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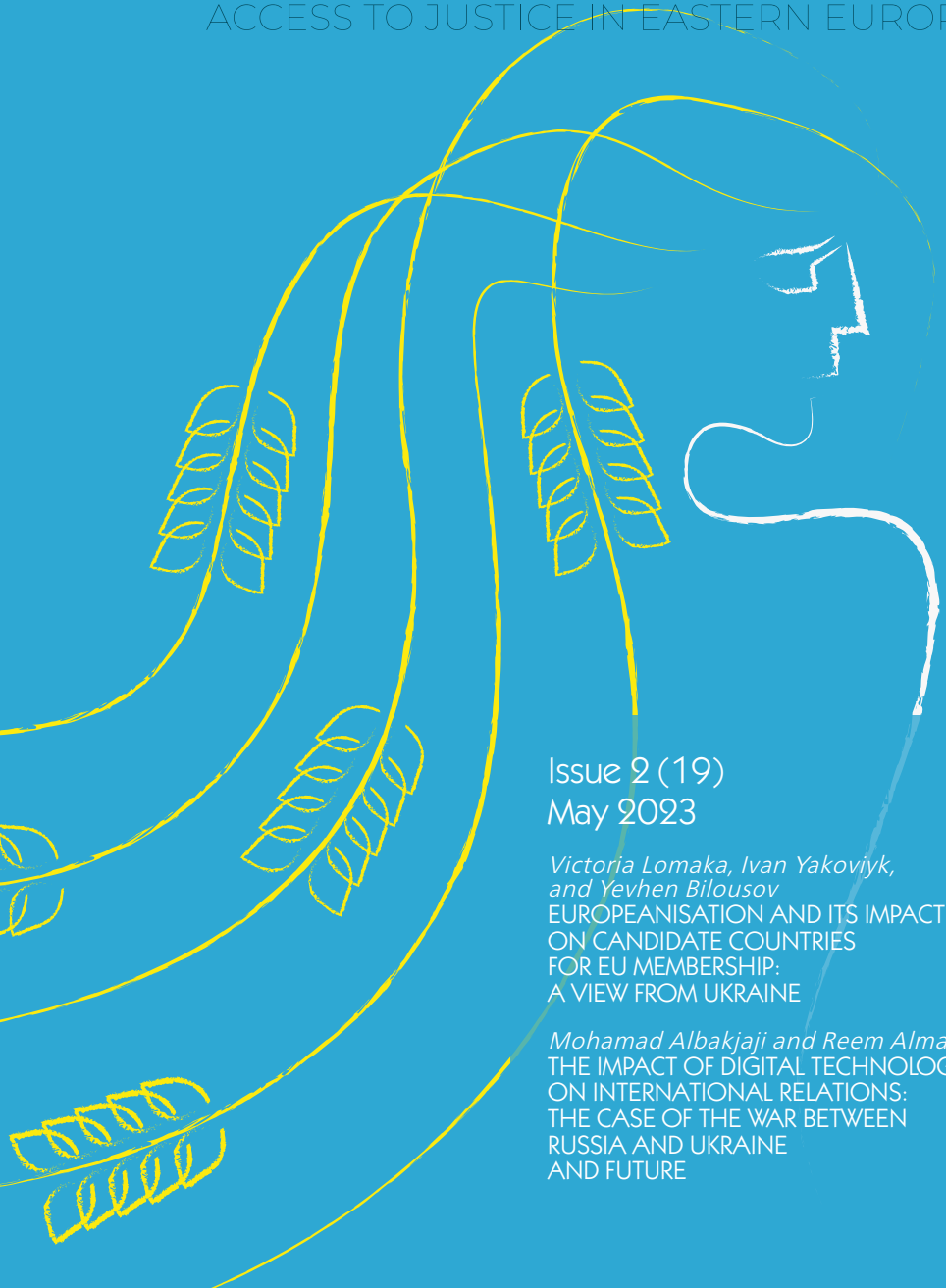

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ACCESS TO JUSTICE IN EASTERN EUROPE

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

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Editor-in-Chief's Note

ABOUT THE ISSUE 2 OF 2023

In this edition of our journal, we are delighted to showcase a compelling collection of articles that delve into diverse facets of the ongoing war in Ukraine. These thought-provoking contributions shed light on critical issues and offer valuable insights for policymakers, legal practitioners, and researchers alike. Allow me to provide a brief overview of some of the notable articles featured in this issue.

The article 'Prospects for Regulating the Right to Posthumous Reproduction in the Context of War in Ukraine: Foreign Experience and Formation of Legal Support for the Realisation of Reproductive Rights of Military Personnel', written by Nataliia Kvit, explores the potential regulation of posthumous reproduction rights in the context of the war in Ukraine. The author delves into foreign experiences and discusses the legal measures necessary to ensure the reproductive rights of military personnel. The article provides valuable insights for policymakers and legal practitioners to address the challenges and prospects of this issue.

In 'Features of Ensuring the Right to Liberty and Personal Integrity in Criminal Proceedings Under the Conditions of Martial Law: Precedent Practice of the European Court of Human Rights and Ukrainian Realities', the authors examine the unique aspects of protecting the right to liberty and personal integrity in criminal proceedings during times of martial law. The article offers valuable insights for improving human rights protection in Ukraine's legal framework through an analysis of the European Court of Human Rights' precedent and practices and a comparison with the Ukrainian legal system.

The article 'Protection of Property Rights During the Russian-Ukrainian War: Theoretical and Legal Analysis' presents a comprehensive theoretical and legal analysis of property rights protection during the Russian-Ukrainian war. The authors illuminate the complexities and legal frameworks surrounding property rights in the context of armed conflict, providing a thorough understanding of the challenges and potential solutions for safeguarding property rights during times of war.

The article titled 'Analysis of Russia's Military Aggression Against the Azerbaijan Democratic Republic from the International Legal Perspective' by Saftar Rahimli focuses on analysing Russia's military aggression against the Azerbaijan Democratic Republic from an international legal standpoint. The author assesses this through the lens of international legal principles and norms by examining the historical context and events surrounding Russia's aggression and relevant international law frameworks and case studies. The article provides insights into the legal implications of Russia's actions against the ADR and contributes to the understanding of international law in relation to aggression and territorial disputes.

We are proud to announce that our journal has achieved an incredible milestone by securing a place in Quartile 2 of Scimago, a prestigious recognition in the academic community. This accomplishment reflects the exceptional quality of the research published in our journal and

the dedication and expertise of our esteemed contributors. We are committed to promoting excellence in scholarship and advancing knowledge in our field.

I would like to express my sincere gratitude to the entire team of our esteemed journal. Your dedication, hard work, and commitment to excellence have been instrumental in our success. Each member has played a vital role in ensuring the smooth operation and continuous improvement of our publication. From the editors and reviewers to the production team and administrative staff, your tireless efforts have been invaluable in maintaining the high standards of our journal. I deeply appreciate your passion, expertise, and unwavering support. Together, we are making a significant impact in the academic community and advancing knowledge in our field. Thank you for your outstanding contributions and for being an integral part of our journal's success.

We are excited to announce our collaboration with Scholastica, a renowned platform for academic publishing and peer review. This partnership aims to further enhance the quality and rigour of the review process for our journal. By leveraging Scholastica's cutting-edge technology and robust peer review tools, we are confident in providing an even higher level of quality assurance and ensuring a thorough evaluation of all submitted manuscripts. This collaboration reaffirms our commitment to excellence and our dedication to fostering a rigorous and constructive scholarly review process.

We look forward to the continued growth and success of our journal.

Slava Ukraini!

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

RESEARCH ARTICLE

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Research Article

THE IMPACT OF DIGITAL TECHNOLOGY ON INTERNATIONAL RELATIONS: THE CASE OF THE WAR BETWEEN RUSSIA AND UKRAINE

Mohamad Albakjaji and Reem Almarzoqi

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Summary: 1. Introduction. – 2. New Technologies as a spatial turn and Paradigms of International Relations. – 3. Technology and a New International Distribution of Power. – 4. Role of New Technologies as a driving force in the social construction of war and peace. – 5. The Aspects of New Technologies Involvement in International Relations: The Russian invasion on Ukrainian territories as an example. – *5.1. The absence of a binding legal framework to regulate the activities of the cyber domain. – 5.2. The Russian-Ukrainian war and the emergence of a new type of sanctions at the international level. – 5.3 Conflict and Technology: The emergence of Digital Currency as a challenge to international relations.* – 6. Legal gaps in legal frameworks when addressing the impact of digital technologies in international relations – 7. Conclusion.

Keywords: New Technology, International Relations, War, Russia, Ukraine.

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ABSTRACT

Background: *The concept of a strong state is no longer measured by its military and economic strength, but also by the level of its ability to both defend against cyber-attacks and control cyberspace. During the Russian invasion of Ukraine, it became clear that modern technology had an active role on the ground. This research focuses on the role of modern technology in conflicts and as a key factor in relations between states. It has been proven that technology has led to the creation of new concepts in international relations - the concept of technological sanctions, electronic warfare, and so on. This paper will focus deeply on studying the impact of technology on international relations, and its role in war, peace and security. The researcher uses the Russian-Ukrainian war to support these ideas.*

Methods: *In this paper, the researcher used an analytical and structural method to provide an in-depth perspective on the impact of new technology on international relations. Moreover, a case study on the war between Russia and Ukraine were deployed to explain how new technology is heavily involved in international relations. To support the ideas discussed in this paper, the author uses legal texts, international conventions, and official reports issued from national and international institutions.*

Result and Conclusion: *In this paper, a comprehensive analysis of how IT has affected international relations has been presented. The researcher found that digital technology is considered a new international distribution of power and driving force in the social construction of war and peace. The paper also found that the war between Russia and Ukraine has proven that new technology is widely used in the conflict. The researcher also found that there is a binding legal framework to regulate the activities of the cyber domain. Moreover, new types of sanctions have been emerging internationally. During the conflict, new means of funding and new types of currency have been also been employed, which is considered a new challenge to international relations. The main finding of the paper is that new technology and cyberspace activities cannot be governed locally. The international community should involve civil actors in the governing and regulatory process of cyberspace.*

1 INTRODUCTION

In the recent past, information technology has had a profound impact on nearly every aspect of society, and international relations are no exception. Information technology has revolutionised the way countries communicate with each other, facilitating the spread of ideas and information.[1] It has also aided the flow of money, goods and people across borders.[2] As a result, international relations are increasingly shaped by the use of information technologies. Information technology has always had a major influence on global politics, economics, security, and culture. It has constantly shaped the way the global system works, the people involved, and how they interact with each other.[3] Its impact on international relations is no exception. Today, it has become a central part of diplomacy and the way countries interact with each other.[4] Technology and International Relations emphasise

1 Blayne Haggart, Kathryn Henne and Natasha Tusikov (eds), *Information, Technology and Control in a Changing World: Understanding Power Structures in the 21st Century* (Palgrave Macmillan 2019) doi: 10.1007/978-3-030-14540-8.

2 Mohamad Albakjaji, 'Cyberspace: The Challenge of Implementing a Global Legal Framework the Impacts of Time & Space Factors' (2020) 23 (4) Journal of Legal, Ethical and Regulatory 1.

3 Stefan Fritsch, 'Technological ambivalence and international relations' (E-International Relations, 24 February 2016) <https://www.e-ir.info/2016/02/24/technological-ambivalence-and-international-relations> accessed 14 February 2023.

4 Daniel R McCarthy (ed), *Technology and World Politics: An Introduction* (Routledge 2017) doi: 10.4324/9781317353836.

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the importance of leadership styles, domestic political agendas, and the relative weight of technologically driven countries in global affairs. The impact of these revolutions has been especially pronounced in the field of international relations.[5] Information technology has allowed countries to communicate with each other more easily than ever before.[6] This focus on technology highlights the ways in which different countries use information technology to shape the global system in their favour.

The Russian-Ukrainian war has proven that technology has greatly affected international relations, as technology has become an important factor in shaping them. For example, during the war, technology was used by Europe and the United States to impose new sanctions on Russia after proving that traditional and economic sanctions did not work.

It has been noted that the war proved that controlling cyberspace had a major role in making progress on the ground. It also became clear the role of the internet and social media in encouraging support for Ukraine. The neutrality that social media platforms used as an argument to defend their activities was abandoned. This paper will explore the ways in which information technology has affected international relations and explore how the traditional elements that governed international relations have changed.

The study aims to answer the following question: How did technology affect international relations, especially during periods of conflict, and especially during the Russian-Ukrainian war?

To answer this question, the researcher divided the work into three sections. The first will discuss new technologies as a spatial turn and paradigms of international relations. The second section will study the technology and the new international distribution of power. The third will cover the role of new technologies as a driving force in the social construction of war and peace. The case on the war between Russia and Ukraine will be explored in the fourth section where the aspects of new technologies' involvement in international relations will be explored.

2 NEW TECHNOLOGIES AS A SPATIAL TURN AND PARADIGMS OF INTERNATIONAL RELATIONS

In a rapidly globalising and digital world, the impact of information technology on international relations is more significant than ever before. The way in which nations communicate and interact with one another has been completely transformed by new technologies such as the internet, smartphones, AI and social media. Since the end of the Cold War, economic globalisation and the explosive growth of information communications technology (ICT) have dominated the political and corporate agenda, helping to define a new paradigm in which cooperation and competition must exist side by side among the most pragmatic nations and cultures.[7]

Another new area for security and diplomacy is cyber space, where today's rapidly advancing technologies enable a single person or small group to pose a serious danger to full-scale

5 Lucia Surdu (Pantea), 'Uncertainty: Strategic Thinking and International Relations in 21st Century' (2019) 11 Analele Universităţii Din Oradea, Seria Relaţii Internationale Şi Studii Europene 271.

6 John Krige and Kai-Henrik Barth, 'Introduction: Science, Technology, and International Affairs' (2006) 21 (1) Osiris, Global power knowledge: Science and Technology in International Affairs 1, doi: 10.1086/507133.

7 Amitav Acharya, 'Global International Relations (IR) and Regional Worlds A New Agenda for International Studies' (2014) 58 (4) International Studies Quarterly 647, doi: 10.1111/isqu.12171.

state apparatus.[8] The transition from the previously highly organized and regulated global environment to the new digital world is a paradigm shift.[9]

In the digital age the use of cyber-attacks or other forms of information warfare are increasingly possible. It is important to consider the implications of this technology on the practice of international relations when formulating theories, as it has the potential to fundamentally alter the way that states interact.

Recently, the term of spatial turn has emerged, which reflects the changing way in which the world is being experienced and focuses on space as a dynamic element in international relations. According to Baylis, technological advancement is critical in the establishment of a new guideline of international relations that is defined by networking, interconnection, and mutual interaction.[10] These shifts may be thought of as a series of "turns" that express the alteration of social life, science and research systems, and, most importantly, the current geopolitical arrangements from regional to global levels.[11]

Technological and spatial impacts on international relations are inseparably linked, as changes in one often reflect and amplify those in the other. For instance, the development of telecommunications and satellite technology has had a profound impact by facilitating global cooperation and the sharing of information. Such advances have enabled the establishment of a more fluid and interconnected world, which has led to new forms of conflict as well as cooperation.[12]

As a result, a new mode of specialisation became the deciding element in the creation of geopolitical tactics based on changeable operations at several scales ranging from the regional to the worldwide.[13]

In the context of international relations, technological and spatial change has been described as a "spatial turn." This refers to the growing emphasis on space in international relations scholarship, which reflects the changing way in which the world is being experienced.[14]

3 TECHNOLOGY AND A NEW INTERNATIONAL DISTRIBUTION OF POWER

The multifaceted effects of technology have an effect on international relations, their goals, and operational horizons.[15] Technology advancement encourages a shift in the organisation

8 Mohamad Albakjaji, and Jackson Adams 'Cyberspace: A New Threat to the Sovereignty of the State' (2016) 4 (6) Management Studies 256, doi: 10.17265/2328-2185/2016.06.003.

9 John Baylis, *The Globalization of World Politics: An Introduction to International Relations* (OUP 2020).

10 ibid.

11 Ken Booth and Toni Erskine (eds), *International Relations Theory Today* (2nd ed, Polity 2016). See also, Scott Burchill and others, *Theories of International Relations* (R Devetak and J True eds, 6th edn, Bloomsbury Publishing 2022).

12 Kalevi J Holsti, 'The Problem of Change in International Relations Theory' in *Kalevi J Holsti, Kalevi Holsti: A Pioneer in International Relations Theory, Foreign Policy Analysis, History of International Order, and Security Studies* (Springer 2016) 37.

13 Kate O'Neill, The Environment and International Relations (2nd edn, CUP 2017) doi: 10.1017/9781107448087. Due to digitally-mediated communication, there is a privacy conundrum when it comes to social communication and data transfer. Societies and political movements are the new way to participate in social and political life. In both situations, the successful mobilization of society depends on the propagation and utilization of information and the resulting communication technologies. Georg Sorensen, Jorgen Moller and Robert Jackson, I*ntroduction to International Relations: Theories and Approaches* (8th edn, OUP 2022).

14 Sorensen (n 15).

15 Mohamad Albakjaji, and Jackson Adams 'Cyberspace: A Vouch for Alternative Legal Mechanisms' (2016) 1 (1) Journal of Business and Cyber Security 10.

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of the international environment, changes the relationships between the major players in international relations, and increases the scope, acuity, and efficacy of transnational operations.[16] The impact of technology on modern international relations can be seen in many facets of social life and in the methodologies that govern them, such as the systems of institutionalisation and management of the global environment, connectivity, global collaboration, and interstate conflicts. Technology has shaped international relations through the ways in which it has influenced the way international institutions are set up, how information is shared and processed, as well as the methods of conflict resolution.

The role of technology in the distribution of power is also significant, as it has made possible the rise of new powers and lessened the influence of traditional players. For example, technology has helped to increase the economic might of China and other emerging economies, while reducing the relative military might of traditional powers. The diffusion of technology has also facilitated the spread of democracy and human rights as well as other forms of social progress.[17] Higher technological ability may be demonstrated in the methodical gathering, articulation, implementation, and adaption of knowledge, techniques, procedures, and processes, which is particularly indicative of the access to and use of power within the international system.

Technology is inextricably linked to power allocation amongst state and non-state actors in the international system as well as its ability and capabilities.[18] Although technology has had a significant impact on the way international relations are conducted, there are still many unanswered questions about the long-term effects of this new environment. For example, it is not yet clear how the diffusion of technology will affect interstate conflicts, or what will be the consequences of global networked societies for individual privacy and security.

Cyber-attacks are creating a challenge to international relations. The challenge of identifying the source of attacks, and the responsibility of the state for the attacks conducted by proxies, and the inability of states to immediately respond to such attacks are the main challenges facing the international community. Currently, the issues of cyberspace security, the behaviour of states in the cyberspace, and the respect of the international norms are at the top of the international community agenda. Nowadays, maintaining international peace is closely related to the way in which cyberspace activities are internationally governed.[19]

The way of dealing with cyber conflicts is still in the early stages. There are only some early international agreements that include some norms, which are on a voluntary base. The international rules governing traditional conflicts are well defined, such as the Geneva Convention, which aims to protect civilians during conflicts. It has been established that the rules that govern interstate cyber-attacks are still not well defined. Unlike traditional conflicts where the war takes place between two states while other nations silently watch, cyber-attacks may have an impact internationally.

In terms of institutionalisation, there are a number of changes that have been brought about by technology, such as the increasing use of social media and the spread of online

16 Baylis (n 11). See also, Zlatan Meskic, Mohamad Albakjaji, Enis Omerovic and Hussein Alhussein, 'Transnational Consumer Protection in E-Commerce: Lessons Learned From the European Union and the United States' (2022) 13 (1) International Journal of Service Science, Management, Engineering, and Technology 1.

17 O'neill (n 15).

18 Booth and Erskine (n 13).

19 'Ukraine Conflict: Digital and Cyber Aspects' (*Digital Watch, 2023*) <https://dig.watch/trends/ukraine-conflict-digital-and-cyber-aspects> accessed 14 February 2023.

communities.[20] The way in which these new technologies are being used is indicative of a shift in the way international relations are conducted, from a top-down to a more participatory model. In addition, the way in which information is shared and processed has led to the development of new methods of conflict resolution, such as the use of cyber-attacks and online petitions. The increased connectivity of people throughout the world has also led to the emergence of new transnational organisations, such as multinational corporations and transnational criminal organisations.

Overall, technology and the distribution of power have had a significant impact on the way international relations are conducted. It has shaped the way international institutions are set up, how information is shared and processed, as well as methods of conflict resolution. Going forward, it is important to continue to study the long-term effects of this new environment on the way international relations are conducted.[21] Additionally, it will be necessary to explore new ways of implementing technology in order to ensure that it does not have negative impacts on the way international relations are conducted. Failure to do so could have significant consequences for the global system and distribution of power.

4 THE ROLE OF NEW TECHNOLOGIES AS A DRIVING FORCE IN THE SOCIAL CONSTRUCTION OF WAR AND PEACE

Technology has been a driving force in the social construction of war and peace. It has played a critical role in facilitating communication, transportation and trade, as well as influencing our ways of thinking. In the current era, new technologies are playing a significant role in facilitating the transfer of information and, as such, have affected the social construction of war and peace. One example is the use of drones.[22] Drones have been used extensively in conflicts around the world, from the War on Terror in Afghanistan to the Syrian Civil War. They have been used to carry out surveillance and airstrikes, making them a valuable tool in the fight against terrorism and insurgency. However, they have also been used in intra-state conflicts, notably in Sri Lanka. There, drones were used to carry out airstrikes in support of the Sri Lankan military, contributing to the escalation of the conflict. Drones have also been used in peacekeeping operations, most notably in the Democratic Republic of Congo, where drones carried out surveillance and airstrikes in support of the United Nations peacekeeping mission. In both cases, drones played a role in facilitating the transfer of information and, as a result, have had an impact on the social construction of war and peace.

Another example of how technology has influenced the social construction of war and peace is the use of social media. Social media has played a significant role in facilitating the spread of information and, as such, has had influence in this regard. One example is the use of Twitter in the Syrian Civil War. Twitter has been used to spread information about events in Syria, helping to shape public opinion about the conflict. In addition, it has been used to help organise protests and rallies, as well as to provide medical assistance to those affected by the conflict. Social media has also been used to spread propaganda from both sides of the conflict, helping to create an environment of misinformation.[23] In addition, the way platforms operate has changed during the conflicts. In this regard, Feldstein stated that:

20 Mohamad Albakjaji, Jackson Adams, Hala Almahmoud and Amer Sharafaldean Al Shishany, 'The Legal Dilemma in Governing the Privacy Right of E-Commerce Users: Evidence from the USA Context' (2020) 11 (4) International Journal of Service Science, Management, Engineering, and Technology 166.

21 Acharya (n 9).

22 Baylis (n 11).

23 Saul Bernard Cohen, Geopolitics: *The Geography of International Relations* (3rd edn, Rowman & Littlefield 2014).

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The decision to finally drop the pretence of neutrality is ushering tech companies into a disorienting new era. No longer are they simply operating as neutral providers of technology. They are now making explicit value judgments regarding how governments use their platforms in wartime and what types of speech violate the bounds of hate, violence, and propaganda. These actions contradict prior content policies and indicate that companies are hastily rewriting their rulebooks—often in an ad hoc manner—in response to recent events.[24]

For many years, social media has been criticised for its role in spreading disinformation and propaganda and it is clear that it has also played a significant role in shaping public opinion about conflicts. As a result, social media has played a role in contributing to the social construction of war and peace.

> *The concept of neutrality has changed. Before the Russia-Ukraine war, major internet platforms continued protecting themselves against governmental effort to hold them responsible for the content displayed on users' accounts. They keep arguing that they are not responsible for the content no matter how vile, and it is not possible to censor these platforms. However, these companies could not continue making such arguments.*[25] *With the outbreak of the war in Ukraine, the concept of neutrality no longer governs the work of these companies. YouTube announced that it had blocked more than 1000 Russian channels, and 15,000 videos. Facebook has followed suit and blocked access to official Russian outlets RT and Sputnik in the European Union. In addition, the ability of the Russian media to distribute information through Facebook has been banned. Big Technology companies such as Apple and Netflix, which suspended its service in Russia, have taken the same actions.*[26]

5 THE ASPECTS OF NEW TECHNOLOGIES INVOLVEMENT IN INTERNATIONAL RELATIONS: THE RUSSIAN INVASION ON UKRAINIAN TERRITORIES AS AN EXAMPLE

The Russian-Ukrainian war was not an ordinary or traditional war. Russia can no longer possess the keys to control the media because most Ukrainians have modern communication devices such as smart phones, which can connect to social media. So, all the outcomes of the invasion can be filmed directly without any delay and streamed internationally.

In this conflict, which is almost an international one, the question here is not what is new in this war, but rather the question is how to understand the dynamics of the modern media used in this conflict, which has become an additional force supporting the air, land and sea

24 Steven Feldstein, '4 Reasons Why Putin's War Has Changed Big Tech Forever: The Conflict Has Permanently Upended How the Major Platforms Do Business' (*Foreign Policy (FP)*, 29 March 2022) Argument. <https://foreignpolicy.com/2022/03/29/ukraine-war-russia-putin-big-tech-social-media-internet-platforms> accessed 14 February 2023.

25 ibid. The internet has led to the inclusion of new topics on diplomatic agendas, such as cyber security, data protection, internet governance, and artificial intelligence (AI) governance. This is significant as it shows that the internet is not just a tool that can be used to promote cooperation and understanding between different countries, but it can also be used to address some of the most pressing issues facing the world today. One risk is that internet-based diplomacy can be used to bypass traditional diplomatic channels. This can lead to misunderstandings and tension. Another risk is that internet-based diplomacy can be used to disseminate false information. For example, during the Ukraine crisis, Russian media used social media to spread disinformation about the situation in the country. See: James Curran, Natalie Fenton and Des Freedman, *Misunderstanding the Internet* (2nd edn, Rutledge 2016).

26 Feldstein (n 26).

forces.[27] The new aspect of this war is the harmony between traditional and modern media. As the broadcast of many pictures and videos via television - which are filmed by means of advanced technology devices such as mobile phones and others - are able to transfer the facts to the whole world. On the other hand, Russia has no ability to control it.[28]

Nowadays, the reports prepared by journalists are not the only means of communication and source of information. Internet users can also upload content and display it online through social media and share it with millions of users around the world.[29]

As mentioned earlier, in the era of cyber war, new technology is considered a supportive force for conventional arms. For example, during the war in Ukraine, Russia identified individual Ukrainian soldiers, designed fake contents, and sent it to the soldiers to persuade them to surrender. They even circulated an ai generated deep fake video of the Ukrainian leader asking Ukrainians to surrender. So, the term of electronic destruction has emerged, which has a greater impact on the infrastructure than traditional weapons of destruction. Therefore, blowing up a hospital or infrastructure is the same as hacking, and invading its network. Moreover, satellites were able to provide many photos of the Russian military forces invading Ukraine towards Kyiv. Digital technology plays a decisive role in the Russian-Ukrainian conflict, as providing a party with digital services, or withholding them from them, has a significant impact on the ground. When the war began in Ukraine, the battles were on various levels: on the ground, in the air, in the sea, in space, and online. A day before the outbreak of the war, Ukrainian government institutions and banks were the target of distributed denial of service (DDoS) attacks. The US and its allies have attributed these attacks to Russia and imposed sanctions on individuals supporting these attacks.[30]

After the increase in electronic attacks, many countries have become aware of the need for cyber armament to confront them. This urgent need has pushed states to maintain their cyber capabilities to protect themselves against any malicious activities that take place within cyberspace, which is considered the fifth military domain (after land, sea, air, and space). The issue of attributing cyber-attacks to a specific country is challenging as well, where cyber proxies, which have an important role in increasing the risk of escalation, usually conduct these attacks.

On other hand, the American and Russian nuclear arsenal still contains the potential threat of turning any conflict between these powers into a new world war. For this reason, the USA refused to impose a no-fly zone over Ukraine. Instead of imposing such a zone, NATO provides Ukraine with new types of weapons such as missile systems and drones. Although Russia invaded Ukraine, it has been unable to penetrate into vast areas since the outbreak of the war. The use of new technology in the war, such as the use of drones, has proven the Ukraine's proficiency in the war.[31]

Financial technology (fintech) has its impact on the Russian economy as well. The Russian economy has been severely affected, as represented by the shutdown of Russian banks in Europe and America, as well being deprived of access to the SWIFT payment system, which

27 Katharina Niemeyer and others, 'The Russian Invasion Shows How Digital Technologies Have Become Involved in All Aspects of War' (*The Conversation*, 28 March 2022) <https://theconversation.com/the-russian-invasion-shows-how-digital-technologies-have-become-involved-in-all-aspects-of-war-179918> accessed 14 February 2023.

28 ibid.

29 ibid.

30 Ukraine Conflict (n 21).

31 Kelsey D Atherton, 'How Technology, Both Old and New, Has Shaped the War in Ukraine So Far' (*Popular Science*, 7 April 2022) <https://www.popsci.com/technology/technology-russia-ukraine-war> accessed 14 February 2023.

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eventually led to the closure of the stock market in the country. In the same vein, Russian investors were affected. For example, Russian importers could no longer pay the price of goods imported from America.[32]

5.1 The absence of a binding legal framework to regulate the activities of the cyber domain

The Russian-Ukrainian conflict revealed that activities that take place in cyber space are not yet governed by a legal framework at the international level. This made countries unbound by any legal scope and as a result, the sovereignty of other countries can be easily breached when conducting activities in cyberspace, which is considered cross border activity. The UN adopted some cyber agreements which established an international framework, but on a voluntary base.

Both countries, Russia and Ukraine signed these agreements. This framework includes some norms, which confirm that cyberspace should be governed by international law, and international humanitarian law should be applied during armed force.

In addition, participating states of the Organization for Security and Co-operation in Europe (OSCE) – including Russia, Ukraine, Belarus, the USA, and other European countries – have agreed on a set of voluntary confidence-building measures (CBMs). CBMs include consultations to reduce the risks of misperception, escalation, conflict, and use the OSCE as a platform for dialogue.[33]

Although, there are international rules, such rules are non-binding and of a voluntary nature. They do not provide for penalties in the event that countries violate such rules, but rather they have become a code of conduct.

5.2 The Russian-Ukrainian war and the emergence of a new type of sanctions at the international LEVEl

Technology has had a great impact on international relations. Previously, economic and military sanctions were the procedure taken by the international community against a country when it violated its international obligations. Technological development has led to the emergence of new types of sanctions internationally.

In addition to the economic sanctions imposed by the US, EU, etc., which affected Russian imports, the US and its allies announced a set of digital sanctions. Cloud computing centres, high-performance computers, aviation, defence technologies, and oil-refining machinery all require regular replacements and upgrades of microprocessors, controllers, sensors, and mechanical parts. Blocking such technology may lead to paralysis of these services, and will eventually have a significant impact on weakening military access.

32 Emily Gersema, 'Technology, Nuclear Power are Driving Issues in the Russia-Ukraine War: USC Experts Discuss How Tech-Driven Globalization and Energy are Front and Center in Russia's War on Ukraine' (*USC News*, 4 March 2022) <https://news.usc.edu/197476/technology-nuclear-power-are-driving-issues-in-the-russia-ukraine-war> accessed 14 February 2023.

33 Ukraine Conflict (n 21).

5.3 Conflict and Technology: The emergence of Digital Currency as a challenge to international relations

Crypto currencies have become a decisive factor in the conflict. Both countries have increasingly used these currencies to overcome the financial and economic crises in the region.

In Ukraine, significant progress has occurred. A new regulation has been adopted on digital assets. In addition, Ukraine has recognised bitcoin and other cryptocurrencies have played a significant supporting role during the conflict.

Previously, during periods of conflict, traditional methods of financial transfers were used to support the invaded country, such as bank transfers, support for its exports, and other methods. Nowadays, new supportive procedures have been adopted internationally. An example is GoFundMe, a crowdsourced fundraising app where donors can send cryptocurrencies to help Ukraine. Moreover, new technologies have been leveraged, such as Solana, Polka Dot, and NFTs in order to facilitate donation. More than 33 million dollars were collected during the first week.

Ukrainian refugees in neighbouring countries who have traditional bank accounts were not able to access their assets whereas people who have digital accounts and assets were able to access their assets internationally. This gave cryptocurrencies transboundary international value during the crisis.[34]

Russia, which was opposed to cryptocurrencies, has started to use them and has adopted a new draft on a central bank digital currency (CBDC) and new regulations for other digital currencies, despite the opposition of the Central Bank.[35]

Although cryptocurrencies have a good impact in terms of supporting the invaded state, they create a challenge to international relations because governments currently have only a limited ability to control money transfers as they will be sent from 'nowhere' to 'nowhere'. So, most international agreements on the control of the money transfer no longer work. A good example of this is that Russia used cryptocurrencies to support its commercial activities internationally. In addition, some other countries which are under strict financial sanctions, such as Iran, have used them as well, despite the strict financial embargo. In a 'war economy', cryptocurrencies can be used to circumvent strict sanctions on the banking system, crowdfunding, and other financial activities.[36]

6 LEGAL GAPS IN LEGAL FRAMEWORKS WHEN ADDRESSING THE IMPACT OF DIGITAL TECHNOLOGIES IN INTERNATIONAL RELATIONS

Digital technologies have quickly advanced and are now widely used, posing significant challenges for international law and diplomacy. There are a number of legal gaps in current legal systems that must be filled in the case of the conflict between Russia and Ukraine. The resolution of the conflict and the capacity of international organisations to adequately address the problems presented by digital technology can both be significantly impacted by these disparities.

The absence of precise and widely recognized guidelines on the use of digital technology

34 ibid.
35 ibid.
36 ibid.

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in conflict is one of the major legal gaps in this field. Although the use of cyberattacks in conflicts throughout the world is on the rise, there is currently no comprehensive international legal framework that governs this practice. As a result, it is difficult for nations to protect themselves against cyberattacks and for international organisations to properly respond to instances of cyberwarfare. This leads to confusion and misunderstanding about what is permitted and what is forbidden.

The rise of cyber-crime presents a challenge for the application of international laws and its principles. According to the United Nation Charter's Article 2 clause 4, countries are forbidden from using cyber strength against other countries, granting each state sovereign control over their own territory and digital infrastructure. However, states are still responsible for preventing the use of their digital infrastructure for illegal activities that impact other states.

International courts have granted states the right to respond to cyber-attacks if they pose a serious threat to their essential interests. This right to self-defence is based on Article 51 of the United Nation Charter and customary international law, allowing a country to use strength to guard against armed attacks, including cyber-attacks causing death, injury, or significant damage.

There are several areas of ambiguity in international law regarding cyber-crimes, particularly in the ICJ's Congo ruling and Wall consultative view, which seem to limit the right of self-defence to instances of cyber-attacks that meet the criteria of "armed attacks" done by countries leading to significant harm.

Protocol I defines an "attack" as an "act of violence." There is a general understanding that this definition can encompass cyber operations that result in physical harm or injury. However, it is unclear whether the protection afforded under this definition applies to cyber-attacks that cause significant economic damage to civilians and civilian targets, even if no physical damage occurs.

Global law is uncertain about the identity of cyber attackers, and it is often assumed that countermeasures can only be taken by victim states if the attacker is another state. However, this assumption may not hold true if the attacker is a non-state actor, such as an individual or a transnational terrorist group. In such cases, victim states may extend their self-defence measures to include these non-state actors. However, proving the connection between the non-state actor and the state responsible for the attack is difficult, as attackers can conceal their identity and locality by using what is termed the "Dark web".[37]

Once more the legislation does not detail if countries must supervise their own digital systems for any illegitimate use and implement procedures to avert such misappropriation. To illustrate, Article 8 of the Draft Articles adopts a restricted perspective on a state's responsibility for actions performed by private entities, where the state is legally accountable for actions carried out by these entities if they act under the state's guidance, supervision, and direction.

Therefore, HongjuKoh maintained that legal structures globally must be more incorporating:[38]

"These rules are designed to ensure that states cannot hide behind putatively private actors to engage in conduct that is internationally wrongful." (p.6)

Moreover, international courts have taken a restrictive approach towards defining the

37 The Dark Web is a collection of websites that are publicly visible, but hide the IP addresses of the servers that run them. Thus they can be visited by any web user, but it is very difficult to work out who is behind the sites. And you cannot find these sites using search engines.

38 Harold Hongju Koh, 'International Law in Cyberspace' (2012) 54 Harvard International Law Journal online 1 <https://harvardilj.org/2012/12/online_54_koh> accessed 14 February 2023.

concepts of "direction" and "control." For example, in the Nicaragua versus USA case, Nicaragua claimed that there was a connection between the USA and cyber-attacks carried out by rebellious groups in Nicaragua. However, the ICJ downplayed the role of the U.S.A even though the group was provided with financial and military support. Thus, providing training and weapons to rebel groups is evidence of a relationship between proxy players and the supporting country, while simply supplying funds and equipment does not imply a country's involvement in using force or go against Article 2(4) of the United Nations Charter. This has faced criticism from various scholars, including Margulies[39], who noted that the International Court of Justice (ICJ) has expressed these conditions in its definition of what it referred to as an "effective control" test. He added that although the phrase "effective control" might suggest actual control to listeners in the United States, the ICJ's usage of the term implies a form of control that is more precise and all-encompassing. Additionally, he stated that the phrases concerning control and direction outlined in the draft documents were vague, and he criticised the International Criminal Tribunal for the former Yugoslavia (ICTY) for its belief that a determination of state accountability necessitated formal involvement in the preparation and overseeing of military actions.

Another legal gap is the haziness around jurisdiction and the extraterritorial application of national laws in the digital world. This makes it difficult for states to hold individuals and entities accountable for negative conduct committed via digital technologies. For instance, it could be difficult for Ukraine to take legal action against Russian individuals or groups who intervene in its domestic affairs digitally. The fast advancement of digital technology has also brought forth new challenges for the defence of human rights in the modern day.[40] Although human rights are recognised in international law, there are still substantial legal gaps that prevent the protection of these rights in the digital sphere. For instance, it is challenging for nations to safeguard the privacy of their citizens and for international agencies to effectively address abuses of privacy rights since there is currently no agreed-upon concept of privacy in the digital era.

In order to address the effect of digital technologies on international relations, there are not enough efficient international collaboration institutions.[41] Even though there are many international organisations and conferences that deal with issues linked to digital technologies, there is still a need for a more efficient and coordinated response to the problems that these technologies cause. For instance, it could be challenging for Russia and Ukraine to work together to investigate cybercrimes that are perpetrated utilizing digital technology.

Considering the significant gap that exists, it is important for international institutions and governments to work together to develop new legal frameworks and mechanisms to address these challenges and to ensure the protection of human rights in the digital age.

Individuals play a crucial role in cyber activities and therefore should take a prominent position in the regulation of cyberspace. The management and regulation of internet and digital technologies should be grounded in human rights law.

Advocates of the conventional perspective advocate for the application of the Cyber Westphalia system, which governs international relations by prioritising state sovereignty over individuals. This would allow each state to establish its own online borders. Demchak and

39 Peter Margulies, 'Sovereignty and Cyber-Attacks: Technology's Challenge to the Law of State Responsibility' (2013) 14 (2) Melbourne Journal of International Law 496.

40 Jawahitha Sarabdeen, 'Protection of the Rights of the Individual When Using Facial Recognition Technology' (2022) 8 (3) Hylion 1, doi: 10.1016/j.heliyon.2022.e09086.

41 Niemeyer and others (n 29).

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Dombrowski[42] posited that the contemporary Westphalian has been explained by territory, independence, governance, and mutual understanding in accordance with traditional international relations theory. They noted that while telecommunication companies and regulatory agencies may adopt different approaches to defining a nation's cyber borders, each will determine what is and is not considered part of the state in cyberspace.

According to Kulesza and Balleste[43], the idea of the "cyber Westphalian age" is flawed because it rests on the notion that a nation can ensure its security by creating online jurisdictions. Nevertheless, in an era of globalisation, where the globe has become like an interconnected village, the traditional idea of independence that forms the backbone of the Westphalian system needs to be replaced with inventive concepts like shared sovereignty. The authors criticise the notion of the "good fence" concept in the cyber Westphalian idea for not acknowledging the reality of a world without borders and the science that shows the universe has no boundaries.

Proponents of cyber Westphalia believe that it's possible to establish boundaries in cyberspace because it's a man-made technology.[44] However, this perspective fails to consider international human rights agreements, for instance the Universal Declaration on Human Rights (1948) and the International Covenant on Civil and Political Rights (1966). It overlooks the role of the internet in enabling other privileges, for instance education, civil and political privileges.[45] Imposing restrictions or censorship in the online world would therefore infringe upon human rights, particularly freedom of speech. Kulesza and Balleste[46] also pointed out that creating borders in the digital realm would hinder the free exchange of information and result in a less interoperable network, where information would be limited and controlled through narrow gateways.

According to Duplessis[47], the state should establish a new approach to enable private parties to have a say in regulating cyberspace, through the use of "soft law". This type of regulation is a new form of social control in the digital world. The concept of cooperation in decision-making has a rich history, starting from the period of "jus gentium" and later becoming the "law of nations", which was practised in the Roman Empire.[48] Soft laws are known for their ease of development, practicality, and adaptability.[49] The World Summit on the Information Society[50] emphasised the significance of this collaboration, defining it as the creation of an inclusive information society through partnerships and collaboration with administrations, the private sector, public spheres, and global establishments. The 2005 Tunis Agenda of WSIS further described the steps for the development of Internet governance, which involves the

42 Chris C Demchak and Peter J Dombrowski, 'Cyber Westphalia Asserting State Prerogatives in Cyberspace' (2014) spec (on cyber) Georgetown Journal of International Affairs 29.

43 Joanna Kulesza and Roy Balleste, 'Signs And Portents In Cyberspace: The Rise Of Jus Internet As A New Order In International Law' (2014) 23 (4) Fordham Intellectual Property, Media & Entertainment Law Journal 1311.

44 Demchak (n 44).

45 Frank La Rue, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue : addendum' (*UN*, 27 May 2011) <https://digitallibrary.un.org/record/706200> accessed 14 February 2023.

46 Kulesza (n 45).

47 Isabelle Duplessis, 'Le vertige et la *soft law*: réactions doctrinales en droit international' (2007) Hors-série Revue québécoise de droit international 245. Isabelle Duplessis, 'Le vertige et la soft law: réactions doctrinales en droit international' (2007) Hors-série Revue québécoise de droit international 245.

48 Kulesza (n 45).

49 Albakjaji (n17).

50 Declaration of Principles : Building the Information Society: a global challenge in the new Millennium WSIS-03/GENEVA/DOC/4 (12 December 2003) <https://digitallibrary.un.org/record/533621> accessed 14 February 2023.

participation of all groups involved in the growth of the Internet, including state authorities, civil society, and the business sector.[51]

This method of establishing soft law alone is not enough to incorporate global peer agreement into country's legal frameworks. However, global organisations must acknowledge the pronouncements made by the cyber community and motivate countries to adopt these laws at a national level. For example, child pornography was deemed unacceptable by most cyber societies and privacy guidelines were established by major internet service suppliers without a global consensus on personal data protection. Thus, the process of adopting soft laws is similar to the creation of international customary law. The International Court of Justice requires two elements for international customary law to exist: a uniform practice among state authorities and a belief by national authorities that the specific behaviour portrayed in this practice is familiar to other countries as having legal force.

The currently available international frameworks do not permit the cyber-community to play a role in the decision-making process. However, global communities must consider the uniform practices agreed upon by the cyber-community and attempt to implement them both internationally and nationally. To strengthen this argument, Albakjaji and Adams[52] have advocated for the involvement of explicit stakeholders in the development of internet regulation and control of cyber actions, emphasising the importance of soft laws.

7 CONCLUSIONS

International relations have been shaped by the rise of Information Technology (IT). In this research paper, a comprehensive analysis of how IT has affected international relations has been presented. The war between Russia and Ukraine as a case study has been used to analytically discuss how new technology has recently been involved in all the aspects of the war. The researcher found that new technology is considered an important factor during both peace and war. Thus, digital technology could be effectively involved in international relations where new aspects have emerged which did not exist before the war, such as the use of new sanctions based on technology, as it has become evident that traditional sanctions are of limited use. Moreover, the widespread use of digital currencies during the war proved that the international community is unable to control these types of financial transactions, which may sometimes be illegal. The current paper has also put a spotlight on the fact that the internet and the social media have played a decisive role in circulating information internationally, and at a time where states are unable to do it without using digital technology. This has led the international community to recognise and emphasise the role of the new technology and heavily rely on it to support Ukraine. This makes digital technology platforms a moving wheel in mobilising public opinion to support the views they wish to pass at the international level. This is also considered a new challenge for international relations, which did not face such a challenge before.

To overcome these challenges, new rules should be adopted internationally. These legal measures may be crucial in reducing the negative effects of digital technology on the ongoing conflict between Russia and Ukraine. For instance, it might assist in lowering the danger of cyberattacks and other negative uses of digital technology by defining the responsibility of nations in cyberspace. In a similar vein, it might contribute to preventing the use of digital technology to meddle in the internal affairs of other nations and aid in respecting the sovereignty of other states in cyberspace by encouraging responsible state conduct.

51 Tunis Agenda for the Information Society WSIS-05/TUNIS/DOC/6(Rev1)-E (18 November 2005) <https://digitallibrary.un.org/record/565827> accessed 14 February 2023.

52 Albakjaji (n17).

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In the context of the conflict between Russia and Ukraine, there are a number of suggested policies and laws that might serve as a framework for addressing how digital technology affects international relations and assists in avoiding conflicts and safeguarding civilians from harm. The adoption of both cyber warfare and International Humanitarian Laws, as an example, would resolve the legal issues and guarantee that international humanitarian rules apply to cyber warfare - and that any acts conducted during such conflicts are compliant with the law of armed conflict. Additionally, international criminal law has to be strengthened. It is crucial to establish clear norms and standards for the use of digital technology in international relations, including the application of international criminal law to serious cyber-crimes, such as hacking and cyber-espionage. It is also recommended to establish laws on state responsibility for cyber-attacks. Such laws must address this issue, including the principle of state responsibility for acts of cyber-crime and the duty to investigate and prosecute cyber-crime. Further, addressing the legal challenges would require data privacy and cybersecurity laws. To safeguard individuals against the negative effects of digital technology and to guarantee that its usage does not violate privacy and civil rights, the international community must endeavour to develop universal laws for data privacy and cybersecurity. The establishment of a treaty system for cyber security is also recommended. A framework for international cooperation in addressing cyber threats, clear rules and norms for the use of digital technology in international relations, and assurance that state actions in cyberspace adequately reflect international law all require the establishment of an international treaty regime for cyber security.

The article also found that, because of the characteristics of the internet, it is not possible for one state alone to regulate this virtual world. Considering that the internet is a stateless space, the study has proven that national and international laws have become outdated and ineffective in managing it.

Consequently, all attempts to govern it internally will be doomed to failure because technological and digital developments are proceeding at a much faster pace than the traditional legislative and regulatory frameworks.

Therefore, the researchers recommend that the best way to govern the Internet should be through international cooperation between states on the basis of a shared sovereignty. The international community should involve civil actors in managing and regulating online activities. This includes cooperation with people who work in the field, such as engineering, academic, users, and law practitioners because they are well qualified in the area of cyberspace and new technology. They can easily adopt new and flexible soft roles when facing emerging circumstances which need immediate solutions.

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Research Article

A NEW EXTRAORDINARY MEANS OF APPEAL IN THE POLISH CRIMINAL PROCEDURE: THE BASIC PRINCIPLES OF A FAIR TRIAL AND A COMPLAINT AGAINST A CASSATORY JUDGMENT

Adrian Zbiciak and Tymon Markiewicz

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Summary: 1. Introduction. – 2. Reasons for introducing the complaint into Polish criminal procedure. – 3. Principle of hearing the case within a reasonable time. – 4. The right to of defence. – 5. Principle of two-instance proceedings. – 6. Equality of arms in complaint proceedings. – 7. Conclusions.

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Keywords: extraordinary means of appeal; complaint against a cassatory judgment; principles of criminal proceedings; right to a fair trial

ABSTRACT

Background: *The main purpose of this study is to present and evaluate a new, extraordinary means of appeal in Polish criminal procedure – a complaint against cassatory judgment of the appellate court from the point of view of principles of criminal proceedings. This includes hearing the case within a reasonable time, the right of defence, two-instance proceedings, and equality of arms in complaint proceedings.*

Methods: *This study draws on comprehensive analyses of the provisions of the Polish Code of Criminal Procedure, partly based on case research, and comparing effects of these analyses with both the Polish constitutional standard and the jurisprudence of the European Court of Human Rights (ECHR).*

Results: *Complaint proceedings comply with the main requirements of a fair trial.*

Conclusions: *Certain limitations on the right of the accused in the discussed proceedings are fully justified by their special features and are proportionate. This conclusion applies to the time-limit for submitting the complaint, the requirement to bring it only through the assistance of a defence counsel, and also to the way of examination of the complaint by the Supreme Court in writing at the closed session. All these solutions constitute only permissible, proportionate restrictions of the indicated principles. This proportionality results primarily from weighing the benefits of the complaint proceedings: limitations of cassatory adjudication in genere, respect for the appeal model of appellate proceedings, and maintaining uniformity of interpretation of narrowly defined grounds for cassatory adjudication.*

1 INTRODUCTION

In 2016, a new extraordinary means of appeal was introduced into the Polish Code of Criminal Procedure (CCP)[1] – a complaint against an appellate court judgment quashing the judgment of the court of first instance and referring the case for re-examination (hereinafter, "complaint against a cassatory judgment" or "a complaint"). The aim of this study is to examine whether this new remedy satisfies the basic principles of criminal procedure sharing the general standard of a fair trial. To this end, the procedure provided for examination of a complaint was analysed in the context of the following principles of criminal proceedings:

1) the principle of hearing the case within a reasonable time;
2) the principle of the right of defence;
3) the principle of two-instance proceedings;
4) equality of arms in complaint proceedings.

The authors use a formal-dogmatic method, and the results of empirical research on the duration of proceedings were used as an aid. The compilation of views of the doctrine and jurisprudence, especially ECHR, was the theoretical basis for applying conclusions to the

1 Code of Criminal Procedure of the Republic of Poland 'Kodeks postępowania karnego' of 6 June 1997 (consolidated text) [2021] DzU 534.

new institution of complaint. The text attempts to relate the selected achievements of the doctrine and jurisprudence concerning other legal institutions to this new instrument in Polish criminal process. An attempt was made to answer the question on whether the new instrument of complaint fits into these established and developed standards.

The thesis of the article is that complaint proceedings compile with the main requirements of fair trial. Certain limitations on the right of the accused in the discussed proceedings are fully justified by their special features and proportionate because the complaint procedure does not result in a consideration of the case on the merits.

The authors argue that the complaint satisfies the right of the accused to have a criminal case examined within a reasonable time, despite the objective dedication of additional time necessary for its examination. Moreover, the legal framework provided for taking a decision on a complaint respects the accused's right to defence, even though a complaint is examined in closed session without the participation of the parties. In this respect, it also does not contradict the adversarial principle and the principle of equality of arms that forms part of it. The new legal remedy, although classified in the national legal order as an extraordinary appeal measure, does not demolish the two-instance model of criminal proceedings, although it results in its currently more formal than material nature. The indirect effect of the complaint is that appellate courts are more inclined to conduct evidence proceedings and new findings of fact at the appeal instance without being subject to the review of another higher court.

The structure of article is as follows. First, the reasons for introducing a new institution to the Polish legal order are briefly characterised, pointing to the characteristic features of the complaint. Then, this instrument is analysed in the context of four principles: the principle of hearing the case within a reasonable time; the principle of the right of defence; the principle of two-instance proceedings; and equality of arms in a complaint proceeding. Selected statements of the doctrine and jurisprudence in this regard have been taken into account.

2 REASONS FOR INTRODUCING THE COMPLAINT INTO POLISH CRIMINAL PROCEDURE

Before the key considerations, it is necessary to present the assumptions and process of systemic changes that led to the introduction of Chapter 55a of the CCP. On 1 July 2015, the model of appellate proceedings in the Polish criminal procedure changed.[2] One of its assumptions was to lead to a situation in which the courts of appeal, when reviewing the decision of the court of first instance, will adjudicate primarily on the merits. As a result, there was a shift from the revisory model to the appeal model of appellate proceedings.[3] In the new model, whenever there is a need to interfere with the content of the judgment of the court of first instance, the court of appeal should change the judgment instead of quashing one and referring the case back to the court of first instance. Instead of the previously applicable open catalogue of grounds for issuing a cassatory judgment by the appellate court, the legislator introduced a closed catalogue as of 1 July 2015. According to the new wording of Art. 437 § 2 of the CCP: "Quashing

2 On that day, the changes introduced by the large amendment Act of the Republic of Poland of 27 September 2013 'On amending the Act - Code of Criminal Procedure and certain other acts' [2013] DzU 1247.

3 Cezary Kulesza, 'Conventional Model of a Fair Appeal Proceedings in the Comparative Perspective' in C Kulesza (ed), *Fairness of the New Model of Polish Criminal Appeal Proceedings in the Context of Delivered Research* (Temida 2 2019) 13.

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of the decision and remitting the case for re-examination may take place only in the cases indicated in Art. 439 § 1, Art. 454, or if it is necessary to repeat the entire first instance trial."[4]

Secondly, Art. 452 § 1 of the CCP was revoked, which prevented the court examining an appeal from conducting evidence proceedings as to the merits of the case. Currently,[5] Art. 452 § 2 of the CCP allows the appellate court to dismiss the motion for evidence solely in two cases. Firstly, if the taking of evidence would be pointless due to the necessity of quashing the judgment for re-examination in the circumstances referred to in Art. 437 § 2 of the CCP. Secondly, if the evidence was not presented before the court of first instance, despite the fact that the applicant could have presented it at that time, or the circumstance to be proved relates to a new fact, which was not the subject of the proceedings before the court of first instance, and the applicant could have indicated it at that time. The evidence preclusion referred to in the second case will not be of great importance in practice, because in accordance with Art. 452 § 2 of the CCP, it shall not apply if the evidence taking is relevant, *inter alia*, for the assessment of whether the accused has committed a prohibited act and whether it is a crime.

As already mentioned, before 1 July 2015, there were no explicit limitations for issuing cassatory judgments by the appellate courts. Having established the procedural or substantive irregularities in a given case, the appellate courts could each time decide whether to issue a judgment changing the decision of the court of first instance or quash this judgment, no matter whether the irregularities at issue could be remedied at the appeal stage of the proceedings. Changes in Art. 452 § 1 of the Code of Criminal Procedure were extremely important, since this provision excluded the possibility of taking evidence on the merits of the case in appeal proceedings.[6] Prior to 1 July 2015, the appellate courts in principle could adjudicate differently in substance only on the basis of the material gathered in the first-instance proceedings. Furthermore, there was no explicit restriction on cassatory adjudication. The change made on 1 July 2015 should therefore be assessed as significant and far-reaching. However, the Polish legislator did not stop there.

In the classic, two-instance criminal proceedings, in which the final judgment of the court of appeal was subject only to a cassation to the Supreme Court, based on allegations of gross violation of the law, no review of cassatory judgments of the appellate courts was provided for. No means of appeal, neither ordinary nor extraordinary, was available to the parties against the decision of the court of appeal quashing the judgment of the court of first instance and referring the case back to this court for re-examination. The cassatory judgment is not a decision closing the case, thus the decision on this matter was not subject to any review. On 15 April 2016, an institution hitherto unknown[7] to Polish criminal procedure was introduced into the CCP, which is a complaint against the judgment of the court of appeal quashing the judgment of the court of first instance and remitting the case for re-examination (chapter 55a of the CCP). This instrument was intended to strengthen

4 These cases will be briefly explained later in the text.

5 The last amendment to this provision took place on 5 October 2019 under the Act of the Republic of Poland of 19 July 2019 'On amending the Act - Code of Criminal Procedure and certain other acts' [2019] DzU 1694.

6 Wojciech Jasinski and Karolina Kremens, *Criminal Law in Poland* (Wolters Kluwer 2019) pt 2, ch 3; Maciej Fingas, Sławomir Steinborn and Krzysztof Woźniewski, 'Poland' in S Allegrezza and V Covolo (eds), *Effective Defence Rights in Criminal Proceedings: A European and Comparative Study on Judicial Remedies* (Wolters Kluwer 2018) 381.

7 Pursuant to the Act of the Republic of Poland of 11 March 2016 'On amending the Act - Code of Criminal Procedure and certain other acts' [2016] DzU 437.

the appeal model of appellate proceedings introduced on 1 July 2015.[8] It is worth mentioning that, according to the assumption of the legislator, the complaint is to be characterised by a limited scope of cognition and a simplified mode of its examination (at a session without the participation of the parties), while entrusting its examination to the Supreme Court is to favour the uniformity of jurisprudence in this regard.

While adjudicating upon the complaint, the Supreme Court may only examine whether the judgment of the court of first instance has been quashed and the case remitted for reconsideration to that court for reasons indicated by the legislator in the closed catalogue of grounds for issuing the cassatory judgment. In accordance with Art. 539a § 3 of the CCP, "The complaint may be filed only due to violation of Art. 437 or due to the irregularities specified in Art. 439 § 1." This means that the Supreme Court reviews whether the cassatory decision was actually issued in the event of any of the absolute grounds for appeal (Art. 439 § 1 of the CCP) or in the event of the need to repeat the entire first instance trial (Art. 437 § 2 of the CCP) or in the event of the *ne peius* rule (Art. 454 § 1 of the CCP).

As absolute grounds for appeal (Art. 439 § 1 of the CCP) are defined the most serious procedural irregularities, these can cause the necessity to quash the judgment. These are, for example, situations where an unauthorised entity or one incapable of adjudication participated in the issuance of the decision (Art. 439 § 1 point 1 of the CCP), when a court lower in rank has rendered a decision in a case falling under the jurisdiction of a court higher in rank (Art. 439 § 1 point 4 of the CCP) or when the accused in court proceedings did not have a defence counsel in cases of obligatory defence (Art. 439 § 1 point 10 of the CCP).

The necessity to repeat the entire first instance trial may occur in the event of (procedural) irregularities of a different nature than absolute grounds of appeal, however so grave, that their removal at the appeal instance is not possible and the trial must take place from the beginning. These may be errors in evidentiary proceedings but only those that affect the need to repeat all actions carried out so far, which is impossible in appeal proceedings. In fact, this would come down to conducting the entire proceedings anew at the appeal instance, depriving the parties of the right to appeal.[9]

As regards the *ne peius* rule, it means that a judgment of the court of first instance acquitting the accused or discontinuing the proceedings may be revoked if, in appeal proceedings, the court sees the possibility of issuing a judgment of conviction. In accordance with Art. 454 § 1 of the CCP, a court of second instance may not convict a defendant who was acquitted by the first instance court or whose case was discontinued at first instance. In Polish criminal procedure a court of second instance may never issue a judgment of conviction for the first time, thus changing the acquittal decision itself, although such conduct is explicitly permitted by Art. 2, section 2 of Protocol o. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, Protocol No. 7), ratified by Poland.[10]

8 A government project No 207 of the Act On amending the Act - Code of Criminal Procedure and certain other acts 'Rządowy projekt ustawy o zmianie ustawy - Kodeks postępowania karnego oraz niektórych innych ustaw' of 27 January 2016 <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=207> accessed 23 January 2023.
The justification for the draft of amending law indicates that "the appeal and reformatory model of appeal proceedings requires the introduction of an institutional mechanism to secure the reformatory nature of adjudication". The new instrument, in accordance with the will of the legislator, is intended to "eliminate unjustified cases of revoking", which will accelerate the proceedings. It will also perform "a preventive function, preventing courts of appeal from hasty cassation of judgments".

9 Dariusz Świecki (red), *Kodeks postępowania karnego: Komentarz*, t 2 (Wolters Kluwer 2021) art 437.

10 Protocol from 22.11.1984 ([2003] DzU 42/364), ratified by Poland under the Ratification Act of 21.06.2002 ([2002] DzU 127/1084), which entered into force on 25.08.2002.
Sławomir Steinborn, 'Ograniczenie zaskarżalności wyroku wydanego w I instancji jako środek uproszczenia procesu karnego w świetle prawa do dwuinstancyjnego postępowania (uwagi de lege lata i de lege ferenda)' (2005) 1 Gdańskie Studia Prawnicze 368; P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn, Kluwer Law International 1998).

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The Polish Supreme Court developed a standing case-law on the scope of the examination of the case in the complaint proceedings. When examining the complaint against the judgment of the appellate court, the Supreme Court may only assess whether the court of appeal was guided by the grounds for issuing the cassatory judgment indicated in Art. 539a § 3 of the Code of Criminal Procedure and whether such a decision was necessary in a specific case. Therefore, it does not carry out a typical instance review. The complaint is not a means of verifying the assessment of evidence carried out in the second instance. Neither is the complaint devoted to checking the quality of examination of the appeal by the second instance court. Hence, the Supreme Court cannot assess whether there are substantive grounds for issuing a specific type of judgment. It is entitled to assess only whether a decision to quash the first instance court was taken with due respect to a closed catalogue of grounds for issuing a cassatory judgment at the appeal stage of the proceedings.[11]

After outlining this issue, one should proceed to the basic considerations, namely, how the institution of complaint refers to selected, basic principles of the criminal procedure, indicated at the beginning.

3 PRINCIPLE OF HEARING THE CASE WITHIN A REASONABLE TIME

The right to hear a case without undue delay is provided directly by the Constitution of the Republic of Poland (Art. 45 para. 1) and norms of international law – Art. 6 para. 1 of the ECHR and Art. 14 para. 3 (b) of the International Covenant on Civil and Political Rights of 19 December 1966.[12].This is also one of the four main objectives of criminal procedure indicated in Art. 2 § 1 of the CCP.

For the sake of clarity, it should be noted at the outset that the proceedings regarding the examination of the complaint shall remain under the protection of Art. 6 of the Convention, which provides for the guarantee of a fair trial by an independent and impartial tribunal established by law in determination of any criminal charge.[13]

11 Case I KZP 13/17 (Supreme Court of Poland, 25 January 2018) <http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/i%20kzp%2013-17.docx.html> accessed 23 January 2023; Case I KS 8/20 (Supreme Court of Poland, 7 May 2020) <http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/i%20ks%208-20.docx.html> accessed 23 January 2023; Case II KS 7/20 (Supreme Court of Poland, 30 July 2020) <http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/ii%20ks%207-20.docx.html> accessed 23 January 2023; Case III KS 5/21 (Supreme Court of Poland, 21 April 2021) <http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/iii%20ks%205-21.docx.html> accessed 23 January 2023; Case IV KS 6/21 (Supreme Court of Poland, 31 March 2021) <http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/iv%20ks%206-21.docx.html> accessed 23 January 2023; Case V KS 13/21 (Supreme Court of Poland, 31 May 2021) <http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/v%20ks%2013-21.docx.html> accessed 23 January 2023; Case V KS 33/20 (Supreme Court of Poland, 29 January 2021) <http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/v%20ks%2033-20.docx.html> accessed 23 January 2023; Arkadiusz Lach, 'Skarga na wyrok sądu odwoławczego' w A Lach (red), *Postępowanie karne po nowelizacji z dnia 11 marca 2016 roku* (Wolters Kluwer 2017) 259; Andrzej Sakowicz, 'Zakres kontroli dokonywanej przez Sąd Najwyższy przy rozpoznaniu skargi na wyrok kasatoryjny sądu odwoławczego' (2018) 23 (1) Białostockie Studia Prawnicze 155, doi: 10.15290/bsp.2018.23.01.10; Jan Kil, 'Skarga na wyrok sądu odwoławczego – uwagi de lege lata i de lege ferenda' (2019) 2 (19) Roczniki Administracji i Prawa 95, doi: 10.5604/01.3001.0014.0430; Adrian Zbiciak, 'Zakres kognicji Sądu Najwyższego przy rozpoznawaniu skargi' w M Wąsek-Wiaderek i inni (redz), *Skarga na wyrok kasatoryjny sądu odwoławczego w polskiej procedurze karnej: teoria i praktyka* (CH Beck 2021) 73.

12 Constitution of the Republic of Poland 'Konstytucja Rzeczypospolitej Polskiej' of 2 April 1997 [1997] DzU 78/483; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) [1977] DzU 38/167.
David Harris, *Cases and Materials on International Law* (Sweet & Maxwell 2004) ch 9.

13 Tymon Markiewicz, 'Skarga na wyrok sądu odwoławczego w świetle zasady rzetelnego procesu z art 6 EKPC' (2021) 31 (4) Roczniki Nauk Prawnych 39, doi: 10.18290/rnp21314-3.

It follows from the case-law of the ECHR that Art. 6 of the Convention shall apply throughout the criminal proceedings, from the indictment of a person to the final determination of his or her criminal liability. Consequently, the standard of a fair trial also applies to the stage of criminal proceedings at which a cassation is recognised as an extraordinary means of appeal.[14] Only the procedure of resuming criminal proceedings is not subject to the rules of Art. 6 of the Convention, although in the latest case law of the ECHR this thesis is also sometimes challenged in special circumstances.[15] These proceedings constitute the stage of resolving a criminal case within the meaning of Art. 6 of the Convention.[16] It is true that the purpose of the complaint proceedings is not to decide on the charges brought against the accused, but to assess the grounds for issuing the cassatory judgment. Nevertheless, these incidental proceedings directly concern the process of examining the main issue in the criminal case. The decision of the Supreme Court on the complaint determines whether the case should, as the court of appeal wanted, be referred for re-examination to the first instance court, or whether it can be terminated already at the appeal instance. The ECHR explicitly pointed out that when examining whether there was an infringement of the right to a hearing within a reasonable period of time, the final resolution of the case is important, and the introduction of additional instruments in national law to verify the correctness of the judgment does not relieve the state of the responsibility for guaranteeing the examination of the case within a reasonable time.[17] Based on the provision of Art. 6 para. 1 of the Convention, it is not possible to indicate the absolute duration of the proceedings.[18] The assessment of whether its duration is reasonable should be made in relation to the specific circumstances of each individual case.[19] In this situation, it is necessary to briefly analyse how the complaint proceedings may affect the duration of criminal proceedings, which is an important aspect of a fair trial.

The introduction of an additional extraordinary means of appeal *prima facie* appears to prolong the procedure by the time necessary for its examination. It is the time:

1) necessary to deliver a copy of the cassatory judgment, together with the statements of reasons (justification), which are drawn up *ex officio;*

2) to lodge the complaint itself, and this is a deadline of 7 days from the date of delivery of a copy of the judgment together with the statement of reasons (Art. 539 § 1 of the CCP);

3) to enable the parties to lodge a response to the complaint within 7 days of being served with a copy of the complaint;

14 Stefan Trechsel, *Human Rights in Criminal Proceedings* (OUP 2005) ch 4; Tom Barkhuysen and others, 'Right to a Fair Trial' in P van Dijk and others, *Theory and Practice of the European Convention on Human Rights* (5th edn, Intersentia 2018) ch 9, 497; *JJ v Netherlands* App no 21351/93 (ECHR, 27 March 1998) <https://hudoc.echr.coe.int/eng?i=001-58147> accessed 23 January 2023; *San Leonard Band Club v Malta* App no 77562/01 (ECHR, 29 July 2004) <https://hudoc.echr.coe.int/eng?i=001-61962> accessed 23 January 2023; Bochan v Ukraine (no 2) App no 22251/08 (ECHR Grand Chamber, 5 February 2015) <https://hudoc.echr.coe.int/eng?i=001-152331> accessed 23 January 2023.

15 *Moreira Ferreira v Portugal* (no 2) App no 19867/12 (ECHR Grand Chamber, 11 July 2017) <https://hudoc.echr.coe.int/eng?i=001-175646> accessed 23 January 2023.

16 Marek Antoni Nowicki, *Wokół Konwencji Europejskiej: Komentarz do Europejskiej Konwencji Praw Człowieka* (Wolter Kluwer 2017) pt 2.

17 *Foti and others v Italy* App nos 7604/76, 7719/76, 7781/77, 7913/77 (ECHR, 10 December 1982) <https://hudoc.echr.coe.int/eng?i=001-57489> accessed 23 January 2023.

18 David Harris and others, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009) ch 6; Małgorzata Wąsek-Wiaderek, 'A New Model of Appeal Proceedings in Criminal Cases: Acceleration v. Fairness? A Few Remarks from the Perspective of the Standards of Protecting Human Rights' (2021) 30 (4) Studia Iuridica Lublinensia 187, doi: 10.17951/sil.2021.30.4.187-207.

19 *Obermeier v Austria* App no 11761/85 (ECHR, 28 June 1990) <https://hudoc.echr.coe.int/eng?i=001-57631> accessed 23 January 2023; Santilli v Italy App no 11634/85 (ECHR, 19 February 1991) <https://hudoc.echr.coe.int/eng?i=001-57656> accessed 23 January 2023.

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4) to hand over the case files to the Supreme Court;

5) for the Supreme Court to examine the complaint.

However, in the case of retrial, which the instrument of the complaint is supposed to combat (if the decision on the necessity to carry it out was incorrect), the entire first-instance proceedings is carried out from the beginning, which in extreme cases may take years, especially if it is to be borne in mind that the judgment issued in the re-examined trial is then subject to the standard, full appeal procedure. At the same time, it is worth mentioning that the standard resulting from Art. 6 of the Convention requires special diligence with regard to the efficiency of proceedings in cases in which detention on remand is applied.[20] At the same time, the legislator explicitly provided that in cases in which a complaint was filed and in which detention on remand is applied, the Supreme Court adjudicates on the further use of this measure (Art. 539d of the CCP).

It seems that extending criminal proceedings by the few months needed to examine the complaint, while taking into account the potential benefits, constitutes an acceptable limitation of the principle of examining the case within a reasonable time. This assessment is not altered by the fact that in some cases this will be a waste of time – these are the situations in which the complaint will be dismissed. In the authors' opinion, there is a lower risk of "losing time" than if the first-instance proceedings were to take place again – which could be avoided. In the case-law of the ECHR in relation to the Polish legal system, it was explicitly pointed out that repeatedly revoking the judgment and referring the same case for reconsideration discloses a serious dysfunction of the Polish justice system.[21] As a result, the costs – both economic and social costs for the parties– that would be generated by the retrial will also be significantly lower. It is worth stressing that the instrument of the complaint, according to the legislator's assumption, is also a "preventive" element – in combination with a narrow catalogue of conditions for issuing a cassatory judgment, it is to have a "motivating effect" on the courts of the second instance and will strengthen the appeal model of appellate proceedings.

As transpires from our empirical research, the complaint proceedings do not significantly prolong the time of examination of a criminal case, and may ultimately contribute to speeding up the conclusion of the case as a result of avoiding the need for a retrial. Of the 692 cases examined,[22] in which a cassatory judgment was issued in the period from 15 April 2016 (introduction of the complaint into the Polish legal order) to 31 December 2018 (completion of the examination of cassatory judgments), 544 cases were re-trialled at first instance by the date of completion of empirical research. The average duration of the retrial in all 544 cases was approximately 216 days, with a median duration of 174 days. It is worth noting that the longest retrial has lasted 824 days. As part of the research, the cases that ended with the issuance of a decision without the hearing (consensual termination of the proceedings) and cases involving a cumulative judgment were analysed separately. In the former, the average duration of retrial was 106 days (median - 84), in the latter, the average was 101 days (median 83).[23]

20 Barkhuysen and others (n 16).

21 *Przemyk v Poland* App no 22426/11 (ECHR, 17 September 2013) <https://hudoc.echr.coe.int/eng?i=001-126357> accessed 23 January 2023.

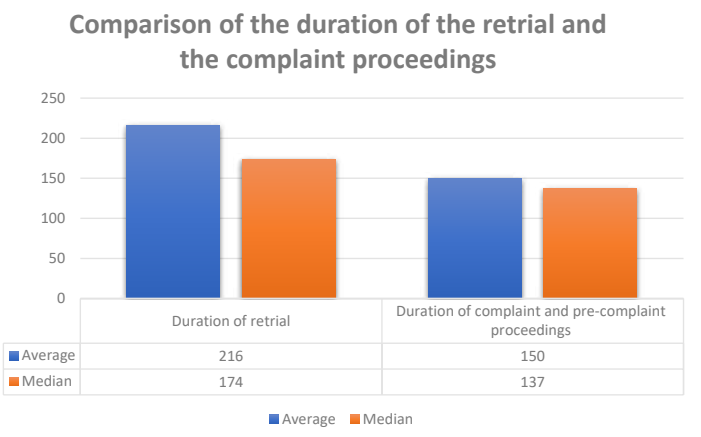
22 The research was limited to all courts of appeal of the Lublin appeal only, which of course cannot be considered representative for the whole country covering a total of 11 appeals, but still gave a noticeable research sample.

23 Tymon Markiewicz i Małgorzata Wąsek-Wiaderek, 'Porównanie czasu trwania postępowania skargowego oraz średniego czasu ponownego rozpoznania sprawy po wydaniu wyroku kasatoryjnego' w M Wąsek-Wiaderek (red), *Skarga na wyrok kasatoryjny sądu odwoławczego w polskiej procedurze karnej: teoria i praktyka* (CH Beck 2021) 307.

As part of the project, 340 cases that were brought to the Supreme Court with the complaint in 2016-2019, were then examined. The duration of the pre-complaint proceedings was analysed – from the issue of the cassatory judgment, to the date of receipt of the case by the Supreme Court.

The shortest duration of such proceedings was 24 days, the longest 268 days. The average duration of these proceedings is approximately 96 days, median 91 days. As for the time of examining the complaint before the Supreme Court in these 340 cases, it was approximately 53 days on average, median 46 days (maximum 419 days, minimum 3 days).[24]

The average duration of retrial was approximately 216 days (median 174), and complaint proceedings before the Supreme Court approximately 53 days (median 46 days). Adding to the duration of the proceedings before the Supreme Court (in order to consider the complaint) the duration of the pre-complaint proceedings (total 96 days, median 91), the total duration of the complaint and the pre-complaint proceedings was on average 150 days (median 137).



Presenting as briefly as possible the extensive conclusions that were made as a result of the research project, it should be pointed out that if the complaint is accepted (i.e., in the case of an incorrect cassatory judgment), the time saved is approximately 30% because the time of pre-complaint and complaint proceedings together is approximately 70% of the average time of retrial. However, it is worth bearing in mind that out of the 340 cases examined, the complaint was dismissed in 152 cases, while its substantive examination did not take place in 38 cases. Thus, in 190 cases in total, the time for examining the complaint was lost because the cassatory judgment turned out to be correct and the case was re-examined.

Summarising, the research proved that a complaint contributed to limiting the number of cassatory judgments, as the courts of appeal are aware that cassatory judgments can be subject to review.[25] Thus, the positive effect of introducing the complaint into the Polish legal system in terms of the duration of criminal proceedings can ultimately be recognised.[26]

24 ibid.

25 In the courts of the Lublin appeal in 2015, 916 cassatory judgments were issued, in 2016 – 705, in 2017 – 623, in 2018 – 579.

26 Małgorzata Wąsek-Wiaderek, 'Podsumowanie i wnioski' w M Wąsek-Wiaderek (red), *Skarga na wyrok kasatoryjny sądu odwoławczego w polskiej procedurze karnej: teoria i praktyka* (CH Beck 2021) 331

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4 THE RIGHT TO DEFENCE

It should be pointed out once again that the essence of complaint proceedings is not a substantive settling on the subject of the procedure, i.e., adjudicating directly on the accused's liability for the act as charged, but only checking the correctness of the cassatory decision of the court of appeal. The scope of the examination of the case in the complaint proceedings is thus very limited.

With reference to the right to defence, it is important to note that the complaint is examined at the session without the participation of the parties (Art. 539 § 1 of the CCP).[27] This has an impact on the accused's legal position and the accused's ability to take defensive actions. Additional issues which should be analysed from the angle of the right to defence are a time-limit of 7 days for submitting a complaint to the Supreme Court and access to a defence counsel in the complaint proceedings. While the precise scope of the right of the defence clearly must be governed by provisions of national law, those provisions cannot be incompatible with the system of guarantees of the rights of the defence resulting from international law.[28]

At the European level, the accused's right to defence is regulated primarily in Art. 6 para. 3 (b) and (c) of the Convention. However, the enumeration of the accused's rights contained therein is only a non-exhaustive clarification of the general standard of a fair trial provided in Art. 6 para. 1 of the Convention. It is indicated that the standard resulting from Art. 6 section 3 letter c of the Convention specifies only the minimum scope of the accused's rights, it is not their closed catalogue,[29] which leads to the conclusion that the provision in question is also an expression of the distinction between this standard in criminal matters and civil matters.[30]

As mentioned above, the standard of Art. 6 of the Convention applies also to the examination of a complaint by the Supreme Court. Thus, a defendant shall have adequate time and opportunity to prepare the defence in these proceedings.[31] The implementation of this guarantee at this stage must differ from what is required at the pre-trial stage of the proceedings or during examination of the case in the first instance.[32] Since the complaint cannot be submitted by the defendant without the assistance of a defence counsel (mandatory representation of a defendant by a defence lawyer is required), the standard of Art. 6 para. 3 (b) ECHR shall be applied to both the accused and his/her defence counsel. However, the right of the defence counsel to have adequate time and opportunity to prepare the defence is of a different nature than the corresponding right of the accused and serves only to respect the guarantee of the accused.[33] Undoubtedly, when assessing whether the accused has adequate time to prepare his/her defence, the time-limit for submitting a complaint, which

27 The adjudication at the session without the participation of the parties rests more broadly on the adversarial principle.

28 Hans-Jürgen Steiner, 'International Protection of Human Rights' in MD Evans (ed), *International Law* (OUP 2003) 757.

29 Peter Kempees, *A systematic Guide to the Case Law of the European Court of Human Rights, vol 1 1960-1994* (Brill Academic Publ 1996).

30 *Deweer v Belgium* App no 6903/75 (ECHR, 27 February 1980) <https://hudoc.echr.coe.int/eng?i=001-57469> accessed 23 January 2023; *Goddi v Italy* App no 8966/80 (ECHR, 9 April 1984) <https://hudoc.echr.coe.int/eng?i=001-57495> accessed 23 January 2023.

31 *Melin v France* App no 12914/87 (ECHR, 22 June 1993) <https://hudoc.echr.coe.int/eng?i=001-57833> accessed 23 January 2023.

32 Andrzej Wróbel i Piotr Hofmański, 'Komentarz do art 6' w L Garlicki (red), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności, t 1 Komentarz do artykułów* 1-18 (CH Beck 2010) 241.

33 *Makhfi v France* App no 59335/00 (ECHR, 19 October 2004) <https://hudoc.echr.coe.int/eng?i=001-67120> accessed 23 January 2023.

is 7 days, is of crucial importance. As is underlined by the ECHR, the introduction of time-limits for initiating legal remedies does not constitute a violation of Art. 6 of the Convention, provided, however, that they have been formulated in national legislation in such a way that it is possible to use these legal remedies.[34] In the last of the mentioned judgments it was indicated that the 5-day deadline for lodging an appeal was too short and violated the right to a court. The time-limit of 7 days for submitting a complaint to the Supreme Court against a cassatory judgment of an appellate court, although relatively short, shall be assessed as compatible with the requirements of the Convention. The subject-matter of a complaint is strictly limited, the scope of the possible pleas is objectively narrow and it relates, in principle, not to the whole proceedings, but only to the settlement of the court of appeal. Under such assumptions, even the fact that this time-limit is objectively short in comparison to the time-limit for bringing a cassation to the Supreme Court (which is 30 days from serving on a party a judgment with written reasons - Art. 524 § 1 of the CCP), it does not allow for a conclusion that a defendant is not granted adequate time for preparation of his/her defence.

Under Art. 6 para. 3 (c) ECHR every accused shall have a right to a defence counsel. This right applies at every stage of the proceedings.[35] As transpires from the well-established case-law of the ECHR, the obligation to be represented by a defence counsel in certain procedural activities (in relation to the complaint such obligation is stemming from Art. 539f of the CCP in conjunction with Art. 526 § 2 of the CCP) is not contrary to the right to a fair trial. Despite the fact that in cases of mandatory defence the accused is prevented from exercising his/her right to choose whether or not to be represented by a defence counsel, the ECHR considered that in the proceedings before the Supreme Court, the obligation to use the assistance of a defence counsel is, due to the specificity of these proceedings, something natural.[36] In the last of the mentioned judgments, the Court, by 9 votes to 8, found no violation of Art. 6 of the Convention in proceedings in which the applicant, who was himself a lawyer (although suspended in the right to practice this profession), was "forced" to have the assistance of a lawyer appointed for him ex officio, due to the requirement of mandatory defence – see, paras. 154-157, 162, and 167-168 of the judgment.

Art. 6 para. 3 (c) of the Convention guarantees the accused the right to use the assistance of a defence counsel of his/her choice or the right to have a defence counsel appointed *ex officio*. Legal aid shall be granted to the accused if he/she has insufficient means to pay for legal assistance and the interests of justice so require. The fulfilment of the economic prerequisite for the appointment of an *ex officio* defence counsel should be proved by the accused. However, if there are doubts as to whether the accused can afford the costs of defence, they should be decided in favour of the accused.[37] The need to appoint an *ex officio* defence counsel may arise not only in *ad quem* proceedings, but also in appeal or cassation proceedings. If access to a court at a certain stage of the proceedings may be exercised by a defendant only with assistance of a defence counsel, as is the case with complaint proceedings, it is obvious that the prerequisite of the "interest of justice", mentioned in Art. 6 para. 3 (c) of the ECHR,

34 *Pérez de Rada Cavanilles v Spain* App no 28090/95 (ECHR, 28 October 1998) <https://hudoc.echr.coe.int/eng?i=001-58260> accessed 23 January 2023; Tricard v France App no 40472/98 (ECHR, 10 July 2001) <https://hudoc.echr.coe.int/eng?i=001-64140> accessed 23 January 2023.

35 Wróbel i Hofmański (n 34).

36 *Antonicelli v Poland* App no 2815/05 (ECHR, 19 May 2009) <https://hudoc.echr.coe.int/eng?i=001-92615> accessed 23 January 2023; *Kulikowski v Poland* App no 18353/03 (ECHR, 19 May 2009) <https://hudoc.echr.coe.int/eng?i=001-92611> accessed 23 January 2023; *Correia de Matos v Portugal* App no 56402/12 (ECHR Grand Chamber, 4 April 2018) <https://hudoc.echr.coe.int/eng?i=001-182243> accessed 23 January 2023.

37 Trechsel (n 16); Małgorzata Mańczuk, 'The Right to Defence in an Appeal Proceedings in the Context of Research Findings' in C Kulesza (ed), *Fairness of the New Model of Polish Criminal Appeal Proceedings in the Context of Delivered Research* (Temida 2 2019) 185; *Pakelli v Germany* App no 8398/78 (ECHR, 25 April 1983) <https://hudoc.echr.coe.int/eng?i=001-57554> accessed 23 January 2023.

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is fulfilled.[38] It is worth noting that in the Polish legal system, the accused, demanding the appointment of a legal counsel (except in situations of compulsory defence), must only prove that he/she cannot afford a defence counsel of his/her choice. A defendant does not have to prove that access to legal aid is required in the interest of justice. Thus, the CCP provides for a higher standard of access to an *ex officio* defence counsel than that stemming from the ECHR or from EU law.[39]

The above-described rules apply also to the appointment of an *ex officio* defence counsel for the purpose of bringing a complaint against a cassatory judgment to the Supreme Court. An accused wishing to submit a complaint shall apply for the appointment of an *ex officio* defence counsel paid by the state (Art. 78 § 1a of the CCP). However, the accused must duly demonstrate that he/she is not able to bear the costs of appointing a defence counsel of choice without prejudice to the necessary maintenance of himself/herself and the family (Art. 78 § 1 and § 1a of the CCP). Such a limitation of access to the complaint is justified, the same rule applies to other extraordinary means of appeal (cassation – Art. 526 § 2 of the CCP and the motion for reopening of proceedings - Art. 545 § 2 of the CCP). At the same time, this limitation forces the actual participation of the defence counsel in the complaint proceedings in the form of a fair preparation of the complaint. The right to active defence in criminal proceedings is treated as an important element of the Convention's right of defence.[40] This is due to the fact that a complaint shall not only be signed by a lawyer but also prepared by him. So, the complaint elaborated by a party and only signed by a defence counsel cannot be admitted for examination by the Supreme Court.[41] Important from the point of view of the principle of the right of defence is the position of the Supreme Court expressed in case II KS 13/20, according to which "in the event of the court of appeal issuing a cassatory judgment, which – although it is formally final (binding) – is not a judgment terminating the proceedings, a court appointed defence counsel is obliged to act further in criminal proceedings, but is not obliged to lodge a complaint against such a judgment – arg. from Art. 84 § 3 CCP.[42] also It is also our view that this limitation of access to the complaint proceedings is justified by their special features. While refusing to elaborate a complaint, an *ex-officio* defence lawyer is obliged to inform the court that in his/her opinion there are no grounds for filing a complaint. Such opinion with written reasons is also available to the accused (Art. 84 § 3 CCP).

The second issue which should be discussed from the angle of the right to defence is the fact that the Supreme Court examines the complaint at a closed session without the participation of the parties. Although the cassatory decision reviewed in the complaint proceedings does not end the case, we cannot lose sight of the fact that the accused will definitely have a legal interest in combating the decision annulling the acquitting judgment or judgment discontinuing the proceedings issued by the first instance court. The complaint proceedings are conducted fully in writing since no evidence is taken by the Supreme Court, which adjudicates only after reviewing the material from the case file. This in itself limits the right to

38 Barkhuysen and others (n 16); G*ranger v United Kingdom* App no 11932/86 (ECHR, 28 March 1990) <https://hudoc.echr.coe.int/eng?i=001-57624> accessed 23 January 2023; *Pham Hoang v France* App no 13191/87 (ECHR, 25 September 1992) <https://hudoc.echr.coe.int/eng?i=001-57791> accessed 23 January 2023.

39 Adrian Marek Zbiciak, 'Effective Access to Defence Counsel in the Judicial Stage of Polish Criminal Proceedings in the Scope of Directives 2013/48/EU and 2016/1919/EU' (2020) 41 (2) Review of European and Comparative Law 153, doi: 10.31743/recl.6429.

40 Stephanos Stavros, *The Guarantees for Accused Person Under* Art. 6 of the European Convention on Human Rights (Brill Nijhof 1993) ch 2.

41 Dariusz Świecki (red), *Kodeks postępowania karnego: Komentarz*, t 2 (Wolters Kluwer 2021) art 539a.

42 Case II KS 13/20 (Supreme Court of Poland, 3 December 2020) <http://www.sn.pl/sites/orzecznictwo/OrzeczeniaHTML/ii%20ks%2013-20.docx.html> accessed 23 January 2023.

defence. The doctrine indicates that an important element of the right of defence are all rights serving the procedural protection of the accused and which enable him/her to participate in criminal proceedings.[43] However, taking into account the limited scope of these proceedings, the solution adopted by the Polish legislator regarding the participation of the accused in the complaint proceedings shall be assessed as compatible with the standard of fair trial. As already mentioned, the examination of the complaint by the Supreme Court does not lead to the launch of another procedure, a "subsequent instance", where evidence is taken, and the parties have the opportunity to prove their case, as in the main proceedings – meaning first or even second instance proceedings. The Supreme Court in the complaint proceedings is not entitled to review the assessment of individual evidence in the aspect of liability of the accused in the judgment of the court of appeal, and the complaint against the judgment of the court of appeal reversing the judgment of the court of first instance is not a means of verifying the assessment of evidence made in the second instance.[44] The limitation of the rights of the defence in the material sense, expressed primarily in the above-mentioned elements, does not exclude the possibility of the accused's personal action at this stage of the procedure. He has the possibility of submitting pleadings other than the complaint itself. Due to the scope of the these proceedings and the possible consequences of the decision of the Supreme Court made after examining the complaint (which in turn leads to a substantive examination of the case – either again in the first or second instance), the restriction of the rights of defence in the material sense is in accordance with the standard resulting directly from both Art. 6 of the ECHR and Art. 42 para. 2 of the Constitution of the Republic of Poland.

5 PRINCIPLE OF TWO-INSTANCE PROCEEDINGS

The principle of two-instance judicial proceedings is provided in Art. 176 para. 1 of the Constitution of the Republic of Poland. This provision complements the right to appeal granted in Art. 78 of the Constitution.[45] The application of these provisions in the context of the complaint proceedings may give rise to some doubts. Art. 78 of the Constitution provides literally for the right to appeal against decisions issued "in the first instance". Reading this provision literally, it does not imply a constitutional right of complaint against the cassatory judgment as a means of appeal against a judgment of the court of second instance. However, although the Constitution does not explicitly provide for the need to establish more than two instances before which it would be possible to challenge the decision, there is no obstacle to the legislator providing for such a solution, although it is not required to do so by constitutional provisions.[46] At the same time, the firm provision of Art. 176 para. 1 of the Constitution contains an order for "at least" two-instance proceedings. Adding that the complaint proceedings are not a "third instance" (which is not prohibited by constitutional provisions), enabling an additional assessment of issues that have already been the subject of the court of appeal's consideration, does not in any way violate the constitutional principle of two instance procedure.

43 Paweł Wiliński, 'Zasada prawa do obrony w polskim procesie karnym' w P Hofmański i P Wiliński (redz), *System prawa karnego procesowego*, t 3 Zasady procesu karnego (Wolters Kluwer 2014) pt 2.

44 Case V KS 33/20 (n 13).

45 Leszek Garlicki i Krzysztof Wojtyczek, 'Komentarz do art 78' w L Garlicki i M Zubik (redz), *Konstytucja Rzeczypospolitej Polskiej: Komentarz*, t 2 (2 wyd, Sejmowe 2016).

46 Tadeusz Wiśniewski, 'Problematyka instancyjności postępowania sądowego w sprawach cywilnych' w T Ereciński i J Gudowski (redz), *Ars et usus: Księga pamiątkowa ku czci Sędziego Stanisława Rudnickiego* (LexisNexis 2005); Adam Zieliński, 'Konstytucyjny standard instancyjności postępowania sądowego' (2005) 11 Państwo i Prawo 3.

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The complaint proceedings shall also be analysed from the angle of the right of appeal provided in Art. 2 of Protocol 7 to the Convention. It regulates the right of appeal of any person found by a court to have committed a criminal offence. Art. 2 of Protocol 7 to the ECHR supplements the general standard of a fair trial provided in Art. 6 Convention, which does not explicitly provide for the right of appeal.[47]

Art. 2 of Protocol 7 provides for the right to appeal against the judgment of the criminal court by which a person was found guilty.[48] Therefore, the decision to discontinue the proceedings, among others, remains outside the protection of this provision.[49] Since Art. 2 of Protocol No. 7 was literally limited only to the above-mentioned judgment, it does not apply to the complaint against a cassatory judgment, which is a means against a judgment that does not adjudicate either on guilt nor the punishment. However, this provision does not preclude the national system of the means of appeal from being developed more broadly, as long as it does not occasionally contradict the substance of the means in question.[50]

Since the new model of appeal proceedings, supplemented by a complaint against a cassatory judgment, indirectly forces substantive adjudication in the appeal instance, it should also be analysed through the prism of the right to appeal as guaranteed in Art. 2 of Protocol 7. The question is whether the substantive amendment of a judgment by the appellate court, including one made to the detriment of the accused, is compatible with the requirements of the right of appeal under Protocol 7 to the ECHR if such a judgment becomes final and is not subject to further appeal measures. With regard to this issue it should be noted that Art. 2 para. 2 of Protocol 7 explicitly allows for limitation of the right to appeal when the person concerned has been found guilty and convicted as a result of an appeal against the acquittal judgment of the court of first instance. Thus, this exception allows for conclusion that other changes of the first instance judgment made at the appeal instance are also permissible, in particular when they are less detrimental for the accused than the conviction by the appellate court of a defendant who was acquitted by the first instance court. This is especially so in that due to Art. 454 § 1 of the CCP regulating the *ne peius* rule, this situation in a Polish criminal case, referred to directly in the provision of the Protocol, cannot take place.[51]

6 EQUALITY OF ARMS IN COMPLAINT PROCEEDINGS

The adversarial trial presupposes the existence of two equal parties to the proceedings with opposite interests, presenting their arguments before an impartial and independent court.[52] The parties shall have a right to present their arguments based on evidence submitted in the course of the proceedings. The doctrine indicates that the essence of its contradictory nature

47 Ed Cape and others, *Effective Criminal Defence in Europe: Executive Summary and Recommendations* (Intersentia 2010) ch 2; *Rybka v Ukraine* App no 10544/03 (ECHR, 17 November 2009) <https://hudoc.echr.coe.int/eng?i=001-95995> accessed 23 January 2023.

48 Stephen C Thaman, 'Appeal and Cassation in Continental European Criminal Justice Systems: Guarantees of Factual Accuracy, or Vehicles for Administrative Control?' in DK Brown, JI Turner and B Weisser (eds), *The Oxford Haandbook of Criminal Process* (OUP 2019).

49 Piotr Hofmański, 'Komentarz do art 2 Protokołu 7' w L Garlicki (red), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności*, t 2 *Komentarz do artykułów 19–59 oraz Protokołów dodatkowych* (CH Beck 2011).

50 *Krombach v France* App no 29731/96 (ECHR, 13 February 2001) <https://hudoc.echr.coe.int/eng?i=001-59211> accessed 23 January 2023.

51 Clare Ovey and Robin CA White, *European Convention of Human Rights* (3rd edn, OUP 2002) ch 12; Wąsek-Wiaderek (n 20).

52 Marian Cieślak, *Polska procedura karna: podstawowe założenia teoretyczne* (PWN 1984).

is inherent in the right to conduct a dispute using instruments specified by law.[53] Thus, the conditions necessary to guarantee the adversarial principle include:

1) precise indication of the subject of the procedure;
2) the existence of the opposite parties before the body appointed to settle the dispute;
3) equality of the parties to dispute;
4) the necessary minimum of availability – the right of the parties to influence the course and outcome of the procedure with their actions.

The main condition of an adversarial proceeding is the equality of the parties, known in the Strasbourg jurisprudence as "the equality of arms principle".[54] In our opinion all requirements of equality of arms are preserved in the complaint proceedings. First of all, Art. 539e § 1 of the CCP provides that a complaint is examined without hearing of any parties, at a closed session of the Supreme Court. So, both parties are "heard" by the Supreme Court enabling them to submit written pleadings to the court. It is pointed out that the fundamental element of a fair trial is the right to be heard by the court, and proceedings without the participation of the accused should be accepted only in a situation where the accused has the opportunity to conduct an adversarial hearing.[55] Furthermore, Art. 539c § 1 and 2 of the CCP clearly states that a complaint shall be accompanied by an appropriate number of copies for other parties. The president of the court (the court of appeal to which the complaint is submitted) delivers copies of the complaint to the other parties and instructs them about the right to submit a written response to the complaint within 7 days from the date of delivery of the copy. It is only after this period that the president of the court sends the files to the Supreme Court. Thirdly, all parties to the complaint proceedings are granted the same opportunity to present their case in conditions that do not put them in a worse situation than the one in which the opponent finds himself.[56] The opposite party has a right to submit a response to the complaint (Art. 539c § 2 of the CCP).

Summarising, all the above circumstances allow for drawing the conclusion that both parties in the proceedings are granted equal opportunity to express their views on the matter.[57] Therefore, it seems that this solution is sufficient to guarantee the possibility of influencing the course of the procedure, i.e., the last of the above four conditions for ensuring the adversarial nature of the complaint proceedings. As already mentioned, in the complaint proceedings the Supreme Court does not examine evidence and its decision is fully based on the case-file. Moreover, the complaint proceedings concern exclusively issues of law and not of fact. Having regard to these special features of the discussed proceedings, we are of the opinion that the mere examination of a complaint by the Supreme Court at a session without the participation of the parties, based on written pleadings, fully complies with the principle of equality of arms and adversarial proceedings.

53 Piotr Hofmański, 'Zasada kontradyktoryjności' w P Hofmański i P Wiliński (redz), *System prawa karnego procesowego*, t 3 *Zasady procesu karnego* (Wolters Kluwer 2014) pt 1.

54 *Kartvelishvili v Georgia* App no 17716/08 (ECHR, 7 June 2018) <https://hudoc.echr.coe.int/eng?i=001-183376> accessed 12 October 2022; *Kress v France* App no 39594/98 (ECHR, 7 June 2001) <https://hudoc.echr.coe.int/eng?i=001-59511> accessed 23 January 2023.

55 Ben Emmerson and Andrew Ashworth, *Human Rights and Criminal Justice* (Sweet & Maxwell 2001).

56 Trechsel (n 16); Drazan Djukić, *The Right to Appeal in International Criminal Law: Human Rights Benchmarks, Practice and Appraisal* (BRILL NIJHOFF 2019).

57 *Parol v Poland* App no 65379/13 (ECHR, 11 October 2018) <https://hudoc.echr.coe.int/eng?i=001-189805> accessed 23 January 2023; *Adamkowski v Poland* App no 57814/12 (ECHR, 28 March 2019) <https://hudoc.echr.coe.int/eng?i=001-191911> accessed 23 January 2023.

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Moreover, it seems that the introduction of the possibility of challenging the cassatory judgment (not subject to any further appeal review) directly fulfils the fourth condition of the adversarial principle – the postulate of availability. The parties were given the opportunity to contest a judgment issued in contravention of the procedural requirements (including those burdened with the existence of an absolute ground of appeal), which they were previously deprived of. It is particularly important in cases when the second instance court is revoking the judgment of acquittal and transmitting the case for re-examination to the first instance court.

As transpires from the case-law of the ECHR, it is possible to depart from a public and oral hearing if the scope of court's examination at the appeal stage of the proceedings is limited to the questions of law and does not cover evidence taking and factfinding.[58] The Strasbourg Court explicitly stated that the lack of an open cassation hearing does not infringe Art. 6, para. 1 of the Convention because it is a hearing concerning only the law.[59] Furthermore, at the cassation stage the additional lack of public and open announcement of the decision does not infringe Art. 6, para. 1 of the Convention.[60] The possible need to perform this action depends on the circumstances of the specific case.[61] Since the complaint proceedings concern only questions of law, lack of oral hearing before the Supreme Court examining the complaint cannot be assessed as contrary to Art. 6 of the Convention.[62]

7 CONCLUSIONS

The analyses conducted in this paper allow for drawing the conclusion that the complaint proceedings comply with the main requirements of a fair trial, namely the principle of the examination of the case within a reasonable time, the right to defence, the principle of two-instance procedure, and the principle of adversarial procedure. Certain limitations on the rights of the accused in the discussed proceedings are both proportionate and fully justified by their special features. This conclusion applies to the time-limit for submitting the complaint, the requirement to bring it only through the assistance of a defence counsel, and also to the way of examination of the complaint by the Supreme Court in writing at a closed session.

All these solutions constitute only permissible, proportionate restrictions of the indicated principles. This proportionality results primarily from the benefits of the complaint proceedings: limitations of cassatory adjudication *in genere*, respect for the appeal model of appellate proceedings, maintaining uniformity of interpretation of narrowly defined grounds for cassatory adjudication. Sometimes there is even a specific coincidence between these limitations – the examination of a complaint in camera, without the participation of the parties, favours the

58 *Axen v Germany* App no 8273/78 (ECHR, 8 December 1983) <https://hudoc.echr.coe.int/eng?i=001-57426> accessed 23 January 2023.

59 *Tierce and others v San Marino* App nos 24954/94, 24971/94, 24972/94 (ECHR, 25 July 2000) <https://hudoc.echr.coe.int/eng?i=001-58765> accessed 23 January 2023; *Dondarini v San Marino* App no 50545/99 (ECHR, 6 July 2004) <https://hudoc.echr.coe.int/eng?i=001-66424> accessed 23 January 2023; *Valovà, Slezàk and Slezàk v Slovak Republic* App no 44925/98 (ECHR, 15 February 2005) <https://hudoc.echr.coe.int/eng?i=001-93462> accessed 23 January 2023; *Saccocia v Austria* App no 69917/01 (ECHR, 18 December 2008) <https://hudoc.echr.coe.int/eng?i=001-90342> accessed 23 January 2023.

60 *Nikolova and Vandova v Bulgaria* App no 20688/04 (ECHR, 17 December 2013) <https://hudoc.echr.coe.int/eng?i=001-139773> accessed 23 January 2023.

61 Małgorzata Wąsek-Wiaderek, 'Standard ochrony praw oskarżonego w świetle Europejskiej Konwencji Praw Człowieka' w P Hofmański i C Kulesza (redz), *System prawa karnego procesowego*, t 6 *Strony i inni uczestnicy postępowania karnego* (Wolters Kluwer 2016) 524.

62 Axen v Germany (n 60); *Sutter v Switzerland* App no 8209/78 (ECHR, 22 February 1984) <https://hudoc.echr.coe.int/eng?i=001-57585> accessed 23 January 2023.

acceleration of the complaint proceedings, which would have to last longer if it was connected with the obligation to organise a public session or hearing. The imposition of an obligation to have a complaint prepared and signed by a lawyer also has a positive effect on the time of examining the complaint, as it forces a certain level of professionalism of the preparation of this legal remedy, which prevents formal actions aimed at meeting the formal and substantive conditions of the complaint – they are supposed to be guaranteed by the entity submitting it.

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Research Article

ANALYSIS OF RUSSIA'S MILITARY AGGRESSION AGAINST THE AZERBAIJAN DEMOCRATIC REPUBLIC FROM THE INTERNATIONAL LEGAL PERSPECTIVE

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ABSTRACT

Background: *The article analyses the aggression of Soviet Russia against the Azerbaijan Democratic Republic (ADR) from two perspectives – from the point of view of both Soviet Russia and international law. The problem of whether or not to continue the subject of international law and recognition during the restoration of independence of the states subjected to aggression has created the need for an unambiguous legal response.*

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Even though the rules of the Montevideo Convention (1933) were fully valid in the establishment of the ADR and the republic became a subject of international law, it was recognised by the Versailles legal system, and it was provided with all the attributes of a state in political, economic, social, and other regards, but it was subject to the aggression of Soviet Russia. The conclusion that it is impossible to assess the aggression of Russia against independent states in the framework of the legal system at the beginning of the 20th century is also controversial. The conclusion that Russia's military aggression against independent states 'cannot be evaluated within the framework of the legal system of the period' is wrong, at least in terms of the IV Hague Convention on the Law and Customs of War on Land Territory of 1907(Regulations (Addendum)) Art. 42, the principle of 'no transfer of sovereignty to the occupying state during occupation'.

***Methods**: The occupation of the Republic of Azerbaijan after the restoration of state independence is comparatively analysed using historical and legal methods, taking into account the practice of other states that were attacked by Soviet Russia. A case study approach was used in this article. Since the case study is explanatory and descriptive in design, the description of the conventions on Russian military aggression (1899-1907 Hague Conventions, 1949 Geneva Convention) and practical explanation are included in the article.*

***Results and Conclusions:** The activity of the emigration government, the national liberation struggle, international crimes committed against the population, and the results of the illegal annexation are evaluated according to international law due to the military aggression of Soviet Russia against the ADR. Illegal annexation does not mean the loss of international legal subjectivity of the occupied state. Only in cases of disintegration of the population and disintegration of the society does the loss of state identity occur. Regardless of the existence or effectiveness of the government-in-exile, the long-term struggle of the Azerbaijani people for self-determination during the Soviet era creates an objective basis for the continuity of the ADR.*

1 INTRODUCTION

Although military aggression is prohibited in interstate relations, the non-regulation of the continuity of the state of the occupied territory in accordance with international law increases the importance of domestic legislation. Assessing the continuity of a state subjected to military aggression from the perspectives of third countries is one of the most problematic issues in terms of ensuring international peace and security. The self-attitude (declarative statement) of the state subjected to military aggression should be taken as a basis for the rule of international law in this area, and third countries should also act on the declarative statement of the state subjected to occupation regarding their self-attitude. The principle of non-transfer of the sovereignty of the occupied territory to the occupying state not only makes war illegal as a political tool but also defines a normative direction for the concept of continuity of states in international relations.

We researched these issues through an examination of archive materials and legal documents. During the research, we referred to local legal documents and international conventions. Using the experience of other states that have encountered similar problems, we have provided suggestions to enrich the international law context through comparative legal analysis.

1.1 International (1907 Hague Regulations) and domestic law during the period of occupation

Since the early years of the establishment of Soviet Russia, a number of acts regarding the illegality of aggression have been adopted. V. Lenin formalised the fall of the Russian Empire with the declaration of the rights of the Russian peoples on 2 (15) November 1917[1] and the Peace Decree on 26 October (8 November)[2] and ended its international agreements on aggressive policy. In Arts. 1 and 2 of the Declaration of the Rights of the Russian Peoples, along with the declaration of the sovereignty of the peoples, the creation of an independent state within the framework of self-determination is considered the only legitimate means for any government.

The Peace Decree not only condemns aggression and annexation but considers any kind of military intervention unacceptable for future Russia. Any measure against the will of the people is declared illegal. Soviet Russia also referred to the right of peoples to self-determination in its international agreements.[3] The acts adopted by Soviet Russia on the prohibition of aggressive war were also on the agenda of the Versailles peace conference. Of course, the non-acceptance of aggression in both the Versailles peace conference and the Statute of the League of Nations, which was created as a result of it, directly refers to US President W. Wilson. First of all, among the 14 principles declared by the US Senate, 'political sovereignty and territorial integrity of states' (Art. 14)[4] is also found in the Statute of the League of Nations (Art. 10)[5] with very little editorial difference. The importance of the domestic law of individual states in the establishment of international law is a well-known fact. Art. 10 of the Statute of the League of Nations, which says that the territory of the state cannot be the object of the aggressive goal of another state, has been reiterated in the Charter of the United Nations (Art. 2.4).[6] The Versailles-Washington treaties of 1919-1920 were supposed to ensure collective security, the prevention of military operations, and the peaceful settlement of interstate disputes by laying the foundation of the League of Nations. The domestic law of these states has influenced not only the Statute of the League of Nations but also other norms of international law. In 1928, the Paris Agreement (Brian-Kellogg Pact) was signed to renounce war as a tool of national policy.[7] Shortly after the entry into force of the Statute of the League of Nations (Art. 10) and the Brian-Kellogg Pact, the adoption of the Montevideo Convention on the Rights and Duties of States on 26 December 1933 also established the obligation to exclude the use of illegal force (Art. 11).[8]

The meaning of the illegality of aggression dates back to the years before the adoption of the Statute of the League of Nations 1907, the Fourth Hague Convention on the Law and Customs of War on Land (Regulations (Appendix)) Art. 43 (respect for public life and rules), Arts. 46 and 50 (protection of personal and property rights of the civilian population), and

1 Declaration of the Rights of the Peoples of Russia (adopted 2 (15) November 1917) [1957] 1 Decrees of Soviet power 39.

2 Decree on Peace (adopted 26 October (8 November) 1917) [1957] 1 Decrees of Soviet power 12.

3 Treaty of Peace between Russia and Esthonia (signed 2 February 1920 Tartu) 289 LNTS 11.

4 Woodrow Wilson, President Woodrow Wilson's 14 Points (1918) <https://www.archives.gov/milestone-documents/president-woodrow-wilsons-14-points> accessed 18 February 2023.

5 Covenant of the League of Nations (signed 28 June 1919, entered into force 10 January 1920) <https://libraryresources.unog.ch/ld.php?content_id=32971179> accessed 18 February 2023.

6 United Nations Charter (signed 26 June 1945) <https://www.un.org/en/about-us/un-charter/full-text> accessed 18 February 2023.

7 General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) (signed 27 August 1928) 2137 LNTS 94.

8 Convention on the Rights and Duties of States (Montevideo Convention) (signed 26 December 1933, entered into force 26 December 1934) 3802 LNTS 165.

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Art. 42, which contains the principle that 'sovereignty should not be transferred to the occupying state during the occupation'.[9] Both international law doctrine[10] and international tribunals draw attention in their decisions that those norms originate from 'customary international law'.[11] While the non-transfer of sovereignty to the occupying state during the invasion indicates the illegality of aggression, it also creates a basis for distinguishing aggression from annexation.

The correctness of this content appears later in the Fourth Geneva Convention of 1949 and the advisory opinion of the UN International Court of Justice. In Latin, *occupare* means to forcefully capture and occupy territories that do not belong to oneself with the help of armed forces. In other words, we are talking about the seizure and occupation of the territory of another state by military force. Acquisition of that territory is not ensured by occupation. In order to acquire or appropriate, an acceptance of occupation must take place. Therefore, it is necessary to distinguish occupation from appropriation, acquisition, and conquest. Appropriation means the complete subjugation of the territory occupied by conquest.[12] The occupation by Russia and the interruption of the activities of ADR in Azerbaijan forced the government to go into exile. Before the process of the occupation of Azerbaijan by the Russian army was completed, the people of Azerbaijan began to fight against this terrible invasion of their country, and in a short period of time, nearly the whole country revolted against the Russian occupation.[13]

The aim was that any occupation would be considered illegal[14] when defining the term 'aggression' in the Hague Regulations (Art. 42) (1907). After the ADR was invaded by Russia, it was not possible to talk about the cessation of the people's struggle with the termination of the ADR's activities by Russia, nor was it possible to appropriate the territory.

1.2 National liberation uprisings against military aggression and Soviet rule

The continuity of a state begins with the determination of the true will of the people, which is the basis for that state. Attempts to create the 'union of workers and peasants', which Russia tried to build, were often accompanied by mass speeches against the Soviet system.[15] No matter how important the political factors are during the acceptance of the new power established as an output of the occupation regime by the international community, the struggle of that people is the only means that determines the legitimacy. As long as the people's ideas of political independence live, there will be no time 'framework for accepting the occupation

9 Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (Hague Convention IV) (signed 18 October 1907, entered into force 26 January 1910) <https://www.refworld.org/docid/4374cae64.html> accessed 18 February 2023.

10 Romulus A Picciotti, 'Legal problems of Occupied Nations after the Termination of Occupation' (1966) 33 Militaru Law Review 25; Christopher Greenwood, 'The Administration of Occupied Territory in İnternational Law' in Emma Playfair (ed), *International Law and Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip: The proceedings of a conference organized by al-Haq, Jerusalem, January* 1988 (Clarendon Press 1992) 244-5.

11 *The Trial against Goering* et al (Judgment of 1 October 1946) International Military Tribunal in Nuremberg, *The Trial of the Major War Criminals* (1947) vol 1, 64-5; *In re Hirota and Others* (Judgment of 12 November 1948) International Military Tribunal for the Far East, Tokyo [1948] AD Case No 118, 366.

12 Eyal Benvenisti, *The International Law of Occupation* (2nd edn, OUP 2012); Karma Nabulsi, *Traditions of War: Occupation, Resistance and the Law* (OUP 2005).

13 Mahammad Amin Rasulzade, *Azerbaijan Republic* (Elm 1990) 69-70; Mirza Bala Memmedzade, *National Azerbaijan Movement* (Nicat 1992) 154.

14 Benvenisti (n 13); Nabulsi (n 13).

15 Khayyam Ismayilov, *Legal History of Azerbaijan* (Elm ve Tehsil 2015) 357.

regime'.[16] As stated in the preamble of the Constitutional Act of 18 October 1991 on the State Independence of the Republic of Azerbaijan, '... the December 30, 1922 Treaty on the Organization of the USSR should have established this annexation. For 70 years, against the colonial policy of the Republic of Azerbaijan, the Azerbaijani people continued to fight for state independence'.[17] One direction of the political struggle of the Azerbaijani people was organised by armed uprisings. This process started on 27 April 1920. Contrary to what is stated in some sources,[18] military resistance began on the first day of the military aggression of the Russian army in Azerbaijan.[19] By 1924, four years after the April occupation of 1920, a total of 54 armed uprisings against the Soviet occupation regime took place in Azerbaijan.[20] In the following years, smuggling, sabotage, and other forms of the resistance movement against the Soviet occupation regime were also tested.

1.3 International crimes committed to cancel the continuity of the ADR

According to the Hague Regulations (Arts. 27, 28-34, 42, 47), voluntary subjugation of the civilian population cannot occur. If the occupation regime survives long-term, the continuity of the state may be questioned over time. However, if the illegal annexation is accompanied by mass crimes, including crimes against humanity and genocide, in this case, it is not possible to apply a time limit.[21] As stated in the preamble of the Constitutional Act on the independence of the Republic of Azerbaijan, '...for 70 years...the people of Azerbaijan were subjected to persecution and mass punishment measures, their national dignity was trampled...'.[22]

This factor was the basis of the repression launched against the Republic officials after the April 1920 occupation. The criminal regime of Soviet Russia began to commit war crimes against members of the Azerbaijani government. From April 1920 to August 1921, 48,000 people in Azerbaijan became victims of 'red Bolshevik terror'.[23] During the existence of Soviet power, genocidal crimes were committed on the basis of ethnic-racial characteristics. From a social perspective, genocide was mainly directed against the intellectual and leadership classes. In 1929, the penal authorities arrested 1,142 supporters of the Musavat party and 474 supporters of the Ittihad party – some of them were killed, and some were exiled to the Far North.[24] The state crimes committed by the USSR in the Baltic states after the 1940s, including crimes against humanity and even possible genocide crimes,[25] seem insignificant in terms of extent and systematicity compared to the crimes committed in Azerbaijan.

One of the directions of the Soviet government's illegal annexation of Azerbaijan was changing the alphabet.[26] The two alphabet changes in 1929 and 1939, from the Latin alphabet

16 Philip Marshall Brown, *Sovereignty in Exile* (1941) 35 (4) AJIL 668.

17 Constitutional Act on State Independence of the Republic of Azerbaijan 'Azərbaycan Respublikasının Dövlət Müstəqilliyi haqqında Konstitusiya Aktı' (adopted 18 October 1991) <https://azerbaijan.az/portal/History/HistDocs/Documents/en/09.pdf> accessed 18 February 2023.

18 Heiko Krüger, *The Nagorno-Karabakh Conflict: A Legal Analysis* (Bakı Universiteti 2012) 19.

19 Bahtiyar Refiyev, *The Underwater Part of the Iceberg* (Azerneshr 1995) 14-9.

20 Memmedzade (n 14) 154.

21 Lauri Mälksoo, 'Soviet Genocide? The Communist Mass Deportations in the Baltic States and International Law' (2001) 14 Leiden Journal of International Law 757.

22 Constitutional Act (n 18).

23 Khaleddin Ibrahimli, *History of Azerbaijani Emigration* (Elm ve Tehsil 2012) 35.

24 Refiyev (n 20) 40.

25 Mälksoo (n 22).

26 *History of Azerbaijan* (Elm 2000) 210.

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to the Cyrillic alphabet, served to further the Russification policy and were again a violation of the Hague Regulations (Art. 43 (respect for public life and rules) and Art. 46 (protection of the personal rights of the civilian population). Accusing, insulting, and killing religious leaders and intellectuals (in 1936-1937, 29,000 intellectuals of Azerbaijan were killed as 'enemies of the people' with the false evidence of the Armenian-Russian investigative team)[27] had become common.

According to the Hague Convention of 1907, the population of the occupied territory has inalienable rights (Arts. 42-47). This right was further developed in the Geneva Conventions of 1949. According to Art. 49 of the 1949 Geneva Convention on the Protection of Civilian Population during a military conflict, individual or mass expulsion or deportation of protected persons from the occupied territory to any territory, regardless of the reasons, is prohibited.[28] As a result of deportation carried out in 1948-1953, more than 150 thousand Azerbaijanis were deported from Armenia to Azerbaijan.[29] This process was continued in the following years.[30] These events were a violation of the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide (Art. 2 (c))[31] as well as Art. 2 (a-b). According to Art. 2 (a-b),

> Genocide is the destruction of any national (the victims of genocide were citizens of the Azerbaijan Democratic Republic, ethnic, racial or religious group (Turkish Muslim population), as a group, causing serious bodily injury to members of such a group; it is considered as one of the actions committed to intentionally create living conditions for such a group aimed at its physical destruction in whole or in part.

Azerbaijanis were deported, and Armenians from abroad were resettled on a massive scale.[32] In 1988-1991, the last deportation of Azerbaijanis from their historical, ethnic lands in the Armenian SSR was carried out. According to Art. 49 of the Fourth Geneva Convention on the Protection of Civilian Population during the military conflict of 1949, the occupying state cannot transfer a part of its civilian population to the occupied territory.[33] The area of the territory where the Azerbaijanis were deported was more than 9,800 km2.[34] This was an area equal to a third of the territory of the Armenian SSR.

27 Ibid 375, 385-6; E Sadiqov, 'Khojali Genocide Crime, Intention and International Law Manifested in the Framework of General Plan and Policy' (2014) 37 International Law and Problems of Integration 93.

28 Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) (adopted 12 August 1949 Geneva) <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949> accessed 18 February 2023.

29 Atakhan Pashayev, 'Relocation' in *Deportation of Azerbaijanis from their Historical-Ethnic Lands in the Territory of Armenia* (Azerbaycan Ensiklopediyasi NPB 1998) 66; Vaqif Arzumanli, 'Deportation, Genocide, Refugee' in *Deportation of Azerbaijanis from their Historical-Ethnic lands in the Territory of Armenia*' (Azerbaycan Ensiklopediyasi NPB 1998) 100; *History of Azerbaijan* (Elm 2003) 151; *XX century History of Azerbaijan* (Chashi oglu 2004) 383; Elekberli E, 'Ancient Turko-Oghuz homeland "Armenia"' in *Deportation of Azerbaijanis from their Historical-Ethnic Lands in the Territory of Armenia*' (Azerbaycan Ensiklopediyasi NPB 1998) 167.

30 Pashayev (n 30) 66.

31 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) (signed 9 December 1948, entered into force 12 January 1951) <https://www.un.org/en/genocideprevention/genocide-convention.shtml> accessed 18 February 2023.

32 Arzumanli (n 30) 97.

33 Geneva Convention IV (n 29).

34 İ Memmedov and S Esedov, 'Azerbaijanis of Armenia and their Bitter Fate' in *Deportation of Azerbaijanis from their Historical-Ethnic Lands in the Territory of Armenia* ' (Azerbaycan Ensiklopediyasi NPB 1998) 141.

2 THE NATURE OF INTERNATIONAL LAW DURING THE PERIOD OF OCCUPATION

The rules of the Hague Convention bind only the participating states. In the early years, the USSR, the successor of Soviet Russia, did not accept the Hague Conventions of 1907 but declared that they would apply them only on the basis of the principle of reciprocity. However, in 1955, it accepted those conventions on the condition that the subsequent convention changes do not conflict with international treaties of the USSR. As a result, the Hague Conventions formed the general basis of the 1949 Geneva Conventions and their protocols, which developed international humanitarian law as a whole.[35] Regarding its legal nature, it is appropriate to first refer to Art. 2 of the Convention. The rule expressed in Art. 1 and the Convention as a whole create obligations for the contracting states and all parties to the conflict if they are parties to the Convention. Of course, this article has a negative impact on the legal significance of the Convention, but the rules established by the Convention emerged as a customary norm. Back in 1899, at the suggestion of F. Martens, a provision was included in the preamble of the IV Hague Convention that 'the population and combatants are under the protection of international law, this rule is formed from established customs, humanitarian laws and public consciousness among civilized nations'[36]. Martens' idea that '... the rule that the population and combatants are under the principles and protection of international law... emerges from the public consciousness' is related to the practice of *clausula si omnes*. That is, the signing of the Convention was the recognition of the existing practice. M.E. O'Connell, speaking about the Hague Conventions, notes that the Hague Conventions of 1907 are not only binding for the parties to the agreement but also widely recognised as customary norms.[37] In this sense, the status of individual states are parties to the IV Hague Convention of 1907 cannot exclude responsibility for the violation of the obligation established in Art. 3. According to Art. 3 of the Hague Rules, a party to the conflict that violates the relevant rules must pay for the damage, if it is substantial. That party is responsible for all actions carried out by persons within its military forces.[38]

The rules established by the Fourth Hague Convention of 1907, along with most other conventions, are recognised as legal norms, general practice, and an expression of international customary norms as a source of international law.[39] Although the mechanism of procedural protection is weak, the Hague Rules as an existing norm of international humanitarian law are still being applied today in other *ad hoc* and permanent international courts (international criminal court, Art. 5.1) in the practice of states, starting with the Nurnberg (1945) and Tokyo (1945) Tribunals. The Statutes of the Nuremberg and Tokyo Tribunals were, in many cases, based on the Hague Rules. The Charter of the Nuremberg Tribunal states that the Charter is not an arbitrary exercise of the power of the victorious nations but an expression of international law that existed before its establishment. The judgment of the Nuremberg Tribunal states that the norms of the Rules of the Laws and Customs of War on Land (Convention IV of 1907) were binding for all states as customary international law until 1939.[40] It is not accidental that the government had to state the fact

35 IN Artchibasov and SA Eqorov, *Armed Conflict: Law, Politics, Diplomacy* (Mejdunarodniye otnosheniya 1989).

36 Hague Convention IV (n 10); Geneva Convention IV (n 29).

37 Mary Ellen O`Connel, 'Historical Development and Legal Basis: Legal Sources' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 27.

38 Hague Convention IV (n 10).

39 Diethrich Shindler and Jiri Toman (eds), *The Laws of Armed Conflicts* (3rd edn, Martinus Nijhoff Publishers 1988) 69.

40 *Judgment of the Nuremberg International Military Tribunal* 1946 (1947) 41 AJIL 248-9; 'Nürnberg trials' (Encyclopedia Britannica, 6 January 2023) <https://www.britannica.com/event/Nurnberg-trials> accessed 18 February 2023.

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that the directive of the leader of Soviet Russia to occupy Baku was illegal.[41] Chicherin, the Commissar of Foreign Affairs of the RSFSR, who considered the recognition of the ADR in the international world, wrote to Lenin, who considered the occupation of Baku necessary: 'The act of violence against Azerbaijan (course-author.) will set our friends against us in international relations'.

3 INTERNATIONAL ATTITUDE TO RUSSIA'S MILITARY AGGRESSION

After the occupation of ADR by Russia, A. Topchubashov, the head of the Azerbaijani delegation at the Paris Peace Conference, submitted a note to the Supreme Council of the Allied Powers, the governments of France, England, the US, and Italy, and the embassies of foreign countries in Paris about the occupation of the sovereign state of Azerbaijan and requested a peace conference to assist Azerbaijan in restoring the country's independence.[42]

However, these notes and appeals were not only fruitless – they were also not answered.[43] Although there were disagreements with Soviet Russia in British political circles on the eve of Azerbaijan's invasion by Russia, Prime Minister Lloyd George was against confronting Russia. With this, Soviet Russia received an international guarantee for the occupation of Azerbaijan.[44] The occupation of Azerbaijan by Soviet Russia was greeted with silence by the British government. The same attitude was shown by other allied states. In the directive sent by the US foreign minister to the ambassador in Italy, he expressed 'America's satisfaction with the annexation of the states formed on the borders of the former Russian Empire to Russia, except for Finland, Poland and Armenia'.[45] Like Great Britain and the US, France, and Italy welcomed the occupation of Azerbaijan by Russia with silence. The invasion of Russia once again showed the expectation of international law being valued by the political interests of individual superpowers. During this period, after the Ottoman Empire, which defended Azerbaijan, was overthrown, Turkey could not prevent the fall of the APC. Iran welcomed the fall of statehood in North Azerbaijan. Only Georgia considered the occupation of APC by Russia as the beginning of the occupation of the entire South Caucasus.[46]

4 ADR GOVERNMENT IN EXILE AND DIPLOMATIC MISSIONS

The government of Azerbaijan, both individually and together with other Caucasian delegations, repeatedly addressed the League of Nations, the heads of the allied states, and the London, Genoa, and Hague conferences held in 1922-1923 regarding the *de jure* recognition of the Caucasian Republics and their support in the struggle against Russian occupation and presented notes and appeals to the Lausanne conferences, asking for help.[47] These notes and appeals were not always without effect. As a result of the serious protests of the Caucasian governments in exile in Europe, the Western allies did not agree with the attempts of Soviet Russia to sign the Treaty of Lausanne on behalf of the Soviet republics, and as a result, the

41 Vladimir Lenin, *About Azerbaijan* (Azerbaycan Dovlet Neshriyyati 1970) 164.

42 Jamil Hasanli, *Alimardan bey Topchubashov* (ADA 2013) 452-9; Firuz Kazımzade, *Fight for Transcaucasia* (1917-1921) (Tarih ve Kuram Yayinlari 2016) 329.

43 İsmayil Musa, 'The Collapse of People's Republic of Azerbaijan: The Position of Great Powers and Neighboring States' (2016) 2 News of Baku University, Series of Humanitarian Sciences 47.

44 Qafarov V, *Azerbaijan Issue in Turkish-Russian Relations 1917-1992* (Azerneshr 2011) 345.

45 Kazimzade (n 43) 329.

46 Musa (n 44) 48, 50-1.

47 *History of Azerbaijan* (n 27) 76.

Treaty of Lausanne was signed only by Soviet Russia on 24 July 1923.[48] According to the agreement reached between M. A. Rasulzadeh and A. Topchubashov during his visit to Paris in 1928, the Azerbaijani delegation in Paris accepted the Azerbaijani National Center in Istanbul as the main competent authority in order to unite the national forces and made a statement that it would act together with it.[49] With this statement, Topchubashov, who was the head of the delegation of the ADR at the Paris Peace Conference, as well as the chairman of the Parliament of Azerbaijan (who also has the powers of the head of state), authorised the chairman of the main party in the parliament, Rasulzadeh, to form the government. Unlike the Baltic states (Latvia and Lithuania did not have a government-in-exile during the Soviet occupation, and the Estonian government-in-exile established in 1953 was not accepted by that country's missions abroad),[50] the government-in-exile of the ADR had full legitimacy.

Even after the military aggression, the ADR government continues to operate abroad. During his activity in Europe, Topchubashov applied to the French Ministry of Foreign Affairs to extend the visas of Azerbaijani students to continue their studies at European universities. Also, he asked to issue one-year cards to Azerbaijani citizens who did not have Russian nationality but Azerbaijan nationality, and he received the consent of the French government on these issues.[51]

Inability to renew diplomatic missions (for example, the French government did not issue a diplomatic visa to Topchubashov after February 1923 and cancelled his diplomatic immunity as the head of the Azerbaijani delegation),[52] making military crimes against Azerbaijan diplomats by Russia had a negative impact on the activities of the government in exile. Russia's pressure against diplomats is directed against the countries where they are located. As a result of Russia's pressure on the Republic of Turkey, Rasulzadeh used his personal kinship relations to continue the activities of the government in exile and transferred his activities to Poland, using the financial support of the Polish government for a while. After Rasulzadeh's death in 1953, the delegation of the Musavat party continued the function of the emigration government in Turkey until the state independence was restored in Azerbaijan in 1991. It played a role as the main political force in the formation of the government during the restoration of state independence. Currently, the Musavat party continues its activities in the Republic of Azerbaijan. As mentioned earlier, the non-recognition (of the governments in exile) of the occupied countries by third countries does not mean the 'loss' of their international legal subjectivity. According to the doctrine, the existence of the government-in-exile is one of the factors opposing the legalisation of annexation.[53] International law (for example, the 1907 IV Hague Convention on the Rules of War on Land Regulations on the Law and Customs of War on Land (Appendix) Art. 43 (respect for public life and rules), Arts. 46 and 50 (personal and property of the civilian population protection of rights)[54] and the IV Geneva Convention of 1949), the generally recognised principle that 'sovereignty does not transfer to the occupying state during occupation' confirms the

48 Hasanli (n 43) 509.

49 Vugar İmanov, *Ali Merdan bey Topchubashi (1865-1934): Leader Representation of the Independent Azerbaijan Republic* (Boğazichi Universitesi Yayinlari 2003) 217.

50 Lauri Malksoo, *Soviet Annexation and State Continuity: The International Legal Status of Estonia, Latvia and Lithuania in 1940-1991. and after 1991: A Study of the Tension between Normativity and Power in International Law* (Tartu UP 2005) 180-1.

51 Hasanli (n 43) 479-80.

52 Ibid 511.

53 Karl Doehring, 'State' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law, vol 10 States, Responsibility of States, International Law and Municipal Law* (Elzevier Sience 1987) 427.

54 Hague Convention IV (n 10).

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relevant rule. This position was also accepted in the decisions of international tribunals[55] in the doctrine of international law.[56]

The existence of a government-in-exile is only one component of the occupied state. As mentioned, the state does not automatically cease to exist. The state is not just an external expression of territory and power; it is much bigger. It consists of men and women, in which sovereignty resides. As long as the idea of sovereignty lives in their hearts, so does their state.[57] Illegal annexation does not mean the loss of international legal subjectivity of the occupied state. Only in the case of the disintegration of the population and the disintegration of the society does the loss of state identity occur. Regardless of the existence or effectiveness of the government-in-exile, the long-term struggle of the Azerbaijani people for self-determination during the Soviet era creates an objective basis for the continuity of the ADR.

5 CONSTITUTIONAL BASIS OF THE RESTORATION OF INTERNATIONAL LEGAL SUBJECTIVITY OF THE REPUBLIC OF AZERBAIJAN AS A CONTINUITY OF THE ADR

The Declaration of the Supreme Soviet of the Republic of Azerbaijan on restoring the state independence of the Republic of Azerbaijan dated 30 August 1991, which resulted in the restoration of Azerbaijan's independence under the influence of the people's movement after the war crimes of the USSR leadership on 20 January 1990.[58]

First of all, the declaration mentions the existence of the Republic of Azerbaijan as an independent state recognised by the international community from 1918 to 1920, and in the Constitutional Act dated 18 October 1991 (Art. 1) on 27-28 April 1920. The invasion of Azerbaijan by the 11th army of the RSFSR, the occupation of the territory of the republic, the overthrow of the ADR, which is a subject of international law, and the occupation of independent Azerbaijan by Russia are considered.[59] Bringing foreign military intervention to attention has been an issue related to the continuity of the state. For comparison, it should be noted that in the context of state continuity, the Resolution of the Supreme Soviet of the Estonian SSR is more specific than the Declaration of the Supreme Soviet of the Republic of Azerbaijan on restoring the state independence of the Republic of Azerbaijan and the Constitutional Act of 18 October 1991.[60] The reference to the identity of the Republic of Azerbaijan in the Constitutional Act of 18 October 1991 on State Independence of the Republic of Azerbaijan requires clarification. Although direct succession is referred to in the Constitutional Act on State Independence of the Republic of Azerbaijan (the Republic of Azerbaijan is the successor of the Republic of Azerbaijan that existed from 28 May 1918 to 28 April 1920, Art. 2), the result of the general content of the act is that the modern Republic of Azerbaijan is the successor of the ADR and reminds the concept of identity without continuity.

55 International Military Tribunal in Nuremberg 1947; International Military Tribunal for the Far East in Tokyo 1948 (n 12).

56 Picciotti (n 11); Greenwood (n 11) 244-5.

57 Brown (n 17) 667-8.

58 Declaration On the Restoration of Independence of the Republic of Azerbaijan 'Azərbaycan Respublikasının dövlət müstəqilliyinin bərpası haqqında' (adopted 30 August 1991) <https://republic.preslib.az/en_d1.html> accessed 18 February 2023.

59 Constitutional Act (n 18).

60 Declaration On the Restoration of Independence of the Republic of Latvia 'Par Latvijas Republikas neatkarības atjaunošanu' (adopted on 4 May 1990) <https://www.archiv.org.lv/index3.php?id=1139> accessed 18 February 2023.

In particular, as stated in Art. 1 of the Constitutional Act, on 27-28 April 1920, the aggression of the XI army of the RSFSR against Azerbaijan, the occupation of the territory of the republic, the opinion of overthrowing of the ADR (which is the subject of international law), and the occupation of independent Azerbaijan by Russia also creates the basis for Art. 3 of the Treaty on the Organization of the USSR dated 30 December 1922, which states that the part pertaining to Azerbaijan is invalid[61] from the moment of its signing.

On the other hand, the preamble of the Constitutional Act of 18 October 1991 on State Independence of the Republic of Azerbaijan directly refers to the Declaration of Independence adopted by the Azerbaijan National Council on 28 May 1918, which was the basis for the declaration of the Azerbaijan People's Republic. It is noted that the Supreme Soviet of the Republic of Azerbaijan adopted this act based on the Declaration of Independence adopted by the National Council of Azerbaijan on 28 May 1918, the succession of the democratic principles and traditions of the Republic of Azerbaijan (it should be read as continuity-author).[62] The reference to the Declaration of Independence is both symbolic and restores the state foundations established in that act.

6 NATIONAL SYMBOLS OF THE ADR AND THE REPUBLIC OF AZERBAIJAN: THE IDENTITY THAT PROVIDES THE BASIS FOR CONTINUITY

Although the universally recognised normative regulation and practice on the continuity and identity of the state's international legal entity have not been formed, the legal policy of self-recognition and attachment to political institutions are of great importance during the restoration of state independence. Acceptance of the attributes of the previous independent state whose international legal subjectivity was cut off (whose identity was 'silenced') means acceptance of its legitimacy by the will of the people (population) and is also the position of the restored state itself, and this is one of the main signs of continuity.

Legal status arises from the attitude towards oneself.[63] The Declaration of the people of Azerbaijan dated 30 August 1991, and the position declared at the constitutional level (Constitutional Act dated 18 October) refer to the continuity and identity of the subject of international law of its restored state. The constitutive signs of the state in the Montevideo Convention of 1933 and its power attributes and symbols also justify the continuity. Although the attributes and symbols of power are regulated by constitutional (state) law, they are also of international legal importance. As one of the constitutive signs of the state in the Montevideo Convention of 1933, the single language factor is of great importance in the formation of the status of the population as a nation (state). The state language of the ADR and the Republic of Azerbaijan and the consistent location of the administrative centre (capital) of the government can be mentioned as factors justifying continuity. These attributes showing identity are under legal protection both in the Republic period and in the modern period (Arts. 21 and 22 of the Constitution of the Republic of Azerbaijan). Of course, the main state symbols are the state flag of the Republic of Azerbaijan, the state coat of arms of the Republic of Azerbaijan, and the state anthem of the Republic of Azerbaijan (Art. 23.I of the Constitution of the Republic of Azerbaijan). Art. 23.III of the Constitution of the Republic of Azerbaijan states that the image of the state flag of the Republic of Azerbaijan, the state coat of arms of the Republic of Azerbaijan, and the music and text of

61 Constitutional Act (n 18).

62 Ibid.

63 Krystyna Marek, *Identity and Continuity of States in Public International Law* (Librairie Droz 1968) 580.

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the National Anthem of the Republic of Azerbaijan are determined by constitutional law.[64] The state flag and other attributes of the Republic of Azerbaijan are the institutions of the Azerbaijan People's Republic.

The long-term occupation did not change the status of the Republic of Azerbaijan. It is noted in the literature of international law that after the occupation of the Baltic states, the status of the subject of international law, their existing substantive law, legal system, and citizenship were not lost from a legal point of view until 1940.[65] Professor H. Keslen notes that legal conclusions cannot be created simply from facts, based on the principle that 'illegal activity does not create law'. Legal conclusions should be drawn only from legal norms that have an effect on the facts in the creation of legal norms.[66] Therefore, the international law of that time, which continues to this day, does not accept illegal annexation resulting from the fact of military aggression. For the Republic of Azerbaijan, the state symbols of the ADR determine its legal status as evidence of the identity of the subject of international law.

7 THE TERRITORY OF THE REPUBLIC OF AZERBAIJAN (UTI POSSIDETIS JURIS IN THE CASE OF THE AZERBAIJAN PEOPLE'S REPUBLIC)

The principles of *uti possidetis juris* (Latin: as [you] possess under law) have been established in the agreements created with the collapse of the USSR (for example, in the Agreement on the establishment of the CIS of 8 December 1991 'for the obligation of the inviolability of the existing borders within the framework of the union'[67]). After the collapse of the USSR, the vast majority of its states were re-recognised *de jure* by the international community. Taking into account the Agreement on the establishment of the CIS of 8 December 1991, member of the UN sub-commission on the protection of minorities and prevention of discrimination and director of the Royal Swedish Institute for Human Rights, A. Eide notes that in the former USSR, it was possible to determine the borders of the allied republics based on the principle of *uti possidetis juris* at the level of the United Nations. This means that the borders of the newly created independent republics should be determined based on the borders of the former allied republics.[68]

However, it should be noted that the principle of 'illegal action does not create rights' should be taken as a basis against the 1920 Russian act of military aggression. The Agreement on the establishment of the CIS of 8 December 1991, which seems to be the basis for agreement at the level of the United Nations (the commitment of the high parties to the agreement to recognise and respect the inviolability of the existing borders and the territorial integrity of each other within the framework of the union (Art. 5)), cannot be accepted because it contradicts the Constitutional Act of 18 October 1991 on the State Independence of the Republic of Azerbaijan (Art. 2).

64 Constitution of the Republic of Azerbaijan 'Azərbaycan Respublikasının Konstitusiyası' (adopted 12 November 1995) <https://president.az/en/pages/view/azerbaijan/constitution> accessed 18 February 2023.

65 Marek (n 64) 581; Boris Meissner, *Sowjetunion und Haager LKO: Gutachten und Dokumentenzusammenstellung* (Universität Hamburg 1950) 7-8.

66 Hans Kelsen, *Principles of International Law* (2nd edn, Holt, Rinehart and Winston Inc 1967) VII.

67 Agreement establishing the Commonwealth of Independent States (Belovezhskaya Agreement) (signed 8 December 1991 Minsk) <https://cis.minsk.by/reestrv2/doc/1#text> accessed 18 February 2023.

68 Asbjorn Eide, 'Territorial integrity of States, minority protection and guarantees for autonomy arrangements: approaches and roles of the United Nations' in European Commission for Democracy through Law, *Local Self-Government, Territorial Integrity and Protection of Minorities: Proceedings of the UniDem Seminar, Lausanne, 25-27 April 1996* (CoE 1996) 282.

The Agreement establishing the CIS of 8 December 1991 may seem significant in terms of formalising the fall of an empire. However, in a number of articles, it creates the impression of encouraging a return to the USSR. Namely, it is possible to connect one of the reasons why the Baltic states did not join. The limitation of the 'recognition and respect of the unity framework' in Art. 5 seems to encourage the accession, thinking that it would be threatened later (for example, by Georgian separatism) if it did not join before. The separatism promoted by Russia and the forced accession of the Republic of Azerbaijan to this agreement after being subjected to open military aggression by the neighbouring state to avoid being left out of the 'privilege' took place within the framework of the 'union on the one hand' and the leadership of the Republic of Azerbaijan in the spirit of a 'Soviet man' as a requirement during the accession. Still, numerous reservations in the 1994 accession act of Moldova,[69] which was faced with the problem of Transnistria separatism, questioned its legal nature. Art. 12 of the agreement provides for the fulfilment of international obligations arising from the agreements and contracts of the former USSR for the members of the organisation, which is contrary to the Constitutional Act of 18 October 1991 on the state independence of the Republic of Azerbaijan. Art. 4 of the Constitutional Act refers to the validity of the 1978 Constitution of the Republic of Azerbaijan (Azerbaijan USSR) in places that do not conflict with the provisions of the Constitutional Act of 18 October 1991 on state Independence. Part 2 of Art. 7 of the Constitutional Act states that during the period when Azerbaijan was a part of the USSR (it would be more correct to say illegally annexed), the property created at the expense of the national income and natural and other resources of the Republic of Azerbaijan, which were usurped in the amount corresponding to the contribution of Azerbaijan in the creation of this property was transferred to the Republic of Azerbaijan under the contract. The justification for this article comes from the preamble of the Constitutional Act. In the preamble of the Constitutional Act, attention is drawn to the 'exploitation of Azerbaijan's natural resources and the looting of national resources, referring to the colonial policy against the Republic of Azerbaijan for 70 years'.[70]

In international law (Appendix of the 1907 Hague Convention on the Law and Customs of War on Land Territory Art. 42 – according to the principle of 'the sovereignty of the occupied territory does not pass to the occupying state'), the determination of borders by the principle of *uti possidetis juris* does not apply to the Republic of Azerbaijan, but to Azerbaijan, the SSR is valid in the relationship. The declaration of 1 December 1920 under the leadership of N. Narimanov regarding the transfer of Nakhchivan and Zangezur to Armenia and the right of the peasants-farmers of Nagorno-Karabakh to self-determination has no value from the point of view of international law. H. Kruger, while justifying the belonging of Nagorno-Karabakh to Azerbaijan, rightly notes that neither Narimanov nor the Azerbaijan Revolutionary Committee, nor Stalin alone had the power to initiate the concession of the territory in terms of international law. Kruger's position up to this point is completely in line with international law. But then, the author notes that only the central government in Moscow had the authority to solve this issue as a new sovereign (author) institution in the Caucasus.[71] According to the codification act of customary international law (Appendix of the 1907 Hague Convention on the Law and Customs of War on Land Art. 42 – the principle of 'the sovereignty of the occupied territory does not pass to the occupying power'), there is no basis for confirming the sovereignty of the central government in the Caucasus in Moscow. There is no doubt that the statement of N. Narimanov, the representative of the Soviet regime appointed by military aggression, was made to promote the change of political power in Armenia. As a result of this, Nagorno-Karabakh remained in Azerbaijan, and

69 Belovezhskaya Agreement (n 68).

70 Constitutional Act (n 18).

71 Krüger (n 19) 20-1.

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the Moscow government's 'sovereignty' in relation to Nakhchivan was neutralised at the initiative of Turkey (by the agreement of Gyumri, Moscow, and Kars). However, Zangezur was handed over to Armenia illegally in violation of the Hague Convention of 1907.

8 CONCLUSIONS

The IV Hague Convention of 1907 and the rules on the law and customs of war in land territory adopted as its annex further promote the creation of new norms in relation to the administration of the occupied territories, the civilians in that territory, the combatants, and the methods and means of conducting international conflicts. One of the very important provisions of the IV Hague Convention is the regulation of the occupied territory and property rights in that territory. In particular, the occupying power can exercise the right to use the property only temporarily. The generally recognised norm on the non-transfer of property, including territories, also prohibits any change of territory. With the invasion of 1920, Soviet Russia not only changed the administrative territorial structure of the ADR but also appropriated part of the territories historically belonging to the Azerbaijani people and gave the rest to Armenia and Georgia on the occasion of the establishment of Soviet power. Art. 55 of the Rules on the Laws and Customs of War on Land of the IV Hague Convention of 1907 states that the occupying power can only recognise for itself the right of administration and use of the buildings, immovable property, forest, and agricultural areas of the other hostile power in that territory. According to the rules of use, management should be carried out in such a way that the basic values of those types of property are protected. Today, the territory of the Republic of Azerbaijan has 86.6 thousand km2 under its authority. When viewed in the context of disputed and non-disputed territory as a continuation of the ADR, a different political and legal picture is visible. According to the official information of the Azerbaijan government published in the 'Address-Calendar' of 1920, 97,297.67 km2 of the 113,895.97 km2 territory of the ADR was its undisputed territory. Only 16598.30 km2 was disputed. The territory-border (peace) agreement between the Republic of Azerbaijan and Armenia stipulates that the 97.3 thousand km2 undisputed territory of the ADR should be recognised unconditionally for the Republic of Azerbaijan as well. The 97.3 thousand km2 undisputed territory of the Azerbaijan People's Republic was also declared at the Versailles conference of that state before the illegal annexation of the RSFSR, the borders of the Azerbaijan People's Republic were recognised by agreements signed with the bordering Ottoman state, Georgia, Iran, and the Mountainous Republic, except Armenia, in 1920. It came under the protection of the Statute of the League of Nations (Art. 10), which entered into legal force on 10 January, and the 1907 Hague Convention on the Law and Customs of War on Land. The concept of the 'generally accepted' territory of Armenia, which was changed by the Russian occupation of 1920 and created by the collapse of the USSR in 1991, is not valid from the point of view of international law. Territorial border recognition for Armenia by the Republic of Azerbaijan can be possible only as a result of the popular vote of the Azerbaijani people. International legal order and justice must be ensured by accepting the existing borders (*restitutio integrum*) until Russia's military aggression against the ADR. Unfortunately, Russia, which violates all the fundamental principles of international law, does not want as always to recognise international law in the twenty-first century and intends to occupy the territories of Ukraine located in its neighbourhood.

The concept of the successor or identity of the Azerbaijan People's Republic of Azerbaijan for the modern state consists of the following: 1) raising a claim on the reparation and satisfaction obligation of the Republic of Azerbaijan to the Russian Federation for a large number of crimes committed against international law on the territory of the Azerbaijan

state (for deportation; war and genocide crimes); 2) solving the individual criminal liability of officials in the context of ongoing crimes; 3) ensuring responsibility for illegal expropriation and confiscation of property; 4) return of illegally annexed territories, etc.

In the case of military aggression, the non-formulation of the international legal regulation of the continuity of the state can be linked to the political interests of the superpowers. But there is a way out. It is well-known that many international standards originate from the domestic law of states with advanced legal practice. In order to solve this problem, the preparation of an international convention can be carried out considering the experience of state law of states that have been subjected to military aggression (including Latvia, Lithuania, Estonia, the Republic of Azerbaijan, etc.). In particular, the draft of the convention that could be prepared within the framework of the International Law Commission (the bases of the international legal regulation of the continuity of the state in the event of military aggression) could include:

1. Military aggression and illegal annexation;

2. National liberation struggles;

3. The existence of a government-in-exile of a state subjected to military aggression;

4. The scale and systematicity of international crimes committed against the struggling people (international law);

5. The legislative attitude of the nation subjected to military aggression and illegal annexation.

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Research Article

EUROPEANISATION AND ITS IMPACT ON CANDIDATE COUNTRIES FOR EU MEMBERSHIP: A VIEW FROM UKRAINE

Victoria Lomaka, Ivan Yakoviyk, and Yevhen Bilousov

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ABSTRACT

***Background**: The nature of the European Union (EU) as a global actor has long been the subject of diverse academic debates. Proponents of an understanding of the EU as a normative force believe that its greatest transformative power lies not in coercion but in a policy of enlargement that allows the EU to stimulate reforms in the candidate countries of the Central and Eastern European region, despite the crisis of enlargement. The aim of the article is to study the impact of the Europeanisation process on the legal systems of member states and candidate countries, in particular Ukraine, as well as the formulation of proposals for national institutions regarding the perception of the 'Europeanisation' impact of EU law on the legal system of Ukraine.*

***Methods:** The methodological basis of the work is interdisciplinary and comprehensive approaches. The interdisciplinary approach is based on the application of theoretical developments in jurisprudence, philosophy, political science, and the theory of international relations, which make it possible to study the process of Europeanisation in relation to member states and candidate countries as fully and comprehensively as possible. The comprehensive approach is aimed at identifying the multifaceted and multifactorial ontological determinants of the Europeanisation process of legal systems. These approaches determined the choice of appropriate general theoretical and special scientific methods: hermeneutic, dialectical, analysis, synthesis, etc.*

***Results and Conclusions:** As a result of the study of the political will, capacity, and legitimacy of the EU to defend the values proclaimed in the founding treaties, in cases of violations of the regulations of the EU law by the member states, the authors come to the conclusion that the EU may face negative consequences due to the display of democratic reformist coalitions in individual member states (Poland and Hungary), as well as due to favouring (authoritarian) stability over uncertain (democratic) change. Concession to candidate countries for EU accession in terms of the fulfilment of the Copenhagen criteria in exchange for satisfying the interests of leading member states may undermine the credibility of the project of building a European identity based on the common values of the EU, as well as the loss of the reputation of the normative power of the European Union. Accelerating the process of Ukraine's accession to the EU, which is connected with Ukraine's acquisition of the status of a candidate for accession to the EU, requires the Europeanisation of the domestic legal culture as a prerequisite for the modernisation of all other elements of the legal system. This, in turn, implies the completion of the process of de-Russification of legal science and education, the development and approval of the Legal Education Development Program, and the modernisation of legal terminology.*

1 INTRODUCTION

The globalisation of law, as one of the directions of globalisation, is a consequence of the ever-increasing interdependence of economic and social relations that are formed between particular political, national and cultural units. It consists of the general process of internationalisation of national law. The meaning of the globalisation of law is to bring legal certainty and stability to these relations. However, it should be noted that political and legal globalisation is not developing as fast as economic, technological and information globalisation, and therefore there is a certain lag of legal and political development behind economic and technical.

Globalisation, which affects the unification of legal regulation of a wide range of social relations, naturally affects the confrontation between the global and the local. As a result, the tendency to localisation, as a reaction to globalisation, strengthens the process of regionalisation in various parts of the world, but primarily in Europe, where it has acquired a

supranational character. European integration, without denying the common objective that reflects the processes of globalisation, arises in the unification of national-state interests and their elevation to the level of regional (group) interests and thus is an alternative and a kind of solidarity group of states' response to challenges globalisation.

The problem of Europeanisation gained popularity at the end of the 20th and the beginning of the 21st centuries and almost immediately acquired the characteristics of a new field of interdisciplinary research:[1] it became an indispensable component of the subject of research not only in jurisprudence but also in political science and the theory of international relations. This is due to the fact that the scope of Europeanisation as a research agenda is broad. The emergence of the term 'Europeanisation' determines the need to reveal its relationship with 'European integration'. The indicated phenomena and the terms denoting them are not identical since the sphere of Europeanisation can go beyond European integration – for example, it can include the transfer of policy from one European country to several other countries.[2]

Today, this field of knowledge has come of age, and the literature on these issues has become an important source of academic debates about European integration, within which discussions continue both about the nature of Europeanisation,[3] its connection with the process of European integration, and its impact on international public[4] and international private law.[5]

In this article, we adhere to the position of those researchers who believe that Europeanisation should be considered a problem and not a solution. The introduction of the concept of Europeanisation into the scientific discourse contributed to the emergence of new original explanations on a number of important issues, in particular the analysis of the impact of the EU legal order on national legal systems, supranational governance on national models of the internal policy of EU member states and candidate countries, and, in some cases, neighbouring states.

Unlike European integration, which is based on the transfer of powers from member states to the EU ('downloading'),[6] the process of Europeanisation involves the transfer of models and content of the European decision-making process in the context of national management systems. The majority of researchers, with whose position we agree, believe that integration theories are not very well suited for revealing the content of Europeanisation, since their main goal is to explain the dynamics and results of European integration, but not the internal processes that Europeanisation[7] describes.

The narrow focus of Europeanisation literature focused on the consequences specifically for the legal systems of the EU member states seemed surprising since, throughout the history

1 CM Radaelli, 'Europeanisation: Solution or Problem?' (2004) 8(16) European Integration Online Papers (EIoP) 16.

2 CM Radaelli, 'The Europeanization of Public Policy' in K Featherstone, CM Radaelli (eds), *The Europeanization of Public Policy* (Oxford University Press 2020) 27. DOI: 10.1093/0199252092.003.0002.

3 R Ladrech, *Europeanization and National Politics* (Palgrave Macmillan 2010).

4 J Wouters, A Nollkaemper, E De Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (TMC Asser Press 2008).

5 NA Baarsma, *The Europeanisation of International Family Law* (TMC Asser Press 2011); J Harris 'Understanding the English Response to the Europeanisation of Private International Law' (2008) 4(3) Journal of Private International Law 347-395.

6 IV Yakoviyk, SS Shestopal, PP Baranov, NA Blokhina, 'State Sovereignty and Sovereign Rights: EU and National Sovereignty' (2018) 34 (87-2) Opcion 376-385; R Sturm, 'The Europeanisation of the German System of Government' (2017) 3 German European Policy Series 377.

7 F Snyder (ed), *The Europeanisation of Law: The legal effects of European integration* (Hart Publishing 2000).

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of integration, its influence has always, to some extent, spread beyond the borders of the European Communities/EU: outsiders of this process have resorted to various forms of unilateral accommodation to EU law (mostly it resembled the reaction of the neighbouring states of the European Communities to various negative external effects of European integration for them). Therefore, a relatively new direction within this research agenda has been the focus, since the early 1990s, on the Europeanisation of the member states of the European Free Trade Association, and since the 2000s on the candidate countries and neighbouring states as part of the enlargement process of the EU to the East,[8] which provided for their unilateral acceptance of EU standards – *acquis communautaire*. In earlier studies of the adaptation of the law of candidate countries and new EU members, the term 'Europeanisation' was not used.

In Ukrainian legal science, despite the constitutional confirmation of the irreversibility of the European and Euro-Atlantic course of Ukraine (Preamble to the Constitution of Ukraine) and the signing of the Association Agreement between the EU and Ukraine,[9] this direction of scientific research is still not given enough attention.[10] This determines the relevance and practical significance of this study.

2 METHODOLOGY OF RESEARCH

The methodological basis of the work is interdisciplinary and comprehensive approaches. The interdisciplinary approach is based on the application of theoretical developments in jurisprudence, philosophy, political science, and the theory of international relations, which make it possible to study the process of Europeanisation in relation to member states and candidate countries as fully and comprehensively as possible. The comprehensive approach is aimed at identifying the multifaceted and multifactorial ontological determinants of the Europeanisation process of legal systems. These approaches determined the choice of appropriate general theoretical and special scientific methods: hermeneutic, dialectical, analysis, synthesis, etc.

3 THE EUROPEAN UNION AS THE NORMATIVE POWER OF EUROPE

As part of European integration research, N. Fligstein notes that considerable attention is paid to EU law, which *de facto* created a European legal order similar to the federal legal system in the USA, and, in fact, constituted the founding Treaties of the European Union.[11] It is worth quoting the words of the first President of the European Commission, W. Hallstein, to characterise this community from his speech delivered on 12 March 1962 at the University of Padua. In his words:

> This community is not due to military power or political pressure, but owes its existence to a creative act. It is based on sound legal standards and its institutions are subject to legal control. For the first time, the rule of law takes the place of power and its manipulation, of the equilibrium of forces, of hegemonic aspirations, and of the game of alliances. [...] In the

8 U Sedelmei, 'Europeanisation in new member and candidate states' (2011). 6(1) Living Reviews in European Governance 17-22. DOI: 10.12942/lreg-2011-1.

9 Association Agreement between the European Union and Ukraine <https://www.kmu.gov.ua/en/yevropejska-integraciya/ugoda-pro-asociacyu> accessed 1 November 2022.

10 IV Yakoviyk, HV Anisimova, OY Tragniuk, 'Europeanization of Environmental Law of the European Union Member State' (2022) 158 Problems of Legality 85-86. DOI: 10.21564/2414-990X.158.263248.

11 N Fligstein 'The Process of Europeanization' (2000) 1 Politique Européenne 25-42. Doi: 10.3917/poeu.001.0025.

> relations between Member States, violence and political pressure will be replaced by the preeminence of the law.[12]

Since the 21st century, the EU has not been associated with civilian power, as it was in the 1970s, and not with a hybrid actor torn between civilian and military power, as it was considered in the 1990s, but identifies itself with the international arena as Normative Power Europe,[13] which is characterised by common principles and willingness to disregard the concepts of 'state' and 'international'. Some authors even use the concept of 'normative empire',[14] which gives them a reason to discuss the civilising mission of the EU, within which the EU uses its own law as a means of legitimising imperial policy towards its neighbours. J. Zielonka believes that a civilising mission is considered to have fulfilled its purpose if both the metropolis and the periphery consider it trustworthy; when the periphery views it as reliable and desirable for a combination of moral, historical, cultural, and utilitarian reasons. In his opinion, it was the imperial discourse that helped the EU legitimise its expansion project in Central and Eastern Europe.[15]

As a normative power, the EU exports universal norms, standards, practices and management models beyond its borders. Thus, access to the internal market of the EU and the signing of trade agreements with it is conditioned by the adoption of EU rules and standards by the respective country. At the same time, it should be noted that the way (persuasion, activation of international norms, formation of discourse and creation of an example for imitation,[16] but not coercion) in which the EU supports and spreads its values and interests in its relations with other countries (para. 5 Art. 3 of the Treaty of the European Union (TEU)[17]) is as important as what it promotes (values of peace, freedom, democracy, the supranational rule of law, human rights, social solidarity, fight against discrimination, sustainable development and proper governance (Arts. 2, 3 of the TEU)).

During the implementation of its normative power, the EU relies on the activity of the Court of Justice of the European Union (CJEU).[18] The fact is that from an early stage, the CJEU saw itself as the exponent of the normative foundations of integration. CJEU transformed the original system through bold and controversial legal decisions declaring the direct effect and supremacy of European law over national law.[19] The influence of the CJEU in the development of EU law has been defining and, in some respects, unprecedented in the history of legal systems: the CJEU has shaped EU law by 'constitutionalised' the treaties establishing the European Communities through its jurisprudence (the direct effect and supremacy of the

12 W Hallstein, 'Die EWG als Schrittzur Europäischen Einheit' in T Oppermann (ed), *Walter Hallstein — EuropäischeReden* (Deutsche Verlags-Anstalt1979); Von Danwitz T, 'Values and the Rule of Law: Foundations of the European Union – An Inside Perspective from the ECJ' (2018) 21 PER/PELJ 4 <https://perjournal.co.za/article/view/4792/6602> accessed 1 November 2022.

13 I Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 4(2) JCMS 235 DOI: https://doi.org/10.1111/1468-5965.00353.

14 H Haukkala, 'The EU's Regional Normative Hegemony Encounters Hard Realities: The Revised European Neighbourhood Policy and the Ring of Fire' in D Bouris, T Schumacher (eds), *The Revised European Neighbourhood Policy* (Palgrave Macmillan 2017) 77-94.

15 J Zielonka, 'Europe's New Civilizing Missions: The EU's Normative Power Discourse' (2013) 18(1) Journal of Political Ideologies 35. DOI:10.1080/13569317.2013.750172.

16 T Forsberg, 'Normative Power Europe, once Again: A Conceptual Analysis of an Ideal Type' (2011) 49(6) 1184 JCMS 1184. DOI: https://doi.org/10.1111/j.1468-5965.2011.02194.x.

17 Consolidated version of the treaty European Union <https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF> accessed 1 November 2022.

18 M Kiener, Europeanization by the Courts. *General Aspects of Variance in Preliminary References Between Member States* (Examicus Verlag 2012).

19 KJ Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2010) 1. DOI: https://doi.org/10.1093/acprof:oso/9780199260997.001.0001.

EU Treaties: these doctrines effectively transformed the European Economic Community Treaty into a constitution, in all but name, protecting fundamental rights, defining the internal market, and expanding EU competence.[20] The CJEU later went beyond these legal bases but was, despite resistance from some national courts and member state governments, considered legitimate to fill the political and legal void in the new supranational order.

According to G. Davies, the legislative competence of the CJEU is wider than the legislative competence of the legislature.[21] M. Blauberger and S. K. Schmidt, in turn, note that the Court's rulings have direct implications for policymaking at the European and domestic levels. And due to the unanimity rule for treaty changes, overruling the CJEU is even more difficult than in the context of national constitutional jurisprudence.[22]

The case law of the CJEU, as evidenced by the analysis, generates numerous effects of Europeanisation. When the case-law of the CJEU shapes policy issues of great political importance, it is expected that legislatures will be interested in participating in policymaking through codification. The European Commission, which systematically participates in legal proceedings as the guardian of the Treaty, actively promotes judicial pressure on EU member states and instrumentally uses the case law of the CJEU. The Commission combines its legislative role with the role of defender of the Treaty, emphasising that the codification of case law (consolidation of principles developed in case of law in the secondary legislature) is necessary for greater legal certainty. As a result of the analysis, D. Martinsen concludes that member states hardly ever override the Court's case law; they codify the case law mostly regarding technical issues; and they try to restrict the Court's impact in more contested areas through 'modification'.[23]

4 EUROPEANISATION AS A PHENOMENON OF EUROPEAN INTEGRATION

The creation of a united Europe is usually perceived primarily as an economic process aimed at the regional integration of production, commercial, banking and financial operations, technologies and information.[24] But in fact, this is a more complex social phenomenon, which, in addition to economic transformations, includes a fairly complex modernisation of the political, legal, social, and cultural systems of the EU member states,[25] which has an equally significant impact on all spheres of social life, including in the former post-socialist countries of the East, Central, and Southern Europe.

Europeanisation is certainly a managed and planned political project aimed at deepening European integration through law and the Europeanisation of law itself. This, however, does not imply the convergence of the national law of the EU member states, although some authors hold the opposite opinion.[26]

20 T Tridimas, 'The Court of Justice of The European Union' in R Schütze, T Tridimas (eds), *Oxford Principles of European Union Law: The European Union Legal Order: Volume I* (Oxford Academic 2018) 581. DOI: https://doi.org/10.1093/oso/9780199533770.003.0021.

21 G Davies, 'Legislative Control of the European Court of Justice' (2014) 51(6) Common Market Law Review 1593 DOI: https://doi.org/10.54648/cola2014133.

22 M Blauberger, SK Schmidt, 'The European Court of Justice and its Political Impact' (2017)40(4) West European Politics 908. DOI:10.1080/01402382.2017.1281652.

23 Ibid., 912.

24 I Yakoviyk, Ye Bilousov, K. Yefremova, 'European Integration as a Challenge for the Implementation of Economic State Sovereignty' (2022) 5 (3) Access to Justice in Eastern Europe 9. DOI: 10.33327/AJEE-18-5.2-a000330.

25 RH Cox '20.: Europeanization of social policy' in *Elgar Encyclopedia of European Union Public Policy* (Edward Elgar Publishing 2022) 189-195.

26 PhA Nicolaides, 'A Model of Europeanisation with and without Convergence' (2010) 45(2) Intereconomics 114-121.

The Europeanisation of law is often reduced to the multi-centrism of the sources of law, the plurality of bodies interpreting it and jurisdictions, which creates specific problems both for the bodies that interpret and apply EU law and for the subjects of this law. But, in our opinion, Europeanisation should be considered more broadly, including in its content the impact of EU law on national legal cultures and legal awareness (scientific, professional and public), since success depends on the effectiveness of changes in this segment of the national legal system: a) perception of new paradigms, styles, a common system of values and beliefs, which are defined and consolidated for the first time in the political process of the EU, and therefore need to be included in the logic of the development of national legislation, the formation of identities, and the implementation of public policy; b) alignment of domestic policies and institutions with their European counterparts; c) conducting negotiations of national authorities with EU institutions; d) effectiveness of adaptation of national legislation to EU legal standards; e) improvement of law enforcement activities.

The EU enlargement policy, which aims at the 'democratisation', 'Europeanisation', and 'modernisation' of the candidate countries before their accession to the EU, is today the main instrument of the Union's normative power in Europe. The EU's normative identity is thus central to debates about the EU's normative influence beyond its borders.[27]

The success of the 'united Europe' project is largely due to the fact that:

1. at the initial stage of the creation of the local social order, six states participated, and they had a common vision of the goals, values, directions of development, intentions and actions of other states and their associations, and a general idea of the rules by which the legal regulation will be carried out;
2. the founding states of the European Communities, and in the process of expansion, the new member states recognised their roles in the union, which were in a hierarchical relationship to each other (for example, the France-Germany tandem is perceived as the 'core' and 'locomotive' of integration, which legitimises their leadership in the EU);
3. the process of Europeanisation from the very beginning covered the national legal systems of the member states, and later also of the candidate countries and neighbouring states, and not only the economic and political spheres;
4. the unification process deepened gradually: starting with the sphere of coal and steel, integration initiatives, depending on the achieved success and therefore positive perception at the level of public consciousness, gradually shifted to new spheres of legal regulation (after the adoption of the Single European Act and changes in voting rules, the number of directives adopted in the EU has increased significantly);
5. the European Communities/EU was, from the beginning, closely linked to the North Atlantic Alliance (NATO) and the Council of Europe, membership of which later became a latent criterion for EU membership.

In general, it should be agreed that the growth of the intra-European economy, lobbying, the number of court cases, and directives – all these characteristics of Europeanisation are in a certain interdependence and develop together,[28] contributing to Europeanisation.

27 R Del Sarto, 'Normative Empire Europe: The European Union, its Borderlands, and the "Arab Spring"' (2015) 54 (2) JCMS 219-223. DOI: https://doi.org/10.1111/jcms.12282; I Manners, 'Normative Power Europe Reconsidered: Beyond the Crossroads' (2006) 13(2) Journal of European Public Policy 235-258. DOI: https://doi.org/10.1080/13501760500451600.

28 N Fligstein, 'The process of Europeanization' (2000) 1 Politique Européenne 35 DOI: 10.3917/poeu.001.0025.

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However, the majority of people in a united Europe are not involved in this process in a direct economic, political, or social sense, and therefore the transformation of their legal culture lags significantly behind the pace of integration, which potentially poses a threat to integration due to the possibility of blocking certain decisions during the ratification of founding treaties or bringing Eurosceptic parties to power.

Reference frames of Europeanisation due to the expansion of the EU at the expense of former post-socialist countries from the beginning of the 21st century went beyond the borders of the member states, covering the candidate countries and neighbouring states and demonstrating the significant influence of the legal culture of the united Europe of the EU even on those states that do not seek to acquire membership in the EU or are still outside the direct process of European integration.[29] As a result, the use of the term 'Europeanisation' is still not unified, and therefore this phenomenon is perceived as having many 'faces' and directions of action both within the united Europe and beyond. It is no coincidence that the discourse on the dimensions of Europeanisation is also projected onto the subject of scientific research on this process.

One should agree with the opinion of J. Olsen, who believes that as a result of the gradual deepening and expansion of integration, Europeanisation has acquired a multidimensional character and currently takes place in four spheres:[30]

a) Europeanisation of politics, that is, the influence of EU membership on the politics of individual member states. In this direction, the greatest effect was achieved during the Europeanisation of Germany (the political system and management system of the Federal Republic of Germany is imbued with European politics, and German statehood has lost its absolute character)31 and the least, in relation to Great Britain (the famous phrase of W. Churchill 'We are with Europe, but not of it' reflects the general approach of the British to European integration as at the time of its expression in 1930, during London's membership in the EU, as well as after leaving it);

b) institutional adaptation, i.e., the transformation of social and political institutions in EU member states;

c) Europeanisation of law, which involves not only the formation of European law but also, in particular, the convergence of national legal systems of member states, as well as countries that intend to join the EU;

d) transnational cultural diffusion, which consists of the spread of cultural standards, ideas, identities, and patterns of behaviour both within the EU and beyond.

Thus, one can agree with C. Radaelli, according to whom Europeanisation consists of processes of construction, use, and institutionalisation of formal and informal rules, procedures, political paradigms, styles, ways of doing things, and common beliefs and norms, which are initially defined and consolidated in the political process of the EU and then incorporated into the logic of internal (national and sub-national) discourse, political structures, and state policy.[32] Similar interpretations can be found in other authors.[33]

29 B Kohler-Koch 'The Evolution and Transformation of European Governance', in B Kohler-Koch, R Eising (eds), *The Transformation of Governance in the European Union* (Routledge 1999) 14-36.

30 JP Olsen, 'The Many Faces of Europeanization' (2002) 2(5) Journal of Common Market Studies 921-952.

31 R Sturm, The Europeanisation of the German System of Government. German European Policy Series № 03/17 (Institut für Europäische Politik (IEP)).

32 CM Radaelli, 'Europeanisation: Solution or Problem?' (2004) 8(16) European Integration Online Papers 9.

33 PhA Nicolaides, 'A Model of Europeanisation with and without Convergence' (2010) 45 (2) Intereconomics 114-121.

The evaluation of the results of the Europeanisation of the candidate countries is connected with the analysis of the internal influence of the EU on these states, in particular, the answers to the following questions:[34]

- Is there convergence in the trajectories and content of reforms, and if so, to what extent was this convergence due to the influence of the EU itself?[35]
- To what extent did external pressure or incentives of the EU contribute to the formation of the candidate country's institutional and political choices? Accession to the EU in itself is extremely important, but not the only reward offered to candidate countries by the EU. Other incentives for reform include preferential trade agreements, financial and technical assistance, and benefits such as the abolition of visa requirements. It should be borne in mind that political changes in candidate countries can occur for many reasons, including internal dynamics. This makes it difficult to attribute successful changes to the results of the Europeanisation process and the use of specific EU instruments. Voluntarily chosen forms of acceptance of EU rules, in which candidate countries use such EU rules either as exact 'copies' or as approximate 'templates', are not the result of Europeanisation.
- Under what conditions did candidate countries and neighbouring countries accept EU rules
- When and how did the EU influence the governments of the candidate countries to adopt relevant legislation? J. G. Kelley notes that usually, a combination of membership terms and diplomacy has been surprisingly effective in overcoming even significant internal resistance. However, diplomacy itself, without an offer of membership, is usually insufficiently effective unless domestic opposition to the proposed policy is limited.[36]

The main goal and consequence of the Europeanisation of law is the formation of a common legal space, within which the principle of the supremacy of EU law is established and in which differences between the legal systems of the member states of the EU are gradually reduced as a result of the implementation of European law by the member states, as well as the Europeanisation of national legal cultures. in particular, the way of legal thinking. This is a rather complicated and lengthy process, as it is necessary to take into account the state-territorial system, the ratio of the public and private sectors, the stability of the traditions of political and legal culture, and a number of other factors. An important consequence of this process is, first of all, the affirmation of the principle of supremacy of EU law. It is difficult to disagree with T. Judt, who points out that few lawyers or legislators, even in the most pro-European 'core' states of the European Communities, would be ready to renounce the supremacy of national law if they were asked to do so at the beginning of the integration process. The EU is ultimately an example of an unusual compromise: supranational governance, which is carried out by national governments. The abstract nature of the European idea, and the absence of a normatively defined final goal, thus played a positive role in the process of European unification.[37]

The Europeanisation of the sources of national law was equally revolutionary – it changed the perception of the national legislator, which is a monopoly in the implementation of

34 U Sedelmei 'Europeanisation in new member and candidate states' (2011) 6(1) Living Reviews in European Governance 9. DOI: 10.12942/lreg-2011-1.

35 MA Vachudova, 'Europe Undivided: Democracy, Leverage and Integration After Communism' (Oxford University Press2005).

36 JG Kelley, 'Ethnic Politics in Europe: The Power of Norms and Incentives' (Princeton University Press2004).

37 T Judt, 'Postwar: A History of Europe Since 1945' (Penguin, 2005) 733.

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legal regulation of all spheres of social relations by means of legal means and established in the public consciousness. It is obvious that without corresponding changes in the legal consciousness of lawyers and the political class, such revolutionary transformations of national legal systems would be impossible.

B. Glencorse and C. Lockhart draw attention to the fact that the enlargement of the EU should not be perceived as a monolithic process that was equally successful in all countries that joined the EU. In some cases, it has led to real and important reforms, while in other countries, the positive institutional changes have been much less obvious. Moreover, in the future, the EU itself will have to adapt to new realities and changing dynamics in order to ensure that future enlargement will be as successful as in the past.[38]The validity of this conclusion is evidenced by the statements of the Chancellor of Germany, O. Scholz,[39] and the President of France, E. Macron,[40] in 2022 in the context of the discussion on the expansion of the EU at the expense of Ukraine and Moldova, as well as the Balkan countries.

5 LESSONS OF EUROPEANISATION OF THE COUNTRIES OF EASTERN AND CENTRAL EUROPE

Some researchers analysing the process of Europeanisation, have come to the conclusion that it is not devoid of certain shortcomings in relation to candidate countries and neighbouring states from Eastern, Southern, and Central Europe.[41] This is due to the fact that the Europeanisation of post-socialist countries from this region of countries concerned states that were at various stages of transition to a market economy and a model of democratic, legal statehood, and in terms of legal culture, they were objectively not ready for the full implementation of the *acquis communautaire*. That is why the EU had to use 'soft instruments', including conditional positive incentives (the attractiveness of EU membership for post-socialist countries) and normative pressure and persuasion to induce them to reform their legal systems in the first place. It should be noted that the model of assistance in reforming candidate countries and potential candidates from the regions of Eastern, Central, and Southern Europe is more effective than the 'assistance complex' that was formed and implemented after the Second World War as part of bilateral and multilateral support for developing countries, in order to develop and stimulate management reforms in them.

According to B. Glencorse, the success of the European model is conditioned by:[42]

38 B Glencorse, C Lockhart, 'EU accession: norms and incentives. World Development Report, 2011' 2, 9 <http://web.worldbank.org/archive/website01306/web/pdf/wdr_2011_case_note_eu_accession4dbd.pdf>accessed 1 November 2022.

39 Thus, O. Scholz conditions the expansion of the EU by the abolition of the principle of unanimity in the field of foreign policy, as well as in other areas, such as tax policy.

40 At the 'Conference on the Future of Europe' (May 9, 2022), President of France E. Macron called for the restructuring of the EU. Instead of simplifying the procedure for acquiring membership in the EU, he proposed to form a 'European political community' in parallel with the EU. In fact, France returned to the idea of former President F. Mitterrand to create a European confederation (1989).

41 JW Scott, 'Visegrád Four Political Regionalism as a Critical Reflection of Europeanization: Deciphering the "Illiberal Turn"' (2022) 63(6) Eurasian Geography and Economics 704-725. DOI: 10.1080/15387216.2021.1972023; AL Dimitrova, 'Understanding Europeanization in Bulgaria and Romania: following broader European trends or still the Balkan exceptions?'(2021) 22(2) European Politics and Society 295-304. DOI: 10.1080/23745118.2020.1729054.

42 B Glencorse, C Lockhart, 'EU accession: norms and incentives. World Development Report, 2011' 3-4, <http://web.worldbank.org/archive/website01306/web/pdf/wdr_2011_case_note_eu_accession4dbd.pdf> accessed 1 November 2022.

- The variety of tools used. The EU applies flexible assistance instruments, the provision of which is conditioned by the progress achieved by the beneficiary countries and their needs, reflected in the evaluations and strategic documents of the European Commission. Accession assistance instruments are subject to the suspension of assistance to any beneficiary country that has not made sufficient progress in meeting the accession criteria or in the reform process.
- Harmonising and aligning assistance using different tools. This is about the use of a number of flexible instruments43 in the fields of institutional construction; cross-border cooperation; regional development; development of human resources, and development of rural areas at the stage preceding the accession of candidate countries to the EU.[44]
- Targeted technical assistance. This is about targeted technical assistance, as well as consulting, mutual visits and familiarisation with the administrative models of the EU member states, and not replacing the actions of the candidate state itself.
- Reforms within a period of time. The accession process involves a certain set of rules and a time frame for achieving long-term goals. This allows for clear communication and decision-making by EU member states. Support is provided directly to government agencies, helping to strengthen the credibility and legitimacy of national governments. The EU studies previous experience and constantly improves the accession procedure within the framework of the evolution of EU legislation.

In general, the Europeanisation of this category of countries took place in a 'top-down' mode since the candidate countries did not participate in the formation of European rules of conduct but only implemented all-European legal standards set by EU institutions.[45] It is quite natural that for many participants in the law-making process, the acceptance of the *acquis communautaire* had no intrinsic value in the process of changing the national regulatory practice.

Assessments of the consequences of Europeanisation for the countries of Eastern and Central Europe range from the recognition of certain pathologies of this process to the undermining of the rule of law, democracy, and good governance due to imperfect and inconsistent methods of promoting these principles. Thus, M. Mendelski notes that although judicial reforms initiated by the EU in the specified group of countries increase the capacity of the judiciary and bring national legislation into line with European and international standards, they are sometimes unable to prevent the strengthening of the power of authoritarian and corrupt elites, to prevent the violation of formal legality, which leads to such pathologies of reforms as instability, inconsistency of legislation and its non-compliance, the politicisation of the judiciary and inconsistency of its decisions, which ultimately undermines the establishment of the rule of law.[46] A similar conclusion is reached by a researcher who analyses the Europeanisation experience of Romania, which traditionally suffers from corruption.[47]

43 It is about the following instruments: Instrument for Pre-Accession Assistance; Programme of Community aid to the countries of Central and Eastern Europe; Pre-Accession Agricultural Instrument; Community Assistance for Reconstruction, Development and Stabilization.

44 L'instrument d'aide de préadhésion (IAP) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:e50020> accessed 1 November 2022.

45 Y Bytyak, I Yakovyuk, O Tragniuk, T Komarova, S Shestopal, 'The State Sovereignty and Sovereign Rights: The Correlation Problem (2017) 97(23) Man in India 584.

46 M Mendelski, 'The Limits of the European Union's Transformative Power: Pathologies of Europeanization and Rule of Law Reform in Central and Eastern Europe' (Doctoral thesis, University of Luxembourg 2014).

47 L Martin-Russu, 'Deforming the Reform. The Impact of Elites on Romania's Post-accession Europeanization' (Springer Cham 2022). DOI: https://doi.org/10.1007/978-3-031-11081-8.

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It should be noted that the length of stay in the EU does not remove the problem. Thus, in 2014, Mendelski cited Poland as an example of a country with a more consistent and successful implementation of reforms, thanks to which the requirements of the principle of the rule of law are implemented and strong and independent institutions are built (for example, the Constitutional Court, the ombudsman, the judicial system), which mitigate the pathologies of reforms and ensure accountable, gradual and non-politicised implementation of reforms.[48] Some experts, in particular, Mendelski, were inclined to the opinion that Poland is entering the final stage of 'democratic consolidation', during which qualitative changes in the socio-political sphere are taking place as a result of consolidation at the following levels:[49] 1) constitutional consolidation, which provides for the formation of the highest constitutional bodies on democratic principles: the president, the government, the parliament and the courts; 2) representative consolidation, i.e., consolidation of a territorial and functional representation of interests; 3) integrative consolidation involves reducing the incentives for unconstitutional actions on the part of potential veto groups (the military, big business, landowners, media owners, radical movements, etc.) to such a level that they are integrated into democracy to the extent that this system is considered more functional and effective than any other.

The analysis of the processes related to the accession to the EU confirms that, as a result of the implementation of the requirements and recommendations of the EU in the candidate countries, the existing differences are gradually being overcome, a common vision of development paths is being formed, legal mechanisms and rules are being developed that allow resolving differences within the country, as a result of which there is a decrease in the level of conflict in society ('the EU... provides security through transparency and transparency through interdependence',[50] as a result of which the possibility of conflict between member states seems absurd). Judt notes that at the end of the 20th century, national elites and EU institutions have become so interdependent that armed conflict, while never impossible, has become somewhat unthinkable. This is why a united Europe has become such a desirable object for applicants for EU membership, as an escape from their past and an insurance policy for the future.[51] All this indicates an increase in the level of legal culture and legal awareness in society.

The peculiarity of the Europeanisation of post-socialist countries was that these candidate countries were at various stages of transition to a market economy and a model of democratic, legal statehood and therefore were not ready for the full implementation of the *acquis communautaire* and therefore the EU used the attractiveness of the incentive of membership for post-socialist countries to achieve broader political goals through the enlargement policy (the model of external incentives confirms that trust in them is a crucial condition for the success of the EU enlargement policy).[52]

Reforms in the political-legal and socio-economic systems taking place at the stage of preparation for joining the EU are largely caused by the conditions of accession and are accompanied by the process of 'Europeanisation', during which countries adopt European norms and values transmitted in various ways. Poland's success, in particular, was determined by the fact that the EU and leading member states (France and Germany) purposefully contributed to the acceleration of democratisation, involving official Warsaw in the closed

48 M Mendelski, 'The Limits of the European Union's Transformative Power: Pathologies of Europeanization and Rule of Law Reform in Central and Eastern Europe' (Doctoral thesis, University of Luxembourg 2014).

49 P Schmitter, T Karl 'The Conceptual Travels of Transitologists and Consolidologists: How Far to the East Should They Attempt to Go?' (1994)53 Slavic Review 173-185.

50 R Cooper, *The Breaking of Nations: Order and Chaos in the 21st Century* (Grove Press 2003) 37.

51 T Judt, Postwar: *A History of Europe Since 1945* (Penguin 2005) 734.

52 F Schimmelfennig, U Sedelmeier 'The Europeanization of Eastern Europe: the external incentives model revisited' (2020) 27(6) Journal of European Public Policy 818. DOI: 10.1080/13501763.2019.1617333

'elitist club', 'Weimar Triangle', supporting the closed 'semi-elitist' organisation 'Visegrad Group', and also granting Poland the status of a candidate country for EU membership. But the artificial 'pulling up' of Warsaw to the Western European level of cultural and value development, even on the condition that Poland has always had a significantly higher level of development of values and orientations characteristic of the political and legal culture of society than in other post-socialist countries, turned out to be in the complete formation of a high legal culture in both the political class and society as a whole, built on a system of established legal and political values.

In 2017, the Polish government adopted a package of laws on the judiciary, which caused heated discussions both in Poland itself and in the EU. In December 2017, the European Commission noted that the laws adopted by the Polish Parliament destroy the separation of powers, as they lead to the concentration of all power in the hands of the Law and Justice party, as well as limit the level of freedom of the mass media,[53] and initiated a procedure in accordance with Art. 7 of the TEU in response to risks to the rule of law. Case law of the CJEU and the European Court of Human Rights, as well as documents compiled by the Council of Europe, based, in particular, on the experience of the Venice Commission, contain a non-exhaustive list and define the main meaning of the rule of law through a system of principles: legality, which provides transparent, accountable, democratic, and pluralistic process of adopting laws; legal certainty; separation of powers; prohibitions of executive arbitrariness; an independent and impartial court; effective judicial supervision, including the observance of fundamental rights; equality before the law.[54] The European Parliament supported this move by the Commission in March 2018.[55] The delegation of the European Parliament, after visiting Poland in February 2022, during which MEPs met with politicians, judges, civil society, and journalists to assess the situation with the rule of law, stated that the situation with the rule of law since 2018 in Poland has deteriorated even more: in addition to the violation of the principle of the independence of the judicial system, media freedom, and fair elections, European values of equality and non-discrimination are not observed in Poland, especially with regard to migrants, women, and the LGBTI+ community; there is a criminalisation of sex education and a de facto ban on abortion. At the same time, it was emphasised that the situation with the rule of law in Poland is not only a national issue but also a European issue since the primacy of EU law is at the heart of the European project and enshrined in the Polish constitution.[56]

During 2016-2022, the Commission made extensive use of the opportunities provided by the Rule of Law Concept for a constructive dialogue with the Polish authorities. However, Poland, which until recently was considered a model of democratic transformations, allowed significant violations of the requirements of the principles of a democratic and legal state and common European values, ignoring the legitimate requirements of the EU institutions (this is because due to the absence of pro-democratic reform coalitions in Poland and Hungary in recent years, the society of these countries prefers (authoritarian) stability over uncertain (democratic) changes[57]). Despite the violation of the situation in Poland in recent years,

53 Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law COM/2017/0835 final – 2017/0360 (NLE) <https://www.europarl.europa.eu/doceo/document/TA-8-2018-0055_EN.html> accessed 1 November 2022.

54 Ibid.

55 European Parliament resolution of 1 March 2018 on the Commission's decision to activate Article 7(1) TEU as regards the situation in Poland (2018/2541(RSP)) <https://www.europarl.europa.eu/doceo/document/TA-8-2018-0055_EN.html> accessed 1 November 2022.

56 EU values in Poland: MEPs wrap-up fact-finding visit to Warsaw <https://www.europarl.europa.eu/news/en/press-room/20220218IPR23604/eu-values-in-poland-meps-wrap-up-fact-finding-visit-to-warsaw> accessed 1 November 2022.

57 K Pomorska, G Noutcheva, 'Europe as a Regional Actor: Waning Influence in an Unstable and Authoritarian Neighbourhood' (2017) 55(S1) JCMS 165-176. DOI: https://doi.org/10.1111/jcms.12612.

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EU member states have opted out of a vote to determine whether there is a 'clear risk of serious violations' of common EU values, which is the next step in the Art. 7 of the TEU procedure. Poland was able to avoid this procedure thanks to the mutual support of Warsaw and Budapest. Thus, the situation with respect to the basic values and principles of EU law gives reason to recognise that the conclusion that the EU has a normative identity is built primarily on the rhetoric of EU leaders and individual scientists. This is not enough for the EU to be a full-fledged normative actor. The EU would have full normative power when it is able to compel a member state to do something it would not otherwise do.[58] But, as the experience of Poland proves, the EU cannot always achieve this.

6 PROSPECTS OF EUROPEISATION OF THE LEGAL SYSTEM OF UKRAINE

The Europeanisation of the Ukrainian state and law is not a new process in the history of the modernisation of Ukraine and has deep roots. The analysis of political processes in Ukraine throughout its history allows us to single out several waves of Europeanisation. The first wave, which covered the period from the beginning of our era to the 10th-13th centuries, was marked by the realisation of the civilisational choice of Prince Volodymyr the Great of Kyiv, which was of decisive importance for choosing the vector of the integration process of Eastern Slavs, its Christianisation, and the entry of the Old Russian state as an equal member of the Christian community of Europe. The second wave spanned the 14th to the first half of the 17th century when Ukraine became part of Poland and the Grand Duchy of Lithuania and thus, a part of the European world. The third wave (the second half of the 17th to 18th centuries) is associated with the functioning of the Ukrainian Cossack state, which adopted Western political and legal values. The fourth, fifth, and sixth waves of Europeanisation of public administration were less effective, as they were caused by the modernisation processes of the Russian Empire.

Ukraine's course towards European integration provided reasons to return to the process of Europeanisation of law. However, it should be noted that Europeanisation, in contrast to the problems of European integration, has not become the subject of deep and extensive research by Ukrainian lawyers. Activity in the development of this problem was observed during 2004-2014, but in the following years, attention to it decreased noticeably. Unlike other countries in Eastern Europe, there are no empirical studies on the influence of the EU on the internal politics of Ukraine. This is explained by the fact that the Europeanisation process proceeds more actively and effectively when there is a closer relationship between the national and supranational levels, in particular, thanks to better coordination between EU institutions and national governments and political parties and their representatives in the European Parliament. It is in this case that the process of reorientation of the direction and form of policy takes place so actively that the political and economic dynamics of the processes taking place in the EU become part of the logic of national policy formation.[59] In the conditions of relatively weak politicisation of Ukraine-EU relations with an unclear prospect of acquiring the status of a candidate country, the Ukrainian government did not have the necessary incentives to adapt its economic, political, and legal systems to EU standards before acquiring the status of a candidate country, and therefore there was no need to talk about Europeanisation amongst noticeable successes in the process.

58 T. Diez 'Constructing the Self and Changing Others: Reconsidering `Normative Power Europe' (2005) 33(3) Millennium - Journal of International Studies, 616 DOI: https://doi.org/10.1177/03058298050330031 7

59 G Pittoors, N Gheyle 'Living up to expectations? EU politicization and party Europeanization in Flanders and the Netherlands' (2022) Acta Politica 2. DOI: https://doi.org/10.1057/s41269-022-00281-4.

In general, during the years of Ukraine's independence, comprehensive monographic studies of the Europeanisation of the Ukrainian legal system and its law were not conducted. An exception is the attempt of the team under the leadership of K. Smyrnova (2021) to investigate the process of Europeanisation of the legal order of Ukraine within the framework of the Association Agreement between Ukraine and the European Union.[60] At the same time, traditionally, Ukrainian lawyers focus their attention on the study of the problems of Europeanisation of legal[61] and judicial systems,[62] higher legal education,[63] as well as relatively narrow issues within the framework of certain branches of legislation, mainly administrative,[64] environmental,[65] criminal,[66] civil,[67] civil procedural[68] law, etc. Thus, conducting comprehensive studies not only of particular branches of law but also of the legal system of Ukraine as a whole remains a real and practically significant issue.

The process of Europeanisation, which takes place both in the member states and in the candidate countries, has its differences. Despite this, there are certain common problems on this path, which Ukraine will also face. One should agree with M.-C. Ponthoreau, who believes that today no common legal epistemic community currently exists in Europe.[69]

60 KV Smirnova (ed), *Association between the European Union and third countries: current state and dynamism in the conditions of integration and disintegration* (VOC 'Kyiv University' 2021).

61 DO Deineko, 'The concept of "European law" and "Europeanization" of the legal system of Ukraine' (2019) 10(1-2) Journal of European and Comparative Law 79-87.

62 RA Petrov, 'Europeanization of the Ukrainian judicial system as a component of the European integration policy of Ukraine' (2012) 1-2 Law of Ukraine 300-306; IM Sharkova, 'Legal and judicial education in Ukraine: requirements of European integration' (2015) 15 Legal Regulation of the Economy 286-294.

63 IV Lukach, VV Poedynok, 'Practical directions for improving legal education in Ukraine' (2020) 26 Scientific Works of the National University 'Odesa Law Academy' 64-71. DOI: https://doi.org/10.32837/npnuola.v26i0.662; PS Patsurkivskyi, RO Havryliuk, 'To be or not to be a European higher legal education in Ukraine? or Committee hearings on the concept of development of higher legal education continue...' 2020 <https://law.chnu.edu.ua/buty-chy-ne-buty-vyshchii-yurydychnii-osviti-v-ukraini-yevropeiskoiu/> accessed 1 November 2022; T Mann (ed), *Europäisierung der Ukrainischen Juristen aus bildung: Dokumentationeiner Tagungim Rahmen des Deutsch-ukrainischenrechtswissenschaftlichen Dialogs e. v.* (Universitätsdrucke Göttingen 2016, Band 1) <http://rechtsdialog.org/images/2016/09/mann_europaeisierung_dt.pdf>accessed 1 November 2022.

64 OR Radyshevska, 'Europeanization of Administrative Law of Ukraine: Features of Modern Tectonics of Influence Mechanisms' (2020) 1 Journal of the Kyiv University of Law 150-154. DOI: 10.36695/2219-5521.1.2020.30.

65 IV Yakoviyk, HV Anisimova, OY Tragniuk, 'Europeanization of Environmental Law of the European Union Member State' (2022) 158 Problems of Legality 82-109. DOI: 10.21564/2414-990X.158.263248.

66 TM Anakina, LV Chornozub, 'Harmonization of the criminal law of the member states of the European Union' (2022) 1 Actual Problems of Domestic Jurisprudence 160-165. DOI: https://doi.org/10.32782/392259; YuV Baulin, 'Europeanization of the General Part of the Project of the CC of Ukraine' in VYa Tatsii (ed), Criminal Law in the Conditions of Globalization of Social Processes: Traditions and Innovations: Materials of the International of Science Practice Round Table, Kharkiv, 15 May 2020 (Pravo, 2020) 45-50.

67 OYu Chernyak, 'The form of the contract in the context of the Europeanization of the civil legislation of Ukraine'(2022) 56 Scientific Bulletin of the International Humanitarian University. Ser.: Jurisprudence 117-120. DOI: https://doi.org/10.32841/2307-1745.2022.56.25; RA Maydanyk, 'Methodology of Ukrainian law in conditions of Europeanization: universal method, algorithm, stages of resolving a legal dispute (case)' (2020) 20 Private Law and Entrepreneurship 8-19. DOI: https://doi.org/10.32849/2409-9201.2020.20.2; *OO Haydulin, Europeanization of contract law* (KNEU 2012).

68 IO Izarova, *Theoretical foundations of the EU civil procedure* (Dakor Publishing House, 2015); IO Izarova, 'Common standards of civil procedure in the EU: General Characteristics and Prospects for Implementation' (2018) 1 Scientific notes of NaUKMA. Legal Sciences 55-61; VV Komarov, 'Civil procedure in the global context' (2011) 9-10 Law of Ukraine 22-44; V Komarov, T Tsuvina, 'The Impact of the ECHR and the Case law of the ECtHR on Civil Procedure in Ukraine' (2021). 1(9) Access to Justice in Eastern Europe 14–36.

69 M-C Ponthoreau, 'Europeanization of minds Imagining a Transnational European Legal Community' 1 < https://www.academia.edu/11184774/Europeanization_of_Minds_Imagining_a_Transnational_European_Legal_Community> accessed 1 November 2022.

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Today, this legal epistemic community appears to be still inherently national. Thus, we can speak of a convergence between legal rules in Europe, but it is altogether more complicated to speak about convergence between legal traditions and particularly between legal (in particular the constitutional) cultures.[70]

The Europeanisation of the domestic legal culture is a prerequisite for the successful modernisation of all other elements of the legal system on the path of Ukraine's entry into a single legal, political, economic and cultural space. The success of the implementation of this task depends on the process of Europeanisation of domestic legal science and education, the completion of the process of de-Russification (the Parliament of Ukraine is considering a draft of the Law, which provides for the prohibition of the use of information sources of the aggressor state or the occupying state in educational programs, in scientific and scientific-technical activity).[71] This is explained by the fact that the formation of a common European legal space and the entry of new legal systems into it involves not only the implementation of EU law by the candidate countries but also the Europeanisation of the sources of law, the concept of human rights and the rule of law, the judiciary, interpretation of law, legal procedures and methods and, ultimately, also the manner of legal thinking.[72] The perception of the doctrines, concepts, principles, practices, and procedures prevailing in EU law by the Ukrainian legislator, courts, and law enforcers depends on the proper legal and language training, first of all, of civil servants of all levels and categories, professional lawyers, legal translators, human rights defenders, and public activists. This requires significant modernisation of higher legal education.

Ukraine needs to increase the training of specialists in the field of EU law with parallel high-quality language training (it should be taken into account that as a result of the Europeanisation of law, there is a hybridisation of the legal languages of the EU member states and the formation of a new European legal culture[73]), as well as an increase in the number budgetary places for the training of specialists in the specified speciality by the Ministry of Education and Science of Ukraine. Institutions of higher education in the legal profile should revise their educational-professional and educational-scientific programs in order to move away from the formal and limited teaching of EU law. It is necessary to introduce Europeanised educational programs, preferably in English, instead of continuing to use traditional national approaches to the study of law. At the same time, it should be noted that student and teacher mobility programs do not solve the problem of Europeanisation of legal education, as they cover a small percentage of students and teachers. Although they are important, they have a quantitatively limited impact on legal education.

The problem of training Ukrainian judges to work in the conditions of Ukraine's accession to the EU requires special attention. Although it is impossible to predict the date of Ukraine's accession to the EU, this line of work must be implemented in advance. For this purpose, it is expedient for the Cabinet of Ministers of Ukraine to consider the issue of developing and approving the Legal Education Development Program (similar programs were approved in

70 VS Lomaka, 'Legal Culture of Society in the Context of European Integration'(2022) 159 Problems of Legality 109. DOI: 10.21564/2414-990X.159.268418.

71 On amendments to some laws of Ukraine regarding the prohibition of the use of sources of information of the aggressor state or the occupying state in educational programs, in scientific and scientific and technical activities: draft Law of Ukraine <https://itd.rada.gov.ua/billInfo/Bills/Card/40164?fbclid=IwAR2HisjRFAKAbrPktEOUQpASAONhHynFZkTalepw4RgeK3y_rSy0DOG9StY>accessed 1 November 2022.

72 M Ečeřa,'The process of Europeanization of law in the context of Czech law' (2012) LX(2) *Actauniv. agric. et silvic. Mendel. Brun.* 461.

73 M Bajčić,'The Role of EU Legal Englishin Shaping EU Legal Culture' (2018) 7 International Journal of Language & Law 8. DOI: https://doi.org/10.14762/jll.2018.008; V Sosoni, L Biel, 'EU Legal Culture and Translation' (2018) 7 International Journal of Language & Law 3. DOI: 10.14762/jll.2018.001.

the early 2000s), as well as adapting the activities of the Institute of Law and Postgraduate Education under the Ministry of Justice of Ukraine to the requirements for the retraining of justice workers in the context of the requirements Europeanisation of the judiciary.

The problem of modernisation of legal terminology[74] is no less important and difficult. The adaptation of Ukrainian legislation to the legislation of the EU and, after joining the EU, the process of harmonisation gives relevance to the problem of modernisation of legal terminology and the introduction of new terms in accordance with EU legal standards. T. Takis draws attention to the fact that, for example, 'diverse and often bewildering judicial terminology serves to obfuscate the role of principles which, in terms of positive law, stand at the apex of the EU law edifice'.[75] During the years 1995-2000, the Commission on Legal Terminology, designed to ensure the exact and uniform use of legal terms in law-making work and in official acts, was functioning in Ukraine. In addition, the Commission studied legislative material with the aim of defining and unifying legal terminology, compiling registers of Ukrainian legal terms, compiling legal dictionaries; preparing recommendations regarding the uniform application of legal terms in various fields of law; implementing terminological and linguistic examination of draft legislative acts.[76] The Commission approved the normative table for the reproduction of Ukrainian proper names in the English language and the rules for it. We believe that at the current stage of integration, it is expedient to create such a body, adjusting its powers in accordance with the needs of the Europeanisation process.

The methodological support of the law-making process in Ukraine needs updating. At the beginning of the 2000s, this issue was regulated at the sub-legal level in Ukraine. Thus, in 2000, the Ministry of Justice approved the Methodological Recommendations for the development of draft laws and compliance with the requirements of normative design techniques, aimed at unifying the drafting of laws and compliance with the requirements of normative design techniques,[77] taking into account the needs of adapting Ukrainian legislation to EU legislation. Although the specified Methodological Recommendations are valid, they are significantly outdated, as they are based on the Partnership and Cooperation Agreement between Ukraine and the European Communities, which expired in 2017.

7 EUROSCEPTICISM AS AN OBSTACLE TO EUROPEANISATION

The development of a united Europe does not exclude the parallel development of processes that hinder the deepening and expansion of integration. It is about separatist tendencies within the EU,[78] the existence of Eurosceptics among current and former (Great Britain) EU member states, as well as candidate countries, as well as the development of the process of

74 MI Lyubchenko, *Legal Terminology: Concepts, Features, Types* (Human Rights Publishing House 2015).

75 T Takis, 'The general principles of EU law and the Europeanisation of national laws' (2020) 13(2) Review of European Administrative Law 5. DOI: https://doi.org/10.7590/187479820X15930701852193.

76 On the provisions on the Committee of Legislative Initiatives under the President of Ukraine, on the Ukrainian Codification Commission and on the Ukrainian Commission on Legal Terminology: Approved by the Decree of the President of Ukraine dated 23 August 1995 N 796/95 <https://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=796%2F95#Text>accessed 1 November 2022.

77 Methodological recommendations for the development of draft laws and compliance with the requirements of normative design techniques: approved by Resolution of the Board of the Ministry of Justice of Ukraine dated 21 November 2000 No. 41 <https://zakon.rada.gov.ua/laws/show/v0041323-00#Text>accessed 1 November 2022.

78 IV Yakoviyk, MG Okladna, RR Orlovskyy, 'Separatism in the United Europe: old problem with a new face' (2018) 140 Problems of Legality 132-143. DOI:10.21564/2414-990x.140.125989.

de-Europeanisation[79] of certain EU policies with the help of such tools as 're-nationalisation', 'differentiation', 'circumvention', 'resistance', etc.

Eurosceptics form a separate subculture within the framework of the democratic legal culture of a united Europe, in which legal and political components are closely intertwined. The creation of a separate subculture of Eurosceptics, who are represented not only in national governments but also in the European Parliament, became possible in particular because EU citizens are poorly informed about how the EU is organised and functions. In 2017, 42% of respondents believed that they were well informed about EU-related issues, while 57% said they were not, and 1% could not state their position on the issue. In 23 of the 28 member states, less than half of respondents say they are well informed about issues related to immigration and integration.[80] This ignorance of a large part of Europeans gives rise to the most dangerous type of Euroscepticism because it is based on a lack of knowledge or understanding or simple ignorance; it spreads quickly and is carefully fuelled by certain mass media, which create and reproduce a bad image of the EU.

The legal subculture has an impact on decision-making both at the national and European levels. Eurosceptics express ideas and judgments, give assessments that express doubts, a certain degree of rejection and criticism regarding the directions and methods of integration (for example, criticism of the strengthening of manifestations of supranationalism in the legal nature of the EU or the delegation of the right to exercise sovereign rights from national governments to EU institutions), or a certain EU policy (the idea of creating an all-European army is an example of a policy that has caused heated debates since the development and failure of the ratification of the Treaty on the European Defence Community until today; criticism of the EU's currency and migration policy is no less acute), or leadership in the middle of the EU,[81] or activities of its separate institute. Eurosceptic countries not only express ideas but also try to influence the process of development and functioning of the EU. It should be noted that 'hard Euroscepticism' means a complete rejection of the entire project of European political and economic integration and opposition to joining or maintaining membership in the EU, while the more common 'soft Euroscepticism' is defined as 'conditional or qualified opposition to European integration'.[82]

Quite often, the basis of Euroscepticism, which inhibits or directly hinders Europeanisation, is the national egoism and populism of individual member states (political parties of both the right and left spectrum, individual public organisations at the national level, as well as the activities of transnational groups). At the same time, the level of public Euroscepticism is not always correlated with the levels of party Euroscepticism), which was clearly demonstrated by the currency and financial crisis (2009-2014) and the migration crisis (2015), as well as the Russo-Ukrainian War.

The very presence of Eurosceptics in the all-European political arena carries a potential threat of slowing down or even suspending the process of European integration, as they

79 J Dyduch, P Müller 'Populism meets EU Foreign policy: the de-Europeanization of Poland´s Foreign policy toward the Israeli-Palestinian conflict' (2021) 43(5) Journal of European Integration 569-586. DOI: https://doi.org/10.1080/07036337.2021.1927010

80 Special Eurobarometer 469: Report Integration of immigrants in the European Union, 2018 <https://www.europeanmigrationlaw.eu/documents/EuroBarometer-IntegrationOfMigrantsintheEU.pdf> accessed 1 November 2022.

81 Actually, the origins of Euroscepticism come from the position of Great Britain, which was opposed to French-German dominance in the EU; in the conditions of the Russo-Ukrainian War, Poland and the Baltic countries question the leadership of Bonn and Paris.

82 P Taggart, A Szczerbiak 'Parties, Positions and Europe: Euroscepticism in the EU Candidate States of Central and Eastern Europe. Working Paper' (Sussex European Institute 2001). https://www.researchgate.net/publication/252483207_Parties_Positions_and_Europe_Euroscepticism_in_the_EU_Candidate_States_of_Central_and_Eastern_Europe accessed 1 November 2022.

represent opposition to the development of any form of supranational European institutions that would encroach on national sovereignty and the traditional European state system.[83] Brexit proved the validity of these fears.

In scientific studies, attention is usually focused on the positions of such countries as Great Britain, Poland, and Hungary, whose policies give reasons to classify them in the camp of principled and consistent Eurosceptics. But there are countries, such as France and the Netherlands, which, although they were the founders of the unification process and are considered to be its driving force, at the same time, occasionally inhibit certain directions of integration (for example, France's failure to ratify the Treaty on the European Defence Community), the process of its deepening (in 2004, France and the Netherlands disrupted the process of ratification of the Treaty establishing a Constitution for Europe, because they believed that it would accelerate the process of federalisation of the EU), or the pace of integration even more seriously than principled Eurosceptic countries. This especially proves the attitude of the specified countries to the EU enlargement process.[84] The inhibition of European integration by individual member states is explained by the desire of the European Commission to gain the widest possible public support for the EU and its initiatives.

8 CONCLUSIONS

Europeanisation should be considered a problem and not a solution. The introduction of the concept of Europeanisation into the scientific discourse contributed to the emergence of new original explanations on a number of important issues, in particular, the analysis of the impact of the EU legal order on national legal systems and supranational governance on national models of the internal policy of EU member states and candidate countries, and, in some cases, neighbouring states.

'Europeanisation' and 'European integration' are not identical phenomena, as the scope of Europeanisation can go beyond European integration, for example, to include the transfer of EU policies to third countries. Unlike European integration, which is based on the transfer of powers from member states to the EU, the process of Europeanisation involves the transfer of models and content of the European decision-making process in the context of national management systems.

The EU is seen as one of the most highly institutionalised supranational political systems in the world, a system developed in part through decisions taken by the Court of Justice of the European Union. The rule of law is the value on which the EU was founded and which its member states must respect and observe. The CJEU regards it as a constitutional meta-principle that informs other constitutional norms and can justify review procedures and sanctions against member states. Consequently, this value is a legal principle applicable to legal disputes under Union law. The activities of the Commission are not sufficient to

83 R Katz 'Euroscepticism in Parliament: A Comparative analysis of the European and National Parliament' European Consortium for political research Joint Sessions of Workshops, Torrino, 22-27 March 2002 <https://ecpr.eu/Events/Event/PaperDetails/14932>accessed 1 November 2022.

84 During the 1960s, France blocked Great Britain's attempts to become a member of the European Communities twice. In 2009, at the stage of negotiations on the signing of the Association Agreement with Ukraine, the Netherlands, Germany, Belgium, and Luxembourg opposed the words 'European perspective' in the text of the draft Agreement. During 2016-2017, the Netherlands blocked the ratification of the Association Agreement with Ukraine. During the Russo-Ukrainian war, the President of France expressed the idea of creating a European political community, which many see as an attempt to slow Ukraine's accession to the EU.

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constitute the rule of law of the Union. The Commission therefore relies primarily on the case law of the CJEU.

The main goal and consequence of the Europeanisation of law is the formation of a common legal space, within which the principle of the supremacy of EU law is established, differences between the legal systems of the member states of the EU are reduced, and the Europeanisation of national legal cultures, in particular, the way of legal thinking, takes place. As a normative power, the EU exports universal norms, standards, practices, and management models beyond its borders.

The EU enlargement policy, which aims at the 'democratisation', 'Europeanisation', and 'modernisation' of the candidate countries before their accession to the EU, is today the main instrument of the Union's normative power in Europe. The EU's normative identity is thus central to debates about the EU's normative influence beyond its borders.

Throughout history, the Ukrainian state has experienced several stages of Europeanisation of its own state and law. The current stage of this process is due to Ukraine's aspiration to become a member of the EU. After Ukraine acquired the status of a candidate for EU accession on the basis of its application to the EU, dated 28 February 2022, this task became particularly relevant and of practical significance. Its implementation requires the Europeanisation of domestic legal culture as a prerequisite for the modernisation of all other elements of the legal system. This, in turn, implies: the completion of the process of de-Russification; high-quality training of a significant number of specialists in the field of EU law with parallel high-quality English language training; the introduction of Europeanised educational programs, preferably in English, instead of continuing to use traditional national approaches to the study of law; the development and approval of the Legal Education Development Program and adaptation of the activities of the Institute of Law and Postgraduate Education under the Ministry of Justice of Ukraine to the requirements of retraining of justice workers in the context of the requirements of the Europeanisation of the judiciary; the modernisation of legal terminology.

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Research Article

PROSPECTS FOR REGULATING THE RIGHT TO POSTHUMOUS REPRODUCTION IN THE CONTEXT OF WAR IN UKRAINE: FOREIGN EXPERIENCE AND FORMATION OF LEGAL SUPPORT FOR THE REALISATION OF REPRODUCTIVE RIGHTS OF MILITARY PERSONNEL

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ABSTRACT

Background: *This article focuses on the analysis of posthumous reproduction regulation perspectives in Ukraine through the lens of war risks, considering how the reproductive rights of male and female military personnel could be best guaranteed. In particular, the peculiarities of different legal and ethical problems, like formal requirements for the disposal of reproductive biological material and embryos in case of death, as well as issues of inheritance and establishment of paternity/maternity, are disclosed. The problem of posthumous reproduction legal regulation unification in the application of technology of posthumous reproduction is considered. Attention is also focused on the possibility of reproductive tourism for the sake of posthumous reproduction.*

Methods: *The methodological framework of the study was a range of philosophical, general, and legal methods. The-dialectical method of cognition made it possible to investigate the problem's social and ethical content and legal form and conduct a systematic theoretical and legal analysis of the applying posthumous reproduction in practice, especially under the scope of risks for health and life, which are conditioned by war in Ukraine. Thanks to the comparative method, the diversity of posthumous reproduction regulation models worldwide was investigated and compared with current Ukrainian draft Laws, particularly considering which of the models listed could best fit the Ukrainian law and moral traditions and the current situation in our country. With the help of a formal-legal approach, the content and peculiarities of contractual and legal practice were analysed.*

Results and Conclusions: *It was comprehensively considered that posthumous reproduction should be allowed and regulated in the special law of Ukraine, which must perform the clear and justified legal framework to protect the rights of all participants of these sensitive relationships: consumers and performers of these reproductive services, as well as so-called postmortal children.*

1 INTRODUCTION

The war in Ukraine affects all spheres of social life and even those that are considered the most intimate and relate to procreation. The adoption of many regulations and the discussion of some draft Laws that directly relate to the exercise of reproductive rights of military personnel under martial law is evidence of this. In particular, nowadays, many reproductive medicine clinics offer free examination, selection, and preservation of reproductive cells of male military personnel and discounts for female military personnel on the same services. Draft Laws, which are aimed to secure coverage of these costs at the expense of the state budget and provide free services to this category of citizens, are under consideration. So, it is evident that active work is underway in this field, and we will face the urgent need to effectively regulate these relations soon.

Many countries have regulated these issues for a long time and can serve as an example to fill the existing gaps in the current Ukrainian medical, civil, and family legislation. The preservation of reproductive function is an acute problem for the young generation of Ukrainians who are currently involved or will be involved in the performance of military duty soon and for the future of the nation in general, which is currently under constant threat of extermination. It is known that service in the armed forces is associated with many risks that can cause significant deterioration or loss of reproductive function. However, it should also be remembered that the main risk here is the risk of death, and if a person has taken advantage of the proposed reproductive cell preservation programs for military personnel or has previously undergone a treatment program and has

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unimplanted embryos or gametes preserved in a cryobank, there may be a problem with the use of posthumous reproduction, which is not currently prohibited but is not regulated by the current legislation of Ukraine. Unfortunately, in light of recent events, Ukrainian reproductive specialists have already experienced the problem of law enforcement in practice since the number of patients requesting posthumous use of the biological material and/or cryopreserved embryos is growing rapidly. The legislation does not provide any answers to the questions of how to legally properly formalise this procedure, what conditions should be met, and what legal consequences the use of assisted reproductive technologies (hereinafter ART) will have. In general, the development of ART in Ukraine, including methods of posthumous reproduction and their proper regulation, will also be of great significance not only for citizens of Ukraine but also for foreigners in the field of reproductive tourism, especially from countries where their reproductive rights are limited by their personal law.

The issues that legislators should answer as soon as possible to properly regulate the field of posthumous reproduction in Ukraine include the following:

1. Permitting or prohibiting the posthumous use of reproductive biological material and/or cryopreserved embryos retrieved from a deceased person during life and determining the possibility of reproductive biomaterial retrieval from a deceased person for reproductive purposes.
2. Establishing comprehensible requirements for the conditions of use of posthumous reproduction, in addition to the procedure for formalising consent, a personal order, an application, so-called biological will, etc.
3. Establishing the period of permitted posthumous storage and use of reproductive biological material and/or cryopreserved embryos of a deceased person and resolving the issue of regulating the inheritance rights of a child born by using posthumous reproduction.
4. Regulating the issue of establishing paternity/maternity of a deceased person to a child born as a result of posthumous reproduction.
5. Possibility of using this method with foreigners on the territory of Ukraine and the permissibility of exporting reproductive biological material and embryos from Ukraine abroad, and thus the possibility of applying the posthumous reproduction method on request of Ukrainian citizens abroad.

Therefore, this article aims to analyse the prospects for regulating this ethically sensitive sphere of social relations according to the issues we have identified above and to propose ways to regulate them which will be organic and comply with the current legislation of Ukraine to ensure the observance of the fundamental rights and freedoms of our citizens in the reproductive sphere.

The methodological framework of the study was a range of philosophical, general, and legal methods. The-dialectical method of cognition made it possible to investigate the problem's social and ethical content and legal form and conduct a systematic theoretical and legal analysis of the applying posthumous reproduction in practice, especially under the scope of risks for health and life, which are brought by war in Ukraine. The diversity of the postmortal reproduction legal regulation in different countries worldwide was investigated thanks to the comparative method. With the help of a formal-legal approach, the content and peculiarities of contractual and legal practice were analysed. The use of all the scientific methods listed above, in their totality, provided an opportunity to comprehensively consider the best legal approach to solving the postmortal reproduction regulation gap, which is now present in Ukraine, and to present the possible ways of the development of bioethics and law in this

area to guarantee the reproductive rights for Ukrainian citizens, especially for military personnel, who risk their life and health defending us all.

2 LIMITS, CONDITIONS, AND LEGAL CONSEQUENCES OF POSTHUMOUS DISPOSITION OF REPRODUCTIVE BIOLOGICAL MATERIAL

2.1 Conditions, procedure, and legal consequences of the use of posthumous reproduction (foreign experience and trends of Ukrainian law-making)

It is worth starting with the description of the general regulation, as it also applies to military personnel, who will be additionally entitled to certain benefits or special rules.

Nowadays, the field of assisted reproduction services in Ukraine is regulated only at the level of a special by-law, namely, the Procedure for the Use of Assisted Reproductive Technologies approved by the Order of the Ministry of Healthcare of Ukraine No. 787 dated 9 September 2013[1] (hereinafter Order No. 787), which does not contain any provisions that would directly regulate the issue of posthumous reproduction, leaving it to the responsibility and risk of reproductive medicine clinics and their patients, who may then face a lot of legal problems both in the course of exercising their reproductive rights and after their exercise, namely after the birth of a child.

Unfortunately, work on the preparation of a special law that would regulate this extremely complex and sensitive sphere of public relations has been going on for many years and has not reached its logical conclusion yet. Therefore, it is advisable to start with the recent trends that can be identified when analysing the latest draft Laws, namely 'On assisted reproductive technologies' No. 6475 dated 28 December 2021,[2] 'On the use of assisted reproductive technologies' No. 6475-1 dated 11 January 2022,[3] and 'On the use of assisted reproductive technologies and surrogate motherhood' No. 6475-2 of 13 January 2022.[4] If these draft Laws are improved, it will be possible to fill the existing gaps in the current legislation and properly regulate these relations at the level of the law in the future.

2.2 Scope of rights and conditions of the use of posthumous reproduction

Since Ukrainian legislation does not currently regulate the issue of posthumous reproduction, it is worth starting with an analysis of foreign experience in regulating this sphere. Israel's legislation pays the most attention to the posthumous reproduction of military personnel, so we will try to highlight its main provisions and assess the possibility of using this method of regulation.

1 Order of the Ministry of Healthcare of Ukraine No 787 'On Approval of the Procedure for the Use of Assisted Reproductive Technologies in Ukraine' of 9 September 2013 <https://zakon.rada.gov.ua/laws/show/z1697-13> accessed 10 February 2023.

2 Draft Law of Ukraine No 6475 'On Assisted Reproductive Technologies' of 28 December 2021 <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=73524> accessed 10 February 2023.

3 Draft Law of Ukraine No 6475-1 'On the Use of Assisted Reproductive Technologies' of 11 January 2022 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=73571> accessed 10 February 2023.

4 Draft Law of Ukraine No 6475-2 'On the Use of Assisted Reproductive Technologies and Surrogate Motherhood' of 13 January 2022 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=73585> accessed 10 February 2023.

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Israel's approach to regulating posthumous reproduction is an example of a flexible regulation. The Attorney General Guidelines on sperm retrieval after death and its use (2003) assist courts in making determinations of requests for extraction of sperm from deceased men. The regulations require: a request from the female partner (married or unmarried) of a dying or deceased man for the extraction of his sperm; and court authorisation to use the sperm, determined on a case-by-case basis, taking into consideration the deceased man's dignity and presumed wishes. In 2012 a Public Committee on Legislation Governing Fertility and Birth in Israel made recommendations for unified legislation on assisted reproduction and that posthumous reproduction must also be permitted for deceased women, but this has yet to be enacted. Israel's courts have also permitted parents to remove the sperm from their deceased sons, using a surrogate to create biological grandchildren.[5]

So, Israeli legislation and judicial practice are using the approach, which is based around the 'presumed wish', which means 'that a man who lived in a loving relationship with a woman would wish her to carry his child after his death'. Court-authorised sperm retrieval requested by parents is unique in Israel's regulatory landscape because, in the 2003 Guidelines, parents have no legal standing regarding the gametes of their deceased children. The recognition of a parent's right to extract gametes from a deceased son has not yet been recognised in any other jurisdiction reviewed. Such an approach, in our view, could not be accepted and used in the Ukrainian legislation.

So, in some legal systems, as in Israel, the principle of priority of the interests of living partners-donors is embodied, according to which posthumous retrieval of gametes is possible without the written informed consent of a deceased person. However, this approach is not compliant with the practice of the European Court of Human Rights (hereinafter the ECtHR), which in the case of *Evans v. United Kingdom,* pointed out that the right to paternity did not take precedence over the right to maternity and vice versa.[6] Therefore, this should be taken into account when regulating the right to posthumous reproduction in Ukraine to avoid possible discrimination that may arise if, due to the restriction of the use of surrogate motherhood only to married couples, men will be deprived of the right to posthumous use of gametes or embryos, transferred to them by their partner/wife in the relevant personal order in case of her death as required by the law.

So, as we can see, the existence of 'critical interest' was derived from the concept of human rights and defined as a person's concern about what happens after his death, a moral conviction or a requirement to make decisions with a posthumous effect,[7] but it is impossible to form guarantees for the realisation of the relevant right based on interest alone.

In this context, the case law of the United States is interesting, namely the decision in the case of posthumous reproduction in *Hecht v. Superior Court*.[8] In this case, the courts of the first and higher instances resolved the case in different ways, and as a result, concluding actions of a person during his lifetime, namely bequeathing gametes to a partner, contact with a cryobank, were interpreted as a desire to exercise his reproductive rights posthumously and biological material was considered as the property of a person. So, it implies the possibility of disposing of it at own discretion.

5 Shelly Simana, 'Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?' (2018) 5 (2) Journal of Law and the Biosciences 329, doi: 10.1093/jlb/lsy017.

6 Jon B Evans, 'Post-Mortem Semen Retrieval: A Normative Prescription for Legislation in the United States' (2016) 1 (1) Concordia Law Review 133.

7 Hilary Young, 'Presuming Consent to Posthumous Reproduction' (2014) 27 (1) Journal o f Law and Health 63.

8 Hecht v Superior Court (Kane) (California Court of Appeal, Second District, Division Seven, 17 June 1993) <https://law.justia.com/cases/california/court-of-appeal/4th/16/836.html> accessed 10 February 2023.

The Belgian reproductive technology legislation allows the conduction of posthumous reproduction after the death of one of the couple if both partners have given consent to it. In this case, this reproductive technology can be implemented no earlier than six months and no later than two years after the death of the partner. Those few months after the death of a partner are given so that the living partner can make an informed decision about the future fate of the embryos.[9] On the one hand, this regulation of the timeframe for the possible posthumous conception of a child establishes a clear understanding of when such a child may be born and, accordingly, how to regulate the issue of inheritance after a deceased parent. On the other hand, the period of two years seems rather long if the future child will retain inheritance rights, which has a direct impact on the heirs who are already subjects of inheritance law. However, the positive aspect here is that the legislator gives time to think and to make a conscious and non-impulsive decision.

The experience of the Australian posthumous reproduction regulation is also interesting. In the Australian state of Victoria, the Human Tissue Act (1982) regulates the retrieval of gametes as the definition of tissue 'includes an organ, or part, of a human body or a substance extracted from, or form a part of, the human body'. Victoria's Assisted Reproductive Treatment Act (2008) has specific provisions concerning the use of posthumous gametes and embryos. These two pieces of legislation require that:

- the deceased provided consent in writing or consented, during his last illness, orally in the presence of two witnesses;[10]
- the procedure is requested by the deceased's partner or, if the deceased is a woman, her male partner uses a surrogacy arrangement;[11]
- the Patient Review Panel has approved it;[12]
- the woman must complete counselling before starting ART treatment.

The Patient Review Panel is required to consider the 'possible impact on the child to be born as a result of the treatment procedure', as well as 'any research on outcomes for children conceived after the death of the child's parents'.

This model seems to be very balanced and well-considered. Firstly, certain freedom is granted to the patient in the formulation of the personal order, which can be either written or oral, but given in the presence of two witnesses. Secondly, this freedom would be possible if the Patient Review Panel makes an additional decision that should not only approve the use of this method but also evaluate the possible consequences for the future child in the best interests of the child. Thirdly, it considers the possibility of posthumous reproduction in case of the death of a man and a woman, and, therefore, the issue of discrimination against reproductive rights does not arise, as it might be in our country if a restriction is established, without an appropriate exception, on the use of surrogate motherhood for the partner of a deceased woman, provided that she has the personal order for the posthumous use of her gametes or their joint embryos for posthumous reproduction. Therefore, it seems that this approach could be taken as a model, if not literally, then at least conceptually.

9 Guido Pennings, 'Belgian Law on Medically Assisted Reproduction and the Disposition of Supernumerary Embryos and Gametes' (2007) 14 (3) European Journal of Health Law 251, doi: 10.1163/092902707x232971.

10 Australian state of Victoria 'Human Tissue Act 1982' No 9860, s 26 <https://www.legislation.vic.gov.au/in-force/acts/human-tissue-act-1982/045> accessed 10 February 2023.

11 Australian state of Victoria 'Assisted Reproductive Treatment Act 2008' No 76, s 46 <https://www.legislation.vic.gov.au/as-made/acts/assisted-reproductive-treatment-act-2008> accessed 10 February 2023.

12 Ibid, s 85 (1) (c).

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There is a stricter procedure in Canada. It concerns the written consent to the posthumous use of human reproductive material, and this issue is regulated by the Assisted Human Reproduction Act, 2004, which stipulates that without the written consent of the donor (deceased person) to perform appropriate actions for a clearly defined purpose, no person may use the donor's reproductive material to create an embryo or remove reproductive material from the donor's body after his death to create an embryo and use the existing embryo in vitro.[13] Undoubtedly, this position of the legislator also has the right to exist and is obviously intended to protect bodily integrity and inviolability and ensure decent treatment of a deceased person. And in view of the special sensitivity of reproductive material and the rapid development of reproductive technologies and biomedicine, such a restriction forms a barrier to the abuse and illegal use of reproductive technologies.

A number of countries chose a more radical approach to solving this problem, which we consider unacceptable for the current situation in Ukraine. They took the way of prohibiting posthumous reproduction. For example, the Swiss Federal Act of 18 December 1998 on Medically Assisted Reproduction (Reproductive Medicine Act, RMA) in Art. 3 prohibits the use of reproductive cells or impregnated ova after the death of the person from whom they were obtained or after the death of any one of the couple, as it is concerned to be a practice that is contrary to the basic principle of the wellbeing of the future child. The exception is sperm cells obtained from donors.[14]

The German Embryo Protection Act (Embryonenschutzgesetz) explicitly prohibits the use of gametes of a deceased person for artificial insemination, punishing the practitioner for up to three years of imprisonment or a fine (Gesetz zum Schutz von Embryonen, 1990).[15] However, where the sperm has already been introduced into the egg (a zygote, the stage before embryo), this zygote could be returned to the wife for her use because the sperm had already been used before he died and were now inseparable.[16]

The French law on Bioethics first allowed assisted reproduction only for couples and only in cases of medical infertility (thus excluding same-sex couples).[17] However, after revising this law in June 2021, the range of people who can access ART was expanded and now includes also same-sex couples and individual women.[18]

However, the law-making trend and military realities that unfortunately take the lives of young Ukrainians do not allow us to consider the possibility of establishing a prohibition on posthumous reproduction in Ukraine. Instead, there are countries where this method is prohibited. Thus, we should consider the possibility of citizens of these countries applying for posthumous reproduction services at Ukrainian clinics, which will require separate regulations and the resolution of many issues, including the applicable right, paternity/

13 Valerie Thomas, 'Life After Death: Regulating Posthumous Reproduction' (How to Regulate?: The Regulatory Institute's Blog, 17 April 2019) <https://www.howtoregulate.org/posthumous-reproduction-2> accessed 10 February 2023.

14 Swiss Federal Act 'On Medically Assisted Reproduction (Reproductive Medicine Act, RMA)' of 18 December 1998 <https://www.fedlex.admin.ch/eli/cc/2000/554/en> accessed 10 February 2023.

15 Federal Republic of Germany 'Act for Protection of Embryos (The Embryo Protection Act)' of 13 December 1990, ss 2 (1), 4 <https://www.gesetze-im-internet.de/eschg/BJNR027460990.html> accessed 10 February 2023.

16 Yael Hashiloni-Dolev and Silke Schicktanz, 'A Cross-Cultural Analysis of Posthumous Reproduction: The Significance of the Gender and Margins-of-Life Perspectives' (2017) 4 Reproductive Biomedicine & Society online 21, doi: 10.1016/j.rbms.2017.03.003.

17 Law of the French Republic No 2011-814 'On Bioethics' of 7 July 2011, art 33 <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000024323102> accessed 10 February 2023.

18 Johnny Cotton, 'French Bioethics Body Backs IVF for All Women Who Want Children' (Reuters, 25 September 2018) <https://www.reuters.com/article/us-france-bioethics-law/french-bioethics-body-backs-ivf-for-all-women-who-want-children-idUSKCN1M51TM> accessed 10 February 2023.

maternity, the procedure for transporting reproductive materials, and/or embryos across the customs border, etc.

It seems that it would be advisable to prohibit the provision of such services to foreigners/stateless persons in Ukraine, regardless of whether their country permits or prohibits the use of ART methods. This should be done primarily in the interests of the future child and to prevent abuse.

Since the current legislation of Ukraine contains a gap in the regulation of the conditions for the use of posthumous reproduction, the providers of ART services solve the problem on their own and at their own risk, forming a law enforcement practice without a special legal basis. The legislative activity that has been going on for many years allows us to identify the latest trends in the possible way to regulate these issues in Ukraine soon.

It is interesting to compare the provisions of the existing drafts regarding the general conditions for the use of ART, in particular, para. 1 of Part 1 of Art. 7 of draft Law No. 6475 establishes the possibility of using assisted reproductive technologies only for married couples; thereby, it restricts the reproductive rights of unmarried persons. In addition, para. 2 of Part 1 of Art. 7 includes provisions of a certain discriminatory nature regarding the reproductive rights of unmarried men that give the right to a woman who is not married for medical and social reasons and has no medical contraindications to use assisted reproductive technologies listed in Art. 4 of this Law. The current regulation does not contain such a restriction. In particular, para. 1.7 of the Procedure for the Use of Assisted Reproductive Technologies establishes that adult women and/or men have the right to undergo ART treatment programs based on medical grounds.

A similar, but one might say graduated, the approach is embodied in Parts 3 and 4 of Art. 6 of draft Law No. 6475-1, which allows the use of all methods, except for surrogate motherhood, to spouses or to a man and a woman who are not officially married or to an unmarried woman. So, unmarried men are again not included in the circle of subjects which can be customers of ART services. And surrogate motherhood is allowed solely for spouses (husband and wife) who are in a registered marriage.

Instead, the newest legislative initiative, namely Part 1 of Art. 7 of draft Law No. 6475-2, also does not contain such a restriction. In particular, it states that 'an adult natural person due to medical indications and in the absence of medical contraindications has the right to use assisted reproductive technologies to treat infertility'. This wording is preferable in terms of expanding the circle of potential customers of assisted reproduction services but still limits the use of ART exclusively to the treatment of infertility, which in turn limits the possibility of using ART to preserve fertility or for posthumous reproduction since posthumous reproduction can hardly be considered as a treatment for infertility. Therefore, it would be advisable to expand the aim, adding the prevention of infertility, delayed fatherhood/motherhood, and posthumous reproduction.

It is worth paying attention to the fact that the general provision of Art. 7 of draft Law No. 6475 on exclusive access to ART of spouses is continued in the regulation of certain ART methods. In particular, in accordance with Part 3 of Art. 23 of draft Law No. 6475, 'the spouse can use the right to cryopreservation if there is a joint written application for cryopreservation in which the owner of reproductive cells, embryos and tissues in case of a divorce or invalidation of the marriage is indicated'. At the same time, unmarried persons are not granted such a right. The provision of Part 2 of Art. 22 of draft Law No. 6475-1 indirectly but still limits the circle of persons who can use this method. In particular, it is established that 'cryopreservation of reproductive cells and embryos is carried out on the basis of a joint written application of patients for cryopreservation in healthcare institutions where assisted reproductive technologies are used'. Thus, it is obvious that the demand for

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a joint application and the use of the word 'patients' prove that the developers of the draft do not allow this method to be used by individuals but only by men and women as patients. And this approach directly contradicts the current trends, in particular, to stimulate the development of the sphere of reproductive biological material preservation, especially in the interest of preserving the fertility of military personnel.

Draft Law No. 6475-2 proposes a more progressive regulation of these issues, and Art. 17 stipulates that:

> cryopreservation and further storage of reproductive cells, reproductive tissues and embryos, provided by the patient and/or patients for use for their own needs when using assisted reproductive technologies, are carried out based on a written application of the patient(s) for cryopreservation and storage in healthcare institutions where assisted reproductive technologies are used, and should be carried out at the expense of the patient(s).

Thus, as we can see, in this model of regulation, by using the general term patient/patients', the legislator did not limit the scope of this type of ART only to married couples but rather expanded the circle of service consumers of personal storage of reproductive cells, tissues, and embryos.

In addition, the aforementioned Part 3 of Art. 23 of draft Law No. 6475, as well as Art. 23 of draft Law No. 6475-1 and Art. 16 of draft Law No. 6475-2, contain another wording that may cause discussions and problems in law enforcement. The developers bravely applied the concept of property to reproductive biomaterials and embryos, while the position of the current civil law on such special objects of civil rights is still unclear and should be regulated.

It is positive that all of these drafts aim to resolve this issue, as the current Procedure for the Use of ART contains only a general provision, namely para. 11.1, which states that 'patient gametes (sperm or eggs), testicular tissue or its appendages, ovarian tissue and embryos are biological material of the patient/patients, and the healthcare institution ensures their storage'. This is correctly interpreted in practice, including courts, as the disposal of material and embryos exclusively by mutual consent. But you must admit that such regulation cannot be called optimal, and this issue should be addressed.

Thus, Art. 23 of draft Law No. 6475 emphasises the need to determine a person who has a right to dispose of these objects in case of divorce or invalidation of the marriage. It is very important because the current legislation does not contain such a requirement and does not regulate the consequences of such significant legal facts that have a direct impact on relations regarding the disposal of such sensitive biological material. On the other hand, it is worth considering whether the consent given in the application at the stage of concluding an agreement on the provision of ART services to transfer the husband's reproductive cells to the wife after the divorce would have legal value if, at the time of the divorce, the husband has changed his mind and does not want to give consent to the use of his reproductive cells by his ex-wife for reproductive purposes. The determining factor here is the genetic connection between a man and a potential child, which implies a number of legal consequences for him as a biological father. Obviously, that is why Part 3 of Art. 2 of draft Law 6475-1 stipulates that the storage of cryopreserved embryos belonging to the spouses is terminated in case of divorce if there is no joint application issued after the termination of the marriage for their further use. Draft Law No. 6475-2 also uses the term 'termination of marriage', which is broader in content and covers any legal facts that result in the termination of marital relations, including the termination of relations of an unregistered marriage since in the same draft, the developers equalised the rights of spouses and persons in an unregistered marriage, and this is correct.

If we compare Art. 24 of draft Law No. 6475, Art. 22 of draft Law No. 6475-1, and Art. 17 of draft Law No. 6475-2, we can conclude that the developers of the latter draft paid much more attention to the issue of regulating the use of reproductive cells, tissues, and embryos, having regulated most of the situations that are currently not regulated by existing legislation. Unlike draft Law No. 6475, which established an imperative norm prohibiting the use of cryopreserved embryos in case of the death of a spouse, Part 3 of Art. 22 and Parts 1 and 2 of Art. 24 of draft Law No. 6475-1 regulated the storage and use of cryopreserved embryos and reproductive cells in case of death or recognition of spouses (a male spouse or a female spouse) as incapacitated or deceased in court or termination of the marriage. Also, Art. 17 of draft Law No. 6475-2 did not establish such a restriction. Therefore, the potential possibility of enshrining such a restriction excludes any use of cryopreserved embryos of deceased spouses, which automatically means that posthumous reproduction cannot be used in this case, which, in our opinion, is absolutely correct in the context of the best interests of the future child. But it also excludes the possibility for spouses to make arrangements for the transfer of their embryos in case of their death for donation or for research purposes, which seems to be wrong and restricts their rights. Instead, the wording of the rights to dispose of cryopreserved cells, tissues, and embryos in Parts 1 and 2 of Art. 24 of draft Law No. 6475-1 and Parts 2 and 3 of Art. 17 of draft Law No. 6475-2, in our opinion, forms an overly broad framework that can cause many problems in the future, if implemented. Let us consider them in more detail.

We fully support the fact that the developers distinguished between rules on the disposal of reproductive cells/tissues and the use of cryopreserved embryos because, in the first case, it is easy to determine a person who is authorised to decide on disposal, and in the second case, the object of these relations is the embryo, which has genetic parents (customers of ART services) who can determine its future only by mutual consent. But would it be legislatively advisable to give consent to the unlimited disposal of an embryo in case of death, or will this primarily ensure the best interests of the future child who may be born by using such posthumous reproduction? In our opinion, no. Firstly, because it is unlikely that our society is morally ready for the practical application of such norms, and secondly, because the drafts themselves refer to genetic parents, at least one of whom the embryo must be related to when using surrogate motherhood (which is the only way to conceive such a child posthumously in this case). Therefore, it seems that these provisions should be more structured, prohibiting the use of posthumous reproduction in case of death of both spouses or of both partners (customers of ART services), and suggesting in case of death, declaration of death, incapacity or termination of marriage or partnership relations the provision of consent in the form of a written notarised order (application) on the possibility of their use for reproductive purposes by the other spouse/partner, as a donor or for research purposes.

It seems more proper to enshrine in the law a general rule from which persons authorised to dispose of reproductive biomaterials, by mutual agreement, can deviate and enter into a written agreement to transfer the rights of disposal to their partner after the termination of marriage or partnership. Namely, it would be advisable to restate this provision in the following wording:

An adult man and/or woman, as well as spouses, who have used assisted reproductive technologies, are the persons who have a right to dispose of the reproductive cells, tissues, embryos obtained from them based on a sole or joint written application for their cryopreservation and storage for use for their own use. A person authorized the right to dispose of cryopreserved reproductive tissues and cells for his/her own use is the person from whom they were obtained unless he/she gives another written notarized order. The persons authorized the right to dispose of cryopreserved embryos are the patient/patients, for whose treatment such embryos were created, unless he/she gives a written notarized order regarding the possibility of their use for reproductive purpose by a partner, as a donation, or for research purposes.

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At the same time, in Art. 17 of draft Law No. 6475-2, the developers first included an essential provision stating that 'in case of a change of the decision to use reproductive cells, reproductive tissues and embryos by the spouses or one of the spouses, such a decision should be notarized'. This provision will significantly facilitate solving these issues in practice. Also extremely important is the novelty of both drafts regarding the direct prohibition of growing embryos for research purposes, which the current Procedure for the Use of ART does not contain, contrary to the provisions of international law.

Therefore, we can conclude that law-making activity in Ukraine shows a steady tendency toward the legalisation of posthumous reproduction. However, it is worthwhile to understand whether the proposed regulatory mechanism will be effective in terms of law enforcement and what exactly needs to be changed to ensure the smooth implementation of this method.

2.3 Formal requirements for the disposal of reproductive biological material and embryos in case of death (problems of practical application)

In this context, it is interesting to consider the recommendations of the Committee on Ethics and Law of the European Society for Human Reproduction and Embryology (ESHRE), issued on 21 August 2006, which sets out the following requirements:

1) Consent to the use of biomaterial after death must be made in writing before cryopreservation or the start of the ART cycle;
2) In case of the death of one of the spouses, the other spouse must receive detailed advice on the use of the frozen biomaterial of the deceased spouse;
3) There should be a minimum period of 1 year before the use of the deceased person's biological material.

The ESHRE Committee also emphasises the legal and ethical issues that may accompany the use of posthumous reproduction. These issues include the possibility of using gametes and embryos without the consent of the biological parents (since the person foresaw the possibility of their use); determining the circle of persons who have the right to use frozen gametes or embryos (all close relatives of the first degree of kinship of the deceased or only the second spouse); how to achieve an appropriate balance between respect for the autonomy of a deceased person's will and the best interests of a future child; whether such newborn children have the right to inherit the deceased's property, etc.

The analysis of the given recommendations leads to the following conclusions: when deciding on the fate of frozen gametes and embryos, the fundamental role is undoubtedly given to the will of a deceased person, which must be formalised in one form or another, which will have legal force in case the patient's death. And the actual issue of formalising such an expression of will in case of death raises the most questions and discussions, primarily among practitioners.

The civil legislation in force excludes the possibility of transferring the right to use and dispose of biological material to another person posthumously by issuing a notarised power of attorney since, in accordance with Art. 248 of the Civil Code of Ukraine (hereinafter the CCU),[19] representation under power of attorney is terminated in case of the death of the person who issued a power of attorney. In addition, it is also impossible to apply the provisions governing posthumous transplantation since, in accordance with the Law of Ukraine 'On the

19 Civil Code of Ukraine No 435-IV of 16 January 2003 (as amended of 1 January 2023) <https://zakon.rada.gov.ua/laws/show/435-15#Text> accessed 10 February 2023.

Application of Transplantation of Human Anatomical Materials',[20] transplantation of gonads, reproductive cells, and live embryos is excluded from the scope of this law.

Draft Law No. 6475-2 proposes, in particular, in Part 2 of Art. 17, that in case of death, recognition of death, and incapacity of a person whose reproductive cells or reproductive tissues are cryopreserved, their further use is prohibited unless there is a written notarised order (application) of the patient regarding their further use. At the same time, the developers stipulate in the same provision that the certification of such an order (application) is carried out in the manner prescribed by law for the certification of wills.

Will this regulation, if adopted, make life easier for notaries? According to the CCU, a will is a personal order of an individual in case of his or her death. Under the current Civil Law, the inheritance may include the rights and obligations belonging to the testator at the time of death, and the will may also stipulate the performance of certain non-property actions, among which the CCU establishes an exhaustive list of specific actions, including the disposal of personal papers, as well as the determination of the place and form of burial. Unfortunately, such objects as biological/anatomical material and embryos are not included in this list, and their legal regime as objects of civil rights remains undetermined.

Thus, notaries today emphasise that this problem leads to the absence of a mechanism for the execution of such a will after the death of the testator because the legal regime of reproductive cells/tissues and embryos is not identified in the law. The current Procedure for the Use of ART determines that patients' gametes, reproductive tissues, and embryos are 'biological material of the patient/patients'. Therefore, it seems logical to assume that reproductive cells/tissues and embryos are objects of law, although they are not included in the list of objects of civil rights defined in Art. 177 of the CCU (things, including money and securities, other property, property rights, results of work, services, results of intellectual and creative activity, information, as well as other tangible and intangible benefits). We should take into account that, first of all, gametes and embryos, through the prism of the potential birth of a future human being, should be granted the status of objects of rights with special properties at the legislative level in order to enable the realisation of rights and obligations of the subjects of legal relations for the provision of assisted reproductive technologies.

At the same time, we should emphasise that the current legislation does not contain a direct prohibition on the certification of a will regarding the disposal of cryopreserved biomaterial of a person, so the issue of law enforcement practice in this sphere remains open. The doctrine of national inheritance law has already made the first attempts to propose the possibility of regulating biological wills. In particular, in the study of M. O. Mykhailiv, it is proposed to supplement the CCU with a new type of a will – a 'biological will' – and define it as a testator's order aimed at transferring the right to use his/her biological material to the heir (heirs) for further use in compliance with the conditions determined by the testator and under the procedure established by law.[21] Undoubtedly, the introduction of such a new type of a will requires systemic changes to both inheritance legislation and acts regulating notarial activities, but first of all, the legislator will again have to decide on the regulation of the regime of these special objects of civil legal relations.

The existing gaps in the current legislation have forced reproductive medicine clinics to independently develop methods to fill them. In particular, over the last year, the contractual practice has developed special forms of contracts with consumers of reproductive services

20 Law of Ukraine No 2427-VIII 'On the Application of Transplantation of Human Anatomical Materials' of 17 May 2018 (as amended of 7 January 2022) <https://zakon.rada.gov.ua/laws/show/2427-19#Text> accessed 10 February 2023.

21 MO Mykhailiv, Legal Regulation of Inheritance Relationships in International Private Law (Ivan Franko National University of Lviv 2022).

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that include conditions for the use of cryopreserved biological materials and embryos in case of the customer's death. Along with this, customers also should sign a statement of consent to the use of biological material in case of death. However, there is still no consensus on the need for notarisation of such documents since the time constraints of persons liable for military service often exclude this possibility, and these documents are drawn up in a simple written form but in the presence of the head of the healthcare institution providing the relevant services. However, it is definitely that the notarised form has many advantages which are important for both the service provider and the customers.

In practice, citizens' appeals to notaries to certificate documents on posthumous disposal of separated biological material have become much more frequent, so notaries already provide such services at their own risk. At the same time, it is important to note that the application form has significant drawbacks. First of all, there is the fact that when the signature is certified, the notary does not leave a copy of it. That is, according to the rules of keeping notarial documentation, it is not supposed to keep in the notary's archive applications certifying the authenticity of a person's signature on the disposal of his biological material after death and documents on the basis of which such applications were certified (in particular, the person's passport). The problem is that the loss of the original of such a document automatically deprives the person who could dispose of such objects on the basis of the right granted to him by this document. In addition, such applications are not subject to registration in any electronic notary register, except the Register for Notarial Acts, which does not allow to determine the content of the certified document. The solution to this problem would be, firstly, to enshrine in civil law a biological will that would be registered in the Register of Wills, and secondly, to enter the content of such a personal order into the Electronic Healthcare System, to which, for example, a family doctor will have access, who will be able to certify the issuance of such a disposal in the event of loss of the document in question. An important drawback of the application form is also the absence of a mechanism to revoke such a document in the current legislation, the authenticity of the signature certified by a notary. Such a problem would not arise if we were talking about a biological will since there is a fixed procedure for its revocation.

We should also not forget about the possibility of resolving the issue of establishing the fact of consent to the posthumous use of biological material in court. However, it is quite understandable that this is the most complicated and time-consuming method; the prospect of its effective application in practice is rather illusory and may be appropriate only in some of the most difficult cases.

2.4 Issues of inheritance and establishment of paternity/maternity

The current civil legislation of Ukraine does not include children conceived and born after the death of the testator among the heirs, and the introduction of posthumous reproduction will force an amendment of the current legislation and the formation of new provisions that will ensure the interests of the so-called 'posthumous children'. The civil law doctrine is already working on this issue. In particular, Mykhailiv substantiates the position on the need to include in the circle of heirs by will and by law individuals who were conceived using reproductive technologies after the opening of the inheritance within six months, subject to the testator's lifetime order in the will or agreement on the use of reproductive material after his death, and were born alive after the opening of the inheritance.[22] We also propose

22 Myroslava M Diakovych, Mariya O Mykhayliv and Volodymyr M Kossak, 'Features of the Inheritance Rights of Children Born as a Result of Artificial Insemination' (2020) 27 (4) Journal of the National Academy of Legal Sciences of Ukraine 214-30, doi: 10.37635/jnalsu.27(4).2020.

to introduce a new type of will, namely a biological will, which can also be used to dispose of gametes and embryos. However, the author emphasises that even if such amendments are made to the legislation, a systematic approach is needed, and the issue of the specifics of the execution of such wills and orders should also be regulated.

When considering the issue of determining legal paternity/maternity concerning a child conceived and born after the death of one of the parents, it is advisable to get familiarised with foreign experience in regulating this issue and then, taking this into account, propose a method of regulation, which will be consistent with the current legislation of Ukraine and fit within the framework of our legal tradition.

In the Australian state of Victoria, the Status of Children Act (1974) Part V concerns the posthumous use of gametes. Section 40 of the Act confirms that a deceased person whose gametes are posthumously used in a treatment procedure will be treated in law as a parent of any child born as a result of that procedure but only for the purpose of being registered on the child's birth certificate.[23] This presumption does not, however, preclude a person from making specific provisions in a will for any child conceived posthumously.

The UK's Human Fertilisation and Embryology Act (2008) (HFEA) follows similar lines as the Australian legislation that the deceased would be treated as a parent for the purposes of birth registration. However, the deceased is not regarded as the legal parent of the child who is thus excluded from claims in intestacy and under the UK's Inheritance (Provision for Family and Dependents) Act 1975.[24]

So, in both the UK and Australian regulations, we can see the legal parentage presumption, but the so-called postmortal children are not heirs of deceased parents by law but can only inherit according to the will. This is an interesting way to solve the problem for the living heirs when there is no will because they do not have to wait to see if and when such a postmortal child or children will be born.

The United States Uniform Parentage Act provides that an individual is the father of a child born as a result of assisted reproduction if:

- a person who intends to become the father of a child conceived by ART dies between the transfer of gametes or embryos and the birth of a child;
- a person who consents to ART from a woman who has agreed to have a child dies before the transfer of gametes or embryos;
- a person agreed in writing that if ART had occurred after his death, the person would have been one of the child's parents or clear and convincing evidence demonstrates the person's intention to be the child's father.[25]

The US Uniform Parentage Act also sets a deadline for the legal paternity of posthumous reproduction, i.e., the child is born no later than 45 months after the person's death (s 708 (b) (2)). After 45 months, the deceased will not be the legal father of any child born by using his gametes.

Ukrainian legislation does not regulate the issue of determining the paternity/maternity of the deceased concerning a child conceived and born after his/her death as a result of

23 Australian state of Victoria 'Status of Children Act 1974' No 8602 <https://www.findandconnect.gov.au/ref/vic/biogs/E000590b.htm> accessed 10 February 2023.

24 Neil Maddox, 'Inheritance and the Posthumously Conceived Child' (SSRN, 29 October 2017) Conveyancing and Property Lawyer <https://ssrn.com/abstract=3061579> accessed 10 February 2023.

25 US ULC 'Uniform Parentage Act (2017)', s 708 <https://www.uniformlaws.org/committees/community-home?communitykey=c4f37d2d-4d20-4be0-8256-22dd73af068f&tab=groupdetails> accessed 10 February 2023.

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posthumous reproduction. This may lead to problems with the registration of the child and contradict the principle of ensuring the best interests of such a child. Therefore, relevant amendments and additions should also be made to family law, in particular, first of all, to the Family Code of Ukraine (hereinafter referred to as the FCU).[26]

In particular, Part 4 of Art. 123 of the FCU, which regulates the issue of determining the origin of a child born by using ART, can be supplemented with the following provision:

In the case of conception and birth of a child by using posthumous reproduction techniques, paternity/maternity of the parent who died and was declared dead in court will be determined according to the rules of Article 133 if the parents were married at the time of notarization of the order (application) on the transfer of gametes and embryos for reproductive purposes to the other spouse in case of death, based on a marriage certificate, death certificate and notarized order (application) on the transfer of the right to posthumous use of gametes and/or embryos to the other spouse, as well as a certificate issued by a healthcare institution certifying the success of the posthumous reproduction method. If a person whose paternity/maternity is established concerning a child born by using posthumous reproduction was not married at the time of submitting an order (application) for the posthumous use of his/her gametes/embryos, the fact of paternity/maternity is established based on a court decision under the procedure provided for in Articles 130, 132, based on genetic expertise confirming kinship, as well as upon submission of a death certificate, a notarized order (application) for the transfer of the right to posthumous use of gametes or/and embryos to the partners, and a certificate provided by a healthcare facility certifying the success of the posthumous reproduction method.

For partners of servicemen or servicewomen who have not been married, this procedure should not cause problems, as it is possible to use the DNA database created on the basis of the Law of Ukraine 'On State Registration of Human Genomic Information' dated 9 July 2022.[27]

2.5 Analysis of the conceptual framework (advantages and disadvantages)

One of the progressive and significant novelties that can be found in all analysed draft Laws is that they define the concept of genetic parents in the context of reproductive medicine. In particular, genetic parents are defined as spouses (a husband and a wife) whose reproductive cells form an embryo that has a genetic connection with both or one of the spouses (a husband and/or a wife). The significance and progressiveness of this provision lie in the fact that the legislator here emphasises that the genetic parents of a conceived embryo will be considered not only those persons who directly have a genetic connection with it, which at first glance should be implied by the term itself but also those persons who, as a result of the exercise of their reproductive rights, give birth to this embryo. In addition, this definition also emphasises that the embryo created by using ART must have a genetic connection to at least one of the genetic parents, which excludes the possibility of creating embryos entirely from donor biological material and indirectly sets an obstacle to abuse and the creation of embryos for other than the reproductive purpose. In other words, this could also facilitate posthumous reproduction, if properly regulated, for military personnel who did not have time to use the ART program but gave their consent in the prescribed form to the use of donor biological material during their lifetime, for the birth of a child after their death, who will be considered their genetic child. Also, the clarification added to this definition in draft

26 Family Code of Ukraine No 2947-III of 10 January 2002 (as amended of 19 February 2022) <https://zakon.rada.gov.ua/laws/show/2947-14#Text> accessed 10 February 2023.

27 Law of Ukraine No 2391-IX 'On State Registration of Human Genomic Information' of 9 July 2022 <https://zakon.rada.gov.ua/laws/show/2391-20#Text> accessed 10 February 2023.

Law No. 6475-2 is important and claims that genetic parents can be not only spouses but also a man and a woman who do not necessarily have to be in a registered marriage, which significantly expands the circle of participants in these relationships and makes it impossible to discriminate against unmarried couples.

The very narrow definition of assisted reproductive technologies given in Art. 1 of all the draft Laws raises certain concerns. This definition is limited to 'solving the problem of infertility', but what about the so-called 'deferred parenthood/maternity' and posthumous reproduction, which cannot be considered infertility treatment, including for military personnel? Therefore, it seems appropriate to expand the content of this concept and give the definition in the following wording: 'Assisted reproductive technologies is a system of methods used to solve the problem of infertility, planning of future fatherhood/motherhood and posthumous reproduction, in which some or all stages of fertilization (for example, obtaining, storing or using germ cells or embryos) occur outside the human body (in vitro)'.

2.6 Controversial and debatable provisions of potential laws

The question of whether the husband or wife of a military spouse can use his/her reproductive cells or cryopreserved embryos after his/her death to carry a future child by a surrogate mother is worthy of attention if, for example, the wife cannot bear a child herself for physiological reasons or if her husband has the right to dispose of the reproductive biomaterial or embryos based on her personal order given during her lifetime. The same issue ultimately applies to the possibility of using posthumous reproduction by one of the spouses (husband and wife) after the death of one of them under similar circumstances.

An analysis of the provisions of the draft laws regulating the conditions and procedure for the use of surrogate (replacement) motherhood, namely Art. 8 of draft Law No. 6475 and Art. 20 of draft Law No. 6475-2, allows us to conclude that the legislator's position in this situation is quite categorical. Despite the different wording of these provisions, the common feature is that exclusively a married couple can use this method, and draft Law No. 6457-2 additionally establishes the requirement that the marriage relationship of such a couple must last at least two years. What, in our opinion, if such provisions enter into force in the form that exists today, will contradict, in particular, Part 3 of Art. 24 of draft Law No. 6475 and Parts 2 and 3 of Art. 17 of draft Law No. 6475-2, which establish that in case of death, recognition of one of the spouses as deceased in court or termination of marriage, the use of cryopreserved reproductive tissues/cells or embryos is possible in the presence of a written notarised order (application) of the deceased spouse, given during his/her lifetime, and in the absence of such an order, the use is prohibited and the material and/or embryos are subject to utilisation.

Thus, on the one hand, it is proposed to establish a permit for posthumous reproduction, while in certain situations mentioned above, due to the prohibitions enshrined in the same law, in particular, regarding the use of surrogate motherhood, such a right will be impossible to exercise in practice. It is worth mentioning the experience of regulating this issue in Australia, where surrogate motherhood is permitted in such cases as an exception. Therefore, it would be advisable to establish an exception in the article regulating surrogate motherhood, in particular, regarding the possibility of using surrogate motherhood if it is the only opportunity for one of the spouses (husband or wife) due to the death of the other spouse, which must be certified by a duly executed order of a deceased person and a death certificate or a court decision declaring him/her dead, to conceive and give birth to a child using the surrogate motherhood method.

Another debatable issue is the prospect of future problems with the regulation of reproductive tourism for the purpose of using the posthumous reproduction method. In particular, whether

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it is advisable to establish in a special law the permission or, conversely, the prohibition of such services to foreigners or stateless persons – and also, whether it is reasonable to create conditions for Ukrainian citizens to seek such reproductive services abroad.

As for the first question, none of the analysed drafts provides an answer. However, it seems that this prospect may have negative consequences, as in the case of surrogate motherhood, primarily for children born as a result of these methods due to the impossibility of legalising their status in the country of origin of one of the parents. Incidentally, if we analyse the provisions of Part 3 of Art. 7 of draft Law No. 6475-2, it prohibits the provision of ART services to stateless persons, while Art. 20 regulates the procedure for using surrogate motherhood services for foreigners and stateless persons. One provision contradicts the other.

As for the possibility of Ukrainian citizens travelling abroad to receive posthumous reproduction services, the current legislation does not contain a direct prohibition on this. Analysing the trends in law-making, we can conclude that no consensus has been reached on this issue so far, as each draft Law has a different approach to solving this issue. In particular, Part 2 of Art. 19 of draft Law No. 6475-2 proposes to prohibit the export and sale of human reproductive cells, reproductive tissues, and embryos abroad. Instead, draft Law 6475-1 does not suggest any prohibitions in Art. 25 on the transportation of reproductive cells/tissues and embryos. Therefore, if the first option is adopted, the possibility of reproductive tourism for Ukrainian citizens, as well as for foreigners who have stored reproductive tissues/cells or embryos in Ukraine, will become impossible. In our opinion, this will solve many problematic issues, including those related to conflict law, which have already arisen or may arise in the future.

3 CONCLUSIONS

In sum, to **appropriately** respond to the challenges posed by full-scale war, in particular in the field of ensuring barrier-free access for military personnel to the exercise of their reproductive rights, it is necessary to quickly complete the law-making process that has been going on for years, improving the proposed provisions and creating optimal conditions for the posthumous use of cryopreserved gametes and embryos to realise the right of families of persons liable for military service to procreate.

It is necessary to amend and supplement the relevant legal acts of Ukraine, which will aim to:

- define in civil law the legal regime of reproductive cells, tissues, and embryos as objects that have a non-property connection with customers of the relevant reproductive services and are the result of the exercise of their reproductive rights;
- define the range of persons to whom a deceased person may transfer the right to use his or her gametes and/or embryos during his or her lifetime and ensure barrier-free access to the exercise of such a right (exception for surrogate motherhood);
- establish a minimum and maximum period during which posthumous disposal of gametes and embryos is allowed, which will have a direct impact on inheritance relations;
- define in civil law the inheritance rights of children conceived and born after the testator's death (setting a maximum period of six months from the date of opening the inheritance for a posthumous conception of a child who, if born alive, will be an heir by law);

- define in family law the procedure for establishing paternity/maternity concerning a child conceived and born after the death of one of the parents;
- develop standard forms of patient/patients' orders (applications) that will be subject to mandatory notarisation before the procedure of biological material preservation and, until the adoption of a special law, will provide for the conditions of its use in case of death;
- determine the procedure for performing notarial acts in the context of certifying the authenticity of a person's signature for the disposal of their biomaterial as a separate special act with the possibility of storing other copies of orders (applications) in the notary's archive;
- regulate the mechanism for cancelling orders (applications) for the disposal of biomaterial by submitting a relevant application to the notary who certified the previous action;
- solve the issue of reproductive tourism by prohibiting the provision of posthumous reproduction and surrogate motherhood services to stateless persons and foreigners whose personal/joint personal law prohibits the use of these methods and prohibiting the export of reproductive cells/tissues and embryos from Ukraine.

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Research Article

PROVIDING A BALANCE BETWEEN EMPLOYER AND EMPLOYEE INTERESTS THROUGH THE DEVELOPMENT OF A PROCEDURAL MECHANISM FOR PROTECTING THEIR RIGHTS

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Keywords: Balance of Interests; Employers; Employees; Labour Rights; Labour Relations.

ABSTRACT

Background: *This article presents a study of the theoretical and practical aspects of balancing the interests of employers and employees in the context of Kazakhstan and the United States. The core purpose was to develop such mechanisms that can aid in balanced employer-employee relations in Kazakhstan. The article analyses the role of legal codes and frameworks for the elimination of imbalance in disputed employment relations.*

Methods: *A qualitative study was conducted and the relevant legislation, codes and extant literature related to the rights of employees and employers were explored, which included ILO documents and relevant research articles. The article investigates Kazakhstan's and United States' labour code and legislation to determine the applicable procedural mechanisms for balancing the interests of employers and employees.*

Results and Conclusions: *On the basis of this study, a number of recommendations have been developed, aimed at protecting the interests of both employers and employees. In particular, the article presents a procedural developed mechanism based on three aspects of employment relations: social dialogue, collective bargaining and dispute resolution aimed at securing the rights and interests of both parties. The developed mechanisms not only facilitate mutually beneficial decisions appealing to the interests of employees and employers via social dialogue and collective bargaining agreements but also aim to reduce the number of labour disputes in the courts in the future with alternative resolution mechanisms.*

1 INTRODUCTION

The employment relationship is a widely discussed phenomenon in organisational and human resources management that entails a set of mutual rights, responsibilities, and obligations between the main parties within the relationship of employer and employee.[1] The employment relationship stresses the crucial need to ensure that all employees have access to their employment-related rights and benefits in the field of labour law and social security. In turn, the relationships mandate the employees to work for the interests of the employer. This reciprocal nature of the relationship between the employee and the employer is the central criterion for determining the degree and nature of the rights and interests that are underpinned by formal and legal structures and ethical values related to fairness.[2] Regardless of the circumstances, all employees and employers possess some fundamental interests that they seek to pursue and achieve via their employment relationships. In this regard, to ensure a balance between the interests of the employers and the employees, the employment relationship is governed and mediated by the labour market and the State, all instances of which are governed by some contract that ranges from both generic to union contracts and

1 Paul Sparrow and Cary L Cooper, *The Employment Relationship: Key Challenges for HR* (Routledge 2003) doi: 10.4324/9780080474571.

2 Cecilie Bingham, E*mployment Relations: Fairness and Trust in the Workplace* (SAGE Publications Ltd 2016).

rules for public service regarding implied expectations and agreements.[3] It is commonly believed that the employment relationship has a highly complex nature that includes varying influences and ideologies.[4] Moreover, the relationship is oftentimes contradictory, raising conflicts of interest and potential for cooperation and disagreement, which calls for the incorporation of mechanisms to balance the interests of the participants.[5]

The study of employment relations has recently evolved to be more diverse and multidisciplinary, integrating perspectives from sociology, psychology, economics, law, and political science. One of the key trends in scholarly research on employment relations is the increasing attention given to the influence of the macro-level factors such as government policies, and legal frameworks on employment relations at the micro-level of organisations.[6] Another trend is the emphasis on understanding the complexities of employment relationships, especially the balance of power between employers and employees and the role of intermediaries like trade unions in mediating conflicts.

The employment relationship has a direct impact on the achievement of many Sustainable Development Goals (SDGs). SDG 8, which aims to promote inclusive and sustainable economic growth, decent work for all, and decent work and economic growth is particularly relevant to employment relations.[7] Strong and positive employment relations can help contribute to achieving SDG 8 by promoting decent work, reducing the incidence of labour conflicts, and creating a supportive environment for workers and employers. The improvement of workers' rights and their protection can play an important role in achieving SDG 8. Moreover, the achievement of SDG 8 also has positive impacts on the other SDGs, such as reducing poverty and promoting gender equality.

One of the major challenges in the field of employment relations is the increasing trend of non-standard forms of employment, such as part-time work, temporary work, and self-employment, which can negatively impact the employment relationship and the protection of workers' rights.[8] Additionally, the rise of globalisation and the global labour market has increased the complexity of employment relations, making it more difficult to ensure that workers' rights are protected. The limited capacity of trade unions in many countries to effectively represent the interests of workers is another challenge. Furthermore, the unequal distribution of power between employers and employees can lead to imbalanced negotiations and unfair treatment of workers, particularly in contexts where workers have limited bargaining power. Finally, the

3 Adrian Wilkinson and others (eds), *The Sage Handbook of Human Resource Management* (2nd edn, SAGE Publications Ltd 2019).

4 Wolfgang Sassin, 'War of Ideology vs a Sober View: Sustainable vs Resilient?' (2020) 4 (2) The Beacon: Journal for Studying Ideologies and Mental Dimensions 020440211 <https://doi.org/10.5281/zenodo.4401296> accessed 24 January 2023.

5 Bingham (n 5).

6 Fang Lee Cooke, Jiuping Xu and Huimin Bian, 'The Prospect of Decent Work, Decent Industrial Relations and Decent Social Relations in China: Towards a Multi-Level and Multi-Disciplinary Approach' (2019) 30 (1) The International Journal of Human Resource Management 122, doi: 10.1080/09585192.2018.1521461.

7 'Employment, decent work for all and social protection: Related SDGS Goal 8 Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all' (*UN Department of Economic and Social Affairs Sustainable Development,* 2015) <https://sdgs.un.org/topics/employment-decent-work-all-and-social-protection> accessed 24 January 2023; 'Relevant SDG Targets related to National Employment Policies' (*International Labour Organization (ILO)*, 2015) <https://www.ilo.org/global/topics/dw4sd/themes/n-e-policies/WCMS_558579/lang--ru/index.htm> accessed 24 January 2023.
Shirin M Rai, Benjamin D Brown and Kanchana N Ruwanpura, 'SDG 8: Decent Work and Economic Growth – A Gendered Analysis' (2019) 113 World Development 368, doi: 10.1016/j.worlddev.2018.09.006.

8 Arne L Kalleberg, 'Nonstandard Employment Relations: Part-time, Temporary and Contract Work' (2000) 26 (1) Annual Review of Sociology 341, doi: 10.1146/annurev.soc.26.1.341.

lack of effective dispute resolution mechanisms at the workplace can lead to the escalation of conflicts, resulting in negative outcomes for both employers and employees.

1.1 Employment Relations

Employee relationships at work are increasingly known to comprise both interpersonal and collective ties. Rising individualisation of the working relationship can be seen as a result of the increase of individual workplace rights. Individual channels can be supplemented and strengthened by collective channels, which provide workers with a collective voice through the employment of union and/or non-union representatives. Every organisation should prioritise informing and consulting its employees since this is a core tenet of people management. If done successfully, it provides a valuable foundation for dialogue between management and employees, who are frequently represented by their chosen representatives. Senior management may utilise this as an opportunity to discuss critical information or plans with employees and get their support. Employees can utilise their collective voice to share ideas, ask questions, or voice concerns through their representatives. Hence, through strong employment relations, employers and employees can mutually benefit, which both enhances business and earns rewards for their efforts.

Trade unions, states, organisations, and employees are important stakeholders in employment relations. Although the direct relationship is between the organisations and employees, trade unions and the state act as intermediaries. It is important for a country and its industries to have positive and strong employment relations as it enables employees to work with high motivation and dedication. The rise of conflict between employees and employers can be detrimental to the organisation as well as to the national economy.[9] Due to this, it is important that the state ensures employment laws protect the rights of both employers and employees. Similarly, trade unions present a collective and strong voice for employee issues to the state or business organisations. This is the main reason that a lot of people in various countries prefer being a part of labour unions rather than raising their issues individually. Nonetheless, all these factors that affect employment relations also have a direct impact on industrial performance and the economy. Hence, state and business organisations usually aim to ensure that there is no conflict with workers so that there are no protests, absences, or strikes. These activities can cause major harm to economic performance. Therefore, it is important that employment relations that benefit all are adequately focused on by the stakeholders to avoid any negative outcomes.

1.2 Clashing Interests of Employers and Employees in the Context of Kazakhstan

International human rights organisations such as the International Labor Organization (ILO) and Human Rights Watch (HRW) consider Kazakhstan an institutionally weak and fragile country, especially in the context of workers' rights protection.[10] We also see an alarming trend related to the occurrence of labour conflicts is present, which is leading to unsolvable socio-economic problems. Local labour unions in Kazakhstan show weak performance

9 Lucio Baccaro and Valeria Pulignano, 'Employment Relations in Italy' in Greg J Bamber and others (eds), *International and Comparative Employment Relations: National regulation, global changes* (6th edn, Routledge 2020) 126, doi: 10.4324/9781003116158.

10 Shatlyk Amanov, 'Kazakhstan's Foreign Policy and Human Rights' in Aizada Nuriddenova and Gaukhar Baltabayeva (eds), *Post-Soviet Dynamics in the Central Asian Region: Textbook* (Suleyman Demirel University 2020).

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and lack of independence while protecting the rights of employees.[11] For example, it was highlighted that the International Confederation of Labour Unions excluded the Federation of Labour Unions of Kazakhstan because the local government deeply influence it.[9]

The Kazakhstan government does not guarantee the rights of employees and fails to protect workers' interests and freedom of association. Workers have to face many types of challenges and hurdles to work properly. For example, workers faced poor working conditions like long working hours, inadequate safety measures, low pay, and in some cases harassment and discrimination as well. Workers also face challenges to defend their interests and have restricted rights to collective bargaining, strike, and freedom of association. The management of companies also exerts pressure on the workers that participate in labour activism. In addition to this, recent changes in legislation have made it problematic for employees to freely form unions and bargain collectively. This is because criminal sanctions are imposed by the Kazakhstan government if employees participate in illegal strikes. Workers and trade leaders involved in labour activism have to face surveillance and harassment, as well as termination of their employment.[12]

The Kazakhstani authorities are very strict - they do not tolerate criticism related to the government and show aggression towards the defenders of employees' rights in the country.[13] Control over civil society groups and trade unions has been tightened, which is evidenced by the awful conditions of workers in the country. For example, in December 2011, violent clashes occurred in Zhanaozen, where workers were on strike for months - resulting in the government opening fire and killing approximately twelve people.[14] The reason behind the strike was to demand an increase in salary, timely payment of wages, and improved working conditions. Thus, the negative feelings of the employees led to protests and violent clashes because no institutionalised mechanism was present in the country to negotiate the conflict. Instead of accommodating the requests of employees, the government of Kazakhstan chose to use force against them. Without considering recommendations from labour unions, employment regulations were revised by the government - a new trade law was adopted in 2014 and a Labor Code in 2015.[15]

1.3 Assessing the Legislation

Every country develops and passes different rules, laws, acts, and legislation for employees based on which employer-employee relations are built. Legislation in each country differs but international laws are also enacted to induce a global code of conduct.[16] Labour relations in Kazakhstan are regulated by an individual contract of employment, regulatory legal instruments, as well as a collective labour agreement.[17] The roots of labour regulations and laws in Kazakhstan are embedded in the Constitution of the Republic of Kazakhstan.[18]

11 Slyamzhar Akhmetzharov and Serik Orazgaliyev, 'Labor Unions and Institutional Corruption: The Case of Kazakhstan' (2021) 12 (2) Journal of Eurasian Studies 133, doi: 10.1177/187936652110411.

12 Sean P Roberts and Arkady Moshes, 'The Eurasian Economic Union: a Case of Reproductive Integration?' (2016) 32 (6) Post-Soviet Affairs 542, doi: 10.1080/1060586X.2015.1115198.

13 Akhmetzharov and Orazgaliyev (n 14).

14 Gulzhan N Mukhamadiyeva and others, 'Evolution of Labor Law in Kazakhstan: Overview and Commentary on Regulatory Objectives and Development' (2018) 9 (8) Journal of Advanced Research in Law and Economics 2664, doi: 10.14505//jarle.v9.8(38).16.

15 ibid.

16 Michele Ford, From Migrant to the Worker: *Global Unions and Temporary Labor Migration in Asia* (ILR Press 2019).

17 Mukhamadiyeva and others (n 17).

18 Amanov (n 13).

Moreover, government agencies and Parliament passed and adopted labour relations for different categories of employment. As per the Labour Law of Kazakhstan (Art. No. 3), all employees have to work under the regulations related to the labour law and maintain relations with the employers based on these regulations. Working hours for employees have been restricted to 40 hours per week and employers are not allowed to ask employees to work beyond this limit. However, the employer can pay overtime wages for employees working in excess of 40 hours per week. The regulation also provides a restriction for people who are under 18 and are employed by organisations. Employees aged 14 to 16 cannot work more than 24 hours per week, and those aged 16 to 18 cannot work more than 36 hours per week. Kazakhstan's labour law has officially regulated and legitimised child labour in the country, which is considered to be an unethical practice as per international regulations. This is a weak area of the labour law that creates various challenges for the country as there are international firms that do not trade or do business with organisations hiring children. Hence, this part of the law has a negative effect on the economy of Kazakhstan.[19]

The most significant legal act through which labour relations are regulated in the country is the Labour Law, 1999.[20] This labour law, which includes 108 articles and 12 chapters, was implemented in 2000 and the old Labour Code from 1972 was amended. Contracts, labour relations, compensation, leave, working hours, and various other factors are regulated by this law. The means of social protection for unemployed people in the country and public employment are provided for by the Law on Employment issued in 1998. The minimum wage rate, monthly payment indicator, allowances, taxes, legal benefits, and compensation are included in the Law on Republican Budget 2002. Security issues, reduction in hazards, and prevention of accidents on the work site are regulated by the Law on Protection of Labour 1993.[21]

Kazakhstan's labour law provides employers and employees with significant protection of rights. For example, data protection and ownership rights are a strong part of labour laws that keep the interests of employees and employers safe. The law asserts that the employees should not breach the data privacy of the employers by leaking them to third-party. Similarly, the employers are also responsible for keeping the data of their employees safe. Besides this, the law also protects employers with ownership rights and trade secrets. The employees are obligated to not share any confidential or secret information about the employer or its business. In case of damage, the employee is liable to compensate for the losses incurred. Therefore, the labour laws of Kazakhstan provide great protection to employers from any unfair or unethical practices of the employees.

The labour laws in the country also protect the social interests of the employees. The Kazakhstan Constitution largely forbids discrimination based on nationality, race, social group, gender, occupation, or financial position - or on any other grounds, including place of residence, language, religion, or opinion. This is also communicated in the labour laws for the country as they state that the employees shall not be discriminated against due to any social factors.[22] Hence, a strong encouragement of equality is present in the labour laws.

It is significant that the regulations related to labour law in Kazakhstan are not only implemented and applicable to local employees but also to foreign employees working in the

19 ibid.

20 Larisa Zaitseva and Kubanychbek Ramankulov, 'SCO and Convergence of Member States Labour Legislation: Foundation, Opportunities, and Prospects' in Sergey Marochkin and Yury Bezborodov (eds), *The Shanghai Cooperation Organization: Exploring New Horizons* (Routledge 2022) ch 8, doi: 10.4324/9781003170617-10.

21 ibid.

22 Aziz Burkhanov, 'Kazakhstan's National Identity-Building Policy: Soviet Legacy, State Efforts, and Societal Reactions' (2017) 50 (1) Cornell International Law Journal 1 <https://scholarship.law.cornell.edu/cilj/vol50/iss1/1> accessed 24 January 2023.

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country until and unless any other international treaty or federal law is provided.[23] As per Labour Law (Art. No. 2), in Kazakhstan, the international treaties that are approved by Kazakhstan exist over the regulatory legal instrument and Labour Law. Kazakhstan's labour law also provides employees with an international level of protection by avoiding unfair terminations. An employer cannot terminate the employee without any valid reason. Any employee that is working according to the requirements of the job and showing good performance cannot be terminated based on disputes with the employers. The law provides a separate section for the termination of employees and disputes between employers and employees. The employer is obligated to provide a strong reason for the termination of an employee. Similarly, the employee is obligated to perform as per the expected criteria to be fit for a particular position. The labour law in the country has ensured the development of a two-way relationship between employers and employees so that the business sector can benefit and the entire economy is enhanced. The law also provides for the employees to have a private arbitrator in case of a dispute with the employer.[24] This means that if an employee has a complaint or disagreement with their employer, they have the right to take their case to an independent arbitrator for resolution, rather than having to go through the court system. This can be a more efficient and cost-effective way of resolving disputes and can help to protect the rights of employees. The private arbitrator ensures that common ground is reached between the employer and employee so that the dispute can end. This term of the labour law aims to provide employers and employees with a chance to develop a positive relationship in case a dispute arises so that the rights of neither are violated.

The role of Kazakhstan's labour law is critical in the development of effective employment relations between employers and employees. The law, as discussed, has provided significant protection for the rights of employers and employees. However, the implementation of these laws in the country remains a controversial aspect. It has been noted that despite the presence of labour laws, they are not adequately followed by employers in the country. Due to this, employment relations have been complex, leading to various labour and economic issues. Therefore, there is a need for an effective upgrade of the employment authority to enhance the implementation of labour laws in the country so that the rights of employees are protected and a trend toward the development of positive employment relations can be initiated.

The Kazakh authorities have also revised different parts of the legislation and added clauses that workers are required to follow. Criminal Code Art. No. 174 was revised and amended by the government, which states that provocation against different nationalities, social groups, races, clans, and classes, or calling labourers to take part in a strike that has been considered illegal by the Kazakh courts are not compatible with employees' right to strike, right to organise, and freedom of association.[25]

It is important to highlight that there are various other legal acts through which industrial and labour relations are regulated in Kazakhstan which are not included in the labour law. These include the Law on Collective Labour Disputes and Strikes (8 July 1996), the Law on the Occupation of the Population (1998), the Law on Collective Agreements (4 July 1992),

23 Diana T Kudaibergenova and Boram Shin, 'Authors and authoritarianism in Central Asia: Failed agency and nationalising authoritarianism in Uzbekistan and Kazakhstan' (2018) 42 (2) Asian Studies Review 304, doi: 10.1080/10357823.2018.1447549.

24 'Labour Laws' (*The Prime Minister of the Republic of Kazakhstan*, 2023) <http://www.government.kz> accessed 24 January 2023.

25 Sergey Sayapin, 'The Implementation of Crimes against the Peace and Security of Mankind in the Penal Legislation of the Republic of Kazakhstan' (2020) 10 (1) Asian Journal of International Law 1, doi: 10.1017/S2044251319000110.

the Law on Employment of Population (23 January 2001), and the Edict on Approving a Position on Qualification Classes of State Employees.[26]

1.4 Theoretical Framework

The field of industrial relations is focused on studying the relationship between employees, trade unions, and employers.[27] Industrial relations as we understand them today have much of their origin in the industrial revolution, when workers demanded improved working conditions and advocated their working rights. There are three main industrial relations theories: the radical or critical school, pluralism, and unitarism.

In 1996, sociologist Alan Fox proposed these three theories as the framework for resolving conflict in the workplace.[28] The unitarist approach to industrial relations refers to a homogenous relationship where all the members share the same interest. In unitarism, third parties are considered to be irrelevant as employers and employees are said to have a mutual corporation. The shared goal in the unitarist approach is loyalty towards the organisation, and the theory depends on a strong sense of cooperation.[29] However, Wood and Elliot[30] argued against the unitarist approach and stated that the theory denies the legitimacy of conflict and is not based on a realistic ideology. From an employee's viewpoint, unitarism can be understood as an organisation with flexible working practices where individuals are expected to both participate and be multi-skilled.[31] The staffing policies adopted in the unitarist approach must be focused on unifying the efforts of employees, along with motivating and inspiring them.[32] Conflicts in such an approach are said to occur due to the absence of information and inadequate presentation of management policies.

The second approach in industrial relations is the pluralist approach. The central idea of the pluralist theory is that it suggests that there is more than one source of power in the relationship between an employer and an employee. The theory considers unions as the central component that is responsible for balancing power between employers and employees.[33] The principal assumption of the pluralist theory is that organisations consist of groups that have their own interests, aims and leaders. These interests and aims often lead to competition and conflict that gives rise to tension in management.[34] The pluralist perspective believes that conflicts between employees and employers are inevitable and rational. This is why the involvement of a third

26 Yaraslau Kryvoi, 'National Labour Law Profile: Kazakhstan' (*International Labour Organization* (ILO), November 2006) <https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158909/lang--en/index.htm> accessed 24 January 2023.

27 Tuğba Özden Bayar, 'Industrial Relations Theory' (*The Wiley-Blackwell Encyclopedia of Social Theory*, 4 December 2017) <https://doi.org/10.1002/9781118430873.est0180> accessed 24 January 2023.

28 ibid.

29 Niall Cullinane and Tony Dundon, 'Unitarism and Employer Resistance to Trade Unionism' (2014) 25 (18) The International Journal of Human Resource Management 2573, doi: 10.1080/09585192.2012.667428.

30 Stephen J Wood and Ruth Elliott, 'A Critical Evaluation of Fox's Radicalisation of Industrial Relations Theory' (1997) 11 Sociology 105, doi: 10.1177/003803857701100106.

31 Matthias Gavrilov, 'Employment Relations as Seen from the Pluralist and Neo Pluralist Perspectives' (*linkedIn*, 30 March 2021) <https://www.linkedin.com/pulse/employment-relations-seen-from-pluralist-neo-matthias-gavrilov> accessed 24 January 2023.

32 Alan Fox, 'Industrial Relations: A Social Critique of Pluralist Ideology' in John Child (ed), *Man and Organization: The Search for Explanation and Social Relevance* (Routledge 2012) ch 7, doi: 10.4324/9780203815601-15.

33 Bruce E Kaufman, 'Rethinking Industrial Relations, or at Least the British Radical Frame' (2018) 39 (4) Economic and Industrial Democracy 577, doi: 10.1177/0143831X187776.

34 Wolfgang Sassin, 'Deja Vue?' (2019) 2 (2) The Beacon: Journal for Studying Ideologies and Mental Dimensions 020210216 <https://doi.org/10.5281/zenodo.3733442> accessed 24 January 2023.

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party in the shape of unions is considered legitimate. Trade unions allow employees to have a voice in management decisions which are considered to be the main reason for the conflict - as compared to the unitarist approach, which considers unions as intruders in the employment relationship.[35] Thus, the trade unions in pluralist industrial relations are considered to be instrumental in providing employees with the freedom to organise, associate, and collectively bargain to avoid conflicts between employees and employers.

The third theory in industrial relations is the radical theory. The radical perspective reveals the nature of a capitalist society and operates on the idea that workplace relations are against history. The perspective incorporates the inequalities in power, employment relationships, and wider society as a whole. The theory argues that the purpose of capitalism is to foster monopolies while the focus remains on the division of interest between the labour and capital thus viewing the workplace against a similar background.[36] The principal idea of radical theory, which emphasises the existence of the organisation within a capitalist society, assumes that the means of production is privately owned and profit remains the key influence of company policy. Conflicts in a radical perspective arise not because of competing interests within organisations (between employer and employee) but because of the divisions within society, and among those who manage the means of production and those who have only labour to offer. Industrial conflicts in such a scenario are viewed as being synonymous with social and political unrest.[37] Trade unions are sometimes seen as a tool to bring about revolutionary change by those who believe that workers are being exploited by capitalists. Additionally, trade unions are viewed as a response from workers to protect themselves from exploitation by capitalists. Therefore, the use of the right to organise and bargain, representation, and workplace mediation are all critical for conflict management.

2 METHODOLOGY

Considering the main focus of the research, the use of a qualitative approach was deemed suitable for collecting relevant data for the study. This approach is helpful in terms of gathering non-numerical data to carry out an in-depth and comprehensive analysis of the research problem. With the help of this approach, a qualitative review of the relevant legislation related to the rights of employees was conducted. However, in this case, the selection of the quantitative approach was unwanted as this approach relies on providing statistical evidence of the research problem using numerical and computational techniques, and focuses on observing, measuring and testing of hypothesis, which was not needed for this research.[38] Hence, the qualitative approach was suitable and appropriate for this study.

An exploratory design was used as this method tries to investigate questions which have not been previously examined in detail. Although the research exists on employers' and employees' rights and the balance between the two, in the context of procedural mechanisms for protecting their rights, limited work is available. Therefore, considering the dearth of investigation in this area, the use of exploratory design was meaningful in providing comprehensive findings.

In terms of data collection, authentic and reliable sources were used, mainly: articles,

35 Kaufman (n 36).

36 R Swayambika, *Approaches to Industrial Relations* (*Economics Discussion*, 2022) <https://www.economicsdiscussion.net/industries/approaches-to-industrial-relations/31776> accessed 24 January 2023.

37 Kaufman (n 36).

38 Mark NK Saunders, Philip Lewis and Adrian Thornhill, *Research Methods for Business Students* (8th edn, Pearson 2019).

journals, government reports and publications, constitutional law on the rights of employers and employees, and reliable online sources published by reputable professionals related to the field of law and employee rights. Largely, published and authentic sources relevant to the case of the study were considered, therefore in this reference the inclusion criteria were to include data sources published from 2010 to 2022 only, available in English, while sources before 2010 were all excluded. The rationale behind this was to ensure that only updated information was gained. To analyse the collected data during literature search, a qualitative review of the research was performed, which was suitable and appropriate for analysing the data with the support of previous relevant literature. The qualitative review was useful for the systematic search for evidence from primary sources and for drawing findings together. Although this process of collecting and analysing data may be exhausting for the research, nevertheless, it was deemed suitable in bringing findings linked to the balance between the interest of employers and employees, and a procedural mechanism for protecting their rights.

3 THE PROCEDURAL MECHANISM FOR BALANCED EMPLOYMENT/ INDUSTRIAL RELATIONS IN KAZAKHSTAN

In the context of the industrial development of a country, the importance of a positive and balanced employment relationship cannot be overemphasised or underestimated. This is because industrial relations issues cover important areas such as employee-employer relations, collective bargaining, performance, compensation management, and employee engagement - all of which help determine the nature of an organisation's commitment and performance, and their contribution towards industrial development. A good, mutually beneficial employment relationship increases motivation that ultimately results in the increase of productivity and profitability.[39] Thus, good employment/industrial relations are crucial for the industrial development of Kazakhstan. In this regard, the following procedural mechanisms are suggested for the development of balanced and mutually beneficial employment relationships in Kazakhstan (see parts 3.1, 3.2 and 3.3).

3.1 Social Dialogue as the Foremost Step

The starting point for the achievement of balance between the interests of employers and employees is the development and promotion of social dialogue. As per ILO studies, when the scope of collective bargaining is restricted, the outcome has a detrimental effect on industrial relations as the employees become more defensive of their rights, which impedes cooperation.[40] Social dialogue entails all kinds of negotiations and consultations between representatives of the employees, as well as the employers, on matters of common interest pertinent to various policies. A major consideration here is that industrial or organisation reforms and initiatives can only work if they are developed through cooperation and consultation with the employees and all other relevant stakeholders, such as the government.[41] In the context of social dialogue, it is worth noting that in Kazakhstan, the labour code

39 Steve Williams and Derek Adam-Smith, *Contemporary Employment Relations: A Critical Introduction* (OUP 2010).

40 Igor Guardiancich and Oscar Molina, 'The Effectiveness of National Social Dialogue Institutions: From Theory to Evidence' (*International Labour Organization (ILO) Working Papers*, 26 November 2020) <https://www.ilo.org/legacy/english/intserv/working-papers/wp016/index.html> accessed 24 January 2023.

41 Simon Jäger, Shakked Noy and Benjamin Schoefer, 'What Does Codetermination Do?' (2021) 75 (4) Industrial and Labor Relations Review 857, doi: 10.1177/001979392110657.

emphasises the inclusion of "social partnership", which refers to a system of partnership among the employers, employees, labour representatives, and the state government.[42] This implies that despite the increased labour conflicts in Kazakhstan, there exist legal codes and guidelines that the organisation can incorporate to balance the interests of their employees with that of their own.

In this regard, it is worth noting that Art. 10 of the Kazakhstan labour code stresses the "agreement of all the parties (employer and employees and their representatives) to demonstrate agreement with the social partnership and collective contracts."[43] Thus, all employers must ensure a social dialogue in terms of consultation with the employees in all decision making. In particular, it is important to ensure employee involvement in decisions regarding the development and enactment of new policies or reforms in order to ensure that they are not in conflict with their interests. With the increased emphasis of the Kazakhstan labour code on social partnership, the following social dialogue triangle proposed by ILO appears to be relevant for Kazakh employers.

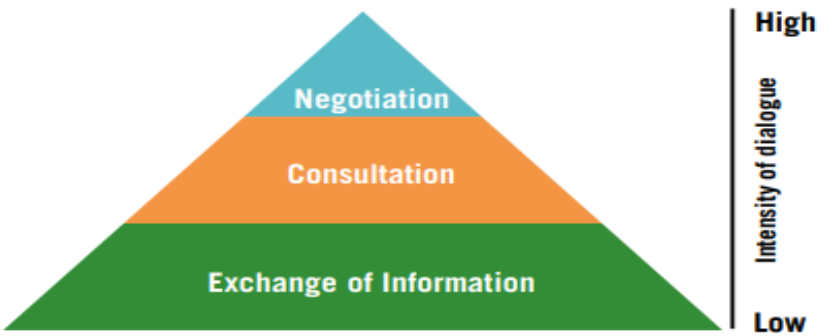

Figure 1. Social dialogue triangle for social partnership[44]

The foremost stage of social dialogue is the exchange of information, which is concerned with any discussions or actions on any employee problem (Figure 1). It entails active information sharing with the employees in the organisation to ensure that they remain informed about organisational practices.[45] Art. 22 of the Kazakhstan Labour Code declares that it is one of the fundamental rights of employees to be able to obtain all the information pertinent to working conditions.[46] This implies that employers should keep all employees informed in order to avoid any kind of conflict. The second stage of social dialogue is consultation, which entails consulting employees when there is any change in any policy, the introduction of any reform, any organisational change that may affect them, or when any organisational issue is raised.[47] This emphasises the need for actively listening to the employees, allowing

42 'Social Partnership' (*Federation of Trade Unions of the Republic of Kazakhstan*, 2022) <https://kasipodaq.kz/strategy-2/social-partnership> accessed 24 January 2023.

43 ibid.

44 Zachary Kilhoffer, Karolien Lenaerts and Miroslav Beblavý, 'The Platform Economy and Industrial Relations: Applying the Old Framework to the New Reality' (*Centre for European Policy Studies (CEPS)*, 7 August 2017) <https://www.ceps.eu/ceps-publications/platform-economy-and-industrial-relations-applying-old-framework-new-reality> accessed 24 January 2023.

45 ibid.

46 Labour Code of the Republic of Kazakhstan No 414-V of 23 November 2015 <https://adilet.zan.kz/eng/docs/K1500000414> accessed 24 January 2023.

47 Kilhoffer, Lenaerts and Beblavý (n 47).

them to have a voice in the decision making process, and taking their input in organisational decisions in order to ensure that no change, policy or reform goes against the interests of the employees. Rather, their interests shall be reflected in all the changes and initiatives enacted by the employer. Furthermore, it is important to develop proper consultation mechanisms whereby employees are provided with sufficient information pertaining to the standard followed for consultation in the organisation. This is again supported by Art. 22 spelling the rights and obligations of the employee, which suggests that the rights and legitimate interests of the employee will be protected. Also, all changes, terminations, or any kind of addition to the employment contract shall proceed via consultation with the employees.

The last stage of social dialogue is the establishment of negotiation, which entails collective bargaining and political cooperation between the employer and employees. Employees shall be given a right to be able to negotiate on various employee issues, such as working conditions, wages and employee benefits etc.[48] Art. 22 of the Kazakhstan Labour Code also supports this idea and gives collective bargaining rights to the employees. Thus, employers are required to allow employees to participate via collective bargaining and negotiate various terms to reach a mutually beneficial decision.

3.2 Right to Organise and Bargaining Representation

Allowing employees to organise and elect representatives is a good mechanism for them to have social security. Employees will feel that their voices are heard and their rights are protected via collective bargaining agreements between their employee organisation (union) and their employers. Collective bargaining is the strongest form of social dialogue between social partners (employees and employers) to facilitate the negotiation between them.[49] It has been asserted that the facilitation of collective bargaining paves the way for the development of mutual trust and respect between employees and employers. This would ultimately contribute to the development of consistent, stable and productive industrial relations in the country. Concurrently, inefficiency or lack of collective bargaining systems can accelerate labour disputes and increase the dissatisfaction of employees with employment conditions.[50] The Labour Code of Kazakhstan also allows employees to organise for the achievement of collective bargaining power. In fact, the labour code suggests the development of a collective bargaining agreement commission with an equal representation of both the employees and the employers that can negotiate on various employment issues and reach mutual agreements.[51] This implies that both the interests of the employees and employers can be included in collective agreements ensuring that the interests of none of the parties would be compromised in pursuit of the interests of any one party. The development of the collective bargaining agreement commission also supports the pluralist approach as per which diverse and often contradictory interests and rights of employees and employers can be achieved with the development of a "union".[52]

In this regard, the idea of social partnership is gaining momentum in Kazakhstan, with the number of collective bargaining agreements increasing at a steady pace. However, the

48 ibid.

49 ibid.

50 Clive Jenkins and Barrie Sherman, *Collective Bargaining: What you always wanted to know about Trade Unions and Never Dared to Ask* (Routledge 2022), doi: 10.4324/9781003349273.

51 Aset A Shyngyssov, Asem B Bakenova and Aida Akhmetova, Labour & Employment 2022: Kazakhstan (Matthew Howse and others eds, Morgan Lewis & Bockius LLP 2022) <https://www.morganlewis.com/-/media/files/special-topics/gtdt/2022/getting-the-deal-through-labour-employment-2022-kazakhstan.pdf> accessed 24 January 2023.

52 Fox (n 35).

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overall coverage still remains low, with an estimate of only 5 to 7 per cent of government employees covered - while the private sector in the country has an even smaller number of such agreements between employees and employers,[53] suggesting it is unlikely to close the gap. This is evident from the rise in employee conflicts and the weak performance of worker unions in Kazakhstan.[54] In this regard, in light of the aforementioned suggestions of the labour codes of Kazakhstan, it is suggested that organisations develop a collective bargaining agreement commission to balance the interests of employees and employers. In this context, it is worth noting that it has been suggested that collective bargaining can strengthen legal compliance by both employees and employers as both parties try to respect the interests of one another to fulfil all their legal obligations towards one another.[55] It is also asserted that the development of collective bargaining systems can provide employees with a mechanism for solving problems pertaining to employee rights by ensuring that employees are able to negotiate for their rights while they oblige the interests of the employers in return for their rights.[56] This would benefit both sides by ensuring that employees get their fair share of benefits, rights, and productivity gains without compromising employer profitability. The agreements can include the terms from both parties that must be obliged by the other party. This way, both parties would be given social security for their rights.

In terms of collective bargaining, two models are widely used across organisations: centralised collective bargaining and decentralised collective bargaining agreements. The former entrusts all the power to labour unions with little or no scope for the employer to adjust or make amendments to the agreement. On the other hand, in the case of the latter, the bargaining can only proceed at the firm level, diminishing the power of the employees over the agreement.[57] Be that as it may, since the emphasis of the present study is on the act of "balancing" the interests of both employers and employees, there is an intention to develop a mediating point between the two to ensure that both parties are given equal power and voice in organisation and employment matters. In this regard, it is suggested that a more mutually agreed collective bargaining commission be formed with equal power granted to both parties via equal representation.

3.3 Dispute Resolution and Prevention Mechanisms

The last major aspect of a balanced employer-employee relationship is the effective management of disputes. Labour disputes are mostly regulated by legal bodies and regulations. However, the employer should have mechanisms in place to attempt to prevent or mitigate the dispute at the company level before proceeding to arbitration.[58] In this regard, mediation and conciliation are considered better alternatives that precede arbitration when there is any conflict between the employer and employee.[59] Taking the suggestion of the

53 'Collective Bargaining Coverage Rate (%)' (*Knoema*, 3 May 2022) <https://knoema.com/ILR_CBCT_NOC_RT_R/collective-bargaining-coverage-rate> accessed 24 January 2023.

54 Akhmetzharov and Orazgaliyev (n 14).

55 Adrian Wilkinson and others (eds), *Handbook of Research on Employee Voice* (2nd edn, Edward Elgar Publishing 2020) doi: 10.4337/9781788971188.

56 Jenkins and Sherman (n 53).

57 Ruth Barton and others, 'Understanding the Dynamics of Inequity in Collective Bargaining: Evidence from Australia, Canada, Denmark and France' (2021) 27 (1) Transfer: European Review of Labour and Research 113, doi: 10.1177/1024258920981827.

58 Jiaojiao Feng and Pengxin Xie, 'Is Mediation the Preferred Procedure in Labour Dispute Resolution Systems? Evidence from Employer–Employee Matched Data in China' (2020) 62 (1) Journal of Industrial Relations 81, doi: 10.1177/0022185619834971.

59 Samuel Chisa Dike, Boma Geoffrey Toby and Dorcas F Elekima, 'Transforming Mediation and Conciliation Practices for Effective Dispute Resolution in Nigeria' (2020) 12 (1) Journal of Property Law and Contemporary Issues 230.

labour code of Kazakhstan into account,[60] it is suggested that a conciliation commission be developed to resolve employment disputes. The commission would consist of equal numbers of employer and employee representatives that would advise on possible solutions to arrive at reconciliation. The conciliation commission would be able to view and analyse the dispute in relation to the interests of both employers and employees to ensure that the possible solution to resolve the dispute does not contradict with the rights and interests of any of them.

The conciliation commitment may, however, fail to meet the interests of both parties due to their inherent biases as the employer representatives may favour the interests of the employers - and the same goes for the employee representatives. In this regard, as suggested by the labour code of Kazakhstan, an ad hoc mediation commission can be developed, or a mediator hired.[61] The mediation would entail the involvement of an unbiased third party who would be able to develop a mutual point for resolution by developing solutions that ensure the interests of both employees and employers. The development of such a mechanism would ensure both the employees' and employers' interests would not be compromised during the conflict resolution process; rather, both the parties would reach a mutually beneficial decision. This will increase the trust of employees in their employers as they will know that their employer has incorporated such mechanisms in order to ensure their rights - and made efforts to prevent and mitigate the disputes. It has been asserted that workplaces that are underpinned by trust and respect between the employers and employees are characterised by greater productivity and higher performance.[62] Thus, this mechanism will ensure the achievement of a balance between the interests of employees and employers.

4 CLASHING INTERESTS OF EMPLOYERS AND EMPLOYEES IN THE CONTEXT OF THE U.S.

Conflict of interest is a common issue in the workplace. Conflicts of interest occur when an individual's personal interest could compromise their judgements or decisions in the workplace. Some of the common causes of conflict in the workplace include poor communication, clashes between personality and values, resource scarcity, overwhelming workloads, and lack of clarity on designated roles and responsibilities.[63] The problems between employers and employees is nothing new, yet there has been a rapid increase in legal allegations and litigation. An active search of media sources also reveals a rise in retaliation lawsuits in the United States. Retaliation by managers can be classified into two different general types:[64] first, in the form of negative actions directed towards the job of the employee, that is, demotion, poor evaluation, pay cut, termination and the like; and the second in the form of antisocial actions like harassment, blame, name calling or silent treatment.

As per 2008 statistics, employees in the United States spend approximately 2.8 hours every week in conflict. This means that around 359 billion dollars in hours is spent in conflict rather than on positive productivity. The figure is equivalent to 385 million days on the job spent arguing instead of collaborating. In the year 2021, around 61,331 workplace discrimination charges were

60 Shyngyssov, Bakenova and Akhmetova (n 54).

61 ibid.

62 Williams and Adam-Smith (n 42).

63 Kristin Brownstone and Barbara Fagan-Smith, '4 Causes of Workplace Conflict' (*ROI Communication*, 8 April 2021) <https://roico.com/2021/04/08/4-causes-of-workplace-conflict> accessed 24 January 2023.

64 Lulu Zhou and others, 'Labor Relations Conflict in the Workplace: Scale Development, Consequences and Solutions' (*eCommons: Cornell's Digital Repository*, 1 November 2017) <https://ecommons.cornell.edu/handle/1813/74243> accessed 24 January 2023.

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reported in the United States. This resulted in 34 million dollars in damages for victims in the federal court. Hiscox[65] stated that US companies face a 10.5 percent chance of being hit by an employment lawsuit and that the average cost of settlement amounts to 160,000 dollars.

As the workplace becomes more competitive, practitioners are extending efforts to understand the job stressors of employees for the purpose of improving work life. An important source of stress in the US workforce is interpersonal conflict between employers and employees. These interpersonal conflicts range from minor disagreements to intense arguments, which can lead to fights. Employees' negative reactions to job stressors are often due to physical strains like headaches, stomach problems or the like, psychological strain like anxiety or anger, or behavioural strain such as absence or lateness. An examination of the research literature reveals that workplace conflict in both eastern and western societies, including the United States, is mainly due to psychological and physical strains.[66] Similarly, a study investigating the potential predictors of absence and lateness at work in the US organisations reveals that employee lateness has cost these same US organisations more than 3 billion dollars a year. Employee absenteeism accounts for 15 percent of the payroll in US firms, whereas job withdrawal behaviour costs over 16.5 percent.

Research also reveals that work-family conflict is much higher in the United States than in any other developed region. One of the reasons is the longer working hours of Americans, where the average middle income family in the country spent an average of 11 hours working. Apart from longer working hours, there is also a scarcity of laws supporting working families. For instance, in 2010, the US was the only one among the industrialised democracies that lacked paid maternity leave. Approximately 90 percent of American working mothers and 95 percent of working American fathers report work family conflict in the US.[67]

One significant theme in workplace conflict has been observed since the pandemic. The increased number of conflicts reported during the pandemic was related to pandemic driven changes in the working lives of employees. For instance, Apple employees voiced their concerns regarding the rigid hybrid working rules imposed by the company and made headlines coming out against them. The rise in the number of conflicts after the pandemic can be attributed to the fact that it has forced people to change their priorities, putting their dreams and lives first.[68] Also, the treatment many employees received from their employer during the pandemic also impacted their view of the employer, prompting what is known as 'the great resignation' by economists. The gender pay gap also remains a problem and a source of conflict between employer and employee. Another surprising finding regarding the clash between employee and employer is that one in five American workers report some type of hostility in the workplace, either in the form of harassment or violence. Although the US government has created over 2 million new jobs, wage growth has still been low, which has been a major point of conflict between employees and organisations.[69]

65 Patrick Mitchell, *The 2017 Hiscox Guide to Employee Lawsuits™* (Hiscox Inc 2017) <https://www.hiscox.com/documents/2017-Hiscox-Guide-to-Employee-Lawsuits.pdf> accessed 24 January 2023.

66 Cong Liu and others, 'Workplace conflict and absence/lateness: The moderating effect of core self-evaluation in China and the United States' (2015) 22 (3) International Journal of Stress Management 243, doi: 10.1037/a0039163.

67 Heather Boushey and Joan C Williams, 'The Three Faces of Work-Family Conflict: The Poor, the Professionals, and the Missing Middle' (*Center for American Progress (CAP)*, 25 January 2010) <https://www.americanprogress.org/article/the-three-faces-of-work-family-conflict> accessed 24 January 2023.

68 Anna Shields, 'The Impact of Covid on Workplace Conflict' (*Forbes*, 28 July 2021) <https://www.forbes.com/sites/annashields/2021/07/28/the-impact-of-covid-on-workplace-conflict/?sh=7634b2b67ccb> accessed 24 January 2023.

69 Warren Robak, 'Exploring the Challenges Facing American Workers' (*RAND*, 15 September 2017) <https://www.rand.org/blog/2017/09/exploring-the-challenges-facing-american-workers.html> accessed 24 January 2023.

4.1 Assessing the Legislation of the U.S.

Retaliation laws in the US fall under the EEOC, Section 704 (a). The gist of the law states that it is unlawful for an employer to discriminate against employees, applicants for employment, employment agency workers, or joint labour management committees.[70]

Moreover, the law also prohibits employers from retaliating against individuals participating in the EEO process. This means that an employer cannot punish an employee for, for instance, filing an EEO complaint, serving as a witness, or in any way participating in the EEO matter. Moreover, retaliation in the form of silent treatment, demotion, violence, or undesirable assignments are also among the list of wrongdoings in the EEOC Section 704 (a) title VII's anti retaliation provision.

The main sources of employment law in the United States can be bifurcated into state, federal and local employment laws. Among the primary federal employment laws include Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in employment Act, the Equal Pay Act, the Fair Labour Standards Act, the National Labour Relations Act (NLRA), the Occupational Safety and Health Act etc. Under these acts employees are protected on the basis of their religion, sex, colour, disability, genetic information, union activity, and the like.[71]

The United States is shaped by its experience with mass immigration. According to the United Nations, 14 percent of the United States' population is immigrants, which is four times more than any other country. The International Labour Organization states that the average American works 10 more weeks each year in comparison to their European counterparts.[72] Wrongful termination in the US varies from state to state. There are some states of the US where an 'employment at will' law persists. This means that in the absence of an employment contract or collective bargaining agreement, the employer is free to let employee go for no reason and with or without notice, as long as the discharge does not violate a law. The US department of Labour's Wage and Hour Division (WHD) enforces some of the nation's most comprehensive labour laws.[73] The minimum wage in the US is 7.25 dollars per hour for non-exempted employees. Moreover, the Fair Labour Standards Act restricts companies from paying overtime to employees working more than 40 hours per week.

Collective bargaining can be understood as the process by which workers negotiate their contracts of employment through unions, including safety policies, pay, leave, benefits, job health, work life balance and more. In America, collective bargaining is considered to be an effective means of raising wages and around two thirds of private sector and two thirds of public sector employees enjoy the right to collective bargaining. However, the right of collective bargaining came to US employees through a series of laws. For instance, in 1926, the Railway Labour act granted collective bargaining to railroad workers, which now covers most transportation employees, including those employed in Airlines. Similarly, in 1935 the NLRA extended collective bargaining rights of private sector employees, which is now also

70 Harika Suklun, 'Retaliation against Employees in the USA: An Analysis in Terms of Organizational Behavior' (2020) 7 (4) Research Journal of Business and Management 228, doi: 10.17261/Pressacademia.2020.1320.

71 Ned Bassen and Catelyn Stark, 'Employment & Labour Laws and Regulations USA 2022-2023' (*International Comparative Legal Guides (ICLG)*, 25 March 2022) <https://iclg.com/practice-areas/employment-and-labour-laws-and-regulations/usa> accessed 24 January 2023.

72 Ronald C Brown, 'United States: Industrial relations profile' (*Eurofound*, 29 May 2014) <https://www.eurofound.europa.eu/publications/report/2014/industrial-relations/united-states-industrial-relations-profile> accessed 24 January 2023.

73 'Labor Laws and Issues' (*USAGov*, 18 January 2023) <https://www.usa.gov/labor-laws> accessed 24 January 2023.

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recognised by international human rights conventions.[74] Thus, the freedom to form a union is the core of the UN Universal Declaration on Human Rights. It extends fundamental rights to employees, ensuring their protection at the workplace. As a result, millions of Americans negotiate and renegotiate their bargained contracts - and unions continue to fight for the intrinsic rights of people and to restore economic power in the country through collective bargaining agreements.

5 THE PROCEDURAL MECHANISM FOR BALANCED EMPLOYMENT/ INDUSTRIAL RELATIONS IN U.S. COLLABORATIVE PROCESSES

Collaborative processes have permeated throughout American organisations for over thirty years. These processes are effective in managing, as well as resolving, conflicts in the workplace. In all three types of organisation, leaders are actively using collaborative processes to reduce any relational or financial cost of unresolved conflict. Among these include ADR, or alternative dispute resolution. Specialist coaches are among those that actively use the ADR technique to manage the relationship between employee and employer. Conflict management through coaching can be defined as a one-on-one process, where a trained coach helps an employee gain increased competence as well as confidence to effectively manage and engage their interpersonal disputes and conflicts.[75] Conflict management coaching is a future-focused and result oriented process that focuses on assisting employees and employers to reach a specific conflict management objective.

The right to organize and bargain collectively is a fundamental human right recognised by the International Labour Organization (ILO). This right allows employees to join a union of their choice and negotiate with their employer for better working conditions, including wages, hours, and benefits. The ability to collectively bargain gives employees a stronger voice and greater bargaining power, enabling them to negotiate for improved working conditions and resolve workplace conflicts in a more effective manner.

Workplace mediation is another important tool for conflict management at the workplace. Mediation provides a neutral, third-party perspective to help employees and employers resolve disputes in a cooperative and respectful manner. Unlike other forms of dispute resolution, such as litigation or arbitration, mediation allows the parties involved to maintain control over the outcome and find a mutually acceptable solution. Mediation can be an effective means of resolving workplace conflicts, as it helps reduce tensions and foster a more positive work environment.

5.1 Workplace Mediation

As previously outlined, one of the major aspects of a balanced employer-employee relationship is the effective management of disputes. Labour disputes are mostly regulated by legal bodies and regulations. However, the employer should have mechanisms in place to attempt to prevent or mitigate the conflict at the company level before proceeding to arbitration. In this regard, mediation and conciliation shall be considered as better alternatives

74 'Collective Bargaining' (*American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)*, 2023) <https://aflcio.org/what-unions-do/empower-workers/collective-bargaining> accessed 24 January 2023.

75 David Brubaker and others, 'Conflict Resolution in the Workplace: What Will the Future Bring?' (2014) 31 (4) Conflict Resolution Quarterly 357, doi: 10.1002/crq.21104.

that precede arbitration when there is any conflict between the employer and employee. Workplace mediation is also among the balanced employment mechanism used in the United States. Workplace mediation is an efficient and fair process that helps organisations resolve employment issues and disputes to reach an agreement between employee and employer. The process involves the hiring of a neutral mediator who assists organisations reach a voluntary yet negotiated agreement. Workplace mediation yields several benefits in balancing employer and employee needs and ensures resolution of discrimination while also promoting a better work environment.[76] Mediation also reduces the costs and labour of both employer and employee. There exists a strong public policy favouring workplace mediation in the United States. The process of mediation is voluntary however, courts do often order parties to mediate their dispute. The courts in the United States also support mediation through the interpretation of mediation clauses. The process does not result in any adverse cost or consequences if parties fail to mediate.[77] Moreover, mediation agreements are confidential.

5.2 Right to Organise and Bargaining Representation

The NLRA supports the collective bargaining rights of employees in the United States. The act allows the employees to negotiate, with the help of the union, hours, wages and other terms and conditions of employment.[78] If negotiations reach an impasse the Act allows the employer to impose the terms and conditions. Collective rights are necessary in protecting the individual rights of the employees and take into consideration economic reality, allowing employees to meaningfully stand for their rights. Unions, through collective bargaining, enhance the ability of members to exercise core civil liberties such as the First Amendment rights of association, petition and speech. The First Amendment right to association protects the rights of individuals to come together over issues related to mutual interest. Similarly, the right to communicate about workplace concerns between employer or employee or among co-workers comes from the statutory right of individuals to join a union and bargain in a collective manner. Nevertheless, the First Amendment right does not protect private sector employees from their employers' efforts to censor speech, and public sector employees only have limited protections. Lastly, as long as petitions are concerned, unions defend the rights of its members, including government lobbying, to defend the interests of individual members. The NLRA is a federal statute that extends most private sector employees the right to join a union and engage in collective bargaining[79] but local or state government employees only enjoy collective bargaining rights if their state legislatures grant them. Thus, allowing employees to organise and elect representatives is a good mechanism for employees to have social security. Employees may feel that their voices are heard and their rights are protected via collective bargaining agreements between their employee organisation (union) and their employers.

6 CONCLUDING REMARKS

In conclusion, the study aimed to examine employment relations in Kazakhstan and the United States and develop a procedural mechanism for balancing the interests of employers

76 'Mediation' (*US Equal Employment Opportunity Commission*, 2 December 2003) <https://www.eeoc.gov/mediation-0> accessed 24 January 2023.

77 James Warnot 'Commercial Mediation in the US' (*Linklaters*, 24 May 2022) <https://www.linklaters.com/en/insights/publications/commercial-mediation-a-global-review/commercial-mediation-a-global-review/us> accessed 24 January 2023.

78 Mediation (n 79).

79 'Defend the Rights of All People Nationwide' (*American Civil Liberties Union*, 2023) <https://www.aclu.org> accessed 24 January 2023.

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and employees. Kazakhstan's labor code and legislation were explored to determine the applicable procedural mechanism for the country. The study found that the protection of employees' rights is weak in Kazakhstan, and the development of effective procedural mechanisms is needed to balance the interests of employers and employees. On the other hand, the protection of employees' rights is strong in the United States, with a legally embedded system ensuring fair treatment of employees and employers.

The study developed mechanisms for employment relations in Kazakhstan including social dialogue, collective bargaining, and dispute resolution. In the context of the United States, workplace mediation, collaborative processes, and collective bargaining were discussed as mechanisms for employment relations. The study observed that the employment law of 1998 in Kazakhstan ensured social protection for unemployed people, while other laws such as the law of protection of labour ensured the reduction in hazards, security issues, and the prevention of accidents on the work site. Besides, the study discussed that the effective employment relations between employers and employees in Kazakhstan heavily rely on the country's labor law. As previously mentioned, this law has established substantial protection for the rights of both employers and employees. Nevertheless, there is ongoing debate surrounding the enforcement of these laws within the country.

The study proposed that a collective bargaining commission can be established through mutual agreement, with both employers and employees having equal power and representation. Collective bargaining is viewed as an effective method of increasing wages in the United States, with approximately two-thirds of private and public sector employees having the right to engage in collective bargaining. Similarly, it is found that the mediation process requires the intervention of an impartial third party, who could work towards finding a common ground for resolution by devising solutions that address the interests of both employers and employees. The establishment of such a mechanism would ensure that neither party's interests are compromised during conflict resolution and that a mutually beneficial agreement is reached. The courts in the United States also endorse mediation by interpreting mediation clauses.

Besides, it is important to acknowledge the limitations of the study, including its narrowed scope of only focusing on Kazakhstan and the United States. Future research can take a broader perspective and develop procedural mechanisms based on international labor codes and best practices implemented globally. Overall, the study highlights the potential of labor codes in protecting the rights of employees and balancing the interests of employers and employees. If implemented effectively, these codes can aid in the development of effective procedural mechanisms.

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Research Article

ASSIGNMENTS OF RECEIVABLES IN CIVIL AND COMMERCIAL MATTERS UNDER THE LAWS OF THE SLOVAK REPUBLIC

Miloš Levrinc

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Keywords: assignment of receivable, assignor, assignee, debtor, contract on assignment of receivable

ABSTRACT

Background: *Receivables play an increasingly important role in the financing of particularly small and medium-sized businesses. This importance has been recognised by many international organisations, including UNIDROIT, which is slated to adopt a Model Law on Factoring in 2023. The purpose of the Model Law is to encourage States to modernise their legal frameworks for absolute and security assignments, as well as pledges of receivables. The EU has been struggling to find common ground*

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with respect to a regulation on the law applicable to assignments that would build on the Rome I Regulation. A modern receivables regime rests on several key foundation blocks that include the ability to describe receivables generically, achievement of third-party effectiveness by registration, and predictable priority rules. Much of the law of assignments is of contractual nature, which is suitable to party autonomy. Party autonomy in the field of contractual obligations is a recognised institution under the national substantive law of the legal order of the Slovak Republic. In some respects, the Slovak legal regime would benefit from modernisation, such as in requiring all types of assignments and pledges to be registered, which facilitates the determination of priorities. This article examines the law governing assignments of receivables in civil and commercial matters in the Slovak Republic. It not only analyses the statutory law but also surveys the relevant case law that fills gaps in the legislation.

Methods: The author uses traditional scientific methods: logical methods - the method of analysis, the method of synthesis, the method of analogy, the descriptive method, as well as comparative method. First, the descriptive method was used to familiarise the reader with the applicable statutory provisions governing assignments of receivables in civil and commercial matters in the Slovak Republic. Second, the author analyses specific provisions with regard to current developments and practical applications. Third, the author uses a comparative method in highlighting the practical needs that incentivise the modernisation of the current legislation in light of recent developments, especially the upcoming adoption of the UNIDROIT Model Law on Factoring.

***Results and Conclusions:** The Slovak regime for absolute assignments of receivables is governed by the Civil Code, which also applies to assignments in commercial transactions. The Code also recognises a security assignment of receivable. The pledge law reform in 2002 introduced a registration system for pledges of receivables. Special laws continue to govern specific types of receivables. Case law has addressed several aspects of transfers of receivables, particularly in insolvency. However, no statutory provision provides a priority rule among the statutorily-recognised types of transfers. Several other aspects have been clarified in case law. For instance, the Supreme Court of Slovakia defined a description standard for future receivables, which must be identified by the name of the transferor, debtor, and a category, such as a receivable arising from the following contract. The degree of specificity is driven by doctrinal considerations rather than the needs of practice. Several important practical aspects are neither grounded in a statutory foundation nor case law. One example is the lack of recognition of transfers of partial interests in a receivable, a practice that is common in the Slovak market. The law recognises and enforces an anti-assignment clause that would make a transfer ineffective. However, such a clause would be ineffective in the insolvency of the transferor, so the insolvency estate would include the receivable. In this aspect, Slovak law falls short of the international standards that override the effect of anti-assignment clauses.*

Since the pledge law reform over two decades ago, no statutory changes concerning transfers of receivables have been introduced. The interpretation of the existing framework by the courts exacerbates uncertainty. The lack of certainty and predictability embedded in the statutory framework that falls short of international standards are good reasons to consider reforming the framework.

1 INTRODUCTION

Receivables generated from the sale of goods and provision of services are an important source of finance for many small and medium-sized enterprises (SMEs) in the European Union. Traditionally, a factoring company provides liquidity to an SME based on the eligible receivables assigned to it.[1] The factoring company may offer a form of credit protection against the default risk of the client's customers as well, providing additional capital to ed-

1 Leora Klapper, 'The Role of Factoring for Financing Small and Medium Enterprises' (2006) 30 (11) Journal of Banking & Business 3111, doi: 10.1016/j.jbankfin.2006.05.001.

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buyers, many of which are also SMEs. Factoring is a vitally important type of financing used across the globe. The FCI, a global representative body for factoring and financing open account domestic and international trade receivables, estimated the global volume of receivables finance in 2021 exceed €3 trillion in its 2022 Annual Report.[2] While the volume declined in 2020 by 6.5%, it increased in 2021 by 13.5%.[3]

Fast-forward to today when the aftermath of the Covid-19 crisis impacts most economies. Factoring will be in high demand during — and after — the crisis. Many companies will seek to retain their role within supply chains or integrate into new ones, which would necessitate alternative funding sources.[4] Supporting receivables finance is especially critical in light of the COVID support measures that propped up companies being withdrawn.

Several jurisdictions, such as Bosnia and Herzegovina (2016) and Serbia (2013), reformed their secured transactions and factoring laws recently. However, the EBRD 2018 Factoring Survey concluded that many of these reformed frameworks are inadequate to facilitate receivables finance.[5] Many of these frameworks reflect the outdated UNIDROIT Convention on International Factoring of 1988.[6] Several aspects of assignments of receivables remain controversial within the EU, including the law applicable to assignments of receivables.[7] The proposed measure to amend the Rome I Regulation remains at a standstill. Only two countries have ratified the United Nations Convention on the Assignment of Receivables in International Trade, which is unlikely to enter into force in the near future.[8] The Model Law on Factoring, expected to be adopted by UNIDROIT in 2023, provides an opportunity to revisit the laws that govern assignments of receivables.[9] The Model Law was proposed by the World Bank Group, which has a significant footprint in Eastern Europe, where it supports many reforms. The Model Law has been supported by the largest factoring associations in the world, including FCI, but also attracted unjustified criticism as potentially

2 Factors Chain International (FCI), *Annual Review* 2022 (FCI 2022) <https://fci.nl/en/annual-review> accessed 17 February 2023. See also Carter Hoffman, 'FCI Releases World Factoring Statistics, Reports Largest Volume Increase in Over Two Decades' (Trade Finance Global, 20 May 2022) <https://www.tradefinanceglobal.com/wire/fci-releases-world-factoring-statistics-reports-largest-volume-increase-in-over-two-decades> accessed 17 February 2023.

3 ibid.

4 'FCI: Factoring Has the Wind in Its Sails — and a Long and Successful History Behind It' (*Capital Finance International (CFI.co)*, 26 October 2020) <https://cfi.co/menu/corporate/2020/10/fci-factoring-has-the-wind-in-its-sails-and-a-long-and-successful-history-behind-it> accessed 17 February 2023.

5 European Bank for Reconstruction and Development (EBRD), *Factoring Survey in EBRD Countries of Operation* (3rd edn, EBRD 2018) <https://www.ebrd.com/documents/ogc/factoring-survey.pdf> accessed 17 February 2023.

6 Franco Ferrari, 'The International Sphere of Application of the 1988 Ottawa Convention on International Factoring' (1997) 31 (1) The International Lawyer 41.

7 Catherine Walsh, 'The Law Applicable to Third-Party Effects of an Assignment of Receivables: Whither the EU?' (2018) 22 (4) Uniform Law Review 781, doi: 10.1093/ulr/unx050; Charles W Mooney CW, 'Choice-of-Law Rules for Secured Transactions: An Interest-Based and Modern Principles-based Framework for Assessment' (2017) 22 (4) Uniform Law Review 842, doi: 10.1093/ulr/unx054; Christian Heinze and Cara Janine Warmuth, 'The Law Applicable to Proprietary Effects of Assignment and its Interplay with Insolvency' (2017) 22 (4) Uniform Law Review 808, doi: 10.1093/ulr/unx039.

8 Spiros V Bazinas, 'Key Policy Issues of the United Nations Convention on the Assignment of Receivables in International Trade' (2003) 11 Tulane Journal of International and Comparative Law 275; Spiros V Bazinas, 'The United Nations Convention on the Assignment of Receivables in International Trade: Insolvency Aspects' (2004) 13 (3) International Insolvency Review 155, doi: 10.1002/iir.119; Franco Ferrari, 'The UNCITRAL Draft Convention on Assignment in Receivables Financing: Applicability, General Provisions and the Conflict of Conventions' (2000) 1 (1) Melbourne Journal of International Law 1, doi: 10.3316/agispt.20012926.

9 See International Institute for the Unification of Private Law (UNIDROIT), 'Model Law on Factoring: Study LVIII A' (*UNIDROIT*, 2023) <https://www.unidroit.org/work-in-progress/factoring-model-law> accessed 17 February 2023.

undermining the efforts to modernize broader secured transactions regimes.[10] UNIDROIT will develop a guide to enactment to provide guidance to policymakers and legislators in the implementation of the Model Law. One of the important functions of the guide would also be to provide insights into the regulatory matters affecting factoring transactions.[11]

The assignment of receivables is an important institution in the area of contractual obligations arising from various business transactions taking place within as well as beyond national borders. Receivables may be transferred voluntarily (contractual assignment) or involuntarily by operation of the law. The receivable itself may be generated from a contractual transaction, such as a sale of goods, or non-contractually, such as from a court order. The ambit of the article is on receivables generated contractually that are assigned contractually, which are typical for commercial transactions that enable SMEs to fund their operations.

2 ASSIGNMENT OF RECEIVABLES IN CIVIL AND COMMERCIAL MATTERS - BASIC LEGAL BACKGROUND

The law of the Slovak Republic does not draw a distinction between the assignment of receivables from civil and commercial transactions. The Commercial Code that governs commercial relations does not provide specific rules concerning assignments.[12] Therefore, contractual assignments of commercial obligations are subject to the Civil Code.[13]

The basis for the voluntary assignment of receivables is a contract on the assignment of receivables. Assignment of a receivable by contract in accordance with Art. 524 et seq. of the Civil Code represents a typical voluntary transfer. As a result, the receivable is transferred from its original owner or creditor, known as the assignor, to the assignee. A transfer occurs without the participation of the debtor, whose consent is not required for the assignment of the receivable and who may not be informed of the assignment at all.[14]

As neither the Civil Code nor the Commercial Code provides for the contract on the assignment of a receivable or its equivalent, such as a factoring contract, an agreement to assign a receivable will be considered as an innominate type of contract. Such a contract must meet both the general legal requirements for contracts or legal acts and must be in accordance with the already mentioned special normative civil law regulation of the assignment of a receivable. In the case of a contractual assignment of a receivable in a commercial transaction, the relevant commercial law will also be applicable.

The contract on the assignment of receivable must be concluded in writing. The subject of the assignment contract may be any current or future receivables, or a set of receivables,

10 Spiros V Bazinas, 'The Desirability and Feasibility of Another Uniform Law on Factoring' (2020) 35 (7) Butterworths Journal of International Banking and Financial Law 467.

11 See UNIDROIT, Model Law on Factoring: Study LVIII A WG3 Doc 2 Issues Paper (Third Working Group Meeting, 26-28 May 2021) s T, 19-21 <https://www.unidroit.org/english/documents/2021/study58a/wg03/s-58a-wg-03-02-e.pdf> accessed 17 February 2023. The desirability to coordinate private law and regulatory aspects of financing transactions has been highlighted primarily in the work of Prof. Castellano and Dr. Dubovec. See Giuliano G Castellano and Marek Dubovec, 'Global Regulatory Standards and Secured Transactions Law Reforms: At the Crossroad Between Access to Credit and Financial Stability' (2018) 41 (3) Fordham International Law Journal 531.

12 Commercial Code of the Slovak Republic No 513/1991 'Obchodný Zákonník' of 5 November 1995 (as amended of 1 February 2023) <https://www.zakonypreludi.sk/zz/1991-513> accessed 17 February 2023.

13 Civil Code of the Slovak Republic No 40/1964 'Občiansky Zákonník' of 5 March 1964 (as amended of 1 December 2019) arts 524-530 <https://www.zakonypreludi.sk/zz/1964-40> accessed 17 February 2023.

14 ibid, art 524 (1); Marek Števček and others, *Občiansky Zákonník: Komentár*, d 2 *(§ 451 – § 880)* (CH Beck 2015) 1802.

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except for those that are excluded by law from the assignment (e.g., it is not possible to assign a receivable if the assignment would be against the law or the agreement with the debtor).[15] The receivable must be defined with sufficient certainty so as not to raise doubts as to the subject of the assignment and to be identified uniquely. Since the law does not specify the precise standards for the identification of receivables, the general legal provisions requiring certainty and clear identifiability of legal acts would apply.[16] Lack of identifiability will render the assignment invalid.[17] According to a decision of the Supreme Court of the Slovak Republic, future receivables must be described by identifying the assignor, the debtor, and other information, e.g., the performance of the loan agreement.[18]

The Constitutional Court has repeatedly stated that excessive legal formalism and exaggerated claims to the formulation of a treaty cannot be accepted from a constitutional point of view and interferes with the contractual freedom resulting from the principle of contractual freedom, according to Art. 2(3) of the Constitution.[19] At the same time, the Constitutional Court emphasised that one of the basic principles of the interpretation of contracts is an interpretation that does not lead to the invalidity of a contract. The principle of autonomy of the contracting parties, the nature of private law, and the associated social and economic function of the contract are thus expressed and supported.[20]

The invalidity of the contract should therefore be the exception and not the principle. The general courts' preference for the interpretation invalidating the contract is therefore constitutionally challengeable and contrary to the principles arising from Art. 1 of the Constitution.[21] The formalistic requirements of general courts to formulate the subject of the contract (description of receivables) are constitutionally challengeable.

Taking into account the above-mentioned starting points for the validity and certainty of the legal act, we can define criteria (elements) for the agreement to assign a receivable, which are: the identification of the debtor and identification of the subject matter of performance from the transferred receivable. In the case of several receivables of the same type, the assigned receivables must be identified in such a way that they are not interchangeable with receivables of the same type which are not being assigned. For instance, the agreement may provide for an assignment of all receivables owed to the assignor by its clients A, B, and C.

It must be clear from the contract on the assignment of a receivable who are the assignor, assignee, and debtor. The legal reason for the receivable is not required to be stated. Unlike the previous legal regulation of the provision of Art. 262(2) of the Civil Code No. 141/1950 Coll.,[22] where valid legal grounds were required. In the case of a divisible performance, the

15 See Civil Code (n 14) arts 525, 604, 844.

16 ibid, art 37 (1).

17 Under the provision of Art 37(1) of the Civil Code, a legal act must be done freely, seriously, and clearly, otherwise it is invalid.

18 Case No 1 M Obdo 2/2008 (Supreme Court of the Slovak Republic, 7 May 2009).

19 Constitution of the Slovak Republic 'Ústava Slovenskej Republiky' No 460/1992 of 1 September 1992 (as amended of 26 January 2023) <https://www.zakonypreludi.sk/zz/1992-460> accessed 17 February 2023. See, e.g., Case No I ÚS 243/07 (Constitutional Court of the Slovak Republic, 19 June 2008); Case No I ÚS 242/07 (Constitutional Court of the Slovak Republic, 3 July 2008); Case No IV ÚS 15/2014 (Constitutional Court of the Slovak Republic, 28 April 2014).

20 See also Miloš Levrinc, 'Voľba práva v medzinárodnom práve súkromnom' (The Rule of Law and Its Place in International Law: Bratislava legal forum 2020, Comenius University in Bratislava, Faculty of Law, 6–7 February 2020) 61.

21 For this see, Case No I ÚS 243/07 (n 20); Case No I ÚS 242/07 (n 20); Case No IV ÚS 340/2012 (Constitutional Court of the Slovak Republic, 22 November 2012).

22 Civil Code of the Czechoslovak Republic No 141/1950 'Občiansky Zákonník' of 25 October 1950 (temporary version of the regulation effective from 1 January 1951 to 31 March 1964) <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1950/141/19510101.html> accessed 17 February 2023.

parties have agreed that only part of the receivable will be assigned; it must be clear from the contract which part of the receivable is being assigned.

From the point of view of the subject matter of the assignment, we can distinguish the assignment of an *individual receivable* from the assignment of *multiple receivables* (so-called global cession or general cession). Based on the postulate, what is not prohibited is allowed, and also only a certain part of the receivable can be assigned. What is not possible, however, is the assignment of the contractual obligation as a whole. From the point of view of the legal framework of the regulation and the effects of the assignment, it is necessary to realise that only a certain receivable against the debtor is always transferred within the assignment, from which follows a specific right of performance of the debtor against the original creditor. It is clear from such a definition that obligations cannot be transferred under the contract on the assignment of a receivable either, but only the rights to a specific performance. At the same time, the subject matter of the assignment can only be a receivable arising from a contractual relationship, not a right in rem or another right of an absolute nature.[23] By concluding a contract on the assignment of a receivable, unless otherwise agreed between the parties, the contractual relationship between the original creditor and the debtor does not terminate, or the new creditor does not enter into all the rights and, in particular, the obligations arising from the basic obligation. The new creditor (assignee) acquires the same receivable as it was generated and modified by the original parties at the time of the assignment.[24]

The receivable may be assigned with or without notification of the debtor. In the absence of a notification, the assignor will enforce the assigned receivable in its own name but hold the proceeds for the benefit of the assignee.[25] Art. 530 (1) of the Civil Code is actually an exception to the principle that in the event of a change of creditor as a result of the assignment of the claim, the assignor loses the right to recover receivable from the debtor.[26]

Among the special methods of assignment arising in practice,[27] we can also include the secure transfer of the receivable in accordance with the provision of Art. 554 of the Civil Code,[28] factoring,[29] debt collection of a receivable,[30] or bianco cesium.[31]

Among the special categories of receivables, we can include receivables whose special conditions of the contractual assignment are regulated by special legal regulations (e.g., the provisions of Art. 92(8) of the Banks Act No. 483/2001 Coll., as amended) as a *lex specialis*. The general civil law regulation in the provision of Art. 524 to Art. 530 of the Civil Code as a *lex generalis* shall apply only if a special regulation does not stipulate otherwise.

23 See Case No 1 M Obdo V 6/2006 (Supreme Court of the Slovak Republic, 30 October 2008).

24 Under the provision of Art. 524(2) of the Civil Code, with the assigned receivable, its accessories and all rights associated with it also pass. See Civil Code (n 14).

25 ibid, art 530 (1).

26 See, Case No I ÚS 718/2014 (Constitutional Court of the Slovak Republic, 1 April 2015).

27 Imrich Fekete, *Občiansky zákonník: Veľký komentár*, d 2 (§ 460 – § 880) (Eurokodex 2011) 1492.

28 The receivable may be secured by assigning the debtor's receivable or a receivable of a third party to the creditor (hereinafter as 'security assignment of the receivable') unless this is precluded by a special law.

29 Repurchase of short-term receivables from the seller before their due date in order to obtain cash and ensure cash flow.

30 The assignee acts as a creditor (enforces receivables in his/her own name) and is contractually obliged to transfer the amounts recovered from the debtor to the assignor.

31 In such a case, we can talk about a framework assignment of a receivable, where the assignee acquires the right to assignment of partial receivables arising in the future, these will be assigned only when they arise, and these must be described in the contract exactly in terms of type and amount.

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3 RECEIVABLES THAT CANNOT BE ASSIGNED

Not all receivables arising from civil or commercial transactions may be validly assigned. The Civil Code restricts the transferability of certain types of receivables in order to protect certain interests, whether of the original creditor, the debtor, or both, or public interest.[32] The purported assignment of a receivable that by law may not be assigned would render the assignment invalid.[33]

> The following receivables may not be assigned:
>
> a) a receivable which expires at the latest on the death of the creditor,
>
> Receivables that expire at the latest on the death of the creditor include rights that are limited to the creditor's person, e.g., the right to maintenance, the right to lost earnings, the right to restitution, social security compensation, the right to damages for interference with the rights to protection of personality.
>
> b) a receivable, the content of which would change with the change of creditor.
>
> Receivables whose content would be altered by a change of creditor include receivables which, due to their nature, retain their original content (identity) only if they are owed to a specific creditor. The examples are receivables, the assignment of which would negatively affect the legal position of the debtor. This would not apply to receivables under which the nature of the debtor's obligation is pecuniary.[34] This restriction encompasses those receivables that arise between close persons or persons in a family relationship or receivables arising from a relationship that is built on mutual trust between the creditor and the debtor.[35] Accordingly, this limitation would have no effect on commercial transactions that do not pertain to such receivables.
>
> c) a receivable which cannot be made subject to an enforcement action.
>
> These receivables are identified by the regulations governing enforcement proceedings.[36] Examples include winnings from bets and games.
>
> d) in the event that the assignment would be contrary to the agreement with the debtor.
>
> In addition to these, the assignment of a receivable may be prohibited by special legislation.[37]

In the case of the contract on the assignment of a receivable, the new creditor does not step into the entire original contractual relationship, which continues to exist between the original creditor and the debtor. By including a prohibition of the assignment of receivables, the debtor seeks to maintain the original relationship with the original creditor. The intention is that only the original creditor can seek performance from the debtor. Violation of

32 See Civil Code (n 14) s 525.

33 ibid, art 39.

34 See, e.g., Case No 4 Cdo 105/2000 (Supreme Court of the Slovak Republic, 1 July 2001).

35 E.g., receivables from the relationship between a lawyer and a client, where the assignment of a receivable could result in a breach of the client's duty of confidentiality on the part of the lawyer.

36 See Act of the Slovak Republic No 233/1995 On Court Executors and Execution Activities (Execution Code) 'O súdnych exekútoroch a exekučnej činnosti (Exekučný poriadok)' of 2 November 1995 (as amended 1 December 2021) Arts 111, 112 <https://www.zakonypreludi.sk/zz/1995-233> accessed 17 February 2023.

37 E.g., the provision of sections 604 and 844 of the Civil Code, possibly a ban on the assignment of tax and other receivables of the state to an entity of private law resulting from special public law regulations. See Civil Code (n 14).

the prohibition of the assignment of receivables would result in the invalidity of the assignment, regardless of whether or not the assignee was aware of that prohibition. The law does not stipulate special conditions and requirements to provide for an effective prohibition on the assignment of receivables. Therefore, such a contract can also be concluded in relation to time (for a certain period), as a general prohibition or possibly as a prohibition on assignment only to certain persons, or even so that the creditor may assign the receivable without the consent of the debtor only to a certain type of a creditor (e.g., a bank).[38] Contractual arrangements prohibiting the bankrupt from assigning his/her receivables or prohibiting the assignment of receivables which arose before the bankruptcy are ineffective during the bankruptcy, and both the administrator and the creditor may assign these receivables to other persons.[39] This exception maximises the value of the bankrupt assignor's assets available for distribution to its creditors.

4 LEGAL EFFECTS OF THE ASSIGNMENT OF A RECEIVABLE

The assignment takes legal effect between the assignor and assignee upon execution of the contract of assignment.

With the assigned receivable, its accessories and all rights associated with it also pass.[40] The assignor is obliged to hand over all documents to the assignee and provide all necessary information concerning the assigned receivable.[41] The transfer of accessories and all supporting rights associated with the receivable, such as a personal guarantee, occurs by law, regardless of whether it has been provided for in the contract. The rights associated with the receivable include, in particular, accessory rights arising from Art. 528 of the Civil Code, such as ownership of the seller that it has reserved in the goods sold. Notwithstanding the above, the legal relations between the lien creditor and the lien are governed by the general provisions of the contractual obligations of the Commercial Code if the secured obligation is subject to the regulation of commercial law. The new modern legislation on liens is based on the Model Law on Secured Transactions developed by the European Bank for Reconstruction and Development, which introduced and developed the principle of registering a lien in a public register.

Some accessory rights, such as the non-possessory pledge, may have been entered in a register. A transfer to the assignee is automatic without the need to amend the relevant registration.

Upon assignment, the assignee acquires the right to collect the receivable. This right may be exercised as soon as the receivable becomes payable. In the event that the receivable is to be enforced in court proceedings, a motion for admission of a change must be filed by the assignor.[42] In the absence of such a motion and the receivable being further enforced

38 Case No 1 Cdo 76/2007 (Supreme Court of the Slovak Republic, 28 January 2009).

39 See Act of the Slovak Republic No 7/2005 On Bankruptcy and Restructuring 'Zákon o konkurze a reštrukturalizácii a o zmene a doplnení niektorých zákonov' of 14 January 2005 (as amended 1 February 2023) art 55 <https://www.zakonypreludi.sk/zz/2005-7> accessed 17 February 2023.

40 Civil Code (n 14) art 524 (1).

41 ibid, art 528 (1).

42 Civil Contentious Procedure Code of the Slovak Republic No 160/2015 'Civilný Sporový Poriadok' of 17 July 2015 (as amended of 17 July 2022) <https://www.zakonypreludi.sk/zz/2015-160> accessed 17 February 2023. See the provision of Art. 80, stipulates as follows: 'If, after the commencement of the proceedings, a legal fact has arisen which involves the assignment or transfer of the rights or obligations in question, the plaintiff may request that the person to whom those rights or obligations have been assigned enter the proceedings or replace him or her, or to whom they passed. The court or tribunal shall grant the application pursuant to paragraph 1 if it is established that a right or obligation has been assigned or transferred after the commencement of the proceedings and if the person who is to take the place of the plaintiff agrees. The legal effects associated with bringing an action remain the same. The person who enters the proceedings accepts the status of the proceedings on the day of his entry'.

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by the assignor, the debtor defending himself/herself in the proceedings by proving the assignment of the receivable, either by notification by the assignor or by proof of assignment by the assignee, the court would have to dismiss the plaintiff's action for lack of active legitimacy. Substantive succession in itself, as a result of the assignment of a receivable after the commencement of legal proceedings, does not automatically result in procedural succession. Changes in the case of a singular succession, i.e., changes in connection with the assignment of a receivable, must be notified without undue delay in the enforcement proceedings to the executor, together with the proof of the assignment of the receivable, and the executor is obliged to deliver this notification to the court. The court shall take this fact into account by issuing an addendum to the execution authorisation, which it shall deliver to the executor. If there are no reasons to change the party to the proceedings, the court shall, depending on the nature of the case, suspend the execution in whole or in part or inform the executor that there is no reason to issue an addendum to the execution authorisation; in such a case, execution is continued with the original parties. During the enforcement, the assignment of the enforced receivable is effective only if the entire enforced receivable is assigned.[43]

If a receivable is transferred during the bankruptcy proceedings, the court shall decide on the motion of the acquirer of the receivable on his/her entry into the bankruptcy proceedings if the acquisition of the receivable is proven in the motion. Otherwise, it will reject the motion to enter bankruptcy proceedings. The court shall decide on the motion to enter bankruptcy proceedings within ten days from the service of the full motion by a resolution, which shall be immediately published in the Commercial Gazette. The person directly concerned by the transfer or assignment of the receivable is entitled to appeal against the resolution. The appellate court shall decide on the appeal within 30 days from the submission of the case. As soon as the resolution on entry into bankruptcy proceedings enters into force, the court shall immediately publish a notice on the entry into force of this resolution in the Commercial Gazette. Since the publication of this fact in the Commercial Gazette, the rights associated with the acquired receivable in bankruptcy proceedings may be exercised by its acquirer.[44] If, during the bankruptcy proceedings, a receivable conferring the creditor's status as a party to the bankruptcy proceedings is transferred or assigned to another party to the bankruptcy proceedings, the court shall confirm the transfer or assignment of the receivable to the acquirer based on the motion of the acquirer of the receivable, if the acquisition of the receivable is proved in the motion. Otherwise, it will reject the motion to confirm the transfer or assignment of the receivable. The court shall decide on the motion to confirm the transfer or assignment of the receivable within ten days from the service of the full motion by a resolution, which shall be immediately published in the Commercial Gazette. The person directly concerned by the transfer or assignment of the receivable is entitled to appeal against the resolution. The appellate court shall decide on the appeal within 30 days from the submission of the case. As soon as the resolution confirming the transfer or assignment of the receivable enters into force, the court shall immediately publish a notice on the entry into force of this resolution in the Commercial Gazette. Since the publication of this fact in the Commercial Gazette, the rights associated with the acquired receivable in bankruptcy proceedings may be exercised by its acquirer.[45] As in court proceedings, also the legal regulation of arbitration proceedings in the Slovak Republic combines with the singular succession in the case of assignment of a receivable the effects of the arbitration agreement on the legal successors of the parties in the relationship covered by the arbitration

43 See Act No 233/1995 (n 37) art 37.
44 See Act No 7/2005 (n 40) art 25.
45 ibid, art 26.

agreement.[46] In arbitration proceedings that have already begun, in the absence of the relevant arbitration rules, the procedural change of the plaintiff in the proceedings will have to be dealt with appropriately using the general rules on court proceedings if the nature of the case so allows.[47]

The assignor and assignee may agree to postpone the effectiveness of the assignment. The law requires the assignor to notify the debtor without undue delay of the assignment of the receivable. Until the assignment of the receivable is notified to the debtor or until the assignee proves the assignment of the receivable to the debtor, the debtor is discharged from the obligation by payment to the assignor.[48] If the assignment of the receivable is notified to the debtor by the assignor, the debtor is not entitled to demand proof of the assignment.[49] The debtor is obliged to fulfil the assignment to the assignee after notification of the assignment of the receivable, and any objections on his/her part in relation to the validity or existence of the assignment may be disregarded unless they relate to the non-transferability of the receivable pursuant to Art. 525 of the Civil Code. In that case, the debtor obtains a discharge by paying the assignor.

Although the law does not provide for any special form in which the assignor should notify the debtor of the assignment, it is advisable to make such notification in writing in case the debtor later challenges the effectiveness of the notification. The Court relies on such a notice without first examining the existence and validity of the contract on the assignment of the receivable. In such a case, the debtor cannot successfully invoke the invalidity of the contract on the assignment of the receivable or its non-existence. He/she would only be able to do so if the assignment of the receivable was proved by the assignee.[50]

The contract of assignment may not negatively affect the position of the debtor. The court does not deal with the contract on the assignment of the receivable, as in such a case, the assignor is responsible for the correctness of the notification and also bears the consequences of the subsequent goodwill performance of the debtor to a third party.[51]

a) The assignor shall be liable to the assignee if:

The assignee did not effectively acquire the receivable.

b) The assignor remains responsible for the validity of the receivable, i.e., for its legal effectiveness.

The debtor did not fulfil the obligation to the assignor before he was obliged to fulfil it to the assignee.

This situation may arise if the debtor pays his/her debt to the assignor before the assignor has informed him/her of the assignment of the receivable. The assignee is entitled to claim the proceeds of collection from the assignor.

c) The assigned receivable has been offset, in full or partially, with the debtor's claim against the assignor.[52]

46 See Act of the Slovak Republic No 244/2002 On Arbitration Proceedings 'Zákon o rozhodcovskom konaní' of 15 May 2002 (as amended 1 January 2020) Art 3 (2) <https://www.zakonypreludi.sk/zz/2002-244> accessed 17 February 2023.

47 ibid, art 51 (3).

48 See, Civil Code (n 14) art 526 (1).

49 ibid, art 526 (2).

50 Case No 4 Obo 210/2001 (Supreme Court of the Slovak Republic, 11 June 2003); Jaroslav Krajčo, *Občiansky zákonník pre prax (komentár): Judikatúra NS SR, NS ČR, ESD, ESĽP* (Urounion 2015) 2318.

51 Števček and others (n 15) 1828.

52 Civil Code (n 14) art 527 (1).

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> Since the position of the debtor cannot be negatively affected by the assignment, it is entitled to set off any claim it has against the assignor that accrued prior to the assignment.

These are mandatory provisions that cannot be excluded or changed by agreement between the assignor and the assignee. The law provides autonomy to the parties to agree on responsibility for the creditworthiness of the debtor, which includes the enforceability of the assigned receivable. This is known as recourse.

5 LEGAL STATUS OF THE DEBTOR IN THE EVENT OF ASSIGNMENT OF RECEIVABLE

Legal rules governing assignments of receivables are based on the principle that the assignment shall not negatively affect the position of the debtor.[53] Thus, any defences to the collection of a receivable that the debtor may have raised at the time of the assignment may be asserted against the assignee.[54]

In particular, the law gives the debtor the opportunity to object to reciprocal receivables which he/she had against the assignor at the time he/she was notified about the assignment of the receivable, or it was proved to him/her if he/she notified about them without undue delay the assignee. The debtor might assert defences even if the receivables were not yet due at the time of notification.[55] The right to set off the debtor's receivable against the assignor cannot be asserted by the debtor in the case of subsequent assignments. Pursuant to Art. 363 of the Commercial Code, it should be highlighted where the receivable was assigned to several successive assignees, the debtor may set off only the claim accrued at the time of the assignment against the first creditor and the claim it has against the last creditor.

Until notification of assignment is received, the debtor offsets its claims and defences directly against the assignor. In such a case, the aforementioned general legal regulation in the provision of Art. 580 et seq. of the Civil Code shall be applied to the offsetting. In the event that the debtor does not notify the assignee of any eligible receivables without undue delay, the right to set off the said receivables against the assignee shall expire.

The law specifically provides for an objection of the debtor for the so-called silent assignment when neither the assignor nor the assignee notifies the debtor about the assignment of the receivable. If the assignor attempts to collect the receivable, the debtor may set off eligible claims against the assignor but not the claims it has against the assignee.[56] However, if the assignment of the receivable has been notified or proved to the debtor (Art. 526 of the Civil Code), the assignor may enforce the receivable only if it is not enforced by the assignee and the assignor proves to the debtor the assignee's consent to such recovery.[57]

53 See e.g., Case No 4 Cdo 105/2000 (n 35).
54 Civil Code (n 14) art 529 (1).
55 ibid, art 529 (2).
56 ibid, art 530 (2).
57 ibid, art 530 (1).

6 CONCLUSIONS

This article examined the law governing transfers of receivables in civil and commercial matters in the Slovak Republic. These transfers include absolute assignments, security assignments, and pledges. It analysed the consequences and legal effects of transfers not only in relation to the assignor and assignee but also in relation to the debtor and third parties that may have issued undertakings securing the performance of a receivable. The increasing market needs to raise capital, particularly for SMEs, also elicited an appropriate response from the judicial authorities. However, the inadequate legal regime has become unpredictable and no longer provides certainty and predictability. This article suggests a reform to align with international standards. This reform would statutorily recognise the validity of assignments even where the receivables have not been individualised, validate assignments of pools of receivables as well as future receivables. The principle that enables the debtor to maximise the value of an estate for creditors by assigning receivables despite a restriction should be extended to a pre-insolvency situation. The law should thus expressly override the effect of anti-assignment clauses. The ongoing efforts in the region to modernise factoring regimes would put pressure on Slovakia to keep pace so as to become an attractive environment for factoring transactions.

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Reform's Forum Note

PROTECTION OF RIGHTS OF MINORS IN ADMINISTRATIVE PROCEEDINGS IN THE EUROPEAN LEGAL FRAMEWORK

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ABSTRACT

Juvenile justice is an essential element of the development of social justice provision for minors in all countries, thus enhancing the safety of youth and the maintenance of order in society. The aim of the research is to analyse the theoretical provisions and legal norms governing the administrative and legal protection of minors in European countries. It is also to formulate proposals and recommendations for the modernization of the legal framework for juvenile justice institutions' functioning in the Republic of Kazakhstan. According to the set goal and objectives, a range of general and special research methods were used for a comprehensive analysis. The theoretical and practical significance of the article is determined by its relevance and novelty, with its focus on solving the most important problems facing protection of minors' rights in the judicial process.

1 INTRODUCTION

The international community, realizing the importance of childhood for social progress and its future, has developed the concept of childhood as one of the most valuable time periods. The international normative legal acts focus mainly on the preferential protection of child's rights. The legal status of children today is determined by extensive international legislation on the protection of the child's rights. There is no doubt that the primary international legal sources in this area are universal, and regional international acts proclaim human rights and freedoms.

The issue of the protection of child's rights is one of the fundamental activities the European Union and the United Nations allocates time to because caring for children means caring for future generations - for the very continuation of human civilization. In recent years, the international community has developed a wide range of treaties regarding the protection of the children's rights and interests, making it possible to assert a certain stability in an international system of standards.

Today's realities help us to ponder about the behaviour of minors in a legal manner. Social transformation causes a change in their behaviour as they age. Thus, the state is more humane towards offenders, especially those under the age of 18. However, humanity cannot increase in pity for offenders. There is controversy among scholars about the effectiveness of existing measures to minimize the delinquency of minors. In addition, in administrative law, there are several administrative influential measures that apply to minors. Though based on their content, compliance problems arise in these measures due to the typical behaviour of a juvenile offender.

Minors are of a special social group, not adapted to life yet and deprived of the opportunity to adequately assess the current situation or the situation(s) in which they find themselves and correctly respond to it. Therefore, children are identified as the most vulnerable group of the population, both socially and legally, in the process of radical transformations that have occurred in the Republic of Kazakhstan over the past decades. This is the reason that demonstrates the existing need to develop an effective mechanism for the legal protection of minors, bolstering it as one of the priority directions of state policy.

Undoubtedly, the Republic of Kazakhstan, in its activities, pays great attention to solving problems regarding protecting the rights of children, systematically conducting socially significant measures for protecting the rights of minors, and has achieved certain success in creating a system of juvenile justice. The basis of the state policy for the protection of children's rights is a system comprised of mutually coordinated actions of the state, the public, and international non-governmental organizations targeted at ensuring children's rights to form a full-fledged and harmoniously developed personality.

The academic novelty of the research is attributed to by the issue regarding formation of an integral mechanism in the Republic of Kazakhstan's juvenile justice bodies, considering the modern demands for social and economic reforms in the field of protecting the rights, freedoms, and interests of children has not been previously posed as a comprehensive study subject, although its need is obvious. The article can serve as subsequent scientific research in the field of the administrative and legal protection of minors and contribute to the search for solutions facing juvenile justice problems.

Many scholars, such as A. Omarova, S. Vlasenko[1], G. Alibayeva, and N. Razzak[2], and D. Liakopoulos[3], studied the issue of protection of minors' rights in administrative proceedings in the European Union countries.

The conceptual and theoretical deviant behaviour problems and legal socialization of minors in the Republic of Kazakhstan were studied by B. A. Zhetopisbayev.[4]

Kratcoski, P. C., examines recent changes in offenders' characteristics along with changes in laws and the development of social media and smartphones, and conducts research on the international perspective on juvenile justice and crime, mental health, and special needs of youth in the juvenile justice system, at-risk children, and innocent children as victims.[5]

The theoretical and practical significance of the article is determined by its relevance and novelty, with a focus on solving the most important problems concerning the protection of minors' rights.

2 METHODOLOGICAL FRAMEWORK

The study used a wide range of scientific methods, including philosophical, general scientific, and special research methods which allowed for an objective analysis of the subject matter. The methodological basis of the study is dialectical, formal legal, and axiological, and uses forecasting, analysis, deduction, induction, and appeal to the categories of general and particular, essence and phenomenon, abstract and concrete.

The dialectical method contributed to the analysis of various conceptual approaches to the protection of minors' rights when bringing them to administrative responsibility. Using the formal legal method, the author traced the interrelationships between the internal content and external expression of the protection of minors' rights in administrative proceedings in the European Union.

The hermeneutic method is also utilized, primarily adapted through the interpretation of legal texts. The legal and dogmatic method analysed existing regulations and identified the factors that determine the current situation for minors. Comparative methods analysed the peculiarities of legal policy in the field related to securing the legal status of minors in administrative cases in different countries.

The axiological method was used to clarify the value orientations of modern law, which are manifested in the need to improve the quality of legal relations for the protection of

1 Aisel Omarova and Serhii Vlasenko, 'International Standards of Juvenile Justice: Its Creation and Impact on Ukrainian Legislation' (2022) 5 (1) Access to Justice in Eastern Europe 116, doi: 10.33327/AJEE-18-5.1-n000100.

2 GA Alibayeva and N Razzak, 'Juvenile Justice in Central Asia: Current Status and the Possibility of Using the European Model' (2015) 6 (5) Mediterranean Journal of Social Sciences 139.

3 Dimitris Liakopoulos, 'Interactions Between European Court of Human Rights and Private International Law of European Union' (2018) 10 (1) Cuadernos de Derecho Transnacional 248, doi: 10.20318/cdt.2018.4123.

4 BA Zhetpisbaev and others, *Conceptual and Legal Foundations of Juvenile Justice* (Kazakh University 2019).

5 Peter C Kratcoski, Lucille Dunn Kratcoski and Peter Christopher Kratcoski, *Juvenile delinquency: theory, research, and the juvenile justice process* (6th edn, Springer 2020) doi: 10.1007/978-3-030-31452-1.

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minors' rights in court. The method of forecasting studied the European experience of case consideration involving administrative offenses by minors in the European Union so it was possible to determine further vectors of legislation development on the protection of children's rights in court and was also used in the reception and implementation of foreign legislation.

The dialectical method deepens the conceptual and terminological apparatus, analysis, and synthesis, and clarified the essence of juvenile justice. A systematic approach unified the theoretical and cognitive foundations of the protection of minors' rights in court. The formal-logical method allowed us to identify the logical and methodological foundations for building basic definitions. The formal legal method, combined with logical analysis, aided our comprehensive study of the existing legal provisions system for governing juvenile justice, and outlined the areas for improving legislation in this area.

3 CHILDS' RIGHTS IN EUROPEAN COUNTRIES AND POLICIES

The issue of protecting children's rights is a problem facing the entire international community. Several international institutions and regulations are designed to facilitate its solution. Today, we can say with confidence that there is no country in the world where there is no problem regarding protecting children's rights. An essential role in the international legal protection of children's rights is played by acts of a general nature that protect human rights in general. Even though these international legal agreements do not practically provide special protection to the child as a representative of a separate social group, their provisions are still important for the protection of the children's rights. The Universal Declaration of Human Rights[6] contains a list of basic civil, political, economic, social, and cultural rights. Currently, this is the standard to which all states are working to approximate their national legislation as much as possible.

After the Universal Declaration of Human Rights was adopted, the United Nations General Assembly, in 1952, decided to prepare and adopt a single pact that could incorporate a scope of fundamental rights and freedoms. After lengthy work on this document and long discussions, two Covenants on Human Rights were developed and adopted - the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights (Resolution 2200 A (XXI) of December 16, 1966).[7] The adoption of these documents served as a new step in the qualitative development, provision, and protection of the rights proclaimed in them. The rights that are expressed and consolidated in these Covenants have already acquired the character of "jus cogens." They are recognized at the international level as invariable norms and deviation from this is unacceptable.

An important document regarding the children's rights was the Declaration of the Rights of the Child, adopted by the UN General Assembly in 1959, consisting of ten articles with key social and legal principles for the children's protection aimed at the harmonious development and social protection of children. The Declaration was a document, for the first time, specifically and fully dedicated to children's rights. Recognizing the statement's validity that "the child should be given the best that society has," the Declaration pointed to the need to "ensure a happy childhood for children" and

6 UNGA Res 217 A 'Universal Declaration of Human Rights' (10 December 1948) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 19 April 2023.

7 UNGA Res 2200 A (XXI) 'International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights' (16 December 1966) <https://www.refworld.org/docid/3b00f47924.html> accessed 19 April 2023.

set as its goal the proclamation and fulfilment of rights and freedoms aimed to benefit both children and society[8].

Today, the Convention on the Rights of the Child (1989) should be considered the main source of international law in the field of protection of children's rights. The initial draft of the Convention, developed by the Polish Republic, was permeated with minors' rights in economic and socio-cultural spheres, which caused heated discussions among countries, organizations, and experts. The subject of the discussion that arose was the requirement to maintain a balance between civil, economic, social, and cultural rights. Polish opponents, recognizing the importance and necessity of economic, social, and cultural rights, defended their position on the inclusion of rights covering the situations encompassing special needs children, refugee children, children who become delinquents, children in emergencies, orphans, etc[9].

Thus, the first step towards the systematization of the norms that form the modern institution of "juvenile law" was taken at the level of international legal documents on the protection of human rights. The norms enshrined in these international acts apply to the state's parties to the agreements. They have a tremendous impact on the formation of the domestic instruments for human and civil rights, helping to ensure them. In this regard, the Republic of Kazakhstan, in November 2005, ratified the listed international Covenants and, subsequently, the Optional Protocols to them. The named international acts are the most important documents used to determine the global directions of international legal norms action regarding human rights protection, and, meanwhile, affect the rights, freedoms, and legitimate interests of the child.

A study of the international organizations' reports allows us to state that there is an improvement in world practice regarding ensuring and protecting children's rights and improving their well-being. It cannot be said that the problems of child protection have been resolved, but one can observe attempts by states to systematically improve the situation. We believe that it is due to the influence of the Convention, which prompted many states to improve their domestic legislation, bringing it in accordance with the Convention's requirements. The provisions included in the Convention have significantly influenced the activities of international and regional non-governmental organizations working on children's rights[10].

Other key international legal documents regarding the protection of the children's rights include the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules") 1985,[11] and the 1990 United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines).[12] It is these acts, in addition to the Convention, that constitute the foundation of the protection mechanism in the administration of juvenile justice.

One of the main goals of the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) is to proclaim the states' desire to promote the well-being

8 UNGA Res 1386 (XIV) 'Declaration on the Rights of the Child' (20 November 1959) <https://digitallibrary.un.org/record/195831?ln=en> accessed 19 April 2023.

9 UNGA Res 44/25 'Convention On the Rights of the Child' (20 November 1989) <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> accessed 19 April 2023.

10 Bart van der Sloot, Chris Jay Hoofnagle and FJ Zuiderveen Borgesius, 'The European Union General Data Protection Regulation: What it is and what it means' (2019) 28 (1) Information & Communications Technology Law 65, doi: 10.1080/13600834.2019.1573501.

11 UNGA Res 40/33 'United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")' (29 November 1985) <https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-standard-minimum-rules-administration-juvenile> accessed 19 April 2023.

12 UNGA Res 45/112 'United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines")' (14 December 1990) <https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-guidelines-prevention-juvenile-delinquency-riyadh> accessed 19 April 2023.

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of the minor and his family. At the same time, juvenile justice is a vital component of each country's development regarding the provision of social justice for all minors while ensuring the protection of children and maintaining an order in society (paragraph 1.4. Part 1). The standards for juvenile justice are defined by two main objectives of its implementation. The first is to promote the well-being of the juvenile, and the second is to respect the "principle of proportionality" (clause 5.1. Part 1). The implementation of both goals should be based on mandatory consideration of the individual characteristics of a minor participant in the relevant procedures, his rights, and legitimate interests, ensuring full access to the process of considering the case, as well as limiting the punitive approach of the state's response to the child's offense. Similar goals and principles are listed in the UN Guidelines for the Prevention of Juvenile Delinquency.

Further, attention should be paid to the provisions of the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice provided on November 17, 2010.[13] The recommendations feature the possibility of their application in all possible cases including child participation, regardless of the reason and role in which the child is involved (paragraph 2 of section I). The drafters of the Guidelines on Child-Friendly Justice, drawing on experience from previous documents, have attempted to articulate a set of universal provisions and standards in the juvenile justice field. These standards can be roughly classified into two main groups: general standards for the administration of justice, which should be available to all participants in legal proceedings, and special standards, which should consider special needs of children in the administration of justice regardless of their procedural status.

The first group of standards is embodied in Art. 6 of the 1950 European Convention on Human Rights, guaranteeing everyone "the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"[14]. The second group of standards is specific and related directly to the regulation of children's participation in the administration of justice. It should be noted that both groups of standards highlighted in this work are closely related. Special standards and guarantees for the participation of children in the legal proceedings supplement and concretize the general standards specified in Art. 6 European Convention on Human Rights 1950.

The above recommendations formulate five fundamental principles of friendly justice: 1) participation, which is the children's right to receive the necessary information and express their opinion during court proceedings; 2) the most important interests of the child, meaning the need for the best and most effective provision of the child's rights; 3) dignity, so children must be treated with sensitivity and respect during all procedures, with special attention given to their situation and unique needs, regardless of the case's form and procedural status; 4) protection against discrimination; and 5) the rule of law, applying equally to children and adults, presupposing the implementation of all elements of fair justice[15].

All other elements and guarantees of child-friendly justice are linked to and based on the above fundamental principles. Thus, the Recommendations on child-friendly justice specify in detail measures to inform and provide qualified legal assistance to children and their family members and measures aimed at protecting private and family life, ensuring the safety of minors themselves (subsections 1-3 of section A of part IV). Strict requirements

13 Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice* (CoE Publishing 2011) <https://www.coe.int/en/web/children/child-friendly-justice> accessed 19 April 2023.

14 Council of Europe, *European Convention on Human Rights: as amended by Protocols Nos 11, 14 and 15 supplemented by Protocols Nos 1, 4, 6, 7, 12, 13 and 16* (CoE Publishing 2021) <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c> accessed 19 April 2023.

15 Ton Liefaard and Ursula Kilkelly, 'Child-Friendly Justice: Past, Present and Future' in Barry Goldson (ed), *Juvenile Justice in Europe: Past, Present and Future* (Routledge 2019) ch 4, 57.

have been established for all specialists working with and for children, accounting for the need for an interdisciplinary approach to the consideration of cases with the participation of minors (subsections 4-5 of section IV). The specifics of the conduct of procedural actions are regulated, considering the peculiarities of the children's development and perception of the world to ensure their effective participation in the process of administering justice (subsections 4-5 of section D of part IV).

Having analysed the provisions in the main international documents on minors' rights in the administration of justice and the practice of the ECHR, it should be noted that many provisions and principles laid down in the 1989 Convention on the Rights of the Child continue to develop and are subject to critical analysis, assessment, and additions. Thus, the principle of child's best interests in the ECHR's practice began to be reflected through the effective participation of the child in the administration of justice with his participation, and the failure to provide any conditions for the child's effective participation in the consideration of his case is regarded by the ECHR as a breach of Art. 6 of the 1950 European Convention on Human Rights. At the same time, the assessment to ensure the effectiveness of the child's participation in the administration of justice should always be carried out ad hoc, considering the individual features and needs of the minor. The state's ability to properly organize a judicial process with the participation of children, regardless of the type of legal proceedings and their procedural status, can be considered a litmus test of the effectiveness, humanity, and vitality of the entire judicial system in a given country[16].

We consider it necessary to consider the experience of countries in the juvenile justice field, which we consider important and useful for our research and further development of this area in the Republic of Kazakhstan.

The legal system of Great Britain, although it did not differentiate proceedings in cases involving adults and minors, passed a law in 1847 on juvenile offenders. On December 21, 1908, the Law on Children was adopted (entered into force on 01.01.1909), or it was also called, the "Charter of Children," which defined the juvenile courts system in Great Britain. The significance of this Children's Act of 1908 is that it defined several institutions of the UK juvenile justice: the prevention of cruelty and violence against minors, the protection of the health and life of children and adolescents, introduced a ban on alcohol, minors who smoke, determined the status of educational and industrial schools, etc. This law consolidated the state's important role in raising children. The state, emphasizing the role of parents in the child's life, determined the importance of family education, regulating the relationship between parents and children, and reserved the right to control the performance of parental duties[17].

From the first steps of juvenile justice in England, the idea of guardianship, having the character of a civil procedure, was developed, justifying the juvenile court's intervention in family relations to provide the care and upbringing of a child. This idea later became one of the principles formed by the end of the 30s. 20th century doctrine states "juveniles in need of care, protection, or control" - the doctrine of "care, protection, and control" regarding minors. Great Britain's juvenile justice is positioned in the primary role of guardianship, care, and upbringing of children. In English law, it was also necessary to thoroughly study the life and environment of the defendant in Great Britain, distinguished by special severity, clear definiteness, and elaboration of punishments. For a minor under the age of 14, the parents or guardian, in the event of a court decision, must pay a fine and reimburse damages or

16 Liakopoulos (n 8).

17 Act of Parliament of the United Kingdom 'The Children Act 1989' <https://www.legislation.gov.uk/ukpga/1989/41/contents> accessed 19 April 2023.

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expenses in the case. The only exceptions are cases, firstly, when the parents cannot be found and, secondly, when the parents are innocent of the child's behaviour that leads to the offense[18].

In general, the Anglo-Saxon system of juvenile justice is characterized by the following features that reflect the merits of this model: 1) educational orientation; 2) lack of judicial investigation, debate, and formal accusation; 3) elimination of publicity when considering offenses; 4) participation of legal representatives; 5) mandatory clarification of the reasons and conditions that contributed to the minor's unlawful behaviour; 6) focus on the face of the child (minor); 7) cooperation with public and charitable organizations; and 8) application as a measure of punishment, as a rule, transferring under supervision of officials of special bodies. However, despite the positive dynamics of this model's functioning in juvenile justice, it has opponents who consider it a wrong approach to borrow its experience and introduce it into the other states' practices.

One of the states using the Romano-Germanic legal system, the juvenile justice model of practical interest for its best practice, is the Federal Republic of Germany. One of the features of juvenile legal proceedings in Germany is a deeply individual approach to adolescents, which is expressed in the judge's specific actions, provided for by law, to establish contact with the accused, investigation methods for the case's circumstances, the language of court proceedings understandable to the minor, and the involvement of special non-legal institutions in the study of the personality [19].

In the Eastern European countries, there are peculiarities in the functioning of the juvenile justice system. They are careful about the introduction of elements into the juvenile justice system, considering their national characteristics, the specifics of the legislation, and the needs of society. For example, the Republic of Bulgaria, like all countries in the European Union, fulfils the requirement of Article 14 of the International Covenant on Civil and Political Rights, so the process should consider minors' age and the need for facilitating their re-education.

Therefore, like all EU member states, it has juvenile courts in its arsenal of judicial bodies, where activities are carefully regulated per international and European standards. The Republic of Bulgaria has an extensive legislation on ensuring and protecting the rights, freedoms, and legitimate interests of minors. The complex legislative acts cover almost all problematic aspects of the lives of modern children, including the issues of social security for certain categories (orphans, without parental care, disabled people). In Bulgaria, the juvenile justice system is represented not only by juvenile justice. Day rehabilitation hospitals have been organized there, where conditions are provided for a rehabilitation complex offering measures for children. Since 2001, the State Agency for Child Protection has coordinated and monitored state policy's execution on the protection of children in the Republic of Bulgaria.

The State Agency for the Protection of the Child implements a wide range of tasks facing modern society:

- develops a unified and coordinated state policy for the child's protection;
- develops and monitors the implementation of national and regional programs for the child's protection;
- organizes checks on the observance of children's rights in all public and private schools, kindergartens, nurseries, service departments, medical institutions,

18 Liefaard and Kilkelly (n 20) 57.

19 Eva Lievens and others, 'Children's Rights and Digital Technologies' in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer Singapore 2018) 487, DOI: 10.1007/978-981-10-4184-6_16.

social aid offices of the Social Assistance Agency (ASA), and other non-profit institutions handling child's protection;

- monitors and controls institutions in charge of raising children for the fulfilment of the child's rights;
- develops social services standards for children, implementing measures for assistance, support, and services in a family or placement in the family of relatives, a foster family, or specialised institution;
- participates in the development of by-laws to the Law on the Protection of Children;
- creates a database in the information system as a mechanism for managing the protection system and analysing problems, policies, and services;
- develops and provides methodological assistance for the child protection departments and the ASA;
- supports the activities of non-profit institutions dealing with child's protection.

The National Council for Child Protection is a body within the State Agency for Child Protection and performs advisory and coordinating functions. Thus, world experience shows that different countries seek out their approaches to the administrative and legal protection of children's rights, forming their own models of the juvenile justice system[20].

Developed countries create an extensive network of juvenile justice bodies, allowing them to cover and provide protection for all aspects of the minors' lives, ensuring a quality level in all sectors. In developed foreign countries, a comprehensive system of prevention of neglect, as well as bringing minors to legal and other responsibilities, has been created and is functioning. The juvenile justice system in these countries is unified, well-coordinated, and integral.

Summing up the above, we consider it necessary to highlight the following priority areas of the administrative and legal protection of children's rights in Kazakhstan: improve the juvenile justice authorities, improve the quality of children's social services and special institutions for children; ensuring the protection of children's rights and combating violence in the family, eliminating cruelty towards children, and prevention of child delinquency.

When shaping international standards for judicial protection and representation of the juvenile participants' interests in justice, it is critical to achieve a balance between their participation and non-participation in the judicial procedure, between publicity and confidentiality of court proceedings, and between protection measures and juvenile offenders' responsibility. On one hand, by adhering to the tactics of excluding children from participation in court proceedings, we try to keep them from colliding with the official legal process; on the other hand, without their direct and effective participation, it is impossible to resolve a legal dispute. Therefore, the formation of international standards on the child justice poses a question to find a balance between the child's best interests and the interests of the state regarding resolving legal disputes and ensuring legal certainty.

To date, there are numerous ECtHR decisions regarding the protection of child's rights based on the European Convention on the Protection of Human Rights, the Universal Declaration of Human Rights, and the Convention on the Rights of the Child. During the review of the ECtHR's practice, several situations were revealed where the applicants did not receive adequate legal protection within their state.

20 Omarova and Vlasenko (n 6).

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In the decision on the case "Y.U. against Russia," the court recognized the violation of Art. 8 of the Convention, expressed because the applicant's legitimate interests in maintaining contact with her child were not adequately protected by law enforcement agencies that refused to help her ensure the execution of the court action that entered into legal force.

Based on the existing law enforcement practice of the ECtHR, "the best interests of the child" can be identified as the following aspects. The interest of the child, as a rule, is the main criterion for the children's rights protection. The need to listen to child's opinion during any legal proceeding that concerns the child. According to the principle of a fair balance between the interests of parents and children, the most important interests of the child are crucial and should prevail over the parents' interests. The child must be brought up in the family and the establishment of state guardianship is possible only in exceptional circumstances, and in particular, if there is a real danger for the child.

In European countries, judicial systems are still not sufficiently adjusted to the special needs of children. Studies show that children's rights to be heard, informed, protected, and not discriminated against are not always fulfilled. Children in conflict with the law have special rights that are not always adequately respected by the justice system. Restrictions on the freedom of children are not considered, contrary to the requirements of the UN Convention on the Rights of the Child, and are a last resort to be used. The administrative detention of migrants and other children, as well as the deprivation of liberty, create serious problems regarding the observance of their rights[21].

By the UN Convention on the Rights of the Child, children must be allowed to be heard in any legal proceeding that affects them and have access to competent, independent, and impartial complaints mechanisms in case their rights are violated. Apart from that, state parties to the UN Convention on the Rights of the Child recognize that all children in conflict with the law have the rights that require treatment in a manner that respects their dignity, while considering the children's age and aiming for their social reintegration. In all actions concerning children, regardless of whether they are taken by public or private institutions, courts, administrative authorities, or legislative bodies, the child's best interests must be essential.

The Council of Europe promotes the execution of the guidelines on child-friendly justice by providing support to states in enhancing children's access, conduct, and participation of children in all types of justice procedures. This embraces a scope of activities carried out by the European Committee for Legal Co-operation (CDCJ), the Legal Professionals Human Rights Program (HELP), and other relevant authorities. Consequently, the Council of Europe will work together with the European Commission, the EU Agency for Fundamental Rights, UNICEF CEE/CIS, and the Council of the Baltic Sea States (CBSS). These actions will be adopted to assist member states in ratifying and implementing the Third Optional Protocol to the UNCRC on a communication procedure.

At the meeting of the UN General Assembly on the rights of children, in her opening statement, the Deputy High Commissioner for Human Rights mentioned that children's access to justice is a crucial element in the protection of human rights and a vital condition for the promotion of all other human rights. She explained that access to justice meant ensuring that children had access to equal and timely remedies for violations of their rights. She also recalled that, despite not being incorporated directly in the Convention on the Rights of the Child, the right to an effective remedy had been recognized as an implication

21 Alibayeva and Razzak (n 7).

of the Convention's requirements in the text of the Committee on the Rights of the Child's general comment No. 5[22].

To ensure children's access to justice, other fundamental rights under international agreements should be exercised, including the right to a fair trial and the right to access information. In addition, children must be able to exercise their right to be heard and the right to be protected from discrimination on any grounds. She highlighted the challenges children face in exercising this right, including the complexity of legal systems, ignorance, lack of information, fear of reprisals and stigmatization, societal attitudes towards children, and dependence on adult support. Certain groups of children also face additional barriers to accessing justice, such as children in institutions, children of migrants, children living in extreme poverty, and children affected by conflict.

At the national level, two main issues need to be considered: empowering children to claim their rights, including raising awareness of rights, providing adequate information, and recognizing children's evolving capacities; and the national legal systems' ability to recognize and address the problems that children face or may face. In this regard, child-sensitive, independent, safe, effective, and easily accessible mechanisms must be introduced. For rights to have real meaning, there must be access to effective remedies in the event of an offense. The rights of the child should not be perceived as "mini-rights." They need to be protected on an equal basis with other rights while considering the additional barriers associated with the children's involvement[23] (Neuwahl & Rosas, 2021).

Also important is a report prepared by Child Rights Connect that provides an overview of the results of a survey of 310 children, aged 11 to 17 and from 24 countries, on issues related to the justice system. Many children stated that they were not always listened to or taken seriously and were often the easiest to ignore due to their lack of authority. Children named parents and guardians as the main source of information regarding access to justice, although 20% prefer to seek information from people outside their family as they believe such individuals are less subjective and easier to communicate with.

UNICEF research indicates that children face the same challenges as adults in accessing justice, such as high fees, lack of trust in the system, lack of information, and stigmatization. However, children experience difficulties related to their special status, including the lack of legal grounds for appeal or social norms that make it unacceptable or impossible for a child to file a complaint without parental consent.

Child-friendly justice must be age-appropriate, accessible, responsive, fair, respect the child's rights, and help the child participate in legal proceedings by explaining the process to them. Access to justice is the cornerstone of human rights protection and is fundamental to sustainable development and effective governance. Ensuring the rule of law and access to effective justice systems, in addition to having an immediate beneficial effect, can stimulate development.

In countries where violence and stability are prevalent, the law rules, and law enforcement lacks, it is difficult to overcome impunity; children in these countries may be at risk of health and social discriminations. The justice system seems to children not just complex, but as a labyrinth - an unknown universe that they do not understand. Access to justice requires the implementation of a system provided with necessary materials, capacity, and resources. At

22 UN Committee on the Rights of the Child, General Comment No 13 'The right of the child to freedom from all forms of violence' (18 April 2011) <https://digitallibrary.un.org/record/711722?ln=en> accessed 19 April 2023.

23 Nanette A Neuwahl and Allan Rosas (eds), *The European Union and Human Rights* (Martinus Nijhoff 1995).

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the same time, this system should be understandable to children, they should feel involved in and trust it without fear of threat. States need to introduce specialized legal aid mechanisms for children and professional codes of conduct for children.

It is also necessary to introduce measures to ensure children's access to justice in Kazakhstan. They embrace the appointment of ombudsmen; the creation of "hotlines;" the provision of free legal assistance; the introduction of a "network cop" who can be contacted via social media or email for advice or to convey information to the police; creation of children's rooms in social assistance centres; introduction of "complaint boxes" in schools; the use of videoconferencing and closed-circuit television systems to provide evidence during court hearings; creation of special courts for juvenile offenders composed of specialized judges; and the use of alternative non-custodial mechanisms in juvenile justice, including mediation, probation, and family rehabilitation (Macenaite & Kosta, 2017).

Attention must be paid to how children are perceived and treated by society. They must be recognized as holders of their rights and given legal authority to protect them. The states of the European Union should create conditions in which the child's voice would be heard. Children need to be made aware of their rights in order to promote and defend children's rights, and an international campaign has been called for in this regard. It should be noted the need to find innovative, creative, and accessible ways to ensure children's access to information, the development of a curriculum and brochures for children to prepare them for participation in court processes and inform them about the role and functions of the courts, and raising children's awareness of their rights through street performances or home visits is essential to protect children as it increases their access to justice.

The lack of professional training remains, including the need to improve the level of training of judges, prosecutors, and law enforcement officials. In addition, accountability is an important factor to ensure access to justice. Effective promotion of rights requires independent, national, regional, and international monitoring mechanisms.

4 ADMINISTRATIVE AND LEGAL PROTECTION OF CHILD'S RIGHTS IN KAZAKHSTAN

The integration processes taking place in the modern world have not left Kazakhstan behind. Kazakhstan, integrating into the international community, and various international and regional organizations pursue a balanced policy in matters of the legal protection of childhood, as evidenced by the adopted legal acts. In particular, the Regulatory Resolution of the Constitutional Council of the Republic of Kazakhstan states that children, due to their age, need enhanced protection and care. Therefore, it is important to provide conditions for their full and harmonious development and protect their rights, freedoms, and interests. It should also be emphasized that minors require special protection because this is a requirement of the life of modern society, consistent with the practical activities of both international and national human rights bodies and the ideas underlying international legal documents.

This determines the importance and need for the development of close international cooperation in the field of protecting child's rights since the use of European countries' positive experience will increase the effectiveness of solving problems such as neglect and homelessness, delinquency of minors, adoption of children, trafficking in minors, etc. Foreign experience in the operation of juvenile justice is also characterized by long-term traditional foundations for the protection of human rights being progressive, having effective methods and positive results, and, most importantly, allowing one to see new variability.

The study of international legal acts on children's rights permitted a summarisation that the Republic of Kazakhstan, like other states, consistently forms national juvenile legislation. The legislation of the Republic of Kazakhstan on children's rights protection and law enforcement practice indicates that the legislation on minors has not found its systematization. Due to the existence of norms governing legal relations involving minors in various branches of law, it is impossible to talk about juvenile legislation itself. It can be characterized as interdisciplinary legislation on the child's legal status. Modernization of branch legislation ensuring children's rights should be systematic, purposeful, consistent, and based on constitutional and legal norms.

When analysing the national legal system as related to child's rights protection, it can be stated that it is headed up by the Constitution of the Republic of Kazakhstan, approved at the referendum on August 30, 1995. The basic law of Kazakhstan declares that the highest value is a person, his/her life, rights, and freedoms (Article 1). Recognizing them as the highest value means that the state has no more important task than caring for a person and his well-being[24].

Today, domestic legislation on the protection of child's rights, along with law enforcement activities of state authorities, is being systematically improved while considering the generally recognized norms of international law. The Code of the Republic of Kazakhstan on Administrative Offenses contains juvenile legislation norms, and with their help, the rights and interests of minors are protected in administrative legal relations and proceedings in cases of administrative offenses[25].

In the Republic of Kazakhstan, the idea of adopting a single codified law on children has been discussed relatively recently. We believe that this initiative will be implemented in the foreseeable future and juvenile law will become an independent branch of law. We believe that the improvement of the legislation will have a positive effect on the legal status of minors. The administrative and legal status of the child is of particular concern, because of how the issue of minors' legal status is observed in the system of relations between the minor and his legal representatives.

The UN Convention's "On the Rights of the Child," and the Law of the Republic of Kazakhstan's "On the Rights of the Child"[26] are the most important legal documents regarding the provision of the child's rights, of one who is subject to justice. In accordance with this norm, children have the right to express their opinions when solving any problem in the family that affects their interests and the right to be heard in any legal procedure. Considering the viewpoint of a child who has reached the age of ten is mandatory if it does not conflict with his/her interests. As well, the child's right to be heard does not mean "the right to self-determination," but only means that he/she has the right to "participate in decision-making."

Article 8 of the Convention on the Rights of the Child stipulates the state's obligation to ensure the children's right "to preserve his identity, including nationality, name, and family ties, as provided by law, without allowing unlawful interference." Today, it is essential to consider the reform of legislation in the juvenile justice field and the protection of children from all types of violence and ill-treatment. Since 2001, the project "Juvenile Justice in Kazakhstan" has been implemented to change the methods of working with minors in the Kazakhstan's juvenile justice system. The purpose of juvenile justice is to prevent offenses committed by minors.

24 Constitution of the Republic of Kazakhstan of 30 August 1995 <https://adilet.zan.kz/eng/docs/K950001000_> accessed 19 April 2023.

25 Code of the Republic of Kazakhstan No 235-V 'On Administrative Offenses' of 5 July 2014 <https://adilet.zan.kz/eng/docs/K1400000235> accessed 19 April 2023.

26 Law of the Republic of Kazakhstan No 345 'On the Rights of a Child in the Republic of Kazakhstan' of 8 August 2002 <https://adilet.zan.kz/eng/docs/Z020000345_> accessed 19 April 2023.

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Juvenile justice, which is a specialized judicial subsystem, should be carried out within the framework of a complex, mixed jurisdiction. In part 3 of Art. 3 of the Constitutional Law of the Republic of Kazakhstan's "On the Judicial System and the Status of Judges in the Republic of Kazakhstan," a specialization of courts is provided and demonstrates the creation of specialized courts for this purpose, including those for juvenile cases, to be carried out in Kazakhstan[27]. The Republic of Kazakhstan's policy expressly states that to further improve the judicial system, it is crucial to address the issue of creating the institution of specialized courts, including juvenile ones.

The process of creating such institutions is not an easy task. Therefore, during the initial stage, it is possible to create a juvenile board in the regional and equivalent courts (for example, such a board has existed in the St. Petersburg City Court since 1962), and then create an interdistrict juvenile court. The creation of district juvenile courts is inexpedient because the number of proceedings on minors in the total array of cases and materials considered by the courts is small. However, the requirements that the judicial composition of such collegiums must meet should be analysed in detail. First, it should be formed among judges who do not only have high professional legal knowledge, but also are specialized in children's and youth pedagogy, psychology, and defectology.

It is necessary that these specialized courts (colleges) for juvenile cases should be courts, as indicated above, of complex, mixed jurisdiction, i.e., in addition to considering criminal cases and related problems of protecting the rights and legitimate interests of minors, these courts should consider cases of civil, administrative, and other jurisdictions relating to persons under the age of majority. In other words, this court should have a strict social orientation. The law must allow for a provision on the inadmissibility of referring such cases to courts of general jurisdiction, as well as to other bodies and organizations. Also, to participate in the consideration of juvenile cases, the courts have the right to involve representatives of the state and organizations in charge of the protection of minors' rights and the provision of social assistance to them (for example, guardianship and guardianship authorities, commissions for minors, health authorities, etc.).

Created within the framework of the pilot project, "Juvenile Justice in Kazakhstan," in the city of Almaty and the Almaty region as an experiment, specialized institutions for accompanying minors in the judicial process have shown their effectiveness and relevance. As a result of this experiment, the Presidential Decree of August 23, 2007, established specialized interdistrict courts for minors in Almaty and Astana, authorized to consider cases of administrative offenses against minors and civil cases affecting their interests.

The main goal of the "Juvenile Justice in Kazakhstan" project is to create and ensure the functioning of a specialized justice system for minors who are suspected or accused of committing a crime.

Analysis of experience with juvenile justice has shown that there are options for solving this problem in Kazakhstan, as they were successfully implemented in the Auezovsky district of the Almaty city and the Karasay district of the Almaty region within the pilot project "Juvenile Justice in Kazakhstan," initiated by the "Soros-Kazakhstan" Charitable Foundation.

The implementation of the pilot project during the period from 2003 to 2006 has significantly improved the criminal justice practice. Another positive factor is that during the four years of the project, the following results were obtained:

27 Law of the Republic of Kazakhstan No 132 'On the Judicial System and the Status of Judges in the Republic of Kazakhstan' of 25 December 2000 <https://adilet.zan.kz/eng/docs/Z000000132_> accessed 19 April 2023.

1) The number of juvenile defendants subjected to the measure of restraint in the form of arrest was reduced (68 of 485 juveniles were arrested).
2) The services of a lawyer specializing in juvenile cases were provided around the clock.
3) A social psychologist was present from the moment of actual detention.
4) By the current legislation of the Republic of Kazakhstan, criminal prosecution at the investigation stage was stopped for 131 juveniles out of 345.
5) As a result of careful consideration of the circumstances of each criminal case, the number of cases in which the charges were mitigated increased: 34 minors' criminal prosecution was terminated, 14 minors' articles of the Criminal Code of the Republic of Kazakhstan were reclassified as less serious).
6) Non-custodial punishments were applied in respect to 61 out of 91 juveniles.

The most important result was that, based on the positive results of this pilot project, the Concept for the Development of Juvenile Justice in Kazakhstan envisages the creation of juvenile justice as part of specialized services: juvenile police, juvenile prosecutors, juvenile courts, juvenile services, the bar, the criminal executive inspection for juvenile affairs, social psychologists, and regional child protection agencies.

Thus, the creation of a juvenile justice system, including through the development of social service institutions, will strengthen society's stability, reduce tensions among minors, and actively influence the processes taking place in society.

It can be noted that, in the development of juvenile delinquency prevention, its step-by-step, timely legislative provision has played a great role.

To further develop and improve the juvenile justice system in the Republic of Kazakhstan, the Concept of the Development of the Juvenile Justice System in the Republic of Kazakhstan was approved. The concept provided for the gradual introduction and development of juvenile justice elements in Kazakhstan, which would contribute to enhancing the effectiveness and quality of the implementation of juvenile justice in all its stages. In this long-term document, it is noted that the judiciary of Kazakhstan fulfils the requirements for ensuring effective legal protection of the rights, freedoms, and interests of citizens, organizations, and the state.

It is determined that the main perspective of the judiciary improvement is the specialization of courts and judges, such as the separation of juvenile courts. Meanwhile, juvenile courts should be the major link with the juvenile justice system. The jurisdiction of juvenile courts also includes cases of administrative offenses, for example, infringement of the rights of minors, non-fulfilment by parents or persons who replace them of their duties regarding the upbringing of children, involvement of minors in the commission of an administrative offense, etc. It will be proper for these cases to be considered by a specialized court, since this category of cases has its specificity and can cause certain difficulties[28].

It is proposed to further expand the scope of probation services in Kazakhstan following the example of the U.S., Germany, and Italy, where both pre-trial and post-trial probation operate in the sphere of juvenile justice. Probation services provide rehabilitation measures for juvenile offenders, providing them with psycho-social support, mediation in the framework of restorative justice, organizing educational measures, and other socially useful activities.

28 G Suleimenova, 'Judicial protection of the rights and legitimate interests of minors' (2003) 4 World of Law 11.

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In the sphere of probation application, it is proposed: A) As part of the prevention of juvenile delinquency, to introduce pre-trial probation control; and B) Concerning juvenile delinquents, as well as children with deviant behaviour in the judicial stage, to introduce probation, to carry out rehabilitation and adaptation measures with minors involved in court proceedings.

The issues of introducing social workers into the process of juvenile justice administration require the adoption of several measures to further improve the Republic of Kazakhstan's legislation in the field of juvenile justice, including:

- at the legislative level, taking measures to organize the activities of social workers (psychologists) who will provide social support for juvenile justice as employees of juvenile authorities (courts, police, local executive bodies in the field of education and healthcare), or non-governmental organizations (based on cooperation agreements between courts and other organizations for the prevention of juvenile delinquency)
- determining the procedural status of social workers, allowing them to participate in the case trials committed by minors
- activation of the activities of commissions for minors, educational organizations, mediation centres, and school groups in resolving conflict situations for schoolchildren who miss classes or are prone to committing offenses, etc.

In modern conditions, it is advisable to take a set of measures aimed at strengthening the state policy regarding children. In particular, measures include: form juvenile justice in the country, including juvenile justice and advocacy; create a system of special services for social and legal assistance to minors and their parents; ensure monitoring of legislative acts on the life of children; restrict children from information that is harmful to their well-being; develop protection mechanisms; adopt an appropriate law; create an interdepartmental commission for the protection of minors' rights to coordinate the actions of all ministries interested in this problem.

Summarizing the above, we consider it necessary to highlight the following priority areas of the administrative and legal protection of child's rights in Kazakhstan: improvement of juvenile justice bodies, improvement of the quality of social assistance for children, and prevention of juvenile delinquency. When forming international standards of judicial protection and representation of the interests of minor participants in justice, it is important to maintain a balance between their participation and non-participation in court proceedings, between publicity and confidentiality of court proceedings, and between protection measures and the responsibility of minor offenders. On one side, by following the tactics of preventing children from participating in legal proceedings, we try to protect them from encountering an official legal process; while it is otherwise impossible to resolve a legal dispute without their direct and effective participation. Therefore, the question of forming international legal framework in juvenile justice is a question of finding a balance between the best interests of the child and the interests of the state in the field of resolving legal disputes and ensuring legal certainty.

5 CONCLUSIONS

A child is a nominal social component of society and the state. It reflects the world in which it lives and the social relations in which it grows. Therefore, the further fate of the entire civil society of the state, its economic, political, and socio-cultural institutions will depend on the

quality of the authorized state institutions to ensure proper conditions for the development of the child as an individual.

During the last decades, the world community considers the issue of legal protection and protection of the rights of the child, childhood, and motherhood, because it understands that each successive generation affects the settlement of world security and peace, mutual understanding and respect, stability, and development of all spheres. A child who receives the necessary support from the state in the process of his growth and formation as a person is the guarantor of his sovereign development, international recognition, the basis of all democratic transformations and processes that take place, and has a main goal to improve everyone's well-being.

Developed countries are creating an extensive network of juvenile justice authorities which allows them to cover and protect all aspects of the lives of minors, ensuring a quality level in all sectors. In developed foreign countries, a complex system of prevention and prevention of neglect, as well as bringing minors to legal and other responsibilities, has been created and is functioning. The juvenile justice system in these countries is unified, coherent, and integral.

We consider it necessary to highlight the following priority areas of the administrative and legal protection of children's rights in Kazakhstan: improvement of juvenile justice bodies, improvement of the quality of social services for children and special institutions for children, ensuring the protection of children's rights and combating violence in the family and team, and eradicating cruel treatment of children, prevention of juvenile delinquency.

Also, in modern conditions, it is advisable to take a set of measures aimed at strengthening the state policy regarding children, in particular: to form juvenile justice in the country, including juvenile justice and advocacy; create a system of special services for social and legal assistance to minors and their parents; ensure monitoring of legislative acts on the lives of children; restrict children from information that is harmful to their well-being; develop protection mechanisms; adopt an appropriate law; create an interdepartmental commission for the protection of minors' minors to coordinate the actions of all ministries invested in this problem.

It is necessary to implement measures to ensure children's access to justice in Kazakhstan. They cover the appointment of ombudsmen; the creation of "hotlines;" the provision of free legal assistance; the introduction of an 'online policeman' who can be contacted via social media or email for advice or to convey information to the police; creation of children's rooms in social assistance centres; implementation of "complaint boxes" in schools; use of video conferencing systems and closed-circuit television for providing evidence during court hearings; creation of special courts for juvenile offenders with specialized judges; and the use of non-custodial alternatives in juvenile justice, including mediation, probation, and family rehabilitation.

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Case Note

FEATURES OF ENSURING THE RIGHT TO LIBERTY AND PERSONAL INTEGRITY IN CRIMINAL PROCEEDINGS UNDER THE CONDITIONS OF MARTIAL LAW: PRECEDENT PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS AND UKRAINIAN REALITIES

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ABSTRACT

This article is devoted to the study of problems related to the peculiarities of ensuring the right to freedom and personal integrity in criminal proceedings under martial law. It is noted that one of the principles of the state policy of Ukraine in the spheres of national security and defence is the protection of people and citizens, their life and dignity, and their constitutional rights and freedoms. The article analyses the conditions of admissibility of derogation, i.e., Ukraine's right to derogate from the observance of individual rights, guaranteed, first of all, by Art. 5 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR). The authors determine the constitutionality of legislative innovations caused by unprovoked Russian aggression and, as a result, the introduction of martial law in our country. The position is argued that the limitation of the right to freedom and personal integrity provided for by the Criminal Procedure Code of Ukraine (Parts 6-7 of Art. 176) only by the use of detention pursues a legitimate goal, which is to prevent persons who are reasonably suspected of committing a number of crimes from hiding from the investigation and the court, as well as perform any actions provided for in Part 1 of Art. 177 of the CPC of Ukraine, which, taking into account the difficult situation in the country associated with military aggression, can be considered fully justified. At the same time, in the future, at the stage of extending the term of detention, the suspect or the accused is actually deprived of the right to request his release from custody and the application of an alternative preventive measure to him, which does not correlate with international standards of limiting the right to freedom and personal integrity and does not comply with the legal positions of the European Court of Human Rights. The authors emphasise that the quasi-automatic extension of the term of detention of a person in custody without appropriate requests from the prosecution, without checking the presence of new or previous risks and assessing the expediency of further deprivation of liberty, introduced into the national legislation, should be considered as a violation of the conventional norms-guarantees established by § 3 Art. 5 of the ECHR.

1 INTRODUCTION

The state's recognition of a person's life, health, honour, dignity, inviolability, and security as the highest social value (Art. 3 of the Constitution of Ukraine)[1] indicates a significant change in priorities, the democratisation of society and its desire to create a truly lawful state, one of the components of which is the principle of connection of the state with the rights and freedoms of man and citizen. The ratification on 17 July 1997 by the Verkhovna Rada of Ukraine of the European Convention for the Protection of Rights and Fundamental Freedoms[2] (hereinafter the ECHR or the Convention) has caused significant practical consequences, which lie in the opening of fundamentally new opportunities for any person whose rights, in their opinion, have been violated by state bodies, to apply for their protection directly to the European Court of Human Rights (hereinafter the ECtHR, the Court, the European Court). The realisation of the rights and freedoms proclaimed by the Convention is not only the main goal and function of the state but also a vital task of the

1 Constitution of Ukraine No 254k/96-VR of 28 June 1996 <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text> accessed 20 December 2022.

2 The Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 20 December 2022.

citizens themselves. They are no less interested in the exercise of their rights and freedoms than the society and the state. Here, it is not the subordination of individual interests to the state that is obvious but their reasonable combination.

Having proclaimed at the constitutional level: 'The establishment and provision of human rights and freedoms is the main duty of the state' (Art. 3),[3] Ukraine confirmed that the provision of human rights and freedoms is the main purpose of the existence and functioning of the state in the civilised world. In addition, in accordance with Art. 3 of the Law of Ukraine 'On the National Security of Ukraine' dated 21 June 2018 No. 2469-VIII, one of the principles of state policy in the spheres of national security and defence is the protection of people and citizens, their lives and dignity, constitutional rights and freedoms, and safe living conditions.[4]

The conventional law: 'Everyone has the right to liberty and security of person. No one can be deprived of liberty, except in such cases and in accordance with the procedure established by law' (para. 1 of Art. 5)[5] became a determinant that led to the introduction and development in domestic doctrine and law enforcement practice of the theory (rule) of the existence of a presumption in favour of abandonment of a person at liberty, the essence of which is formulated in the precedent practice of the ECtHR (for example, the decisions on the cases *Witold Lithuania v. Poland*[6] and *Ambruszkiewicz v. Poland*)[7] and lies in the fact that the use of detention as the most severe preventive measure can be justified only in cases where milder preventive measures are recognised as insufficient to ensure state-protected interests (both personal and public).

In the special legal literature based on a systematic analysis of the precedent practice of the European Court, a number of rules for implementing the presumption of freedom are distinguished: 1) the need to observe the presumption of freedom is not limited to solving the issue of keeping a person in custody, but extends to all cases related to the restriction of a person's freedom; 2) deprivation of a person's liberty must satisfy the requirement of proportionality; 3) the national judicial body in each case must necessarily consider the possibility of applying measures alternative to deprivation of liberty and apply detention only in the event where the relevant measures have been considered and recognised as unable to ensure the effectiveness of criminal proceedings; 4) compliance with the procedure established in the national criminal procedural legislation for consideration and resolution of the issue of deprivation of liberty, as well as guarantees provided to a person by national law and the Convention in connection with consideration of the issue of deprivation of liberty; 5) periodic review of the court decision on the deprivation of a person's liberty, taking into account the dynamics of the actual circumstances and the person's release, as soon as the deprivation of liberty ceases to be reasonable.[8]

3 Constitution of Ukraine (n 5).

4 Law of Ukraine No 2469-VIII of 21 June 2018 'On National Security of Ukraine' <https://zakon.rada.gov.ua/laws/show/2469-19#Text> accessed 20 December 2022.

5 The Convention for the Protection of Human Rights and Fundamental Freedoms (n 6).

6 *Witold Litwa v Poland* App no 26629/95 (ECtHR, 4 April 2000) <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-6873%22]}> accessed 20 December 2022.

7 *Ambruszkiewicz v. Poland* App no 38797/03 (ECtHR, 4 May 2006) <https://hudoc.echr.coe.int/eng#{%22appno%22:[%2238797/03%22]}> accessed 20 December 2022.

8 V A Zavtur, 'Presumption of personal freedom when applying clause 'c' of Article 5 of the Convention on the Protection of Human Rights and Fundamental Freedoms: practice of the European Court of Human Rights and the national context' in *Practice of the European Court of Human Rights in activity bodies of the prosecutor's office and the court: challenges and prospects: cont. and International science and practice conference (June 13, 2018)* (National Academy of the Prosecutor's Office of Ukraine 2018) 84-85 <http://hdl.handle.net/11300/10786> accessed 20 December 2022.

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However, the increased public danger of certain categories of crimes, in particular, against the foundations of national and public security, peace, human security, and international legal order, against the established order of military service, forces the legislator to abandon the normative requirement to substantiate the grounds for the application of a preventive measure in favour of maintaining public order and ensuring the safety of its citizens. The legitimacy of this kind of deviation from conventional obligations is the subject of this study.

2 DEROGATION

The unprovoked large-scale military aggression against Ukraine by the Russian Federation (hereinafter referred to as the RF) actualised the need for rapid and significant legislative transformation in many spheres of public life, in particular, criminal justice, which is at the forefront of the fight against crime in this most difficult time for Ukraine.

In this context, the study of William Burke-White, who drew a rather interesting conclusion (especially in the current conditions of aggression against Ukraine) about the existence of a correlation between the degree of protection of human rights and the possibility/impossibility of participating in international aggression, is of some interest. He concludes that: (1) states in which the rights and freedoms of people and citizens are systematically violated will, as a rule, take part in international aggression (the RF is a striking example); (2) states in which human and citizen rights and freedoms are protected at a relatively adequate level, most likely will not participate in international aggression; 3) states, in which the rights and freedoms of man and citizen are recognised and respected, will participate in international intervention exclusively for the purpose of protecting the rights and freedoms of citizens from violations by their own state while observing the norms of international law.[9]

In our opinion, the rights and freedoms of a person and a citizen are the main objects of the state's national security policy, and the modern paradigm of domestic criminal procedural legal relations determines the mutual correlation between the provision of national security, its protection from internal and external threats, and the observance of human rights and freedoms, guaranteed by international legal documents, including the Convention on the Rights of the Child. The need for a certain compromise between the protection of national security and, enshrined in Art. 5 of the Convention, a fundamental right – the right of a person to freedom and personal inviolability – led to the normative correction of criminal procedural legal relations, namely the introduction of extraordinary procedures when applying preventive measures in criminal proceedings under martial law.

For the first time, the Criminal Procedure Code of Ukraine[10] (hereinafter the CPC of Ukraine) was supplemented with section IX-1 'Special regime of pre-trial investigation in conditions of war, state of emergency or in the area of an anti-terrorist operation' in 2014 by the Law of Ukraine 'On Amendments to the Criminal Procedure Code of Ukraine regarding the special regime of pre-trial investigation in conditions of war, state of emergency or in the area of anti-terrorist operation' dated 12 August 2014 No. 1631-VII,[11] which briefly regulated

9 For more details, see W W Burke-White, 'Human Rights and National Security: The Strategic Correlation' (2004) 17 Harvard Human Rights Journal 254 <https://www.law.upenn.edu/cf/faculty/wburkewh/workingpapers/.pdf> accessed 20 December 2022.

10 Criminal Procedure Code of Ukraine No 4651-VI of 13 April 2012 <https://zakon.rada.gov.ua/laws/show/4651-17#Text> accessed 20 December 2022.

11 Law of Ukraine No 1631-VII of 12 August 2014 'On amendments to the Criminal Procedure Code of Ukraine regarding the special regime of pre-trial investigation in conditions of war, state of emergency or in the area of an anti-terrorist operation' <https://zakon.rada.gov.ua/laws/show/1631-18#n2> accessed 20 December 2022.

the relevant legal regimes. Taking into account the realities in the conditions of Russian aggression and the temporary occupation of the territories of our state, a number of Laws of Ukraine made changes to Section IX-1 of the CPC of Ukraine,[12] which established the features of pre-trial investigation and court proceedings under conditions of martial law, including in relation to ensuring the right to freedom and personal integrity.

A systematic analysis of legislative innovations related to the normalisation of the institution of preventive measures under martial law allows us to conclude that this is a special procedure for their application, which in some cases indicates that our state will not be able to fulfil certain obligations regarding, in particular, its compliance with international standards in the field of human rights in full due to objective reasons, the state of necessity. Such an order, most likely, can be characterised not as simplified but as compensatory, aimed at ensuring the synchronisation of criminal procedural activities with the needs of today.

Having embarked on the path of integration with the European Union, Ukraine undertook to guarantee to everyone under its jurisdiction the rights and freedoms defined in the Convention and its Protocols, which is implemented by taking into account the norms of the Convention and the practice of the European Court in national law enforcement.

The state's right to derogate from obligations during special situations (derogation procedure) is provided for in Art. 15 of the Convention, which provides that:

In time of war or other public danger threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention, only to the extent that urgency requires position, and provided that such measures do not conflict with its other obligations under international law.[13]

Note that the state has the right to use the derogation procedure only 'to the extent that it is strictly required by the urgency of the situation' (which, of course, is the military aggression of the RF against Ukraine). National discretion regarding the possibility of derogating from convention norms is not unlimited.

The European Court, in the decision on the case *A. and others v. United Kingdom* dated 19 February 2009, emphasises, in particular, that 'even in the most difficult circumstances, such as the fight against terrorism, and regardless of the conduct of the person concerned, the European Convention absolutely prohibits torture and inhuman or degrading treatment and punishment'.[14]

12 Law of Ukraine No 2111-IX of 03 March 2022 'On Amendments to the Criminal Procedural Code of Ukraine and the Law of Ukraine "On Pre-trial Detention" regarding additional regulation of law enforcement activities under martial law' <https://zakon.rada.gov.ua/laws/show/2111-20#n5> accessed 20 December 2022; Law of Ukraine No 2125-IX of 15 March 2022 'On Amendments to the Criminal Procedural Code of Ukraine regarding the procedure for canceling a preventive measure for military service under conscription during mobilization, for a special period or its change for other reasons' <https://zakon.rada.gov.ua/laws/card/2125-20> accessed 20 December 2022; Law of Ukraine No 2137-IX of 15 March 2022 'On Amendments to the Criminal Procedural Code of Ukraine and the Law of Ukraine "On Electronic Communications" regarding increasing the effectiveness of pre-trial investigation "on hot leads" and countering cyberattacks' <https://zakon.rada.gov.ua/laws/show/2137-20#n5> accessed 20 December 2022; Law of Ukraine No 2201-IX of 14 April 2022 'On Amendments to the Criminal Procedure Code of Ukraine on Improving the Procedure for Conducting Criminal Proceedings under Martial Law' <https://zakon.rada.gov.ua/laws/show/2201-20#n2> accessed 20 December 2022; Law of Ukraine No 2462-IX of 27 July 2022 'On Amendments to the Criminal Procedure Code of Ukraine regarding the improvement of certain provisions of pre-trial investigation under martial law' <https://zakon.rada.gov.ua/laws/show/2462-20#n2> accessed 20 December 2022; Law of Ukraine No 2472-IX of 28 July 2022 'On Amendments to the Criminal and Criminal Procedural Codes of Ukraine and other legislative acts of Ukraine regarding the regulation of the procedure for the exchange of persons as prisoners of war' <https://zakon.rada.gov.ua/laws/show/2472-20#n11> accessed 20 December 2022.

13 The Convention for the Protection of Human Rights and Fundamental Freedoms (n 6).

14 *A. and Others v the United Kingdom* App no 3455/05 (ECtHR, 19 February 2009) <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22003-2638619-2883392%22%5D%7D> accessed 20 December 2022.

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In the legal doctrine[15] and precedent practice[16] of the ECtHR, the criteria (conditions) for the legality of derogating from conventional obligations when conducting criminal proceedings in an emergency situation have been developed, namely: (1) the presence of an exceptional threat; (2) notification;[17] (3) the proportionality of the measures applied during the corresponding retreat, the severity of the emergency situation;[18] (4) inviolability of absolute rights and freedoms;[19] (5) legality.[20]

Thus, in particular, in the decision of the European Court of Justice in the case *Ireland v. United Kingdom* (Application No. 5310/71) dated 18 January 1978, it was stated:

When a state is dealing with an emergency situation that threatens the life of the nation, it would be defenseless if it were required to do everything at once to provide each of its chosen means of action with all the guarantees compatible with the primary requirements for the proper functioning of the authorities and the restoration of peace in the community from the very beginning. The interpretation of Article 15 should leave room for progressive adaptation (p. 220).[21]

In another decision in the case of *Baş v. Turkey* from 3 March 2020[22] (Application No. 66448/17), the Court emphasises:

> States do not enjoy unlimited freedom of action in this regard. It is the Court that must decide whether, in particular, states have gone beyond the "extent strictly necessary by the urgency" of the crisis. Thus, domestic discretion is accompanied by European supervision. In particular, if the derogating measure interferes with a fundamental Convention right, such as the right to liberty, the Court must ensure that it was a genuine response to an emergency, that it was fully justified by the particular circumstances of the emergency, and that adequate safeguards were provided against abuse. In exercising this supervision, the Court must give due consideration to such significant factors as the nature of the rights affected by the derogation and the circumstances giving rise to the emergency and its duration.[23]

15 For more details, see O V Lazukova, *Special regime of pre-trial investigation in conditions of war, state of emergency or in the area of an anti-terrorist operation (Pravo 2018); H Teteryatnik, Criminal proceedings in conditions of emergency legal regimes: theoretical, methodological and praxeological foundations* (Helvetica Publishing House 2021); 'Waiver of obligations during an emergency' <https://kau.in.ua/press-center/espch/vdstup_vd_zobovjazan_pd_chas_nadzvichajnoji_situacji/> accessed 20 December 2022.

16 See, for example, *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57506%22%5D%7D> accessed 20 December 2022; Aksoy v Turkey App no 21987/93 (ECtHR, 18 December 1996) <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58003%22]}> accessed 20 December 2022; *Brannigan and McBride v the United Kingdom* App no 14553/89 and 14554/89 (ECtHR, 26 May 1993) <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-9555%22]}> accessed 20 December 2022.

17 Official notification (preliminary or post factum) of the Secretary General of the Council of Europe about the measures taken by the state and the reasons for taking them.

18 The restriction must have a legitimate aim and be proportionate between the means of restriction used and the aim to be achieved.

19 The right to life; prohibition of torture, cruel, inhuman or degrading treatment; prohibition of slavery and servitude; prohibition of punishments in the absence of law; prohibition of deprivation of liberty on the sole grounds that a person is unable to fulfil any contractual obligation; punishment solely on the basis of law; recognition of the legal personality of every person; freedom of thought, conscience and religion.

20 If one or another measure restricts human rights, these restrictions should be defined as precisely as possible, moreover, they should be necessary and correspond to the set goal.

21 *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57506%22%5D%7D> accessed 20 December 2022.

22 *BAŞ v. TURKEY* App no 66448/17 (ECtHR, 03 March 2020) <https://hudoc.echr.coe.int/fre?i=001-201761> accessed 20 December 2022.

23 See the decision in the case of Aksoy v Turkey App no 21987/93 (ECtHR, 18 December 1996) <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58003%22]}> accessed 20 December 2022; *Brannigan and McBride v the United Kingdom* App no 14553/89 and 14554/89 (ECtHR, 26 May 1993) paras 48-66 <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-9555%22]}> accessed 20 December 2022.

While resorting to derogation from convention obligations, the legal system of specific states must provide sufficient guarantees for the protection of human rights, in particular, by applying such an institution as habeas corpus, ensuring the right to access professional legal assistance, informing close relatives or other persons about detention, and obtaining medical help.

In the context of the above, it should be noted that Ukraine was forced to resort to the right to derogate from its obligations under the Convention in 2015 as a result of the aggression of the RF, its occupation of parts of the Donetsk and Luhansk regions, as well as the annexation of the Autonomous Republic of Crimea and the city of Sevastopol, which made our state's full implementation of a number of contractual obligations in the field of human rights in these territories impossible. On 21 May 2015, the Verkhovna Rada of Ukraine adopted Resolution No. 462-VIII, which adopted the Statement of the Verkhovna Rada of Ukraine 'On the withdrawal of Ukraine from certain obligations defined by the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms'.[24] Ukraine's withdrawal from certain obligations was informed by submitting Verbal Notes with Declarations and their annexes by the Secretary General of the United Nations and the Secretary General of the Council of Europe, as well as submitting relevant information to the ECtHR.[25] In addition, a number of special laws were adopted, which regulated the possibility of limiting human rights. A systematic analysis of the cited legal acts allows us to state that Ukraine has made a departure from international obligations that guarantee the right to personal integrity (preventive detention), judicial control over the observance of the rights, freedoms, and interests of individuals (transfer of certain powers of investigative judges to prosecutors), other constitutional rights, namely restrictions on staying on the streets and other public places during a certain period of the day without specified documents, temporary restrictions or bans on the movement of vehicles and pedestrians on the streets, roads, and areas, verification of identity documents of individuals, and, if necessary, an inspection of things, vehicles, luggage and cargo, office premises and citizens' homes, except for the restrictions established by the Basic Law. At the same time, large-scale unprovoked military aggression on the part of the RF caused in 2022 the need to further adapt domestic criminal procedural legislation to today's requirements, in particular, in the sense of the realisation of certain fundamental human rights and freedoms, including the right to freedom and personal integrity.[26]

3 THE NON-ALTERNATIVE CHOICE OF DETENTION IN CUSTODY

Laws of Ukraine 'On Amendments to the Criminal Code and Criminal Procedural Code of Ukraine on Improving Responsibility for Collaborative Activities and Features of the Application of Preventive Measures for Crimes Against the Basics of National and Public

24 Resolution of the Verkhovna Rada of Ukraine dated No 462-VIII of 21 May 2015 'On the Statement of the Verkhovna Rada of Ukraine "On the withdrawal of Ukraine from certain obligations defined by the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms"' <https://zakon.rada.gov.ua/laws/show/462-19#Text> accessed 20 December 2022.

25 Concerning a given State (or the European union) <https://www.coe.int/en/web/conventions/concerning-a-given-state-or-the-european-union-?module=declarations-by-state&territoires=&codeNature=0&codePays=U&numSte=&enVigueur=true&ddateDebut=05-05-1949&ddateStatus=05-02-2022> accessed 20 December 2022.

26 For more details, see A R Tumanyants, I O Krytska, 'Exercise of Ukraine's right to derogate from Article 5 of the Convention for the Protection of Human Rights and fundamental freedoms: case law of the European Court of Human Rights in criminal proceedings and domestic realities in martial law' (2022) 5 Legal scientific electronic journal 603-607 <http://www.lsej.org.ua/5_2022/145.pdf> accessed 20 December 2022.

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Security' No. 2198-IX dated 14 April 2022[27] and 'On Amendments to the Criminal Procedural Code of Ukraine regarding the selection of preventive measures for servicemen who committed war crimes during martial law' No. 2531-IX dated 16 August 2022[28] provide a normatively established extraordinary procedure for choosing a preventive measure exclusively in the form of detention under certain conditions, namely: (a) introduction of martial law; (b) a person is suspected or accused of committing crimes provided for in Arts. 109-114[2], 258-258[5], 260, 261, and 437-442 of the Criminal Code of Ukraine[29] (hereinafter the CC of Ukraine); (c) a serviceman is suspected or accused of committing crimes provided for by Arts. 402-405, 407, 408, and 429 of the CC of Ukraine.[30]

We will immediately emphasise that according to the ordinary procedure, in accordance with Part 4 of Art. 176 of the CPC of Ukraine,[31] the application of any preventive measure, in particular, detention for any period, relates to the subject of referral to the investigating judge and the court.

Thus, with the introduced changes, in the presence of risks provided for in Art. 177 of the CPC of Ukraine[32] to persons who are suspected or accused of committing crimes against the foundations of national security, public safety, peace, human security, and international legal order, as well as to military personnel who are suspected or accused of committing crimes against the established order of military service (military criminal offences), no other preventive measure softer than detention can be applied.

The purpose of the legislative changes that took place in connection with the adoption of the above-mentioned Laws was, as follows from the explanatory notes, to prevent existing facts and risks of violations by persons suspected (accused) of committing serious and especially serious crimes against the foundations of national and public security of Ukraine, the requirements of the CPC of Ukraine, concealment from pre-trial investigation bodies and the court, resulting in non-fulfilment by the latter of the provisions of Art. 2 of the CPC of Ukraine, the tasks of criminal proceedings, under the conditions of the existing military aggression of the RF against Ukraine, during which various forms and methods of destabilisation and influence on the internal political and social processes of the state are used,[33] as well as the impossibility of applying any other preventive measures, except detention, to servicemen who committed separately defined war crimes during martial law.[34] However, in pursuing the above-described goal, the legislator did not provide a systematic approach to making corrections in the text of the criminal procedural law.

27 Law of Ukraine No 2198-IX of 14 April 2022 'On Amendments to the Criminal and Criminal Procedural Codes of Ukraine regarding the improvement of responsibility for collaborative activity and the specifics of the application of preventive measures for committing crimes against the foundations of national and public security' <https://zakon.rada.gov.ua/laws/show/2198-20#n12> accessed 20 December 2022.

28 Law of Ukraine No 2531-IX of 16 August 2022 'On Amendments to the Criminal Procedure Code of Ukraine regarding the selection of preventive measures for military personnel who committed war crimes during martial law' <https://zakon.rada.gov.ua/laws/show/2531-20#n3> accessed 20 December 2022.

29 Criminal Code of Ukraine No 2341-III of 5 April 2001 <https://zakon.rada.gov.ua/laws/show/2341-14#Text> accessed 20 December 2022.

30 Criminal Code of Ukraine (n 33).

31 Criminal Procedure Code of Ukraine (n 14).

32 Ibid.

33 Explanatory note to the Law of Ukraine project 'On Amendments to the Criminal and Criminal Procedural Codes of Ukraine regarding the improvement of responsibility for collaborative activities and the specifics of the application of preventive measures for committing crimes against the foundations of national and public security' <https://itd.rada.gov.ua/billInfo/Bills/pubFile/1247318> accessed 20 December 2022.

34 Explanatory note to the Law of Ukraine project 'On Amendments to the Criminal Procedure Code of Ukraine (regarding the selection of preventive measures for servicemen who committed war crimes during martial law)' <https://itd.rada.gov.ua/billInfo/Bills/pubFile/1339013> accessed 20 December 2022.

It must be stated that this is not the first attempt of the legislator to outline the list of criminal offences, for the commission of which the possibility of applying a preventive measure in the form of detention was imperatively established. Thus, by the Law of Ukraine 'On Amendments to the Criminal Code and Criminal Procedural Code of Ukraine regarding the inevitability of punishment for certain crimes against the foundations of national security, public security and corruption crimes' dated 7 October 2014 No. 1689-VII, Art. 176 of the CPC was supplemented by part five, according to which preventive measures in the form of personal commitment, personal guarantee, house arrest, bail cannot be applied to persons who are suspected or accused of committing crimes provided for by Arts. 109-114[1], 258-258[5], 260, and 261 of the CC of Ukraine.[35]

At the same time, the specified normative provisions of Part 5 of Art. 176 of the CPC of Ukraine by decision of the Constitutional Court of Ukraine No. 7-r/2019 dated 25 June 2019 were recognised as not in accordance with the Constitution of Ukraine (are unconstitutional). In the justification of its decision, it was indicated:

> Restrictions on the realization of constitutional rights and freedoms cannot be arbitrary and unfair, they must pursue a legitimate goal, be conditioned by the social necessity of achieving this goal, proportional and justified, in the case of limiting a constitutional right or freedom, the legislator is obliged to implement such legal regulation that will make it possible to optimally achieve a legitimate goal with minimal interference in the realization of this right or freedom (paragraph three of subsection 2.1 of paragraph 2 of the motivational part of the Decision dated June 1, 2016 No. 2-рп/2016). However, in the opinion of the Constitutional Court of Ukraine, the legislator, having established such a preventive measure as detention exclusively, for persons who are suspected or accused of committing crimes provided for in Articles 109-114[1], 258-258[5], 260, 261 of the Criminal Code of the Code of Ukraine, did not comply with the specified requirements.[36]

When expressing one's own position regarding the constitutionality of the above legislative innovations, it should be noted that, according to the practice of the European Court, certain guarantees of fundamental human rights and freedoms enshrined in the Convention can be narrowed in view of the degree of public danger of a certain category of crimes, in particular, terrorism. At the same time, it is important that the establishment of a lower threshold of these guarantees does not encroach on the very essence of human rights and freedoms, thereby depriving them of their value. Thus, in particular, in the decision in the case of *Fox, Campbell and Hartley v. United Kingdom*[37] of 30 August 1990, § 32, it is stated that in the situation of terrorism in Northern Ireland, the reasonableness of suspicion for arrest cannot always be justified on the basis of the same standards that apply to ordinary crime. Nevertheless, the Court should be able to make sure that the guarantee against arbitrary arrest and detention, provided for in paragraph 'c' of Art. 5 of the Convention, was ensured and thereby obtain at least some facts or information that could convince him that the arrested person is reasonably suspected of committing a crime.

Restriction of the right to freedom and personal integrity should be carried out only for a legitimate purpose, which is provided by law, is necessary for a democratic society, and

35 Criminal Code of Ukraine (n 33).

36 Case No 3-68/2018(3846/17, 2452/18, 3657/18, 347/19) [2019] Constitutional Court of Ukraine <https://zakon.rada.gov.ua/laws/show/v007p710-19#Text> accessed 20 December 2022.

37 *Fox, Campbell et Hartley v. RoyaumeUni* App no 12244/86; 12245/86; 12383/86 (ECtHR, 27 March 1991) <https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-62277&filename=AFFAIRE%20FOX%2C%20CAMPBELL%20ET%20HARTLEY%20c.%20ROYAUME-UNI.pdf&logEvent=False> accessed 20 December 2022.

takes into account the principle of proportionality, which is one of the components of the rule of law. As the ECtHR notes in its decisions,[38] the principle of proportionality means that when interpreting the Convention and its provisions to a specific situation, it is necessary to achieve a balance between the interests of society and human rights. That is, when analysing the articles of the Convention, in which, next to the fundamental right of an individual, it is said that the limitation of this right under certain circumstances, one should proceed from these criteria. So, for example, in Arts. 8-11 of the Convention, it is indicated that the state can limit the protected right if it is 'necessary in a democratic society'. The relevant provision means that any limitation of a protected right must be proportionate to the purpose pursued by this limitation. At the same time, however, the principle of proportionality should not change the very essence of the protected right. The principle of proportionality in the field of preventive measures requires that such restrictions are necessary under specific circumstances. In addition, investigative bodies must prove that the application of a less severe measure will not be sufficient to achieve the effectiveness of criminal proceedings. In order to implement this principle, a regulatory provision has been established that the court refuses to apply a preventive measure unless it is proven that milder measures cannot prevent the risks that the investigation will point to (Part 3 of Art. 176 of the CPC of Ukraine).[39]

The purpose of applying preventive measures in accordance with Part 1 of Art. 177 of the CPC of Ukraine[40] is to ensure that suspects and accused persons fulfil the procedural duties assigned to them, as well as to prevent attempts to hide from pre-trial investigation bodies and/or the court; destroy, hide, or distort any of the things or documents that are essential for establishing the circumstances of a criminal offence; illegally influence the victim, witness, suspect, accused, expert, specialist in the same criminal proceedings; obstruct criminal proceedings in other ways; commit another criminal offence or continue a criminal offence in which the person is suspected or accused.

The basis for the application of a preventive measure is complex and includes, first, the existence of a well-founded suspicion that a person has committed a criminal offence; secondly, the existence of a risk (risks) that give the investigating judge or the court, sufficient grounds to believe that the suspect or the accused may carry out the actions provided for in Part 1 of Art. 177 CPC of Ukraine.[41]

The general definition of the concept of 'reasonable suspicion' that a person has committed a criminal offence is formulated in the legal positions of the ECtHR. In particular, in the decision in the case *Nechiporuk and Yonkalo v. Ukraine*[42] dated 21 April 2011. The ECtHR noted that 'reasonable suspicion' presupposes the presence of circumstances or information that would convince an impartial observer that this person may have committed a certain crime. The requirement of reasonable suspicion is a significant part of the guarantee against arbitrary detention and keeping in custody. In the absence of reasonable suspicion, a person may not

38 *Soering v the United Kingdom* App no 14038/88 (ECtHR, 7 July 1989) para 89 <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57619%22]}> accessed 20 December 2022; *Matheieu-Mohin and Clerfayi v Belgium* App no 9267/81 (ECtHR, 2 March 1987) <https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=001-87677&filename=CLERFAYT%20AND%20OTHERS%20v.%20BELGIUM.pdf> accessed 20 December 2022; Ashingdane v UK App no 8225/78 (ECtHR, 12 May 1983) para 57 <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-73506&filename=ASHINGDANE%20V.%20THE%20UNITED%20KINGDOM.pdf> accessed 20 December 2022.

39 Criminal Procedure Code of Ukraine (n 14).

40 Ibid.

41 Ibid.

42 Nechiporuk and Yonkalo v Ukraine App no 42310/04 (ECtHR, 21 April 2011) <https://hudoc.echr.coe.int/fre#{%22tabview%22:[%22document%22],%22itemid%22:[%22001-104613%22]}> accessed 20 December 2022.

under any circumstances be detained or taken into custody for the purpose of forcing him to confess to a crime, to testify against other persons, or to obtain from him facts or information that may serve as a basis for reasonable suspicion. Therefore, the CPC stipulates that by the request of the investigator, the prosecutor for the application of a preventive measure, specific circumstances that give grounds to suspect a person of committing a criminal offence must be provided, as well as references to materials confirming these circumstances (clause 3, Part 1, Art. 184 of the CPC of Ukraine).[43] When considering such a request, 'the competent court must check not only compliance with the procedural requirements of national legislation, but also the validity of the suspicion on the basis of which the detention was carried out, and the legality of the purpose of this detention and further detention' (ECtHR decision in the case *Myronenko and Martenko v. Ukraine*[44] from 10 December 2009).

The second component of the basis for the application of a preventive measure is the risks specified in Part 1 of Art. 177 of the CPC of Ukraine.[45] Such risks are understood as the presence of information obtained from sources provided for by law, which testify to the possibility of the occurrence of the specified manifestations of illegal behaviour of the suspect or the accused in the future. Thus, proving the reasons for the application of preventive measures is predictive in nature; that is, it is aimed at the future, but it must be based on specific factual data that testify to the validity of the decision made. The presence of the specified risks must be confirmed by the relevant evidence, which together allows us to assert the existence of grounds for the application of a preventive measure with reasonable probability.

In addition, when deciding on the issue of choosing a preventive measure, the investigating judge or the court is obliged to assess all the circumstances in total, including those provided for in Art. 178 of the CPC of Ukraine:[46] 1) the weight of the available evidence about the commission of a criminal offence by the suspect or the accused; 2) the severity of the punishment that threatens the relevant person in case the suspect or the accused is found guilty of the criminal offence of which he is suspected or accused; 3) age and state of health of the suspect or the accused; 4) the strength of social ties of the suspect or the accused in his place of permanent residence, including the presence of his family and dependents; 5) presence of the suspect or the accused in a permanent place of work or study; 6) the reputation of the suspect or the accused; 7) property status of the suspect or the accused; 8) presence of criminal records of the suspect or the accused; 9) compliance by the suspect or the accused with the conditions of the applied preventive measures, if they were applied to him earlier; 10) presence of notification to a person of suspicion of committing another criminal offence; 11) the amount of property damage that the accused person is suspected of causing, or the amount of income that the accused person is suspected of receiving as a result of committing a criminal offence, as well as the weight of the available evidence that substantiates the relevant circumstances.

One of the precautionary measures used in criminal proceedings is detention. In accordance with Part 1 of Art. 183 of the CPC of Ukraine, detention is an exclusive preventive measure, which is applied only if the prosecutor proves that none of the milder preventive measures will be able to prevent the risks provided for in Art. 177 of the CPC of Ukraine, except for the cases provided for in Parts 6 and 7 of Art. 176 of the CPC of Ukraine.[47]

43 Criminal Procedure Code of Ukraine (n 14).

44 *Myronenko and Martenko v Ukraine* App no 4785/02 (ECtHR, 10 December 2009) <https://hudoc.echr.coe.int/fre?i=001-96195> accessed 20 December 2022.

45 Criminal Procedure Code of Ukraine (n 14).

46 Ibid.

47 Criminal Procedure Code of Ukraine (n 14).

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Therefore, as a general rule, the reason for choosing a preventive measure in the form of detention, in addition to the above-mentioned circumstances, also includes the fact that none of the milder preventive measures will be able to prevent the risks provided in Art. 177 of the CPC of Ukraine.[48] This approach of the legislator to the settlement of this issue is fully justified, given the fact that detention significantly limits a person's constitutional right to freedom and personal integrity, guaranteed by Art. 29 of the Constitution of Ukraine[49] and Art. 5 of the ECHR.[50] Not being absolute, this right may be subject to limitations, but when they are applied, guarantees must be observed to ensure the legality of interference with human rights.

The application of the mentioned provisions, which in general ensure the legality of the restriction of a fundamental human right, to the assessment of compliance with the content of Parts 6 and 7 of Art. 176 of the CPC of Ukraine[51] and Art. 29 of the Constitution of Ukraine[52] allows one to conclude that the limitation of the right to freedom and personal integrity provided for by the CPC of Ukraine only through the use of detention pursues a legitimate goal, which is to prevent persons who are reasonably suspected of committing crimes of the above category from hiding from investigation and court, as well as perform any actions provided for in Part 1 of Art. 177 of the CPC of Ukraine,[53] which, in our opinion, can be considered fully justified, taking into account the difficult situation in the country associated with military aggression. In this regard, the ECtHR noted that the Court's functions do not include the determination of measures that are the most appropriate from the point of view of an emergency situation since the question of the ratio of measures aimed at the effective fight against terrorism and the respect of individual rights belongs to the direct responsibility of the government. The Court reminds that each participating state is responsible for the life of [its] nation, and it is up to it to determine whether society is threatened and, if so, what measures should be taken to eliminate it. Directly and constantly facing dangerous realities, national authorities are, in principle, in a better position than an international judge to determine the presence of such a danger, the nature and possible degree of deviations from their obligations necessary to overcome it. Therefore, they should be given wide discretion in this matter (decision on the case *Ireland v. United Kingdom*[54] of 18 January 1978, Series A No. 25, paras. 78-79, para. 207).

That is, at the stage of choosing a preventive measure in criminal proceedings of the above-mentioned category of crimes, the right to freedom and personal integrity is limited by using only detention, but there are guarantees that are sufficient to establish the reasonableness of the intervention, because when choosing this preventive measure, the investigating judge ensures the implementation of the judicial control, during which he checks the validity of suspicion of a person in committing a crime, the presence of risks prescribed by law, and only on the condition that these two grounds are proven, issues a decision to keep the suspect in custody.

At the same time, it is necessary to pay attention to certain shortcomings of the considered innovations.

(A) Formulating Parts 6 and 7 of Art. 176 of the CPC of Ukraine, the legislator used approximately the same terminological construction:

48 Ibid.

49 Constitution of Ukraine (n 5).

50 The Convention for the Protection of Human Rights and Fundamental Freedoms (n 6).

51 Criminal Procedure Code of Ukraine (n 14).

52 Constitution of Ukraine (n 5).

53 Criminal Procedure Code of Ukraine (n 14).

54 *Ireland v the United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57506%22%5D%7D> accessed 20 December 2022.

> During the period of martial law, to persons/military personnel who are suspected or accused of committing crimes provided for in Articles 109-114[2], 258-258[5], 260, 261, 402-405, 407, 408, 429, 437-442 of the Criminal Code of Ukraine, the preventive measure specified in clause 5 of the first part of this article is applied exclusively[55].

The use of the word 'applied' in the context of the above sentence (instead of the word 'chosen') makes it possible to state the impossibility of further changing this preventive measure to any other, which de facto turns further judicial control (which is carried out during the pre-trial investigation and proceedings in the court of first instance and exists *de jure*) into a formality.

In our opinion, there is no possibility to change this preventive measure to another one, despite the passage of time, the reduction of the risks that led to the selection of a preventive measure in the form of detention, disclosure, and investigation of the crime, the assistance of the suspect or the accused to the authorities of the pre-trial investigation in the resolution of the crime, deterioration of health of the suspect or the accused, etc., violates the substantive component of the right to freedom and personal integrity, guaranteed by Art, 29 of the Constitution of Ukraine, because such legal regulation encroaches on the essential content of this right, turning it into a declaration.

In the case *Khairedinov v. Ukraine*, dated 14 October 2010, the European Court noted the following:

> There is a presumption in favor of dismissal. The Court has consistently noted in its practice that the second aspect of paragraph 3 of Article 5 of the Convention does not give the courts a choice between bringing the accused to justice within a reasonable time and temporarily releasing him during the proceedings. Until conviction, the accused must be presumed innocent and the purpose of this provision essentially requires his temporary release from custody as soon as his further detention ceases to be justified. The Court cannot fail to note the fact that during the entire period under consideration, the national authorities never considered the possibility of securing the applicant's appearance in court by applying alternative preventive measures, such as a stay order or bail, which the applicant expressly requested.[56]

In the decision on the case *Kharchenko v. Ukraine*[57] from 10 February 2011, the ECtHR emphasised that, according to para. 3 of Art. 5, after a certain period of time, only the existence of reasonable suspicion ceases to be a reason for deprivation of liberty, and the judicial authorities are obliged to provide other reasons for continued detention. In addition, such grounds must be clearly indicated by national courts.

In terms of regulation of Parts 6 and 7 of Art. 176 of the CPC of Ukraine,[58] the suspect or the accused is effectively deprived of the right to request his release from custody and the application of an alternative preventive measure to him since, as it is enshrined in the current law, in this category of criminal proceedings, such a right, in view of the prohibition of the application of alternative preventive measures, is a legal fiction.

(B) The Criminal Procedure Law establishes a clear and comprehensive list of cases in which it is permissible to apply a preventive measure in the form of detention (Part 2 of Art. 183).[59]

55 Criminal Procedure Code of Ukraine (n 14).

56 *Hayredinov v Ukraine* App no 38717/04 (ECtHR, 14 October 2010) <https://hudoc.echr.coe.int/fre?i=001-100958> accessed 20 December 2022.

57 *Kharchenko v Ukraine* App no 37666/13 (ECtHR, 3 October 2019) <https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-196145&filename=CASE%20OF%20KHARCHENKO%20v.%20UKRAINE.pdf&logEvent=False> accessed 20 December 2022.

58 Criminal Procedure Code of Ukraine (n 14).

59 Ibid.

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In particular, the indicated preventive measure can be applied to a previously unconvicted person who is suspected or accused of committing a crime punishable by imprisonment for a term of more than five years (clause 4, Part 2, Art. 183 of the CPC of Ukraine),[60] as well as to a previously convicted person who is suspected or accused of committing a crime punishable by imprisonment for a term of more than three years (clause 4, Part 2, Art. 183 of the CPC of Ukraine).[61] That is, in a situation where taking into account the severity of the possible punishment and the presence or absence of a criminal record, a preventive measure in the form of detention cannot be chosen for a person, but at the same time, there are risks provided for in Part 1 of Art. 177 of the CPC, the investigator or the prosecutor is obliged to ask the investigating judge the question of choosing another, less strict preventive measure.

Analysis of sanctions of articles of the CC listed in Parts 6 and 7 of Art. 176 of the CPC of Ukraine[62] makes it possible to state that not every one of them provides for punishment in the form of deprivation of liberty for a term of more than five years (or at least more than three years, if we are talking about a previously convicted person), which, according to the requirements of Part 2 of Art. 183 of the CPC of Ukraine[63] is necessary for the application of a preventive measure in the form of detention. In particular, Part 2 of Art. 109 and Part 1 of Art. 258^2 of the CC of Ukraine[64] provides for punishment in the form of restriction of freedom for a term of up to three years or deprivation of liberty for the same term; Part 3 of Art. 109 of the CC of Ukraine[65] – restriction of freedom for a term of up to five years or imprisonment for the same term; Part 1 of Art. 110, Part 1 of Art. 110^2, and Part 1 of Art. 258^1 of the CC of Ukraine[66] – deprivation of liberty for a term of three to five years; Part 2 of Art. 258^2 and Part 1 of Art. 260 of the CC of Ukraine[67] – imprisonment for up to five years. Accordingly, in the case of qualification of the suspect's actions according to the above-mentioned parts of the articles of the CC of Ukraine, on the one hand, a preventive measure in the form of detention cannot be chosen due to the requirements of Part 2 of Art. 183 of the CPC of Ukraine[68] (unless the prosecutor, in addition to the grounds provided for in Art. 177 of the CPC of Ukraine, proves that, while at large, this person hid from the pre-trial investigation body or the court, obstructed criminal proceedings, or was notified of the suspicion of committing another crime (clauses 2, 3, Part 2 of Art. 183 of the CC of Ukraine), and on the other hand, Part 6 of Art. 176 of the CC of Ukraine[69] prohibits choosing any other preventive measure.

The approach outlined in Parts 6 and 7 of Art. 176 of the CPC of Ukraine[70] essentially does not take into account the idea of individualising the application of preventive measures, as it eliminates the possibility of choosing any milder preventive measure, in particular in the case when the risks (escape, obstructing the investigation, etc.) are significantly reduced, taking into account the individual characteristics of the suspect or the accused. Suspicion in itself, the accusation of committing even a serious or especially serious crime without taking into account the identity of the suspect or the accused, the way the crime was committed, the

60 Ibid.
61 Ibid.
62 Ibid.
63 Ibid.
64 Ibid.
65 Ibid.
66 Ibid.
67 Ibid.
68 Ibid.
69 Ibid.
70 Ibid.

evidence confirming his guilt, and other circumstances cannot be the basis for 'automatic' detention of the suspect or accused.

In addition, this kind of approach does not take into account the position expressed at the time by the Constitutional Court of Ukraine in the decision in the case on the constitutional submission of 50 People's Deputies of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of the provisions of Art. 150 of the CPC of Ukraine regarding the gravity of the crime (the case of taking into account on the gravity of the crime when a preventive measure is applied) dated 8 July 2003 No. 14-rp/2003, it was established that when deciding on the application of a preventive measure *together with other circumstances, the gravity of the crime,* of which the person is suspected or accused is taken into account.[71]

In numerous judgments of the ECtHR,[72] it was established that the gravity of the accusation could not in itself serve as a justification for a person's long pre-trial detention.

4 EXTENSION OF THE PERIOD OF DETENTION IN CUSTODY

From the point of view of a person's right to freedom and personal integrity, the issue of extending the term of detention requires an appeal to the general principles developed in the precedent practice of the ECtHR, which determine the legitimacy of further deprivation of a person's liberty, namely: (1) prolonged detention may be justified in a specific case only if there are clear signs of the existence of a public interest, which, despite the presumption of innocence, prevails over the principle of respect for personal freedom, enshrined in Art. 5 of the Convention; (2) the existence of reasonable suspicion is a condition *sine qua non* for the legality of long-term detention, but after a certain period of time, such suspicion will no longer be sufficient: therefore, the Court must establish: a) whether other grounds given by the judicial authorities continued to justify the deprivation of liberty, and b) if such grounds were 'relevant' and 'sufficient', whether the national authorities showed 'special care' during the proceedings; (3) the duty of the official who administers justice to indicate appropriate and sufficient reasons (danger of concealment from the investigation, risk of putting pressure on witnesses or falsification of evidence, risk of conspiracy, risk of re-committing a crime, risk of causing a breach of public order, as well as the need of protection of the detainee) detention, in addition to the existence of well-founded suspicion, relies on it from the moment of the first decision on the application of a preventive measure in the form of detention; (4) when deciding on the issue of release or further detention of a person in custody, state authorities are obliged to consider alternative means of ensuring his appearance in court.[73]

According to Part 2 of Art. 615 of the CPC of Ukraine,[74] the head of the relevant prosecutor's

71 Case No. 14-рп/2003 [2003] Constitutional Court of Ukraine <https://zakon.rada.gov.ua/laws/show/v014p710-03#Text> accessed 20 December 2022.

72 See, for example, *Mamedova v Russia* App no 7064/05 (ECtHR, 1 June 2006) <https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-98574&filename=MAMEDOV%20v.%20RUSSIA.docx&logEvent=False> accessed 20 December 2022; *Hayredinov v Ukraine* App no 38717/04 (ECtHR, 14 October 2010) <https://hudoc.echr.coe.int/fre?i=001-100958> accessed 20 December 2022; *Panchenko v. Russia* App no 11496/05 (ECtHR, 11 June 2015) <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-155085&filename=001-155085.pdf&TID=ihgdqbxnfi> accessed 20 December 2022; *Kalashnikov v Russia* App no 47095/99 (ECtHR, 15 July 2002) <https://hudoc.echr.coe.int/eng?i=001-60606> accessed 20 December 2022.

73 See *Buzadji v. the Republic of Moldova* App no 23755/07 (ECtHR, 05 July 2016) <https://hudoc.echr.coe.int/eng?i=001-172357> accessed 20 December 2022; *Hrubnyk v Ukraine* App no 58444/15 (ECtHR, 17 September 2020) <https://hudoc.echr.coe.int/fre?i=001-204604> accessed 20 December 2022; *Avraimov v Ukraine* App no 71818/17 (ECtHR, 04 October 2017) <https://hudoc.echr.coe.int/fre?i=001-180440> accessed 20 December 2022.

74 Criminal Procedure Code of Ukraine (n 14).

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office is authorised to repeatedly extend the validity period of the decision of the investigating judge or the decision of the head of the prosecutor's office on detention for up to one month. At the same time, the term of detention can be extended repeatedly within the term of the pre-trial investigation. In comparison with the general procedure provided for in Arts. 197 and 199 of the CPC of Ukraine,[75] we note that the relevant powers are vested exclusively in the investigative judge. Examining the normative construction of the extension of the term of detention in the light of international standards and precedent practice of the ECtHR, we note that the expression 'judge or other person authorized by law to exercise judicial power' is equated with the concept of 'competent judicial authority' in clause (c) Part 1 of Art. 5 of the ECHR. It is important that the 'official' provides guarantees corresponding to the 'judicial power', and for this, he must be independent of the executive power and the parties.[76] At the same time, the impartiality of such a person authorised to exercise judicial power may cause reasonable doubts if he has the right to participate in the further consideration of the case as a representative of the prosecution.[77] Thus, without a doubt, the delegation of the relevant powers from the investigating judge to the head of the prosecutor's office constitutes the deviation of Ukraine from its obligations under Art. 5 of the ECHR, about which the Secretary General of the Council of Europe was informed on 28 February 2022. However, we state that a possible alternative would be the revival of military courts in Ukraine, which are able to ensure the administration of justice and judicial control, including in wartime conditions.[78]

It is worth noting that, unlike Part 1 of Art. 615 of the PC of Ukraine,[79] delegating to the head of the relevant prosecutor's office the authority of the investigating judge to extend the term of detention, the legislator does not indicate such a caveat as the absence of an objective possibility of exercising such powers by the investigating judge. In any case, in our opinion, the real lack of an objective possibility for the investigating judge to exercise his powers must be substantiated every time in the relevant procedural decision, which, in particular, is noted in the letter of the Supreme Court 'Regarding certain issues of conducting criminal proceedings under the conditions of martial law' dated 3 March 2022 No. 1/0/2-22[80] and the recommendations of the Council of Judges of Ukraine 'Regarding taking urgent measures to ensure the stable functioning of the judiciary in Ukraine in the conditions of termination of the powers of the High Council of Justice and military actions by the Russian Federation' dated 24 February 2022 No. 9.[81]

Reflecting on the legitimacy of the above legislative innovations, we state: the European Court has repeatedly pointed out that the establishment of legislative procedures that limit the powers of national courts in relation to the protection of a person from arbitrary interference

75 Ibid.

76 *Schiesser v Switzerland* App no 7710/76 (ECtHR, 4 December 1979) <https://hudoc.echr.coe.int/eng?i=001-57573> accessed 20 December 2022.

77 *Brincat v Italy* App no 13867/88 (ECtHR, 26 11 1992) <https://hudoc.echr.coe.int/eng?i=001-57769> accessed 20 December 2022.

78 For more details, see Oksana Kaplina, Serhii Kravtsov, Olena Leyba 'Militari justice in Ukraine: renaissance during wartime' (2022) 3 (15) Access to Justice in Eastern Europe 120-136. DOI: https://doi.org/10.33327/AJEE-18-5.2-n000323.

79 Criminal Procedure Code of Ukraine (n 14).

80 Letter of the Supreme Court No. 1/0/2-22 of 03 March 2022 'Regarding certain issues of conducting criminal proceedings under martial law' <https://supreme.court.gov.ua/supreme/pres-centr/news/1261413/> accessed 20 December 2022.

81 Recommendations of the Council of Judges of Ukraine No 9 'Regarding taking urgent measures to ensure the stable functioning of the judiciary in Ukraine in the conditions of the termination of the powers of the High Council of Justice and military actions by the Russian Federation' of 24 February 2022 <https://ips.ligazakon.net/document/MUS36788> accessed 20 December 2022.

by the state in their right to freedom violates para. 3 of Art. 5 of the Convention.[82] At the same time, such a retreat in the conditions of the military conflict in Ukraine is permissible, proportional (commensurate) to the acuteness of the emergency situation, and, as noted by J. McBride, such measures should be no more than strictly necessary as guarantees against possible abuse of powers.[83]

The peculiarities of the extension of the term of detention are also established in court proceedings. Thus, in Parts 5 and 6 of Art. 615 of the CPC of Ukraine[84] provides for the possibility of automatic extension of the term of the preventive measure in the form of detention until the relevant issue is resolved in a preparatory court session or in a court trial, but not for more than two months.

In contrast to the ordinary procedure provided for in Part 3 of Art. 315 and Art. 331 of the CPC of Ukraine,[85] which regulates the prohibition of 'automatic' extension of the term of detention, an extraordinary procedure is introduced, but in the presence of certain conditions, namely: a) the impossibility of holding a preparatory court session (which must be established in each specific case); b) a preventive measure in the form of detention, which was applied at the stage of pre-trial investigation, is considered extended for no more than two months; c) the impossibility of holding a court session to resolve the issue of the feasibility of further extending the term of detention of the accused; d) the selected preventive measure in the form of detention is considered extended until the relevant issue is resolved by the court but for no more than two months.

Contextually, one should refer to the decision of the Constitutional Court of Ukraine No. 1-p/2017 dated 23 November 2017, which recognised that:

continuation by the court during the preparatory court session of the application of measures to ensure criminal proceedings regarding preventive measures in the form of house arrest and detention in the absence of petitions of the prosecutor violates the principle of equality of all participants in the judicial process, as well as the principle of independence and impartiality of the court, since the court takes the side of the prosecution in determining the presence of risks under Article 177 of the Code, which affect the necessity of continuing house arrest or detention at the stage of court proceedings in the court of first instance. When the judge, in the absence of requests from the parties (of the prosecutor), initiates the issue of continuing the detention of the accused in custody or under house arrest, he goes beyond the judicial function and actually takes the side of the prosecution, which is a violation of the principles of independence and impartiality of the judiciary.[86]

Therefore, the third sentence of Art. 315 of the CPC of Ukraine was declared unconstitutional. In this way, the court of constitutional jurisdiction implemented the observations of the European Court expressed in the decisions on the pilot cases *Chaniev v. Ukraine*,[87] para. 30 and *Kharchenko v. Ukraine*, dated 5 October 2011.[88]

82 See decision in the cases of *S.B.C. v the United Kingdom* App no 39360/98 (ECtHR, 19 June 2001) para 23 i 24 <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-5635%22]}> accessed 20 December 2022; *Boicenco v Moldova* App no 41088/05 (ECtHR, 11 July 2006) para 134-138 <https://hudoc.echr.coe.int/fre?i=002-3201> accessed 20 December 2022; *Piruzyan v Armenia* App no 33376/07 (ECtHR, 26 June 2012) para 105 i 106 <https://hudoc.echr.coe.int/eng?i=001-111631> accessed 20 December 2022.

83 Jeremy McBride, 'To what extent does the fight against the coronavirus infection allow restrictions on human rights' (*Zakon i Biznes*, 04 April – 10 April 2020) <https://zib.com.ua/ua/142070-covid-19_i_konvenciya_u_yakiy_miri_borotba_z_koronavirusnoyu.html> accessed 20 December 2022.

84 Criminal Procedure Code of Ukraine (n 14).

85 Ibid.

86 Case No 1-p/2017 [2017] Constitutional Court of Ukraine <https://zakon.rada.gov.ua/laws/show/v001p710-17#Text> accessed 20 December 2022.

87 *Chanyev v Ukraine* App no 46193/13 (ECtHR, 9 October 2014) para 30 <https://hudoc.echr.coe.int/fre?i=001-146778> accessed 20 December 2022.

88 *Kharchenko v Ukraine* (n 61).

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Thus, we believe that the 'automatic' extension of the term of detention of a person in custody without appropriate requests from the prosecution and without checking the presence of new or previous risks and assessing the expediency of further deprivation of liberty, introduced into national legislation, does not correlate with international standards of limiting the right to freedom and personal integrity and does not correspond to the legal positions of the ECtHR expressed, in particular, in the decision on the cases *Tejs v. Romania*[89] (§ 40), *Swepsta v. Latvia*[90] (§ 86), and others.

In our opinion, in order to ensure the implementation of conventional guarantees when solving the issue, in particular, about the continuation of detention in conditions of martial law, it is possible to involve other institutions, for example, changing the jurisdiction of the consideration of the petition, holding a court hearing in the corresponding judicial control procedure using available technical means of video communication in order to ensure the remote participation of a person, as provided for in Clause 6, Part 1 of Art. 615 of the CPC of Ukraine.[91]

In the special legal literature, attention is drawn to the applied problem, which is connected with the fact that, in accordance with Part 3 of Art. 615 of the CPC, the prosecutor, in the absence of an objective possibility of further conduct, completion of the pre-trial investigation, and an appeal to the court with an indictment, a request for the release of a person from criminal responsibility, must decide before making a decision on suspension of pre-trial investigation. However, the legislator did not pay attention to the question of a possible situation when the term of detention may exceed the term of the pre-trial investigation in those proceedings in which a decision was made to stop the pre-trial investigation because the term of the pre-trial investigation in such a case, in accordance with clause 3 Part 1 of Art. 615 of the CPC, is suspended, and the term of detention is not.[92]

5 CONCLUSIONS

The conducted research gave the authors the opportunity to draw the following conclusions. Normative regulation of ensuring a person's right to freedom and personal integrity, as well as determining the grounds for lawful restriction of a person's right to freedom and personal integrity when applying preventive measures in criminal proceedings, are not able to protect a person as a participant in criminal proceedings from possible oppression of rights by the relevant state authorities. That is why, at the regulatory level, effective guarantees of compliance with a person's right to freedom and personal integrity in criminal proceedings should be provided.

The challenges faced by Ukraine in connection with Russian aggression determined the transformation of the institution of measures to ensure criminal proceedings. Peculiarities of the regulatory regulation of pre-trial investigation and trial in martial law conditions lead to the introduction of extraordinary procedures in the application of preventive measures, the systematic analysis of which indicates that our state will not be able to fulfil certain obligations regarding, in particular, its observance of international standards in the field of rights of a person in full due to objective reasons, a state of necessity.

89 *Tase v. Romania* App no 29761/02 (ECtHR, 10 June 2008) para 40 <https://hudoc.echr.coe.int/fre?i=001-86861> accessed 20 December 2022.

90 *Svipsta v Latvia* App no 66820/01 (ECtHR, 9 March 2006) para 86 <https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-185929&filename=CASE%20OF%20SVIPSTA%20v.%20LATVIA%20%E2%80%93%20%5BRussian%20translation%5D%20summary%20by%20Development%-20of%20Legal%20Systems%20Publ.%20Co%20.pdf&logEvent=False> accessed 20 December 2022.

91 Criminal Procedure Code of Ukraine dated (n 14).

92 Tetiana Fomina, Victoriia Rogalska, 'Preventive measures under martial law: what has changed' (*Zakon i Biznes*, 19 May 2022) <https://zib.com.ua/ua/151472.html> accessed 20 December 2022.

At the stage of choosing a preventive measure in criminal proceedings, in particular, against the foundations of national and public security, peace, human security, and international legal order, against the established order of military service, the right to freedom and personal integrity is limited by applying only detention due to increased public danger of the above-mentioned crimes, but there are guarantees that are sufficient to establish the reasonableness of the intervention, because when choosing this preventive measure, the investigating judge ensures the implementation of judicial control, during which he checks the validity of the suspicion of a person in committing a crime, the presence of risks provided for by law, and only on the condition that these are proven issues a decision to detain the suspect on two grounds.

However, at the stage of the extension of the term of detention, the suspect or the accused is effectively deprived of the right to request their release from custody and the application of an alternative preventive measure to them, which contradicts the provisions of the Constitution of Ukraine and the practice of the ECHR. Quasi-automatic extension of any term of detention should be considered as a violation of the conventional norms-guarantees established by § 3 of Art. 5 of the ECHR.

The authors emphasise that the problems discussed in this publication certainly are not exhaustive and require further scientific support.

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Case Note

PROTECTION OF PROPERTY RIGHTS DURING THE RUSSIAN-UKRAINIAN WAR: THEORETICAL AND LEGAL ANALYSIS

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ABSTRACT

Background: *This article presents a scientific and legal analysis of the provisions of the current legislation of Ukraine and international legal acts in the field of protection of private property rights during the Russian-Ukrainian war. Based on historical and legal analysis of scientific heritage and modern scientific theories in the field of protection of private property rights and the right of possession by all subjects of public life, the authors of this article provide generalisations and recommendations for improving the effectiveness of international protection mechanisms in this area.*

Methods: *The authors resort to numerous research methods, such as the method of philosophical dialectics and hermeneutics, historical, comparative, structural, and functional methods, analysis and synthesis, and induction.*

Results and Conclusions: *The article examines international and Ukrainian regulatory legal acts that substantiate the mechanisms of acquisition, possession, and disposal of property owned by a person on the right of private property. Particular attention is paid to the latest problems associated with bringing to the established international responsibility war criminals involved in causing property damage and moral damage to the civilian population in connection with the destruction of private property. The authors suggest improving the mechanisms for the protection of the rights of private property that has been destroyed or damaged as a result of war crimes committed by Russian invaders on the territory of Ukraine.*

1 INTRODUCTION

The problem of protecting property rights with legitimate legal instruments has been accompanying human civilisation since our initial self-awareness of our individuality as participants in social processes. J. Locke, an outstanding English philosopher and thinker, pointed out that 'The primary goal of civil society is the protection of property'.[1] In another work, Locke considers the importance of the protection of property rights as one of the main functions of public authorities and notes that '… the great and foremost purpose of uniting people into commonwealths and putting themselves under government is the preservation of their property'.[2] V. Kisel studied the genesis of ideas about the essence of property rights and noted that

> One of the critical questions that the doctrine of philosophy tried to answer was the question of the origin of property rights. In this context, the supporters of the most popular concept advocated the natural essence of the emergence of property rights. In particular, Montesquieu, Diderot, and Rousseau interpreted property as a natural

1 John Locke, *The Philosophical Works of John Locke*, vol 2 (Nabu Press 2010) 16.

2 John Locke, *The Works of John Locke*, vol 5 *Two Treatises of Government: In the Former, The False Principles and Foundation of Sir Robert Filmer, and His Followers, Are Detected and Overthrown: The Latter, Is an Essay Concerning the Original, Extent, and End, of Civil Government* (Printed by Thomas Davison 1823) 159

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> right that, along with freedom and equality, belongs to everyone from birth and is inalienable and sacred.[3]

R. Mykhaylenko considered the scientific contributions of J. Locke and G. W. F. Hegel to the study of the property doctrine and noted that Hegel deduced private property and justified its necessity from the social factor rather than from the natural one. Thus, Hegel did not see the principles of private property in nature but in natural law. The spiritual and social aspects of the human person took precedence in Hegel's legal conception, while J. Locke defined private property through the prism of the properties of 'people as people' rather than as members of a particular society. Hegel believed the foundation of private property was the 'second' nature of humans, namely their spiritual and social essence. Unlike J. Locke, who revealed the essence of private property through the prism of the nature of an individual, Hegel believed the individual freedom of a person constituted the starting point of private property rights only indirectly, namely as a 'reasonable' volition determined by the development of the 'objective spirit'.[4]

The scientific method of extrapolation allows the authors to proceed from the genealogical foundations of the concept of property to the present. There is a significant variety of scientific research on the raised issues at this stage.[5] Some scholars believe that property rights are guaranteed as an object of protection by an individual and the state, which is entrusted with this task as a legitimate entity and implements its will through the application of '…laws and judicial and other state bodies. It follows that natural property rights remain rights of free private property in civil society'.[6] The authors of this article hold to this statement since the primary role in the protection of property rights belongs to the state, which has legitimate instruments of coercion to fulfil the will of the law.

Following the logical law of sufficient grounds, it is necessary to substantiate the purely legal research section since the interpretation history of the genesis of the concept of property is marked by attempts to turn it into a discourse of economic science.

The theoretical and legal study of the genesis and dynamics of the development of ownership relations based on the law showed that property rights, as fundamental human rights, underwent a permanent transformation under the influence of social processes. In the modern sense, this right should be considered within the defined regulatory framework of international treaties (conventions). The essential document for this article is the Convention for the Protection of Human Rights and Fundamental Freedoms, where Art. 1, 'Protection of property', of the Additional Protocol defines the right of every person to possess particular property on legal grounds. Legal restrictions on such a right are introduced by reservations about the legitimate need for deprivation of legally acquired property '… in the public interest and subject to the conditions provided for by law and by the general principles of international law'.[7]

3 VY Kisel, 'The Genesis of Ideas about the Essence of Property Rights: History and Modernity' (2015) 1 Actual Problems of Historical and Legal Science 116.

4 Roman Mykhaylenko, 'Private Property in the Philosophical Tradition' (2016) 1 (11) Philosophical and Methodological Problems of Law 179.

5 Viktor Beschastnyi et al, 'Place of Court precedent in the system of law of the European Union and in the System of Law of Ukraine' (2019) 22 (6) Journal of Legal, Ethical and Regulatory 3; Larysa Nalyvaiko, Olena Marchenko and Vasyl Ilkov, 'Conceptualization of the Phenomenon of Corruption: International Practices and Ukrainian Experience' (2018) 172 (7-8) Economic Annals-XXI 33, doi: 10.21003/ea.V172-06.

6 Mykhaylenko (n 9) 178.

7 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 20 February 2023.

In the context of this study, it is necessary to analyse the protection of property rights and compensation for damages during the Russian-Ukrainian war, the state of protection of citizens from encroachment on the property right guaranteed by the Constitution and Laws of Ukraine. The war adjusted all legal relationships, including civil ones, changing the usual processes and mechanisms of regulating relations to more complex and, accordingly, problematic ones. In addition to this, new civil legal relations have emerged, which are not yet sufficiently regulated, although they are gradually adapting to the realities of today.

Since the full-scale invasion and introduction of martial law in Ukraine shifted the focus to more important problems of the state, today, looting and the activities of 'black' realtors have increased. Accordingly, the problem of protecting private property and compensation for damages has become even more urgent. It should be added that the issue of protection of private property under the above circumstances is regulated by laws, liability is established, and legal mechanisms are available for compensation of damage. The most problematic is compensation for damage to private property as a result of direct military actions of the Russian Federation, namely as a result of rocket and artillery shelling of cities and villages and open clashes between the Ukrainian military and invaders. Such costs and damages are inevitable in the course of the war. Although the right to property is an inviolable right guaranteed by both international and national law, in such a case, a clear and regulated mechanism for the protection of private property and compensation for damage should be in place. At the same time, the persons who will make the compensation, as well as the order and terms of such compensation, should be established. In part, Ukraine has experience in such matters due to the hostilities in the Donetsk and Luhansk regions since 2014. Therefore, the Verkhovna Rada of Ukraine has already begun to adapt the legislation to new realities with the aim of legal regulation of newly created civil legal relations.

Given the fact that this article is one of the first to raise issues of the protection, preservation and restitution of property rights under the conditions of the Russian-Ukrainian war, its purpose is to identify related problems to the practical implementation of new provisions of domestic and world legislation in the regulation of property relations and develop effective tools for their solution. This process is long-term and requires an in-depth analysis of the problem from 2014 to today.

2 METHODOLOGICAL FRAMEWORK

The authors of this article fulfilled the set tasks by resorting to the methodological framework of general scientific and special scientific direction, which ensured compliance with the fundamental principles of scientific knowledge, such as objectivity, cognition, a creative approach to the problem, a combination of theory and practice based on the laws of dialectics and logic, the specificity of truth, etc. The method of philosophical dialectics and other means of scientific research are the leading methodological instruments applied in this article; they helped to determine general trends and individual features of the legal regulation of property relations during the Russian-Ukrainian war.

The method of hermeneutics was used to achieve a professional understanding of the genesis of property rights and the ways of transforming this legal institution. The authors pay particular attention to the features of scientific and practical changes in approaches to understanding property rights and the legal content of interstate measures aimed at their restoration in case of violation. The historical and comparative method was applied to present the multidisciplinary legal nature of the concept of property rights. The comparative legal method provided for the comparison and legal analysis of updated regulatory legal acts of Ukraine and the countries of the democratic world in the field of regulation of property relations under special conditions.

The structural and functional methods provided access to an understanding of the internal structure of the integral concept of property rights, which made it possible to substantiate the inseparable dialectical connections between its components. Analysis and synthesis as a system of scientific and logical methods made it possible to elaborate an integrated approach to the analytical and legal assessment of the processes of restitution of violated property rights under specific conditions, which are military operations in the territory of Ukraine. The method of induction allowed the authors to combine individual elements of the progressive destructive process, such as illegal damage of the legal phenomenon of property rights, into a holistic, scientifically substantiated knowledge of the general condition and ways of restoring private property rights violated by Russia's military aggression.

3 RESULTS

3.1 Features of legislative regulation of property rights in Ukraine in the context of aggression

Having chosen the path of independent statehood, Ukraine, with the adoption of the Constitution, declared general equality before the law of all subjects of property rights on the principles of the rule of law. The provisions of the Basic Law guarantee the rule of law in Ukraine. Other provisions of this document entrust the state with the tasks of protecting the rights and ensuring equality before the law of all subjects of property rights. The Basic Law also declared the right to possess, use, and dispose of their property, including the results of their intellectual and creative activities.

The principal limitation in the relations of change of ownership is the constitutional guarantee that 'no one shall be unlawfully deprived of the right of property. The right of private property is inviolable'.[8] However, the ongoing full-scale war unleashed by the Russian Federation against Ukraine has significantly changed the current world order regarding the mere procedure for owning and disposing of property in terms of deprivation in this area.

A selective logical and legal analysis of domestic and foreign documents of the period from the beginning of the armed aggression of the Russian Federation to the present showed that the reason for this approach on the part of legitimising legal restrictions on the acquisition, use, and disposal (in the broad sense of this concept) of objects of property rights by controlled subjects of most countries of the democratic world was the provision of possible compensation for material losses and moral damage caused to Ukraine and its citizens by hostilities at the expense of the aggressor country. The above refers to the objects of property rights with the participation of Russian owners both in the territory of Ukraine and in other democratic countries.

A selective analysis of international measures to assist Ukraine in countering Russian military aggression showed the high effectiveness of the sanctions and restrictive measures imposed by the G7 and the EU in support of Ukraine. Such actions contributed to the attraction of significant amounts of financial, military, and humanitarian assistance.

However, this study shows that the international situation in the direction of anti-aggressive cooperation has the following distinct features:

- gross disregard for the principles of international law by the Russian Federation;

8 Constitution of Ukraine No 254 k/96-BP of 28 June 1996 (as amended 1 January 2020) <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 20 February 2023.

- ineffectiveness of the international security system;
- open support of the aggression of the Russian Federation against Ukraine by the leaders of individual EU member states;
- ambiguity of approaches to the recognition of the Russian Federation as a state sponsor of terrorism by the leaders of several UN member-states;
- inconsistencies of the imposed sanctions with the threats, including nuclear ones, that have arisen in the global security system;
- the provision of necessary assistance (especially military) to repel the aggressor effectively is not sufficiently active nor timely, and complete.

However, the administrative legislative and executive bodies are changing the legislation very quickly in this challenging situation, adapting it to the requirements of wartime. It is worth noting that the restrictive and confiscatory measures taken against the property of representatives of the aggressor country have a dualistic nature. On the one hand, it is compensation for losses caused by aggressive actions at the expense of seized funds and property. On the other hand, these measures indicate the state's implementation of constitutional guarantees regarding the inviolability of property rights and their complete and timely restoration in case of violation.[9]

The authors of this article have conducted a theoretical and legal analysis of the regulatory framework for ensuring the preservation of the property of the Ukrainian people and each citizen, which shows that numerous legislative acts provide the implementation of constitutional guarantees of property rights. The authors of this article believe the Law of Ukraine 'On the Basic Principles of Forcible Seizure of Objects of Property Rights of the Russian Federation and its Residents in Ukraine'[10] comes to the fore among other legislative acts. The said Law determines the legal grounds for forced seizure of the objects of property rights of the Russian Federation as a state-aggressor and its residents for reasons of social necessity, including cases of military necessity.

In accordance with the provisions of Part 2 of Art. 2 of this Law, the forcible seizure of objects of property rights of the Russian Federation and its residents is carried out without any compensation (reimbursement) of their value due to the ongoing full-scale war launched by the Russian Federation against Ukraine and the Ukrainian people. The authors of this article believe that the category of 'Ukrainian people' used by the legislator to conclude this rule of law embodies all the features of the right holder and the right user, which are fully applied to everyone who has lost their property or whose property is damaged as a result of the hostilities committed by the invaders.

The Law of Ukraine 'On Amendments to Certain Laws of Ukraine Regarding the Regulation of the Legal Regime in the Temporarily Occupied Territory of Ukraine'[11] occupies an important place among the normative legal acts that regulate legal relations in the field of property rights, which made significant corrections to a number of normative legal acts in the regulation of the legal relations we are investigating. Thus, the Law of Ukraine 'On Ensuring Civil Rights and Freedoms, and the Legal Regime on the Temporarily Occupied

9 Viktoriya V Korolova and others, 'International legal aspects of migration in the EU: Policies and standards' (2022) 72 (246) International Social Science Journal 1071, doi: 10.1111/issj.12376.

10 Law of Ukraine No 2116-IX 'On the Basic Principles of Forcible Seizure of Objects of Property Rights of the Russian Federation and its Residents in Ukraine' of 3 March 2022 [2022] Official Gazette of Ukraine 33/1720.

11 Law of Ukraine No 2217-IX 'On Amendments to Certain Laws of Ukraine Regarding the Regulation of the Legal Regime in the Temporarily Occupied Territory of Ukraine' of 21 April 2022 [2022] Official Gazette of Ukraine 40/2147.

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Territory of Ukraine'[12] explicitly stated that compensation for material and moral damage caused as a result of the temporary occupation to the state of Ukraine, legal entities, public associations and citizens of Ukraine, foreigners and stateless persons, fully relies on the Russian Federation as the occupying power. At the same time, it is noted that the state of Ukraine must contribute to the implementation of such compensation in all possible ways within the framework of the law.

The above-mentioned changes in the legislation apply only to temporarily occupied territories. At the moment, the compensation mechanism for the damage caused as a result of the armed aggression of the Russian Federation on the territory of Ukraine, in all regions, has not yet been settled. The draft law on compensation for damage caused to the victims as a result of armed aggression of the Russian Federation[13] has only passed the first reading and is being worked out by the relevant committees. Adoption of this Law is very important, as it proposes to define the concept of 'property damage', as well as to provide a list of sources of compensation for damage. The main source of such compensation is the funds and other property of the aggressor state and its residents, other persons whose illegal actions led to armed aggression against Ukraine. Also, the draft law provides for the creation of a special state institution – the compensation fund, and the monopolisation by this institution of the functions of retrieving Russian assets as a source of compensation for damages. It can be implemented thanks to the Law of Ukraine 'On the Basic Principles of Forcible Seizure of Objects of Property Rights of the Russian Federation and its Residents in Ukraine', which was mentioned above. Also, targeted grants, contributions of individuals and legal entities, and other sources that are not prohibited by legislation will also be included as sources of compensation.

The draft law on compensation for damage and destruction of certain categories of real estate objects as a result of hostilities, terrorist acts, and sabotage caused by military aggression of the Russian Federation[14] is still under consideration, too. In the future, subject to the adoption of the Law, issues regarding the procedure for paying victims compensation for their lost houses will be settled. The Law will also apply to unfinished residential buildings.

In this aspect, it is also worth paying attention to the procedure for determining damage and losses caused to Ukraine as a result of the armed aggression of the Russian Federation,[15] which, in combination with the above-mentioned legal acts, will create a comprehensive and effective mechanism for compensation for damage to private property.

Thus, the provisions of these Laws will entitle each victim of Russian aggression to substantiate their claims on the basis of the Civil Code of Ukraine (hereinafter – the CC)[16] and, of course, these Laws. Specific articles of the CC provide a legal justification for the internal structure of

12 Law of Ukraine No 1207-VII 'On Ensuring Civil Rights and Freedoms, and the Legal Regime on the Temporarily Occupied Territory of Ukraine' of 15 April 2014 (as amended of 01 January 2023) <https://zakon.rada.gov.ua/laws/show/1207-18#top> accessed 20 February 2023.

13 Draft Law of Ukraine No 7385 'On Compensation for Damage Caused to the Victims as a Result of armed aggression of the Russian Federation' of 17 May 2022 <https://itd.rada.gov.ua/billInfo/Bills/Card/39602> accessed 20 February 2023.

14 Draft Law of Ukraine No 7198 'On Compensation for Damage and Destruction of Certain Categories of Real Estate Objects as a Result of hostilities, terrorist acts, and sabotage caused by military aggression of the Russian Federation' of 24 May 2022 <https://itd.rada.gov.ua/billInfo/Bills/CardByRn?regNum=7198&conv=9> accessed 20 February 2023.

15 Resolution of the Cabinet of Ministers of Ukraine No 326 'Procedure for Determining Damage and Losses Caused to Ukraine as a Result of the armed aggression of the Russian Federation' of 20 March 2022 (as amended of 11 November 2022) <https://zakon.rada.gov.ua/laws/show/326-2022-%D0%BF#Text> accessed 20 February 2023.

16 Civil Code of Ukraine No 435-IV of 16 January 2003 (as amended of 01 January 2023) <https://zakon.rada.gov.ua/laws/show/en/435-15?lang=uk#Text> accessed 20 February 2023.

property rights as an independent legal institution. First, the above is indicated by Chapter 1, 'Ownership', of the Third Book, 'Ownership and Other Proprietary Rights', of the CC.

In this regard, it is necessary to provide a legal definition of property rights and characterise their types and the acquisition of the legitimate status of the owner. In the context of the above, the authors provide their understanding of particular provisions of the Civil Code of Ukraine, such as Arts. 316-319, which reflect the upward positions of the legislator towards the approaches to the interpretation of this category. Art. 316 interprets the concept of the right of ownership as the right of a person to free possession of the subject of a right that does not depend on the will of other persons.

In accordance with the provisions of Art. 317 of the CC, the content of the right of ownership is the legitimate possession of a specific object of the right of ownership by the owner as an exclusive opportunity belonging to him or her alone. According to Part 1 of Art. 318, 'Subjects of the Right of Ownership', the subjects of property rights are the Ukrainian people and other participants in civil relations defined by Art. 2 of the CC. The provisions of Art. 319 define the content of the right of ownership as the possibility of owners to possess, use, and dispose of their property at their discretion and their right to perform any actions regarding their property that do not contradict the law.

The provisions of the Constitution of Ukraine have been extended and substantiated in the CC, where Art. 321 provides for the inviolability of the property right and determines the circumstances under which this right may be limited or violated. A person may be deprived of the property right or limited in its exercise only on the grounds of and by the procedure established by law. The compulsory expropriation of objects of the right of private property may be applied only as an exception for reasons of social necessity, on the grounds of and by the procedure established by law, and on the condition of advance and complete compensation of their value, except for the cases established by para. 2 of Art. 353 of the CC. The CC defines the Ukrainian people as the holders (subjects) of property rights (Art. 324), and private owners can be individuals and legal entities (Art. 325), the state (Art. 326), and territorial communities (Art. 327).

It follows from the above that the generalised victims of aggressive military actions on the part of the Russian Federation are the Ukrainian people, who personify the material damage caused to citizens, legal entities, territorial communities, and the state. Thus, it is inadvisable to divide the process of protection of property rights into the categories of right holders during the war period. However, one should characterise the actions taken to protect the inalienable property right violated by the invaders as a holistic mechanism that acquired specific features after the full-scale Russian invasion of Ukraine.

In order to comply with a comprehensive approach to the study of the legal protection of property rights (in the broad sense of this category), it is necessary to resort to the legal characteristics of the regulatory and judicial documents put into effect by the participating countries in the anti-Russian coalition. To provide a uniform understanding of the concept of legal characteristics, the authors of this article suggested focusing on the definition by M. Hryhorchuk[17] provided in the monograph *Legal protection of economic entities: theory and practice*. Hryhorchuk defines the concept of legal characteristics as a measure of the competence of the subjects of protection within the legal influence of the primary source, which is the constitutional legal order.

17 Myroslav Vasyljovych Hryhorchuk, *Legal Protection of Economic Entities* (Theory and Practice) (KROK 2020) 47.

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3.2 Legal characteristics of international legal acts on the protection of property rights

Given the problems associated with compensation for damage caused to Ukraine and its people by the Russian aggressor, it is necessary to turn to the rules of international law. The following regulatory legal acts govern the procedure for bringing a guilty person to a particular type of liability in the event of specific circumstances that enforce coercive measures to restore possession of destroyed or damaged objects of property rights. The procedure for asserting the violated property right is determined by international legal acts for the international community and Ukraine, where the previously cited Convention for the Protection of Human Rights and Fundamental Freedoms and the Geneva Conventions for the Protection of War Victims play the central stage.

The authors of this article conducted a historical and legal analysis of the implementation of the Geneva Conventions for the Protection of War Victims. The analysis showed that the ratification of this document faced some resistance from the Soviet regime in force at that time, as evidenced by the provisions of the Decree of Presidium of the Supreme Council of the Ukrainian SSR[18] 'On the ratification of the Geneva Conventions of 12 August 1949, for the protection of war victims'. Even though the positions of the Ukrainian state leadership of those times regarding the ratification of the provisions of these Conventions were highly justified, approaches to the protection of civilians during the war were ambiguous since the Ukrainian side indicated reservations to Arts. 11 and 45 of this document, which concerned the protection of civilians in time of war.

It would be logical to conclude that the content of the concept of 'protection of the civilian population' should include issues related to the protection of property rights. The Law of Ukraine 'On Lifting the Reservations of Ukraine to the Geneva Conventions for the Protection of War Victims of August 12, 1949'[19] was adopted in order to bring the legal position of the domestic legislation of independent Ukraine into line with international standards. The authors of this article believe it is advisable to provide a theoretical and legal analysis of particular provisions of the Geneva Conventions at this research stage. These provisions prohibit the destruction and deprivation of property in the occupied territory by signatory states of this landmark document. In particular, Art. 53 determines that any destruction by the occupying power of real or personal property belonging individually or collectively to private persons or the state is prohibited unless it is a necessity of military operations.

Part 1 (General Provisions) of the Fourth Convention (Implementation of the Convention) defines that states parties to this Convention shall be bound to follow the prescribed procedure for bringing war criminals to justice. Thus, in accordance with Art. 146, the high contracting parties shall legitimise any legislation necessary to impose effective penal sanctions for persons violating the provisions of this Convention.

Each high contracting party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such violations and shall bring such persons before its courts. At the same time, the principal role in bringing them to the responsibility established by law is entrusted to national courts, and the nationality of criminals is not considered. It is allowed to transfer war criminals on the basis of law to another interested state party to the Convention.

18 Decree of the Presidium of the Supreme Council of the Ukrainian SSR 'On the Ratification of the Geneva Conventions of 12 August 1949 on the Protection of War Victims' of 3 July 1954 <https://zakon.rada.gov.ua/laws/show/114%D0%B0-03#Text> accessed 20 February 2023.

19 Law of Ukraine No 3413-IV 'On Lifting the Reservations of Ukraine to the Geneva Conventions on the Protection of Victims of War of 12 August 1949' of 8 February 2006 [2006] Official Gazette of Ukraine 9/514.

Pursuant to Art. 147, the grave violations referred to above shall be those committed against persons or property protected by this Convention, such as the capture of prisoners and extensive destruction and deprivation of property, not justified by military necessity. Art. 148 allows no high contracting party to absolve itself or any other high contracting party of any liability provided for each of the high contracting parties in respect of violations referred to in the preceding article.

The signal of the Russian Federation was quite obvious but left unnoticed by the world security system. Thus, on 12 November 2019, the Russian Federation adopted a law on the refusal to recognise the additional protocol to the Geneva Convention for the Protection of War Victims. The consequence of such actions is that Russia has *de jure* and *de facto* refused to recognise international law on refraining from attacking civilian objects and other restrictions specified by this Convention. It also means that Russia has withdrawn from the jurisdiction of the UN special commission for consideration of violations of the rights of civilians during military conflicts, to which it is a party.

The authors analysed the algorithm of actions of the Russian Federation in the direction of renouncing international law in terms of causing no harm to other countries by armed aggression and provided a retrospective conclusion of such a situation. Thus, the context of the measures taken by Russia is its state policy of seizure of Ukraine, which involves non-recognition of the instruments of legal deterrence of military actions and protection of property rights of all participants in public relations (especially the civilian population of Ukraine).

An additional analytical and legal study of selected protocols to the Geneva Conventions shows that international law has deeply and comprehensively analysed the threats to the population, such as the risk of loss of life or the destruction of property belonging to citizens as private property and located on the territories where hostilities take place.

Thus, Part IV, 'Civilian Population', of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977[20] introduced the following penal restrictions:

- According to Art. 48 (Basic rule), the high contracting parties shall direct their operations only against military objectives and distinguish between military and civilian objects and the civilian population and combatants.
- According to Art. 49 (Definition of attacks and scope of application), the provisions of this Section apply to all objects, regardless of their location (land, air, sea), which may affect the civilian population or civilian objects on land. The same restrictions apply to the occupying power who carry out attacks from the sea or the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air (part 3).
- Art. 51 (Protection of the civilian population) guarantees general protection against the dangers arising from military operations to the civilian population and individual civilians. In order to ensure this protection, the following rules, which are complementary to other applicable rules of international law, shall be respected in all circumstances (part 1). The civilian population and civilian individuals shall be adequately protected against any violation of these prohibitions, and non-compliance with the rules of international law shall not

20 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) of 8 June 1977 (as amended 8 December 2005) <https://zakon.rada.gov.ua/laws/show/995_199#top> accessed 20 February 2023.

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release the parties to the military conflict from their legal obligations with respect to the said category of population, including the obligation to take preventive measures provided for in Art. 57.

- According to Art. 54 (Protection of objects indispensable to the survival of the civilian population), parties to the conflict are prohibited from attacking, destroying, or rendering useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works in order to prevent their use by the civilian population or the adverse party as a means of subsistence. This does not take into account the motives and purpose of causing a famine among the civilian population or forcing them to move away or any other motive.
- Art. 57 (Precautions in attack) stipulates that parties to the conflict shall take care of the safety of the civilian population, civilians, and civilian objects when conducting military operations (part 1). However, the following strict restrictions have been imposed on the scale of damage to the civilian population and infrastructure from attacks: take all feasible precautions in the choice of means and methods of attack to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians, and damage to civilian objects (para. A of part 2).
- According to Art. 91, a party to the conflict which violates the provisions of the Conventions or this Protocol shall, if it has caused damage, be liable to pay compensation. It shall bear full responsibility under international law for all acts committed by its armed forces and people belonging to them.

Summarising the analysis of the provisions of international humanitarian law, it is necessary to systematise the restrictive and preventive elements regarding the inviolability of property rights under hostilities or in occupied territories, etc. The authors of this article believe that such a system has the following elements:

1. the gradation of people present during the conduct of military operations on civilians and combatants;
2. the application of the principle of necessity to limit acts of a violent nature;
3. the search for a balance between the destructive impact of military operations and real circumstances, considering the danger to the civilian population and property;
4. alleged legitimate influence by instruments of legal coercion through the application of restriction of freedom and compensation for damages caused by criminal acts (war crimes).

3.3 Legal analysis of court decisions on the protection of property rights, adopted by the courts of Ukraine, international and national judicial institutions

A selective analysis of court decisions on the claims for property protection showed that judicial practice had been characterised as ambiguous during the Russian-Ukrainian military conflict (from 2014 to the present day). The authors of this article believe that the lack of case law was the reason for the courts to deliver judgments against the favour of persons who lost property due to the beginning of hostilities in the Luhansk or Donetsk regions. However, it is possible to take a favourable view of the courts' attempts to investigate the cases of violated property rights as deeply as possible and apply adequate measures of

state coercion to restore the ownership of property damaged or destroyed by hostilities. The substantive argumentation of the authors' judgments is obtained as a result of a selective legal analysis of court decisions on the protection of property rights of citizens who suffered losses from military actions in the Luhansk and Donetsk regions in 2014-2016.

Thus, on 28 February 2020, the Artemivsk Municipal District Court in Donetsk Oblast delivered a judgment in civil case No. 757/16104/18-ts[21] on a claim of PERSON_1 to the Cabinet of Ministers of Ukraine, the State Treasury Service of Ukraine for compensation for material and moral damage. In support of the claim, PERSON_1 ('the applicant') noted that he was the owner of a household located at the address of ADDRESS_1 until 2015. This household suffered damages caused by artillery shelling in 2014-2017. At that moment, the household was in an uninhabitable state.

The court held the dismissal of the claim of PERSON_1 to the Cabinet of Ministers of Ukraine and the State Treasury Service of Ukraine for compensation for material and moral damage. The motivational part of this judgment is as follows: the applicant did not provide satisfactory evidence that the value of the damaged property, taking into account the amended claim, was UAH 577,618.86; therefore, for the above reasons, the court held that there were no legal grounds for satisfying the claim of PERSON_1. Claims for non-pecuniary damage in the amount of UAH 100,000 are determined as received by damage to property as a result of a terrorist act; therefore, their satisfaction should also be denied. The judgment entered into force.[22]

On 24 March 2021, the Donetsk Court of Appeal delivered a judgment in a civil case (application No. 22-ts/804/709/21)[23] on the appeal of the representative of the Cabinet of Ministers of Ukraine and the representative of PERSON_1 against the decision of the Druzhkivka City Court in Donetsk Oblast as of 11 December 2020 (presided by Judge A. L. Hontar in the city of Druzhkivka of Donetsk Oblast), in a civil case No. 242/68/19 on a claim of PERSON_1 to the State of Ukraine represented by the Cabinet of Ministers of Ukraine and the State Treasury Service of Ukraine for compensation for material and non-pecuniary damage.

Claims under the lawsuit were that PERSON_1 ('the applicant') and her family left their place of residence in the village of Pisky in 2014 in connection with the hostilities during the anti-terrorist operation. In mid-2016, the applicant learned that the house belonging to her on the basis of the right of ownership was destroyed due to the hit of an artillery shell. The applicant asked to recover the damage caused by a terrorist act in the form of destruction of a house and outbuildings in the amount of UAH 2,296,674 and non-pecuniary damage in the amount of UAH 250,000 from the State of Ukraine in the person of the Cabinet of Ministers of Ukraine and the State Treasury Service.

By the judgment of the Druzhkivka City Court as of 11 December 2020, the claims were partially satisfied. The Court recovered monetary compensation in the amount of UAH 120,000 from the State of Ukraine, represented by the Cabinet of Ministers of Ukraine, at the expense of the State Budget of Ukraine in favour of PERSON_1. However, PERSON_1 was denied in satisfaction of claims for non-pecuniary damage. The Court of Appeal held the dismissal of the appeals of the representative of the Cabinet of Ministers of Ukraine and the representative of PERSON_1. The Court of Appeal also upheld the judgment of the Druzhkivka City Court as of 11 December 2020.

21 Case No 757/16104/18-ts (Artemivsk Municipal District Court in Donetsk Oblast, 28 February 2020) <https://reyestr.court.gov.ua/Review/88085237> accessed 20 February 2023.

22 Ibid.

23 Case No 242/68/19 (Donetsk Court of Appeal, 24 March 2021) <https://reyestr.court.gov.ua/Review/95767645> accessed 20 February 2023.

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In support of this judgment, the Court of Appeal states that 'similar conclusions' are contained in the decision of the Grand Chamber of the Supreme Court of 4 September 2019 (case No. 3265/6582/16-ts) and decisions of the Supreme Court composed of the panel of judges of the First Court Chamber of the Civil Court of Cassation of 25 March 2020 (case No. 757/61954/16-ts) and of 18 March 2020 (case No. 243/11658/15-ts). This judgment was appealed to the Supreme Court. The cassation appeal was motivated by the fact that the first-instance court and the Court of Appeal incorrectly applied the provisions of the Law of Ukraine 'On Combating Terrorism', the Code of Civil Protection of Ukraine, and the case law of the European Court of human rights.

The courts violated part four of Art. 58 of the Civil Procedure Code of Ukraine regarding the determination of the state representative in the case. The violation of the applicant's rights by the state represented by the Cabinet of Ministers of Ukraine in accordance with its powers was not proven. The legal relations in dispute have no grounds to assert a legitimate expectation of receiving compensation from the state for property damage since there are no conditions and an appropriate mechanism for reimbursement for such damage. The amount of compensation determined by the courts is excessive.

In the cassation appeal, the Cabinet of Ministers of Ukraine points out the need to deviate from the conclusion of the Grand Chamber of the Supreme Court, set out in the judgment of 4 September 2019, in case No. 265/6582/16-ts. The Supreme Court, composed of the panel of judges of the Third Court Chamber of the Civil Court of Cassation, held to dismiss the cassation appeal of the Cabinet of Ministers of Ukraine. The Supreme Court also upheld the judgment of the Druzhkivka City Court in Donetsk Oblast as of 11 December 2020 and the judgment of the Donetsk Court of Appeal as of 24 March 2022.[24]

This court judgment is considered to have signs of case law since the Court of Appeal uses the phrase 'similar conclusions are contained in the decisions of the Supreme Court' when delivering the judgment. The authors of this article consider that Ukrainian justice is gradually moving to the same-type assessment of similar legal relations, which may make it possible to introduce the category 'judicial precedent' as a basis for decision-making in such legal relations.

The subject of this article obliges the authors to carry out legal monitoring of the current state-restrictive measures for the protection of property under conditions of the Russian-Ukrainian war. The authors find out that compensation mechanisms for the damage caused by Russian aggression are being developed in Ukraine through the application of existing legal instruments and the elaboration of new forms for restoring the violated poverty rights. In this regard, it is advisable to provide examples of the use of judicial instruments to ensure the compensation for losses caused by the Russian invaders to the civilian population and the state by selling property and confiscating funds from people who cooperate with the aggressor state or have a share in the business entities owned by Russians.

Thus, officers of the Economic Security Bureau of Ukraine (hereinafter – ESB) exposed a citizen of the Russian Federation who avoided paying taxes. As noted, the offender concealed the actual amount of income received from the lease of commercial real estate in one of the regions of Ukraine and failed to pay 18.6 million in taxes. The court held to seize bank accounts, land plots, and commercial real estate. The estimated value of the seized property was almost UAH 1.3 billion.

V. Melnyk, the director of the ESB, notes

> ESB examines the activities of 21,700 companies whose beneficial owners are citizens of the aggressor country. Analysts see the priority in high-net-worth companies and

24 Case No 242/68/19 (Civil Cassation Court of the Supreme Court of Ukraine, 22 September 2021) <https://reyestr.court.gov.ua/Review/99926446> accessed 20 February 2023.

> integral property complexes that can benefit the state. The primary tasks of the ESB are to prosecute violators, seize their property, prevent this property from being re-registered to other companies, and turn this property for the good of Ukraine. This will help to restore the economy of our state and destroyed settlements or for the needs of the Armed Forces.

As reported, the estimated total value of assets in all criminal proceedings for which the ESB has secured the seizure is UAH 30 billion.[25]

'Assets of Ukrainian companies owned by Russian "Gazprom", "Rosneft", and "Rosatom" in the amount of UAH 2.1 billion (more than USD 71 million) have been seized in Ukraine', said the Security Service of Ukraine. At the department's initiative, the seizure was imposed on the corporate rights and real estate of 11 enterprises, the final beneficiaries of which were these three Russian state corporations. Furthermore, 46 objects of real estate owned by enterprises were also seized.[26]

The High Anti-Corruption Court of Ukraine confiscated the assets of Putin's oligarch Vladimir Yevtushenkov. This was the first such decision of the Ukrainian court. In particular, the High Anti-Corruption Court of Ukraine confiscated 17 real estate objects with a total area of almost 100,000 square meters.

Moreover, the following shares of the oligarch in several Ukrainian companies were confiscated:

- 42.09% in LLC 'Elektrozavod-VIT' (Zaporizhzhia)
- 59.2% in LLC 'ITM-Ukraine' (Kyiv)
- 59.2% in LLC 'Smart Digital Solutions' (Kyiv)
- 42009% in LLC Scientific and Engineering Center 'ZTZ-Service' (Zaporizhzhia
- 34.21% in JSC 'Ukrainian Research Design and Technological Institute of Transformer Construction' (Zaporizhzhia).[27]

This list is not exhaustive but demonstrates the determinative position of Ukraine regarding the forced seizure of property and funds of Russian oligarchs who stay on the territory of Ukraine and whose profits are directed to support Russian aggression.

Ukraine, as a candidate for accession to the European Union, is consistently working to develop an effective mechanism for restoring the state's economy and protecting the subjective right of a person. The authors of this article analysed court documents of the European Court of Human Rights (hereinafter – ECtHR) in which Ukraine is the defendant and found that many problems remained unresolved. These problems are due to the imperfection of the current domestic legislation in the field of compensation for private property damages caused by the armed aggression of the Russian Federation in the Luhansk and Donbas regions and throughout Ukraine that has lasted more than eight years.

25 'In Ukraine, the property of a Russian was seized for ₴1.3 billion' (Ukrinform, 29 June 2022) < https://www.ukrinform.ua/rubric-economy/3517909-v-ukraini-arestuvali-majno-rosianina-na-13-milarda.html > accessed 20 February 2023.

26 'The Security Service of Ukraine reported the seizure of assets of Rosneft, Gazprom and Rosatom' (*Radio Svoboda*, 8 July 2022) <https://www.radiosvoboda.org/a/news-sbu-aresht-aktyvy-roskompaniyi/31935305.html> accessed 20 February 2023.

27 Aljona Mazurenko, 'For the first time, VAKS confiscated the fortune of a Russian oligarch: one of the pillars of Putin's regime' (*Ukrainska Pravda*, 1 September 2022) <https://www.pravda.com.ua/news/2022/09/1/7365681> accessed 20 February 2023.

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The current additional regulatory framework is supplemented by the above laws, bylaws, and several other documents, which introduce measures for protecting property rights. Thus, the authors of this article refer to the Law of Ukraine 'On Ensuring Civil Rights and Freedoms, and the Legal Regime on the Temporarily Occupied Territory of Ukraine',[28] where Part 2 of Art. 1 stipulates that the date of the beginning of the temporary occupation of certain territories of Ukraine by the Russian Federation is 19 February 2014. This means that individuals and legal entities whose property rights have been violated (real or other property has been destroyed or damaged as a result of hostilities, terrorist acts, or sabotage caused by the military aggression of the Russian Federation) have the right to submit an information report about damaged and destroyed real estate from the date of the introduction of martial law,[29] whatever the place of residence or stay of a person or the location of a legal entity.

The above acquires a tangible embodiment in the context of the provisions of Art. 5 (Protection of human and civil rights and freedoms in the temporarily occupied territory) of this Law. Para. 9 of Art. 5 of this Law stipulates that

> The Russian Federation as the state that carries out the occupation shall be fully compensated for material and non-pecuniary damage caused by the temporary occupation to the state of Ukraine, legal entities, public associations, citizens of Ukraine, foreigners, and stateless persons. The State of Ukraine shall contribute by all possible means to the compensation of material and non-pecuniary damage by the Russian Federation.

At the same time, the development of mechanisms for the compensation for damage requires considering mistakes in this field. That is why it would be appropriate to give the following suggestions for improving legislation in this area:

1. Create a single authority that will be responsible for the compensation mechanism for damage to private property.
2. Adopt a special law that will regulate the activities of the above-mentioned authority and relations in this sphere.
3. The grounds for receiving compensation should contain only two points: the fact of committing aggression and the fact of causing damage as a result of hostilities which were the result of this aggression. The victims will not need to prove every single fact of violation of the laws and customs of war by the military personnel of the aggressor state, the absence of military necessity in their actions, and the causal relationship between their actions and the damage caused. At the same time, it will be possible for the courts not to consider the cases of each of the victims separately but to group their claims and apply to the courts with collective claims for compensation for damages caused by hostilities in a certain territory.
4. Develop in detail methods for calculating and determining the amount of compensation.
5. Subjects of evaluation activity and specialists in the field of construction (if the matter directly concerns real estate) should be involved in the calculation and determination of the amount of compensation.

Bipolar positions of regulatory legal acts, bureaucracy, and overregulation of those processes that should work as an integral system for the restoration of the violated property right

28 Law of Ukraine No 1207-VII (n 17).

29 Decree of the President of Ukraine No 64/2022 'On the Imposition of Martial Law in Ukraine' of 24 February 2022 (as amended of 14 February 2023) <https://zakon.rada.gov.ua/laws/show/64/2022#Text> accessed 20 February 2023.

are sometimes the factors that encourage victims of military aggression to search for the protection of their rights in the ECtHR. Such a situation largely spoils the image of Ukraine at the interstate level and guarantees of legality and the formation of the state governed by the rule of law remain declarations that have no confirmations.

Analysing the case law of the ECtHR, the authors of this article did not find judgments on the violation of property rights of persons affected by Russian aggression after 24 February 2022. The authors of this article selected and analysed the court judgments relating to the confirmation or refutation of the results of domestic proceedings in view of compliance with substantive and procedural law, as well as the compliance of court decisions with the factual circumstances of the case.

It is worth noting that the domestic courts and the ECtHR require a sufficient evidence base regarding the legitimate ownership of the property to deliver a judgment in favour of the applicant who claims compensation for the destruction or damage of the property. After all, there is a significant number of refusals to satisfy claims against Ukraine precisely because the applicants do not provide convincing evidence of ownership.

Such an example was the judgment of the ECtHR of 2016, which did not satisfy the complaints of three residents of the Luhansk region (the cities of Trokhizbenka and Yasynuvata), who sued Ukraine and Russia for the property damage as a result of artillery shelling in the anti-terrorist operation zone (applications No. 5355/15 – *Lisnyy v. Ukraine and Russia*, No. 44913/15 – *Piven v. Ukraine*, No. 50853/15 – *Anokhin v. Ukraine and Russia*).

In the Decision on admissibility, the First Section of the ECtHR in the case of *Lisnyy v. Ukraine and Russia*, application no. 5355/15[30] puts forward the following demands:

para. 27. The applicants were required to provide sufficient evidence in support of their complaints under Art. 1 of Protocol No.1 to the Convention about the destruction of property in the context of an armed conflict. The same approach is applicable to complaints under Arts. 2, 6 (1), 8, 10, and 13 of the Convention.

para. 30. It should be noted, however, that the applicants did not provide any reasons for which they had failed to submit any relevant documents in support of their complaints under the Convention. Nor had they informed the Court of any attempts they might have made to obtain at least part of the documentary evidence to substantiate their allegations. Thus, the ECtHR established the following: pursuant to paragraph 1 of Rule 44c of the Rules of Court, where a party fails to add the evidence or provide the information requested by the Court or to communicate relevant information of its own motion or otherwise fails to participate effectively in the proceedings, the Court may draw such inferences as it deems appropriate (see also *Savriddin Dzhurayev v. Russia*, application no. 71386/10).

para. 31. In these circumstances, and in the application of Rule 44C § 1 of its Rules, the Court concludes that their complaints have not been sufficiently substantiated (for a similar approach, see *Ponomaryov and Others v. Bulgaria* (dec.), 5335/ 05, 10 February 2009).

Para. 32. Consequently, the application is manifestly ill-founded and must be rejected in accordance with Art. 35 §§ 3 (a) and 4 of the Convention.

However, another circumstance virtually eliminates any decision of the ECtHR to restore property rights violated due to the Russian military aggression against Ukraine. The authors of this article refer to the decree of the President of the Russian Federation, V. V. Putin, on the non-fulfilment of the ECtHR decisions adopted after 15 March 2022. These circumstances

30 *Lisnyy and two other applicants v Ukraine and Russia* App no 5355/15 (ECtHR, 5 July 2016) <https://rm.coe.int/16-lisnyy-and-others-v-ukraine-and-russia-uaa/16806b5961> accessed 20 February 2023.

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are stated in an article by O. Pavlysh.[31] The Russian Federation announced its withdrawal from the Council of Europe on 15 March. The Committee of Ministers of the Council of Europe adopted a resolution on the expulsion of Russia from the organisation in accordance with Art. 8 of the Charter (Gross violation of the provisions of the Charter). The Committee used a formal-coercive mechanism and unilaterally terminated Russia's membership in the organisation. On 11 June, Putin signed laws on the establishment of a deadline for the implementation of ECtHR resolutions in the Russian Federation. Under these laws, ECtHR rulings issued after 15 March 2022 have no force in the Russian Federation.

4 DISCUSSION

Problems related to the protection of property rights have always been socially sensible and are in the field of scientific interest of many domestic jurists. The breadth of scientific views in this field is represented by Ukrainian scholars, such as Z. Romovska,[32] I. Dzera,[33] R. Stefanchuk,[34] O. Hnativ,[35] and others. The authors of this article addressed the judgments expressed by individual scholars, highlighting their views and providing quotes.

I. Dzera defines the protection of property rights as a system of active measures applied by the owner, competent state, or other bodies.[36] Such a system aims to eliminate violations of property rights and impose an obligation to the offender to restore the violated right. R. Stefanchuk considers the protection of the right as a type and extent of possible or mandatory influence on social relations that have been illegally influenced in order to restore the violated, unrecognised, or disputed right.[37] Z. Romovska defines the essence of legal protection (protection of the right) as the implementation of the measure of state coercion chosen by the law enforcement agency. Romovska also highlights the need to consider legal protection in dynamics as a process that has its beginning (expressed by filing a lawsuit) and completion (execution of a court ruling).[38] O. Hnativ believes the aim behind the protection of property rights is to restore the violated right and terminate the action that violates the right. Legal relations regarding the protection of property rights are manifested in the use of the remedies provided for by law chosen by the authorised subject, depending on the purpose of protection.[39]

The current analysis of the above scientific approaches to understanding the protection of property rights showed that scientists ignored a crucial characteristic of any process. This characteristic is continuity in time and jurisdictional coverage. Since scientists have not reached a common understanding of the essence and content of the concept of protection of property rights and ignored particular aspects of the functioning of the mechanisms for the restoration of the violated right, the authors of the article propose a jointly developed definition.

31 Oleksij Pavlysh, 'Russia Left the Council of Europe, the Answer is Obvious: Putin Reacted to Akhmetov's Claim Against Russia' (*Ukrainska Pravda*, 27 June 2022) <https://www.epravda.com.ua/news/2022/06/27/688598> accessed 20 February 2023.

32 Zoryslava Vasylivna Romovska, *Protection in Soviet Family Law* (Vyshha Shkola 1985).

33 Iryna Oleksandrivna Dzera, *Civil Legal Means of Property Rights protection in Ukraine* (Jurinkom Inter 2001).

34 Ruslan Oleksijovych Stefanchuk (ed), *Civil Law of Ukraine* (Pravova jednistj 2009).

35 Oksana Boghdanivna Hnativ, 'Protection of Property Rights in Civil Law' (PhD (Law) thesis, Ivan Franko National University of Lviv 2014).

36 Dzera (n 38) 85.

37 Stefanchuk (n 39) 116.

38 Romovska (n 37) 63.

39 Hnativ (n 40) 17.

Thus, the protection of property rights is a permanent, coordinated system of state-legal actions introduced to regulate the legal grounds for the acquisition, disposal, and possession of objects of the material world and to prevent violation of the owner's right. The main features of the protection of property rights, based on the scientific studies of the above-mentioned researchers and our analysis, can be attributed to: state guarantee; the need to use state coercion to protect property rights in cases established by law; the need to restore the violated right as a logical conclusion of the process; generality; its equality for all subjects; full protection (the owner whose rights have been violated has the right not only to demand the restoration of the state that existed before the violation and termination of the violation, but also the right to compensation for property and moral damage caused to him/her).

The scientific research of these and other authors is necessary for the improvement of the legal regulation of the protection of property rights. It is possible in the close cooperation of the lawmaker and researchers to cover the full range of relations and not miss details which could later hinder the process of protecting property rights. Yes, of course, the positions of different scientists differ, but the truth is born in such contradictions and discussions, which subsequently turns into a rule of law.

5 CONCLUSION AND RECOMMENDATIONS

The conducted historical-legal and logical-legal analysis of the theoretical component and material support of property protection processes in the context of the Russian-Ukrainian war showed that international legal instruments for the protection of the right are practically ineffective, and the measures introduced by individual states are limited to their jurisdictional influence. The authors of this article refer to Russia's total refusal to comply with all ECtHR decisions. It is necessary to understand that the recovery of funds as compensation for losses caused by Russia's hostilities on the territory of Ukraine is impossible. The aggressor country does not intend to return to the course of international law, which forces the world order to face the problem of satisfying the legitimate claims of people whose property has been destroyed or damaged by the actions of the invaders.

Under such conditions, it is necessary to develop new, persuasive mechanisms for forcing the guilty party to comply with the rules of international law. The authors of this article consider the seizure and confiscation of the assets of the aggressor country located on the territory of the member states of the anti-Putin coalition to be the most effective measures. The authors also believe it is necessary to carry out similar measures systematically in Ukraine, identify and seize property belonging to Russia or persons who conduct business activities in Ukraine, and finance aggression against Ukraine at the expense of the profits received. The authors of this article do not deny that such conclusions are debatable. However, this approach can be the most effective given the ineffectiveness of interstate legal instruments of private international law.

The presented material combines theoretical and practical components and thus has an interdisciplinary nature. Given this reason, the expressed authors' generalisations can be widely used in science and practice. Since property rights are exercised in the new socio-political conditions, the conclusions drawn can help develop new scientific and theoretical approaches to the analysis and characteristics of instruments for the protection of property rights.

The historical-legal and logical-legal assessment of court rulings of various instances will contribute to an understanding of the effectiveness of legal enforcement and remedial measures for the protection of the violated property rights, which gives this study a particular applied significance. The suggested measures as an updated framework in the field

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of protection of property rights can be considered in the scientific (conceptual studies) and legislative (collaboration of additional regulations) spheres. It is also advisable to apply them in practice as a means of restoring the lawful possession of the property.

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Case Note

CHILD HOMELESSNESS AND NEGLECT IN UKRAINE AND POLAND IN THE 1920S: THE STATE OF THE PROBLEM AND LEGAL MEASURES TO COMBAT IT

Aisel Omarova

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ABSTRACT

Background: *With Russia's full-scale invasion of Ukraine and other problems that have arisen in recent years, the issue of Ukrainian children who find themselves in difficult life circumstances has become a significant problem. This situation demands urgent measures. For better or worse, Ukraine has experience in this regard and a history of combating the problem of child homelessness and neglect in the 1920s. Moreover, Ukraine's neighbour, Poland, also has a history of combating the same problem in the 1920s. In this article, child homelessness*

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and neglect in Ukraine and Poland were studied. Furthermore, legal measures to combat this problem were explored. It was useful to examine the state of the problem and legal measures to combat it to see what lessons could be learned from the successful experience in Ukraine and Poland in solving the problem of child homelessness and neglect in the 1920s.

Methods: *Historical and legal methods were used to study the issue effectively. This method allowed us to investigate the state of the problem in two countries at the same time and to outline the main measures that were used to combat the problem of child homelessness and neglect. The comparative method was also used to reveal the differences in combating the problem mentioned above.*

Results and Conclusions: *Some suggestions that could be used in Ukraine to solve the problem of children who find themselves in difficult life circumstances were proposed in the conclusions.*

1 INTRODUCTION

Even though we live in an age of economic and social progress, in an era of advanced technologies, child homelessness and neglect, unfortunately, remain a common phenomenon in the world (including Ukraine). Assuredly, this issue became acute in our country after the beginning of Russia's aggression against Ukraine in 2014, and after the start of a full-scale invasion on 24 February 2022, it deepened even more. This is explained by the fact that one of the consequences of hostilities is an increase in the number of orphans, as well as children who, due to the difficult financial situation and/or psychological state of their parents/guardians (or the passing of one parent/guardian), have become neglected or become homeless. However, currently, there is no classical child homelessness in Ukraine. Homeless and neglected children in Ukraine have slightly changed their 'face', meaning that now, they are children who find themselves in difficult life circumstances. However, as a result of the war, classic homelessness may return to the territory of Ukraine. According to OCHA's data as of 19 December 2022[1] and UNICEF's data (reporting period 24 February – 31 December 2022),[2] some 3.3 million children are in need of child protection interventions in Ukraine. According to OCHA's data, as of 27 January 2023, children are also at risk of war crimes, and there are 2,415 proceedings being investigated by prosecutors covering crimes against children and in the field of child protection.[3] The problem is not new – it existed not only in Ukraine but also in other European countries in the twentieth century, in particular, after the First World War. Based on this, I believe that it is expedient to comprehensively investigate the state of child homelessness and neglect in Ukraine and Poland in the 1920s and the experience of combating it. The choice of Poland as a country for comparison is justified firstly by the level of losses as a result of the First World War, secondly by the close territorial location with Ukraine, thirdly by the presence of a common history, and lastly, as it currently maintains a different system of values, specifically European ones. The historical period was chosen in view of the similarity of the historical realities of that time with the present in Ukraine.

During the First World War, the population of Ukraine and Poland suffered very large material, cultural, and physical losses. As a result, both countries found themselves in a deep economic crisis. However, the saddest thing was that because of the hostilities, there were

1 UN OCHA, 'Ukraine Humanitarian Response – Key Achievements in 2022: Situation Report' (*OCHA*, 19 December 2022) <https://reports.unocha.org/en/country/ukraine> accessed 19 February 2023.

2 UNICEF, 'Ukraine Humanitarian Situation Report No 24: 24 February – 31 December 2022' (*UNICEF* Ukraine, 31 Dectmber 2022) <https://www.unicef.org/ukraine/en/documents/humanitarian-situation-report-december-2022> accessed 19 February 2023.

3 UN OCHA, 'Ukrainian Crisis: Situational Analysis 27 January 2023' (*OCHA*, 27 January 2023) <https://reliefweb.int/report/ukraine/ukrainian-crisis-situational-analysis-27-jan-2023> accessed 19 February 2023.

a large number of orphaned children, many of whom were forced to live on the streets, so to speak. In Ukraine, the situation was complicated by the famine of 1921-1923. Thereby, in the post-war years, in both Ukraine and Poland, state policy was developed and implemented with an emphasis on the protection of such a category of people as homeless and neglected children.

The research and analysis of such a phenomenon as child homelessness and neglect, as well as the means of overcoming it in the territory of Ukraine and Poland in historical retrospect, will provide the necessary scientific basis to help us find mechanisms for overcoming the problem in our state, which has been recognised by the entire civilised world as one of the terrible consequences of Russia's war against Ukraine.

2 CHILD HOMELESSNESS AND NEGLECT IN UKRAINE IN THE 1920S

The First World War had a disastrous impact on families, as most of the fathers were sent to the war, and many of them died on the front, and mothers, in order to feed their children, were engaged in production almost around the clock. As a result, a significant number of children were deprived of proper care. In addition, the network of schools shrank, and education was disrupted. By the early 1920s, cities were overrun with homeless children, and juvenile crime had nearly doubled and become more dangerous. According to statistics, the number of homeless children reached 1 million, which was an eighth of all children in the country.[4] According to O.I. Anatolyeva at the end of 1920, there were more than 50,000 pupils in 760 orphanages in the republic, and 125,000 children visited playgrounds and clubs. However, this was not enough: almost 750,000 orphans and semi-orphans needed immediate help.[5]

Considering the complexity and acuteness of the problem, the Council of People's Commissars of the Ukrainian SSR issued a Decree[6] that provided an exhaustive list of cases when a child could be recognised as homeless, which was an important and timely event. The Decree stated that minors under the age of 18 were considered homeless in the following cases:

a) if they were left without any supervision and care by their parents or people who could replace them;

b) if there was cruel treatment by the people specified in point a;

c) if there was a failure to provide them with the necessary minimum education and training provided for by current legislation;

d) if they were under the influence of a corrupting home environment;

e) if they were leading a vicious lifestyle, including begging or vagrancy;

e) if they were engaging in any kind of trade.

4 Tetjana Antoniuk, 'Orphanage as a Form of Social Education: Historical Aspect' (2004) 8 Bulletin of the Taras Shevchenko National University of Kyiv, Ukrainian Studies 22.

5 Olga Anatolyeva, 'Legal Regulation of Combating Homelessness, Neglect and Crime in the USSR in the 20s of the XX century' (PhD (Law) thesis, National Academy of Internal Affairs of Ukraine 2003) 55.

6 Decree of the Council of People's Commissioners of the Ukrainian SSR 'On Measures to Combat Child Homelessness' of 16 June 1921 [1921] Collection of Laws and Decrees of Workers' and Peasants' Government of Ukraine 11/293.

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2.1 Protection measures for homeless and neglected children

It is worth pointing out that in the early 1920s, the Council of Children's Protection (hereinafter – the Council)[7] became the first Soviet body in Ukraine, one of the main tasks of which was the nutrition, sanitary protection, and civic education of children. In addition to this function, the Council resolved the issue of providing children with clothes and shoes, as well as looking for premises for children's institutions. At the same time, in its activities, the Council often used methods of administrative coercion (requisitions, taxation, imposition of fines).[8] Based on the decisions of the executive authorities and with the active support of the Council, in the early 1920s, kindergartens, clubs, and communes began to open everywhere. It was during this period that the network of institutions for homeless, neglected children and juvenile delinquents expanded significantly: day orphanages were formed,[9] which took on the upbringing of those children who were left without the care of their parents during the day due to their work, and orphanages were opened[10] to accept orphans and children under the age of 16 who were left without parental care.

However, this body operated for only two years because, on 6 December 1922, instead of the Council of Children's Protection, a new group was created – the Central Commission for Children's Assistance (CCCA),[11] the main task of which was to combat child homelessness, improve the living conditions of children's institutions and public child nutrition, and re-evacuate children to the homeland when needed. It should be noted that at that time, the powers in the field of combating homelessness were significantly expanded: departments of the social and legal protection of minors were created, daycare centres for children whose parents were unemployed, playgrounds, nurseries, etc. were opened, guardianship and patronage institutes were introduced on a much larger scale, and children's social inspection, rehabilitation measures, etc., were carried out. Also, it should not be overlooked that it was in the 1920s when special institutions for children with vision and hearing disorders, mentally disabled children, and children with physical disabilities were first established in Ukraine.[12]

As for re-evacuation, significant work in this direction was carried out by the children's address desks of the People's Commissariat of Education. In particular, in 1923, they processed more than 3,000 requests from parents who lost contact with their children during the evacuation. According to the data, the search for children was successful in 42% of these

7 Decree of the Council of People's Commissioners of the Ukrainian SSR 'On the Establishment of the 'The Council of Children's Protection'' of 29 June 1920 [1920] Collection of Laws and Decrees of the All-Ukrainian Revolutionary Committee 18/341.

8 Central Council for the Protection of Children and Provincial Council for the Protection of Children 'Report on the Activities of the Central Council for the Protection of Children and the Provincial Council for the Protection of Children for 1920' (Central State Archives of the Higher Organs of the Government of Ukraine, f 166, inv 2, case 578) 89-95.

9 Decree of the Council of People's Commissioners of the Ukrainian SSR 'On Day Orphanages' of 8 June 1920 [1920] Collection of Laws and Decrees of the All-Ukrainian Revolutionary Committee 17/338.

10 Decree of the Council of People's Commissioners of the Ukrainian SSR 'On Open Orphanages' of 10 June 1920 [1920] Collection of Laws and Decrees of the All-Ukrainian Revolutionary Committee 17/337.

11 Decree of All-Ukrainian Central Executive Committee 'Regulations on the Central Commission for Assistance to Children under the All-Ukrainian Central Executive Committee' of 6 December 1922 [1922] Collection of Laws and Decrees of Workers' and Peasants' Government of Ukraine 53/773.

12 Viktor Yermolaiev, Aisel Omarova and Hanna Ponomarova, 'The Development of Children's Medical Rights in Ukraine (1919 – beginning of the XXI century)' (2021) 28 (4) Journal of the National Academy of Legal Sciences of Ukraine 184, doi: 10.37635/jnalsu.28(4).2021.181-189.

cases.[13] In general, in 1923, about 18,000 minors were re-evacuated.[14] The return of children to their parents was seen both outside and within the borders of Ukraine.[15] It is noteworthy that the children who were still on the street arrived in place of the re-evacuated children. Thus, thanks to the re-evacuation, it became possible to accommodate other homeless children in children's shelters.

That said, given the huge number of homeless people, the existing institutions were not able to receive all the children who needed state protection. This indicates that against the background of the significant scale of child homelessness, the network of children's institutions was insufficiently developed – that is, it did not meet the needs of the time. It cannot be overlooked that one of the measures to combat neglect was the placement of children among the urban and rural populations on the basis of a voluntary agreement between child protection authorities and citizens who gave their consent. However, this measure was temporary until the situation with food and other supplies improved.[16] The absence of a legal basis for the use of such forms of placement of children as adoption and guardianship should be recognised as a significant problem of neglect prevention. It is also should be added that due to the state's inability to provide reliable protection to homeless children, the practice of patronage – the transfer of homeless and neglected children to care – was introduced.[17] It bears noting that public organisations were involved in the provision of financial assistance to families who took children for patronage. The CCCA provided scholarships for the studying of former homeless people.[18] However, primarily younger children were placed in children's institutions and foster care. It is clear that when considering this issue, special attention should be paid to the fact that in the first half of the 1920s, Ukraine was experiencing a deep economic crisis, which affected the income of the population (due to poverty, not all families were able to participate in the patronage of homeless and neglected children) and financing of children's institutions, which was insufficient.

Equally difficult was the increase in the level of unemployment, which, of course, had a negative impact on patronage as well as on the possibility of legal earnings for teenagers. As is known, it was at this time that the number of enterprises decreased, and a trend towards massive downsizing was observed, primarily among teenagers who, in order to feed themselves, were forced to commit crimes. Identifying teenagers who broke the law and placing them in boarding schools became the main focus of the work of the commission on juvenile affairs.[19] It is worth pointing out that in the activities of this commission, an

13 'Information about homeless children in Ukraine and the work of childhood protection according to data for 1923' (Central State Archives of the Higher Organs of the Government of Ukraine, f 166 inv 2, case 1623) 18.

14 Central Commission for Assistance to Children, 'Brief report on the activities of the Central Commission for Assistance to Children under the All-Ukrainian Central Executive Committee for the period: September 1923 – June 1924' (Central State Archives of the Higher Organs of the Government of Ukraine, f 1, inv 20, case 1958) 1-14.

15 Decree of All-Ukrainian Central Executive Committee 'On the Combat Against Child Homelessness' of 17 April 1924 [1924] Collection of Laws and Decrees of Workers' and Peasants' Government of Ukraine 21-22/190.

16 Aisel Omarova, 'State and Legal Policy of Combating *Juvenile Delinquency in Ukraine in the 1920s*' *in Juvenile Policy as a Component of Supporting Ukraine's National Security and Defense* (Baltija Publishing 2023) 256, doi: 10.30525/978-9934-26-276-0-12.

17 Decree of the Council of People's Commissioners of the Ukrainian SSR 'On Homeless Children' of 14 October 1921 [1921] Collection of Laws and Decrees of Workers' and Peasants' Government of Ukraine 20/591.

18 Anatolyeva (n 6) 67.

19 Decree of the Council of People's Commissioners of the Ukrainian SSR 'On the Responsibility of Minors' of 12 June 1920 [1920] Collection of Laws and Decrees of the All-Ukrainian Revolutionary Committee 15/281.

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important role was also assigned to preventive work, the main forms of which were the examination of the conditions of raising children in families, in relation to which there were reports of violations of the rights of minors or the commission of offences by themselves, detection of cases of parental rights abuse, provision of assistance for children, protection of their rights in administrative and judicial bodies, consideration and resolution of cases of neglect, care of children recognised as neglected (appointment of supervision, placement in educational institutions), and prosecution of parents and guardians if children were left without supervision due to the fault of a guardian, that is, those who did not perform their duties properly.

According to the Soviet tradition, one of the measures to combat child homelessness and neglect was the involvement of teenagers in work. Thus, the practice of reserving workplaces for teenagers at enterprises was introduced. That said, a global solution to this problem required taking measures to bring the country out of the economic crisis. It was for this reason that a new economic policy was developed, which made it possible to create an adequate material base for the combat against child homelessness and neglect. Of course, the legislative basis was also laid. Thus, the Labor Code of 1922[20] provided for a lowering of the age of employment while at the same time enshrining broader guarantees of the labour rights of minors. It was forbidden to hire people under the age of 16, but in exceptional cases, on the basis of a special instruction of the authorised People's Commissariat of Labor, in agreement with the Southern Bureau of the All-Union Central Council of Trade Unions, the labour inspector was given the right to grant employment permits to minors under the age of 14. The introduction of compulsory primary education, summer campaigns, sanatoriums, and school camps should be recognised as an equally important measure to combat child homelessness and neglect.[21] In particular, the network of schools was significantly expanded, which allowed all children to receive education and be under supervision. Moreover, in order to prevent homelessness, neglect, and the commission of crimes by graduates of orphanages in these institutions, they tried to change the priorities of education. In particular, they organised work in such a way that after graduating from these institutions, children were prepared for independent life. For example, industrial training continued to be developed in boarding schools. Of no less importance is the fact that in the work of orphanages was the organisation of medical assistance for homeless children.

Thus, a new economic policy, consolidation of compulsory primary education with a simultaneous increase in the network of children's institutions, industrial training, activities of bodies and organisations dealing with the issue of eliminating homelessness and neglect of children, etc. All this made it possible to almost get rid of the mass homelessness of children. However, the social and political processes that took place at the end of the 1920s, namely the roll-back of the new economic policy, the announcement of a course for industrialisation and collectivisation, the formation of a command-administrative management system, the roll-back of the work of special bodies that cared for minors, etc., nullified the achieved successes, and as a result, a new wave of homeless and neglected children began.

20 Decree of All-Ukrainian Central Executive Committee 'On the Enactment of the Code of Labor Laws' of 2 December 1922 [1922] Collection of Laws and Decrees of Workers' and Peasants' Government of Ukraine 52/751.

21 Decree of All-Ukrainian Central Executive Committee 'On the entry into force of the Code of Laws on Public Education' of 22 November 1922 [1922] Collection of Laws and Decrees of Workers' and Peasants' Government of Ukraine 49/729.

2.2 The issue in the case law of Ukraine

One of the directions of Ukraine's Association Agreement implementation is the adaptation of national legislation to European standards. The protection of children's rights is one of the relevant areas of law-making and law-enforcement activities. Thus, the national normative regulation of homeless children and those in need of protection is reflected in a number of laws and subordinate legal acts (the Law of Ukraine 'On the Protection of Childhood', the Law of Ukraine 'On the Basics of Social Protection of Homeless Citizens and Homeless Children', etc.). The main emphasis in the national legislation is on the protection of children's property rights. According to the Resolution of the Civil Court of Cassation,[22] it is assumed that it is the parents' duty to take care of the preservation and use of the child's property in his/her interests. In order to guarantee the state-declared priority of the child's interests, the law provides for the additional means of control by the state over the proper performance of their duties by parents, prohibiting the parents of a minor and people who replace them from carrying out certain transactions regarding his/her property rights without the prior permission of the guardianship authorities.

In order to prevent the violation of the principle of legal certainty and the formation of a uniform practice of the court of cassation, the Supreme Court tries to interpret broadly normative acts that are devoted to the protection of children's rights. However, these views are not unanimous, which, to some extent, creates legal conflicts.

The legislative construction on the protection of children's property rights is sometimes a tool for the manifestation of the unscrupulous behaviour of the parties to the dispute and a result of the abuse of rights. As the Supreme Court notes, the parents of a minor do not have the right, without the permission of the guardianship authorities, to carry out transactions regarding the child's property rights, including renouncing those rights (sub-section 3 para. 2 of Art. 177 of the Family Code of Ukraine).

One of the fundamental principles of civil legislation is good faith (para. 6 of Art. 3 of the Civil Code of Ukraine), and the actions of participants in the civil legal relations must be in good faith, i.e., meet a certain standard of behaviour characterised by honesty, openness, and respect for the interests of the other party to the contract or the relevant legal relationship. According to para. 2 and 3 of Art. 13 of the Civil Code of Ukraine, when exercising his/her rights, a person is obliged to refrain from actions that could violate the rights of other people, cause damage to the environment, or damage cultural heritage. Actions of a person with the intention of harming another person, as well as abuse of rights in other forms, are not allowed. Thus, the deed committed by the parents (or adoptive parents) in relation to real estate, the ownership of which or the right to use belongs to the children, in the absence of prior permission of the guardianship authorities, may be recognised by the court as invalid (para. 6 of Art. 203, para. 1 of Art. 215 of the Civil Code of Ukraine). This is the case if it is established that the contested deed contradicts the rights and interests of the child, narrows the scope of the existing property rights of the child, and/or violates the legally protected interests of the child in relation to the residential premises.[23]

In some cases, realising the important role of the child as an indicator of the legal regulation of contractual relations and the order of executive proceedings, debtors begin to manipulate the child. This leads to the impossibility of executing the court decision. When analysing the law enforcement activity of national courts, attention should be paid to the Resolution

22 Case No 201/9425/18 (Civil Cassation Court of the Supreme Court of Ukraine, 2 November 2022) <https://reyestr.court.gov.ua/Review/107219343> accessed 19 February 2023.

23 Case No 727/2116/20 (Civil Cassation Court of the Supreme Court of Ukraine, 14 September 2022) <https://reyestr.court.gov.ua/Review/106280330> accessed 19 February 2023.

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of the Grand Chamber of the Supreme Court, according to which it is indicated that unlike the execution of the court decisions, which directly provide for the foreclosure of specifically defined residential premises in a specifically defined manner, for other court decisions, which provide for the general right to collect a debt (including joint debt) from the debtor (his guarantor) for a specified amount of obligations, obtaining the corresponding permission of the guardianship authorities by the State Executive is mandatory by virtue of the very fact of the existence of the right of ownership or the right of use of a minor in relation to immovable property, which is realised within the framework of executive proceedings. The protection of the relevant rights of a minor is ensured by the body of the guardianship authorities within the limits of its powers in deciding to grant the specified permission or refuse to grant the specified permission to the State Executive, as well as the court in the case of an appeal to it by an authorised person regarding the actions of the State Executive and/or the guardianship authorities. This also applies to the actions of private parties.[24]

In other cases, the role of guardianship authorities is so significant that parents, acting in the interests of their children, cannot properly obtain permission to alienate property. In this context, the issue of jurisdictional certainty of the dispute subject is quite interesting. Thus, considering the dispute regarding the appeal of the refusal of the guardianship authorities to grant a permit for the sale of real estate, the courts of the first and appellate instances reached a unanimous conclusion on the satisfaction of the claim. When discharging these decisions and closing the proceedings in the case, the court of cassation reached the following conclusions. Disputed legal relations arose regarding the implementation and protection of the property interests of the plaintiff and her son, in whose interests a lawsuit was filed, as a result of the enforced execution of a court decision on the division of the property of the spouses and the collection of funds. The disputed decisions of the defendant became an obstacle to further enforcement of the decision and sale of property. Therefore, the disputed actions and decisions, though taken by the subject of authority, were aimed at implementing the prescriptions of the civil legislation and affected the property rights of the plaintiff and a third party. In this instance, the disputed legal relations had a private law character. In view of the above, and taking into account the nature of the disputed legal relationship, the panel of judges came to the conclusion that the specified dispute was not a public legal dispute and did not belong to the jurisdiction of administrative courts and therefore the conclusions of the courts of first instance and appeals about the consideration of the case in the order of administrative proceedings were erroneous.[25]

Revealing such an applied problem as determining who exactly is considered a homeless child and what are the criteria of this definitive apparatus, attention should be paid to the decision of the ECtHR *Mamchur v. Ukraine*.[26] After the death of his wife, the child's father tried to establish custody of his child, who lived with his grandparents for some time. National methods of protection did not grant him such a right, denying him the satisfaction of the claim. That said, the ECtHR, when determining the violation of the right to respect for private life (Art. 8 of the ECHR), noted the following. When making decisions about measures to protect children, national authorities and courts often face a task that is extremely difficult. They tend to have the advantage of direct contact with all concerned parties, often at the stage when the need for social protection measures first arises or immediately after their implementation. Therefore, there is a need to provide them

24 Case No 755/12052/19 (Grand Chamber of the Supreme Court of Ukraine, 26 October 2021) <https://reyestr.court.gov.ua/Review/101584602> accessed 19 February 2023.

25 Case No 337/2021/17(2-a/337/159/2017) (Administrative Cassation Court of the Supreme Court of Ukraine, 21 February 2020) <https://reyestr.court.gov.ua/Review/87758724 > accessed 19 February 2023.

26 *Mamchur v Ukraine* App no (ECtHR, of 16 July 2015) <https://hudoc.echr.coe.int/eng?i=001-156388> accessed 19 February 2023.

with some discretion in deciding how best to deal with their cases, subject to appropriate and professional conclusions being reached. The task of the Court is not to replace the national authorities but to consider the conformity of the decisions and conclusions of the authorities with the Convention in the exercise of their freedom of discretion. The scope of the review may vary depending on the nature and importance of the intervention. While national authorities generally exercise wide discretion in resolving disputes between parents regarding child custody, the Court should take a closer look at cases where the restriction of parental rights may cause the termination of the family relationship between the parent and the child. Moreover, the Court notes that the assessment of the overall proportionality of any measure taken, which may cause the breakdown of the family ties, will require the courts to carefully assess a number of the factors, and, depending on the circumstances of the respective case, they may differ. However, it is necessary to remember that the main interests of the child are extremely important. When determining the main interests of the child in each specific case, two conditions must be taken into account: first, it will be in the best interests of the child to maintain his/her ties with the family, except in cases where the family is particularly unsuitable or clearly dysfunctional; second, it will be in the best interests of the child to ensure his/her development in a safe, calm, and stable environment that is not disadvantaged.

3 CHILD HOMELESSNESS AND NEGLECT IN POLAND IN THE 1920S

After regaining independence in 1918, Poland did not become a single and integral state. This is because the territory of Poland at the end of the 18th century was divided between the Kingdom of Prussia, the Russian Empire, and the Austrian monarchy. Poland lost its statehood for 123 years, and, accordingly, in 1918, at the time of the revival of Poland, there was no single system of law on its territory. Moreover, like Ukraine, it had to overcome social, economic, cultural, and educational difficulties. After the First World War, children made up a vast proportion of refugees from areas of combat, primarily in Galicia and Volyn.[27] At that time, thousands of Polish families lived in extreme poverty and material and moral neglect and were waiting for social assistance from the state. There was a considerable lack of economic stability and the presence of such phenomena as impoverishment, hunger, infectious diseases, homelessness, and unemployment (almost the same set as in Ukraine at that time). However, the most important and most dangerous thing was that, first, it was difficult to overcome these challenges quickly, and second, they had a negative impact on the public mood and led to demoralisation, which threatened children and teenagers in particular. It is worth adding that vagrancy became widespread in Poland at that time; it was especially characteristic of large cities. Most often, children resorted to vagrancy due to the death of their parents, or because their parents left them, so to speak, to the mercy of fate, or because demoralised parents forced them to cadge, thus earning a living for their parents and family. The main occupation of this category of children was trade, cadging, or theft. According to statistical data, there were from 1,000-2,000 street children in every provincial city[28] and they had no support from either their mother or their father. It is noteworthy that the problem of child homelessness was mostly a problem in cities, not villages. It should also not be overlooked that as a result of the war and the backwardness of many regions, there was a catastrophic housing situation in Poland, due to which the number of children who became homeless increased.

Based on the above, it is worth emphasising that the worst thing was that orphans, homeless, and vagrant children found themselves on the street, which was a source of

27 Natalia Krestovska, 'Children and the Armed Conflict in Eastern Ukraine' in S Sayapin and E Tsybulenko (eds), *The Use of Force against Ukraine and International Law* (Asser Press Springer 2018) 265.

28 Marian Balcerek, *Child Rights* (PWN 1986) 210.

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the spread of alcoholism, prostitution, and crime, considered it a salvation from family problems and poverty. As a result, a generation of street children grew up. It is quite clear that these phenomena required not only recognition but also the adoption of radical measures by the state.

Let me dwell on one more point. According to documents, about 50,000 illegitimate children are born annually in Poland.[29] This category was in the worst situation, especially if the mother of such a child had a low status. In this case, she could not count on help and therefore had to provide the child with material conditions for life, which confirms the existence of discrimination against these people. Under the conditions of that time, they were most often not able to do this, and as a result, women abandoned their children.

To the above, let me add that in interwar Poland, the very refusal of a child (abandonment of a child) was understood in two categories: material and moral. According to J. C. Babicki and W. Woytowicz-Grabińska, moral refusal occurred when the child lacked conditions for normal mental development – this refers to situations when the child's mental development was hindered and ethical and social tendencies were distorted. It is noteworthy that the term 'abandoned child' did not define any negative features of the child (neither physical nor mental); therefore it did not characterise the child him/herself but only contained information about the conditions in which he/she found himself/herself. This reflects the goal of social care for a child deprived of a natural upbringing environment, which can be formulated as follows: 'so that the child is well, and society is well with him'.[30] As for material refusal, it is clear enough here: the child's parents/guardians could not provide for the child's basic needs (a place to live and food).

However, in the 1920s and 1930s, private individuals, church organisations, and public associations, created first aid centres, mother and child homes, and shelters for foundlings. Some shelters for foundlings were converted into mother-child homes, where they not only cared for the children but even tried to find the mothers.

To sum up, let me emphasise that it was the First World War, during which many people died, that caused the appearance of the largest group of homeless and neglected children – orphans – as well as children who became orphans due to the loss of their parents during their return to the Motherland from abroad. There were also cases when, due to a lack of means of livelihood, children were temporarily placed in boarding schools, even when they had living parents. Some authors cite the following statistics: in 1921, of the total number of children under 16, about 15% were orphans of the war,[31] which indicates the scale of the tragedy.

What is interesting is the fact that in Ukraine at that time, there was already a legally established concept of 'homeless child', while in the normative acts of Poland, this concept was absent in the 1920s. According to M. Rodak, in Poland, a homeless person was considered to be someone who did not have a home (owned/rented) and was forced to use social assistance to get a replacement home or decided/was forced to live on the street.[32] In addition, the fact that no separate act was adopted in Poland to solve the problem of

29 Łucja Kabzińska and Krzysztof Kabziński, 'Childhood in Jeopardy – on Various Hazards of Growing up in Interwar Poland' (2012) 4 Warmia and Mazury Scientific Quarterly, Social Sciences 26.

30 Ibid 31.

31 J Wojtyniak and H Radlińska, Orphanhood: *Reach and Alignment* (Polish Institute of Social Service 1946) 20.

32 Mateusz Rodak, 'The Phenomenon of Homelessness in the Second Rzeczpospolita (with a Special Inclusion of Warsaw)' in P Grat (ed), *From the Working Issue to the Modern Social Issue: Studies in Polish Social Policy of the XX and XXI Centuries*, vol 1 (University of Rzeszów 2013) 41.

homelessness seems rather surprising, given the scale of the problem (during the period under study, not only children were homeless, but also adults).

4 PROTECTION OF HOMELESS AND NEGLECTED CHILDREN

The Law 'On Social Security' of 16 August 1923[33] was used to resolve the issue of homelessness of children. According to Art. 1 of this Law, social security was understood as meeting the vital needs of those people who cannot permanently or temporarily do so with their own material resources or their own labour at the expense of state funds, as well as preventing the creation of the above conditions. Art. 2 of the mentioned act is worthy of attention, which, among other things, states that social security includes the care of infants, children, and adolescents, especially orphans, half-orphans, neglected, abandoned, or criminal children, and those who are at risk of being influenced by a bad environment. Having analysed the prescriptions of the specified article, it could be concluded that, though not directly, the division of the homeless into victims of war, vagrants, and cadgers was foreseen. In this regard, it is considered appropriate to note that the Law provided for the fight against cadging and vagrancy and not for helping cadgers and vagrants. The care of the homeless, and therefore the obligation to provide housing, according to the provisions of the Law, was entrusted to local self-government bodies. They had to help all residents who lived on their territory, regardless of their territorial affiliation. According to the Law, two types of social security were distinguished – shelter (in care institutions) and care. The first form consisted in placing the needy in care facilities, namely non-treatment facilities, city shelters, or other care facilities. The second provided for the provision of: 1) necessary food products, linen, clothes, and shoes; 2) a suitable room with fuel and light; 3) assistance in acquiring the necessary professional skills and obtaining medical care and medicines at the expense of the commune; 4) assistance in restoring lost or improving reduced working capacity. In addition, in Art. 3 of the Law stipulated that the basic life needs of children were considered to be their religious, moral, mental, and physical upbringing, and that of teenagers included help in preparing for professional activities. Teenagers could work after they turned 15, with the permission of their parents or guardians and with the mandatory provision of a certificate of schooling and a doctor's certificate from the labour inspectorate that the work did not exceed their capabilities.[34] Young workers under the age of 18, pupils, and students had the right to a 14-day holiday in case of continuous work during the year.[35] Thus, attempts were made to give children from the age of 15 the opportunity to support themselves and not be forced to look for means of life on the street.

The Resolution of the President of Poland of 14 October 1927[36] enshrined in Arts. 2 and 3 the definitions of the concepts of 'cadger' (one who professionally asks for alms in any way) and 'vagrant' (a person who, having no work and means of livelihood, constantly changes his/her place of residence for reasons other than to find a job). This resolution also contained a list of institutions that were used to combat cadging and vagrancy. These included voluntary labour houses, shelters, and forced labour houses.

33 Law of Poland 'On Social Security' of 16 August 1923 [1923] DzU 92/726 <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19230920726> accessed 19 February 2023.

34 Law of Poland 'On the Work of Young People and Women' of 2 July 1924 [1924] DzU 65/636 <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19240650636> accessed 19 February 2023.

35 Law of Poland 'On Holidays for Employees Working in Industry and Trade' of 16 May 1922 [1922] DzU 40/334 <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19220400334> accessed 19 February 2023.

36 Resolution of the President of Poland 'On Combating Begging and Vagrancy' of 14 October 1927 [1927] DzU 92/823 <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19270920823> accessed 19 February 2023.

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Their organisation was already determined by the Decree of the Minister of Labor and Social Care of 25 May 1929.[37] In shelters, work was organised according to the physical condition of dependents determined by a doctor. Religious care was also provided, together with medical care and assistance. Dependents were rewarded for their work in the form of monetary bonuses, the amount of which depended on the type of work and the diligence shown by the dependent. Cadgers and vagrants who were fit for work and had no means of subsistence were placed in the forced labour houses, in respect of which the court decided to place them in forced labour. They worked eight hours a day. A separate section was created for minors. Cadgers and vagrants were placed in voluntary labour houses to the extent possible and at their own will after release from forced labour houses, with those serving a prison sentence, persons with partial working capacity, and all other persons who could not either be employed in another way or find another job. Moral care for minors was carried out in voluntary workhouses by appointing a special educator.

Other ways of combating child homelessness and neglect were nurseries, children's homes, orphanages, etc. Some of them provided full care, others material (clothes, food), and only some provided school education. According to M. Łapot, in 1927, there were 1,011 care and education institutions and special institutions in Poland managed by *gmina* (commune), associations, as well as individuals or private foundations, which cared for 53,000 children.[38] The introduction of compulsory seven-year school education also had a positive effect on the situation.[39] It is interesting that the parents were responsible for the child's non-fulfilment of the school duty (primarily the father, but in his absence, the mother). Keeping a child from enrolling in school resulted in criminal liability (fine, arrest, imprisonment). Therefore, the state tried to reduce the number of neglected children by making parents accountable. However, this only applied to those children who had parents or guardians, while the situation was different for orphans.

Some orphans were grouped in separate institutions, others were given to relatives, and the rest were sent to their *gminas*, where they were placed in institutions of care of the state, public, and local authorities. For example, nine guardian districts were created in Lviv.[40] It should be noted that by the Resolution of the President of Poland of 10 March 1927,[41] the responsibilities of communal guardianship unions were separated. Among the responsibilities was the duty to organise institutions for the care of mothers and children, as well as orphans. The act also established the provision that assistance is provided in kind or in cash.

The formation of summer camps played an equally important role in combating child homelessness and neglect. Their goal was to save the lives and health of orphans, exhausted by the poverty of several years of war. In particular, in Galicia, the opening of summer camps for children was initiated by the Polish Pedagogical Society, as well as other societies and public committees. For orphans who were kept in the city shelter, the Lviv *gmina* established

37 Ordinance of the Minister of Labor and Social welfare of Poland 'Issued in Consultation with the Minister of Justice and the Minister of Internal Affairs On the Organization of Foster Houses, Voluntary and Forced Labor Houses' of 25 May 1929 [1929] DzU 41/350 <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19290410350> accessed 19 February 2023.

38 Mirosław Łapot, *From the History of Caring for a Jewish Orphan Child in Lviv (1772-1939)* (Gliwice Higher School of Entrepreneurship 2011) 100.

39 Decree of the President of Poland 'On Compulsory Education' of 7 February 1919 [1919] DzPrPP 14/147 <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19190140147> accessed 19 February 2023.

40 Łapot (n 39) 104.

41 Resolution of President of Poland 'On the Delineation of the Duties of Municipal Community Associations' of 6 March 1928 [1928] DzU 26/232 <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19280260232> accessed 19 February 2023.

a camp in Brzhuhovyce near Lviv. Every year, about 200 children and young people took advantage of the several-week vacation.[42]

Due to such initiatives, at the end of the 1920s in Lviv, there was already a network of orphanages, cultural centres and youth clubs, vocational and technical schools with boarding schools, a sanitary and hygienic campaign, and a summer camp. The workers were mostly volunteers. In addition, attempts were made to connect the work of institutions for orphans with vocational and technical educational institutions so that young people could acquire a profession and become independent. However, the lack of appropriate financial resources was still particularly acute, and this made it difficult to professionalise activities according to Western models.

Thus, despite the establishment of an effective system of care for orphans, there was still a problem with funding. The Law on Social Security of 1923 and other acts that developed its provisions, according to Polish researchers, turned out to be unviable.[43] However, the main problem was the lack of legal acts that would oblige *gminas* to fulfil their social security obligations. Moreover, the self-governing *gminas* were underfunded and did not prioritise social welfare.

5 CONCLUSIONS

In the 1920s, the position, fate, and development opportunities of the children both in Ukraine and in Poland were the result of many factors, such as socio-economic relations, the level of civilisation and culture, the state of the family, and forms of assistance and care, as well as legal guarantees of its functioning. It should be borne in mind that in both countries, the terrible consequences of the First World War were evident, especially in terms of human resources – both countries were in a deep economic crisis. All this had a negative impact on the situation of children, and a large number of them became homeless or neglected. However, in Ukraine for a certain time (closer to the end of the 1920s), it was possible to overcome this phenomenon, although the results were completely levelled by the roll-back of the new economic policy and the introduction of the command-administrative management system. By the end of the 1920s, it was also possible to stabilise the situation of child homelessness and neglect in Poland, but inadequate financing of measures minimised the work of the relevant bodies in this direction.

Considering the generally positive experience of combating child homelessness and neglect in Ukraine and Poland in the 1920s, I can suggest that present-day Ukraine take the following measures. First, it is necessary to suspend the implementation of the provisions of the national strategy for reforming the system of institutional care and upbringing of children for the years 2017-2026, which was adopted in 2017 and provides for a significant reduction of institutional care and upbringing of children. Instead, it is advisable to provide an opportunity to place homeless and neglected children in these institutions for a 24-hour stay because these institutions have the necessary material and technical base for the introduction of care and guardianship.

Second, given that the European standard is to create conditions for the realisation of the right of every child to be raised in a family and ensure the priority of family forms of child placement, it is also necessary to support the foster care form of upbringing (patronage) by increasing funding. It should be considered that under the current conditions of the state of

42 Mirosław Łapot, 'Activities of the Adolf Lilien Society of Children's Friends in Lviv in the Interwar Period' (2006) 15 Research Works of the Academy of Jan Długosz in Częstochowa, Pedagogy 187.

43 Łapot (n 39) 108.

war and the economic crisis in Ukraine, there will be fewer people willing to become foster carers than before the start of a full-scale war on the territory of Ukraine.

Third, at the same time, the financial instability of parents can also cause a new wave of neglected children, and therefore prevention of child homelessness and neglect is necessary. In the countries of Western Europe, there is a practice of paying monthly cash benefits to the parents of children under the age of 18. For example, in present-day Poland, this payment is 500 PLN for each child. The purpose of childcare assistance is to partially cover the costs associated with raising a child, including taking care of him/her and meeting vital needs.[44] Unfortunately, such a practice does not currently exist in Ukraine. The legislative consolidation of such social assistance from the state is timely and necessary.

Fourth, homeless and neglected children are one of the main sources of juvenile delinquency. That is why, as was recommended in previous research,[45] the draft law on child-friendly justice, which was submitted to the Verkhovna Rada of Ukraine on 4 July 2021,[46] should be adopted.

To implement the proposed measures to combat/prevent child homelessness and neglect, Ukraine needs the financial support of its partners and allies more than ever. Today, humanitarian aid is no less important than military aid.

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Case Note

THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE PRACTICE OF THE ECTHR IN THE FIELD OF GESTATIONAL SURROGACY

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ABSTRACT

Background. *The article focuses on the analysis of the case law of the European Court of Human Rights regarding gestational surrogate motherhood and the development of the bioethics issue in this area. It was established that the notion of "private life," regulated by Article 8 of the European Convention on Human Rights, guarantees everyone the ability to demand the establishment of their identity, providing for the possibility of establishing family relationships. It is highlighted that, despite the legal ban on the implementation of surrogate motherhood technology, to confirm the child's identity, there is a need for official recognition of this kind of family relationship as indicated by other relevant relationships. In particular, the peculiarities of establishing parent-child relationships in the case of individuals applying for gestational surrogacy to exercise their reproductive rights are disclosed. The problem of legal regulation unification in the technological application of gestational surrogate motherhood is considered. A conclusion set regards the need to create an international legislative and regulatory framework useful for national governments, particularly in gradually banning the use of surrogate motherhood technologies. Attention is placed on international efforts focused to create an international legislative and regulatory framework that will provide recommendations useful to national governments, particularly in the gradual prohibition of surrogacy. The authors believe that the corresponding international agreement will constitute a legal framework for ensuring individual rights, freedoms, and health, the limitation to gestational surrogate motherhood services, and the observance of a uniform policy in this area.*

Methods: *The methodological framework of the study incorporated a range of philosophical, general, and legal methods. The worldview-dialectical method of cognition made it possible to investigate the problem's social content and legal form, then to conduct a systematic theoretical and legal analysis of the practice by applying the judgments of the European Court of Human Rights. The diversity of legal certainty of the surrogate motherhood system's legality in Europe, particularly in France, Italy, Iceland, Poland, and Norway, was investigated using the comparative method. With the help of a formal-legal approach, it analysed the content and peculiarities of applying the ECtHR practice.*

Results and Conclusions: *We comprehensively considered the ECtHR legal positions on gestational surrogate motherhood and the bioethics development in this area. International efforts should be concentrated on establishing an international regulatory framework that will provide recommendations practical to national governments, particularly in the gradual prohibition of surrogacy.*

1 INTRODUCTION

The development of science and medicine, the increase in infertility, changes in traditional family structures, and the presence of many single parents and same-sex couples have determined the relevance of assisted reproductive technologies. One of these methods is gestational surrogacy. According to its legal definition, the institution of surrogate motherhood belongs to a person's reproductive system's rights. It acts as an alternative in cases where the use of related auxiliary reproductive technologies do not produce the desired result[1]. Thus, infertility is a prerequisite for an increasing number of people to seek specialized help, leading to the need to develop and establish regulations that will properly regulate the rights and obligations of all persons participating in the reproductive medicine using surrogate motherhood technology.

1 Viktor Beschastnyi and others, 'Place of Court Precedent in the System of Law of the European Union and in the System of Law of Ukraine' (2019) 22 (6) Journal of Legal, Ethical and Regulatory 1.

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Meanwhile, the specified alternative technology raises a significant number of legal discussions, mainly due to differences in legal certainty regarding the legality of providing surrogate motherhood services in different states. The diversity of legal certainty of the institution of surrogate motherhood's legality can be resolved by recognizing the significance of identification rights as an aspect of the right to respect private and family life[2]. Significantly, the issue of proper provision and guarantees for a person's reproductive rights, determining the limits of their legality, is increasingly reflected in the Strasbourg Court's practice, which analyses national legislation through the prism of established rights and freedoms.

Studies of the gestational surrogacy institute, by conducting a correlation between medical and legal certainty, demonstrate that despite the popularization of surrogate motherhood, the legislators in these countries currently face a challenge consisting of the need to legitimize the researched institute and develop an effective mechanism for its implementation[3]. The permission to conduct gestational surrogacy in several countries and the opportunity for cross-border surrogacy are grounds for drawing the attention of the international community to the effectiveness of the existing legal framework. The community then continues to search for fairness of the interests of society and people who want to use gestational surrogacy services, a just agreement between the interests of the surrogate mother and potential parents to protect their reproductive rights[4].

Domestic legislation does not prohibit gestational surrogacy; therefore, the relevance of borrowing and analysing foreign experience in this area is of great importance for further law enforcement. In this regard, the aim of the research is to analyse the legal positions of the European Court of Human Rights regarding reproductive technologies, such as gestational surrogate motherhood, as well as the development of the bioethics issue.

The methodological framework of the study incorporated a range of philosophical, general, and legal methods. The worldview-dialectical method of cognition made it possible to investigate the problem's social content and legal form, then to conduct a systematic theoretical and legal analysis of the practice of applying the European Court of Human Rights' (hereinafter – ECtHR) judgments. Using the anthropological method, the right to respect private and family life is considered, guaranteeing every person the opportunity to demand the reality of establishing their identity. The diversity of the legal certainty of the surrogate motherhood system's legality in Europe, particularly in France, Italy, Iceland, Poland, and Norway, was investigated using the comparative method. With the help of a formal-legal approach, the content and peculiarities of applying the ECtHR practice in the unification of gestational surrogacy regulations, based on ensuring the child's best interests, were investigated. The use of all the scientific methods listed above, in their totality, provided an opportunity to comprehensively consider the ECtHR legal positions on gestational surrogate motherhood and the development of bioethics in this area.

2 Andrea Mulligan, 'Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements' (2018) 26 (3) Medical Law Review 449, doi: 10.1093/medlaw/fwx066.

3 SO Boldizhar, 'Surrogate Maternity: Correlation of Medical and Legal Definition' (2019) 58 (1) Uzhhorod National University Herald, Series Law 196, doi: 10.32782/2307-3322.58-1.41.

4 Sergii Antonov, 'Methods of Legal Regulation for Surrogacy in Ukraine and Abroad' (2020) 3 Law of Ukraine 129, doi: 10.33498/louu-2020-03-129; Oksana M Ponomarenko, Yuriy A Ponomarenko and Kateryna Yu Ponomarenko, 'Legal Regulation of Surrogacy at the International and National Levels: Optimization of Permissions, Prohibitions and Liability' (2020) 73 (12-2) Wiadomości Lekarskie 2877, doi: 10.36740/wlek202012229; Valeria Piersanti and others, 'Surrogacy and "Procreative Tourism". What Does the Future Hold from the Ethical and Legal Perspectives?' (2021) 57 (1) Medicina 47, doi: 10.3390/medicina57010047.

2 THE NOTION OF SURROGATE MOTHERHOOD WITHIN LEGAL RELATIONS

The study of the Strasbourg Court's legal positions regarding gestational surrogate motherhood and bioethics development in this area makes it possible to state the following. The notion of "private life," regulated in the Article 8 of the ECtHR, guarantees everyone the opportunity to request the establishment of their identity. Moreover, this right ensures the chance to establish family relations. The ECtHR emphasizes that legislative uncertainty has led to difficulty in recognizing a person's status.

In this context, regardless of the legal ban on the implementation of surrogate motherhood technology, the ECtHR has identified indicators that the state exceeded the limits of reasonable discretion when making decisions regarding the formed relationships. So, to confirm the child's identity, no matter what the method, and if there is any legal ban on the researched reproductive technology's use, the implementation of the relevant relationships indicates the need for official recognition of this kind of family relationship. The presence of "family life" signs between the potential parents and the child, in case there is no biological connection between them, must not entail the recognition of these relationships at the national level by a country where surrogacy is illegal[5].

Grounds for establishing the absence of a family connection include the lack of a biological connection, a short-term relationship between the alleged parents and the child, and the ambiguity of the relationship between them from the legal point of view, despite the presence of parental care and emotional ties, the absence of severe suffering for the child as a result of separation with intended parents. The extraction of a child and the denial to recognize a parent-child relationship that was accepted abroad through the registration of a child's birth certificate belongs to people's private life in pursuing the lawful goals of avoiding disturbances and defending their rights and freedoms[6].

The government's desire to confirm the state's exclusive competence to recognize legal relations between parents and children, only in the cases of establishing a biological connection or legal adoption, to protect the child's interests is well-founded. Refusal to enter the information from the child's birth certificate issued abroad due to gestational surrogacy into the birth registry in a country that prohibits using such technology is not an abuse of discretion. Discrimination based on "birth" is absent since the difference in behaviour regarding the means of recognizing parent-child relations has an objective basis[7].

The presence of genetic kinship does not mean that the child's right to respect for private and family life requires the establishment of a legal relationship with the intended parents using a special entry in the birth certificate. When it is necessary to ratify the legal relationship between the child and the alleged parents, adoption has legal consequences similar to the birth registration recognized abroad. Thus, the state is not required to register information from the birth certificate of a child born via gestational surrogacy abroad to establish the

5 Igor M Kopotun and others, 'Health-Improvement Competences Formation Technique in Future Police Officers by Means of Personality-Oriented Approach to Physical Education' (2019) 18 (11) International Journal of Learning, Teaching and Educational Research 205, doi: 10.26803/ijlter.18.11.12.

6 Matteo Bertelli and others, 'Combined Use of Medically-Assisted Reproductive Techniques: A New Bioethical Issue' (2019) 90 (10-S) Acta Biomedica Atenei Parmensis 58, doi: 10.23750/abm.v90i10-S.8761.

7 Roman A Maydanyk and Kateryna V Moskalenko, 'Towards Creation of Unified Regulation on Surrogacy in Europe: Recent Trends and Future Perspectives' (2022) 73 (12-2) Wiadomosci lekarskie 2865, doi: 10.36740/WLek202012227.

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legal relationship of parents and children since adoption can also function as an instrument to ratify such a legal relation[8].

The birth of a child in another country because of the surrogacy technology's use and the intended father's gametes, with the legal parent-child relationship as recognized by national law, the child's right to respect for private and family life under Article 8 of the Convention demands that domestic legislation should provide the recognition of the legal parent-child relationship with the potential mother. However, these rights do not entail entering information into the register of birth certificate data. Establishing a connection with the intended mother can be implemented in another way, particularly by adopting the child[9].

The state's refusal to recognize such a parent-child relationship does not intercede with the right to respect for private and family life if such a relationship is recognized by the state authorities where the child lives. This legal recognition indicates that the person was not left in a "legal vacuum" regarding their citizenship and recognition of legal relationships. The trial's duration is directly related to the state's responsibility to exercise exceptional care in such category of cases, involving prioritization of the child's best interests[10]. Thus, a long trial may lead to a legal issue based on whether it has already occurred. The explanation as to why the ECtHR relies to a great extent on the proper provision of the child's interests and identity in society lies within the court's competencies to interpret the legislation of countries that set restrictions on the use of gestational surrogate motherhood technologies in their territory.

3 THE ECTHR CASE LAW ON REPRODUCTIVE RIGHTS

Reproductive rights belong to individual human rights and freedoms. Significantly, these rights and freedoms belong to any person on an equal basis; they arise from solely human existence. However, recognition of reproductive rights was significantly affected by the increase in infertility, changes in traditional family structures, and the presence of many single parents and same-sex couples. These factors determined the relevance of assisted reproductive technologies (hereinafter referred to as ART), particularly gestational surrogate motherhood[11]. The basis for a person to recognize his/her reproductive function, through the use of surrogate motherhood technology, may be the presence of medical indications, according to which carrying and/or giving birth to a child is physiologically impossible or associated with a risk to the life and health of that person and/or child[12].

The World Health Organization identifies the existence of two types of surrogate motherhood. Traditional surrogacy is an infertility treatment method involving fertilizing

8 Larysa Nalyvaiko, Olena Marchenko and Vasyl Ilkov, 'Conceptualisation of the Phenomenon of Corruption: International Practices and Ukrainian Experience' (2018) 172 (7-8) Economic Annals-XXI 32, doi: 10.21003/ea.V172-06.

9 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 20 February 2023.

10 Marianna Iliadou, 'Surrogacy and the ECtHR: Reflections on Paradiso and Campanelli v Italy' (2018) 27 (1) Medical Law Review 144, doi: 10.1093/medlaw/fwy002.

11 Effy Vayena, Patrick J Rowe and P David Griffin (eds), *Current Practices and Controversies in Assisted Reproduction: Report of a meeting on "Medical, Ethical and Social Aspects of Assisted Reproduction", WHO Headquarters in Geneva, Switzerland, 17–21 September 2001* (WHO 2002) <https://apps.who.int/iris/handle/10665/42576> accessed 20 February 2023; Eleonora Skyba and Kateryna Tkachenko, 'Gender Challenges of Modern Societies' (2021) 1 (2) Philosophy, Economics and Law Review 18, doi: 10.31733/2786-491X-2021-2-18-24.

12 Anna-Lena Wennberg, 'Social Freezing of Oocytes: A Means to Take Control of Your Fertility' (2020) 125 (2) Upsala Journal of Medical Sciences 95, doi: 10.1080/03009734.2019.1707332.

the surrogate mother's ovum from the father's or donor's biological material in-vitro. As a result, the surrogate mother has a direct biological connection with the unborn child. Gestational surrogacy is a method to treat infertility involving in-vitro fertilization of an embryo from the biological material of the parents or donor(s), after which the embryo is transferred to the uterus of the surrogate mother, and the intended parents are the persons who are the owners of the embryos as mentioned above[13]. Therefore, gestational surrogate motherhood is the right of a surrogate mother to bear and deliver a child who will not have a direct genetic connection with her (except in cases of carrying for close relatives of the future parents), who will not be regarded as the biological mother of the child born to her due to the relevant acts. The surrogate mother will no longer have rights or obligations with such a child after birth.

It is also worth noting that gestational surrogacy is based on contractual principles between the parties and involves a commercial or altruistic transaction, dependent upon whether the surrogate mother receives financial compensation for her pregnancy[14]. When individuals, or organizations representing them (such as agencies and clinics), enter into a gestational surrogacy agreement, the laws of the country where the agreement was signed and where the child was born may apply to the agreement. Therefore, commercial contracts for gestational surrogacy may be common in countries where national legislation does not regulate this reproductive technology.

Several international treaties on human rights and normative acts at the national level regulate the right to use assisted reproduction methods. The leading international act establishing and guaranteeing the observance of fundamental human rights is the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) ECtHR (European Convention on Human Rights, 1950). And although the Convention does not contain a direct confirmation of the right to carry out surrogate motherhood, cases related to this assisted reproduction method mostly refer to Article 8 of the Convention (the right of a person to respect for private and family life)[15].

It is worth mentioning that legal certainty's diversity regarding the legality of the surrogate motherhood institution in different European countries leads to differences in the legal frameworks of the Council of Europe's member states. Thus, the latter may be prohibited at the legislative level, permitted, permitted under certain legal restrictions, or not at all regulated by law. Faced with a differentiated approach, the ECtHR tries to guarantee the rights enshrined in the Convention in the context of surrogacy. In particular, the issue of gestational surrogate motherhood was considered by the ECtHR in the demonstrative cases of "Mennesson v. France"[16], "Labassee v. France"[17], "Foulon and Bouvet v France"[18], "Laborie

13 Maydanyk and Moskalenko (n 12).

14 Council of Europe and European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life, Home and Correspondence* (CoE; ECtHR 31 August 2022) <https://www.echr.coe.int/documents/guide_art_8_eng.pdf> accessed 20 February 2023; Bertelli and others (n 12).

15 Iliadou (n 15).

16 Mennesson v France App no 65192/11 (ECtHR, 26 June 2014) <https://hudoc.echr.coe.int/eng?i=001-145389> accessed 20 February 2023.

17 *Labassee v France* App no 65941/11 (ECtHR, 26 June 2014) <https://hudoc.echr.coe.int/eng?i=001-145180> accessed 20 February 2023.

18 *Foulon and Bouvet v France* App nos 9063/14 and 10410/14 (ECtHR, 21 July 2016) < https://hudoc.echr.coe.int/fre?i=001-164968> accessed 20 February 2023.

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v. France"[19], "Paradiso and Campanelli v. Italy"[20], "C and E v. France"[21], "D. v. France"[22], "Valdís Fjölnisdóttir and Others v. Iceland"[23], "S.-H. v. Poland"[24], "A. L. v. France"[25] and "A. M. v. Norway"[26] , etc.

It is important that cases regarding agreements on gestational surrogacy are primarily related to the provisions of Article 8 of the Convention, which controls the right of everyone to respect private and family life, home, and correspondence. Thus, state authorities must not intercede with the enjoyment of this right, except in cases protected by the law or as required in a democratic society to ensure national security, public safety, or economic well-being of the society to counteract riots or crimes, protect the health, morality, rights, and freedoms of citizens[27]. Therefore, to establish if there is an intrusion into the private and family life of the applicants by the authorities and to maintain a fair balance of the violated interests, the Strasbourg Court determines whether such interference was lawful, whether it pursued a legitimate objective, and whether it was proportionate to the objective(s) pursued.

Combined into one proceeding, the cases of "Mennesson v. France" and "Labassee v. France" related to the denial to recognize child-parent relationships, lawfully established in the United States, between couples who resorted to surrogate motherhood and children born through this reproductive technology. In particular, the intended parents complained that they could not achieve recognition of the child-parent relationship which was legally established in another country, harming the child's interests[28].

In this case, the Court assessed the notions of "family life" and "private life" found in Article 8 of the Convention. However, no violations of the right to respect for private and family life were identified. The main motives in the analysis of the right to family life's observance are: that the French government issues a certificate based on the French citizenship of one of the parents, making it impossible to remove minor children from this country; documents issued in the U.S.A. that determine the child's citizenship and, accordingly, regulate the duties and responsibilities of the parents concerning the child; in the event of a divorce, the court will determine the child's place of living and the rights of the ex-spouse in relation to him/her; confirmation of a person's status gives possibility to the applicant to inherit property based on documents issued in the U.S.A.

Instead, the Court established that Article 8 of the Convention on the right to respect for private and family life had been violated. The Strasbourg Court noted that the right to respect private life guarantees everyone the opportunity to request identification. This right

19 Laborie v France App no 44024/13 (ECtHR, 19 January 2017) < https://hudoc.echr.coe.int/fre?i=001-170369> accessed 20 February 2023.

20 *Paradiso and Campanelli v Italy* App no 25358/12 (ECtHR, 24 January 2017) <https://hudoc.echr.coe.int/eng?i=001-170359> accessed 20 February 2023.

21 *C and E v France* App nos 1462/18 and 17348/18 (ECtHR, 19 November 2019) <https://hudoc.echr.coe.int/eng?i=001-199497> accessed 20 February 2023.

22 *D v France* App no 11288/18 (ECtHR, 16 July 2020) <https://hudoc.echr.coe.int/eng?i=001-203565> accessed 20 February 2023.

23 *Valdís Fjölnisdóttir and Others v Iceland* App no 71552/17 (ECtHR, 18 May 2021) <https://hudoc.echr.coe.int/eng?i=001-209992> accessed 20 February 2023.

24 *SH v Poland* App nos 56846/15 and 56849/15 (ECtHR, 16 November 2021) <https://hudoc.echr.coe.int/eng?i=001-214296> accessed 20 February 2023.

25 *AL v Franc* App no 13344/20 (ECtHR, 07 April 2022) <https://hudoc.echr.coe.int/eng?i=001-216632> accessed 20 February 2023.

26 *AM v Norway* App no 30254/18 (ECtHR, 24 March 2022) <https://hudoc.echr.coe.int/eng?i=001-216348> accessed 20 February 2023.

27 ECHR (n 14) art 8.

28 *Mennesson v France* (n 21); *Labassee v France* (n 22).

includes, among other things, the possibility of establishing family relations. The ECtHR emphasized that the legal uncertainty led to the complication of recognizing the status and personality of a person. In this context, despite the legal ban on the implementation of surrogate motherhood technology in France, the ECtHR identifies grounds in the case file to indicate that the state exceeded the limits of reasonable discretion when making decisions regarding relationships that had already been established.

Therefore, even in cases where surrogate motherhood is prohibited by law, if the relevant relationship takes place, i.e., is realized, the state must recognize this family connection to ensure a person's status in society, regardless of how and where he was born. In similar cases, relying on decisions in the cases of "M. against France" and "L. v. France," the Court found no violation of Article 8 of the Convention regarding the right to respect for family life and violation of Article 8 regarding the right to respect for children's private life[29].

Thus, each state can independently resolve the legal regulation of the surrogate motherhood procedure on its territory. Therefore, considering that citizens and stateless persons of different countries can enter surrogacy relations, this issue is subject to regulation at the national legal level in each country, often causing conflicts. An example of this includes the case in which, in 2015, a gestational surrogate mother gave birth to a child in Ukraine after artificial insemination using the genetic material of a couple from Germany. Thus, the child's parents were indicated in the birth certificate as a married couple. However, when entering registration information in Germany under the provisions of the country's legislation, the child's mother was indicated as her surrogate mother since surrogate motherhood is prohibited in Germany[30].

It should be noted that the issue of foreign judgment recognition in accordance with § 109 of the German Family Code (which determines parentage of a child born by a surrogate mother in relation to the intended mother) is practically clarified by the established case law of the country's Federal Court. Thus, if a foreign court has international jurisdiction from the point of view by German law (§ 109 para. 1 para. 1 of the Family Code), the recognition of German public order (§ 109 para. 1 para. 4 of the Family Code) in principle does not exclude that future parents could fraudulently circumvent the provisions of German legislation[31]. Accordingly, the decisive factors are: the existence of a legal norm on the possibility of such recognition; the need to observe the principle to ensure the best interests of the child; ensuring compliance with public order, if one of the intended parents is genetically related to the child.

It should be noted that § 109 of the German Family Code provides that, depending on specific circumstances, decisions of foreign authorities can be recognized, not only court decisions. However, it is assumed that such bodies should be empowered by state power and functionally correspond to German courts[32].

For example, in Ukraine, from the moment of the decision, German couples will not only be able to carry out the standard registration of the child according to the Family Code of Ukraine, but also receive a court decision on the genetic connection with the child, which

29 ibid.

30 'The German Court Passed a Landmark Decision on Suroggate Motherhood in Ukraine' (*Yevropeyska Pravda*, 23 April 2019) <https://www.eurointegration.com.ua/news/2019/04/23/7095554> accessed 20 February 2023.

31 Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG) vom 17 Dezember 2008 (in der fassung vom 16 Dezember 2022) § 109 Anerkennungshindernisse <https://www.gesetze-im-internet.de/famfg/__109.html> zugegriffen 20 Februar 2023.

32 ibid.

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can then be recognized by a German court and will provide an opportunity to establish parental relations in Germany.

Regarding the problem of family relational recognition between parents and children who were born with the help of gestational surrogacy, the case of "Paradiso and Campanelli v. Italy" arises. The proceedings dealt with the custody of a nine-month-old child born in Russia as a result of a gestational surrogacy agreement between a Russian woman and an Italian couple (the applicants). However, it was revealed that the latter was not biologically related to the child. The applicants complained about the extraction of their child and the denial to recognize the relation between parents and children established abroad by recording the child's birth certificate in Italy[33].

The Grand Chamber, by eleven votes to six, found no violation of Article 8 of the Convention. Thus, considering the lack of any genetic connection between the child and the applicants, the short length of time of their relations with the child, and the legal uncertainty of the relationship between them, despite the presence of parental care and emotional ties, the ECtHR decided that there was no family life between the applicants and the child. However, the Court established that the disputed issues belonged to the sphere of the applicants' private life.

Significantly, the Strasbourg Court justified the Italian government's desire to confirm the exclusive competence of the state to recognize legal relations between parents and children, only in the cases of genetic connection or legal adoption in order to defend the interests of the child. Thus, by concluding that the separation will not seriously or irreparably harm the child, the Italian courts created a balance of interests within the existing domestic legislation.

In the given decision of the ECtHR, attention is given to a few pieces of information, including that the intended parents did not confirm the use of their biological material by the clinic that applied reproductive technology, the lack of relationship between the child and potential parents, and the emotional connection of the child with the applicants; the recognition of parental relationships has not been confirmed because the applicants cannot be the legal representatives of the child. Following the balance of interests, the Court upheld the position of the national courts that the child had not suffered severe trauma due to the separation from the putative parents. The given legal position is based primarily on studying the peculiarities of family and biological relationships between parents and the child.

The case of "D. v. France," which focused on the feasibility of a legal relation recognition between a child born abroad through gestational surrogacy and the intended mother indicated on a birth certificate legally issued abroad as the "legal mother" in situations where the child was conceived using the gametes of an outside donor, and the legal relationship between the parents and the intended father, was recognized by national law. The applicants complained about the violation of the child's right to respect for private and family life and about "birth"-based discrimination[34].

In this case, the ECtHR found no violation of Article 8 of the Convention since the denial to enter information from the child's birth certificate into the French birth registry is not an abuse of discretion. It was also established that there was no violation of Article 14 (prohibition of discrimination) of the Convention, along with the Article 8, since the difference in treatment, brought up as a complaint by the applicants regarding the recognition of the legal relationship between the child and its genetic mother, was reasonable.

33 *Paradiso and Campanelli v Italy* (n 25).
34 *D v France* (n 27).

Therefore, the Court concluded that, according to its precedent practice, the presence of genetic kinship does not involve that the child's right to respect for private life requires the establishment of a legal relationship with the parents through a special entry on the birth certificate (a similar position is laid out in the case "C. and E. v. France"[35]). At the request of the French Court of Cassation, in an advisory opinion, the ECtHR emphasized the fact that adoption had consequences similar to the registration of data on birth abroad in dealing with the recognition of the legal relationship between the child and the intended mother. Consequently, the state did not require registration of the information from the birth certificate of a child born as a result of gestational surrogacy abroad to establish the legal relationship of children with the intended mother, since the adoption can also function as a tool for recognizing such a legal relation.

Therefore, if a child was born abroad as a result of gestational surrogacy and was conceived using the gametes of the intended father and an outside donor, and if the legal relation between the child and the intended father was recognized in national legislation, the child's right to respect for private life under Article 8 of the Convention requires that domestic legislation provides for the possibility of recognizing legal parent-child relationships with the intended mother. However, such a right must be free of recognition to enter information into the birth certificate data register. Establishing a connection with the intended mother can be implemented in another way, particularly by adopting a child.

We consider it appropriate to pay attention to the case "Valdís Fjölnisdóttir and Others v. Iceland,"[36] which dealt with the non-recognition of paternity between the intended parents (the applicants) and a child born to a surrogate mother in the United States of America. The applicants were not biological parents of the child. Furthermore, they were not recognized as the child's parents in Iceland where surrogacy is illegal. Thus, the applicants complained that the authorities' denial to register them as the child's parents interfered with their rights[37].

The ECtHR found that, despite the absence of a genetic connection between the applicants and the child, the parent-child relationship had "family life" characteristics. The decision not to recognize the applicants as the child's parents had reasonable legal grounds in domestic legislation. As a result, having regard to the efforts of the authorities to preserve this "family life," the Court held that the Icelandic authorities acted within their discretion.

Based on the above, we would like to emphasise that according to the consideration results of none of the cases analysed above, the ECtHR did not establish a violation of their provisions by recognizing the sufficiency or prohibition of the use of gestational surrogate motherhood technology. To a greater extent, the Court relies on the proper provision of the interests and identity of children in society. The explanation of this practice consists of considering individual provisions in the national legislation of France, Italy, and Iceland, which directly prohibit the use of surrogate motherhood on the state's territory[38].

35 *C and E v France* (n 26).

36 *Valdís Fjölnisdóttir and Others v Iceland* (n 28).

37 *SH v Poland* (n 29).

38 Code civil des Français (tel que modifié du 06 février 2023) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721?etatTexte=VIGUEUR&etatTexte=VIGUEUR_DIFF> accédé 20 Février 2023; Code pénal (France) du 22 juillet 1992 (tel que modifié du 04 février 2023) <https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070719?etatTexte=VIGUEUR&etatTexte=VIGUEUR_DIFF> accédé 20 Février 2023; Legge federale concernente la procreazione con assistenza medica (Legge sulla medicina della procreazione, LPAM) del 18 dicembre 1998 (stato 01 dicembre 2022) <https://www.fedlex.admin.ch/eli/cc/2000/554/it > accesso 20 Febbraio 2023; Frumvarp til laga um staðgöngumæðrun í velgjörðarskyni (Lagt fyrir Alþingi á 144 löggjafarþingi 2014-2015) <https://www.althingi.is/altext/144/s/1141.html> skoðað 20 febrúar 2023.

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Regarding parent-child relationship research, the case of "S.-H. v. Poland" concerned the Polish authorities' denial to recognize the parent-child relationship between the applicants and one of their biological parents. It is crucial that they had dual citizenship in Israel and the United States, residing in Israel, and were a same-sex couple who used the services of gestational surrogacy with the gametes of one of the spouses. The applicants complained about the denial to receive Polish citizenship by the child (one of the applicants' parents was Polish), because the parents were a same-sex couple[39].

The ECtHR held the applications unacceptable, establishing that there were no objective grounds for the conclusion that there had been the violation of the right to respect for private and family life. However, although not recognized by the Polish authorities, the relationship between parents and children was recognized by the state where the applicants resided. Therefore, the legal recognition of the relationship in the U.S.A. indicates that the applicants were not left in a legal vacuum concerning their citizenship, providing the recognition of the legal relationship between the children and their biological father.

Recognition of paternity within the surrogate motherhood contract was considered in the case of "A. L. v. France," which focused on the applicant's complaint against the domestic court's denial to legally recognize the applicant's paternity concerning his biological son, who was born of gestational surrogacy services in France. The applicant claimed that the rejection of the paternity application for his biological son constituted a violation of the right to respect for his private life without any legal ground[40].

The ECtHR found the violation of Article 8 of the Convention owing to the state's failure to exercise due diligence in the case's specific circumstances. However, the Strasbourg Court emphasized that the identified violation should not be understood as casting doubt on the Court of Appeal's evaluation of the child's best interests or its decision to reject the applicant's claim, as concluded by the Court of Cassation.

In this case, the ECtHR determined the Court of Appeal, and supported by the Court of Cassation, correctly prioritized the child's best interests, considering the applicant's biological relationship with the child. Levelling the father's right to respect for his private life and his son's right to respect for his private life, the ECtHR decided that the grounds established by the national court's decision to justify the contested intervention were appropriate and sufficient for paragraph 2 of Article 8 of the Convention.

It is important to understand that the trial took six years, which is incompatible with the responsibility to exercise special care in this category of cases. The child was about four months old when the case was brought to court, and he was six and a half years old when the internal review was completed. Thus, in cases related to the relationship between a person and his child, an extended period can cause a legal issue to be decided based on the fact that it has already occurred. The ECtHR followed a similar position when considering the case of "A. M. v. Norway."[41]

The considered legal positions give grounds for asserting that the state should resolve the official recognition of paternity if individuals use the surrogate motherhood technology that, in turn, is prohibited by national legislation. Accordingly, the legal prohibition of surrogate motherhood is not an obstacle to recognizing family relations if it is realized to confirm and guarantee the child's identity in society, irrespective of the manner and place of his birth. In turn, genetic kinship does not involve the child's right to respect for private and family life nor requires establishing a legal relation with the intended parents using a particular entry in

39 *SH v Poland* (n 29).
40 *AL v Franc* (n 30).
41 *AM v Norway* (n 31).

the birth certificate. Thus, establishing a suitable connection with the intended mother can be implemented in another way, particularly by adopting a child.

We regard it essential to draw attention to the bioethics issue in carrying out gestational surrogacy, a complex moral and ethical issue, concerning several fundamental ethical aspects, including the individual's attitude, the public, and the state toward the practice of surrogacy, as well as the degree of state policy's influence on the adoption by private individuals' solutions in this area.

It should be noted that in its resolution, the European Parliament disapproved the practice of surrogate motherhood and the policy of the European Union on this issue. The materials emphasise the need to ban surrogacy (including gestational surrogacy) as the only way to end cross-border services that contradict the provisions of the national legislation of individual states. The European Parliament laid out the reasons for a legislative ban on surrogate motherhood, including: surrogate motherhood involves the sale of the woman's body who is acting as a surrogate mother; surrogate motherhood is actually the sale of a child[42]; surrogate motherhood is the exploitation of reproductive abilities and the use of a woman to please other persons; surrogate motherhood is not intended to satisfy individual rights; surrogate motherhood increases existing inequality between women; regulation of surrogate motherhood creates a new form of human trafficking; surrogate motherhood violates the rights of children and women, contributing to a society that supports the policy of cruel treatment toward people related to the organization of first and second classes of people, the creation of a discriminatory unequal global order; reproductive rights can be satisfied in ways that do not involve the exploitation or transformation of women and children into commodities[43].

However, the legislative regulation of gestational surrogacy varies across Europe. Thus, altruistic gestational surrogacy is legal and commercial surrogacy is illegal in the United Kingdom, Ireland, Denmark, Belgium, and the Netherlands. France, Italy, Iceland, Spain, and Germany prohibit all forms of surrogate motherhood[44]. We also note that concluding international agreements on surrogate motherhood is complex. Some countries require the recognition of the parent-child relation of the surrogate mother with the child born to her. In contrast, others recognize the child's legal relation only with its intended mother. This demonstrates the likelihood of legal conflicts and essential ethical disagreements.

Human rights organizations provide numerous recommendations to ensure the rights of women and children properly and focus on protecting human rights against transforming a person's exercise of their reproductive rights into commercial entrepreneurship[45]. However, the heterogeneity of state policies and legal approaches to gestational surrogacy services caused the growth of the number of potential parents turning to individual DRTs abroad. The absence of regulations of cross-border surrogacy in low-income countries can threaten women's dignity and rights, as the low cost of the service leads to considerable buying

42 United Nations and Human Rights Council, *Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children, including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material: Note by the Secretariat* (UN 15 January 2018) <https://digitallibrary.un.org/record/1473378> accessed 20 February 2023.

43 European Parliament Resolution of 17 December 2015 on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI)) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015IP0470> accessed 20 February 2023.

44 Paola Frati and others, 'Bioethical Issues and Legal Frameworks of Surrogacy: A Global Perspective about the Right to Health and Dignit' (2020) 258 European Journal of Obstetrics & Gynecology and Reproductive Biology 1, doi: 10.1016/j.ejogrb.2020.12.020.

45 LR Nalyvayko, IO Hrytsay and OS Dniprov, *Non-Governmental Human Rights Organizations of Ukraine* (Khai-Tek Pres 2014).

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power and demand. International efforts should be focused on developing an international regulatory framework that will provide valuable guidance to national governments. Thus, a relevant international agreement would create a substantial legal basis for protecting an individual's reproductive rights. Therefore, to protect a woman's rights, freedoms, and health, limiting economic interests related to the provision of gestational surrogate motherhood services, states must adhere to a uniform policy in this area.

4 CONCLUSIONS

Summarizing the above, it seems possible to state that the unification of gestational surrogacy regulations should be carried out to ensure the best interests of the child. National legislation should also develop in this direction, regardless of whether the use of gestational surrogacy technologies is allowed or prohibited on its territory. Therefore, international efforts should be concentrated to establish an international regulatory framework that will provide practical recommendations to national governments, particularly in the gradual prohibition of surrogacy. However, supporting the opinion on the need to ban surrogate motherhood, and taking into account the complexity of implementing a unified policy in this area, we consider it expedient to conclude an international agreement aimed at ensuring the possibility of recognizing parent-child relationships in connection with the need to observe the principle that ensures the child's best interests and observes public order if one of the intended parents is genetically related to the child. An appropriate international agreement will constitute a legal basis for protecting the rights of persons applying for such reproductive technology. To protect individual rights, freedoms, and health, and limit economic interests related to the provision of gestational surrogate motherhood services, states must adhere to a uniform policy in this area.

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Case Note

ANNULMENT OF AN INTERNATIONAL COMMERCIAL ARBITRATION AWARD: THE UKRAINIAN EXPERIENCE

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ABSTRACT

Background: *The development of foreign economic relations between business entities is the key to a stable economy of each country as a whole. During the implementation of these relations, the emergence of disputes and the procedure for their resolution is one of the main prerequisites for giving preference to alternative dispute resolution, namely international commercial arbitration. Despite the existence of unified rules and standards for the recognition and enforcement of international commercial arbitration awards, which are enshrined in the New York Convention of 1958, many issues arise in the doctrine of international civil procedure and law enforcement practice. These issues are the result of an inconsistent approach to arbitration in the national legislation of the member states of the New York Convention of 1958.*

Methods: *The article will consider the distinction in the definitive approach of 'challenging' and 'annulment' the decision of international commercial arbitration through the prism of comparative legal regulation and evaluation of the results of both the domestic doctrine of arbitration and foreign scientific schools. In addition, during the analysis of the numerical judicial practice of national courts, the problematic issues of the procedural procedure for annulment of decisions of international commercial arbitration and the grounds for their annulment are considered.*

Results and Conclusions: *Among the results, some gaps and contradictions were discovered, in particular, the ideas of 'challenging' and 'appealing' such awards. These procedures differ in that within the framework of the procedure for challenging the decision of international commercial arbitration, and the state court has no right to review such a decision on the merits.*

1 INTRODUCTION

For many years, international arbitration has been at the forefront of the list of the most popular and effective means of resolving disputes in various jurisdictions.[1] Such popularity is not accidental since such a means of dispute resolution is distinguished by a number of advantages: the ability of the parties to decide their own relationship 'neutral territory', transferring it for consideration to neutral persons who are not tied to the country in which one of the parties is registered or resides; the ability of the parties to independently determine the procedure for considering their dispute, adapting it in accordance with the specific circumstances of the case; confidentiality of the process, which, as a general rule, can only be violated by the mutual consent of both parties; international arbitration can be less expensive than traditional litigation; international arbitration can provide better justice since many domestic courts are overloaded, which does not always allow judges to devote enough time to adopting quality legal rules, etc.

Despite its numerous advantages, the resolution of disputes through international commercial arbitration has its drawbacks, one of which is the ambiguity of challenging arbitral awards.[2] Given this, the topic under study is especially relevant in the context of modern legal thought.[3]

1 Hong Kong International Arbitration Centre (HKIAC) (ed), *International Arbitration: Issues, Perspectives and Practice: Liber Amicorum Neil Kaplan* (Kluwer Law International 2019).

2 Christopher Koch, 'The Enforcement of Awards Annulled in their Place of Origin: The French and US Experience' (2009) 26 (2) Journal of International Arbitration 267.

3 Cristina M Mariottini and Burkhard Hess, 'The Notion of Arbitral Award' (*Max Planck Institute Luxembourg for Procedural Law*, 7 May 2020) 3 MPILux Research Paper Series, <https://www.mpi.lu/research/working-paper-series/2020/wp-2020-3> accessed 10 January 2023.

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2 THE CONCEPT OF CHALLENGING AND ANNULMENT OF THE DECISIONS OF INTERNATIONAL COMMERCIAL ARBITRATION

Protection of the rights and freedoms of citizens by unconstrained methods of protection is an integral element of the rule of law.[4] Among such methods of protection, the leading place is occupied by the judicial one, which is clearly provided for both in the Basic Law of Ukraine (Arts. 55, 129 of the Constitution of Ukraine)[5] and special national legislation (the Law of Ukraine 'On the Judiciary and the Status of Judges').[6]

Though the reform of the national civil proceedings in 2017 led to alternative schemes of dispute resolution, international commercial arbitration has become the most effective mechanism for protecting rights and freedoms in foreign economic relations. In addition, in accordance with the decision of the Constitutional Court of Ukraine, 'one of the ways to exercise the right of everyone by any means not prohibited by law to protect their rights and freedoms from violations and unlawful encroachments in the field of civil and commercial legal relations is to appeal to the arbitral tribunal'.[7]

In accordance with the current legislation, a dispute in the field of civil and commercial legal relations subordinate to the court of general jurisdiction may be referred by its parties to the arbitral tribunal, except in cases established by law. In order to ensure the implementation of these provisions of the Codes, guided by para. 3 of part 1 of Art. 85 of the Constitution of Ukraine, the Verkhovna Rada of Ukraine adopted the Law regulating the establishment and operation of arbitral tribunals in Ukraine. The functioning of arbitral tribunals in Ukraine is based not only on the principles of national but also international law.[8]

These issues are reflected in the literature of both Ukrainian and international scientists.[9] And it was thanks to the systematic analysis of various points of view regarding the legal nature of the 'judicial method of protection' and 'alternative' that it allowed us to draw certain conclusions and recommendations for improving the procedure for consideration of foreign economic disputes. Scientists draw particular importance to the issues of recognition and enforcement of an international commercial arbitration award and the grounds for its annulment.

Art. 35 of the Law of Ukraine 'On International Commercial Arbitration' provides that arbitrage award, regardless of the country in which it was rendered, is recognised as mandatory and, when submitting a written petition to the competent court, is executed

4 Jeffery Commission and Rahim Moloo, *Procedural Issues in International Investment Arbitration* (Oxford International Arbitration Series, OUP 2018).

5 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#Text> accessed 10 January 2023.

6 Law of Ukraine No 1402-VIII 'On the Judiciary and the Status of Judges' of 2 June 2016 <https://zakon.rada.gov.ua/laws/show/1402-19#Text> accessed 10 January 2023.

7 Decision No 1-рп/2008 in Case No 1-3/2008 'On constitutional submission 51 people's deputies of Ukraine on compliance with the Constitution of Ukraine (constitutionality) of the provisions of paragraphs seventh, eleventh of Article 2, Article 3, paragraph 9 of Article 4 and Section VIII 'Arbitration Self-Government' of the Law of Ukraine 'On Arbitration Courts' (case on the tasks of the arbitral tribunal)' (Constitutional Court of Ukraine, 10 January 2008) <https://zakon.rada.gov.ua/laws/show/v001p710-08#Text> accessed 10 January 2023.

8 Decision No 1-рп/2008 in Case No 1-3/2008 'On constitutional submission 51 people's deputies of Ukraine on compliance with the Constitution of Ukraine (constitutionality) of the provisions of paragraphs seventh, eleventh of Article 2, Article 3, paragraph 9 of Article 4 and Section VIII 'Arbitration Self-Government' of the Law of Ukraine 'On Arbitration Courts' (case on the tasks of the arbitral tribunal)' (Constitutional Court of Ukraine, 10 January 2008) <https://zakon.rada.gov.ua/laws/show/v001p710-08#Text> accessed 10 January 2023.

9 Sophie Goldman and Sigrid van Rompaey, *Annulment and Enforcement of Arbitral Awards from a Comparative Law Perspective: Contributions from CEPANI40 Colloquium Held on October 18, 2018* (Kluwer België 2018).

taking into account the provisions of this article.[10] From this, it follows that the decision issued by international commercial arbitration is final, that is, one that is not subject to review by the appellate and cassation instances. At the same time, the international and national jurisdiction in the field of regulation of international commercial arbitration recognises the possibility of challenging such a decision. In particular, Chapter VII of the Law of Ukraine 'On International Commercial Arbitration' is entitled 'contesting an arbitral award'.[11]

This difference was also emphasised by the Supreme Court within the framework of the procedure for challenging the decision of international commercial arbitration. In particular, the Court noted that 'the court of general jurisdiction has no legal basis for analysing the correctness of the application by the International Commercial Arbitration Court of the substantive law of Ukraine in resolving the dispute and to review the dispute on the merits'.[12]

This position is clearly seen in other decisions of the Civil Court of Cassation within the Supreme Court of Ukraine. For example, considering the appeal against the decision of the arbitral tribunal of 15 February 2018, by which BEGARAT Fertribs-und Service GmbH LLC was charged an amount of money for the supply of goods that, according to their technical characteristics, did not meet the technical specification that the parties agreed to enter into a contract, the appellate court, which considered the complaint as a court of first instance, concluded that 'the circumstances established by this decision do not apply to public, of the economic and social foundations of the state, the decision is not aimed at violating public order, and therefore is not a violation of public order'. In turn, the Supreme Court found that

> the appellate court came to a reasonable conclusion that the disputed decision of the arbitral tribunal does not go beyond the contract and does not contradict the public order of Ukraine, and the court of general jurisdiction has no legal basis to analyse the correctness of the application by the International Commercial Arbitration Court of the substantive law of Ukraine in resolving the dispute and to review the dispute on the merits.[13]

It is also worth mentioning another decision of the Court, which emphasised that

> any assessment by the trial court of the circumstances of the arbitration dispute, the completeness and propriety of the evidence submitted by the parties to the arbitration proceedings, etc., would mean unlawful judicial interference prohibited by Art. 5 of the Law of Ukraine "On International Commercial Arbitration" and violation of the principle of legal significance of the court decision.[14]

3 PROCEDURE FOR CHALLENGING INTERNATIONAL COMMERCIAL ARBITRATION AWARDS

The issue of challenging an arbitral award in Ukraine is governed by Chapter VIII of the Civil Procedure Code of Ukraine and Art. 34 of the Law of Ukraine 'On International

10 Law of Ukraine No 4002-XII 'On International Commercial Arbitration' of 24 February 1994 <https://zakon.rada.gov.ua/laws/show/4002-12#Text> accessed 10 January 2023.

11 Ibid.

12 Case No 824/85/19 (Civil Cassation Court of the Supreme Court of Ukraine, 31 October 2019) <https://reyestr.court.gov.ua/Review/85390247> accessed 10 January 2023.

13 Case No 796/124/2018 (Civil Cassation Court of the Supreme Court of Ukraine, 11 October 2018) <https://reyestr.court.gov.ua/Review/77089264> accessed 10 January 2023.

14 Case No 761/10859/17 (Civil Cassation Court of the Supreme Court of Ukraine, 17 October 2018) <https://reyestr.court.gov.ua/Review/77312943> accessed 10 January 2023.

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Commercial Arbitration'.[15] When investigating the issue of challenging an arbitral award, it is worth paying attention primarily to the fact that state courts of Ukraine may accept an application for annulment of an arbitral award only if the place of arbitration is located in Ukraine (Part 2 of Art. 454 of the Civil Procedure Code of Ukraine). At the moment, there is only one permanent International Commercial Arbitration Court operating in Ukraine at the Ukrainian Chamber of Commerce and Industry in Kyiv, and based on the provisions of Part 4 of Art. 454 of the Civil Procedure Code of Ukraine, 'An application for annulment of an international commercial arbitration decision shall be submitted to the General Court of Appeal at the location of the arbitration', i.e., to the Kyiv Court of Appeal.

The application for annulment of the arbitral award shall be submitted in writing or by electronic means of communication by the party to the arbitration proceedings, with its obligatory signature but not later than three months from the date of the decision of the international commercial arbitration. The term for consideration of an application for annulment of an arbitral award is 30 days from the date of receipt of such an application to the court and is considered by the judge alone.

Despite the clear legal regulation of the procedure for challenging the decision of international commercial arbitration, there is a certain inconsistency between the provisions of the Civil Procedure Code of Ukraine and the Law of Ukraine 'On International Commercial Arbitration'. Thus, in accordance with Art. 455 of the Civil Procedure Code of Ukraine, annulment of the award of international commercial arbitration must be submitted by the application itself in writing and signed by the person submitting it.

The Law of Ukraine 'On International Commercial Arbitration' Art. 34 states that the appeal in court of an arbitral award can only be carried out by filing a petition. Thus, it is possible to notice a certain inconsistency between the provisions of these regulations regarding which procedural document should be submitted to the court in order to challenge arbitral awards.

According to the Law of Ukraine 'On Citizens' Appeals', a petition is a written request for recognition of a person's status, rights or freedoms, etc.[16] A statement is an appeal of citizens with a request to promote the implementation of their rights and interests enshrined in the Constitution and current legislation or to report on violations of current legislation or shortcomings in the activities of enterprises, institutions, organisations (regardless of ownership), people's deputies of Ukraine, deputies of local councils, or officials, as well as expressing opinions on improving their activities.

After analysing the meaning of these two terms, it can be concluded that with regard to the issue of challenging the decision of international commercial arbitration, the proper procedural basis (document) to be submitted in such a case to the court is the application. The statement itself, based on the content of the interpretation of this term, is the document in which questions regarding the shortcomings of the activities of the relevant authorities may be raised, while the petition is filed only on issues of recognition of status, rights, and freedoms.

Additional confirmation of the expressed position is the fact that, based on the provisions of Art. 184 of the Code of Civil Procedure, it is the statement of claim that is the document on the basis of which the court opens the claim proceedings. With regard to separate and orderly proceedings in civil proceedings, it is also worth noting that the court opens such proceedings only in the presence of relevant applications.

15 Code of Ukraine No 1618-IV 'Civil Procedure Code of Ukraine' of 18 March 2004 <https://zakon.rada.gov.ua/laws/show/1618-15#Text> accessed 10 January 2023; Law of Ukraine No 4002-XII (n 14).

16 Law of Ukraine No 393/96-BP 'On Citizens' Appeals' of 2 October 1996 <https://zakon.rada.gov.ua/laws/show/393/96-%D0%B2%D1%80#Text> accessed 10 January 2023.

Investigating the issue of the grounds on which decisions of international commercial arbitration can be challenged, it is worth noting that they are the same in the Civil Procedure Code of Ukraine and in the Law of Ukraine 'On International Commercial Arbitration'. So, in accordance with Art. 459 of the Civil Procedure Code of Ukraine, the list of grounds for annulment of an arbitral award can be divided into 2 groups: 1) those that are subject to verification by the court at the request of the party on which the burden of proving the relevant circumstances lies; 2) those that are subject to verification by the court ex officio, even if neither party refers to them.

With regard to the first group of grounds, in accordance with clause 1 of part 2 of Art. 459, the following grounds are: a) one of the parties to the arbitration agreement was incapacitated; or this agreement is invalid under the law to which the parties subordinated this agreement, and in the absence of such an indication, according to the law of Ukraine; or (b) s/he was not properly notified of the appointment of an arbitrator or of the arbitration proceedings or for other valid reasons she was unable to submit his/her explanations; or c) the award is rendered in respect of a dispute not provided for in the arbitration agreement or that does not fall within its terms or contains rulings on matters beyond the scope of the arbitration agreement, but if the rulings on matters covered by the arbitration agreement may be separated from those not covered by such agreement, then only that part of the arbitral award may be set aside, which contains rulings on matters not covered by the arbitration agreement; or d) the composition of the international commercial arbitration or the arbitration procedure did not comply with the agreement of the parties, unless such agreement is contrary to the law from which the parties cannot deviate, or, in the absence of such agreement, did not comply with the law.

To the second group of grounds, clause 2 of part 2 of Art. 459 adds the following: a) under law, the dispute, in view of its subject matter, cannot be referred to the resolution of international commercial arbitration; or b) the arbitral award is contrary to the public order of Ukraine.

With regard to disputes that cannot be referred to international commercial arbitration, this issue is governed by Part 1 of Art. 22 of the Commercial Procedural Code of Ukraine, according to which a dispute relating to the jurisdiction of a commercial court may be referred by the parties to an arbitral tribunal or international commercial arbitration, except for listed grounds.[17]

Thus, the current legislation of Ukraine quite clearly regulates relations regarding the appeal of decisions of international commercial arbitration, giving an exhaustive list of grounds for initiating such proceedings. But the desire of the legislator to reform arbitration legislation also gives rise to various points of view on this issue in the scientific community.[18]

4 GROUNDS FOR ANNULMENT OF AN ARBITRAL AWARD AT THE REQUEST OF ONE OF THE PARTIES

In order to study the problems of the annulment of an arbitral award[19] and find ways to resolve them, it is necessary to analyse each of the grounds for the annulment of the arbitral award in accordance with the legislation of Ukraine.

17 Code of Ukraine No 1798-XII 'Commercial and Procedure Code of Ukraine' of 6 November 1991 <https://zakon.rada.gov.ua/laws/show/1798-12#Text> accessed 10 January 2023.

18 Yuriy Prytyka, Vyacheslav Komarov and Serhii Kravtsov, 'Reforming the Legislation on the International Commercial Arbitration of Ukraine: Realities or Myths' (2021) 3 (11) Access to Justice in Eastern Europe 117, doi: 10.33327/AJEE-18-4.3-n000074.

19 Toms Krūmiņš, *Arbitration and Human Rights: Approaches to Excluding the Annulment of Arbitral Awards and Their Compatibility with the ECHR* (Springer 2020).

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According to subpara. 1 of para. 1 of part 2 of Art. 34 of the Law of Ukraine 'On International Commercial Arbitration' and para. 1 of part 2 of Art. 459 of the Civil Procedure Code of Ukraine, [20] a decision of international commercial arbitration may be annulled if the party filing the application for annulment provides evidence that one of the parties to the arbitration agreement was incapacitated; or this agreement is invalid under the law to which the parties subordinated this agreement and, in the absence of such an indication, under the law of Ukraine. After analysing this provision, we can conclude that this basis contains two elements – the incapacity of the parties to the arbitration agreement and the invalidity of the arbitration agreement. At the expense of the first element, it can be noted that it is associated with the lack of appropriate competence among the parties to the arbitration agreement. In addition,[21] we can conclude that the parties to the arbitration agreement have incapacity, as noted in the manual of the International Council for Commercial Arbitration (ICCA) on the interpretation of the New York Convention, the most frequently mentioned basis, proving, for example, 'mental insanity, physical incapacity, lack of authority to act on behalf of a legal entity', etc. For example, in case No. 761/28906/17, a petition was considered to annul the arbitral award due to the fact that the contract containing the arbitration clause was signed by the director of the company in excess of the powers specified in the statute.[22] Thus, it can be traced that the incapacity of the parties to the arbitration agreement is used as a basis for the annulment of the arbitral award.

The second element of the above ground is the invalidity of the arbitration agreement. The requirements to be met by the arbitration agreement under Ukrainian law are provided for in Part 2 of Art. 7 of the Law of Ukraine 'On International Commercial Arbitration'. The said provision states that the arbitration agreement is concluded in writing, namely: the agreement is considered concluded in writing, (1) if it is contained in a document signed by the parties, or (2) concluded by exchanging letters, electronic messages, if the information contained therein is available for further use, (3) messages by teletype, telegraph or other means of telecommunications, ensuring the fixation of such an agreement, or (4) by exchanging a statement of claim and a response to a claim in which one of the parties asserts the existence of an agreement and the other does not object to it.

The aforementioned provision of the Law gives the parties some freedom to choose which way to enter into an arbitration agreement, but, at the same time, such freedom is limited to the requirement for a written form.[23] In this regard, the arbitration agreement concluded by the parties through conclusive actions or by giving oral consent is invalid.

The following grounds for annulment of an arbitral award at the request of one of the parties relate specifically to procedural defects.[24] Thus, in accordance with para. 2 of para. 1 of part 2 of Art. 34 of the Law of Ukraine 'On International Commercial Arbitration', an arbitral award may be annulled by a court if the party filing the petition for annulment submits evidence that it was not properly notified of the appointment of an arbitrator or of the arbitration proceedings or for other valid reasons it could not submit its explanations.

In addition, in accordance with para. 4 of para. 1 of part 2 of Art. 34 of the Law of Ukraine 'On International Commercial Arbitration', the basis for annulment of the award is the inconsistency of the composition of the arbitral tribunal or the arbitration procedure with

20 Law of Ukraine No 4002-XII (n 14); Code of Ukraine No 1618-IV (n 19).

21 VS Deshpande, 'International Commercial Arbitration: Uniformity of Jurisdiction' (1988) 5 (2) Journal of International Arbitration 115, doi: 10.54648/joia1988017.

22 Case No 761/28906/17-ц (Kyiv Court of Appeal, 24 October 2018) <https://reyestr.court.gov.ua/Review/77413779> accessed 10 January 2023.

23 Ilias Bantekas, 'Transnational arbitration agreements as contracts: in search of the parties' (2022) 38 (3) Arbitration International 169, doi: 10.1093/arbint/aiac007.

24 Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021).

the agreement of the parties unless such an agreement contradicts any provision of this Law, from which the parties cannot deviate, or, in the absence of such an agreement, inconsistency with the Law of Ukraine 'On International Commercial Arbitration'.

These grounds are primarily aimed at protecting the fundamental rights of the parties to the arbitration process, including the right to due process, the right to autonomy to determine its own dispute resolution procedure, the right to fair and impartial consideration by an independent arbitral tribunal, etc.

So, in accordance with Art. 18 of the said Law, the parties shall be treated equally, and each party shall be given every opportunity to state its position. Art. 19 of the Law of Ukraine 'On International Commercial Arbitration', in turn, stipulates that subject to compliance with the provisions of this Law, the parties may, at their discretion, agree on the procedure for consideration of the case by the arbitral tribunal. Art. 12 of the Law of Ukraine 'On International Commercial Arbitration' imposes on arbitrators the obligation to notify circumstances that may raise reasonable doubts about their impartiality or independence, thereby providing the parties to the arbitration process with the right to an impartial arbitral tribunal. Similarly, in Arts. 10 and 11 of the Law 'On International Commercial Arbitration', details the procedure for appointing arbitrators in the absence of an agreement between the parties regarding such a procedure. Violation of the above-mentioned rules leads to an encroachment on the fundamental rights and guarantees of the parties to the arbitration process and therefore may become the basis for annulment of the arbitral award.

The reason for setting aside an arbitral award is the incorrect determination of the jurisdiction of the arbitral tribunal. Thus, the Law of Ukraine 'On International Commercial Arbitration' in subpara. 3 of para. 1 of part 2 of Art. 34 and the Civil Procedure Code of Ukraine in para. 1 of part 2 of Art. Art. 459 determines that an award of an international commercial arbitration may be set aside if the party filing the annulment application provides evidence that the award has been rendered in respect of a dispute not provided for in the arbitration agreement or that does not fall within its terms or contains rulings on matters beyond the scope of the arbitration agreement. However, if the rulings on matters covered by the arbitration agreement may be separated from those not covered by such agreement, then only that part of the arbitral award that contains rulings on matters not covered by the arbitration agreement may be annulled. Scientists note that this is 'based on the principle that the arbitral tribunal receives its powers by agreement of the parties and therefore has the right to exercise no more powers than such an agreement of the parties allows'. At the same time, the said grounds for annulment of the arbitral award shall be applied in connection with Art. 16 of the Law of Ukraine 'On International Commercial Arbitration', according to which the arbitral tribunal may itself adopt a decision on its competence, including any objections to the existence or validity of the arbitration agreement.

The Supreme Court, when analysing the above provision in the case on the claim of Jodovit S.R.L. (Italy) against Public Joint Stock Company Energomashspetsstal, noted that it constitutes the generally accepted principle of 'competence-competence', which in practice 'is implemented in such a way that the Arbitral Tribunal itself must interpret the content of the arbitration agreement in order to determine whether or not it (the court) has the competence to consider a particular case'.[25] However, given that the State Court under national arbitration law has the power to review the award of international commercial arbitration in terms of possible defects in the jurisdiction of the arbitral tribunal, the principle of 'competence-competence', scientists note that it is not absolute.

25 Case No 824/166/19 (Civil Cassation Court of the Supreme Court of Ukraine, 13 February 2020) <https://reyestr.court.gov.ua/Review/87793666> accessed 10 January 2023.

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Consequently, there are two types of annulment of an arbitral award at the request of one of the parties: defects in the arbitration agreement concluded between the parties to the dispute and defects in the procedure for conducting the arbitration process. Both some and other grounds are applied differently by national courts, so it is necessary to form a unified judicial practice in this regard.

5 GROUNDS FOR ANNULMENT OF AN ARBITRAL AWARD AT THE INITIATIVE OF THE COURT

Unlike the previous ones, the grounds to be considered in this section shall be applied by the court on its own initiative without the need for any initiative on the part of the applicant.[26]

In accordance with para. 2 of part 2 of Art. 34 of the Law of Ukraine 'On International Commercial Arbitration' and para. 2 of part 2 of Art. 459 of the Civil Procedure Code of Ukraine,[27] an arbitral award may be annulled by a court only if the court determines that

1) the object of the dispute cannot be the subject of arbitration proceedings under the legislation of Ukraine;

2) the arbitral award is contrary to the public order of Ukraine.

At the same time, as noted by the Supreme Court in the case on the petition of Ostchem Holding Limited for the recognition and granting of permission to enforce a foreign arbitral award on the territory of Ukraine,

> the court ... shall ex officio, in accordance with the nature of its own powers and its legal status in the State, check, on its own initiative and without fail, the observance of public order in each case, regardless of whether the party objecting to the recognition and enforcement of the award of international commercial arbitration refers to the existence of these obstacles to such appeal and its satisfaction by the court. ...An obligatory element simultaneously with the clarification of compliance with public order is to provide an assessment of the arbitrability of the dispute resolved by international arbitration.[28]

Therefore, the Supreme Court stressed that whenever courts decide whether to annul, recognise, or enforce an arbitral award, they have an obligation to analyse the said grounds, regardless of whether the party objecting to the recognition and enforcement of an international commercial arbitration award refers to the existence of these obstacles to such appeal and its satisfaction by the court. To demonstrate how to solve this problem, legal scholars give examples of legislation in other countries in which this issue is regulated in more detail.[29]

The main issue is the arbitrability of economic disputes related to bankruptcy. Art. 22 of the Commercial and Procedural Code of Ukraine expressly provides for bankruptcy cases and cases in disputes with property claims against the debtor against whom bankruptcy proceedings have been opened, including cases in disputes on invalidation of any transactions

26 Silja Schaffstein, *The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals* (Oxford International Arbitration Series, OUP 2014).

27 Law of Ukraine No 4002-XII (n 14); Code of Ukraine No 1618-IV (n 19).

28 Case No 519/15/17 (Civil Cassation Court of the Supreme Court of Ukraine, 27 June 2018) <https://reyestr.court.gov.ua/Review/75717009> accessed 10 January 2023.

29 Joseph Lee, 'Intra-Corporate Dispute Arbitration and Minority Shareholder Protection: A Corporate Governance Perspective' (2017) 83 (1) Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 85.

(agreements) concluded by the debtor, are inexplicable, involve the collection of wages, etc.[30] At the same time, the current legislation does not contain an answer to what should happen to the arbitration process in the event that after its commencement, a bankruptcy case was initiated against one of the parties. In order to avoid controversial judicial practice, this issue should be regulated at the legislative level.

As noted above, as a general rule, by virtue of the provisions of part 1 of Art. 22 of the Commercial and Procedural Code of Ukraine, the parties may not submit to international arbitration disputes relating to the privatisation of property and disputes arising from relations related to the protection of economic competition. At the same time, part 2 of Art. 22 of the Code of Civil Procedure of Ukraine contains an exception, providing that the parties may submit to the resolution of international arbitration the civil law aspects of these categories of disputes. Today, domestic courts ignore the latter rule, completely refusing to consider this category of disputes.

The last reason for the annulment of the award of international arbitration that will be considered is a violation of the public order of Ukraine. For the first time, the definition of the term 'public order' was provided by the Plenum of the Supreme Court of Ukraine on 24 December 1999. Public order should be understood as 'the law and order of the state, the determining principles and principles that form the basis of the existing system in it (concerning its independence, integrity, independence and inviolability, basic constitutional rights, freedoms, guarantees, etc.)'.[31]

Thus, already in 2018, the Supreme Court, when defining the concept of public order in the petition of CJSC Peter-Service for permission to enforce an arbitral award and issue a writ of execution, pointed out that the legal concept of public order exists in order to protect the state from foreign arbitral awards that violate the fundamental principles of justice and justice in force in the state.[32] These provisions are called upon to establish a legal barrier to decisions made contrary to the cardinal procedural and substantive principles on which public and state order rests. They are also intended to prevent the possibility of recognition and granting permission to enforce decisions related to corruption or inadmissible ignorance of arbitrators. Within the framework of this case, the debtor referred to the violation of public order as a basis for denying the petition for recognition and enforcement of an international arbitration award made in favour of a Russian company. The debtor believed that the fact that the company in favour of which the arbitral award was made is located in the territory of the aggressor country is sufficient to apply the policy of public order. However, the Supreme Court drew attention to the risk of unreasonable refusal to enforce the award of international commercial arbitration when applying the concept of public order, noting that this 'is a kind of blocking of the award and will be in the nature of an artificial regulatory a barrier that, from the point of view of international law, is completely unacceptable'.[33] In view of this, the Supreme Court rejected the debtor's argument, concluding that references to public order can take place only in cases where the enforcement of a foreign arbitral award is incompatible with the fundamentals of the state's law and order and the events that occurred in Ukraine since February-March 2014 and the recognition of the Russian Federation as an aggressor country in relation to Ukraine did not affect private law relations between CJSC

30 Code of Ukraine No 1798-XII (n 21).

31 Resolution of the Plenum of the Supreme Court of Ukraine No 12 'On the practice of court consideration of petitions for the recognition and enforcement of decisions of foreign courts and arbitrations and for the annulment of decisions rendered in the order of international commercial arbitration on the territory of Ukraine' of 24 December 1999 <https://zakon.rada.gov.ua/laws/show/v0012700-99#Text> accessed 10 January 2023.

32 Case No 755/6749/15-c (Civil Cassation Court of the Supreme Court of Ukraine, 26 September 2018) <https://reyestr.court.gov.ua/Review/76885631> accessed 10 January 2023.

33 Ibid.

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'Peter-Service' and PJSC 'Telesystems of Ukraine' or their obligations arising on the basis of this agreement.[34]

Thus, the court distinguished between the private law consequences of the execution of the decision on the territory of Ukraine (which cannot entail a violation of public order but are only negative consequences for the private side of the contractual relationship) and those consequences that have a public interest and may violate the fundamental legal principles enshrined in Ukraine.

In turn, the use by Ukrainian courts of a broad understanding of the term 'public order' may lead to the unreasonable annulment of the arbitral award or refusal to recognise such a decision. For example, we can cite the decision of the Supreme Court on the application of JV Poltava Petroleum Company to the State of Ukraine on granting permission for the enforcement of an arbitration award. According to the circumstances of the case, the applicant initiated arbitration proceedings against Ukraine in accordance with the Energy Charter Treaty (ECT) and bilateral investment agreements concluded by Ukraine with WelIkobria and the Netherlands. Within the framework of the initiated arbitration proceedings, the parties appointed an emergency arbitrator, who established a violation by Ukraine of its obligations to the applicant and an order of Ukraine 'to refrain from imposing a rent for the use of subsoil for the extraction of natural gas by JV Poltava Petroleum Company at a rate higher than 28%'. In turn, Ukraine asked the court to refuse to implement this decision on the basis of violation of public order since 'giving the courts the competence to change the amount of taxes / mandatory payments contrary to the norms of the Tax Code of Ukraine would be a violation of the fundamental principles established in the state'.[35] First, the Kyiv Court of Appeal, in its ruling of 21 December 2016, and then the Supreme Court, in its decision of 19 September 2018, applied a broad approach to the definition of the term 'public order' and rejected the applicant's application for execution of the said decision. Thus, the courts interpret the term 'public order' differently, which does not always have positive consequences.[36]

6 CONCLUDING REMARKS

The procedure for challenging arbitral awards is ambiguous, imperfect, and notwithstanding seemingly detailed legislative regulation, has some gaps and contradictions.

Thus, the idea of 'challenging' an international commercial arbitration award is used in arbitration law and is opposed to the procedure for 'appealing' such a decision. These procedures differ in that within the framework of the procedure for challenging the decision of international commercial arbitration, and the state court has no right to review such a decision on the merits.

Ukrainian arbitration law contains several main categories of grounds for the annulment of arbitral awards. One of these categories is a defect in the arbitration agreement. In particular, the existing wording does not allow the arbitration agreement, which was concluded by conclusive actions or orally, to be considered valid even if there is written confirmation of the content of such an agreement. In addition, national law also contains two separate grounds for annulment of arbitral awards that relate to violations of the arbitration procedure, including failure to notify a party of the arbitration proceedings, violation of the principle of due process, violation of the procedure for selecting arbitrators, etc.

34 Ibid.

35 Case No 757/5777/15-c (Civil Cassation Court of the Supreme Court of Ukraine, 19 September 2018) <https://reyestr.court.gov.ua/Review/76596637> accessed 10 January 2023.

36 Niek Peters, *The Fundamentals of International Commercial Arbitration* (2nd edn, Maklu 2020).

Modern Ukrainian legislation in the field of arbitration does not clearly regulate the issue of the possibility of annulment of an arbitral award due to the non-arbitrable nature of the dispute in a case during which one of the parties was declared bankrupt. Thus, it is proposed to supplement the Code of Ukraine on Bankruptcy Procedures with relevant provisions for clearer regulation of this issue.

Under Ukrainian law, the civil law aspects of some public disputes may be referred to international arbitration, but the courts ignore this possibility, so there is a need to detail such civil law aspects at the legislative level. In modern judicial practice, a very broad concept of public order is used, which can lead to the unreasonable annulment of arbitral awards on this basis. Therefore it is necessary to consolidate a narrower definition of such a term.

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Note

PROSPECTS FOR THE USE OF ARTIFICIAL INTELLIGENCE AND MACHINE LEARNING ALGORITHMS FOR EFFECTIVE RESOLUTION OF CIVIL DISPUTES[1]

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ABSTRACT

The article examines the main direction of the modern model's formation of justice in Ukraine regarding sustainable development, the need to support and develop strong and peaceful institutions, and adaptation of Ukrainian legislation to EU law. Based on the analysis of existing approaches, the use of artificial intelligence for the development of tools that analyse

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large data sets of the Unified the State Register of Court Decisions to identify stable regularities in the judicial system's functioning will be possible through the development of systems and assessment of risks to achieve the desired outcome of civil cases, increase the percentage of funds awarded, ensure the effective use of public funds for the maintenance of the judiciary in the state, and promote its growth equally across levels in society. The study showed that it is necessary to determine the indicators of the justice system's efficient functioning and the main factors affecting their efficient consideration of civil cases by the court, as well as the reasons for the risk of excessive length in court proceedings, non-enforcement of court decisions, and high court costs. The findings show that it is necessary to develop a catalogue of information from the analysed cases by taking into account the legal proceedings' administrative performance indicators in civil cases, as well as the identification of their main and significant factors affecting the effectiveness of legal proceedings and the derivation of quantitative and effective indicators.

1 PRECONDITIONS FOR THE EFFECTIVE RESOLUTION OF CIVIL DISPUTES PROBLEM IN UKRAINE

An effective system for the protection of human rights is an integral element of modern society and the duty of any democratic state to ruling the international community's law. The modern world's formation, in the context of globalisation and regionalisation under the auspices of the Universal Declaration of Human Rights and the European Convention on Human Rights, necessitates compliance with the standards of such protection, ensuring the existence of specific mechanisms for implementation and their proper restoration in the case of a violation of rights. The definition of the Sustainable Development Goals lays the foundations for specific directions to reform and improve existing mechanisms for the protection of rights. Everyone should feel protected, and their rights, in cases of violation, will be properly restored through existing mechanisms. These mechanisms in today's world must be effective and accountable to build peaceful and inclusive societies.[2]

In the context of recent crises, the importance of effectively functioning mechanisms to protect rights and ensure equal access to justice for all, and their ability to solve their main tasks, is even more pronounced. The coronavirus pandemic brought global restrictions on physical contact and digitalization to even the most archaic institutions. The war in Ukraine inevitably leads to large-scale losses and damages, and is likely to lead to greater negative consequences given the complexity of reforming the protection of private rights system in post-Soviet society.

All of this radically affects the deepening of the main problems of the modern Ukrainian system for protection of rights, including features such as the lack of an integrated approach to the resolution of private law disputes, which, accordingly, causes problems for further development and proper functioning of the protection system of such rights.

The already familiar concept of "civil justice" is practically unknown to Ukrainian legislation. Consequently, outdated post-Soviet ideas about civil proceedings intersect

2 UNGA Res 217 A 'Universal Declaration of Human Rights' (10 December 1948) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 19 April 2023; Council of Europe, *European Convention on Human Rights: as amended by Protocols Nos 11, 14 and 15 supplemented by Protocols Nos 1, 4, 6, 7, 12, 13 and 16* (ECtHR 2021); UNGA Res 70/1 'Transforming our World: the 2030 Agenda for Sustainable Development' (25 September 2015) <https://sdgs.un.org/2030agenda> accessed 19 April 2023. Goal 16 of Sustainable Development "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels".

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with current trends in attempts to introduce alternative dispute resolutions, but are not successful enough.[3]

Mediation, introduced in autumn 2020 by law, is not mandatory, even for certain case categories that are most suitable for its application. Although the requirements for the parties during pre-trial resolution of disputes are formal in practice, the parties do not adhere to this obligation, considering it an unnecessary formal procedure on the way to the administration of justice. An essential feature of justice in the eyes of most of society is the element of possible execution of a court decision, which cannot replace the priorities of compromise and the dispute's own mutually beneficial resolution. The procedure for resolving a dispute with the participation of a judge, introduced into Ukrainian procedural legislation due to the reforms of 2017 when following the example of the Canadian experience, is used in some cases, though of course, is not a common practice in Ukrainian courts.[4]

It is worth noting the problems regarding the judicial system's functioning and selection of judges in Ukraine, which makes it impossible to implement those innovations that assist in case of a reasonable and balanced approach in practice. The judiciary portal lacks transparent and accessible ways to search for specialists in information, legislation, and law, and this portal, in particular, does not interact with Ukraine's lawyer and mediator portals, holds no details on the execution of court decisions, etc.

The execution of court decisions is separated from the very essence of the trial, and often the parties involved in a private law dispute face the problem of non-enforcement of a court decision after an exhausting trial. Some of these decisions, by their nature, cannot be enforced, which challenges the participants in the trial whose efforts were aimed more toward achieving this enforcement than protecting rights (for example, the widespread practice of determining the child's place of residence, etc.; that is, cases when a decision's enforcement is practically impossible).[5]

The idea of mandatory representation of persons in courts by a lawyer, that has not been fully implemented, further distorted the idea of differentiation of legal proceedings and introduction of simplified consideration of claims for small amounts (small cases) in Ukrainian procedural legislation. The categorization of civil cases into insignificant and significant is so complex and ambiguous, both in rights and in judicial practice, that without

3 It is worth noting that Ukrainian scientists operate with the concepts of "civil litigation" and "civil procedure" in the national doctrine of law; bn this case, the latter does not differ essentially from the other in a meaningful way (see M Shtefan, O Uhrynovska); recently, there have been widespread tendencies to study the concepts of "justice in civil cases" (V Komarov), which is close to understanding civil proceedings; sometimes the concept of "civilistic process" is used in Ukrainian literature, which was traced mainly from russian sources by isolated scholars who tried to introduce it into national science. In our opinion, the concept of "civil justice" is more complex and reflects modern approaches and ideas of sustainable justice in civil cases, allows to gather in their diversity all the integral elements of access to justice and the right to a fair trial and to ensure their mutually coordinated functioning. I Izarova, V Nekrošius, V Vėbraitė and Yu Prytyka, 'Legal, Social and Cultural Prerequisites for the Development of ADR Forms in Lithuania and Ukraine' (2020) 116 Taze (Law) 8, doi: 10.15388/Teise.2020.116.1.

4 For example, the participation of children in civil proceedings is almost not regulated, there are not even requirements and peculiarities of children's participation in court hearings, testimony, etc.; this determines the special role of mediators in the resolution of disputes involving children, see: I Izarova, A Krychyna, Y Mukha and A Tsybulko, 'On the Way of Implementing the Principle of Best Interests of the Child During Mediation: Ukrainian Experience' (2022) 1 Bulletin of Taras Shevchenko National University of Kyiv, Legal Studies 40, doi: 10.17721/1728-2195/2022/1.120-8. For example, in so-called medical disputes, given the urgent need to ensure the confidentiality of dispute resolution, mediation and other alternative dispute resolution methods are extremely effective, see: I Izarova and V Vėbraitė, 'Towards Effective Resolution of Medical Disputes in Ukraine and Lithuania: Comparison of Analyses, Challenges and Prospects' in R Maydannyk, A den Exter and I Izarova (eds), *Ukrainian Legislation in the Field of Health Care in the Context of European and International Law* (Springer Cham 2022) 153, doi: 10.1007/978-3-031-05690-1_9.

5 I Izarova, 'Sustainable Civil Justice through Open Law Enforcement: The Ukrainian Experience' (2020) 9 (5) Academic Journal of Interdisciplinary Studies 206, doi: 10.36941/ajis-2020-0098.

professional legal assistance, the average citizen is unable to apply in the manner prescribed by law which is most effective for the consideration of his case.[6]

The very differentiation of private law cases in the context of the case management's widespread implementation in different European countries is controversial. However, the complication of the criteria for determining such case categories distorts this opinion altogether.[7]

Court fees are the next fundamental problem related to Ukrainian civil proceedings, given the unpredictability of judicial mechanisms for protection of rights, as well as the low probability of voluntary enforcement of a court decision. A comparative study, conducted in more than 20 jurisdictions in the world, shows access to justice largely depends on the amount of court fees, which will be indicative in the context of Ukraine's recovery after the war and the population's mass impoverishment, which will seek compensation for the damage in the most effective way.

Directing justice to the enforcement of court decisions, instead of building a system of preventive mechanisms and facilitating the resolution of disputes between the parties, identifies the main problems of the Ukrainian justice system's modern model. In the post-war conditions of restoration of justice for all who suffered from hostilities, suffered losses, damage to property – it will become the basis for a catastrophic decline in public confidence in the authorities.

In the context of ensuring the implementation of the Sustainable Development Goals, the lack of effective out-of-court mechanisms to prevent the emergence and escalation of private disputes is one of the problems that should gain our special attention. The spread of a negotiable culture, appeals to lawyers for professional legal assistance as well as for mandatory representation in courts, combined with the mandatory introduction of pre-trial dispute resolution procedures involving specific counterparties (banking institutions, employers' associations, etc.) will contribute to the development of an effective justice system. These ideas are in line with those reflected in the ELI / UNIDROIT Model Rules for European Civil Procedure, currently recognized as a set of the best rules worldwide.[8]

Another challenge faced is the massive displacement of Ukrainians, of about 12 million who have left their places of residence. The UN stated that 7 and a half million people left Ukraine during the war; 4.1 million refugees from Ukraine registered for temporary protection or similar national protection schemes in Europe[9] (*Last updated on September 30, 2022*). Regarding the states where Ukrainians are fleeing the war, they include Poland, which sheltered 2.95 million Ukrainians, Germany (867 thousand), Italy (105), Austria (73), and others. The ratio of a given country's population and the number of Ukrainians who received asylum there is also noteworthy (in particular, Lithuania sheltered Ukrainians in the amount of 2% of its total population, while Austria sheltered less than 1% (0.98 %), and France sheltered 0.10%).[10]

6 R Flejszar, I Izarova and V Vėbraitė, 'Access Towards Small Claims Justice: A comparative Study of Civil Procedure in Lithuania, Poland and Ukraine' (2019) 9 (1) International Journal of Procedural Law 97.

7 CH van Rhee, E Maan and R Kostur, *Monitoring of Implementation of the Civil and Commercial Procedural Codes: Final Report* (Project Pravo-Justice, EU 2019); I Izarova, V Vebraite and R Fleishar, 'Case Management in Civil Procedure: A Comparative Study of the Legislation of Lithuania, Poland and Ukraine' (2018) 10 Law of Ukraine 129, doi: 0.33498/louu-2018-10-129.

8 ELI and UNIDROIT, 'Model Rules of European Civil Procedure' (*UNIDROIT*, 2020) <https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules> accessed 19 April 2023.

9 The most up-to-date data can be found here: 'Ukraine Refugee Situation' (*Operational Data Portal*, 29 June 2022) <https://data.unhcr.org/en/situations/ukraine> accessed 19 April 2023.

10 ibid; 'Ukraine Situation: Refugees from Ukraine across Europe' (*Operational Data Portal*, 30 June 2022) <https://data.unhcr.org/en/documents/details/94001> accessed 19 April 2023.

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This means that a sufficiently large group of the population temporarily residing in a state's territory should receive equal access to justice, regardless of their status (temporarily displaced person), as well as the actual circumstances of their stay. The European Union Agency for Fundamental Rights has published national legislation implementing the Directive, but there are only 9 states included, and no details provided related to free legal aid or access to courts.

Ukraine's European integration aspirations necessitate the development of transparent relations on conditions of mutual trust in the member states' judicial systems. At the same time, the Ukrainian mechanism's low efficiency is evidenced by indicators of international organizations and an extremely low level of trust in Ukrainian society.[11]

According to the ECHR statistics, Ukraine ranked third in the number of complaints filed with the ECHR. Among the decisions adopted by the ECHR in 2020, almost a quarter (23%) are decisions in which Art. 6 ECHR is involved, especially regarding the fairness or length of court proceedings, or judgments' enforcement.

Sociological surveys that measured trust in the judiciary and independence of judges in the EU, conducted within the framework of the Eurobarometer and the EU Justice Scoreboard, aimed at clarifying public opinion about the state of justice, remain unknown to the general public in Ukraine but should be taken into account when implementing an effective system to monitor measures.[12]

All the above demonstrates the need for an integrated approach to reform Ukraine's civil justice system, which will be useful to incorporate artificial intelligence and machine learning algorithms to identify stable patterns of the justice system's functioning and development.

It is important to clearly clarify the real public expectations from the modern justice system in Ukraine, the demand of citizens and businesses for justice's effectiveness in the post-war country, and purposefully identify areas for improvement to substantiate the concept of sustainable justice. For the first time, a comprehensive approach will be applied to the formation of a holistic view of the justice system for citizens and businesses, as well as the peculiarities of the modern justice system in the sustainable development field, based on the requirements of proportionality and optimality of models for preventing and resolving private disputes.

Specific components of building trust in the judiciary and an algorithm developed on this basis for assessing the judiciary's quality in the country, as well as collection of data on its functionality works to strengthen trust in the justice system by following the example of analogues, EU and CoE. Such indicators of justice efficiency, with the help of algorithms for continuous monitoring and collection of data on the developed indicators, will allow timely and flexible responses to unavoidable changes.[13]

11 The 2022 Eurobarometer Standard Study demonstrates continued strong support for the EU's response to Russian aggression against Ukraine, in any case, relations should be based on constant mutual trust. The 2022 Eurobarometer Standard Study demonstrates continued strong support for the EU's response to Russian aggression against Ukraine, in any case, relations should be based on constant mutual trust, see: 'Standard Eurobarometer 97 – Summer 2022' (*European Union*, September 2022) <https://europa.eu/eurobarometer/surveys/detail/2693> accessed 19 April 2023. In the World Bank rating Doing Business 2020 Ukraine took 64th place. Program Rule of Law Index of the World Justice Project, in 2020–2021 Ukraine took the 72nd place-74 seats, see: Ukraine (*World Justice Project*, 2022) <https://worldjusticeproject.org/rule-of-law-index/country/2021/Ukraine> accessed 19 April 2023. Freedom House Seeding Ukraine at 39/100 and announcing transition or hybrid regime, see: Ukraine (*Freedom House*, 2022) <https://freedomhouse.org/country/ukraine/nations-transit/2022> accessed 19 April 2023.

12 European Commission, Directorate-General for Justice and Consumers, *Perceived Independence of the National Justice Systems in the EU Among the General Public: Report* (Publications Office 2019) doi: 10.2838/60311; European Commission, 'EU Justice Scoreboard' (*European Commission*, 19 May 2022) <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en> accessed 19 April 2023.

13 EU Justice Scoreboard (n 14).

Special attention should be given to the issues of recognition and enforcement of court judgments for EU member states in Ukraine, servicing documents and collecting evidence in court proceedings involving temporarily protected Ukrainians.

2 METHODOLOGY FOR APPLYING ARTIFICIAL INTELLIGENCE AND MACHINE LEARNING ALGORITHMS FOR EFFECTIVE RESOLUTION OF CIVIL DISPUTES

In the overwhelming majority, legal research of Ukrainian scientists involves the use of general scientific methods that allow reaching conclusions as well as special scientific methods used in legal research.

In particular, the application of the dialectical method involves a comprehensive consideration of the study's objects in their interrelation, totality, and dynamics of development, using categories and laws of dialectics. To determine the negative consequences of the colonial-totalitarian model of the court's functioning as a mechanism of state coercion in Ukraine, and to formulate specific directions of the modern model of sustainable justice; justification of the need to change the focus of permanent justice to the peaceful resolution of disputes as opposed to the system that provides cases by national courts, etc.[14]

Logical methods make it possible to generalize the conditions and features of the widespread use of out-of-court dispute resolution and determine their place in the justice system with performance indicators. This may lead to a shift in the focus on permanent justice to the peaceful resolution of disputes, in contrast with the system of enforcement by national courts, while units of research papers focus on supporting and developing strong and peaceful institutions in Ukraine's justice system, determining compliance with the requirements of sustainable development of modern legal procedural institutions.

Statistical studies allow determination of quantitative indicators of the judicial system's work, often used in scientific research.[15] At the same time, the indicators taken into account cannot objectively demonstrate the advantages and gaps of the current justice system without defining relationships and specific indicators of the effectiveness of judicial proceedings in specific civil cases. It should be noted that among certain categories of cases developed for the collection of judicial statistics, there are no characteristics[16] of main and significant IP factors altering the effectiveness of legal proceedings, and there are no quantitative indicators of the effectiveness of the administration of justice.

Some studies carry out a systematic analysis of Ukraine's current civil procedural legislation, as well as legislation in the judicial system, enforcement proceedings, regulatory legal acts, and draft laws that will form a comprehensive view of the regulation of relations regarding the protection of individuals' rights in Ukraine, the use of judicial or extrajudicial forms

14 O Khotynska-Nor and I Izarova, 'To reach sustainable justice with Millennials': Example of Ukraine' (2022) 12 (4) Juridical Tribune 457, doi: 10.24818/TBJ/2022/12/4.02; O Khotynska-Nor, 'Judicial Transparency: Towards Sustainable Development in Post-Soviet Civil Society' (2022) 5 (2) Access to Justice in Eastern Europe 83, doi: 10.33327/AJEE-18-5.2-n000212; M Stefanchuk, 'Modern Trends in the Formation and Development of the Human Rights Mechanism in Ukraine' (2022) 5 (3) Access to Justice in Eastern Europe 19, doi: 10.33327/AJEE-18-5.3-a000311.

15 Judicial Statistics' (*Judicial Power of Ukraine*, 2023) <https://court.gov.ua/inshe/sudova_statystyka > accessed 19 April 2023; I Izarova and Yu Prytyka, 'Simplified Civil Litigation of Ukraine: Challenges of the First Year of Application in Judicial Practice' (2019) 145 Problems of Legality 51, doi: 10.21564/2414-990x.145.160567.

16 Catalogue of 101 categories and open data resource, see: Datasets (*Diya: Open Data Portal*, 2023) <https://data.gov.ua/en/dataset?q=Court + decisions&sort=title_string+asc> accessed 19 April 2023.

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of protection of rights, which becomes the basis for the development of appropriate recommendations for improving current legislation.

The comparative legal method will help clarify the experience of leading jurisdictions in studying other countries' relevant legislation. It will answer questions such as directions for reforming national and European procedural legislation in terms of balancing judicial and out-of-court resolution of disputes, whether the current Ukrainian regulations correspond to such trends, as well as how to identify the necessary directions for further reform.[17]

The disadvantage of such work is the lack of objective and large-scale studies of judicial practice, namely the data from the Unified State Register of Court Decisions (hereinafter – the Register), which in recent years, has accumulated more than one million court decisions for free access. Of course, the majority of procedural and legal studies contain references to the data used in the Register. At the same time, it should understood that some of the studies contain at least an analysis of 100-200 court decisions, while one category of cases usually covers more than 1,000 cases per year and sometimes reaches tens of thousands. The selection of decisions is carried out through the choice of keywords and several options available for choosing the type of decision and court's region, which does not contribute to the objectivity of the conclusions, but only narrows the sample of cases for analysis.[18]

Units of scientific research are devoted to the issues of obtaining large amounts of data currently available for research.

Additionally, during 2015–2022, many interdisciplinary studies appeared in process in which scientists defended the idea(s) of the possibilities of the predictive function of machine learning algorithms and other artificial intelligence tools.[19]

In our opinion, modern scientific research in the field of justice requires using artificial intelligence machine learning algorithms, such as special hardware and software systems for pre-processing the texts from court decisions. This will make it possible to prepare objective recommendations for improving and optimizing Ukraine's judicial system's functionality, the consideration and resolution of civil cases, and the reduction of judicial cases' costs, development of a risk assessment system for achieving the desired civil litigation result, increasing the percentage of funds awarded, and ensuring the effective use of public funds for the maintenance of the state judiciary.

Labelling texts of court decisions in large arrays when collecting empirical data for further application in deep algorithms of Natural Language Processing will make it possible to

17 OM Spektor, 'Alternative Methods of Resolving Civil Legal Disputes' (PhD (Law) thesis, Taras Shevchenko National University of Kyiv 2012) 18; MJ Polishchuk, 'Mediation as a Method of Resolving Civil Legal Disputes' (PhD (Law) thesis, Taras Shevchenko National University of Kyiv 2017) 18; O Terekh, 'Alternative Ways to Resolve Labour Disputes: Practice of Ukraine and the EU' (2020) 2 Bulletin of Taras Shevchenko Kyiv National University, Legal Studies 61, doi: 10.17721/1728-2195/2020/2.113-12; N Vasylyna, 'Prospects for the Development of the Dispute Resolution Institute with the Participation of a Notary' (2020) 1 Bulletin of the Higher Qualification Commission of Judges of Ukraine 20; CH van Rhee, 'Mandatory Mediation before Litigation in Civil and Commercial Matters: A European Perspective' (2021) 4 (4) Access to Justice in Eastern Europe 7, doi: 10.33327/AJEE-18-4.4-a000082; T Tsuvina and T Vakhonieva, 'Law of Ukraine "On Mediation": Main Achievements and Further Steps of Developing Mediation in Ukraine' (2022) 5 (1) Access to Justice in Eastern Europe 142, doi: 10.33327/AJEE-18-5.1-n000104.

18 SE Ustiushenko, 'Legal Fees in Ukrainian Civil Proceeding' (PhD (Law) thesis, National University "Odesa Law Academy" 2021); KA Lubiana, 'Participation of a Lawyer in the Simplified Civil Court Proceedings of Ukraine' (PhD (Law) thesis, Taras Shevchenko Kyiv National University 2021); TV Oldak, 'Class Action in the Civil Proceedings of Ukraine' (PhD (Law) thesis, Kharkiv National University of Internal Affairs 2023); TF Korotenko, 'Court Orders in the Civil Process of Ukraine Addressed to the Competent Authorities of Foreign Countries' (PhD (Law) thesis, National Academy of Sciences of Ukraine, VM Koretsky Institute of State and Law 2021); DA Korol, 'Differentiation of Civil Court Proceedings' (PhD (Law) thesis, Institute of Law of Taras Shevchenko Kyiv National University 2020).

19 M Medvedeva, M Wieling and M Vols, 'Rethinking the Field of Automatic Prediction of Court Decisions' (2023) 31 Artificial Intelligence and Law 195, doi: 10.1007/s10506-021-09306-3.

identify patterns and predict changes in the number of court cases, participants, and court costs, as well as optimize legal proceedings in civil cases with a high degree of probability, taking into account the possibilities of analysing hundreds of thousands of court decisions.

Some indicators for the justice system's effective functioning may highlight significant problems. Take, for instance, the total duration of protection of the rights of a person who applied to the court. In this case, we must think not about the time interval from the date of filing an application to the court until the final court decision, but from the moment of applying for protection of rights until the actual execution of the court decision. The behaviour of the parties in a trial based on the analysis of court orders on procedural coercion measures applied may be such an indicator, as well as information about court costs and their distribution between the parties. It is possible to find out the proportionality and effectiveness of the case's trial. The enforcement of a court decision, which finalizes the case's trial, is not transparent for investigation given the lack of unified data and openness of the work of the enforcement service. At the same time, in some case categories, it is possible to presume the possibility of such execution when the court allows the immediate execution of court decisions.

Analysis of large amounts of data will show more objectively the relationships and priorities of compromise and disputes' mutually beneficial resolution between the parties before litigation. Specifically, review of the ratio of directed and successfully conducted dispute resolution procedures with the participation of a judge, though not yet a common practice in Ukrainian courts, should become common in certain case categories.

The methods of execution of court decisions as a separate, painful issue of effective judicial protection of rights, as well as an element of the resolution of civil law disputes, should also become an indicator of the effectiveness of the justice system's functioning. Considering the importance of choosing the appropriate method of protection of rights for its effective resolution and proper consideration of a civil case by the court, as well as the mutual influence of the protection of rights' effectiveness and the method choice of such protection.[20]

The relationship between the representation of the individuals' interests in civil and commercial proceedings and the effectiveness of court proceedings and the protection of rights can also become an important indicator that will substantiate the idea of mandatory representation by a lawyer of persons in courts in specific case categories, or according to the criteria of the case's complexity.

Categorizing civil cases by analysing the relationships between these and other indicators, and the effectiveness of case consideration, can significantly improve the procedures for their consideration, saving public funds, time, and money spent on trial.

Undoubtedly, one of the most important indicators of the justice system's effective functioning should be data regarding court costs and their distribution with the outcome of the trial.

Thus, identifying the main factors influencing the effectiveness of civil cases by the court, as well as the reasons for the risk of excessive length of court proceedings, non-enforcement of court decisions, and high court costs, will ensure the formation of an integrated system of effective dispute resolution.

20 *AV Potapenko, Determination by the court of an effective way of protecting a private right and interest that does not conflict with the law* (LLC 7BC 2022).

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3 CONCLUSIONS

The current model of justice in Ukraine is characterized by a special focus on enforcement rather than the development of strong and peaceful institutions, the introduction of a comprehensive system for resolving civil disputes that do not meet the requirements of sustainable development, and the adaptation of Ukrainian legislation to EU law. Sustainable justice should ensure effective prevention and resolution of private law disputes in Ukraine with a special focus on disputes and groups of persons affected by war, increasing trust in the judiciary system and saving costs.

The algorithm for predicting risks and results of court proceedings and the methodology for processing the database of the Unified State Register of Court Decisions developed based on certain indicators of dispute resolution's effectiveness will be a solution to provide objective data as a result of processing large amounts of data.

The lack of objective information necessitates utilizing machine learning algorithms and other artificial intelligence capabilities for processing large amounts of data to provide more objective information for analysis and decision-making, improving the existing litigation system and out-of-court dispute resolution.

In the future, we consider it is promising to develop a catalogue of information on analysed cases, considering the performance indicators of the legal proceedings' implementation in civil cases, as well as identifying the main and significant factors influencing the effectiveness of legal proceedings, to derive quantitative performance indicators.

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Case Study

THE ROLE OF THE POLICE IN REDUCING THE FEAR OF CRIME IN THE COMMUNITY

Driton Muharremi and Mensut Ademi

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ABSTRACT

The feeling of fear of crime is a condition created in the hearts of many citizens, both in urban and rural areas, in war or peace, and the goal of many international researchers in the field of criminology is to evaluate it. This article is broken into three parts. The first

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Corresponding author, responsible for writing: The author and the co-author together have reached the hypotheses, analyses, discussion and recommendations of the data and concurrent preventive models.
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part introduces the factors that explain the fear of crime, a including socio-demographic and social-psychological model by A. van der Wurff, L. van Staalduinen, and P. Stringer. The second part provides an overview of paradoxes and inconsistencies in the literature regarding fear of crime and the police's role in reducing the fear of crime. Discussing public, political, and media perceptions of the role of police, and these perceptions' implications for possible ways the police can increase feelings of security. Finally, it covers measures that can reduce fear of crime.

The police presence in dangerous areas with criminal influence is an important factor to reduce the fear of crime. Citizens continue to make more demands of the police to fight crime, and this task is directed mainly at community policing.

Alleviation of the fear of crime comes with the preventive actions of the police. They believe their presence in a neighbourhood calms the situation. For citizens, on the other hand, police presence can be seen as an indicator of an unsafe, tense, or disorderly situation.

Methods: *The combined methodology from the studies of self-accusation and victimization was used in this paper by following the listed methods. The police's role to reduce the fear of crime in the RPRFCC community has two distinctive features identified within a comparative study of crime and victimization: the large number and cultural diversity of participants in our country, Kosovo, and its explicitly comparative design. The study reviews how to overcome these challenges and how to gather the data in time or to give an early warning.*[1]

An integral part of comparative survey research is the inclusion of a long tradition of researchers in the fields of cultural anthropology, sociology, political science and criminology, with few clear solutions (A. Prezworski and H. Teune, M. Armer and A. D. Grimshaw, M. L. Kohn, C. Ragin, E. Allardt, S. Karstedt, N. J. Smelser, F. van de Vijver and N. K. Tanzer, T. Bennett, D. Nelken, S. Rokkan, et al.). During the implementation of RPRFCC, many technical, human, and logistical challenges and problems can arise, but awareness of these problems is the best weapon against oversimplification or misinterpretation of the results.[2] *The research also analyses the strongest and most problematic aspects, such as the challenges faced by residents and identification of a number of recommendations to strengthen law enforcement agencies' work in the future.*

The paper addresses the following questions:

> *1. What conditions and causes lead to the occurrence or development of criminal behaviour in a society at a given time?*
>
> *2. What are effective ways to remove the conditions and causes of criminal behaviour?*

Case study: Kosova.

Research participants: 2,060 respondents in rural and urban areas.

Researchers: Students of Law Faculty at AAB University, 25, Professors of Law and Criminology, 5.

1 For a more detailed explanation of the basic ISRD research and methodology, see Ineke Haen Marshall and Dirk Enzmann, 'Methodology and Design of the ISRD-2 study' in *The Many Faces of Youth Crime: Contrasting Theoretical Perspectives on Juvenile Delinquency across Countries and Cultures* (Springer 2012) 21, doi: 10.1007/978-1-4419-9455-4.

2 Ibid 21.

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Survey and interview method in hybrid form, online, paper and pencil, and electronic questionnaire.

***Results and Conclusions**: The latest criminological research emphasizes two ways to study and discover the hidden number of criminal offenses in the official national crime records. The most popular methods are via self-report studies and victim studies. The consequences of fear of crime, namely its economic and social effects, are serious challenges facing any society. The weight of the consequences due to the fear of crime in any concrete society depends on many factors, including the criminalization in society, corruption, organized crime, nepotism, criminal offenses handled in national legislation, leading to implementation in the social system for all of the afore-mentioned items. In fact, the consequences depend on the prevailing type of criminal in the respective country. Corruption and organized crime produces poverty and general economic decline accompanied by social dissatisfaction of democratic development reforms, reducing the effectiveness of the state power's functioning and minimizing the trust of citizens in law enforcement bodies and state public service.*

The problems of combating and detecting criminal offenses, such as corruption and organized crime, are complicated and caused by various political, legal, economic, and social factors in general. Laws always require enforcement, and while the limit of legal behaviour has generally shrunk over time, to a large extent the laws in our country are not largely applicable to a society obliged to enforce the laws in force. The time it takes for quality implementation is less clear. Enforcement requires a form of initial information about the collusive act, such as corruption – reported either by a government investigator or a third party – and then taking a legal action from that information, culminating in an adequate conviction. Public knowledge about organized crime and corruption is made possible primarily by third parties or investigators from some branches of the government, separate from the current criminal and corrupt groups.

Solving and overcoming the obstacles in the detection and combating of organized crime and corruption is achieved with complex state policies, including analysis of the current state of this phenomenon; obligations of political activity and general goals; specific measures against organized crime and corruption, and in particular, the special laws against organized crime and the confiscation of illegally acquired property; the formation of specialized anti-corruption institutions operated by the Judicial Police and foreseen by the Criminal Procedure Code and the Law on the Police; the full cooperation of intelligence bodies, such as KIA (Kosovo Information Agency), Police Intelligence, and many governmental and non-governmental organizations that specialize in the fields, investigations, and trials as upheld to professional principles and ethics; legislative regulation of special authorizations of certain bodies and organizations in detecting and fighting corruption; effective implementation of the law and measures controlled by institutions; good governance, administration, and full legality in the functional performance of justice bodies, police, customs, inspections, and municipal government bodies; the scientific and professional approach to detecting and fighting organized crime, corruption, educating the public, and mobilizing the media to prevent and combat organized crime and corruption.

1 INTRODUCTION

Internationally, research on the fear of crime has existed since 1906 in the United Kingdom (UK), and in 1960 in the U.S.A. For example, every two years, the Crime Survey for England and Wales interviews around 10,000 residents regarding their views of crime and crime-related matters. The survey sheds light on the public's attitude towards policing, victimization,

risk perception, and overall fear of crime. Crime surveys are conducted not only in Western European countries and the U.S.A., but also in Central and Eastern European countries.[3]

The research findings from the UK and U.S. are insightful. A plethora of studies have concluded that fear of crime influences the well-being of a large part of the population. Some studies even go as far as to suggest that fear of crime is now a larger issue than the committed crime itself.[4]

G. Chambers and J. Tombs, while reviewing the 1982 British Crime Survey (Scotland), reported that "more than half of the respondents (58%) said that at some time in the past they had worries about the possibility of being a victim of crime."[5]

Fear of crime results from socioeconomic, demographic, and psychological changes in a democratic society.[6] Today, in all countries of the world, and especially after the start of the Covid-19 pandemic and important wars (including Ukraine, Russia, Syria, etc.), society largely demonstrates its feeling of insecurity in communities, particularly in urban areas where the population includes immigrants and refugees who are targeted by criminal groups. These communities are often victims of criminal offenses against human rights, life and body, sexual integrity, and criminal offenses of organized crime.

The effects seen include the disintegration of traditional societies which previously were characterized by social cohesion, predictable economic environments, and local specificities. These destructive effects have resulted in a society in which feelings of insecurity and the search for vague and secure identities in communities are permanent and defining characteristics.[7]

D. Garland studied the problem of cultural formation in high crime societies. This cultural formation produces a series of psychological and social effects that exert influence on politics and policy and "give the experience of crime a fixed institutional form."[8] People become more aware of crime under these conditions and are experience common, everyday practices that require them to assume the actual identity of a criminal (or a potential victim) and to think, feel, and act accordingly. In response, the public policy focus has shifted from offender-oriented policies (rehabilitation, etc.) to victim-oriented policies, which are primarily based on repressive and punitive measures.

This article consists of three parts. The first part introduces the factors that explain fear of crime, including the socio-demographic and social-psychological model of A. van der

3 Oksanna Hatalak, Anna Alvazzi del Frate, and Ugljesa Zvekic (eds), *The International Crime Victim Survey in Countries in Transition: National Reports* (UNICRI 1998); Ugljesa Zvekic, *Criminal Victimisation in Countries in Transition* (UNICRI 1998); Helmut Kury (ed), *International Comparison of Crime and Victimization: The ICVS* (de Sitter Publications 2001); Duxita Mistry, 'Falling Crime, Rising Fear: 2003 National Victims of Crime Survey' (2004) 8 South African Crime Quarterly 17, doi: 10.17159/2413-3108/2004/v0i8a1041; Kauko Aromaa and Markku Heiskanen (eds), *Crime and Criminal Justice Systems in Europe and North America 1995-2004* (HEUNI 2008); Gorazd Meško, Andrej Sotlar and John Winterdyk (eds), *Policing in Central and Eastern Europe – Social Control of Unconventional Deviance: Conference Proceedings* (University of Maribor 2011).

4 Mark Warr, 'Fear of Victimisation: Why Are Women and The Elderly More Afraid?' (1984) 65 Social Science Quarterly 681; Trevor Bennett, 'Tackling Fear of Crime' (1990) 28 Home Office Research Bulletin 14; C Hale, *Fear of Crime: A Review of The Literature, Report Prepared for the Metropolitan Police Service Working Party on Fear of Crime* (University of Kent 1992).

5 Gerry Chambers and Jacqueline Tombs (eds), *The British Crime Survey – Scotland* (HMSO 1984); Gorard Meško et al, 'Police Efforts in the Reduction of Fear of Crime in Local Communities: Big Expectations and Questionable Effects' (2007) 2 Sociologija Mintis ir veiksmas 70, doi: 10.15388/SocMintVei.2007.2.6038.

6 Rene Boomkens, 'Towards the Capsular City? Public Safety and Public Fears' in K van der Vijver and J Terpstra (eds), *Urban Safety: Problems, Governance and Strategies* (IPIT 2004).

7 Meško (n 7) 71.

8 David Garland, 'The Culture of High Crime Societies: Some Preconditions of Recent "Law and Order" Policies' (2000) 40 (3) The British Journal of Criminology 367.

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Wurff, L. van Staalduinen, and P. Stringer.[9] The second part provides an overview of the paradoxes and inconsistencies in the literature on fear of crime and the police's role in reducing fear of crime. Public, political, and media perceptions of the police's role and the perceptions' implications help identify possible ways the police can assist. Then, ways to increase sense of security is described. Finally, measures that can reduce the fear of crime are discussed.[10]

2 THE SOCIAL-PSYCHOLOGICAL MODEL OF FEAR OF CRIMINALITY

Approaches to fear of crime can also be called *indicators of safety* in socio-demographic terms, whereas such models are useful for explaining the fear of crime in certain countries.[11]

These models may combine socio-demographic and social-psychological characteristics when analysing the reduction and fear of criminality. According to some approaches, there are three main models that explain the levels of fear of crime.[12] The first model is the victimization model in which high levels of crime (a socio-demographic factor) lead to a higher number of victims, resulting in higher levels of fear due to the expectation of becoming a victim (a socio-psychological factor). The next model, the model of vulnerability, proposes that personal characteristics, another social-psychological factor, contribute to people's fear of crime. Social and/or physical vulnerability is one of the primary explanations for fear of crime according to this model. Lastly, the social control model proposes that lack of social control, a socio-demographic factor, is the source of fear. Lack of social control involves instability, disorder, and neighbourhood decline that leads to actual or symbolic threats, thus increasing the fear of crime. The models show that there are different types of socio-demographic and social-psychological factors that may contribute to fear of crime. Socio-demographic factors, such as age, gender, health, and poverty may be related to social and physical vulnerability under the vulnerability model. The environment and media are two important psychological factors in the social control model. These three explanatory models take both socio-demographic and social-psychological factors into account. Thus, both demographic concerns and individual levels of fear of crime explain fear of crime in general.[13]

3 LAW ENFORCEMENT AGENCIES

Law enforcement agencies protect society from criminality and help to decrease the amount of "dark" and "grey" criminal offenses. Having analysed some practical cases, we can verify the validity of certain theoretical methods, tactics, and technical tools, providing the appropriate empirical material for preventive measures against deviant activities. Law enforcement agencies must take certain steps in the fight against criminality, develop scientific methods and tools for the detection, investigation, judgment, and prevention of

9 Adri van der Wurff, Leendert van Staalduinen and Peter Stringer, 'Fear of Crime in Residential Environments: Testing a Social Psychological Model' (1989) 129 (2) Journa of Social Psychology 141, doi: 10.1080/00224545.1989.9711716.

10 *G.Meško 'Police Efforts in Reducing the Fear of Crime', Policing in Central and Eastern Europe: Dilemmas of Contemporary Criminal Justice* (Faculty of Criminal Justice University of Maribor 2004) 734.

11 Wurff (n 11); Stephen Farrall and others, 'Social Psychology and the Fear of Crime' (2000) 40 (3) British Journal of Criminology 399-413, doi: 10.1093/bjc/40.3.399.

12 European Communities, *A Review of Scientifically Evaluated Good Practices for Reducing Feelings of Insecurity or Fear of Crime in the EU Member States* (European Crime Prevention Work 2004).

13 Meško (n 7) 72.

criminal offenses, research the entire repressive and preventive activity aimed to fight crime. As well, new preventive methods and tools should be consistently sought.[14]

It should be emphasized that, regarding the methods taken from other fields, they become criminalistic due to the specifics of the object treated; therefore, mandated law enforcement agencies should have a special role for involvement.

State institutions and scientific university research centres must take on the study and processing based on the criminal code and methodical criminal procedure, technical and tactical tools, and methodical recommendations for searching, finding, fixing, examining, and evaluating evidence for the purpose of discovery, investigation, trial, and prevention of criminal offences. The methods studied and tools processed by science to extract the right information about their mechanisms and ways of committing criminal offences are grouped into three homogeneous parts,[15] interrelated and inseparable as tactical methods (criminological tactics), and methodological recommendations (criminological methodology or investigation methodology).

Thus, in the fight against criminality, along with other legal sciences, the science of criminology as a legal science continues to play an active role. [16]

4 RESULTS AND DISCUSSIONS

The Self Report Victimisation (SRV) has two distinctive features as a comparative study on crime and victimization: the large number and cultural diversity of participants in Kosovo and its explicitly comparative design.[17]

With this research, we evaluated how the insecurity affects the citizens of Kosovo, as well as acquire an indicator of how possibly increase quality of life in the municipalities.

The research aims at identifying the perception about individual and collective security, safety, and the environment in which citizens live, the trust in the Kosovo Police (KP) and other law enforcement agencies, community relations, and inter-ethnic relations.

The research also analyses the strongest and most problematic points, such as the challenges faced by residents, as well as identifying a number of recommendations to strengthen the work of law enforcement agencies in the future. An integral part of comparative survey research is an inclusion of a long tradition of researchers in the fields of cultural anthropology, sociology, and political science.

The paper addresses the following questions:

1. What are the conditions and causes that lead to the occurrence or development of criminal behaviour in a society at a given time?

2. What are effective ways to remove the conditions and causes of criminal behaviour?

Case study: Kosovo.

Research participants: 2,060 respondents in rural and urban areas.

Researchers: 25 students of law faculty at AAB University, 5 professors of law and criminology.

14 Mirsad Abazoviq et al, *Crime Fighting Policy* (University AAB; University of Sarajevo FKN 2006) 4, 23.

15 Nedzad Korajlic and Driton Muharremi, *Criminalistics* (Riinvest 2009).

16 M Ademi and M Budimlic, *Fear of Crime, 2009-2016* (AAB College).

17 For a more detailed explanation of the basic ISRD research and methodology, see Marshall and Enzmann (n 3).

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Survey and interview methods took a hybrid form (a combination of online and face-to-face forms), and an electronic questionnaire.

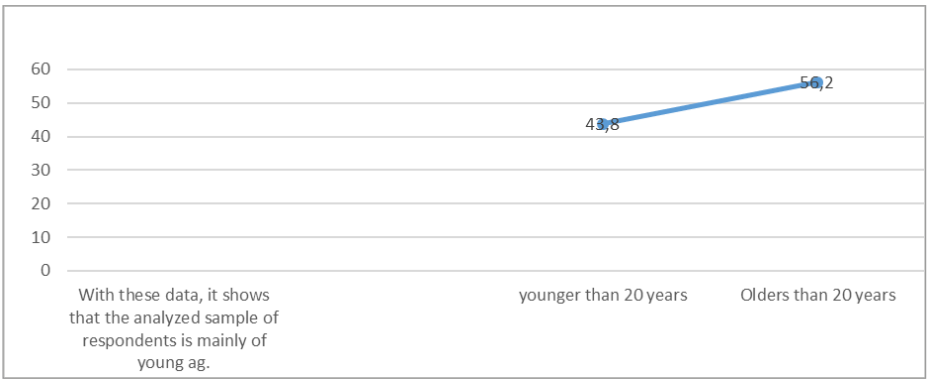


Fig.2 Economic situation

We can see a few factors from the analysed sample of respondents: they are primarily of a young age, i.e., 43.8% are younger than 20 years, and 56.2% are older than 20 years; the gender ratio is 44% men and 56% women. According to the data, 80.5% of the respondents have a secondary education. Regarding housing status, 78.8% live in a private house or have lived for a long period at their existing address while 22.2% have resided at the same address for a period of up to 11 years. This may mean that they have migrated to cities from other regions, and in this case, we see the counterculture (observed in criminology as conflict of cultures). The highlighted characteristics are that they live with their families (96.3%), and their own financial capacities are low (34.3%), average (24.2%), and (41.5%) higher.

The data shows that only 7.5% of the respondents have been victimized by some form of delinquent behaviour (damage, private matters, theft, etc.) in the past. This data relates to the time after the 2000-2013 war. The percentage of victimization varies enormously before and during the war and would skew the data. Their psychophysical ability shows that they can assess risk at average (42.3%) and excellent (41%) levels. In most cases, their health is assessed as excellent (75.5%), with only slightly more than half of respondents communicate with their neighbours (59.7%), and a number of interviewees (58.5%) visit friends in the neighbourhood.

Behaviour and risk assessment

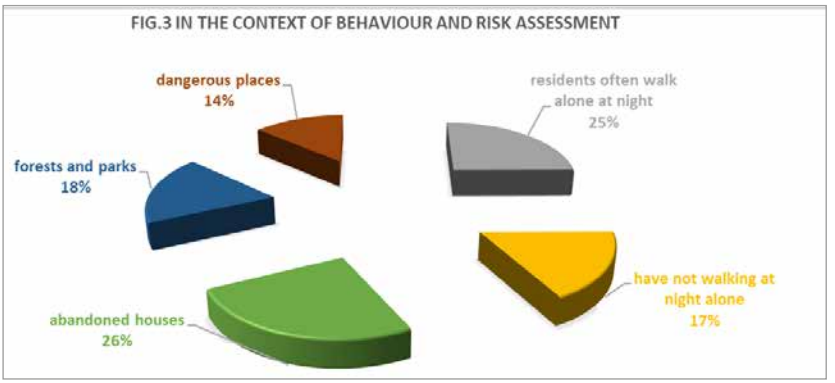
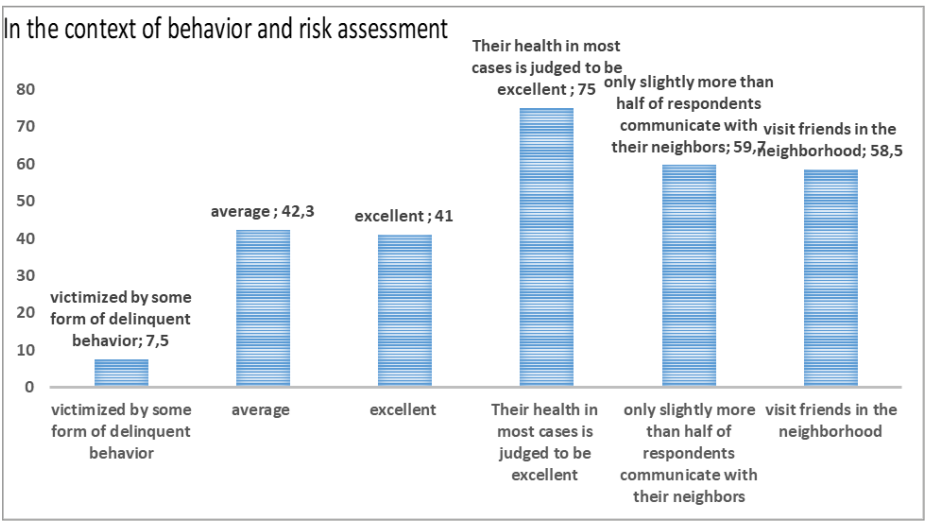


Fig.3 Context of behaviour and risk assessment

The results show that a relatively large number of residents often walk alone at night (43.6%), although (considering the age of the interviewees), the remainder of the residents (30.5%) do not regularly walk alone at night. Regarding certain locations in the risk assessment, respondents perceived the following as dangerous: abandoned houses (45.2%), forests and parks (32.1%), market (23.8%).



Through characterisation of the social-psychological model of fear of crime from the referred samples, it is seen that the analysed respondents' samples do not perceive themselves as targets of significant victimization; 29% of respondents thought that bad people threaten them and their property, and 16.8% of respondents believe that people are jealous of them.

Fig.4. Context of behaviour and risk assessment

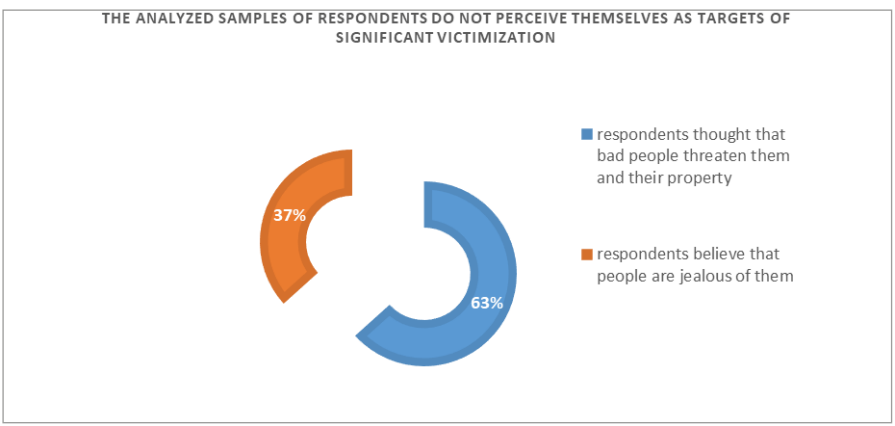


Fig. 5 Characteristics of the social-psychological model of fear of crime

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Considering self-perception

Considering self-perception, respondents indicated that, regardless of gender, age, and experience, they can overcome and stop a potential attacker, while more than a third of the respondents are not sure. More than half of the respondents perceive that, with their behaviour, they can avoid a case of conflict (50.4%).

The study revealed that only 13.7% of the respondents trusted the people they know, and 51.5% of the respondents do not trust some people in their environment. The perception of the criminogenic space is relatively high. More than one-third of the respondents sometimes imagine that someone may attack or steal on the street and 27.5% of the respondents believe that they could safely move inside.

5 CONFRONTING THE FEAR OF CRIME

Van der Vijver used Lerner's theory of the "Belief in the Just World' to understand how people deal with potentially threatening situations. The just world theory asserts that human beings want to and must believe that they live in a world where people get what they deserve, and deserve what they get, so that they can go about their daily lives with a sense of trust, hope, and confidence in their future. In a just world, there is no place for innocent victims, but at the same time, we are all aware that there are innocent victims. The judiciary is used to uphold our image of the just world because it is a symbol for both the protection of the "good" and elimination of the threat of crime by ignoring the "evil."[18]

Though if someone becomes the victim of a crime that incites outrage, the perception of the just world is violated and that perception must be reinstated. This has more to do with the battle against experienced injustice than arresting the perpetrator. This is why victims and the public want to know that the police and the justice department are working to solve the case effectively.[19] Lerner's theory of "Belief in the Just World" is, however, problematic in many ways. The press and television present a world where every single person, good or bad, can be a victim. It does not explain why many people feel unsafe, although, according to this theory, most people believe that they are good citizens, and therefore, implicitly protected from bad events, including crime.[20]

18 Melvin J Lerner, *The Belief in a Just World: A Fundamental Delusion* (Springer 1980) 9-30; CD van der Vijver, *De burger en de zin van strafrecht* (Koninklijke Vermande 1993).

19 Karin Lasthuizen, BAP van Eeuwijk and Leonardus WJC Huberts, 'How Policing Can Reduce Feelings of Insecurity: Results from Survey Research in the Netherlands' (2005) 6 (4) Police Practice and Research 375, doi: 10.1080/15614260500294125.

20 Lerner (n 21).

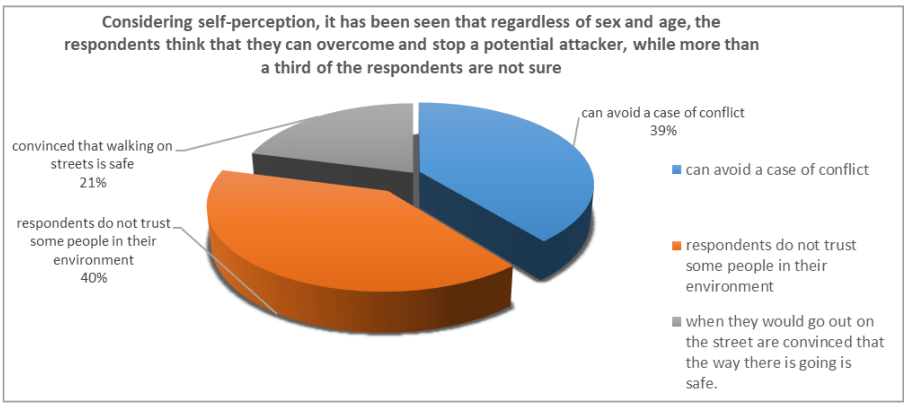

Fig.6. Self-assessment of the ability to overcome and stop a potential attacker

6 ROLE OF POLITICS AND MEDIA IN THE FEAR OF CRIME

The role of politics and media in people's fear of crime is a very important concept as it has a strong influence on political decisions. We find punitiveness increasing in western countries in recent years,[21] often based on a victim-oriented approach. Fear of crime is such an important element of penal populism that politicians recognize and use expressed fear of crime, generated by the media, well-publicized cases, and changes in some legal norms (often without sufficient expert consultation and under the pressure of so-called moral entrepreneurs), to their own ends. [22] According to G. Mesko, political elites have overlooked the fact that society is not only a victim, but also a cause of crime. To fight crime and guarantee security, politicians are placed in a dilemma of "freedom and security." [23] Political elites seem to sacrifice freedom for security. Their declared goal is citizens' protection from victimisation, but the hidden goal is quite frequently some political gain (i.e., getting re-elected). Nowadays, crime is an accepted piece of our society, and like most other problems (e.g., unemployment), is a solvable problem. It seems that contemporary society wants to eliminate all evil so that the "good citizen" can live in freedom without feeling afraid (justifying a belief in a just world). This perspective on reducing crime and fear of crime raises high expectations of citizens to be good, accepted, and avoid becoming a victim. Fear of crime issues are a political matter due to politicians who abuse fear of immigrants, the poor, southerners, easterners, and other marginalized and stigmatized social groups, attributing criminality to them to increase fear of crime and the groups' credibility with a trusting public. The media's influence on one's understanding crime's attribution to specific individuals, circumstances, and possible victimization deserves additional research. The media is often seen as one of the leading causes for fear of crime; fear of crime is fuelled, in part, by heavy exposure to violent, dramatic programming on prime-time television. For example, research study conducted by D. Romer, K. H. Jamieson, and S. Aday indicates that

21 Julian V Roberts et al, *Penal Populism and Public Opinion: Lessons from Five Countries* (OUP 2003).

22 Helmut Kury et al, 'Fear of Crime as Background of Penal Policy?' in G Mesko, M Pagon and B Dobovsek (eds), *Policing in Central and Eastern Europe: Dilemmas of Contemporary Criminal Justice* (Faculty of Criminal Justice University of Maribor 2004) 126.

23 Gorazd Meško, 'Local Safety Councils in Slovenia: A Story on Attempts to Make Local Communities Responsible for Solving Crime and Safety Problems' in G Mesko, M Pagon and B Dobovsek (eds), *Policing in Central and Eastern Europe: Dilemmas of Contemporary Criminal Justice* (Faculty of Criminal Justice University of Maribor 2004) 734.

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watching local television news relates directly to increased fear and concern about crime.[24] K. Lasthuizen, B.A.P. van Eeuwijk and L. W.J.C. Huberts showed that one single incident of violence receiving extensive media coverage can be enough to influence the public's feelings of insecurity.[25] The media's impact is increasingly significant.

Methods to reduce the fear of crime became an internationally discussed and researched topic in the 1990s. Until recently, the European Union was especially focused on the prevention and investigation of different kinds of crimes (including organized crime), but, over time, became aware of the importance of fear of crime as a quality-of-life issue. Reduction of fear of crime is now one of the European Crime Prevention Network (EUCPN)'s priorities. Several measures and good practices to reduce the fear of crime are discussed in a review written by the EUCPN (2004) regarding their effectiveness. Although the research on fear of crime is based on three indicators from the International Crime Victim Surveys (ICVS), the EUCPN discusses the implications of certain methods to reduce fear of crime. These methods, discussed below, are often related to crime prevention and not specifically to fear of crime. [26]

7 CONCLUSIONS

With this research, we were able to assess how perceived insecurity affected the citizens of Kosovo.[27]

We have tried to reflect the sense of security of the residents of Kosovo accurately, including their perception of individual and collective security, safety, and their environment; trust in the Kosovo Police (KP) and other law enforcement agencies, community relations, and inter-ethnic relations. The research also analyses the strongest and most problematic issues, such as the challenges faced by the residents of Kosovo, as well as identifying several recommendations to strengthen the work of law enforcement agencies in the future.

This research had a significant impact on safety issues and increasing the quality of life for Kosovo residents, especially in the municipalities where the research was implemented, and from locations where the challenges presented to the Kosovar society can be seen.[28]

This paper emphasizes the need for full commitment from municipal authorities and other stakeholders to achieve a sustainable improvement in the security levels for Kosovo residents.

By including members of different communities in their compositions and working with non-Albanian communities during the implementation of the project, we have managed to build reliable and cooperative partnerships between residents and communities, improving the levels of trust in the municipalities of Prishtina, Prizren, Gjakov, and Ferizaj.

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25 Lasthuizen, Eeuwijk and Huberts (n 22).

26 European Communities (n 14).

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