ucrania: primeros pasos a seguir' (2022) 40 (72) Political Questions 927, doi: 10.46398/cuestpol.4072.56 etc.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

or conciliation, which opens a set of questions: Can judges provide an amicable dispute resolution for the parties? What are the forms of such a resolution? Do judges need to have a proper qualifications to conduct conciliation or mediation?

3 COURT-RELATED AMICABLE DISPUTE RESOLUTION PROCEDURES: THEORETICAL BACKGROUND

If the parties do not resolve their conflict themselves and thus without third-party support, professional dispute resolution can take place on both a state and a private level and must ensure an adequate response to the different types of conflict. At the state level, judges take up the juridified conflict, placing the legal dispute in a direct context with the relevant rights. The view of the conflict thus becomes rights-based, and conflict resolution is channelled toward a decision[53] and tied to the norms generally developed for the functioning of society. The situation is different at the private level, which forms the basis for amicable dispute resolution. At this level, the respective interests of the parties are paramount. The case-specific norms are not binding, but they provide orientation and indicate the limitations within which conflict resolution may permissibly move. The two levels outlined above are not mutually exclusive, however; instead, a conflict can pass through both levels before it is resolved in the best case.[54] What position do third parties take in the course of the conflict management delegated to them? What assistance can they provide, and how do they differ?[55] In any case, in contrast to the allies in the conflict, independent third parties must be assumed here, whose involvement can be voluntary or coerced and who are themselves equipped with the state means of coercion or whose decisions can be compulsorily enforced. In general, some serve as advisory third parties, while others play a mediating role. According to T. Raiser, the form of third parties acting in conflict can be understood in many different ways, although a tiered typology of the various activities of third parties can be identified concerning the range of conflict termination options. We are talking about consultation, mediation, conciliation, and adjudication in the sense of arbitration and litigation.[56]

The purpose of a consultation is, for example, to obtain information that can reduce substantive misunderstandings and revise gross misconceptions (for example, an external opinion from the consumer advice service, an expert opinion, legal information from a lawyer, or consultation days at court).

A similar purpose applies to mediation, even though the tasks are different. Thus, the focus is not on the advice provided by the mediator but on the mediator's expertise in shaping the proceedings. The primary task of this neutral person is to re-establish communication between the disputants so that they are subsequently enabled to resolve their private conflict through their own responsibility. Its informal nature, flexibility, including parties behind the parties, and interest-driven negotiation structure provide sufficient space to enable future-oriented distributions.

Unlike mediators, certain restrictions bind conciliators. They act according to rules that still give them more or less procedural leeway but prevent them from considering arbitrary particularities of the case. If necessary, they also make a decision, but in most cases, this is a non-binding one.

53 To capture conflicts, see N Luhmann, *Legitimation durch Verfahren* (Suhrkamp Verlag 1983) 102.

54 M Birner, *Das Multi-Door Courthouse: Ein Ansatz zur multidimensionalen Konfliktbehandlung* (Dr Otto Schmidt KG 2003) 9.

55 T Raiser, *Grundlagen der Rechtssoziologie* (6 aufl, Mohr Siebeck 2013) 305 ff.

56 Ibid 306.

The transition from conciliation to arbitration is complete when the impartial third party reaches a decision that is binding on the parties. This form of conflict resolution, therefore, ultimately belongs to the fourth possibility of orderly dispute resolution, namely adjudication.[57] The focus here is on dispute resolution before state courts,[58] which are best suited to resolving conflicts in formalised and institutionalised proceedings by – as already indicated – focusing on and analysing the primarily material rules to which the dispute relates.[59] The central instrument of dispute resolution is judgment, which as a procedural endpoint, regularly reflects an evaluation of the past. Since courts in the continental European legal area are bound to comply with the law, there is hardly any room for overstretching decisions.[60] Along the way, however, it is up to the judges to lead the parties in a kind of conciliation hearing to a settlement.[61] If this does not succeed, the state court decision in the sense of a verdict should end the conflict.

3.1 What are Conciliation and Mediation?

The term 'conciliation' is often used to refer to various processes in different contexts. It is therefore not sharply delineated in common usage.[62] It can be considered an umbrella term for any facilitative, consensual, amicable dispute resolution process.[63] However, in international literature, conciliation is regarded as a voluntary, out-of-court dispute resolution method based on a party agreement and generally follows the same procedural principles worldwide.[64] It is a communicative process not conducted in public (principle of non-publicity) led by an independent, neutral third party, the conciliator,[65] to reach an amicable agreement between two parties to a dispute as soon as possible. Resolving the conflict at its root is, therefore, not the focus of the procedure.[66]

The process is initiated based on an agreement between the parties or by appealing to conciliation boards (e.g., Board for Consumer Protection; Office of Ombudsperson).[67] Some of these institutions follow internal conciliation rules prescribing fundamentals[68] of the conciliation procedure.[69] Concerning the subject matter of the proceedings, conciliators

57 See also V Gessner, *Recht und Konflikt: Eine soziologische Untersuchung privatrechtlicher Konflikte in Mexiko* (Mohr Siebeck 1976) 102.

58 Arbitration as private jurisdiction remains unconsidered.

59 Gessner (n 61) 179.

60 Birner (n 58) 12.

61 See chapter 2.2.

62 JM von Bargen, *Gerichtsinterne Mediation – Eine Kernaufgabe der rechtssprechenden Gewalt* (Mohr Siebeck 2008) 54.

63 Concerning this for instance T Sourdin, *Alternative Dispute Resolution* (6th edn, Thomson Reuters 2020) 193 ff.

64 J Fischer and AM Schneuwly, *Alternative Dispute Resolution* (Dike 2021) 27 f.

65 Ibid.

66 K Sonnleitner, *Wege aus dem Konflikt. Mediation – Schlichtung – Gericht* (Uni-Press Graz 2015) 55.

67 Directive 2013/11/EU (n 13) Art 4 para 1 lit h.

68 About the access to the entity to a fair, effective, and transparent ADR procedure, see for instance Art 7 ff Directive 2013/11/EU (n 13).

69 E.g., in Austria each conciliation institution shall establish rules for the procedure according to Art 6 of the Alternative Dispute Resolution Act (AStG) See: Alternative Dispute Resolution Act of the Republic of Austria (AStG) 'Bundesgesetz, mit dem ein Bundesgesetz über alternative Streitbeilegung in Verbraucherangelegenheiten erlassen wird und das Konsumentenschutzgesetz, das Gebührengesetz 1957 und das Verbraucherbehörden-Kooperationsgesetz geändert werden' of 13 August 2015 <https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2015_I_105/BGBLA_2015_I_105.pdfsig> accessed 1 December 2022.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

act similarly to judges,[70] which means that they enable both parties to present their points of view fairly[71] and concentrate on evaluating the facts presented to them. At this level, the conciliators then attempt to intervene in a conciliatory way to achieve a deviation of the parties from their initial positions, in other words, a compromise, and thus open up the possibility for them to reach an amicable agreement themselves.[72]

If the parties do not succeed in finding a solution themselves, the conciliators take charge of this.[73] They form their own opinion on the factual and legal issues[74] and may submit a legally non-binding proposed solution for amicable dispute resolution, that is, in the best case, as well thought out as a court's judgement.[75] The United Nations Commission on International Trade Law (UNCITRAL) assumes in its former conciliation rules that the conciliator formulates the terms of a possible solution and presents them to the parties, who then also have the opportunity to comment on them. If necessary, the conciliator reformulates the settlement in light of these comments.[76] However, whether the proposed solution ends the conflict depends entirely on the parties.[77] They are ultimately free to accept or reject it.[78] At this point, it must be mentioned that although the parties have this freedom concerning the non-binding conciliator's decision, the authority of the conciliator and the publication of the award can create a certain pressure on the parties to reach or even force an agreement.[79] Ultimately, the conciliators, like judges, want to convince the parties of the correctness of their legal opinion.[80]

If the parties, therefore, accept the conciliator's result, it is recorded in an out-of-court settlement. This contract is usually, however, not a directly enforceable execution title, but further steps, such as preparing an enforceable notarial deed, can be taken.[81] If the parties reject the conciliator's proposal, the standard legal process is still open to them. In this respect, conciliation is a procedure that is usually 'upstream' of civil proceedings.[82] The costs of conciliation are either borne equally by the two parties or institutions like conciliation boards, regardless of the outcome of the proceedings.[83]

There is a wide range of definitions of mediation. However, common principles can be derived from these.[84] Generally, mediation is a voluntary future-oriented process in which an impartial third party, the mediator, facilitates the negotiation between two or more disputing parties concerning their needs and interests to find an amicable agreement to

70 Bargen (n 66) 56.

71 Fischer and Schneuwly (n 68) 28.

72 Bargen (n 66) 55; D Girsberger and JT Peter, *Außergerichtliche Konfliktlösung* (Schulthess Verlag 2019) 6.

73 Fischer and Schneuwly (n 68) 28.

74 H Eidenmüller and G Wagner, *Mediationsrecht* (Dr Otto Schmidt KG 2015) 16.

75 Ibid; Raiser (n 59) 308.

76 Art 13 UNCITRAL Conciliation Rules (adopted 4 December 1980 UNGA Res 35/52) Art 13 <https://uncitral.un.org/en/texts/mediation/contractualtexts/conciliation> accessed 1 December 2022.

77 Raiser (n 59) 308; Eidenmüller and Wagner (n 78) 16.

78 A Meisinger and H Salicites, 'Alternative Formen der Streitbeilegung', in A Deixler-Hübner and M Schauer (eds), *Alternative Formen der Konfliktbereinigung: ADR-Richtlinie, Schlichtungswesen, Mediation und Einigungsverfahren* (Manz 2016) 11; Girsberger and Peter (n 76) 6.

79 Bargen (n 66) 55.

80 OC Ruppel, *Interdisziplinäre Schlüsselqualifikation Mediation* (Verlag Dr Kovac 2007) 10.

81 A Meisinger, *System Der Konfliktbereinigung: Alternative, komplementäre und angemessene Streitbeilegung* (Manz 2021) 34 ff.

82 Ibid.

83 Fischer and Schneuwly (n 68) 28.

84 Meisinger and Salicites (n 82) 18.

the conflict.[85] The costs of the mediation are generally equally borne by the two parties.[86] And finally, such a process can be placed upstream or alongside traditional court and public authority proceedings.[87]

The ultimate goal of the mediation process is the autonomous and joint search for creative solutions to the conflict, which should ultimately be satisfactory and sustainable for all parties involved (the so-called 'win-win-solution').[88] The outcome is to be found autonomously in a conflict management procedure primarily determined by the parties themselves and based on the principles of the Harvard concept. The process must adhere to a fixed basic structure, reflected in a phase model. The number and arrangement of the phases in the process may vary.[89] However, essentially, there are three primary phases – preliminary negotiation, actual negotiation, and implementation (review/monitoring).[90] It is not a question of the exact adherence to each phase of the proceeding but of the individual procedural steps that provide a methodologically justified, specific logic for finding a consensus. When selecting the procedural model, the conflict's nature and the parties' needs must be considered. Therefore, the process is intended to be flexible, open, and essentially free of strict formalisms and prescribed standards to react to the individual case depending on the situation.[91]

The mediators who conduct the mediation must be accepted by all parties to the dispute, be neutral, and assume responsibility for the progress of the negotiation. They do the latter, for example, by trying to eliminate prejudices and pointing out dangers and aspects that need to be regulated and might form the basis for a possible agreement acceptable to all parties. Under no circumstances, however, should the mediators pursue their interests and make decisions on a matter in dispute. According to the understanding within the EU, they have no coercive power[92] and may not make any concrete proposals for solutions to the factual and legal situation, especially not in the form of settlement proposals, as in conciliation proceedings.[93]

The mediator's role is to guide the parties through the process to recognise each other's interests and needs behind the conflict to shift away from their rigid positions and standpoints and move toward a common goal.[94] Therefore, their main tasks are result-oriented process management, structuring, and building trust. To create the conditions for a successful mediation that will enable the parties to resolve their conflict effectively, mediators act according to certain principles.[95] The main principles of mediation are: 'impartiality, self-determination, confidentiality, and participation of all'.[96] Accordingly, mediators must approach all parties openly, without prejudice, and impartially, and secure an even balance between them in the

85 N Alexander, 'Global Trends in Mediation: Riding the Third Wave' in N Alexander (ed), Global Trends in Mediation (2nd edn, Kluwer Law International 2006) 2 f.

86 Fischer and Schneuwly (n 68) 28.

87 G Falk, 'Die Entwicklung der Mediation' in E Töpel and A Pritz (eds), *Mediation in Österreich* (LexisNexis ARD Orac 2000) 41 ff.

88 Meisinger and Salicites (n 82) 18.

89 Bargen (n 66) 15.

90 M Hehn, *Nicht gleich vor den Richter: Mediation und rechtsförmliche Konfliktregelung* (Brockmeyer 1996) 20 ff; H Zilleßen, 'Mediation im Spannungsfeld von Umweltpolitik und Umweltrecht' (1998) 1 (1) Konsens 26.

91 HJ Fietkau, *Leitfaden Umweltmediation: Hinweise für Verfahrensbeteiligte und Mediatoren* (Wissenschaftszentrum Berlin für Sozialforschung 1994) 11, 14 f.

92 Meisinger and Salicites (n 82) 18.

93 Fischer and Schneuwly (n 68) 24 f.

94 Eidenmüller and Wagner (n 78) 16; S Ferz, 'Amicable Dispute Resolution at court: Conciliation Hearings, The Austrian and German Perspectives' (2022) 8 (1) International Comparative Jurisprudence 106, doi: 10.13165/j.icj.2022.06.008.

95 Bargen (n 66) 17.

96 S Proksch, *Conflict Management* (Springer Cham 2016) 32, doi: 10.1007/978-3-319-31885-1.

Access to Justice in Eastern Europe
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proceedings. Therefore, mediators must not have any personal or institutional relationship with them.[97] Furthermore, the mediator must ensure that all information and communication flows are transparent to the participants and that all information that emerges within the course of mediation is treated confidentially[98] and not communicated to the public.[99]

The parties control the content and outcome of the process.[100] The solution to the conflict is to be found and developed by themselves in the sense of practiced self-responsibility.[101] Following this approach, there are as many possible solutions to the conflict as can be considered by the parties. However, this presupposes that the parties break away from their entrenched expectations and create space for a mutually agreeable solution.[102] The solution is recorded if a consensus is reached at the end of the mediation process. Both parties possibly sign the agreement, making it legally binding,[103] but this decision is also voluntary.[104] Mediation can, therefore, only lead to a legally binding solution if both parties agree to this outcome[105] and also have the autonomy to decide.[106]

The line of demarcation between mediation and conciliation often does not seem so apparent at first glance. In both procedures, an independent, neutral third party is consulted to provide mediatory support to the parties on the way to an agreement but is not allowed to make binding decisions.[107] Furthermore, the two procedures can be placed upstream of formal court proceedings,[108] and their costs are usually borne equally by the two parties.[109] Conciliation and mediation can be similar in many ways. However, mediation and conciliation can be differentiated according to the role and the powers of disposition of the neutral, independent third party,[110] as well as their procedures and desired outcome.

A concise difference between the procedures is that conciliation procedures, like court proceedings, are past-oriented. Concrete facts from the past are dealt with, and conciliators form their opinion around factual and legal issues. The mediation process, on the contrary, focuses on the future. The aim is to find a satisfactory and sustainable solution to the conflict considering the relationship level and to restore the estranged relationship and the broken connection for the future.[111]

Another difference is found in the aspect that conciliation proceedings, when they are carried out by specific institutions, occasionally follow internal conciliation rules that prescribe

97 Meisinger and Salicites (n 82) 18.

98 In a recent international survey about international commercial disputes done by SIDRA, fewer respondents found confidentiality 'absolutely crucial' or 'important' in litigation (26%) compared to arbitration (81%) and mediation (89%). The authors explain this with the fact that litigation is a generally more public process compared to mediation, and users selecting litigation would generally be less concerned about a confidential dispute resolution forum. NM Alexander and others, *International Dispute Resolution: 2022 Final Report of 28 July 2022* (Singapore International Dispute Resolution Academy at Singapore Management University 2022) 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4174678> accessed 1 December 2022.

99 Fischer and Schneuwly (n 68) 25.

100 H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edn, LexisNexis Butterworths 2002) 146.

101 Meisinger and Salicites (n 82) 18; Fischer and Schneuwly (n 68) 26; Bargen (n 66) 26.

102 Fischer and Schneuwly (n 68) 26.

103 Proksch (n 100) 50 ff.

104 Girsberger and Peter (n 76) 6.

105 SJ Ware, *Principles of Alternative Dispute Resolution* (3rd edn, West Academic Publishing 2016) 389.

106 Ruppel (n 84) 23.

107 Bargen (n 66) 54.

108 Meisinger (n 85) 34 ff; Falk (n 91) 41 ff.

109 Fischer and Schneuwly (n 68) 28.

110 Ibid 238.

111 Ibid 239.

fundamentals of the conciliation procedure.[112] This factor distinguishes conciliation from mediation, which is typically informal, albeit following a phase model.[113]

Furthermore, conciliators deal with legally relevant issues and may or should provide the parties with legal information. This approach is by no means the case with interest-based mediators.[114] Mediators do not comment on the content of the conflict and do not evaluate it on the basis of legal or factual criteria.[115] Therefore, mediators do not take a position on the dispute and its legal dimension itself but only try to support the conflicting parties in working out their interests behind the conflict and focusing on the relevant personal aspects.[116] This approach is necessary, as the conflicts dealt with in mediation are often highly emotional and relationship-based. For this reason, compared to mediation, conciliation is more suitable for situations in which the parties involved want to deal with a 'one-time' or fact-bounded resolvable conflict in an unemotional manner and clarification at the relationship level is not proper or is not in the foreground but rather the reappraisal of the concrete facts from the past.[117] In addition, the conciliator can make non-binding proposals for solutions to the parties if they are unable to reach an agreement themselves, whereas, in mediation, the mediator does not propose any options for a solution.[118] Therefore, the conciliator has a more active role in the process concerning the content of a possible settlement and can be much more direct and interventionist than mediators.[119] This fact leads to the main difference between the two conflict resolution processes regarding the result. The main task of conciliators is to reach an amicable agreement between two parties to a dispute as soon as possible by achieving a deviation from their original positions, i.e., a compromise. Mediation, on the contrary, is not just about moving the parties away from their initial demands and finding an accepted solution in the middle.[120] The ultimate goal of the mediation process is the autonomous and joint search for creative outcomes to reach a future-oriented and so-called 'win-win solution',[121] in other words, consensus. Therefore, the resolution process of the conflict in mediation does not remain on a factual level. It already starts at its roots, the trigger of the conflict, but without taking on therapeutic tasks, and ends by negotiating options created by the parties after discovering their needs.[122]

3.2 Conciliation and Mediation in Court: Concepts and Comparison

The question now arises whether conciliation and mediation are used both out of court and in legal proceedings. Thus, it must be assessed whether the elements of compensation or, rather, a settlement also find their place in the context of judicial disputes. It, therefore, seems essential to place conciliation and mediation in a procedural environment that is characterised by a sense of entitlement. Admittedly, as parties enter the judicial environment, the *modus operandi* and the assumptions change to a legal one. The basic assumptions are

112 As an example, see Art 5 and 7 Directive on consumer ADR, 2013/11/EU (n 13).

113 Bargen (n 66) 56.

114 Alexander (n 89) 2; Fischer and Schneuwly (n 68) 28.

115 Bargen (n 66) 55; Girsberger and Peter (n 76) 6 f.

116 Bargen (n 66) 56.

117 Fischer and Schneuwly (n 68) 239.

118 M Paleker, 'Mediation in South Africa: Here but Not All There' in N Alexander (ed), *Global Trends in Mediation* (2nd edn, Kluwer Law International 2006) 356; Fischer and Schneuwly (n 68) 28.

119 Girsberger and Peter (n 76) 6 f; Alexander (n 89) 2; Paleker (n 122) 363.

120 Bargen (n 66) 55; Girsberger and Peter (n 76) 6.

121 Meisinger and Salicites (n 82) 18.

122 Sonnleitner (n 70) 55.

Access to Justice in Eastern Europe
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that there is no right without entitlement, that entitlement reasoning lies in the past, that the truth represented and filtered out in each case is absolute, and that decisions are made on individual issues and not in the overall view of the delegates. Finally, this means too that this requires conflict resolution characterised by winning and losing.[123] Consequently, how can conciliation and mediation take their place as amicable procedures in this environment without losing their DNA and their self-conception?

A brief look back, however, makes it clear that this is not a peculiarity. For instance, the origin of conciliation can be traced back to Roman law and the idea that the judge should lead the parties to an amicable settlement. After the French Revolution, this idea was carried forward in Western Europe, with amicable conciliation proceedings before so-called 'justices of the peace' preceding court proceedings.[124] However, most of them were abolished over time.[125]

The central element in the course of any conflict settlement is negotiation. As long as the decision-making power is not finally handed over to the neutral third party, there remains the possibility of an amicable settlement of the conflict by the parties themselves (e.g., in the form of a private-law settlement). The resolution of the conflict can therefore be limited to negotiation or combined with other forms of conflict management. An example of this is the settlement hearing.[126] It can be scheduled immediately before the initiation of or during civil proceedings[127] and thus becomes a judicial activity. Institutionalised court proceedings are the *ultima ratio*,[128] usually serving to resolve disputes, but not only that, as the process is also intended to contribute to the resolution of private conflicts. In any case, there is a danger that another legal dispute will soon follow due to not dealing with the actual cause of the conflict. Also, as a rule, the way to the court must not be blocked either.[129] Therefore, civil court proceedings should also offer the opportunity for dialogue and rational discourse.[130] Possibilities that can be summarised in the procedural principle of promoting an amicable solution arise,[131] for example, if a party submits an application to summon the opposing party to appear before the court for the purpose of an attempted settlement even before civil proceedings have been initiated. Above all, however, the opportunity for amicable intervention appears to be given during the oral proceedings, in that not only do the parties find their way back into a conversation, but also the judges can attempt an amicable settlement of the dispute at every stage of the proceedings and thus ensure the implementation of the purpose of the process, 'legal peace'.[132] However, since the court is often not the appropriate forum for resolving these conflicts, it may be incumbent on judges to refer the parties to other institutions that are more suitable in individual cases (conciliation and mediation).[133]

123 Ruppel (n 84) 5.

124 S Ferz, 'Mediation. Das Recht auf dem Weg zurück in die Gesellschaft?', in G Dohle (ed), *Bericht über den 23. Österreichischen Historikertag in Salzburg veranstaltet vom Verband Österreichischer Geschichtsvereine in der Zeit vom 24. bis 27. September 2002* (Verband Österreichischer Historiker und Geschichtsvereine 2003) 280.

125 Meisinger and Salicites (n 82) 11 f.

126 About case management power of the judge in ADR areas see 2.3.

127 K Röhl, *Rechtssoziologie : ein Lehrbuch* (Heymann 1987) 473; M Roth, *Zivilprozessrecht* (3 aufl, Manz 2020) 2.

128 Rechberger and Simotta (n 23) 11.

129 R Greger, H Unberath and F Steffek, *Recht der alternativen Konfliktlösung: Mediationsgesetz, VSBG: Kommentar (*2 aufl, CH Beck 2016) 382 f.

130 Kodek and Mayr (n 22) 34.

131 Ibid 73.

132 H Prütting, § 278 in W Krüger and T Rauscher (eds), *Münchener Kommentar zur Zivilprozessordnung*, Bd 1, §§ 1-354 (6 aufl, CH Beck 2020) 1-5.

133 Kodek and Mayr (n 22) 34.

The content of what has just been described becomes even more tangible when one realises that judges have to decide a dispute according to norms and values that are recognised by the larger social group to which the disputants and the judges themselves belong. The idea that judges decide a dispute according to 'justice' in an individual case is not only legal doctrine but also social reality, as the judge may also perform other functions on the side, such as conciliation.[134] However, for the conflict to be made accessible to a third person and decided upon as a judge, the dispute must first be transformed or legalised into a conflict of values. The reformulation of the conflict matter and thus the reduction to the legally relevant points, though, cause selective processing of reality. In this process stage, the more complex causes of the dispute and the underlying personal and social tensions are lost and make the original dispute appear as a meta-conflict.[135] In this way, the dispute becomes one about truth and justice, which is accompanied by the idea of an objectively correct and, thus, all-binding solution of an individual aspect. Ultimately, it follows that judges who know the law and have mastered the process of determining the material truth are granted the competence of a decision in the conflict.

Since, on the contrary, a conflict of interest cannot be decided by a third party, the delegation of decision-making power first requires the legal process of encoding. This has to do with the fact that conflicts of interest describe a dispute based on exchangeable objects of desire. However, in those cases where an exchange is not possible, there is no basis for decision-making. Where an exchange would be possible, there is no objective standard for the valuation of the service to be exchanged. This addresses the 'problem of the fair price'. In resolving conflicts of interest, the third parties can therefore only be helpful as mediators, but not as judges. In this respect, they can contribute to clarifying the self-interests of the parties through communication and point out possibilities of agreement that both parties prefer to the continuation of the conflict.[136]

The deeper the amicable settlement of disputes is to be implemented in the judicial procedure itself, the clearer must be the guidelines for the judicial activity and, likewise, the demarcation from it. This means that it can make sense to allow the trial judges to use cooperative, interest-oriented negotiation methods in principle. However, the same person cannot hold decision-making authority and also be able to act as a mediator in the same proceedings. Conversely, this means that in the event of a personnel separation of judicial conciliation hearing and decision-making competence, the use of mediation in judicial proceedings cannot be ruled out.[137]

The degree to which amicable dispute resolution can be intertwined within existing legal systems is particularly evident in the context of 'court-related' programmes.[138] Mediating and conciliatory elements exist in and on the margins of legal schemes.[139] Thus, the efforts to reach an amicable settlement between the disputing parties do not end with resorting to legal action.[140]

Court-related amicable dispute resolution comprises processes with institutional links to the judiciary[141] and exists in different models.[142] On the one hand, within the courts, judges could undertake conciliatory or mediating efforts themselves or refer the parties to an in-court amicable dispute resolution proceeding, including conciliation or mediation, led by

134 Röhl (n 131) 480 f.
135 Raiser (n 59) 318.
136 Röhl (n 131) 463, 481.
137 Greger, Unberath and Steffek (n 133) 384 f.
138 Alexander (n 89) 6.
139 Ibid 21.
140 Greger, Unberath and Steffek (n 133) 394.
141 Girsberger and Peter (n 76) 191; Fischer and Schneuwly (n 68) 240.
142 Alexander (n 89) 7.

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another judge; on the other hand, they could refer the parties to external organisations with mediation and conciliation services for out-of-court dispute resolution processes.[143] These procedures may either be mandatory or offered by the courts at their discretion.[144] Thus, court-related amicable conflict resolution procedures are alternatively or cumulatively approved, proposed, or even offered itself by judges.[145]

Judges must examine the possibilities of consensual conflict resolution of the parties and discuss these with them.[146] Following this approach, judges act as so-called 'case managers' or 'managerial judges'.[147] In this role, they assist the parties in finding the most appropriate procedure for their conflict.[148] To fulfil this task, the judge may encourage or help the parties to identify or narrow down their issues in dispute, identify strengths and weaknesses, and, as said before, refer them to the appropriate dispute resolution procedure,[149] like conciliation, mediation, or another amicable dispute resolution proceeding.

a) *Standard Conciliation as an in-court settlement procedure*

Conciliatory elements can particularly be found in the in-court settlement function of the trial judge in court proceedings.[150] This kind of settlement role is exercised by the same judge who will decide on the matter if the parties cannot reach an agreement. They adopt a 'facilitative role' and act within the courtroom in a legalistic and interventionist way. Private sessions are not permitted, as the rules of justice require that the parties must have the opportunity to hear and respond to all allegations made against them. The goal is to lead the parties to a resolution of their conflict. In doing so, judges, even when exercising their settlement role, are required to ensure that these solutions also comply with the relevant legal norms.[151] In some states, judges have a statutory obligation to attempt to reach a settlement before hearing a case. Such statutory obligations are, however, not found in common law jurisdictions. Judicial attempts to encourage parties to settle are a matter of case management practice rather than law in these jurisdictions.[152]

It may also be added that the structure of court conciliation is usually not procedurally regulated. Judges are granted wide discretion to act according to their perception, experience, knowledge, and skills. In most jurisdictions, court conciliation is not confidential as it is part of the preparatory hearing. But this means conversely that in some countries, it is permitted to conduct the preparatory hearing and the conciliation in a non-public manner if there is an inclination to settle.[153]

143 Alexander (n 89) 22f; Greger, Unberath and Steffek (n 133) 394; Council of Europe, *The early settlement of disputes and the role of judges: 1st European Conference of Judges* (24-25 November 2003, Strasbourg): proceedings (CoE 2005) 62.

144 Council of Europe (n 147) 62.

145 Girsberger and Peter (n 76) 191.

146 Greger, Unberath and Steffek (n 133) 394.

147 Eidenmüller and Wagner (n 78) 295.

148 In Germany Art 278a Code of Civil Procedure of the Federal Republic of Germany (ZPO) 'Zivilprozessordnung (ZPO)' [2005] Bundesgesetzblatt 1/72 <https://dejure.org/gesetze/ZPO> accessed 1 December 2022.

149 Astor and Chinkin (n 104) 242.

150 In Switzerland civil actions usually start with conciliation conferences, to encourage the parties to settle. There are even special conciliation courts for some cases (Art 274a Swiss Code of Obligations '22 Obligationenrecht' of 30 March 1911 <https://www.fedlex.admin.ch/de/cc/internal-law/22#22> accessed 1 December 2022); I Meier, 'Mediation and Conciliation in Switzerland' in N Alexander (ed), *Global Trends in Mediation* (2nd edn, Kluwer Law International 2006) 373.

151 N Alexander, W Gottwald and T Trenczek, 'Mediation in Germany: The Long and Winding' in N Alexander (ed), *Global Trends in Mediation* (2nd edn, Kluwer Law International 2006) 250.

152 Art 278 German Code of Civil Procedure (ZPO) (n 79); Alexander (n 89) 22.

153 Vėbraitė (n 26) 52.

Considering in regard to court conciliation, even if the settlement is not reached, the same judge continues to settle the dispute in question in the court hall, it should be stated that judges as conciliators may not be considered as impartial third parties in a conventional sense. This statement does not challenge the impartiality of that third assisting party as a judge. It is instead a question of whether it should be noted that the judges' and mediators' impartiality is to be treated as different. Judges are impartial regarding the parties to a dispute and their interests but cannot be impartial regarding the dispute's judicial outcome. Finally, they face a need to evaluate and decide the dispute. In the case of court mediation or in-court amicable conciliation process, assisting third parties do not face such a threat and may be considered impartial concerning both the process and the outcome of a mediation.

b) *Mediation*

In addition to the amicable-oriented function of judges in court proceedings in the context of judicial settlement, there are also court-related models of mediation. One is an in-court mediation procedure that takes place at the request of the parties as part of the court proceedings. A judge who acts as mediator will not be the judge in the main trial if the mediation does not lead to an agreement.[154] The case will be referred from the trial judge (case managerial judge) to another judge who serves as a mediator in the same court.[155] The courts thus integrate mediation into their system and support the proceedings in terms of personnel and funding. The mediators are trained, supervised, and approved by the court.[156] The parties do not bear any additional costs for such a procedure, as they are generally borne by the justice system and cannot choose the judicial mediator themselves.[157] During the process, the judicial mediators give the disputing parties the opportunity to look at their conflict from all sides and to identify the underlying and often unspoken interests that should lead to the resolution of the conflict. They are furthermore responsible for keeping the mediation process on track but must never interfere in the decision-making of the parties. The essence of mediation is to transfer decision-making power from the state to the parties.[158]

c) *Amicable conciliation process*

Some other civil procedures deploy an in-court conflict resolution proceeding that follows the principles of an amicable conciliation process led by a so-called conciliation judge, who can choose any method of conflict resolution (not only mediation).[159] Such proceedings come about by means of a referral by the trial judge and are based on the voluntariness of the parties. Such conciliation hearings at court bring movement into deadlocked conflicts by the conciliation judge gathering facts together with the parties and trying to shed light on the underlying interests to facilitate comprehensive conflict management tailored to the parties involved, thus finally solving the overall conflict. Judges take on this role of a conciliation judge in addition to their in-court settlement work in standard proceedings as judicial

154 Alexander (n 89) 22.

155 Alexander, Gottwald and Trenczek (n 155) 254.

156 E.g., in Slovenia, mediation is offered as such a court service; Council of Europe (n 147) 62.

157 Alexander (n 89) 22. In France, the judge must obtain the consent of the parties for a referral to mediation (Art 21 Law No 95-125 On the Organization of Courts and of Civil, Criminal and Administrative Procedure 'Loi relative à l'organisation des juridictions et à la procédure civile, pénale et administrative' of 8 February 1995 <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000350926> accessed 1 December 2022); D Macfarlane, 'Mediation in France' in N Alexander (ed), *Global Trends in Mediation* (2nd edn, Kluwer Law International 2006) 198.

158 L Otis and EH Reiter, 'Judicial Mediation in Quebec' in N Alexander (ed), *Global Trends in Mediation* (2nd edn, Kluwer Law International 2006) 115 f.

159 E.g., in Austria and Germany. The initiative in Germany is already legally enshrined (ZPO (n 79) Art 278), whereas in Austria, it is still assumed to be a project. In Austria, the judges work on a voluntary capacity; in Germany, they function as organs of the administration of justice. Furthermore, the conciliation judges in Germany can give legal advice and propose solutions. This is not provided for in Austria.

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bodies.[160] However, they do not act within the framework of the court administration, nor do they act like extrajudicial mediators.[161] In addition, it may be provided that the conciliation judges give legal advice and propose solutions, but they have no decision-making authority. This competence remains to the trial judge.

The conciliation judges have to be professionals in ADR in order to be allowed to act as conciliation judges. They must be trained mediators or complete appropriate training.[162] The main differences between conciliation hearings at court and out-of-court amicable dispute resolution procedures lie mainly in the motivation of the parties and the higher degree of the escalation of the conflict. In contrast to out-of-court procedures, the stronger presence of the law, the freedom to choose any method of conflict resolution, the narrower time frame (average duration is around half a day), and the cost-free nature are particularly characteristic of conciliation proceedings at court. Furthermore, it is not possible to freely choose the conciliation judge,[163] representation by a lawyer is not required, and there is a greater responsibility on the part of the conciliation judge to ensure that the overriding principles of law are upheld.[164] If the parties reach an agreement at the end, it must be clarified whether it should be written down. This depends solely on the parties' will. The conciliation judge can then notarise the final agreement within the framework of an in-court settlement. If the parties do not reach a result, the proceedings before the conciliation judge are terminated, and the trial judge continues the process.[165]

It is to be mentioned that this procedural model was not introduced to shift an out-of-court procedure to the judiciary. The aim is to enable a consensual solution still in court proceedings instead of a contentious one and to offer amicable conflict resolution methods even if this was missed in the pre-judicial period. Moreover, this procedure is useful if the referral back to out-of-court procedures would be unfeasible, such as for reasons of proportionality.[166]

From the in-court conflict resolution proceedings, judicial referrals to out-of-court mediative and conciliatory processes are to be distinguished. This model provides for mediation or conciliation referred by judges and external to courts.[167] The referral can be obligatory or may require the consent of the disputing parties.[168] These are usually free to select the mediator from a group of mediative certified professionals. Mediators are usually paid directly by the parties but may also be publicly funded in certain circumstances. This court-related model of mediation extends the arm of the court into the private sector.[169] Accordingly, the judiciary occupies an important, influential position as referrers of amicable dispute resolution procedures.[170] The advantage of out-of-court dispute procedures is that the professionals have more time and bring more experience with them. This is especially useful when dealing with difficult conflicts, such as profound divorce conflicts or corporate restructuring.[171]

160 Ferz (n 98) 104.
161 Greger, Unberath and Steffek (n 133) 408.
162 Ferz (n 98) 106; Fischer and Schneuwly (n 68) 241.
163 Alexander (n 89) 23; Greger, Unberath and Steffek (n 133) 408.
164 Greger, Unberath and Steffek (n 133) 408.
165 Ferz (n 98) 109.
166 Greger, Unberath and Steffek (n 133) 408.
167 Alexander (n 89) 23; Paleker (n 122) 367 f.
168 In France, the judge must obtain the consent of the parties for a referral to mediation (Law No 95-125 (n 161) Art 21); Macfarlane (n 161) 198.
169 This model is frequently found in common law jurisdictions. Alexander (n 89) 23.
170 Alexander (n 89) 23;
171 Greger, Unberath and Steffek (n 133) 399.

4 CONCLUSIONS

Different national practices show that amicable dispute resolution has become a current trend in the civil procedure policies of European countries. This has an integrative effect. The drift towards a consensual tenet in the civil procedure may be observed at the most general level. This is reflected in the idea of problem-solving as one of the aims of civil justice, the strengthening of the cooperative approach at the different stages of the trial, and the recognition of the settlement principle as a fundamental principle of modern civil procedure.

The latter can be seen at both international and national levels. The ELI/UNIDROIT Rules recognise the settlement principle and interpret it as a three-dimensional obligation of the civil procedure participators: a) obligation of the parties to cooperate with each other for reaching the settlement; b) obligation of the lawyers to inform parties about the opportunities of such a settlement; c) obligation of a court to facilitate the settlement during the trial. At the national level, this principle can be enshrined in the legislation directly (Belgium) or derived implicitly from the requirements of other principles (Austria) or particular rules of civil procedure (Lithuania).

At the same time, such doctrinal provisions seem to run the risk of remaining in books without practical tools for their implementation. Such tools should be present within the framework of effective case management in national civil procedures. Case management should give the judges a wide range of powers in different areas, inter alia, to ensure amicable dispute resolution for parties. It may cover various court activities – from the right to propose amicable dispute resolution to the right to conduct special court-related amicable dispute resolution procedures on their own.

The theoretical model of the court-related amicable dispute resolution procedures can differ from state to state, but in the most general sense, it covers in-court and out-of-court schemes. For this purpose, national legislators usually use the two most popular amicable dispute resolution procedures with the participation of the third neutral person – conciliation and mediation. The difference between them is reflected in the powers of the third neutral person, the structure of the procedure, its principles, the outcome orientation, and the main style of conduct – consensus v. cooperation. On the one hand, integration of these procedures into the court proceedings allows them to retain their main features. On the other hand, the need to ensure the effectiveness of civil justice stimulates the legislator and the practice of searching for new forms and policy decisions in the justice sector. This is how modern forms of court-related amicable dispute resolution proceedings appear.

The different designs and practices observed in the different states can be summarised as in-court conciliation, in-court and court-connected mediation, and amicable conciliation processes. However, the models shown are intended to represent an attempt to structure or simplify the classification of the different amicable court-related procedures applied in civil cases. In global terms, answers are certainly not that simple. All over the world, 'court-connected' programs and their mediation and conciliation elements differ. For this reason, it is essential to look into individual national regulations, analyse the empirical data, and assess the criteria for evaluating the most appropriate form of dispute resolution in a particular case.

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