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

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Editor-in-Chief's Note

ABOUT ISSUE 4 OF 2023 AND NON FOR PROFIT ACADEMIC PUBLISHING

Academic publishing plays a crucial role in fostering communication and advancing the development of modern science. It serves as the cornerstone of the scholarly exchange of ideas and research findings, facilitating the dissemination of knowledge to a global audience, engaging scholars in fruitful discussions, and creating clear and transparent competence between innovators.

By making research accessible to the broader academic community and the public, academic publishing allows for the validation, replication, and expansion of scientific discoveries. Peer-reviewed publications ensure the quality and reliability of the information, promoting transparency and accountability in the scientific process. Moreover, academic publishing promotes collaboration among researchers, encouraging critical analysis of findings and ultimately driving innovation and progress across various fields of study. In this way, it serves as a linchpin in the continuous growth and evolution of human knowledge.

Open Access publishing is of paramount importance in transforming the current model of academic publications for several compelling reasons.

Firstly, open access publications make research findings readily accessible to a global audience. This accessibility helps democratise knowledge, enabling researchers, students, and the public to benefit from the latest discoveries, irrespective of their institutional affiliations or financial means.

Secondly, open access promotes transparency and accountability. It allows for greater scrutiny and validation of research, as anyone can access and evaluate the work. This transparency is vital for maintaining the integrity of the scientific process.

Furthermore, open access publishing accelerates the pace of innovation and scientific progress. Removing access barriers fosters collaboration, encourages interdisciplinary research, and allows for the rapid dissemination of critical information, particularly in fields where time is of the essence.

Finally, open access can alleviate the financial burden on researchers and institutions. Traditional publishing models often involve costly subscriptions and paywalls, which can limit the dissemination of research and hinder researchers with limited budgets. Open access mitigates these financial barriers and ensures that research is accessible to all.

In essence, the move toward open access publishing is pivotal for advancing science, fostering collaboration, transparency, and inclusivity in the dissemination of knowledge, ultimately accelerating progress and benefiting society as a whole.

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Nevertheless, there is a spoonful of tar in a barrel of honey - Open Access publications mean no payment for publishers from readers, no subscriptions, just free and no barrier availability of publication. But how to cover the expenses?

The work of managing editors, language editors, peer review editors, guest editors, and other professionals in academic publishing is both crucial and demanding. They are responsible for maintaining the quality and integrity of scholarly publications, a task that often requires attention to detail, precision, and adherence to rigorous ethical and editorial standards. It is important to recognise the significance of their contributions and ensure that they are fairly compensated for their efforts, as their work is essential for advancing knowledge and disseminating high-quality research. Fair compensation not only acknowledges the difficulty of their roles but also incentivises the continued dedication and expertise they bring to the academic publishing process.

During the Soviet Union era, editors faced significant challenges due to their unpaid work. They often served a single institution's interests, resulting in a narrow scope of academic publishing. The lack of proper compensation led to financial struggles for editors, discouraging talent from pursuing such roles. Quality control suffered, as resources for peer review and language editing were limited, and in-house journals sometimes fell short of genuine academic standards. Moreover, isolationist policies hindered access to international academic discourse, impeding intellectual growth and cross-disciplinary collaboration.

Debates upon for-profit and non-profit academic publishing are endless.

For-profit and non-profit academic publishing represent two distinct models within the realm of scholarly communication.

For-profit academic publishing companies operate with a primary focus on generating revenue. They often charge substantial fees to access their journals, articles, and other academic resources. These companies may also require authors to pay publication fees, known as article processing charges (APCs), which can be a barrier for researchers, especially those from resource-constrained institutions. While for-profit publishers can invest in marketing and technology, they have been criticised for sometimes prioritising profits over open access and affordability.

On the other haand, non-profit academic publishing prioritises the dissemination of knowledge over financial gain. Organisations such as universities, academic societies, and open-access initiatives often lead non-profit publishing efforts. They aim to make research more widely accessible and affordable, with a focus on public good rather than profit. Many non-profit publishers provide open-access journals, which are freely available to readers, and they may rely on grants, subsidies, or volunteer efforts to sustain their operations.

Both for-profit and non-profit publishing have their advantages and drawbacks. For-profit publishers can invest in quality control and technology, while non-profit publishers prioritise accessibility and affordability. The choice between these models often depends on the goals and values of the academic community, as well as the specific field of study. The ongoing debate and evolving landscape of academic publishing continue to shape the future of how research is disseminated and shared.

Open access publishing and article processing charges (APCs) are closely linked. APCs serve as a financial mechanism that supports the open access model. In open access publishing, research articles are made freely available to the public, and to offset the costs of publishing and maintaining journals, authors or their institutions often pay APCs. These charges fund the peer-review process, editorial services, and the infrastructure necessary for open access publication. Thus, APCs are integral to the sustainability of open access publishing, ensuring that research remains accessible to a global audience without paywalls or subscription fees.

For instance, in AJEE, we have a publication fee (article processing charge) for each article published in Open Access. We publish under a CC BY 4.0 license, permitting copying and distributing the material in any medium or format in an unadapted form only, for noncommercial purposes, and with proper attribution to the creator.

This one-time fee covers peer review administration, professional article production in various formats, and dissemination, in addition to other publishing functions. Here is a list of the supported activities carried out by us with this funding.

AJEE staff support and trainings

AJEE is proud to be a member of COPE, ELI, and ALPSP. AJEE successfully cooperates with the European Association of Science Editors. The School for Editors in 2022-2023 was attended by the Journal's staff to enhance their qualifications (Dr. Yuliia Baklazhenko, Dr. Olha Dunaievska, Polina Siedova, Yuliia Hartman, Olha Samofal). AJEE staff are members of the Ukrainian regional chapter of EASE (Prof. Iryna Izarova is the chair, and Dr. Yuliia Baklazhenko, Dr. Olha Dunaievska, Polina Siedova are members).

Submission to Prepublication Checks

Articles submitted to the Journal first undergo an editorial process, which assesses article scope and eligibility, checks for plagiarism and AI detection, and verifies whether the underlying data and software have been made available. Before, during, and after these checks, the assigned editor also responds to editorial inquiries and provides authors with information on what is required for the full prepublication checks to begin. Since May 2023, AJEE has been cooperating with Scholastica for submission and peer review services.

Prepublication Checks to Publication

The AJEE assigned editor provides a comprehensive service consisting of rigorous prepublication checks to ensure adherence to all editorial policies, reporting guidelines, and ethical considerations. Before an article is published, the production team provides proofs and performs quality checks on citations, references, image resolutions, and ensures that persistent identifiers are correctly assigned and resolved.

Peer Review Management

Authors suggest expert reviewers using a built-in peer reviewer selector tool, which is verified by the assigned editor. If deemed suitable, the reviewers are invited to review on the authors' behalf. When a review is submitted, the editorial team checks it and its accompanying peer review status.

Services after Publication

Once an article is published, AJEE creates a dedicated page for each article that displays article-level metrics for authors and readers to see and measure the impact of their work (Dimensions). AJEE ensures that all articles are fully discoverable. For articles that pass peer review, AJEE sends content to all the major bibliographic indexers across our subject areas (Scopus, Web of Science, Heinonline, DOAJ). The Journal has been accepted for indexing by these major databases. For readers, all articles can be live-tracked and easily found through customisable article alerts and feeds.

AJEE Website Development

AJEE has a scalable, custom-built publishing infrastructure supporting the open research publishing process, including registration, submission, publication, post-publication peer review, and article versioning. This technology is regularly improved and customised to meet the needs of authors and reviewers, ensuring high-quality publications. AJEE continually innovates its web-based publishing technology to make articles more dynamic,

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interactive, and reproducible, enhancing the overall user experience and making its content widely discoverable.

Marketing and Business Development

AJEE uses social media, digital media, newsletters, and webinars to promote and highlight the work of authors, reviewers, and editors. A proactive communications team collaborates with authors and institutions to disseminate authors' research to the scientific community and the wider society. AJEE's editor on social media promotes articles and initiatives through editorial campaigns and events to specifically spotlight authors' work. We use the following social media platforms:

on Twitter: https://twitter.com/ajee_journal

on LinkedIn: https://www.linkedin.com/company/access-to-justice-in-eastern-europe/?viewAsMember=true

on Academia.edu: https://independent.academia.edu/AJEEJournal

on Facebook: https://www.facebook.com/Access-to-Justice-in-Eastern-Europe-102418504898401/

Author and User Support

AJEE welcomes open debate and discussion, supporting and managing an open and transparent commenting functionality on published articles for registered users. We provide resources to authors and reviewers to help conduct research, promote research, and track the impact of their work.

Every issue, AJEE waives 20% of its content and offers waivers or discounts to authors from Ukraine and low-income states to support the transition to full open access. The fee is transparently displayed to demonstrate the cost of publication to authors.

We want to share our experience for the following reasons. Creating more sustainable models of publishing is imperative to support the dissemination of research. It is not solely the responsibility of publishers and scholarly journals; universities should offer increased funding to authors to encourage open access publishing, thus reducing financial barriers and promoting the wider accessibility of research findings. This financial support can empower researchers to choose open access options, leading to broader dissemination and increasing the impact of their work. Furthermore, grant agencies and institutions should allocate specific grants for open access publication, fostering open science principles and encouraging researchers to make their work openly available. Sustainable open access models can then invest in upholding the quality and integrity of research by supporting rigorous peer review processes and editorial services, ensuring that open access publishing remains a reputable avenue for scholarly communication.

Certainly, here are some recommendations regarding the necessity of creating more sustainable models of publishing and providing increased support for open access publishing:

1. **Recommendation for Universities**: Universities should consider increasing financial support for their researchers to cover article processing charges (APCs) for open access publishing. This support can help reduce the financial barriers that authors often face and promote the wider dissemination of research findings. It is not a secret that universities benefit from the indexing of articles in well-known databases, which currently focus on high-quality content requiring thorough peer review and pre-press services
2. **Recommendation for Grant Agencies**: Grant agencies should introduce specific grant opportunities dedicated to funding open access publications. These grants

can incentivise researchers to embrace open access, aligning with the principles of open science and fostering greater transparency and collaboration in the academic community.

3. **Recommendation for Sustainable Open Access Models**: Sustainable open access publishing models should prioritise the maintenance of research quality by investing in rigorous peer review processes and editorial services. This ensures that open access publishing remains a reputable and credible avenue for scholarly communication.

By implementing these recommendations, universities, grant agencies, and open access publishers can collectively contribute to a more sustainable, accessible, and high-quality scholarly publishing ecosystem.

We do not support for-profit academic publishing; however, we do insist on fair compensation for the work of editors and all the editorial staff. Non-profit should not equate to jobs without salaries and should encompass professional development, affiliation and engagement. Despite this, editors should not be dependent on article processing charges and should be fully independent in their decisions if this is the model of journal financing.

In particular, I want to draw our audience to some very important articles from Ukraine and Kosovo, published in this issue.

This scholarly article, titled '**The Concept of 'Militant Democracy' in the Context of Russia's Armed Aggression Against Ukraine,'** written by **Oleksandr Bakumov**, explores the application of the concept of "militant democracy" in the context of Ukraine's democratic transition and the external armed aggression it has faced from Russia. The article delves into the historical development of this concept, which emerged after World War II to safeguard democracies capable of defending themselves. The work focuses on the relevance of this concept to Ukraine, given its ongoing conflict with Russia since 2014. The author provides proposals for constitutional and legislative improvements in Ukraine, drawing from global experiences and practices, to strengthen the country's democratic resilience in the face of external threats.

One more article, **'The Impact of the Armed Conflict on Labour Law: The Case of Ukraine'**, written by **Sergii Venediktov**, explores the profound effects of the armed conflict between Ukraine and the Russian Federation on Ukrainian labour law, focusing on the unique challenges faced and potential solutions based on Ukraine's experiences. It emphasizes the importance of adaptable, context-specific legal approaches to labour regulation during armed conflicts.

In this issue of AJEE, we feature more highly interesting and noteworthy articles. I would like to express my sincere gratitude to all the authors who have contributed, as well as to the peer reviewers who have helped maintain the high quality of our content. At the same time, I would also like to extend my thanks to our dedicated team, including managing editors, language editors, and assistant editors. Let us take pride in our collective work, knowing that this important job is both necessary and deserving of recognition and compensation.

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

RESEARCH ARTICLE

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Research Article

THE CONCEPT OF 'MILITANT DEMOCRACY' IN THE CONTEXT OF RUSSIA'S ARMED AGGRESSION AGAINST UKRAINE

Oleksandr Bakumov*

ABSTRACT

Background: *The fall of a dictatorship is accompanied by a period of democratic transit, which necessitates the use of special measures to protect a young and, thus far, unstable democracy. This model's use began in practice after the Second World War in connection with the spread of the doctrine of "democracy capable of defending itself," also known as militant democracy (English) or Wehrhafte (Streitbare) Demokrarie (German). The flagship here was the German science of constitutional law, which formed the tools for the creation of a new legal system accounting for the mistakes of the Weimar Republic. This experience is especially relevant for Ukraine, as since 2014, it has faced external armed aggression by revanchist forces that took power from the heir of the Soviet empire, Russia, in which a totalitarian regime was established and became a full-fledged aggressor state.*

Methods: *The following methods were used in the work to study the concept of militant democracy in the conditions of Russia's armed aggression against Ukraine. The system multi-structural method was utilized to discover the means of militant democracy in Ukraine (ban of political parties, lustration, etc.), as well as problems associated with the use of certain militant democracy means. The logical-legal method made it possible to identify the essence of the decisions of the constitutional, supreme, and other courts, the decisions of the European Court of Human Rights, in which the means of militant democracy were used or the legality of their use was assessed (legality, constitutionality, or compliance with the European Convention on Human Rights). The comparative method justified the implementation of different countries' experience (primarily, European) in reforming the constitutional and legislative regulation of the militant democracy in Ukraine and the mechanisms required for further action.*

Results and Conclusions: *The work contains proposals for the constitutional and legislative improvement of the regulation of the means of militant democracy in Ukraine, which are based on the pre-existing experiences across the world and the use of already existing practices that have been successfully tested and achieved results.*

1 INTRODUCTION

The encroachment on the sovereignty and territorial integrity of Ukraine, carried out externally by Russia and supported by some internal forces starting in 2014, and which received a

new development on 24 February, 2022, actualizes the discussion of the concept of "militant democracy." For Ukraine, this concept was not new in its essence, as certain legal constructions are laid down directly in the 1996 Constitution of Ukraine. However, the set of these tools was clearly insufficient if we compare Ukraine with other post-totalitarian and post-authoritarian regimes of the periods spanning after the Second World War or in the late 80s and early 90s of the 20th century in Eastern Europe. Until 2014, the application of the existing mechanisms in Ukraine was almost not implemented.

Another factor involved includes the evolution of militant democracy itself, which has gone through many stages. The first is from the doctrinal idea formulated by Karl Loewenstein[1] for the practice of its implementation in the late 1940s-1950s, primarily evident in Germany. The second stage covers the new wave of the late 1980s and 1990s of the 20th century (at first, Portugal and Spain, later, Eastern and Central Europe, post-communist and post-socialist countries). The third wave tentatively encompasses the 2000s and continues until now, characterised by the liberalisation of practice, and at the same time, the strengthening of a new threat: populism. Currently, this idea is growing in connection with Russia's aggression against Ukraine.

2 MILITANT DEMOCRACY: GENERAL REMARKS

As A. Shayo and R. Uitz rightly claim, tolerance can become suicide under certain political circumstances. It ignores the platitude that Goebbels pointed out and abused with great pleasure: "It will always remain one of the best jokes of democracy — that it has given its mortal enemies the means by which it was destroyed."[2]

Not a new development to the scene are anti-democratic groups that attempt to get into government positions to undermine tolerant, pluralistic, democratic societies.[3] There is a danger of abuse of rights by using legal procedures to protect the interests of populist or marginal political forces, referring to the principle of political and ideological pluralism.[4]

Among other tasks, the new democratic regimes needed to decide what to do with the symbols and doctrines, organisations, laws, officials, and leaders of the authoritarian system. S. Huntington analyses in detail the relevant practice of democratic regimes as well as the problems that these regimes confronted.[5] As A. Pshevorsky points out, the process of the destruction of the authoritarian regime can veer in the opposite direction and, ultimately, lead to a new type of dictatorship.[6]

The key answer to this challenge should lie precisely at the constitutional level. As A. Shayo states, the new constitutions have become means for managing emotions. It is a matter of choosing which emotions are acceptable.[7] The introduction of emotionalism into constitu-

1 Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31(3) American Political Science Review 417, doi:10.2307/1948164; Karl Loewenstein, 'Militant Democracy and Fundamental Rights, II' (1937) 31(4) American Political Science Review 638, doi:10.2307/1948103.

2 András Sajó and Renáta Uitz, The Constitution of Freedom: An Introduction to Legal Constitutionalism (OUP 2017) 438, doi:10.1093/oso/9780198732174.001.0001.

3 Samuel Issacharoff, Fragile Democracies: Contested Power in the Era of Constitutional Courts (Cambridge Studies in Election Law and Democracy, CUP 2015) 100, doi:10.1017/CBO9781139839334.

4 MV Savchyn, Constitutionalism and the Nature of the Constitution (Lira 2009) 189.

5 Samuel P Huntington, The Third Wave: Democratization in the Late Twentieth Century (OU Press 1991) 211-31.

6 Adam Przeworski, Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America (Studies in Rationality and Social Change, CUP 1991) 37.

7 András Sajó, 'Emotions in Constitutional Design' (2010) 8(3) International Journal of Constitutional

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tional law is due to the ideas of Karl Loewenstein, who noticeably influenced the Basic Law of Germany in 1949. This is evidenced by the idea of the unconstitutionality of parties[8] as well as the possibility of deprivation of rights.[9] At the same time, as Konrad Hesse notes, the deprivation of fundamental rights has not yet acquired practical significance. While political criminal law and the practice of banning parties provide simpler and more effective opportunities for eliminating anti-constitutional forces, it is unlikely to acquire the proposed amount of significance.[10]

It is worth emphasising that the concept of militant democracy radically differs from what was called the "value neutrality" of the Weimar Constitution.[11] Militant democracy in Germany became textually-based primarily in Para 2 of Art. 21 of the Basic Law (regarding the possibility of banning anti-constitutional parties that encroach on the free democratic order — "*die freiheitliche demokratische Grundordnung*"). As Konrad Hesse states, "the appearance of this norm owes itself mainly to the experience of the Weimar Republic, under which conditions the growth of the number of radical parties hostile to the constitution from 1930 led to a crisis and which was finally destroyed by the strongest of these parties. Therefore, anti-constitutional parties should be eliminated as early as possible."[12]

Also worth mentioning is Para 4 of Art. 20 of the Basic Law of Germany, which appeared in the text of the Basic Law later, explaining that all Germans have the right to resist any person who encroaches on the constitutional legal order ("*die verfassungsmäßige Ordnung*"), in case other means are unavailable.

As for the practice of the Federal Constitutional Court of the Federal Republic of Germany, a direct reference to the concept of "militant democracy" occurred in the case of banning the Communist Party in 1956.[13]

The above-mentioned norms should not be considered as a denial of democracy. On the contrary, Philip Kunig emphasises that Para 1 of Art. 21 of the Basic Law of the Federal Republic of Germany gives parties the right to participate in public life, not for their own sake, but to provide society with the opportunity to form a state will. Such an opportunity, which is given to society to express its opinion, is itself an element of the constitutional understanding of democracy.[14] As P. Kommers and A. Miller state, the German Basic Law combines the protection of the rule of law with the principle that democracy is not defenceless against

Law 355, doi:10.1093/icon/moq009.

8 Para. 2 Art. 21 of the Basic Law of the Federal Republic of Germany of 1949 indicates that parties that aim, either through the actions or inaction of their members, to undermine or destroy the free democratic system, or to endanger the existence of the Federal Republic of Germany, are recognized as unconstitutional. See: Grundgesetz für die Bundesrepublik Deutschland (1949) <https://www.gesetze-im-internet.de/gg/BJNR000010949.html> accessed 06 April 2023.

9 According to Art. 18 of the Basic Law of the Federal Republic of Germany of 1949, any person who violates the right to free expression of one's views, especially in terms of freedom of mass media (Para 1 of Art. 5), freedom of assembly (Art. 8), freedom of association (Art. 9), secrecy of correspondence, postal correspondence and telephone conversations (Art. 10), the right to property (Art. 14) or the right to asylum (Art. 16a) in order to protect the free dem-ocratic fundamental order, may be deprived of these fundamental rights. The decision to deprive these basic rights and the duration of such deprivation is announced by the Federal Constitutional Court.

10 Konrad Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland (CF Müller 1999) 297.

11 Donald P Kommers and Russell A Miller, The Constitutional Jurisprudence of the Federal Republic of Germany (3rd edn, Duke UP 2012) 51-2.

12 Hesse (n 10) 297-8.

13 Urteil 1 BvB 2/51 [KPD Verbot] (Bundesverfassungsgericht (Ersten Senats), 17 August 1956) <https://www.servat.unibe.ch/dfr/bv005085.html> accessed 06 April 2023.

14 Josef Isensee und Paul Kirchhof (hg), Handbuch des Staatsrechts der Bundesrepublik Deutschland, bd 3: Demokratie — Bundesorgane (3 Aufl, CF Müller 2005) 297-356.

parties or political movements that try to use the constitution to undermine or destroy it.[15]

Many countries adopted the German model of banning the party, linking possible grounds for such a ban with the wording of the German Basic Law, directly using the term "free constitutional order" ("*die freiheitliche demokratische Grundordnung*") or similar analogues (Greece, Croatia, Cyprus, Republic of Korea). At the same time, the constitution can specify an ideology or regime, the totalitarian methods, and manner in which they serve as a basis for prohibition (references to the "fascist regime" are found in Italy in paragraph XII of the chapter "Final and transitional provisions" of the Constitution;[16] references to communism, Nazism, and fascism in Poland[17] are in Art. 13 of the Constitution; fascist ideology in Portugal found in Para 4 of Art. 46 of the Constitution[18]).

The demand for the need to observe the democratic structure for the parties is essential. This is a direct norm of Para. 1 of Art. 21 of the Basic Law of the Federal Republic of Germany. It was once applied by the Federal Constitutional Court of Germany in the decision to ban the Socialist Party of the Reich in 1952.[19] A similar requirement is specified in a number of constitutions (Para 5 of Art. 51 of the Constitution of Portugal, Art. 6 of the Constitution of Spain,[20] Para 1 of Art. 69 of the Constitution of Turkey[21] and many others).[22]

At the same time, there is a growing number of sceptics of militant democracy today. According to A. Shayo and R. Uitz, the experience of militant democracy is not convincing in its effectiveness, and it was the effectiveness that dictated the introduction of such a regime in liberal constitutions in the first place.[23]

What specific concerns about militant democracy exist other than appeals to ineffectiveness? As known, militant democracy is characterised by tension, which can cause militant measures to limit rights in the name of maintaining free and open political competition, thus, harming democracy.[24]

We do not remain strictly categorical in these conclusions. The fact is that countries that have not experienced totalitarianism are not inclined to the idea of militant democracy. Countries that are transitioning to democracy from an undemocratic regime introduce measures of militant democracy, rather than using it as a mechanism to combat consequences and prevent totalitarianism in the future.

We believe it is more accurate that neither procedural (formal) democracy nor substantive (militant) democracy protects democratic freedom. In fact, the survival of democracy depends

15 Kommers and Miller (n 11) 51-2.

16 Constitution of the Italian Republic (1947) <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf> accessed 06 April 2023.

17 Constitution of the Republic of Poland (1997) <https://www.sejm.gov.pl/prawo/konst/angielski/konse.htm> accessed 06 April 2023.

18 Constitution of the Portuguese Republic (7th revision 2005) <https://www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortuguesa.aspx> accessed 06 April 2023.

19 Urteil 1 BvB 1/51 [SRP Verbot] (Bundesverfassungsgericht (Ersten Senats), 23 Oktober 1952) <https://www.servat.unibe.ch/dfr/bv002001.html> accessed 06 April 2023.

20 The Spanish Constitution (1978) <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf> accessed 06 April 2023.

21 Constitution of the Republic of Türkiye (1982) <https://global.tbmm.gov.tr/constitution> accessed 6 April 2023.

22 See more: GV Berchenko, 'Internal organization of political parties as a subject of constitutional regulation' (2009) 12 Bulletin of the Ministry of Justice of Ukraine 111.

23 Sajo and Uitz (n 2) 439.

24 Max Steuer, 'Militant Democracy and COVID-19: Protecting the Regime, Protecting Rights?' (2020) 2 Hong Kong Journal of Law and Public Affairs 131.

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on strengthening a strong democratic political culture.[25]

Militant democracy cannot be considered without flaws. As Konrad Hesse points out, the external protection of a free democracy must be provided at the cost of limiting political freedom, that is, the basic premise of this democracy. Therefore, Hesse offers an interpretation of Para 2 of Art. 21 of the Basic Law of the Federal Republic of Germany with reservations.[26]

The increasing concern of democracies about the proportionality of militant democracy measures is a completely normal process. One can notice regularity, the content of which is that the more the threat recedes in time (as it happened for old Europe after the Second World War), the less actuality these measures hold.

Accordingly, in the practice of the ECtHR, a rigid standard for the application of militant democracy began to take shape. At the national level, the "softening" of the most militant democracy took place most vividly in Germany. Thus, after the 1950s, the Federal Constitutional Court of Germany never decided to ban parties despite the presence of relevant cases.

Proceedings to ban the National Democratic Party of Germany (NPD) in 2001 were dropped in 2003 for procedural reasons. In the decision on January 17, 2017, the court could not find "evidence of the successful implementation of its anti-constitutional goals" when questioning the unconstitutionality of the NPD (National Democratic Party). Thus, the party was not banned, but recognised as unconstitutional.[27] As a result, amendments were made to the Basic Law of the Federal Republic of Germany (the amendment to Art 21 of the Basic Law entered into force on July 20, 2017): "Parties that, based on their goals or the behaviour of their supporters, aim to impair or destroy the free democratic basic order or endanger the existence of the Federal Republic of Germany, are excluded from state funding."[28] This means the unconstitutionality of the party and its ban began to be distinguished, as unconstitutionality can only lead to the loss of state funding.

In addition, the possibility of deprivation of funding was directly provided for in Para 8 of Art. 69 of the Constitution of Turkey. It states that instead of the final dissolution of a political party in accordance with the above-mentioned points, the Constitutional Court can rule that the relevant party will be completely or partially deprived of state aid, accounting for the intensity of the claims submitted to the court.

But the manipulation of militant democracy and the idea of emergency by populist regimes is an imitation of militant democracy. Violations of rights by authoritarian and populist regimes are mistakenly attributed to measures of militant democracy. In this case, there is no corresponding feature, i.e., the legitimate goal of protecting democracy and the constitution; these measures, while appearing externally similar to the tools of militant democracy, are created and used with another goal: the establishment of authoritarianism.

Such cases can be termed abusive (harmful) militant democracy. For example, T Drinóczi,

25 Judith Wise, 'Dissent and the Militant Democracy: The German Constitution and the Banning of the Free German Workers Party' (1998) 5(1) The University of Chicago Law School Roundtable 335.

26 Hesse (n 10) 298.

27 Judgment 2 BvB 1/13 (Federal Constitutional Court (Second Senate), 17 January 2017) <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/01/bs20170117_2bvb000113en.html> accessed 06 April 2023; Federal Constitutional Court, 'No prohibition of the National Democratic Party of Germany as there are no indications that it will succeed in achieving its anti-constitutional aims: Press Release No 4/2017' (Bundesverfassungsgericht, 17 January 2017) <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/01/bs20170117_2bvb000113en.html > accessed 06 April 2023. See: Roy H Gordon, 'The Second Attempt at a Third Successful Ban of an Established German Political Party' (2016) 17 Rutgers Journal Law & Religion 527.

28 Grundgesetz für die Bundesrepublik Deutschland (n 8).

G Mészáros[29] emphasise the abusive characteristics. The fundamental study "Constitutional Democracy in Crisis?" mentions many other European cases, and identifies the key factors of the crisis of constitutional democracy, such as populism, racism, migration, etc.[30]

The emergence of populist regimes often demonstrates precisely the unsuccessful model of the transition from totalitarianism to democracy, in which the true mechanisms of militant democracy were not implemented sufficiently and were used at some point for their opposite purpose.

In Hungary, after the victory of the current governing party, FIDESZ, in 2010, all state power lies in the hands of representatives of one party. In the context of Hungary's EU membership, a rather serious conclusion states: "If Hungarians choose an illiberal system, they must accept certain consequences, including parting with the European Union and the wider community of liberal democracies."[31]

We agree that even if it is true that the democracies of Central and Eastern Europe are not going to collapse, and even if the existence of the EU eliminates some of the danger of rising authoritarianism, there are still reasons to be concerned about the authoritarian leaders attacking liberal democracies.[32]

As the well-known researcher of democracy and populism, Jan-Werner Müller, writes, there can be no absolute pluralism. As one political community, the EU has external and internal boundaries. Therefore, when constitutional mutations go so far that liberal democracy and the rule of law do not function, Europe ends. In this regard, the scientist proposes a new institution with the previous name "Copenhagen Commission," as well as a set of tools (financial sanctions). All this is considered by Müller as a European militant democracy, which should function on the level of the EU itself.[33]

Thus, the current anxiety among scientific discourse in the West is caused by two positions that hold opposing arguments. The first position is being trapped in the Fukuyama End of History (at least within the framework of a specific country), that is, the final victory of the democratic project and the absence of a real threat to it (or unwillingness to see it). This is clearly evidenced by the experience of the Federal Republic of Germany regarding the latest decision on the unconstitutionality of the NPD. The second position is a view of authoritarian and populist regimes that ban parties and limit other political rights and unwillingness to provide appropriate tools for power in their countries in case populists suddenly come to power, which are anti-pluralists by nature. The paradox of this view lies in the fact that, with a reasonable application of militant democracy, such forces be unable to claim power. We believe that in the future, with a possible reform of the EU, the idea of individual supranational instruments of militant democracy could be another answer in the fight against populists.

29 Tímea Drinóczi and Gábor Mészáros, 'Hungary: An Abusive Neo-Militant Democracy' in Roman Bäcker and Joanna Rak (eds), Neo-Militant Democracies in Post-Communist Member States of the European Union (Routledge, 2022) 98, doi:10.4324/9781003245162-8-8.

30 Mark A Graber, Sanford Levinson, and Mark Tushnet (eds), Constitutional Democracy in Crisis? (OUP 2018) doi:10.1093/law/9780190888985.001.0001.

31 Gábor Halmai, 'A Coup Against Constitutional Democracy The Case of Hungary' in Mark A Graber, Sanford Levinson, and Mark Tushnet (eds), Constitutional Democracy in Crisis? (OUP 2018) ch 15.

32 Bojan Bugarič, 'A Crisis of Constitutional Democracy in Post-Communist Europe: "Lands in-between" Democracy and Authoritarianism' (2015) 13(1) International Journal of Constitutional Law 244-5, doi:10.1093/icon/mov010.

33 Jan-Werner Müller, 'The EU as a Militant Democracy, or: Are there Limits to Constitutional Mutations with-in EU Member States?' (2014) 165 Revista de Estudios Políticos (nueva época) 141.

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3 MILITANT DEMOCRACY AND WAR

Considerable attention is traditionally paid to issues of power and its limitations during wartime. The Western science of constitutional law once again reviewed this problem during the second war in Iraq in the 2000s.[34] M. Takshnet tentatively singles out two generations of scientists who studied the war and the constitution. The scholars of the second generation use the emergence of war to reflect on such questions: is war an exception to the constitution, or an example of when compliance with the constitution is particularly important?[35]

One of the most cited scientists today on this issue is Carl Schmitt, who set forth his main ideas in his writings in the 1920s and developed the doctrine of sovereignty, considering the question of emergency, extreme conditions, and the possibility of suspending the constitution to eliminate such emergency or extreme conditions.[36]

An important trend of modern times is described by Guy Lurie regarding the difficulty of protecting against the normalisation of emergency situations and the blurring of the distinction between state powers during a crisis and under normal conditions. The threat of the normalisation of emergency situations is more acute than ever.[37]

A. Shayo and R. Uitz, in their work on "The Constitution of Freedom," in the section "Constitutions Under Stress," write that constitutions serve to ensure society's safety and survival. Constitutionalism is concerned about the fate of the democratic system. At the same time, such survival must be a worthy survival.[38] It is within the framework of this section that they consider the concept of militant democracy. Moreover, one can understand that they consider militant democracy not so much as a way to avoid the blow to the constitution, but due to the presence of examples of abuse, on the contrary, as a phenomenon, puts the constitution under stress (Under Stress).

Instead, we believe that the successful application of militant democracy can help when the constitution is under stress due to war. As an example, the use of the doctrine of militant democracy in conditions of war is Ukraine's experience, which was formed after the start of full-scale Russian aggression on February 24, 2022, as well as the previous period of armed aggression by Russia, which has been ongoing since 2014.

4 PROHIBITION OF POLITICAL PARTIES IN UKRAINE

Militant democracy is one of the central concepts of Samuel Isaaharov's book, *Fragile Democracies. Contested Power in the Era of Constitutional Courts,* which draws attention to the threat of excessive intolerance. At the same time, according to the scientist, "... the prerequisites for banning parties or other restrictions on political expression in the electoral arena obviously exist for parties that are allies of rebel or regional military forces, since there is a

34 See: Mariah Zeisberg, War Powers : The Politics of Constitutional Authority (Princeton UP 2013) 276.

35 Mark Tushnet (ed), The Constitution in Wartime: Beyond Alarmism and Complacency (2nd edn, Duke UP 2005) 3, doi:10.1215/9780822386902.

36 See: Carl Schmitt, Dictatorship (Polity Press 2013); Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty (CUP 2005).

37 Richard Albert and Yaniv Roznai (eds), Constitutionalism under Extreme Conditions: Law, Emergency, Exception (Ius Gentium: Comparative Perspectives on Law and Justice, Springer Cham 2020) 17, doi:10.1007/978-3-030-49000-3.

38 Sajo and Uitz (n 2) 416.

direct organisational connection with illegal activities and the immediacy of possible harm."[39]

For Ukraine, in the conditions of armed aggression by Russia, this concept has become more relevant than ever. By 2014, due to liberal legislation and the practice of its application, the number of political parties had grown to several hundred. Moreover, there were almost no legal claims to the content of the programs and actions of the parties by official authorities. Many leadership parties appeared (using the leader's last name in the party name), parties whose names included the criterion of gender, regional, religious, or foreign political identity. When the claims were officially presented to the party, "Ukrainian National Assembly" (now, "Right Sector"), they were rejected the Supreme Court of Ukraine's decision dated 05.11.2004, and the Supreme Court of Ukraine refused to ban the party due to the lack of proper evidence and arguments.[40] Also, this case characterises the abuse of militant democracy, since in 2004, the fight against "nationalism" was central to Viktor Yanukovych's election campaign and the official authorities were active in labelling it as such.

In 2014, the District Administrative Court of Kyiv banned the political parties "Russian Bloc" and "Russian Unity" for encroachment on territorial integrity (they helped Russia occupy Crimea and carry out an unrecognised annexation). On April 9, 2015, the Law of Ukraine "On Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and Prohibition of Propaganda of Their Symbols" No. 317-VIII was adopted. Among other items, this law introduced an additional basis for banning political parties, if they promote propaganda of National Socialist or Communist totalitarian regimes. Subsequently, the constitutionality of this law was confirmed in the Decision of the Constitutional Court of Ukraine in the case based on the constitutional submission of 46 people's deputies regarding the conformity with the Constitution of Ukraine (constitutionality) of the Law of Ukraine "On Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and Prohibition of Propaganda of Their Symbols," dated July 16, 2019, No. 9-r/2019.[41] The corresponding law became the basis for the ban in 2015 of parties such as, "Communist Party of Workers and Peasants," "Communist Party of Ukraine (updated)," "Communist Party of Ukraine," though the decision became legal only in 2022 after review by the appeals court. In 2022, the "Workers' Party of Ukraine (Marxist-Leninist)" was banned.

On May 3, 2022, the grounds for banning political parties was expanded by the adoption of Law No. 2243-IX [42] "On Amendments to Certain Legislative Acts of Ukraine Regarding the Prohibition of Political Parties." Thanks to this law, during 2022-2023, a significant number of political parties had already been banned through court.

The question now is whether we could follow Germany's path and use already existing constitutional constructions without such detailed specification at the level of current legislation. In particular, this refers to Art. 37 of the Constitution which specifies the following grounds for banning parties: if their program goals or actions are aimed at eliminating the independence of Ukraine, changing the constitutional order by violent means, violating the sovereignty and territorial integrity of the state, undermining its security, etc.

This issue was once ignored by the CCU in the previously mentioned decision on July 16, 2019. When motivated to make the decision, he did not refer to Art. 37 and did not analyse it, although it would have been appropriate. In our opinion, the need for legislative speci-

39 Issacharoff (n 3) 100.

40 Decision [On the ban of a political party] (Supreme Court of Ukraine, 5 November 2004) <https://zakon.rada.gov.ua/laws/show/n0114700-04> accessed 06 April 2023.

41 Decision No 9-p/2019 in Case No 1-24/2018(1919/17) (Constitutional Court of Ukraine, 16 July 2019) [2019] Official Gazette of Ukraine 62/2163.

42 Law of Ukraine No 2243-IX 'On Amendments to Some Legislative Acts of Ukraine Regarding the ban on Political Parties' of 3 May 2022 [2022] Official Gazette of Ukraine 41/2211.

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fication in 2015 arose due the text's wording in Art. 37 of the Constitution of Ukraine. The word "change" is used, not "encroachment" on the constitutional system, and it specifies the violent criterion for changing the constitutional system (the basis for banning the party). The very construction of the constitutional system is still considered rather uncertain. Therefore, when reforming the Basic Law, it would be appropriate to revise the relevant wording so that it is universal. For example, it would be successful to use the term "free democratic order" ("*die freiheit-liche demokratische Grundordnung*"), as is done in Germany. As an option, even without textual replacement of the wording itself, one can interpret the already used term "constitutional system" in the appropriate way (in line with the interpretation of the Federal Constitutional Court of Germany) by judicial and other law enforcement bodies. In this way, the national concept of the constitutional system would transform and give it the features that should have inherently existed from the beginning.

This was partly done by the Constitutional Court of Ukraine in the decision on July 16, 2019, No. 9-r/2019, where it used certain terms, such as "democratic constitutional system," "denial of the fundamentals of the constitutional system of Ukraine," and "democratic essence of the content of the Constitution of Ukraine," for the development of current constitutional provisions, thereby justifying the existence of grounds in the Constitution for banning parties that carry out propaganda of totalitarian regimes without referencing the text of Art. 37. However, the CCU still does not carry out a direct correlation with the experience of the Federal Republic of Germany, which would be extremely appropriate.

Also, the condemnation of the "Nazi totalitarian regime," which was introduced in the context of Russian aggression by the law of May 22, 2022, "On the prohibition of propaganda of the Russian Nazi totalitarian regime, the armed aggression of the Russian Federation as a terrorist state against Ukraine, symbols of the military invasion of the Russian Nazi totalitarian regime in Ukraine" No. 2265-IX,[43] it is reasonably proposed to transform it into a condemnation of "russism."[44] A draft resolution of the parliament on this matter already exists.[45]

Regarding the violation of the sovereignty and territorial integrity of the state, the wording in Art. 37 of the Constitution of Ukraine is precise, as evidenced by the practice of banning political parties in 2014. In 2022, the legislator determined to push law enforcement into active action by filing the law, "On political parties in Ukraine," with additional grounds for banning parties, which detailed the already existing instruction on encroachment on sovereignty and territorial integrity (in the context of existing Russian aggression).

Summarising the issue of banning political parties, we will identify a few problems that arose resulting from the use of the means of militant democracy in the form of banning political parties in Ukraine.

First, uncertainty regarding the consequences of such a ban for elected deputies on different levels, from local councils to the Verkhovna Rada of Ukraine.

After the appearance of so many court decisions on the banning of parties, the question arose

43 Law of Ukraine No 2265-IX 'On the Prohibition of Propaganda of the Russian Nazi Totalitarian Regime, Armed Aggression of the Russian Federation as a Terrorist State against Ukraine, Symbols of the Military Invasion of the Russian Nazi Totalitarian Regime in Ukraine' of 22 May 2022 [2022] Official Gazette of Ukraine 49/2681.

44 See: Yurii Barabash and Hryhorii Berchenko, 'Can democracy Protect Itself in Conditions of War? (On the Experience of State Building During Russian Aggression)' (2023) 1 Law of Ukraine 54; Mykhailo Savchyn, 'Russo-Ukrainian War and the Transformation of Constitutional Law' (2023) 1 Law of Ukraine 12.

45 Draft Resolution of the Verkhovna Rada of Ukraine No 9101 'On the Statement of the Verkhovna Rada of Ukraine "On defining the existing political regime in the Russian Federation as racism and condemning its ideological foundations and social practices as totalitarian and antihuman"' of 13 March 2023 <https://itd.rada.gov.ua/billInfo/Bills/Card/41531> accessed 06 April 2023.

regarding the mechanism of early termination of the deputies' powers of banned parties. At the level of the parliament, there was a faction of the banned party, "Opposition Platform — For Life," at the local council level, a significant number of banned parties had their own factions and deputies. To date, there is no special mechanism for early termination of the mandate of elected deputies from the respective parties. During the last elections, more than 3,700 deputies were elected from parties that were subsequently banned.[46]

What are the ways to solve this problem? Of course, it would be ideal to have a direct rule on this matter in the Constitution of Ukraine (for people's deputies) and in the law (for deputies of local councils). To solve this problem in the future, changes should be made to the Constitution (in the conditions of martial law, due to the direct assembly on making changes to the Constitution itself, this is not yet possible). On the other hand, even without making changes, foreign experience can be referred to and, if possible, used.

Although this was not directly reflected in the Basic Law of Germany, the famous German constitutionalist, Konrad Hesse, claims that after the decision of the Federal Constitutional Court comes into force, the ban on the party will lead to the automatic loss of mandates for all deputies of the dissolved party.[47] Hesse refers to the textbook decision of the Constitutional Court of Germany on the banning of the Socialist Party of the Reich in 1952 — SRP (BVerfGe 2.1 (72 ff)), as mentioned at the beginning of the article. As a reminder, in the decision of October 23, 1952, the Federal Constitutional Court (BVerfG) determined to deprive the members of the non-constitutional party of their mandates in the federal parliament and the state parliament. This party was represented by two deputies in the Bundestag, as well as the parliament of the state of Schleswig-Holstein and the senate of Bremen. Despite a tension between the idea of militant democracy and the principle of a free mandate, the position of militant democracy won.[48]

As another example, the Constitutional Court of the Republic of Korea also ruled on the loss of mandate in the case of the United Progressive Party in 2014[49] without any special legal basis, since the party's ban was based solely on the institutionalisation of a party ban and the principle of defensive democracy.[50] After the adoption by the Constitutional Court of the Federal Republic of Germany, appropriate changes were made to the current legislation. In the Republic of Korea, there is still no legislative regulation for this issue.

Unfortunately, on June 20, 2022, the Eighth Administrative Court of Appeal, satisfying the Ministry of Justice's lawsuit and banning the "Opposition Platform for Life" party, ignored the relevant problem of the loss of mandates of already elected people's deputies and deputies of local councils. The ruling of the Supreme Court, dated on September 15, 2022, No. P/857/8/22 as an appellate body, confirmed the ban's legality for the party, "Opposition platform — for life," [51] though it did not say a word about the loss of mandates. Courts also ignored relevant issues in other decisions regarding the banning of remaining parties that had representatives in local councils.

46 Viktoriya Oliynyk, 'Deputies of pro-Russian parties — to be held accountable: The results of the social survey' (LB.ua, 25 January 2023) <https://lb.ua/news/2023/01/25/543560_deputativ_prorosiyskih_partiy-.html> accessed 6 April 2023.

47 Hesse (n 10) 300.

48 See more: Sven Soltau, 'Mandatsverlust von Mitgliedern verfassungswidriger Parteien — Das freie Mandat vs. das Prinzip der Parteienstaatlichkeit' (GRIN Verlag, 2002) <https://www.grin.com/document/7692> accessed 06 April 2023.

49 Див.: Case [Dissolution of the Unified Progressive Party] (South Korea's Constitutional Court, 19 December 2014) <https://casenote.kr/%ED%97%8C%EB%B2%95%EC%9E%AC%ED%8C%90%EC%86%8C/2013%ED%97%8C%EB%8B%A41> accessed 6 April 2023.

50 See: Myeongjin Han, 'Mandatsverlust von Mitgliedern verfassungswidriger Parteien im Deutschen Recht' (2018) 19(3) Public Law Journal 109, doi:10.31779/plj.19.3.201808.004.

51 Case No П/857/8/22 (Administrative Cassation Court of the Supreme Court of Ukraine, 15 September 2022) <https://reyestr.court.gov.ua/Review/106339460> accessed 06 April 2023.

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Related to this problem is the issue of the impossibility of registration by deputies of those candidates who are next on the list of the banned party, so this issue must be solved in a complex manner.

A temporary decision from the people's deputies, while amendments to the constitution are not possible given the judicial branch's disregard for the relevant issue, could lead to the adoption of draft Law No. 8345 dated January 10, 2023, on amendments to some legislative acts of Ukraine to ensure state sovereignty under martial law.[52] It is proposed to use the existing constitutional provision, namely Clause 6, Para 2 of Art. 81 of the Constitution of Ukraine, which stipulates that the powers of a people's deputy of Ukraine are terminated early in the event that a people's deputy of Ukraine elected from a political party (electoral bloc of political parties) does not join the parliamentary faction of this political party (electoral bloc of political parties), or the people's deputy of Ukraine leaves such a faction. As another additional option, it is possible to provide an official interpretation of the Constitution on this issue by the Constitutional Court of Ukraine (in the case of a corresponding constitutional submission).

Secondly, consider suspension of parties.

The Decree of the President of Ukraine, dated on March 19, 2022, No. 153/2022, put into effect the Decision of the National Security and Defense Council of Ukraine, "Regarding the suspension of the activities of certain political parties."[53] At the same time, this issue requires more detailed normalisation. Additionally, according to Art. 64 of the Constitution of Ukraine, the right to association, like many other rights, may be subject to restrictions under martial law. Unfortunately, the procedural mechanism of such a restriction is not documented in the current legislation. The suspension of the activities of parties and other associations should become a constitutionally and legally regulated mechanism. An example of constitutional regulation of this issue can be the provision of Art. 33 of the Constitution of Turkey, where the decision to stop the activity of the association (as well as the ban) must be determined by the court.[54]

Thirdly, another problem is solving the issue of further political activity of persons who belonged to governing bodies or deputies from banned parties.

To date, there are no such restrictions on this, but in the future, after the end of the legal regime of martial law and the opening of legal possibilities for holding elections, this issue will become extremely relevant. After all, granting such persons the passive right to vote is quite controversial, considering the negative consequences that have already occurred in Ukraine associated with many human victims and forced displacement of persons, destruction of infrastructure, loss of property, drop in the economic level, etc.

An example to review is the provisions of Art. 69 of the Constitution of Turkey (in general, we refer to it often as it is possibly the most detailed article on this issue among foreign constitutions). These are the following provisions: A party that has been dissolved forever must not be re-established under a different name; members, including founders of a political party, whose actions or statements led to the dissolution of the party on a permanent basis, may no longer be founders, members, directors, or leaders of any other party within five years from the date of publication of the final decision of the Constitutional Court justifying the final dissolution of the party in the official gazette.[55]

52 Draft Law of Ukraine No 8345 'On Amendments to Certain Legislative Acts of Ukraine on Ensuring State Sovereignty in Martial Law' of 10 January 2023 <https://itd.rada.gov.ua/billInfo/Bills/Card/41129> accessed 06 April 2023.

53 Decree of the President of Ukraine No 153/2022 'On the decision of the National Security and Defense Council of Ukraine dated March 18, 2022 "Regarding the suspension of the activities of certain political parties"' of 19 March 2022 [2022] Official Gazette of Ukraine 48/2633.

54 Constitution of the Republic of Türkiye (n 21) art 33.

55 ibid, art 69.

As a legislative regulation of this issue, we propose to adopt draft law No. 9081 of 03/06/2023, "On Amendments to Certain Laws of Ukraine," regarding the limitation of participation of persons associated with political parties, whose activities are prohibited in state management.[56] It proposes to restrict the right of persons associated with parties whose activities are prohibited, for reasons of ensuring national security or countering the spread of totalitarian ideology, to be elected people's deputies of Ukraine, deputies of local councils, or village and town mayors for a period of 10 years after the termination or abolition of martial law in Ukraine.

Fourth, the regulation of the judicial jurisdiction issue over the banning of political parties is of some concern.

Until 2005, the jurisdiction fell to the Supreme Court of Ukraine, from 2005 to 2021, the district administrative court of the city of Kyiv, from 2022, the appellate administrative court, the jurisdiction of which extends to the city of Lviv (under the conditions of martial law) or to the city of Kyiv (under normal conditions).

According to the Venice Commission, a significant number of constitutional courts have jurisdiction to rule on the constitutionality of political parties and, as a result, on their dissolution and ban (examples: Czech Republic, Germany, Republic of Korea, Poland, Portugal, Slovakia, Slovenia, Turkey). In some countries, the jurisdiction of the constitutional court extends not only to parties, but also to other organisations. In Albania and Bulgaria, it includes other political organisations, and in Azerbaijan, associations in general (see Section I, Subsection 6 of the Report CDL-INF(2001)009-e "Decisions of constitutional courts and equivalent bodies and their execution," approved at the 46th plenary session (Venice, March 9-10, 2001).[57] Therefore, it is logical to transfer the authority to ban political parties to the Constitutional Court of Ukraine in the future.[58]

Removal of this type of cases from the jurisdiction of the CCU will not best effect the quality of decisions. Specialists have already repeatedly analysed in detail the cases of banning political parties during 2014-2015 and reached conclusions about problems with the application of the three-fold test.[59] A better situation with additional grounds for banning parties was introduced in 2022, because then, it was possible to avoid excessive formalism. At the same time, the literature claims that the current legislation does not clearly regulate the procedure for collecting evidence of political parties' illegal activities, does not distinguish between the actions of individual representatives of the political party and the political force itself, and some positions expressed in the decisions of the Eighth Administrative Court of Appeal, under certain conditions, contradict the conclusions of the Venice Commission and the European Court of Human Rights in cases related to the prohibition of the activity of political parties.[60]

In addition, as we have seen, the issue of the loss of mandates in court decisions on the banning of the party was completely ignored by the courts; instead, it was the CC of Germany

56 Draft Law of Ukraine No 9081 'On Amendments to Certain Laws of Ukraine (Regarding Limiting the Participation of Persons Associated with Political Parties, whose Activity is Prohibited, in State Administration)' of 06 March 2023 <https://itd.rada.gov.ua/billInfo/Bills/Card/41482> accessed 06 April 2023.

57 Decisions of Constitutional Courts and Equivalent Bodies and their Execution: Report (Venice Commission, 9-10 March 2001) <https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(2001)009-e> accessed 06 April 2023.

58 Yurii Barabash and Hryhorii Berchenko, 'Freedom of Speech under Militant Democracy: The History of Struggle against Separatism and Communism in Ukraine' (2019) 9(3) Baltic Journal of European Studies 9, doi:10.1515/bjes-2019-0019.

59 See: Bohdan Vitaliyovych Bernatsky, 'Formation of the Ukrainian Model of Banning Political Parties in the Light of International Standards and Practices' (PhD (Law) thesis, National National University of Kyiv-Mohyla Academy 2019).

60 See: Olha Kotsiuruba, 'State Influence on Political Parties: A View Through the Prism of the Russian Federation's Aggression against Ukraine' (2022) 2 Ukrainian Journal of Constitutional Law 23, doi:10.30970/jcl.2.2022.3.

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that played a key role in this process in 1952, as did the CC of the Republic of Korea in 2014. We can assume that being immersed in constitutional issues would not allow the CCU to ignore the relevant issue if the decision to ban parties was attributed to its competence.

5 OTHER MEANS OF MILITANT DEMOCRACY AND THEIR ROLE IN PROTECTION AGAINST RUSSIA'S ARMED AGGRESSION AGAINST UKRAINE

In addition to the ban on parties and other restrictions stemming from the Law of Ukraine "On Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and Prohibition of Propaganda of Their Symbols" No. 317-VIII of April 9, 2015, other measures of militant democracy were also taken.

Lustration became the most extensive measure in its field of application. Law "On Purification of Power" No. 1682-VII was adopted on September 16, 2014. The problems of this law included its belated nature (regarding members of the Communist Party of Ukraine and KGB employees) as well as insufficient quality. Despite the absence of a decision of the Supreme Court of Ukraine regarding the Law "On Purification of Power" for more than 8 years,[61] two of the ECtHR's decisions have already been passed against Ukraine regarding the application of the Law "On Purification of Authorities": "Polyakh et al. v. Ukraine" dated October 17, 2019,[62] and "Samsin v. Ukraine" dated October 14, 2021.[63] In both cases, Ukraine was found to have violated the ECHR and no concessions were made for Ukraine.

The Ukrainian lustration was not related to the restriction of the right to vote, but only related to access to public service. At the same time, in foreign countries when applying lustration, we saw the constitutionalising of restrictions on the right to vote. Thus, in Italy, according to para. 2 p. of Section XII of the Transitional and Final Provisions of the Constitution, a temporary restriction of active and passive voting rights was established for responsible leaders of the fascist regime for a period of no more than 5 years from the date of entry into force of the Constitution. In addition, in accordance with Para 4 of Art. 48 of the Constitution of Italy, the right to vote may be particularly limited by virtue of a final criminal sentence or in cases of inappropriate behaviour as determined by law. We should also mention the limitation of the passive voting right in Latvia, the compliance of which was checked by the European Court of Human Rights in the decision on June 17, 2004, in the case "Zhdanoka v. Latvia."[64] Without limiting the right to vote, in accordance with Art. 6 and 7 of the Law of the Republic of Estonia "On the Implementation of the Constitution,"[65] the obligation for certain categories of persons to take an oath of assurance was foreseen, especially for those persons elected to the State Assembly. If the court proves that the information confirmed by the oath is untrue, the candidate is excluded from the list of candidates or loses his powers (if elected).[66]

61 Constitutional Submission of the Supreme Court of Ukraine of 20 November 2014 <http://www.ccu.gov.ua/sites/default/files/46.pdf> accessed 06 April 2023.

62 Polyakh and others v Ukraine App nos 58812/15 and 4 others (ECtHR, 17 October 2019) <https://hudoc.echr.coe.int/?i=001-196607> accessed 06 April 2023.

63 Samsin v Ukraine App no 38977/19 (ECtHR, 14 October 2021) <http://hudoc.echr.coe.int/eng?i=001-212148> accessed 06 April 2023.

64 Zhdanoka v Latvia App no 58278/00 (ECtHR, 17 June 2004) <https://hudoc.echr.coe.int/?i=001-61827> accessed 06 April 2023.

65 The Constitution of the Republic of Estonia Implementation Act (passed 28 .June 1992) <https://www.riigiteataja.ee/en/eli/530102013012/consolide> accessed 06 April 2023.

66 For additional information on the practice of the ECtHR regarding the right to free elections, see: Oleksandr Bakumov, 'The Legal Position of the European Court of Human Rightson the Right to Free Elections: Disputes Practice' (2016) 3 Journal of the National Academy of Legal Sciences of Ukraine 183.

As previously noted, in the future, a question will certainly arise regarding the electoral rights of leaders of banned parties, and this question will require a separate legislative (perhaps constitutional) regulation.

In addition, in connection with the issues of reintegration of de-occupied territories, primarily those that were occupied since 2014-2015 (but not only), lustration should obviously receive a new scope of application and be extended to certain categories for persons who cooperated with the occupiers. Moreover, lustration was mentioned before the large-scale aggression in the draft law, "On the principles of state policy of the transitional period," developed by the government, regarding which the Opinion No. 1046/2021 of October 18, 2021, by the Venice Commission CDL-AD(2021)038 (adopted at the 128th plenary session (Venice, online, October 15-16, 2021).[67] At the same time, the lustration procedure itself must be written out in detail and must account for the ECtHR's existing practice as well as the positions of the Venice Commission.

During 2014-2023, the means of militant democracy acquired other areas of application.

Thus, administrative responsibility was established for the public use, demonstration, or wearing of St. George's (Guards) ribbon or its image, being recognised as an offence that entails administrative responsibility in the form of a fine.[68] Amendments were made to the Law of Ukraine "On Television and Radio Broadcasting," "On Cinematography" (which was subsequently recognised as constitutional by the CCU in its decision No. 3-p/2021 of December 21, 2021, precisely in view of the concept of "democracy capable of defending itself" and its previous decision, namely the first paragraph of paragraph 11 of the motivational part of the Decision of July 16, 2019, No. 9-p/2019).[69]

Public denial of the legitimacy of the struggle for the independence of Ukraine in the 20th century is considered an insult to the memory of the fighters for the independence of Ukraine, a humiliation of the Ukrainian people's dignity, and is illegal.[70]

In the context of militant democracy, one cannot fail to mention the Law of Ukraine No. 2116-IX of March 3, 2022, "On the Basic Principles of Forcible Expropriation in Ukraine of Objects of Property Rights of the Russian Federation and its Residents"[71] and the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Regarding Increasing the Effectiveness of Sanctions Related to the Assets of Individuals" of May 12, 2022, No. 2257-IX.[72]

There are also specific measures of militant democracy used as a test of loyalty to Ukraine. Thus, according to the Law "On Amendments to Chapter II Final Provisions" of the Law of Ukraine "On the National Anti-Corruption Bureau of Ukraine," regarding the establishment of restrictions for the appointment of the Director of the National Anti-Corruption Bureau of Ukraine in connection with the introduction of martial law in Ukraine, dated September

67 Opinion No 1046/2021 'On the Draft Law of Ukraine "On the Principles of State Policy of the Transition Period"' (Venice Commission, 15-16 October 2021) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)038-e> accessed 06 April 2023.

68 Law of Ukraine No 2031-VIII 'On Amendments to the Code of Ukraine on Administrative Offenses Regarding the Prohibition of the Production and Propaganda of St. George's (Guards) Ribbon' of 16 May 2017 [2017] Official Gazette of Ukraine 49/1507.

69 Decision No 3-p/2021 in Case No 1-252/2018(3492/18) (Constitutional Court of Ukraine, 21 December 2021) [2022] Official Gazette of Ukraine 5/311.

70 Law of Ukraine No 314-VIII 'On the Legal Status and Commemoration of the Fighters for the Independence of Ukraine in the 20th century' of 9 April 2015 [2015] Official Gazette of Ukraine 40/1178.

71 Law of Ukraine No 2116-IX 'On the Basic Principles of Forced Expropriation in Ukraine of Objects of Property Rights of the Russian Federation and Its Residents' of 3 March 2022 [2022] Official Gazette of Ukraine 33/1720.

72 Law of Ukraine No 2257-IX "On Amendments to Certain Legislative Acts of Ukraine on Increasing the Effectiveness of Sanctions Related to the Assets of Individuals' of 12 May 2022 [2022] Official Gazette of Ukraine 43/2317.

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7, 2022, No. 2582-IX in 2022, a person, after the introduction of martial law, cannot be appointed to the position of Director of the National Anti-Corruption Bureau of Ukraine state, if they remained outside the borders of Ukraine for a total of more than 21 days.[73]

One way or another, restrictions can be associated with militant democracy in accordance with the Law of Ukraine "On Sanctions" dated August 14, 2014, No. 1644-VII,[74] the Law of Ukraine "On Prevention of Threats to National Security Associated with the Excessive Influence of Persons Who Have Significant Economic and Political Weight in Public Life (oligarchs)" dated September 23, 2021, No. 1780-IX,[75] and more.

Regarding the Law of Ukraine "On Amending Article 12 of the Law of Ukraine," "On Freedom of Conscience and Religious Organizations," in reference to the name of religious organisations (associations), which are part of the structure of a religious organisation (association), the management centre of which is located outside Ukraine in a state recognised by law as having carried out military aggression against Ukraine and/or temporarily occupying part of the territory of Ukraine, dated December 20, 2018, No. 2662–VIII, in the decision dated December 27, 2022, No. 4-p/2022 (case regarding the full name of religious organisations),[76] the CCU recognised the relevant law as constitutional. Although the CCU did not refer directly to the concept of militant democracy, it nevertheless emphasised that this law "contributes to ensuring the defence capability of the state and the combat capability of units of the Armed Forces of Ukraine in conditions of armed aggression" (paragraph 5, clause 4.9 of the motivational part).[77]

In our opinion, the improvement of the militant democracy tools in the conditions of martial law could be the strengthening of the block of constitutional norms on martial law/state of emergency in the future. So, for example, at one time in the Federal Republic of Germany, an entire section under the number "Xa" was introduced into the text of the Basic Law. It regulates the extension of powers of bodies whose term of powers expired during martial law; activities of the joint committee; Chancellor's powers; making peace and cancelling emergency measures; and much more.

6 CONCLUSIONS

Thus, we consider militant democracy to be an integral element of the constitutional design of post-totalitarian and post-authoritarian countries. There is a certain loss of relevance of militant democracy for stable democracies (which have already passed their critical period after the Second World War), as well as concern about the use of its means to excessively restrict human rights. On the other hand, in Ukraine, the means of militant democracy have

73 The Law of Ukraine No 2582-IX 'On Amendments to Section II "Final Provisions" of the Law of Ukraine "On the National Anti-Corruption Bureau of Ukraine" Regarding the Establishment of Restrictions for the Appointment of the Director of the National Anti-Corruption Bureau of Ukraine in Connection with the Introduction of Martial Law in Ukraine' of 7 September 2022 [2022] Official Gazette of Ukraine 80/4811.

74 Law of Ukraine No 1644-VII 'On Sanctions' of 14 August 2014 <https://zakon.rada.gov.ua/laws/show/1644-18> accessed 06 April 2023.

75 Law of Ukraine No 1780-IX 'On Prevention of Threats to National Security Associated with Excessive Influence of Persons who have Significant Economic and Political Weight in Public Life (Oligarchs)' of 23 September 2021 [2021] Official Gazette of Ukraine 88/5599.

76 Decision No 4-p/2022 in Case No 1-13/2019(374/19) (Constitutional Court of Ukraine, 27 December 2022) [2023] Official Gazette of Ukraine 7/588.

77 On the protection of the principles of independence and territorial integrity in the practice of the Constitutional Court of Ukraine, see: Hryhorii Berchenko, Tetiana Slinko and Oleh Horai, 'Unamendable Provisions of the Constitution and the Territorial Integrity of Ukraine' (2022) 5(4-2S) Access to Justice in Eastern Europe 122, doi:10.33327/AJEE-18-5.4-n000447.

not yet fulfilled their function; they continue to fulfil it in the conditions of Russia's armed aggression against Ukraine and will certainly continue to after its completion. Ukraine found itself in a unique situation of Russian attempts, wherein the successor of the Soviet empire desired to take revenge with absolute denial of Ukrainian independence and its democratic vector of development on the part of the aggressor.

Starting in 2014, although not without problems and mistakes, means of militant democracy such as banning political parties, means related to banning propaganda of totalitarian regimes, lustration, and many others have been utilized. Today, Ukraine can benefit from the experience of post-totalitarian countries, constitutional and legislative regulation of the means of militant democracy, as well as judicial and other law enforcement practice. It is also important to use the ECtHR's practices and the recommendations of the Venice Commission.

We consider it urgent to resolve a few issues. First of all, we identify terminating the powers of deputies elected on the lists of political parties, which are prohibited by the courts, as well as limiting their passive right to vote in the future. Secondly is the adoption of legislation in the field of reintegration of de-occupied territories with the establishment of clear criteria for future lustration. Thirdly, we recognise the needed improvement of the constitutional regulation of the means of militant democracy used both in conditions of war and a state of emergency, and without its use (suspension of the activities of associations, transfer of consideration of cases on the banning political parties to the Constitutional Court of Ukraine). Fourthly, Ukraine, as an active player in the international arena, can propose in the future, in the event of possible EU reform, the introduction of supranational tools of militant democracy, which is especially relevant given the strengthening of populist forces within the EU and outside it, as well as the conduct of hybrid wars of a new type. Such means may consist of intensifying the application of various financial instruments and sanctions as well as a possible reform of the procedures for making such decisions within the EU.

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Research Article

WAR AS A CATALYST: UKRAINE'S INSPIRING NARRATIVE FOR "MADE IN UKRAINE" PHARMACEUTICALS IN THE GERMAN MARKET

Nataliia Kochkina*, Sofiia Mashchenko, Liudmyla Yarosh-Dmytrenko, Olga Prygara, and Gianluca Gatto

ABSTRACT

Background: *The favourable perception of Ukraine, bolstered by global support during the full-scale Russian invasion of Ukraine, has profoundly influenced the country's national brand. This has increased receptiveness towards Ukrainian products, particularly in Europe and North America. These perceptual shifts have yielded notable ramifications for Ukraine's export patterns and trade dynamics. This article investigates the relationship between the positive perception of Ukraine, the "Made in Ukraine" concept, and the consumption of Ukrainian goods. It specifically emphasises the impact of the country of origin on consumer perceptions and decision-making processes. By examining these factors, the study endeavours to enrich the comprehension of consumer preferences while furnishing practical insights relevant to Ukrainian brands engaged in international markets. The research findings contribute to the existing literature on a nation's image, national branding, and consumer behaviour. Furthermore, they offer invaluable guidance for Ukrainian enterprises seeking to leverage their national brand and promote "Made in Ukraine" products globally.*

Method: *The research methodology encompasses a two-stage approach that includes desk research and a survey to investigate the external environmental factors and comprehend German residents' attitudes and purchasing behaviour regarding Ukrainian pharmaceutical products. The formulated research questions aim to reveal the drivers behind product choices and perceptions of Ukraine as a nation. Several factors, including the established Ukrainian pharmaceutical industry, the potential for increased support and investment, geopolitical dynamics, the demand within the German healthcare system, and future growth opportunities, underpin the German market selection as this study's focal point.*

Results and Conclusions: *The desk research analysis has identified numerous market opportunities available to Ukrainian pharmaceutical manufacturers in the German market. These opportunities encompass leveraging the COVID-19 crisis, addressing medicine shortages, and strategically targeting specific demographic segments. The survey analysis, on the other hand, sheds light on the motivations and attitudes of Germans toward Ukrainian pharmaceutical products. It highlights the significance of doctors' prescriptions and pharmacists' influential recommendations. The survey indicates a strong willingness among Germans to support Ukraine*

by purchasing its pharmaceutical offerings. To harness Ukraine's positive perception in the German market, Ukrainian manufacturers should proactively implement communication strategies and cultivate robust relationships with healthcare professionals. They should focus on augmenting their product portfolio and optimising supply chain efficiency while raising awareness and collaborating with pertinent stakeholders. Ultimately, this study underscores the potential for Ukrainian pharmaceutical manufacturers to leverage the favourable perception of Ukraine within the German market, offering invaluable for successful market entry and sustainable growth.

Keywords: Consumer Behaviour, Country of Origin, Desk Research, Survey, Ethnocentrism, German Market, Made in Ukraine, National Brand, PESTEL Analysis, Pharmaceutical Market, Full-Scale Russian Invasion of Ukraine.

1 INTRODUCTION

Russia's full-scale invasion of Ukraine in February 2022 garnered unprecedented global attention, resulting in a surge of support from most countries worldwide. This heightened international focus on Ukraine positioned the nation as a symbol of heroism and a defender of freedom and democratic values, thereby strengthening its national brand on a global scale.[1] This heightened global awareness of Ukraine has positively impacted the perception of Ukrainian products and brands. Research conducted by Bloom Consulting[2] on the impact of the Russia-Ukraine war on national brands reveals that North America and Europe have witnessed a significant shift in the attitudes of respondents. About 80% of respondents now hold favourable views of Ukraine, while around 15% maintain a neutral perception in light of the conflict. In Asia and Africa, the impact has been less pronounced. The research further indicates that the war has had a constructive impact on Ukraine's overall global image, with 54% of respondents believing that the conflict has enhanced Ukraine's appearance on the world stage.

Data from the R&D Centre, You Control,[3] highlights substantial shifts in Ukraine's export relationships with other countries, reflecting notable changes in global perception. Poland has emerged as the foremost destination for Ukrainian exports, surpassing China, which held the top position in 2021 but dropped to fourth place because of the ongoing conflict. In the initial ten months of 2022, Ukrainian exports to Poland amounted to over USD 5.6 billion, constituting 15.4% of the total export volume. Traditional consumers of Ukrainian goods, including Italy, India, and Egypt, have witnessed a decline in their import shares. Notably, Ukraine's official exports to Russia categorised as an aggressor country, have sharply declined, resulting in Russia's drop from fifth to twentieth position in the ranking of export destinations. These shifts in export patterns underscore how support for a nation can profoundly shape its perception and trade dynamics, particularly during times of war.

This article delves into the interplay between the enhanced global perception of Ukraine resulting in the Russia-Ukraine war, the promotion of national brands under the "Made in Ukraine" concept, and the diffusion of local goods consumption. By examining Ukraine's inspiring narrative and national image, the study seeks to determine whether the favourable attitude towards Ukraine translates into tangible support for its products. The research aims to uncover the opportunities and challenges Ukrainian pharmaceutical products face as

1 Brand Ukraine and Ministry of Foreign Affairs of Ukraine, 'Ukraine's Global Perception Report, 2022' (*Brand Ukraine*, 31 January 2023) <https://brandukraine.org.ua/en/analytics/zvit-pro-sprijnyattya-ukrayini-u-sviti-2022/> accessed 11 July 2023.

2 'Impact of Russia-Ukraine war on Nation Brands' [2022] *Bloom Consulting Journal* <https://www.bloom-consulting.com/journal/impact-of-russia-ukraine-war-on-nation-brands> accessed 11 July 2023.

3 'Import and Export of Ukraine: Influence of war' (*You Control*, 21 December 2022) <https://youcontrol.com.ua/data-research/import-ta-eksport-ukrayiny/> accessed 11 July 2023.

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they attempt to capitalise on the strengthened national brand. This research contributes to the existing literature on country image, national branding, and consumer preferences. The research findings yield practical implications for Ukrainian brands seeking to harness the favourable global perception of Ukraine within international markets.

2 THE COUNTRY OF ORIGIN IMPACT ON CONSUMER PERCEPTIONS AND DECISION-MAKING

Numerous studies have underscored the profound impact of a product's Country of Origin (COO) on consumer perceptions and its overall success in the international market (G. Erickson et al., I. Nebenzahl and E. Jaffe, M. Thakor and C. Kohli, G. Balabanis and A. Diamantopoulos, J. Pharr, T. Aichner, J. Polfuß).[4] The COO concept pertains to the country in which a product is manufactured or with which it is closely associated, serving as a reference point for consumers when assessing products labelled "Made in...". Research by E. Kipnis et al.[5] has revealed that the COO effect is deeply rooted in consumers' strong emotional product preferences. Consumers often harbour preconceived notions regarding product quality, reliability, and authenticity based on the COO. Various factors can influence these perceptions, including a country's reputation for producing specific types of goods, historical associations, cultural stereotypes, and economic or political considerations.

The COO can evoke specific emotions and associations, potentially influencing consumers' emotional connections and ethical considerations, ultimately impacting their purchasing decisions. A study by P. Verlegh and G. Steenkamp[6] highlights the multifaceted nature of the COO effect, emphasising its cognitive, affective, and normative dimensions that shape consumers' preferences and choices. Within this framework, the affective dimension of the COO effect involves consumers associating the COO with status, identity, national pride, and past personal experiences. On the other hand, the normative dimension encompasses consumers' preferences through 'customer voting,' whereby purchasing or avoiding products from a particular country is seen as a way to either support or oppose the policies and practices associated with that specific nation.

A substantial body of research has examined the phenomenon recognised as the 'home country bias,' whereby consumers prefer domestically manufactured goods over foreign alternatives, a tendency observed across various product categories and geographic locations (P. Huddleston et al., Z. Ahmed et al., G. Balabanis and A. Diamantopoulos, L.-A. Casado-Aranda

4 Gary M Erickson, Johny Johansson and Paul Chao, 'Image Variables in Multi-Attribute Product Evaluations: Country-of-Origin Effects' (1984) 11(2) Journal of Consumer Research 694, doi:10.1086/209005; Israel D Nebenzahl and Eugene D Jaffe, 'Measuring the Joint Effect of Brand and Country Image in Consumer Evaluation of Global Products' (1996) 13(4) International Marketing Review 5, doi:10.1108/02651339610127220; Mrugank V Thakor and Chiranjeev S Kohli, 'Brand Origin: Conceptualization and Review' (1996) 13(3) Journal of Consumer Marketing 27, doi:10.1108/07363769610147929; George Balabanis and Adamantios Diamantopoulos, 'Domestic Country Bias, Country-of-Origin Effects, and Consumer Ethnocentrism: A Multidimensional Unfolding Approach' (2004) 32(1) Journal of the Academy of Marketing Science 80, doi:10.1177/0092070303257644; Julie M Pharr, 'Synthesizing Country-of-Origin Research from the Last Decade: Is the Concept Still Salient in an Era of Global Brands?' (2005) 13(4) Journal of Marketing Theory and Practice 34, doi:10.1080/10696679.2005.11658557; Thomas Aichner, 'Country-of-Origin Marketing: A List of Typical Strategies with Examples' (2014) 21(1) Journal of Brand Management 81, doi:10.1057/bm.2013.24; Jonas Polfuß, '"Made in China" and Chinese Brand Management Across Cultures: A New Matrix Approach' (2021) 33(1) Journal of International Consumer Marketing 19, doi:10.1080/08961530.2020.1731900.

5 Eva Kipnis and others, '"They don't want us to become Them": Brand Local Integration and Consumer Ethnocentrism' (2012) 28(7-8) Journal of Marketing Management 836, doi:10.1080/0267257X.2012.698634.

6 Peeter WJ Verlegh and Jan-Benedict EM Steenkamp, 'A Review and Meta-Analysis of Country-of-Origin Research' (1999) 20(5) Journal of Economic Psychology 521, doi:10.1016/S0167-4870(99)00023-9.

et al.).[7] Concurrently, the literature indicates a significant increase in consumers' intention to purchase products bearing the label "Made in Domestic Country" (Y. Bernard et al., A. Yu et al.).[8] Previous studies have also highlighted the role of specific emotions, such as consumer guilt, in shaping attitudes toward foreign-made products (S. Mishra et al.).[9] Consumer guilt refers to an emotional state of remorse experienced by individuals when their behaviour conflicts with personal and societal norms (M. Burnett and D. Lunsford, W. Fan et al.).[10]

Many studies have delved into the intricate dynamics that govern consumer decision-making regarding domestic and foreign products. Prior research has consistently identified ethnocentrism as a fundamental factor contributing to the home country bias (G. Balabanis and A. Diamantopoulos, T. Shimp and S. Sharma).[11] S. Mishra et al. delve into the interplay between consumer ethnocentrism, patriotism and their combined impact on consumers' intentions to purchase domestic products.[12] Their study illuminates the motivational role played by patriotism, which acts as a driving force encouraging support for domestic manufacturers. Purchasing domestic products is seen as a patriotic duty, symbolising loyalty to one's home country (C. Han, S. Mishra et al.).[13] S. Carvalho et al.[14] contribute to understanding how consumers' alignment with national symbols or rhetoric can influence their consumption behaviour. Their research emphasises that individuals' perception of external threats heightens their sense of national identity, intensifying positive emotions, stronger identification, and a more profound attachment to their home country.

However, certain academic studies present a counterargument to the presumed positive influence of employing the COO concept in promoting domestic products. J. Polfuß[15] conducted case studies on Chinese companies and concluded that only a few internationally oriented brands from China actively communicate their Chinese origin in their brand management. Notable exceptions include brands that consistently incorporate Chinese references in their names, like Air China. Polfuß also underscores the potential risk of differentiating brands

7 Patricia Huddleston, Linda K Good and Leslie Stoel, 'Consumer Ethnocentrism, Product Necessity and Polish Consumers' Perceptions of Quality' (2001) 29(5) International Journal of Retail and Distribution Management 236, doi:10.1108/09590550110390896; Zafar U Ahmed and others, 'Does Country of Origin Matter for Low-Involvement Products?' (2004) 21(1) International Marketing Review 102, doi:10.1108/02651330410522925; Balabanis and Diamantopoulos (n 4); Luis-Alberto Casado-Aranda, Angelika Dimoka and Juan Sánchez-Fernández, 'Looking at the Brain: Neural Effects of "Made in" Labeling on Product Value and Choice' (2021) 60(2) Journal of Retailing and Consumer Services 102452, doi:10.1016/j.jretconser.2021.102452.

8 Yohan Bernard and others, 'Products Labeled as "Made in Domestic Country": The Brand Matters' (2020) 54(12) European Journal of Marketing 2965, doi:10.1108/EJM-04-2018-0229; Anqi Yu, Shubin Yu and Huaming Liu, 'How a "China-Made" Label Influences Chinese Youth's Product Evaluation: The Priming Effect of Patriotic and Nationalistic News' (2022) 66(C) Journal of Retailing and Consumer Services 102899, doi:10.1016/j.jretconser.2021.102899.

9 Sita Mishra and others, 'Investigating the Impact of Consumers' Patriotism and Ethnocentrism on Purchase Intention: Moderating Role of Consumer Guilt and Animosity' (2023) 32(4) International Business Review 102076, doi:10.1016/j.ibusrev.2022.102076.

10 Melissa S Burnett and Dale A Lunsford, 'Conceptualizing Guilt in the Consumer Decision-Making Process' (1994) 11(3) Journal of Consumer Marketing 33, doi:10.1108/07363769410065454; Wuqiu Fan, Hanchun Zhong and Anding Zhu, 'Destigmatising the Stigma: Understanding the Impact of Message Framing on Chinese Consumers' Guilt and Attitude Associated with Overspending Behaviour' (2021) 20(1) Journal of Consumer Behaviour 7, doi:10.1002/cb.1848.

11 Balabanis and Diamantopoulos (n 4); Terence A Shimp and Subhash Sharma, 'Consumer ethnocentrism: Construction and validation of the CETSCALE' (1987) 24(3) Journal of Marketing Research 280, doi:10.2307/3151638.

12 Mishra and others (n 9).

13 C Min Han, 'The Role of Consumer Patriotism in the Choice of Domestic Versus Foreign Products' (1988) 28(1) Journal of Advertising Research 25; Mishra and others (n 9).

14 Sergio W Carvalho, David Luna and Emily Goldsmith, 'The Role of National Identity in Consumption: An Integrative Framework' (2019) 103 Journal of Business Research 310, doi:10.1016/j.jbusres.2019.01.056.

15 Polfuß (n 4).

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through country-based branding, wherein unexpected political changes may impede brand communication or even work against it.

In the context of consumer behaviour, N. Nguyen et al.[16] explore how a country's image influences consumer purchasing behaviour, specifically among Vietnamese consumers and their preferences for imported Chinese goods. Their findings illuminate a positive correlation between the perceived image of a country and Vietnamese consumers' intentions to purchase Chinese imported products, indicating the substantial role played by a nation's image in shaping consumer preferences and decision-making processes. However, the research also highlights the negative influence of consumer ethnocentrism on the perception of a country's image and subsequent purchase intentions.

Contrary to ethnocentrism, the research conducted by E. Kipnis et al.[17] identifies cases where consumers exhibit positive attitudes toward foreign brands. In these scenarios, consumers tend to favour foreign brands recognised for their societal contributions and positive impact on the community's well-being. This discovery suggests that ethnocentric tendencies do not solely drive consumer preferences, and consumers can embrace foreign brands that align with their values.

3 CONSUMER PURCHASING BEHAVIOUR IN THE CONTEXT OF COO AND COUNTRY IMAGE

Expanding on the COO theory, the literature suggests that consumers' evaluations go beyond considering product attributes and encompass a broader association with the COO. This indicates that consumers are influenced by factors beyond the product itself, assuming a more holistic perception of the originating country. J. Pharr[18] argues that traditional product-specific evaluations related to the COO are evolving into a more comprehensive concept known as 'country image.' This multidimensional construct incorporates cognitive, affective, and conative components, aligning with the country where a global brand has historical or developmental ties.

G. Balabanis and C. Lopez[19] investigate the factors that shape consumers' evaluations of a country's image, delving into the theoretical underpinnings and various motivations driving their purchase decisions. The study reveals that consumers have diverse reasons for choosing products from a particular country. These motivations span a spectrum, ranging from economic advantages and associations of prestige with certain countries' products to the desire to reduce uncertainty about product quality or to express solidarity with the country. Similarly, W. K. Li and K. B. Monroe [20] suggest that individuals consider specific products for authenticity, exoticness, patriotism, personalisation, or enhanced social standing. T. Aichner[21] asserts that companies benefit from a country's good reputation and suffer from its poor

16 Ngoc Ha Nguyen and others, 'Role of Consumer Ethnocentrism on purchase Intention Toward Foreign Products: Evidence from data of Vietnamese Consumers with Chinese Products' (2023) 9(2) Heliyon e13069, doi:10.1016/j.heliyon.2023.e13069.

17 Kipnis and others (n 5).

18 Pharr (n 4).

19 George Balabanis and Carmen Lopez, 'Reflective Versus Unreflective Country Images: How Ruminating on Reasons for Buying a Country's Products Alters Country Image' (2022) 31(5) International Business Review 102024, doi:10.1016/j.ibusrev.2022.102024.

20 WK Li and KB Monroe, 'The Role of Country of Origin Information on Buyers' Product Evaluation: An In-Depth Interview Approach' in *Ama Educators' Proceedings: Enhancing Knowledge Development in Marketing*, vol 3 (Amer Marketing Assn 1992) 274.

21 Aichner (n 4).

reputation. Companies can employ "Made in..." labels, quality and origin labels, written and spoken language, symbols, landscapes, buildings, flags, and famous or stereotypical individuals associated with the COO to communicate their origin to customers.

The 'COO warmth' concept has also emerged to understand a country's image. A. Maher and L. Carter[22] define perceived warmth as friendliness and sincerity directed towards out-groups. C. Barbarossa et al.[23] expand on this concept, introducing 'COO warmth' as a cognitive appraisal encompassing a country's friendliness, cooperativeness, and trustworthiness. This appraisal is influenced by the historical and contemporary cultural, political, and economic relationship between the foreign country and the consumer's own country. A. Diamantopoulos et al.[24] further demonstrate a direct correlation between a country's warmth and competence and a brand's perceived warmth and competence.

Furthermore, studies indicate that consumers' perception of a country's personality traits can significantly shape their evaluations of brands associated with that country. A. Maher and L. Carter[25] found that affective country attitudes, such as contempt and admiration, are related to consumers' willingness to purchase American products. P. Magnusson et al.[26] support the idea that a country's warmth and competence positively impact admiration, and a country's personality traits have a tangible influence on consumer assessments of brands connected to that country. T. Motsi and J. E. Park[27] examine the effects of national stereotypes on a country's overall image and specific product-related outcomes. Their findings suggest that the perception of warmth, associated with a country's stereotype, can effectively promote tourism. Additionally, the study underscores the substantial role of national stereotypes in shaping perceptions and consumer behaviour regarding countries and their products.

While extensive research has explored the influence of COO and country image on consumer behaviour, there has been limited investigation into the effects of war and adverse circumstances on consumers' purchasing behaviour. Studies focused on moral emotions associated with COO have found that consumer animosity towards a particular country can trigger feelings of anger, subsequently leading to avoidance or boycotting products from that country.[28] In this context, H. Hino[29] explores the influence of moral emotions on consumers' attitudes toward purchasing Israeli goods, suggesting that anger towards Israel significantly influences the intention to boycott such products. However, empathic concerns towards Arabs in West Bank and Golan Heights's territories minimally affect consumers' buying

22 Amro A Maher and Larry L Carter, 'The Affective and Cognitive Components of Country Image: Perceptions of American Products in Kuwait' (2011) 28 (6) International Marketing Review 559, doi:10.1108/02651331111181411.

23 Camilla Barbarossa, Patrick De Pelsmacker and Ingrid Moons, 'Effects of Country-of-Origin Stereotypes on Consumer Responses to Product-Harm Crises' (2018) 35(3) International Marketing Review 362, doi:10.1108/IMR-06-2016-0122.

24 Adamantios Diamantopoulos and others, 'The Bond Between Country and Brand Stereotypes: Insights on the Role of Brand Typicality and Utilitarian/Hedonic Nature in Enhancing Stereotype Content Transfer' (2021) 38(6) International Marketing Review 1143, doi:10.1108/IMR-09-2020-0209.

25 Maher and Carter (n 22).

26 Peter Magnusson, Stanford A Westjohn and Nancy J Sirianni, 'Beyond Country Image Favorability: How Brand Positioning Via Country Personality Stereotypes Enhances Brand Evaluations' (2019) 50(3) Journal of International Business Studies 318, doi:10.1057/s41267-018-0175-3.

27 Terence Motsi and Ji Eun Park, 'National Stereotypes as Antecedents of Country-of-Origin Image: The Role of the Stereotype Content Model' (2020) 32(2) Journal of International Consumer Marketing 115, doi:10.1080/08961530.2019.1653241.

28 Jill Gabrielle Klein, Richard Ettenson and Marlene D Morris, 'The Animosity Model of Foreign Product Purchase: An Empirical Test in the People's Republic of China' (1998) 62(1) Journal of Marketing 89, doi:10.2307/1251805.

29 Hayiel Hino, 'More than Just Empathy: The Influence of Moral Emotions on Boycott Participation Regarding Products Sourced from Politically Contentious Regions' (2023) 32(1) International Business Review 102034, doi:10.1016/j.ibusrev.2022.102034.

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decisions. Given previous research on the impact of emotional connection and empathy on consumer behaviour, it is reasonable to anticipate that these factors may influence consumer attitudes and intentions toward products from Ukraine, particularly given the challenging circumstances surrounding the war.

4 LEGISLATIVE IMPLICATIONS OF "MADE IN . . ." LABELS

Using "Made in..." labels on products bears considerable legislative implications. Countries have established specific regulations and laws governing the requirements for labelling products with their COO. These regulations aim to provide consumers with accurate information about the origin of products and prevent deceptive practices. Legislative concerns related to "Made in..." labels predominantly revolve around three key domains: COO determination, labelling requirements, and measures for ensuring compliance and enforcement.

Determining the COO can be complex, particularly when products are manufactured or assembled across multiple countries. Legislative frameworks often establish specific criteria and guidelines for COO determination, considering factors such as the location of substantial transformation, the value added in a particular country, or the source of critical components. For instance, in Ukraine, the Customs Code or guidance from the Chamber of Commerce and Industry[30] can be consulted to determine the COO for goods. Although 'goods of domestic production' lacks a legal definition, it generally refers to goods manufactured within Ukraine. When products are manufactured in multiple countries, the COO is typically determined based on the criterion of sufficient processing. In other words, the country where the final manufacturing or processing operations occurred, imparting the goods with their essential characteristics, is considered the COO.

Legislations commonly specify particular requirements for product labelling that denote the COO. These requirements often encompass the size, visibility, and placement of the "Made in..." label on the product or its packaging. For instance, COO product labelling is considered voluntary in Ukraine. However, non-compliance with safety and quality indicators may result in fines for food products, impacting both legal entities and individual entrepreneurs. During the early months of the war, some labelling requirements were simplified to ensure the ready availability of essential products in the market. However, the European Commission is currently working on introducing mandatory origin marking for all non-food products, including textiles. The specific timeline for implementation of this regulation, however, remains undecided by the EU Parliament.[31]

During times of war, businesses may encounter challenges in meeting product labelling requirements. Although government authorities may attempt to alleviate burdens for manufacturers and importers during such periods, businesses may still require further assistance. The situation is expected to continue to evolve, and authorities may take further actions in the short and medium term to address these challenges.[32] In contrast, the European Community has implemented strict measures, including administrative and criminal penalties, for violations of CE marking rules. Products that do not comply with EU directives and harmonised standards mandating the use of the CE Mark are prohibited from the EU internal market.

30 Customs Code of Ukraine no 4495-VI of 13 March 2012 [2012] Official Gazette of Ukraine 32/1175 <https://zakon.rada.gov.ua/laws/show/4495-17#Text> accessed 11 July 2023.

31 'Product Labeling in Accordance with EU Requirements' (*Diia. Business Export*, 2023) <https://export.gov.ua/206-markuvannia_produktsii_vidpovidno_do_vimog_ies> accessed 11 July 2023.

32 Myroslava Koval-Lavok, 'Features of Product Labeling in Ukraine During the Period of Martial Law' *Ekonomichna Pravda* (Kyiv, 18 August 2022) <https://www.epravda.com.ua/columns/2022/08/18/690574> accessed 11 July 2023.

Using state symbols necessitates carefully considering the legislative regulations specific to each country. In Ukraine, state symbols are subject to governance by several legislative acts, including the Constitution of Ukraine,[33] which specifies the official state symbols, and the Law of Ukraine on Advertising,[34] which prohibits using or imitating state symbols that may promote disrespect towards them. The Draft Law of Ukraine on State Symbols[35] also provides a comprehensive description and outlines the procedures for using and protecting state symbols.

In the European Union, "Made in..." labels must adhere to stringent standards set by the Paris Convention for the Protection of Industrial Property and the EU Community Trademark Regulation.[36] These regulations explicitly prohibit the registration of signs containing national symbols without official consent from the relevant authority. The enforcement of "Made in..." labelling regulations is the responsibility of governments and regulatory bodies, which conduct inspections, verify labelling claims, and take necessary actions against violations.

It is important to note that while the Paris Convention provides a framework for safeguarding intellectual property, including trademarks and trade names, it does not directly address using national symbols for commercial purposes within the EU. This matter is generally addressed through national legislation and may also be influenced by guidelines or directives at the EU level. Specifically, the primary purpose of the Paris Convention's Article 6 is to protect armorial bearings, flags, and other State emblems of the States that are party to the Paris Convention, as well as official signs and hallmarks indicating control and warranty adopted by them.[37] As a result, the use of national symbols for commercial purposes within the EU must strictly comply with these regulations to avoid any legal consequences.

5 EUROPEAN PHARMACEUTICAL LEGAL AND REGULATORY LANDSCAPE

The legal and regulatory framework governing pharmaceuticals in the European context[38] exhibits a notably intricate structure featuring a network of regulatory authorities spanning 30 European Economic Area nations. This consortium encompasses the 27 EU Member States, Iceland, Liechtenstein, and Norway. This unique regulatory system is underscored by a harmonious synergy among approximately 50 distinct regulatory bodies, underpinned by collaborative interactions among these entities, the European Commission, and the European Medicines Agency (EMA). This collaborative approach harnesses the substantial expertise contributed by more than 4,000 experts from diverse regions across Europe, thus enabling unrestricted access to top-tier scientific knowledge and expertise, ensuring the highest level of scientific guidance.

33 Constitution of Ukraine no 254 k/96-BP of 28 June 1996 (as amended of 01 January 2020) <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text> accessed 11 July 2023.

34 Law of Ukraine no 270/96-BP 'On Advertising' of 3 July 1996 [1996] Vidomosti of the Verkhovna Rada of Ukraine 30/141 <https://zakon.rada.gov.ua/laws/show/270/96-вр#Text> accessed 11 July 2023.

35 Draf Law of Ukraine no 4103-1 'On State Symbols of Ukraine, the Procedure for their Use and Protection' of 03 March 2016 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=58320> accessed 11 July 2023.

36 Paris Convention for the Protection of Industrial Property (1883) <https://www.wipo.int/treaties/en/ip/paris/> accessed 11 July 2023; 'European Union Trade Mark Legal Texts' (*European Union Intellectual Property Office (EUIPO)*, 2023) <https://euipo.europa.eu/ohimportal/en/eu-trade-mark-legal-texts> accessed 11 July 2023.

37 'General Information on Article 6ter' (*WIPO*, 2009) <https://www.wipo.int/article6ter/en/general_info.html> accessed 27 July 2023.

38 'Legal Framework' (*European Medicines Agency*, 2023) <https://www.ema.europa.eu/en/about-us/what-we-do/legal-framework> accessed 12 July 2023; European Medicines Agency, *The European Regulatory System for Medicines: Bringing New Safe and Effective Medicines to Patients Across the European Union* (EMA 2023) <https://www.ema.europa.eu/en/about-us/how-we-work/european-medicines-regulatory-network> accessed 12 July 2023.

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The EMA and the Member States collaborate extensively to evaluate new medicinal products, ensure their safety, and address public health emergencies. This partnership involves the exchange of information across various regulatory domains, including the reporting of adverse drug reactions, the oversight of clinical trials, and the inspection of pharmaceutical manufacturers to ensure compliance with established standards of good clinical practice (GCP),[39] good manufacturing practice (GMP),[40] good distribution practice (GDP),[41] and good pharmacovigilance practice (GVP).[42] This cooperation is facilitated by EU legislation that mandates uniform rules and standards for authorising and overseeing medicines among Member States. These regulations effectively reduce duplication and enhance the efficiency of pharmaceutical regulation throughout the EU.

The legal framework governing veterinary and human medicines within the EU is primarily established through Regulations (EU) 2019/6[43] and (EC) 726/2004,[44] along with Directive 2001/83/EC,[45] which form the foundational basis for pharmaceutical law. Over time, these regulations have expanded to encompass specialised domains within the pharmaceutical sector, including pediatric, advanced therapy, orphan, and traditional herbal medicines. These sectors are subject to distinct legal frameworks and regulations tailored to address their specific characteristics and needs within the EU's pharmaceutical landscape.[46]

The European pharmaceutical regulatory framework is further underpinned by Directives 65/65/EEC,[47] 75/318/EEC,[48] and 75/319/EEC,[49] bolstered by 2004 EU regulations. A significant milestone in this framework is Directive 2011/62/EU,[50] amending Directive 2001/83/

39 'Good Clinical Practice' (*European Medicines Agency*, 2023) <https://www.ema.europa.eu/en/human-regulatory/research-development/compliance/good-clinical-practice> accessed 12 July 2023.

40 'Good Manufacturing Practice' (*European Medicines Agency*, 2023) <https://www.ema.europa.eu/en/human-regulatory/research-development/compliance/good-manufacturing-practice> accessed 12 July 2023.

41 'Good Distribution Practice' (*European Medicines Agency*, 2023) <https://www.ema.europa.eu/en/human-regulatory/post-authorisation/compliance/good-distribution-practice> accessed 12 July 2023.

42 'Good Pharmacovigilance Practices' (*European Medicines Agency*, 2023) <https://www.ema.europa.eu/en/human-regulatory/post-authorisation/pharmacovigilance/good-pharmacovigilance-practices> accessed 12 July 2023.

43 Regulation (EU) 2019/6 of the European Parliament and of the Council 'On Veterinary Medicinal Products and Repealing Directive 2001/82/EC (Text with EEA relevance)' of 11 December 2018 <https://eur-lex.europa.eu/eli/reg/2019/6/oj> accessed 11 July 2023.

44 Regulation (EC) no 726/2004 of the European Parliament and of the Council 'Laying Down Community Procedures for the Authorisation and Supervision of Medicinal Products for Human and Veterinary Use and Establishing a European Medicines Agency (Text with EEA relevance)' of 31 March 2004 <http://data.europa.eu/eli/reg/2004/726/oj> accessed 11 July 2023.

45 Directive 2001/83/EC of the European Parliament and of the Council 'On the Community Code Relating to Medicinal Products for Human Use' of 6 November 2001 <http://data.europa.eu/eli/dir/2001/83/oj> accessed 11 July 2023.

46 'Legal Framework' (n 38).

47 Council Directive 65/65/EEC 'On the Approximation of Provisions Laid Down by Law, Regulation or Administrative Action Relating to Proprietary Medicinal Products' of 26 January 1965 (Date of end of validity 17/12/2001) <http://data.europa.eu/eli/dir/1965/65/oj> accessed 11 July 2023.

48 Council Directive 75/318/EEC 'On the Approximation of the Laws of Member States Relating to Analytical, Pharmaco-Toxicological and Clinical Standards and Protocols in Respect of the Testing of Proprietary Medicinal Products' of 20 May 1975 (Date of end of validity 17/12/2001) <http://data.europa.eu/eli/dir/1975/318/oj> accessed 11 July 2023.

49 Second Council Directive 75/319/EEC 'On the Approximation of Provisions Laid Down by Law, Regulation or Administrative Action Relating to Proprietary Medicinal Products' of 20 May 1975 (Date of end of validity 17/12/2001) <http://data.europa.eu/eli/dir/1975/319/oj> accessed 11 July 2023.

50 Directive 2011/62/EU of the European Parliament and of the Council 'Amending Directive 2001/83/EC On the Community Code Relating to Medicinal Products for Human Use, as Regards the Prevention of the Entry into the Legal Supply Chain of Falsified Medicinal Products (Text with EEA relevance)' of 8 June 2011 <http://data.europa.eu/eli/dir/2011/62/oj> accessed 11 July 2023.

EC, which is vital in enhancing safeguards against counterfeit medicines within the EU supply chain. This directive mandates authenticity labels on pharmaceutical packaging, stricter manufacturing inspections, mandatory reporting of suspicious counterfeit medicines, and the requirement for online pharmacy websites to display a specific logo linked to official national registers. These measures fortify public health protection and uphold pharmaceutical market integrity in the EU.

Within the EU, medicines are classified into prescription and non-prescription, primarily based on their active ingredients. Some herbal and over-the-counter (OTC) medicines fall into the category that allows them to be sold outside of pharmacies, and certain products even permit self-service. However, it is crucial to emphasise that advertising prescription medicines to the general public is strictly prohibited. Conversely, OTC medicines, including those eligible for reimbursement, are subject to regulations permitting their promotion through various media channels.

A rigorous authorisation process is obligatory for all medicines before they can be marketed to ensure the availability of safe, effective, high-quality medicines for EU citizens and safeguard public health. The European regulatory system offers several routes for such authorisation, with the centralised marketing authorisation procedure being a prominent mechanism applicable to both human and veterinary medicines. This procedure operates under the framework of Regulations (EC) 726/2004 (as amended)[51] and (EU) 2019/6[52].

The centralised procedure is designed to simplify bringing medicines to the market by facilitating a single, EU-wide assessment and marketing authorisation that is legally valid across all EU Member States. Pharmaceutical companies are mandated to submit a single application for authorisation directly to the EMA. Subsequently, the Committee for Medicinal Products for Human Use or Committee for Veterinary Medicinal Products undertakes a comprehensive scientific evaluation of the application, ultimately furnishing a recommendation to the European Commission regarding the grant of marketing authorisation. Once granted by the European Commission, the centralised marketing authorisation automatically extends to cover all EU Member States.

The centralised marketing authorisation procedure is mandatory for most innovative medicines, including those featuring new active substances tailored for addressing critical conditions such as HIV/AIDS, cancer, diabetes, neurodegenerative disorders, autoimmune diseases, and specific viral infections. In addition, it covers medicines derived from biotechnology, advanced therapies like gene and cell therapy, tissue-engineered medicines, orphan drugs designed for rare diseases, and veterinary growth enhancers. However, the centralised procedure remains optional for other medicines, such as those with new active substances intended for indications beyond those previously mentioned, those demonstrating significant therapeutic, scientific, or technical advancements, and those serving broader public or animal health interests at the EU level.[53]

In the current regulatory landscape, the predominant route for evaluating and authorising new and pioneering medicines is the centralised authorisation procedure, which expedites their entry into the EU market. However, most generic and non-prescription medicines are evaluated and authorised nationally within the EU Member States. Furthermore, a substantial portion of older medicines currently available underwent initial authorisation through national-level procedures before establishing the EMA and harmonising regulatory processes at the EU level.

51 Regulation (EC) no 726/2004 (n 44).

52 Regulation (EU) 2019/6 (n 43).

53 'Authorisation of Medicines' (*European Medicines Agency*, 2023) <https://www.ema.europa.eu/en/about-us/what-we-do/authorisation-medicines> accessed 12 July 2023.

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Each EU Member State maintains its distinct national authorisation processes for medicines. When pharmaceutical companies seek authorisation in multiple Member States, they can opt for two procedures. The Decentralised Procedure permits concurrent authorisation in several EU Member States for medicines outside the centralised procedure's scope that have not been previously authorised in any EU country. Conversely, the Mutual Recognition Procedure allows companies with existing authorisation in one EU Member State to seek recognition in others, facilitating the authorisation process by relying on shared scientific assessments.

For example, two primary regulatory authorities in Germany oversee pharmaceutical products: the Federal Institute for Drugs and Medical Devices and the Paul Ehrlich Institute.[54] The first institution holds responsibility for a wide range of pharmaceuticals, including conventional medicines and medical devices. At the same time, the Paul Ehrlich Institute specialises in regulating advanced biotechnology products such as sera, vaccines, and genetically engineered medical components. Regardless of whether these pharmaceuticals are intended for the German market or export, both authorities subject them to rigorous assessments to ensure they meet stringent quality, safety, and efficacy standards before granting authorisation. This rigorous evaluation process underscores Germany's commitment to safeguarding public health and maintaining the integrity of its pharmaceutical sector.

Over the past years, Ukraine has made substantial progress in aligning its pharmaceutical legislative framework with EU laws, demonstrating its commitment to integrating with European regulatory standards.[55] This harmonisation effort encompasses various aspects, including establishing the State Service of Ukraine for Medicines and Drugs Control as the country's pharmaceutical regulatory authority, mirroring the EMA's role in the EU. Moreover, Ukraine has made strides in synchronising its GMP standards with EU requirements, thereby ensuring the quality and safety of locally manufactured pharmaceuticals. Additionally, the nation has introduced streamlined processes and criteria for the marketing authorisation of medicines, making them more compatible with EU regulations. These initiatives reflect Ukraine's dedication to achieving regulatory alignment with the EU in the pharmaceutical sector.

6 RESEARCH METHODS

This research explores the opportunities and challenges Ukrainian products face, particularly in the pharmaceutical sector, as they seek to leverage the strengthened national brand resulting from the Russian full-scale invasion. The focus is primarily on the German market, chosen due to Ukraine's long-standing presence in the pharmaceutical industry, featuring established manufacturers and a proficient workforce.[56] Ukraine has several competitive advantages, including cost-effectiveness, strong manufacturing capacities, and a diverse product portfolio. These factors enhance the attractiveness of Ukrainian pharmaceutical products to German buyers who prioritise high-quality offerings at competitive prices.

The growing interest in Ukraine provides a promising opportunity for increased support and investment, particularly in the post-war period. Such support could lead to improvements in

54 Pharmaceuticals Export Promotion Council of India, 'Regulatory and Market Profile of Germany' (*Pharmexcil*, 2018) <https://pharmexcil.com/uploads/countryreports/Germany-Regulatory_Market_profile.pdf> accessed 11 July 2023.

55 Ruslan S Fyl and others, 'Legal Regulation of the EU Pharmaceutical Market and the Possibility of Implementing the European Experience in Ukraine' (2019) 9(4) Journal of Advanced Pharmacy Education and Research 1.

56 In 2021, the Ukrainian pharmaceutical industry was among the ten biggest pharmaceutical industries in the Central and Eastern European. More detailed: ReportLinker, *Pharmaceutical and Healthcare Industry in Ukraine: Forecast and Analysis 2021* (Aruvian's R'search 2021) <https://www.reportlinker.com/p06103753/Pharmaceutical-and-Healthcare-Industry-in-Ukraine-Forecast-and-Analysis.html > accessed 11 July 2023.

infrastructure, regulatory reforms, and investments in the pharmaceutical sector, ultimately making Ukrainian pharmaceutical products more appealing in the German market. Furthermore, the geopolitical dynamics surrounding Ukraine and Germany's potential political motivations to bolster economic relations create avenues for Ukrainian pharmaceutical companies to enter the German market. The EU-Ukraine Association Agreement[57] further facilitates trade and market access for Ukrainian pharmaceutical products in Germany and the broader European Union.

Moreover, Germany's extensive and advanced healthcare system generates substantial demand for pharmaceutical products, enabling Ukrainian manufacturers to access an established market. Germany's reputation for strict quality standards in healthcare benefits Ukrainian pharmaceutical companies capable of meeting these requirements and obtaining the necessary certifications. Despite the ongoing conflict in Ukraine introducing uncertainties, establishing a presence in the German market positions Ukrainian pharmaceutical companies for future growth and allows them to leverage opportunities as the situation stabilises. Additionally, Ukraine's geographical proximity to Germany offers logistical advantages, including shorter delivery times and lower shipping costs, further enhancing the attractiveness of Ukrainian products to German buyers.

Hence, the selection of the German market aligns perfectly with the research objective of exploring the opportunities and challenges for Ukrainian pharmaceutical products in the European Union. The well-developed industry, growing interest and support, geopolitical considerations, market potential, and the potential for future stability collectively justify the focus on the German market.

The research methodology adopts a two-stage approach to fulfil the research objective. In the initial stage, desk research examines the external environmental factors in the German pharmaceutical market, contributing to the opportunities or threats encountered by "Made in Ukraine" pharmaceuticals. Subsequently, the second stage encompasses a survey administered to German residents, aiming to explore their purchasing behaviour and attitudes towards Ukrainian medicine and the country as a whole.

The PESTEL analysis framework was applied to scrutinise the macro-environmental factors influencing Ukrainian pharmaceutical manufacturers in the German market. This methodical examination encompassed various categories of factors, spanning political, economic, social, legal, and other dimensions. A rigorous selection was undertaken to identify the most influential factors affecting these companies.[58] Each selected factor underwent an expert evaluation employing a 10-point rating scale. This scale stratified the factors into three discrete tiers of influence. Factors with a low impact were represented by scores within the [0.0 to 3.3] range. Those with a moderate impact received scores within the [3.4 to 6.6] range. Factors deemed to have a high impact were identified by scores ranging from [6.7 to 10.0].

Specific evaluation criteria were defined for each factor, serving as a structured framework for the assessment process. These criteria provided a clear roadmap for analysis, ensuring a systematic and comprehensive evaluation. Furthermore, weighting factors were introduced to quantify the relative significance of each factor. Unlike traditional percentage-based calculations, these weighting factors were expressed as fractions of one, offering a more precise measurement of each factor's impact on Ukrainian pharmaceutical companies' activities in the German market. Following the evaluation process, strategic approaches were formulated to leverage opportunities and address threats associated with each factor selected for analysis. These strategies encompassed proactive measures to harness favourable conditions and

57 'EU–Ukraine Association Agreement "Quick Guide to the Association Agreement"' (*Delegation of the European Union to Ukraine*, 25 September 2016) <https://www.eeas.europa.eu/node/10418_en> accessed 11 July 2023.

58 Natalia Kochkina, *Marketing Management: a Textbook* (Interservis 2019).

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responsive actions to mitigate potential risks, culminating in a comprehensive approach to navigating the complex macro-environmental landscape of the German market.

The survey aimed to understand the current perception of Ukraine among German residents, specifically focusing on how this perception influences consumer motivations. Four research questions were formulated to guide the investigation into the motivations that shape the selection of pharmaceutical products:

RQ1: What underlying motivations drive Germans when choosing pharmaceutical products?

RQ2: To what extent are German residents familiar with Ukrainian pharmaceutical products and Ukraine as a country?

RQ3: Is there a correlation between the support shown towards Ukraine during times of war and the attitudes of Germans towards Ukrainian medicine?

RQ4: What are the Germans' primary associations with Ukraine as a nation?

The survey was conducted from March to May 2022, coinciding with the early stages of Russia's full-scale invasion of Ukraine. An online self-administered questionnaire was employed to gather data, which collected responses from a random sample comprising 78 individuals. The sample was characterised by a predominant representation of socially and economically active individuals, with a noteworthy proportion of female respondents (65%) and a significant majority holding EU citizenship (85%). Moreover, a significant % of the sample (84%) indicated employment or self-employment, covering various professions, including office workers, business owners, and freelancers. It is worth mentioning that approximately half of the survey participants were currently pursuing higher education at the university level.

The survey sample's gender distribution, with a slightly higher percentage of females, may not perfectly align with the overall gender distribution of the German population, which is roughly equal in terms of males and females. However, this minor discrepancy should not significantly impact the overall findings and insights drawn from the survey data. Regarding employment status, the substantial representation of employed or self-employed individuals in the sample suggests that it reflects the broader population's workforce participation rates and economic activity. This alignment with the employment status of the general population enhances the survey's relevance and applicability to understanding consumer behaviour in Germany. The presence of a significant portion of respondents engaged in higher education at the university level is consistent with Germany's robust education system and the prevalence of individuals pursuing tertiary qualifications. This sample characteristic underscores its suitability for exploring consumer attitudes and motivations among a well-educated population segment.

In summary, while the sample may not perfectly mirror the demographic distribution of the entire German population, it generally aligns with expectations based on knowledge of German demographics. The sample's characteristics reflect the socio-economic activity, gender representation, and educational aspirations observed in the broader German population, making it suitable for the study's objectives.

7 FACTORS AFFECTING "MADE IN UKRAINE" PHARMACEUTICALS IN THE GERMAN MARKET: DESK RESEARCH ANALYSIS

The desk research indicates that the German market offers more opportunities than threats for Ukrainian pharmaceutical companies. Political factors suggest that the German government's support during medicine shortages resulting from the pandemic reduces economic barriers and expedites the introduction of generic pharmaceuticals, creating an opportunity. Further-

more, Germany's relatively low level of corruption, ranked 17th worldwide in transparency, provides a less hostile environment for Ukrainian companies seeking to enter the market. From an economic perspective, Germany's high income level signifies an opportunity since countries with higher incomes tend to prioritise scientifically-based medicine and exhibit higher consumption rates. However, the significant growth rate of the European pharmaceutical market poses a mild threat due to intensified competition. On a positive note, the COVID-19 crisis has stimulated increased demand for pharmaceutical products, presenting an opportunity for Ukrainian companies to meet this rising need.

Regarding social factors, the similarity between the EU's and Ukrainian medical representative systems allows Ukrainian pharmaceutical companies to navigate the German market relatively easily due to an open, accessible, and lightly regulated system. Germany's ageing population also creates an opportunity as there is a greater demand for specific medications such as cardiovascular medicine, pain relievers, muscle pain management drugs, supplements, and vitamins. The prevailing trend of self-medication in Europe further enhances the opportunity, as many Europeans rely on medication instructions to address minor ailments. Furthermore, the role of pharmacist recommendations in customer decision-making presents an avenue for successful market entry by fostering strong business relationships with pharmacies.

From a technological standpoint, Germany's well-developed EHealth system does not currently pose a significant threat, given its participation in authorised pharmaceutical producers. However, the emergence of new medications, particularly for chronic illnesses, may pose a low threat once they become available to the broader population. Regarding legal considerations, the rapid updates to the certification system in Germany present a mild threat, as pharmaceutical companies must stay abreast of changing laws and regulations to ensure compliance. Furthermore, the dominance of major pharmaceutical companies controlling a substantial portion of the European market may present challenges in accessing distribution channels and intermediaries. Additionally, the growth rate of prescription-only medicines (POM) poses a mild threat, as Ukrainian pharmaceutical companies must navigate the bureaucratic process to become part of the POM system.

Table 1 summarises market opportunities for Ukrainian pharmaceutical manufacturers in the German market. Each factor is assessed based on specific criteria with an assigned evaluation score (CE) and weight (W). The weighted evaluation (WE) is obtained by multiplying the CE with the assigned weight. The total weighted evaluation reflects the overall potential for market opportunities, which in this case is 6.20.

Table 1. *Analysis of Market Opportunities for Ukrainian Pharmaceutical Manufacturers in the German Market*[59]

Factor	Evaluation criteria			CE	W	WE	Way to leverage the opportunity
	Low (0-3.3)	**Medium (3.4-6.6)**	**High (6.7-10)**				
COVID crisis: consumption growth	Less than 5€ annually per person	5-12€ annually per person	More than 12€ annually per person	7	0.25	1.75	Enhance product range and supply chain efficiency to meet growing consumer demand

59 Compiled by the authors based on: Julia Albrecht and Gregor Kemper, *The Pharmaceutical Industry in Germany: Industry Overview 2021/2022* (GTAI 2020) <https://www.gtai.de/en/invest/service/publications/the-pharmaceutical-industry-in-germany-63940> accessed 11 July 2023; 'Darnitsa Pharmaceutical Company: History' (*Darnitsa*, 2022) <https://www.darnitsa.ua/en/history> accessed 11 July 2023; Christina Economides, 'EU's New Pharmaceutical Strategy' *The National Law Review* (*Hinsdale IL*, 3 December 2020) <https://www.natlawreview.com/article/eu-s-new-pharmaceutical-strategy> accessed

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Factor	Evaluation criteria			CE	W	WE	Way to leverage the opportunity
	Low (0-3.3)	Medium (3.4-6.6)	High (6.7-10)				
COVID crisis: medicine shortage	Fast-track legal processes for pharmaceutical manufacturers' entry	Reduction of economic barriers to pharmaceutical manufacturers' entry	Governmental support for pharmaceutical manufacturers, including lower taxes and state procurements	6	0.20	1.20	Optimise production capabilities and expedite market entry
High market growth	Less than 5% annually	5-10% annually	More than 10% annually	7	0.10	0.70	Develop strategic marketing initiatives and product diversification
High-income level	Less than 2% GDP growth rate	2-5% GDP growth rate	More than 5% GDP growth rate	5	0.10	0.50	Position products as premium offerings, emphasising quality, innovation, and exclusivity
Well-developed medical representative system	Permitted and monopolized	Permitted, developed, and accessible	Developed, regular, accountable, and transparent	5	0.20	1.00	Establish strong relationships with healthcare professionals
High average age of the population	Under 29 years	29-45 years	Over 45 years	7	0.05	0.35	Offer pharmaceutical products that cater to the specific health needs and conditions associated with aging
Self-medication trend	Practised by less than 15% of the population	Practised by 15-40% of the population	Practised by more than 40% of the population	7	0.10	0.70	Offer a wide range of OTC pharmaceutical products, including pain relievers, supplements, and vitamins
TOTAL					**1.0**	**6.20**	

11 July 2023; European Medicines Agency, 'Shortages Catalogue' (*European Medicines Agency*, 2020) <https://www.ema.europa.eu/en/human-regulatory/post-authorisation/availability-medicines/shortages-catalogue> accessed 12 July 2023; Eurostat, 'Medicine Use Statistics' (*Eurostat: Statistics Explained*, 2021) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Medicine_use_statistics> accessed 11 July 2023; Eurostat, 'Causes of Death Statistics' (*Eurostat: Statistics Explained*, 2022) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Causes_of_death_statistics> accessed 11 July 2023; Nathaniel Flakin, 'Could Germany's obsession with homeopathy explain the low vaccination rate?' (*Exberliner*, 5 January 2022) <https://www.exberliner.com/politics/germany-homeopathy-vaccination-rate-covid> accessed 21 June 2023; Grand View Research, *Europe Pharmaceutical Market Size, Share & Trends Analysis Report By Product (Branded, Generic), By Type (Prescription, OTC), By Therapeutic Category, By Region, And Segment Forecasts, 2021–2028* (Grand View Research 2021) <https://www.grandviewresearch.com/industry-analysis/europe-pharmaceutical-market-report> accessed 8 July 2023; Matej Mikulic, 'Pharmaceutical Industry in Europe — Statistics & Facts' (*Statista*, 31 August 2022) <https://www.statista.com/topics/8631/pharmaceutical-industry-in-europe> accessed 11 July 2023; OECD and European Union, *Health at a Glance: Europe 2018: State of Health in the EU Cycle* (OECD Pub 2018) 140-1, doi:10.1787/health_glance_eur-2018-en; Quintiles, 'Market Access in the German Healthcare System: National and Subnational Structures to Help Navigate Complexity' (*IQVIA*, 2015) <https://www.iqvia.com/-/media/library/brochures/market-access-in-the-german-healthcare-system.pdf?vs=1> accessed 11 July 2023.

Notes: CE denotes the current evaluation of the factor, W represents the assigned weight, WE represents the weighted evaluation, and the 'Way to Leverage the Opportunity' column suggests strategies to capitalise on the identified opportunities.

The analysis underscores several advantageous opportunities for Ukrainian pharmaceutical manufacturers in the German market. These opportunities encompass leveraging the COVID crisis for consumption growth, addressing medicine shortages, capitalising on high market growth, targeting a high-income level demographic, utilising a well-developed medical representative system, tapping into the self-medication trend, and catering to the needs of an ageing population. To capitalise on these opportunities, Ukrainian companies should enhance their product portfolio and improve supply chain efficiency, optimise their production capabilities, develop strategic marketing initiatives, position their products as premium offerings, establish strong relationships with healthcare professionals, offer specialised products for the ageing population, and provide a wide range of OTC pharmaceuticals. The overall weighted evaluation of 6.20 indicates significant market potential and growth opportunities.

On the other hand, Table 2 examines the threats confronting Ukrainian pharmaceutical manufacturers in the German market. These threats encompass a low corruption level, limited R&D financing, modest benefits for EU businesses, POM's high growth rate, rapid certification requirements updates, the influence of pharmacist recommendations on customer choice, and the availability of new medications. To mitigate these threats, Ukrainian companies should prioritise enhancing transparency and anti-corruption measures, increasing R&D funding, optimising costs through partnerships, closely collaborating with medical representatives, integrating with the existing EHealth system, improving communication and cooperation with regulatory authorities and industry stakeholders, promoting collaboration between pharmacists and healthcare professionals, strengthening ties with research institutions, establishing strategic partnerships with distributors, and collaborating with German insurance providers for broader coverage. Despite threats, the weighted evaluation of 5.50 indicates that the German pharmaceutical market offers more opportunities than challenges for Ukrainian manufacturers.

Table 2. *Analysis of Market Threats for Ukrainian Pharmaceutical Manufacturers in the German Market*[60]

Factor	Evaluation criteria			CE	W	WE	Way to overcome the threat
	Low (0-3.3)	**Medium (3.4-6.6)**	**High (6.7-10)**				
Low corruption level	0-25 Corruption Perceptions Index	26-75 Corruption Perceptions Index	76-100 Corruption Perceptions Index	2	0.05	0.1	Enhance transparency and enforce stricter anti-corruption measures
Financing support for R&D	Less than 10% of the budget	10-20% of the budget	More than 20% of the budget	6	0.10	0.60	Increase funding allocation for R&D initiatives

60 Compiled by the authors based on: Albrecht and Kemper (n 59); Darnitsa (n 59); Economide (n 59); European Medicines Agency (n 59); Eurostat, Medicine (n 59); Eurostat, Causes (n 59); Flakin (n 59); Grand View Research (n 59); Mikulic (n 59); OECD and European Union (n 59); World Health Organization, *Access to Medicines and Health Products Programme: Annual Report 2020* (WHO 2021) <https://iris.who.int/handle/10665/342314> accessed 5 July 2023; Quintiles (n 59).

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Factor	Evaluation criteria			CE	W	WE	Way to overcome the threat
	Low (0-3.3)	Medium (3.4-6.6)	High (6.7-10)				
EU businesses benefits	Less than 3% reduction in pharma prices	3-7% reduction in pharma prices	More than 7% reduction in pharma prices	7	0.20	1.40	Establish partnerships for cost optimisation
POM growth rate	Less than 7% annually	7-15% annually	More than 15% annually	7	0.20	1.40	Work in partnership with medical representatives
Developed EHealth system	Allows additional opportunities without restrictions	Has specific requirements but does not entirely limit access	Demands participation, restricting customers	4	0.10	0.40	Collaborate with the existing EHealth system
Rapid certification system updates	Information available prior to a public announcement	Information becomes available after a public decision	Information becomes available late	6	0.10	0.60	Enhance communication and collaboration between regulatory authorities and industry stakeholders
Pharmacist recommendation role in customer choice	Plays a decisive role for less than 20% of customers	Plays a decisive role for 20-50% of customers	Plays a decisive role for more than 50% of customers	4	0.05	0.20	Promote collaboration between pharmacists and healthcare professionals
Invention of new medication	Targets rare illnesses or conditions; slow entry to the market	Targets chronic illnesses or COVID-related syndromes; available to exclusive segments	Targets chronic illnesses or COVID-related syndromes; available to the public immediately	5	0.05	0.25	Strengthen collaborations with research institutions and establish partnerships to facilitate technology transfer and knowledge exchange
Strategic partnerships with distributors	Immediate access to 5 or more distribution channels upon market entry	Strong competition for access to distribution channels	Limited and exclusive access to distribution channels	3	0.05	0.15	Strategic partnerships with established German distributors
Medical insurance system	Coverage extends to less than 7% of the population	Coverage extends to 7-20% of the population	Coverage extends to more than 20% of the population	4	0.10	0.40	Collaboration with German insurance providers for expanded coverage
TOTAL					**1.0**	**5.50**	

Notes: CE denotes the current evaluation of the factor, W represents the assigned weight, WE represents the weighted evaluation, and the 'Way to Overcome the Threat' column suggests strategies to address the identified threats.

8 GERMAN ATTITUDES AND PURCHASING BEHAVIOUR TOWARD UKRAINIAN MEDICINE AND THE COUNTRY: SURVEY ANALYSIS

The survey results offer insights into the motivations that guide Germans in selecting pharmaceutical products. The analysis of responses and statistical techniques identified key factors influencing the decision-making process. Understanding consumer behaviour within the pharmaceutical market empowers companies to align their offerings with consumer preferences and efficiently meet the needs of the German population.

RQ1: What underlying motivations drive Germans when choosing pharmaceutical products?

The survey results revealed that many participants reported regular consumption of medicine for chronic diseases (53.85%), with a majority indicating regular intake of vitamins and supplements (62.82%). The 95% confidence intervals for these proportions suggest that the actual percentages of individuals engaging in these practices likely fall within 41.60% to 66.00% for medicine consumption and 51.32% to 72.76% for vitamins and supplements. Acknowledging the potential variation in individual interpretations of the term 'regularly' is essential, as this term was not explicitly defined in the questionnaire.

The survey also shed light on the decision-making patterns when individuals experience illness or notice body changes. A significant portion of respondents (37.18%) preferred visiting a pharmacy and consulting with a pharmacist, while a notable percentage (17.95%) relied on online recommendations. A smaller proportion (2.56%) sought advice from family members, while the majority (42.31%) opted to visit a doctor and follow their prescribed treatments. These findings correspond to the significance of various factors in selecting medicine, vitamins, and supplements.

The importance of a doctor's prescription received the highest median rating of 5, indicating its paramount significance in respondents' decision-making process. Familiarity with the manufacturer brand, pharmacist recommendation, and the home country of production received median ratings of 3 and 4, underscoring their considerable influence. Online reviews and additional health properties garnered a median of 3, suggesting moderate importance. In contrast, packaging obtained a lower median rating of 2, implying a lesser impact on decision-making (see Fig. 1).

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Figure 1. *Determinants of Medicine Selection among German Consumers: Average Importance Scores*[61]

The survey findings indicated that a significant proportion of consumers (43.59%) adhere to doctors' prescriptions in the context of generics. Some consider generic alternatives influenced by pharmacist consultations (21.79%) or price considerations (16.67%). These results underscore the diverse attitudes and considerations when choosing generic medicine. For pharmaceutical companies aiming to navigate the complex landscape of consumer preferences and decision-making processes, it is essential to establish strong relationships with medical professionals and pharmacists. This will enable them to understand better and cater to their target audience's needs and considerations.

RQ2: To what extent are German residents familiar with Ukrainian pharmaceutical products and Ukraine as a country?

The survey results confirm the expected outcome that most participants had not experienced Ukrainian products. Using the Wilson score interval formula, the estimated proportion of respondents who have not tried any Ukrainian-made products falls within the range of 64.18% to 77.01% with a 95% confidence level. However, it is noteworthy that a significant portion of respondents expressed uncertainty about the origin of the products they consume, indicating a lack of awareness. Only 9% of respondents claimed familiarity with Ukrainian goods in at least one category. Food items and online services such as Grammarly were frequently cited among the products mentioned by participants. These findings emphasise the necessity for heightened efforts in raising awareness and promoting Ukrainian products to appeal to a broader consumer base. Enhancing visibility and educating consumers about the quality and advantages of Ukrainian goods are crucial steps toward fostering market acceptance and expanding their reach.

RQ3: Is there a correlation between the support shown towards Ukraine during times of war and the attitudes of Germans towards Ukrainian medicine?

The survey results indicate a high willingness among respondents to support Ukraine by purchasing its pharmaceutical products. Specifically, 47.44% of respondents expressed their readiness to buy these products if prescribed by their doctors, while 38.46% would do so based on pharmacist recommendations. Additionally, 10.26% of respondents would support

61 Compiled by the authors based on the survey results.

Ukraine by purchasing its vitamins and supplements. In contrast, only a small proportion of respondents (5.13%) stated they would not support Ukraine in this manner.

Confidence intervals were calculated using the Wilson score interval method at a 95% confidence level to provide a reliable estimate of the proportions. The confidence intervals for the 'Yes' responses indicate that the true proportion of respondents willing to support Ukraine falls between 94.34% and 99.35%. Conversely, the confidence interval for the 'No' responses suggests that the proportion of respondents unwilling to support Ukraine ranges from 0.65% to 5.66%.

These findings demonstrate a strong inclination among most Germans to support Ukraine by purchasing its pharmaceutical products. The results emphasise the significance of doctors' and pharmacists' opinions and recommendations in shaping consumer behaviour. Effective communication between healthcare professionals and patients is crucial in guiding medication choices and fostering support for products from Ukraine.

RQ4: What are the Germans' primary associations with Ukraine as a nation?

The survey findings reveal that the predominant associations of Germans with Ukraine include the Chornobyl tragedy (53.00%), Eurovision (42.00%), and personal acquaintance with Ukrainians (31.00%). These statistics validate that, for many EU residents, their initial exposure to Ukraine was through the significant and wide-reaching impact of the Chornobyl incident. It suggests that their understanding of the country surpasses surface-level familiarity.

The substantial contribution of Ukrainians to shaping the knowledge and the image of Ukraine implies that every citizen, to some extent, serves as a cultural diplomat or representative of his or her country. The responses further support the idea that the perception of Ukraine as a 'singing nation' is not solely a government-driven domestic agenda but has effectively shaped the perception of external consumers. This indicates that cultural diplomacy can be integrated into a public relations strategy as it already carries an associative framework. Consequently, Ukraine was not an abrupt and unfamiliar entity for EU residents solely due to the full-scale Russian invasion but a country they had been acquainted with long before.

The open-ended questionnaire deepened the previous association analysis by inviting respondents to provide their spontaneous associations evoked by the word 'Ukraine.' A total of 711 associations were documented, demonstrating a positive response as respondents exceeded the minimum requirement of five associations (see Fig. 2). Given that the survey was conducted in Germany, a notable percentage of associations (4.50%) revolved around the Klitschko brothers — well-known Ukrainian heavyweight boxing champions who built their careers in Germany.[62]

In line with previous findings, the historical event of Chornobyl strongly influences perceptions of Ukraine. While this incident had already garnered global recognition due to its profound impact, the release of the HBO mini-series in 2019[63] further heightened awareness of the tragedy. Associations related to Chornobyl were mentioned at a frequency exceeding 5.00%. It is reasonable to expect these associations to become more pronounced in light of the Russian occupation of the Chornobyl and Zaporizhzhia nuclear power plants at the beginning of the full-scale invasion, coupled with the ongoing threats of potential sabotage.[64] These developments entail global risks of new radiation contamination, which could further

62 *Klitschko* <https://klitschko.com/en> accessed 11 July 2023.

63 'Chernobyl' (*The official podcast of the mini-series* from *HBO*, 2022) <https://www.hbo.com/chernobyl> accessed 11 July 2023.

64 Marc Santora, 'Ghosts Past and Present Cross Paths as War Comes to Nuclear Wasteland' *The New York Times* (New York, 14 April 2023) <https://www.nytimes.com/2023/04/14/world/europe/chernobyl-russia-ukraine-war.html> accessed 11 July 2023.

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cement Chornobyl's significance in public perception and awareness.

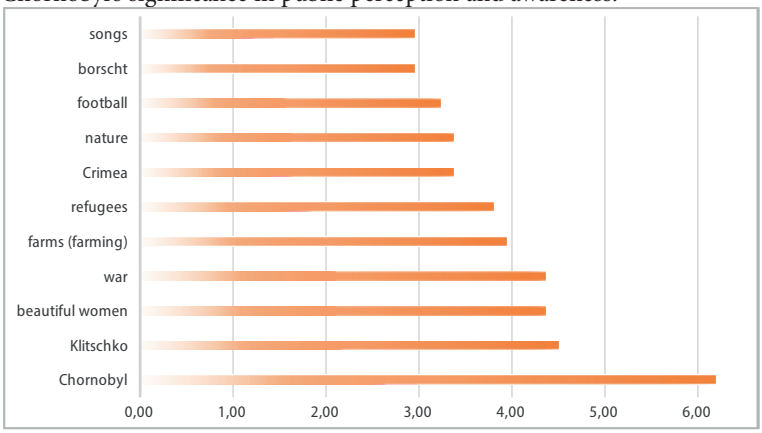

Figure 2. *Associations of German Consumers with Ukraine: Distribution and Percentages*[65]

The stereotype of Ukrainian women's beauty is a recurring theme (4.36%), encompassing both positive and negative connotations. The negative aspect of this association underscores a shallow focus on appearance without a deeper appreciation of Ukrainian nature and culture. This narrow assessment based solely on physical attractiveness may stem from stereotypes associated with sex tourism. Conversely, the positive interpretation suggests associating Ukraine with beauty reflects a favourable attitude toward the nation.

The presence of associations related to 'war', 'refugees,' and 'Crimea' does not inherently denote a positive or negative attitude. However, their prominence suggests that respondents are well-informed about current events, including the tragic days of 2014. Associations related to farming and nature indicate a prevailing perception of Ukraine as an agricultural country. Although the agricultural and pharmaceutical sectors are distinct, the link between homoeopathy and natural resources can be used to construct a narrative based on these associations.

The final three associations foster an awareness of Ukraine's cultural life, encompassing its achievements, cuisine, and creativity. These associations fall within the entertainment category and offer insights into the perception of a typical Ukrainian as athletic, musically inclined, and adhering to a healthy diet. This image portrays a relatively healthy individual without specific expertise.

The survey results indicate that European consumers have a limited and somewhat narrow perception of Ukrainian products, mainly associating Ukraine with agricultural goods. However, their overall perception of Ukraine tends to be neutral, which creates an opportunity to shape new stereotypes and associations. Notably, the ongoing war and Ukraine's struggle against Russian aggression have made freedom a significant value associated with the country. Although the concept of freedom may initially appear contradictory to quality assurance principles in production and health, it can be reframed as the absence of restrictions and limitations imposed by diseases and illnesses. Highlighting how pharmaceutical products promote a healthy state of the body and provide individuals with freedom from health-related constraints could be a compelling message for Ukrainian manufacturers in their communication strategies. By communicating these values, Ukrainian companies could enhance their positioning in the German market, emphasising their commitment to ethical practices, patient-centric communication, and transparent operations (Fig. 3). It allows them

65 Compiled by the authors based on the survey results.

to align with their target audience's values and showcase their products' positive impact on individuals' well-being and quality of life.

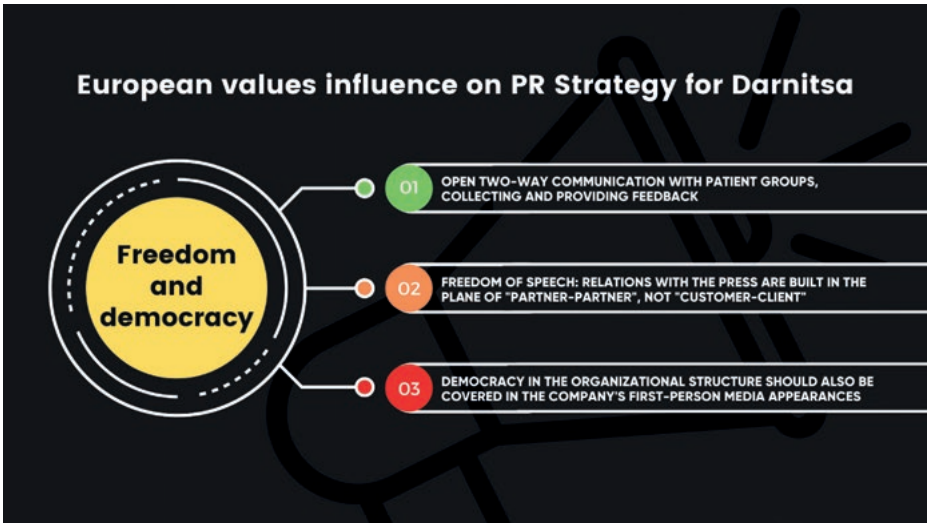

Figure 3. *European Values of Freedom and Democracy in the Communication Strategies of Ukrainian Manufacturers*[66]

9 CONCLUSION

This article delves into the connection between the positive perception of Ukraine resulting from global support during the full-scale Russian invasion, the promotion of Ukrainian brands through the "Made in Ukraine" concept, and the consumption of national products. The desk research analysis and survey findings provide a deeper understanding of the opportunities and challenges Ukrainian pharmaceutical manufacturers face in the German market. This research provides practical implications for Ukrainian brands seeking to leverage Ukraine's favourable international perception.

The COO effect is pivotal in shaping consumer perceptions and purchase decisions. Factors such as reputation, historical associations, and cultural stereotypes influence these perceptions, impacting preferences for domestic or foreign products. While ethnocentrism often drives the home country bias, consumers may also embrace foreign brands aligned with their values. Notably, limited research explores the influence of war and adverse circumstances on consumer behaviour, presenting an area for future investigation.

Using "Made in..." labels involves legislative complexities related to COO determination, labelling requirements, and compliance enforcement. Pharmaceutical regulation is a complex European network prioritising safety and counterfeit prevention, focusing on uniform rules and efficiency. Germany, as a key EU Member State, maintains rigorous pharmaceutical oversight. Ukraine's commitment to aligning its pharmaceutical regulations with EU standards demonstrates its dedication to regulatory convergence. This aligns with broader efforts to integrate with European regulatory norms, positioning Ukraine as a potential player in the European pharmaceutical sector. Understanding the COO effect and navigating related

66 Compiled by the authors based on the survey results.

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legislative aspects are vital for businesses seeking international success in today's competitive global market.

The desk research analysis identified several market opportunities for Ukrainian pharmaceutical manufacturers in the German market. These opportunities include leveraging the COVID-19 crisis to stimulate consumption growth, addressing medicine shortages, capitalising on the high growth potential of the market, targeting high-income demographics, utilising a well-established medical representative system, tapping into the self-medication trend, and catering to the needs of an ageing population. While certain threats were also identified, such as POM's high growth rate and rapid updates in certification requirements, the overall evaluation suggests that the German pharmaceutical market presents more opportunities than challenges for Ukrainian manufacturers.

The survey analysis explored the motivations and attitudes of Germans toward Ukrainian pharmaceutical products. It revealed that many Germans regularly consume medicine for chronic diseases and rely on vitamins and supplements. The survey also emphasised the importance of doctors' prescriptions and pharmacists' recommendations in decision-making. Although most respondents were unfamiliar with Ukrainian pharmaceutical products, there is potential to increase awareness and promote them among the German population. Notably, the survey demonstrated a strong willingness among Germans to support Ukraine by purchasing its pharmaceuticals, indicating a positive association between the support shown towards Ukraine during times of war and the attitudes of Germans towards Ukrainian medicine. Germans primarily associate Ukraine with the Chornobyl tragedy, Eurovision, acquaintances with Ukrainians, and perceptions of Ukrainian women's beauty.

Based on these findings, Ukrainian pharmaceutical manufacturers can leverage the positive perception of Ukraine in the German market through effective communication strategies. By emphasising core values of freedom, democracy, and ethical practices, companies could resonate with German consumers and set Ukrainian brands apart from competitors. Establishing strong relationships with healthcare professionals and recognising the influential role of pharmacists in customer decision-making could also contribute to successful market entry. Additionally, Ukrainian companies could capitalise on existing associations related to cultural achievements and natural resources to shape a multidimensional and positive image of Ukraine in the eyes of German consumers.

Looking ahead, Ukrainian pharmaceutical manufacturers should focus on enhancing their product range and supply chain efficiency, optimising production capabilities, developing strategic marketing initiatives, and cultivating strong relationships with healthcare professionals. Offering specialised products for the ageing population and providing a wide range of OTC pharmaceuticals are essential steps. Continuous efforts to raise awareness and promote Ukrainian products in the German market are vital, focusing on highlighting quality, efficacy, and ethical practices. Collaborating closely with regulatory authorities, industry stakeholders, research institutions, and distributors will be crucial in navigating the German market and accessing distribution channels.

While this study specifically focused on the German market, the insights gained are also relevant to other international markets. The findings from this study contribute to understanding the country's image, national branding, and consumer preferences, providing a foundation for Ukrainian brands to expand their presence and effectively compete globally.

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Research Article

CAN WAR IN UKRAINE BE A STEP BACK IN THE CLIMATE CHANGE FIGHT?

Din Shahiqi*

ABSTRACT

Background: *The war in Ukraine, the major event of recent years in relation to public international law, is being challenged by the actions of the Russian side by interfering in the territory of a sovereign state with the intention to annex specific parts of the state of Ukraine. The special importance of this war is the international community's involvement, striving to uphold principles of international justice, preventing these situations from happening in Europe. Beyond the tragic loss of people's lives, a critical point is the degradation of the environment in these areas along with the possibility of destroying the states' efforts to fight climate change. This war has far-reaching consequences beyond the battlefield. It impacts numerous social aspects and has a direct impact on the social well-being of society. Besides this, the increase of inflation rates globally, an energy crisis, disruptions within the transport market of goods and services, as well as other interconnected aspects of social life in general, are being directly impacted.*

This research encompasses an analysis across different categories, starting with GHG emissions, the effects of bombing campaigns in the vicinity of nuclear reactors, and assessing the potential risks of meltdowns and their subsequent repercussions.

We have also analysed the socio-economic aspect, global market movement, energy crisis, and inflation. A critical discussion revolves around shifting the focus from fighting climate change towards addressing the current situation created by the war in Ukraine. Moreover, part of the research encompasses gauging public sentiment on specific questions and comparing the results from two different groups to discern potential divergencies in viewpoints.

Methods: *Methodology used: collection of materials from books, articles, official data, and other scientific reports; analysing and structuring the collected material; surveys.*

Results and Conclusions: *Based on the research and analysis made throughout the study, we concluded that the war in Ukraine has been a step back in the fight against climate change.*

1 INTRODUCTION

Institutions with an international character, established to uphold 'world order' consistently encounter challenges stemming from different actors of the international community. These institutions and their mechanisms were created to avoid possible conflicts and address these

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general interest matters. By increasing economic cooperation, it was thought that major problems could be avoided, leading individuals with interrelated ties to avoid any conflicts. This idea has been challenged several times so far, but recent challenges have created a new moment of reflection for the civilised world. Such challenges like climate change or the war in Ukraine, has illuminated the fragility of international frameworks. Likewise, these confrontations have continuously hindered progress in the creation of a unified society.

In this article, we will build an analytical description of the new concepts that can emerge from these topics, emphasising how the war in Ukraine has impacted the increase in gas emissions. Additionally, we will explore its effects on the economic sphere and its disruptive influence on climate change mitigation agendas. We will also outline potential pathways forward.

The purpose of the research is to show:

1) If there is any possibility that the war in Ukraine will impact the targets set by international agreements?
2) To what extent is this war hindering the fight against climate change?
3) Should Ukraine be reconstructed ecologically in the future?
4) Should there be restraint in attacks around nuclear reactors?
5) Should Russia be held accountable for the destruction of the environment?
6) What are the repercussions on the global market brought on by the war?
7) Utilising these and other questions, we aim to pose and present our ideas regarding these issues.

Also, a good basis for discussion will be the examination of the legal dimension. This encompasses exploring the signed agreements and how the diverse approaches taken by different nations. Moreover, an assessment of public opinion will be measured on different topics. To do this, a survey was distributed among two distinct groups of individuals. By comparing the data collected from these two groups through several analytical methods, such as the 'descriptive method' and the 'Chi- square' analysis, we aim to ascertain significant differences in attitudes between the two groups.

The questions raised in the questionnaire were devised to help us understand individuals' ideas, to see how they view climate change, their assessment of the current legal basis, and their stance on the enforceability of agreements. These questions are aligned with our overarching topic. The first question relates to individuals' understanding of the danger of the war in Ukraine and the potential damage it can cause to the environment. The subsequent two questions assess public opinion concerning whether if a sufficient legal basis in place, would there be less damage from the war? Would the states refrain from war? Would they be more selective and concerned about the environment in which bombs would be detonated, or the weapons used? The questions assess whether if legally binding agreements would be in place, whether the warring states would be more careful about the damage as they would be held legally responsible for any damage.

In our conclusion, we formulate a hypothesis to the extent of which the war has influenced climate change. The issue of accountability to whether Russia should be held responsible for the damage caused will be raised. We will consider whether we need to intensify efforts to render international agreements legally binding as well as analyse the war's impact on economic and social aspects, drawing comparisons with other wars and how they have affected them.

The war in Ukraine has turned the world's attention to this part of Europe since the consequences of this war affect many dimensions of social life. The commencement of the war

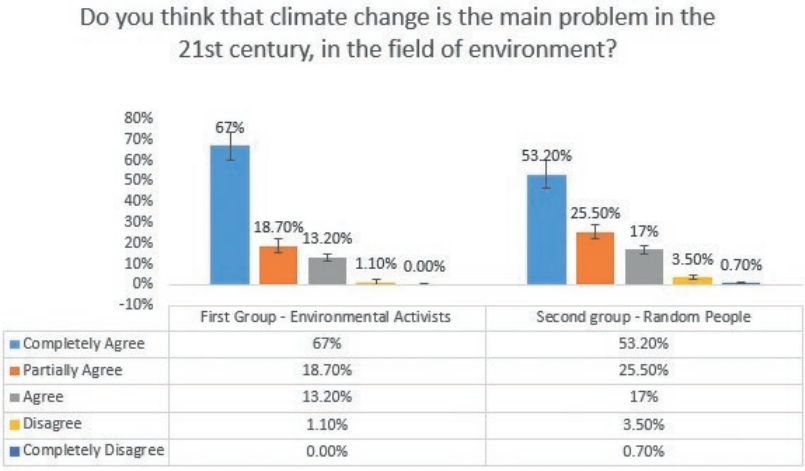
between Ukraine and Russia has triggered a range of problems for the international community.

First, the realm of public international law has been challenged in many ways, creating situations that have influenced a global crisis.

Determined to occupy new territories, Russia has become a violator of international law. Initially, in 2014, Crimea was annexed, which until that point was part of the state of Ukraine. Since the international community's response at that time had not been particularly responsive, Russia's appetite increased and subsequently, in 2022, Russian troops were sent to annex the Donbas provinces, territories of Ukraine.

War always brings consequences beyond the warring parties. Their effects extend to other parts of the world, and the war in Ukraine has done just this. The war has generated a multitude of consequences, ranging from violations of international law to causing widespread difficulties, in general, all over the world.

To give credibility to the research on this topic and the connection with climate change, in one of our surveys, we posed the question: 'Do you think that climate change is a main problem of the 21st century?' This question was raised to discern people's perceptions regarding climate change, gauging whether they view it as a defining challenge of this century. Importantly, it should be noted that the research was extended to two groups of people: marginalised environmentalist groups and the general public. Their answers first underwent analysis via the Chi-square method, performed by SPSS, to identify if there are significant differences in attitudes.



	First Group - Environmental Activists	Second group - Random People
Completely Agree	67%	53.20%
Partially Agree	18.70%	25.50%
Agree	13.20%	17%
Disagree	1.10%	3.50%
Completely Disagree	0.00%	0.70%

Figure 1 — *Shahiqi, D. (2023) Unpublished raw data (Survey date: 10-03-2023 — 25-03-2023)*

Observing the responses from both groups, it becomes evident that they have similar opinions. They collectively lean towards the viewpoint that climate change is the main problem of the 21 century. The Chi-square analysis showed a significant linear-by-linear association ($p = .039$). The computed values are within the standard limits without any significant difference.

This margin of discussion is almost the same in the two groups. The results derived from the Chi-square test shows that the P value determined by the test is 0.039, falling below the conventional threshold of 0.05, which means that a statistical relationship exists between these two variables. This link is not accidental; the overall difference between the variables is 3.9%. Based on this, it is apparent that a prevailing sentiment exists among people that regard climate change as a main concern. This situation is exacerbated by the ongoing conflict in

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Ukraine. Presently, the situation has grown more complicated; the longer the war lasts, the greater need for states to make an effort to improve the situation.

2 ENVIRONMENTAL DAMAGES IN UKRAINE

Apart from the social and economic aspects, its imperative to examine other critical factors such as environmental degradation, the utilisation of unconventional weapons, the energy market crisis, and their effects on climate change. There is a need to analyse countries, how they reacted towards the new situation with thewar in Ukraine and how this could affect the current agendas for the reduction of greenhouse gases (GHG).

If we go back in retrospect and analyse the situation in Ukraine before the war started, based on official data from the 'EPI Environmental Performance Index', Ukraine was considered one of the countries with poor environmental performance across indicators such as air quality, production quality and general ecosystem health[1]. Since the commencement of the war, the current situation must have worsened. In the past, Ukraine was considered 'the Green Heart of Europe' precisely because of its biodiversity. According to the records, 70,000 types of species are found in this region. The territory of Ukraine accounts for 35% of Europe's biodiversity and is home to many endangered species. [2]

But it is crucial to delve into the extent of environmental damage caused by the war. How much ecological degradation has been monitored by international organisations? How many incidents have occurred? Based on the data from Ecodozor, since the onset of the war up until now, 1220 incidents have been reported, spanning different sectors and involving 629 locations across the region.[3]

In the past, Ukraine faced a dangerous environmental situation, the Chernobyl disaster. A devastating event which had stark repercussions on the people in this region who are still suffering today. The lingering effects and the risk of a repeated situation are extremely high. At the beginning of the conflict, field data indicated that gamma radiation in the Chernobyl region was 28 times higher than the annual emitted radiation. [4]

The concern for new nuclear catastrophes remains high, given the presence of fifteen nuclear plants in Ukraine. According to Ecodozor's notes, approximately 126 incidents have been recorded across nine nuclear plants, potentially leading to extraordinary consequences for Ukraine and neighbouring countries. Notably, Ukraine has a developed heavy industry, encompassing metallurgy and metal processing. So far, there have been 97 accidents in the facilities of these industries, potentially posing an ecological challenge that the Ukrainian people will deal with in years to come. [5]

The situation has been exacerbated by the Russian army's attack on Zaporizhzhia Nuclear Plant.

1 'Ukraine and the Others: The Environmental Impacts of War' (European Union, 22 February 2023) <https://youth.europa.eu/year-of-youth/young-journalists/ukraine-and-others-environmental-impacts-of-war_en> accessed 19 June 2023.

2 Bohdan Vykhor and Andreas Beckmann, 'Assessing the Environmental Impacts of the war in Ukraine' (World Wildlife Fund (WWF), 13 June 2022) <https://wwfcee.org/our-offices/ukraine/assessing-the-environmental-impacts-of-the-war-in-ukraine> accessed 19 June 2023.

3 Ecodozor: Environmental Consequences and Risks of the Fighting in Ukraine <https://ecodozor.org> accessed 19 June 2023.

4 Marthe de Ferrer, 'Radiation levels at Chernobyl are rising: The environmental impact of Russia's war in Ukraine' (Euronews.Grenn, 25 February 2022) <https://www.euronews.com/green/2022/02/25/radiation-levels-at-chernobyl-are-rising-the-environmental-impact-of-russia-s-war-in-ukrai> accessed 19 June 2023.

5 Ecodozor (n 3).

Experts suggest that this attack could be equivalent to six times the power of the Chernobyl disaster. It is important to highlight that the energy supply of this nuclear plant has been disrupted six times by rocket attacks since the beginning of the war.[6] The International Atomic Energy Agency (IAEA) is making constant calls to restrain combat in this area, as a reactor meltdown or explosion could be fatal for many people. Such an incident would constitute another environmental catastrophe, inflicting irreparable damage on the area and its people.[7]

Likewise, fires and burning of buildings from the Russian invasion have contributed to increased GHG emissions. Beyond the loss of civilian lives, critical infrastructure has been destroyed. Ukraine thinks that in future, based on international law, it will seek compensation for losses and damages caused to the environment.[8] All damages caused will be able to be calculated correctly at the end of the war by international organisations, such as UNEP, who will apply the same methodologies to those utilised in previous cases of war conflicts. Their evaluation will look for the potential for environmental contamination and verify the viability of habitation in bombarded areas. In terms of destruction, they will assess the extent of destruction, estimating the need for interventions and the associated costs.

3 CAN THE WAR IN UKRAINE THREATEN CLIMATE CHANGE TARGETS?

Undoubtedly, the concerns are widespread among countries that have persistently made efforts to improve the situation with GHG emissions. The signatories of the international agreements from the United Nations Framework Convention for Climate Change, Kyoto Protocol, Paris Agreement and Glasgow Climate Pact now find themselves in a state of vulnerability.[9] The collaborative efforts aimed at curbing the rise in temperature in accordance with the Paris Agreement's stipulations encounter potential obstacles. From a legal point of view, parties who have signed Paris Agreement are obliged to uphold its principles, given it is considered a legally binding agreement. This signifies that the signatory parties have a legal obligation to comply. Based on the facts so far monitored by legitimate organisations, the attainment of targeted goals has been seriously jeopardised as a result of the ongoing war in Ukraine.

According to estimates presented by the Ukrainian delegation, during COP27, damages equivalent to 11.4 billion dollars have been attributed solely to the contamination of fertile soils. This holds substantial implications for the future since Ukraine stands as a leading producer of raw materials for sunflower oil and flour.[10]

6 Marita Moloney and Emily McGarvey, 'Ukraine war: Russian air strikes cut power at Zaporizhzhia nuclear plant' (BBC News, 9 March 2023) <https://www.bbc.com/news/world-europe-64897888> accessed 19 June 2023.

7 'Nuclear Safety and Security in Ukraine' (International Atomic Energy Agency (IAEA), 2023) <https://www.iaea.org/nuclear-safety-and-security-in-ukraine> accessed 21 July 2023.

8 Alejandro de la Garza, 'Ukraine Wants Russia to Pay for the War's Environmental Impact' (Time, 19 October 2022) <https://time.com/6222865/ukraine-environmental-damage-russia> accessed 19 June 2023.

9 United Nations Framework Convention for Climate Change (New York, 9 May 1992) <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en> accessed 19 June 2023; Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-a&chapter=27&clang=_en> accessed 19 June 2023; Paris Agreement [under the United Nations Framework Convention on Climate Change] (Paris, 12 December 2015) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en> accessed 19 June 2023; Glasgow Climate Pact Decision 1/CMA.3 of 13 November 2021 <https://unfccc.int/documents/310475> accessed 19 June 2023.

10 Oliver Milman, 'Ukraine uses Cop27 to highlight environmental cost of Russia's war' (The Guardian, 13 November 2022) <https://www.theguardian.com/world/2022/nov/13/ukraine-cop27-highlight-environmental-cost-russia-war> accessed 19 June 2023.

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President Zelensky's declaration that 'There can be no effective climate policy without the peace' best explains the premise that the war in Ukraine will impede the achievement of intended targets and setbacks in the battle against climate change. [11]

According to Ruslan Strilets, Ukraine's environmental protection minister, during his COP27 address, approximately 33 million tons of greenhouse gases have already been emitted during the war. Concerns were raised over Russia's utilisation of Ukraine's natural reserves military bases. Strilets further noted that the reconstruction efforts of Ukraine would emit about 49 million tons of GHG, thereby further damaging the set targets.[12]

Importantly, it must be emphasised that the environment constitutes a general good, transcending individual state boundaries. In the context of various wars, the loss of human lives, destruction of homes, and damage to different habitats stand as predominant issues.

The last three years have witnessed the world grappling with the global Covid-19 pandemic, underscoring its fragility and how quickly attention can be shifted from one problem to another. Likewise, the crisis with the pandemic has badly positioned the situation with the fight against climate change.

As we mentioned, the dimensions affected by war, which directly or indirectly affect the loss of targets, are numerous. Some of the key elements related to the socio-economic situation are that after the war in Ukraine, the global market has been deregulated in many spheres, and this has directly affected the loss of focus and intervention in the sectors related to the well-being of the people.

The war in Ukraine will worsen the situation for many reasons:

1) Increased emissions from bombing and ongoing fighting
2) The real possibility of nuclear reactors melting from bombarding
3) Shifting attention away from the fight against climate change and increased awareness to the war in Ukraine
4) Deterioration of the economic situation in the global trend, increase in inflation, increase in prices and the orientation of the economy in socio-economic policies, economic focus on improving well-being
5) Energy market disruption
6) Transportation of goods and services disruption

All these factors in one form affect climate change; some affect it directly, and others indirectly. Each distraction undermines progress towards meeting international agreement targets, signifying a step back in the fight against climate change.

4 LEGAL ASPECTS — ARMED CONFLICTS

Armed conflicts always pose a risk on many fronts. Beyond the death of human lives, it also brings the destruction of the environment. Bombing campaigns usually contaminate

11 Gloria Dickie and William James, 'COP27: Ukraine's Zelenskiy Says Climate Policy Impossible Without Peace' (Reuters, 8 November 2022) <https://www.reuters.com/business/environment/cop-27-ukraines-zelenskiy-says-climate-policy-impossible-without-peace-2022-11-08> accessed 19 June 2023.

12 Georgina Rannard, 'COP27: War causing huge release of climate warming gas, claims Ukraine' (BBC News, 14 November 2022) <https://www.bbc.com/news/science-environment-63625693> accessed 19 June 2023.

air, land, and water, risking the future of individuals who struggle to survive the aftermath of war. While scientists all agree that climate change itself is not a direct cause of conflict, it can be an indirect cause, increasing the risk of other factors that could lead to conflict[13]. A similar situation with Ukraine also occurred during the bombing campaign in the Republic of Kosovo in 1999. For three months in a row, NATO forces bombed the country of Serbia, raising suspicion about potential environmental contamination. Leading the effort, UNEP established a task force to investigate the extent of the contamination.

The task force concluded that four cities — Kragujevac, Bor, Novi Sad and Pancevo — posed a permanent risk to the health of citizens[14]. The cost of the project was 17 million euros, encompassing assessments across five distinct categories: the consequences of air strikes on industrial sites, the impact of the conflict on the Danube River, the consequences on biodiversity in protected areas, the repercussions for human settlements and the environment in Kosovo, and the possible use of depleted uranium weapons in Kosovo[15]. The findings concluded that there were no discernible consequences or environmental disasters attributable to the Kosovo War.

Comparatively, the situation in Ukraine may be more complicated than Kosovo due to many factors that warrant consideration:

1) Ukraine has several nuclear reactors, some of which have faced bombings in proximity
2) The ongoing duration of the war is lasting more in Ukraine than in Kosovo
3) Weapons used in the war in Ukraine are non-conventional and in-contrary to international treaties, particularly as they are used against civilians
4) Bombing of national parks and nature reserves
5) Largest number of destroyed industrial cities
6) Damaging of fertile soils
7) CO2 Emission Records.

By comparing these two events, we can understand that UNEP's work in Ukraine will be much more challenging and complex than those in Kosovo. The imminent risk of contamination is very substantial. Compared to previous wars, Ukraine's vulnerability is more endangered by Russia's disregard for international treaties. Moreover, the weapons used by Russia differ from those used by NATO forces in Kosovo.

Of particular concern are some of the weapons that may have been used against civilians in the war in Ukraine could potentially hold Russia responsible for future damages. These instances may provide a strong basis for taking legal action for damage caused. While these weapons may not be prohibited within military contexts, their use against civilians is prohibited. Preliminary findings from the research conducted by the warring parties suggest the possibility of such weaponry being used:

- Cluster munitions, which many organisations are working to curtail their use, wield

13 International Committee of the Red Cross, 'Seven Things you Need to Know about Climate Change and Conflict' (International Committee of the Red Cross (ICRC), 9 July 2020) <https://www.icrc.org/en/document/climate-change-and-conflict> accessed 19 June 2023.

14 'UNEP-led Balkans Task Force to Continue its Work in Yugoslavia' (OCHA ReliefWeb, 8 February 2000) <https://reliefweb.int/report/serbia/unep-led-balkans-task-force-continue-its-work-yugoslavia> accessed 19 June 2023.

15 'UNEP-led Balkans Task Force to Continue Work in Yugoslavia: Press Release HAB/161 UNEP/58' (United Nations Meetings Coverage and Press Releases, 8 February 2000) <https://press.un.org/en/2000/20000208.unep58.doc.html> accessed 19 June 2023.

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a destructive impact; their potential to damage the environment encompasses the contamination of water, air, and land, rendering them highly destructive. [16]

- Thermobaric weapons, known for their harmful effects on the environment, can release toxic gases during detonation, leading to oxygen depletion. They contribute to air pollution, water contamination, and habitat destruction. [17]
- White phosphorus prohibited when used in civilian areas due to its potential for widespread environmental consequences. Its distribution can lead to substantial contamination[18].

The first problem could be the use of cluster munitions. Their use is prohibited under the Convention on Cluster Munitions, stipulated explicitly in its first article, which disallows their use, production or any kind of assistance or support from countries[19]. Although Ukraine and Russia have not signed the agreement, the use of these weapons against civilians is prohibited, and according to research by Human Rights Watch, they have been deployed against civilians. [20]

In every armed conflict, it is crucial to preserve the violation of human rights. The use of weaponry against the civilian population is unequivocally prohibited, and protected by international law. However, this situation in Ukraine raises concerns. The Ukrainian Ambassador to the USA has reported deploying thermobaric weapons against civilian populations[21]. Also, in the Bakhmut region, drones have observed the use of phosphorus bombs. While such bombs may not be prohibited for use in war, their use against civilians is prohibited[22]. In the future, these occurrences provide a compelling basis for any eventual lawsuit against the Russian state for the environmental damages of their actions.

From a legal standpoint, as part of the codified protection in wartime, important agreements are made:

- The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention)[23]
- 1977 Additional Protocols to the Geneva Conventions of 1949[24]

16 Jawad Faresa and Youssef Fares, 'Cluster Munitions: Military Use and Civilian Health Hazards' (2018) 96 (8) Bulletin of the World Health Organization 584, doi: 10.2471/blt.17.202481.

17 Arthur van Coller, 'Detonating the Air: The Legality of the Use of Thermobaric Weapons under International Humanitarian Law' (2023) 105 (923) International Review of the Red Cross 11125, doi: 10.1017/S1816383123000115.

18 Seyed Mohammad Mojabi and others, 'Environmental impact of white phosphorus weapons on urban areas' (2010 International Conference on Environmental Engineering and Applications, Singapore, 10-12 September 2010) 112, doi: 10.1109/ICEEA.2010.5596102.

19 Convention on Cluster Munitions (Dublin, 30 May 2008) <https://www.clusterconvention.org> accessed 19 June 2023.

20 'Ukraine: Civilian Deaths from Cluster Munitions' (Human Rights Watch, 6 July 2023) <https://www.hrw.org/news/2023/07/06/ukraine-civilian-deaths-cluster-munitions> accessed 21 July 2023.

21 'Fact Sheet: Russia's use of thermobaric weapons in Ukraine' (Center for Arms Control and Non-Proliferation, 1 March 2022) <https://armscontrolcenter.org/fact-sheet-russias-use-of-thermobaric-weapons-in-ukraine> accessed 19 June 2023.

22 Matt Murphy, 'Ukraine war: Russia accused of using phosphorus bombs in Bakhmut' (BBC News, 6 May 2023) <https://www.bbc.com/news/world-europe-65506993> accessed 19 June 2023.

23 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) (New York, 10 December 1976) <https://disarmament.unoda.org/enmod> accessed 19 June 2023.

24 Protocol Additional to the Geneva Conventions of 12 August 1949, And Relating to the Protection of VIctims of International Armed Conflicts (Protocol I) (Geneva, 8 June 1977) < https://ihl-databases.icrc.org/en/ihl-treaties/api-1977> accessed 19 June 2023; Protocol Additional to the Geneva Conventions of 12 August 1949, And Relating to the Protection of VIctims of Non-International Armed Conflicts (Protocol II) (Geneva, 8 June 1977) < https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977 > accessed

These two agreements stand as cornerstones that determine the bans on the use of weapons in cases of conflict. Consequently, in the future, Ukraine and the international community can pursue legal actions against Russia based on the violations of the articles within these international treaties.

In the first article of the ENMOD Convention, there is a distinct declaration: 'Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.' [25]

Article 2 of this agreement addresses the prohibitions for states and organisations, emphasising their restrictions from instigating other states to violate Article 1 of the convention. This article outlines environmental modification techniques. The paradox becomes evident when examining Article V, in which states are obliged to provide their expertise in times of conflict. This amplifies Russia's accountability, as its actions deviate from this obligation. Rather than providing expertise, Russia stands as a violator of the convention, further heightening its culpability.

Article 54 of the '1977 Additional Protocols to the Geneva Conventions of 1949' states:

'It is forbidden to attack or destroy objects indispensable to the survival of the civilian population, namely, foodstuffs and food-producing areas, crops, livestock, drinking water supplies and irrigation works, whether it is to starve out civilians, to cause them to move away or for any other reason. These objects shall not be made the object of reprisals.'[26]

From this, we can conclude that what was happening in Ukraine are in violation of these provisions. The permanent risk of environmental degradation in the region could have fatal consequences for the future of civilians there. Although comparisons between conflicts may differ, each instance warrants distinct treatment by international courts after the war is over. It should be noted that in terms of international law, Russia has violated the territory of a sovereign state, necessitating future compensation for the incurred damages in Ukraine.

Undoubtedly, the repercussions of the war will reverberate in the sphere of climate change. The unprecedented CO2 emissions registered in these affected areas will leave lasting consequences. It would be wise for future climate change agreements to encompass provisions that prohibit the utilisation of weapons capable of rendering the situation irreversible.

To enhance the research, we incorporated public opinions to understand how individuals perceive the field of climate change from a legal point of view. In our survey, we posed two questions:

1. Do you think there is a proper legal framework to address all climate change issues?
2. Do you think that agreements in the field of climate change should be 'legally binding'?

We compared the two groups' answers to identify disparities in their opinion. By measuring public opinion, we can gain a more explicit idea of public sentiment regarding the adequacy of the appropriate legal framework for combating climate change and the desirability of legally binding agreements.

19 June 2023.

25 ENMOD (n 23) art 1.

26 Protocol I Additional to the Geneva Conventions (n 24) art 54.

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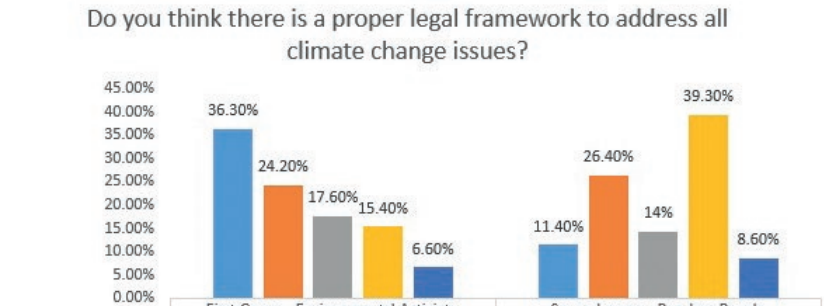


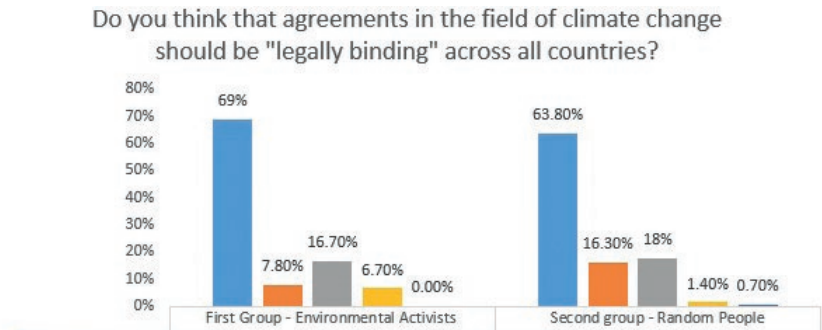
	First Group - Environmental Activists	Second group - Random People
Completely Agree	36.30%	11.40%
Partially Agree	24.20%	26.40%
Agree	17.60%	14%
Disagree	15.40%	39.30%
Completely Disagree	6.60%	8.60%

Figure 2 *Shahiqi, D. (2023) Unpublished raw data (Survey date: 10-03-2023 — 25-03-2023)*

As can be seen in the above diagrams, opinions are split. Specifically, 36.3% of the environmental activist group completely agree that there exists a proper legal framework. Conversely, there is a marked difference in opinion among the group of random individuals regarding those who disagree with the finding. A substantial 39.3% of individuals from this group disagree with the assertion that a proper legal framework is in place. Importantly, the average opinion within the group of random individuals is considered to be equal to the environmental activist group's average.

In other words, the sample difference between the averages of the two groups is not big enough to be statistically significant. Furthermore, even in the context of this question, Chi-square analysis reveals that the observed difference between the two variables is not random. The derived value obtained from the analysis indicates a very small P value of 0.0011. At the same time, the two variables don't exhibit a condition wherein these two variables do not exhibit any significant divergence. Notably, a lack of statistical significance does not prove that H0 is correct, only that the null assumption cannot be rejected.

If there was a robust legal framework, it could potentially foster a mindset of environmental preservation, even in times of conflict. Such a framework might have deferred attacks around nuclear reactors. It should be noted that many agreements exist, but the problem lies in respecting them. Notably, most agreements in the environmental realm are signed by both Russia and Ukraine. Still, the ultimate test awaits in the aftermath of war — it remains to be seen whether violations of these agreements will entail any consequences.



	First Group - Environmental Activists	Second group - Random People
Completely Agree	69%	63.80%
Partially Agree	7.80%	16.30%
Agree	16.70%	18%
Disagree	6.70%	1.40%
Completely Disagree	0.00%	0.70%

Figure 3 *Shahiqi, D. (2023) Unpublished raw data (Survey date: 10-03-2023 — 25-03-2023)*

In the above question concerning the legally binding nature of agreements in the field of climate change, most responses were positive, highlighting the desire for people to protect the environment. We also carried out the Chi-square analysis to clearly understand both groups. As expected, the two groups had no significant difference of opinion.

Building on the discussion, it is evident that countries must respect and adhere to international agreements. Such commitments can easily prevent environmental degradation. Moreover, a culture of respect would cultivate a heightened sense of caution among states when undertaking military actions since they would be held responsible for any violations to these agreements.

5 EFFECTS ON THE GLOBAL MARKET

The main challenge is the emission of GHG from fighting, burning and destruction occurring on the frontlines. However, another important element exists responsible for endangering the targets set forth in the Paris Agreement. One of the main challenges resulted from the war is the supply of electricity, compounded by the global market's dependence on Russian gas. The situation has further been exacerbated due to the imposition of sanctions on Russia by a majority of countries, avoiding supply from them. According to the data from the Russian state, there is a notable reduction in the export of natural gas by 25.1%, attributed directly to these sanctions.[27] This prompts other countries that Russia previously supplied to restore alternative forms of obtaining electricity. It is worth noting that Russia traditionally held the position of the number 1 exporter of natural gas and oil in Europe. Remarkably it held a share of 50% in total oil exports and 60% of natural gas exports, with Europe as its primary buyer.[28]

The data from the statistical agencies portrays the trajectory of energy price increases that occurred across all European countries throughout 2022, and this trend continuing into 2023, following an upward trend, continues to impact consumers negatively.

27 'Russian Gas Exports Sink by 25% Despite Rise in Oil Sales' The Moscow Times (Amsterdam, 14 February 2023) <https://www.themoscowtimes.com/2023/02/13/russian-gas-exports-sink-by-25-despite-rise-in-oil-sales-a80215> accessed 19 June 2023.

28 Fatih Birol, 'Where things stand in the global energy crisis one year on' (International Energy Agency (IEA), 23 February 2023) <https://www.iea.org/commentaries/where-things-stand-in-the-global-energy-crisis-one-year-on> accessed 19 June 2023.

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This price increase in the global energy market has several connections with the environmental situation. [29] Due to high and unaffordable pricing, many countries dependent on Russian gas have been compelled to explore alternative forms of energy production. As a consequence, the activation of coal-fired thermos plants has been adopted, certainly endangering the targeted and proclaimed limits due to considerably higher GHG emissions.

Of course, every situation brings new changes and challenges and prompts states to take action based on the prevailing situation. States have now begun the possibility of concluding agreements with other countries for the import of natural gas. Notably, the U.S. has emerged as a global leader in natural gas production for 2022. [30] Moreover, there is a very large increase in production and supply by Norway, catering to Western European countries. Simultaneously, states have started distancing themselves from their direct reliance on Russia, opting to explore generating energy in alternative forms.

In Kosovo, as a government measure to cope better with these fluctuations in the global market, government decisions have been taken to subsidise electricity. In this context, consumers who have saved electricity and had better performance compared to the previous year are eligible to receive a subsidy from the government of up to 50 euros from the invoice value.[31] Furthermore, in Kosovo, citizens who transition from conventional heating methods involving wood and coal to more environmentally friendly alternatives like air conditioning and heat pumps are provided with an 80% subsidy on the equipment value. [32]

From an economic standpoint, the increase in energy prices has effects that extend to other fields such as oil refinery, gas production, the car industry, metal production, and the chemical industry. This interconnectedness subsequently ripples through other areas, such as the transportation industry, resulting in the price of transport around Europe increasing, as well as the construction industry.[33] All these changes in the economy have affected the entire production chain, subsequently reflected in the increase in inflation and destabilisation of the economy in general. Many countries are facing the biggest increases in inflation in recent years, directly impacting the well-being of their citizens. Businesses are also bearing the brunt as fluctuations in transportation costs push up prices in sectors ranging from food production to textiles.

An analysis of food supply statistics from January 2023 reveals a marked increase from 14.1 % in EU Region compared to the previous year. [34] Inflation norms have soared by approximately 9.2 %, with most affected areas observed in electricity, water, gas, transport and food supply[35].

29 'Russia's War on Ukraine: Analysing the impacts of Russia's invasion of Ukraine on global energy markets and international energy security' (International Energy Agency (IEA), 2023) <https://www.iea.org/topics/russias-war-on-ukraine> accessed 19 June 2023.

30 Bruno Venditti, 'Which Countries Produce the Most Natural Gas?' (Visual Capitalist, 25 October 2022) <https://www.visualcapitalist.com/which-countries-produce-the-most-natural-gas> accessed 19 June 2023.

31 Decision of the Government of the Republic of Kosovo no 01/135 of 20 March 2023 <https://kryeministri.rks-gov.net/wp-content/uploads/2023/03/Vendim-i-mbledhjes-se-135-te-i-Qeverise.pdf> accessed 19 June 2023.

32 Ministry of Economy of the Republic of Kosovo, 'Public Call for Energy Efficiency Subsidies for Citizens' no 02/2022 of 6 Oktober 2022 <https://me.rks-gov.net/blog/thirrje-publike-per-subvencionim-te-eficiences-se-energjise-per-qytetaret> accessed 19 June 2023.

33 'One Year on: Impact of the Ukraine war on Global Energy Prices' (Open Access Government, 20 February 2023) <https://www.openaccessgovernment.org/one-year-impact-of-ukraine-war-global-energy-prices-input-output-analysis/152599> accessed 19 June 2023; Michiyuki Yagi and Shunsuke Managi, 'The Spillover Effects of Rising Energy prices Following 2022 Russian Invasion of Ukraine' (2023) 77 Economic Analysis and Policy 680, doi: 10.1016/j.eap.2022.12.025.

34 Óscar Arce, Gerrit Koester and Christiane Nickel, 'One Year Since Russia's Invasion of Ukraine — the Effects on Euro area Inflation' (European Central Bank, 24 February 2023) <https://www.ecb.europa.eu/press/blog/date/2023/html/ecb.blog20230224~3b75362af3.en.html> accessed 19 June 2023.

35 'Measuring Inflation — the Harmonised Index of Consumer Prices (HICP)' (European Central Bank,

Ukraine, grappling with the ramifications of war has experienced a staggering inflation rate of 22.6% in comparison to the previous year. This extraordinary increase has affected different aspects of socio-economic life. [36] The disruption of the economy is intrinsically linked climate change as it generates problems that can interfere with and influence each other.

The biggest risk in terms of impact lies in the potential diversion of attention and focus toward the reduction of inflation rates and market regulation, potentially pushing the focus away from the urgent fight against climate change.

According to the OECD report, prior to the commencement of the war in Ukraine, the post-COVID 19 economic recovery was expected to have an increase of 5% in economic growth. However, the outbreak of war has led to a downward adjustment in economic growth in the states, diminishing it from 2.2% to 3.1%, exemplifying the negative impacts of this situation.[37]

Looking at these aspects, it becomes evident that the outlook may be less bright because of the constant distractions from other problems that are diverting attention away from the pressing issue of climate change.

6 CONCLUSIONS

As mentioned, the situation in Ukraine before the war, based on official data from the 'EPI Environmental Performance Index', was characterised by poor performance indicators such as air quality, production quality and ecosystem health in general. With the Russian invasion, the situation in this country has become even more alarming and critical. The statement 'There can be no effective climate policy without peace' best explains the core issue that the war in Ukraine could undermine the achievement of the intended targets and is a step back in the nations's fight against climate change. Even though the legal part is quite straightforward, international conventions have been violated since the well-being of civilians and the environment has been threatened. Attacks near nuclear reactors give the real possibility of environmental disaster. If these attacks continue to persist, the risk of reaching an irreversible situation becomes a genuine concern.

The damages inflicted on nine nuclear plants, coupled with over 97 accidents in industries like heavy metallurgy and metal processing, indicate an ecological problem that the Ukrainian people will have to deal with in years to come.

The ENMOD Convention of 1977 and the Additional Protocols to the Geneva Conventions of 1949 are among the agreements whose articles have been violated. Post-war, these instances should be strongly condemned so that these aggressive behaviours are not repeated in the future.

Based on abovementioned fact, we can conclude that what is happening in Ukraine is prohibited. The permanent risk of environmental degradation could have fatal consequences for the future of civilians.

The economic realm has not remained untouched, with the increase in energy prices affecting various industries such as oil, gas refinery, the metal industry, the mineral industry, the car industry, the chemical industry product, transport, and construction. These changes are actually extensive and affect the global world, particularly Europe. Nowadays, inflation rates

6 January 2023) <https://www.ecb.europa.eu/stats/macroeconomic_and_sectoral/hicp/html/index.en.html> accessed 19 June 2023.

36 'Ukraine Inflation (CPI, ann var %, aop)' (FocusEconomics, 2023) <https://www.focus-economics.com/country-indicator/ukraine/inflation> accessed 19 June 2023.

37 Brian Michael Jenkins, 'Consequences of the War in Ukraine: The Economic Fallout' (RAND Blog, 7 March 2023) <https://www.rand.org/blog/2023/02/consequences-of-the-war-in-ukraine.html> accessed 19 June 2023.

are high, and a new economic crisis seems to be knocking at our doors. These consequences have only one cause, the war in Ukraine.

But every created situation also requires finding ways to get out. That being said, no one should wait for the war to stop to return to normality. To address this crisis, a series of actions and recommendations are essential:

1) It is essential in these difficult times to stop the war,
2) Try to reconstruct Ukraine in an ecological way with low emissions
3) Halt bombings near nuclear plants as they can be fatal for the environment
4) Stabilise the market in general, particularly in the energy and oil remarket
5) Reduce Europe's dependence on Russian Gas
6) Formation of UNEP task forces for war-related environmental damage as in previous cases in countries where there were conflicts
7) Initiation of a lawsuit against Russia under the EU law for the damage caused by the war, the damage to the environment due to the use of non-conventional weapons
8) Continuation of economic measures against Russia
9) Stabilisation of the market, reduction of inflation rates, improving fiscal policies,
10) Transition towards solar energy and wind energy, as opposed to Russian gas,
11) Determination of new agendas in terms of climate change, dynamism and frequency of state meetings, with the aim of improving the situation,
12) Continuation of funding according to the Paris climate agreement,
13) Lowering the target from 2 degrees Celsius to 1.5 degrees and making it legally binding
14) Establishment of an International Environmental Court of Justice to deal with the implementation of the agreements and to deal with cases of environmental damage.

Within the realm of international law, this is an open debate, with most legal scholars thinking that the creation of such court might bolster the authority of international environmental law, and then it would serve as an oversight for violations of agreements by states. Such a court would not only oversee and address violations of agreements by states but emerge as a body body that would be able to assess the environmental damage. If this court were to be established, the way would be opened for international environmental law to become a separate discipline.

To conclude, the war in Ukraine has set back the fight against climate change, necessitating urgent and comprehensive measures to reverse this situation. The world needs sustainable peace, where the priority is the fight against climate change.

Any deviation from the targets provided by the Paris Agreement seriously endangers people's well-being and the planet's future. It is imperative to stop the war, rebuild the country, and refocus efforts on conservating and protecting the environment collectively.

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RIGHTS AND PERMISSIONS

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Research Article

HUMAN TRAFFICKING: PROBLEMS OF COUNTERACTION IN KAZAKHSTAN

Amangeldy Khamzin*, Zhanna Khamzina, Omon Mukhamedzhanov Binur Taitorina, Yermek Buribayev

ABSTRACT

Background: *This paper assesses the current circumstances regarding the protection and rights of victims of human trafficking in Kazakhstan. The study aims to evaluate Kazakhstan's main national instruments and laws adopted to combat human trafficking.*

Methods: *The study employed several key methodological approaches, including a systematic approach, which involves the study of combating human trafficking in conjunction with the provision of guarantees of human rights; an integrated approach that consists of the study of objective and subjective factors, as well as an analysis of internal and external (socio-economic, demographic, geopolitical, etc.) factors that are the causes of illegal migration and human trafficking; an empirical approach involving research, taking into account the application of relevant experience available in Kazakhstan and abroad; a formal-legal approach to analyse the existing regulatory framework for combating human trafficking and ways to improve it.*

Results and Conclusions: *Based on the study's results, several practical proposals are put forward to eliminate the identified shortcomings and gaps in the legal framework of Kazakhstan and law enforcement practice. This paper concludes that Kazakhstan's response to its international obligations to prevent human trafficking has some shortcomings. However, we conclude that significant improvements are possible through the adoption of a special law, as well as in cases of implementation of special organisational measures, strengthening legal responsibility.*

1 INTRODUCTION

According to Counter-Trafficking Data Collaborative, from 2002 to 2022, an average of 108 foreign victims of human trafficking (hereinafter referred to as foreign VHTs) were identified in Kazakhstan each year. This figure is twice the number of cases involving victims who were citizens of the Republic of Kazakhstan (approximately 50). The nations from which these foreign victims originate are Uzbekistan (84.5%), Kyrgyzstan (6.8%), China (1.8%), and Tajikistan (1.7%).[1] The geography of identified foreign VHTs in Kazakhstan is extensive

1 See 'CTDC Global Dataset IOM' (Counter-Trafficking Data Collaborative (CTDC), 2023). <https://www.ctdatacollaborative.org/map/ctdc-iom> accessed 10 August 2023. Virtual map with data collected by the International Organization for Migration since 2002. This data reflects victims assisted/identified/referral/reported to aid providers, which may not represent all victims identified in the country. This map is based on a global dataset hosted by the Collaborative Data Counter-Trafficking Data Collaborative

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and includes victims from countries such as Ukraine, Belarus, Moldova, Turkmenistan, Mongolia, Nigeria, the Philippines, and South Africa. Out of all foreign victims of human trafficking identified in Kazakhstan since 2002, 66% were subject to cross-border trafficking.

Per the official data in 2022, Kazakhstan reported 103 instances of crimes tied to human trafficking, which included cases involving minors. In 2021, 117 offences were registered in the Unified Register of Pre-Trial Investigations, 179 in 2020, 151 in 2019, and 190 in 2018.[2]

In the annual report presented in July 2022 by the U.S. State Department's Office to Monitor and Combat Trafficking in Persons, it is stated that 'over the past five years, human traffickers continue to exploit local and foreign victims in Kazakhstan, and traffickers exploit victims from Kazakhstan abroad... The most vulnerable groups at risk of trafficking include undocumented migrants, persons without identity documents, unemployed individuals, individuals experiencing homelessness, and disabled persons.'[3]

The U.S. State Department report indicates that women and girls from nearby East Asian, Central Asian, and Eastern European nations, as well as from Kazakhstan's rural areas, are exploited for sexual purposes within Kazakhstan. Traffickers increasingly force Central Asian citizens, primarily men and women from Uzbekistan and, to a lesser extent, from Tajikistan and Kyrgyzstan, into roles such as domestic servants, construction labourers, market workers, and agricultural workers, making them targets for exploitation by human traffickers. Thousands of undocumented Uzbek migrants, arriving daily in Kazakhstan via informal border crossings for seasonal work in sectors like construction, agriculture, retail, hospitality, and commercial sex, are especially vulnerable to human trafficking due to their unregulated immigration status. This vulnerability extends to their children, who often forego schooling despite having the right to attend. NGOs have reported a rising trend in traffickers' use of debt bondage to exploit migrants in recent years. Using stringent law enforcement policies, traffickers coerce migrants to endure exploitative conditions and intimidate victims with threats of legal repercussions and deportation if they approach authorities, thereby fostering a deep mistrust of law enforcement agencies.[4]

The U.S. State Department report recognises some improvement in Kazakhstan's efforts to prevent and identify human trafficking victims, highlighting increased governmental action to eliminate such trafficking. This shifted Kazakhstan's ranking from the "Tier 2 Watch List" to "Tier 2" in 2022.[5]

In the first half of 2023, there were 111 recorded criminal cases related to human trafficking in the country, marking a significant 91.4% increase from the same timeframe the previous year. The predominant offences in this category were tied to the facilitation or operation of brothels and pandering, with 67 cases registered. This is a sharp 2.1-fold rise from the year before. Additionally, cases involving the trafficking of minors have surged, with 17 incidents this year compared to just five the previous year. Other offences during this period included eight cases of adult trafficking, seven cases of coercing minors into prostitution, seven cases of coercing adults into prostitution, and five instances of unlawful detainment with the intent

(CTDC) prior to k-anonymization. The IOM data includes information on approximately 53,000 victims of human trafficking from 138 nationalities who were exploited in 171 countries.

2 'Statistical Reports' (Legal Statistics, 2023) <https://qamqor.gov.kz/crimestat/statistics> accessed 10 August 2023. See, Report Form No SNG-1 'Information on the state of crime and the results of the investigation of criminal offenses', section No 1 'General information on the state of crime'.

3 Office to Monitor and Combat Trafficking in Persons, '2022 Trafficking in Persons Report: Kazakhstan' (US Department of State, 2023) <https://www.state.gov/reports/2022-trafficking-in-persons-report/kazakhstan> accessed 10 August 2023.

4 ibid.

5 ibid.

of exploitation. [6]

These figures underscore the growing severity of the human trafficking crisis in the country. The escalating number of criminal cases is alarming and emphasises the need for enhanced efforts from both law enforcement and the broader society to combat this grave issue.

The objective of this study is to develop theoretical and practical suggestions for enhancing the guarantee of rights for human trafficking victims in Kazakhstan, pinpointing shortcomings in national law and enforcement practices, assessing the degree of social and legal protection for victims across all categories, and analysing the problems faced in safeguarding the rights of trafficking victims, with the intent of proposing solutions.

This research aims to provide academic and practical advice and suggestions for improving the situation concerning the safeguarding of rights for victims of human trafficking in Kazakhstan, identifying gaps in national laws and enforcement methods, analysing the level of social and legal protection for all classes of trafficking victims, and addressing the main challenges in safeguarding the rights of trafficking victims and the methods for solving them.

In addition, the research is aimed at systematising the necessary measures and actions with the following objectives:

- prevention of human trafficking incidents;
- determining priority areas of work in the field of victims' rights protection;
- increasing the effectiveness of prevention and detection of criminal offences related to human trafficking;
- pinpointing the key strategies for evolving legislative and law enforcement practices in Kazakhstan in relation to safeguarding the rights of victims of human trafficking;
- enhancing the mechanisms of the standard for providing special social services to human trafficking victims, irrespective of their nationality and residency status, across all regions of Kazakhstan.

2 LITERATURE REVIEW

In the past twenty years, the research field dedicated to human trafficking has expanded considerably, resulting in a vast collection of scholarly work. This increase is highly commendable as the wealth of research and advocacy literature has substantially impacted shaping policies and determining funding priorities. More specifically, much progress has been made on measurement and prevalence estimation techniques, and some consensus is forming gradually on the standard measures and counting rules to quantify human trafficking activities.[7]

Significant progress has been made in assessing the impact of the measures taken to prevent the trafficking of persons in different parts of the world.[8]

6 'Breaking Data: The Number of Trafficking Offenses in Kazakhstan Almost Doubled' (Ranking.kz, 8 August 2023) <https://ranking.kz/reviews/socium/aktualnye-dannye-kolichestvo-pravonarusheniy-v-sfere-torgovli-lyudmi-v-kazahstane-vyroslo-pochti-vdvoe.html> accessed 10 August 2023.

7 Sheldon X Zhang, 'Progress and Challenges in Human Trafficking Research: Two Decades after the Palermo Protocol' (2022) 8(1) Journal of Human Trafficking 4, doi:10.1080/23322705.2021.2019528.

8 Stephanie Hepburn and Rita J Simon, 'Hidden in Plain Sight: Human Trafficking in the United States' (2010) 27(1-2) Gender Issues 1, doi:10.1007/s12147-010-9087-7; Lauren A McCarthy, 'Beyond Corruption: An Assessment of Russian Law Enforcement's Fight Against Human Trafficking' (2010) 18(1) Demokratizatsiya 5, doi:10.3200/DEMO.18.1.5-27; Julie Kaye, John Winterdyk and Lara Quarterman, 'Beyond Criminal Justice: A Case Study of Responding to Human Trafficking in Canada' (2013) 56(1)

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Modern scientific research aims to study three main areas: the definition of the concept and parameters of human trafficking,[9] factors influencing the prevalence of human trafficking[10] and the evaluation of measures to combat and prevent trafficking in persons.[11]

The last research type, as mentioned above, based on the evaluation of measures to combat and prevent trafficking in persons, involves measuring the effectiveness of international and national law. Our review of previous works allows us to present the following conclusions.

Efficient strategies to combat human trafficking require integrating various elements, which collectively can generate the expected outcome. One such measure concerns both international and domestic legislation that are fundamental components of any anti-trafficking strategy.[12] Scholars call on states to marshal human rights, tax, trade, tort, public health, and labour laws to combat this growing international crime and human rights violation.[13]

Based on the importance of scientific recommendations for making practical decisions, considering the impact of research results on the rationale for new approaches to improving legislation, this paper aims to evaluate Kazakhstani laws that form the legal framework for combating human trafficking. Consequently, it will present several practical suggestions for addressing certain identified weaknesses and shortcomings within the legal system.

Canadian Journal of Criminology and Criminal Justice 23, doi:10.3138/cjccj.2012.E33; Vladislava Stoyanova, 'The crisis of a legal framework: Protection of victims of human trafficking in Bulgarian legislation' (2013) 17(5-6) International Journal of Human Rights 668, doi:10.1080/13642987.2013.832217; Siddhartha Sarkar, 'Rethinking Human Trafficking in India: Nature, Extent and Identification of Survivors' (2014) 103(5) Round Table 483, doi:10.1080/00358533.2014.966499; Dana C Beck and others, 'Human Trafficking in Ethiopia: A Scoping Review to Identify Gaps in Service Delivery, Research, and Policy' (2017) 18(5) Trauma, Violence, and Abuse 532, doi:10.1177/1524838016641670; Laura A Dean, 'Criminalizing Human Trafficking in Latvia: The Evolution and Implications of Human Trafficking Policies' (2018) 49(2) Journal of Baltic Studies 129, doi:10.1080/01629778.2018.1441887; Sani S Ibrahim, Adlina Ab Halim and Zatul Himmah Adnan, 'A Review of Human Trafficking Issues in Malaysia and Nigeria' (2019) 27(S1) Pertanika Journal of Social Sciences and Humanities 15; Zbigniew Lasocik, 'Response for Human Trafficking in Poland in a Nutshell' in J Winterdyk and J Jones (eds), The Palgrave International Handbook of Human Trafficking (Palgrave Macmillan 2020) 1033, doi:10.1007/978-3-319-63058-8_55; Janane El Khoury, 'Combatting Human Trafficking in Lebanon: Prosecution, Protection, and Prevention' in J Winterdyk and J Jones (eds), The Palgrave International Handbook of Human Trafficking (Palgrave Macmillan 2020) 1205, doi:10.1007/978-3-319-63058-8_120.

9 Carolina Villacampa and Núria Torres, 'Human Trafficking for Criminal Exploitation: The Failure to Identify Victims' (2017) 23(3) European Journal on Criminal Policy and Research 393, doi:10.1007/s10610-017-9343-4; Ike Herdiana, Mein Woei Suen and Myrtati D Artaria, 'The Society's Perspective of Human Trafficking' (2019) 43(4) Collegium Antropologicum 241; Ângela Fernandes, Mariana Gonçalves and Marlene Matos, '"Who are the Victims, Who are the Traffickers?" University Students' Portrayals on Human Trafficking' (2020) 15(2) Victims & Offenders 243, doi:10.1080/15564886.2019.1711276.

10 Alicja Jac-Kucharski, 'The Determinants of Human Trafficking: A US Case Study' (2012) 50(6) International Migration 150, doi:10.1111/j.1468-2435.2012.00777.x; Katherine Taken Smith, Hannah M Russell and L Murphy Smith, 'Human Trafficking: A Global Multi-Billion Dollar Criminal Industry' (2014) 4(3) International Journal of Public Law and Policy 293, doi:10.1504/IJPLAP.2014.063006.

11 Deanna Davy, 'Understanding the Support Needs of Human-Trafficking Victims: A Review of Three Human-Trafficking Program Evaluations' (2015) 1(4) Journal of Human Trafficking 318, doi:10.1080/23322705.2015.1090865; Alex Kreidenweis and Natalie F Hudson, 'More Than a Crime: Human Trafficking as Human (In)Security' (2015) 16(1) International Studies Perspectives 67, doi:10.1111/insp.12066; Nathaniel A Dell and others, 'Helping Survivors of Human Trafficking: A Systematic Review of Exit and Postexit Interventions' (2019) 20(2) Trauma, Violence, & Abuse 183, doi:10.1177/1524838017692553; Michelle Munro-Kramer and others, 'Human Trafficking Victim's Service Needs and Outcomes: An Analysis of Clinical Law Data' (2020) 6(1) Journal of Human Trafficking 95, doi:10.1080/23322705.2019.1574476.

12 Reza Montasari, Hamid Jahankhani and Fiona Carrol, 'Combating Human Trafficking: An Analysis of International and Domestic Legislations' in H Jahankhani, S Kendzierskyj and B Akhgar (eds), Information Security Technologies for Controlling Pandemics (Advanced Sciences and Technologies for Security Applications, Springer 2021) 135, doi:10.1007/978-3-030-72120-6_5.

13 Janie A Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108(4) American Journal of International Law 609, doi:10.5305/amerjintelaw.108.4.0609.

In addition, we have identified the assessment of Kazakhstan's implementation of certain provisions of the Palermo Protocol[14] and the obligations that the Protocol imposes on states to prevent human trafficking as an additional aim of this paper.

It should be said that scientific studies of human trafficking in relation to the conditions of Kazakhstan are at an early stage. Projects, ideas, and field strategies are just being formed, which follows from the totality of the collection of a few papers in this field that take place in the scientific space.[15] As such, this publication will complement existing knowledge and strategies on new anti-trafficking measures in Kazakhstan.

3 MONITORING SOURCES OF LEGAL REGULATION

Given the complexity of human trafficking, it can be examined from various angles, making numerous international conventions and accords relevant to this domain. These include those related to forced labour, the rights of women and children, migration, slavery, and the slave trade, as well as broader agreements pertaining to civil, cultural, economic, political, or social rights that can contribute to the fight against human trafficking.

International human rights law is a tool that is accepted as a conceptual paradigm for analysing state behaviour in the field of preventing human trafficking.[16] Kazakhstan is extensively engaged in incorporating international human rights law standards into its domestic legislation when it ratifies international agreements aimed at combating human trafficking.

Kazakhstan has joined over 25 international agreements related to combating human trafficking, including the Palermo Protocol, obliging the nation to protect the rights of victims of human trafficking. Key treaties that Kazakhstan has ratified include the Slavery Convention 1926, the International Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949, the Supplementary Convention for the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956, ILO Abolition of Forced Labour Convention 1957, International Convention on the Elimination of All Forms of Discrimination Against Women 197, International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, Convention on the Rights of the Child 1989, ILO Worst Forms of Child Labour Convention 1999, the United Nations Convention against Transnational Organized Crime 2000, the Protocol

14 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000 UNGA Res 55/25) <https://treaties.un.org/Pages/ViewDetails.aspx?src=ind&mtdsg_no=XVIII-12-a&chapter=18&clang=_en> accessed 10 August 2023. This Protocol, often simply called the 'Palermo Protocol', provides an international definition of human trafficking and forms the basis for global initiatives to combat this crime.

15 Bakhyt Moldatjaevich Nurgaliyev and Alexey Vladimirovich Boretsky, 'Resistance to Investigation of Crimes, Related to Human Trafficking: The Forms, Methods and Ways to Overcoming' (2015) 6(3S1) Mediterranean Journal of Social Sciences 86, doi:10.5901/mjss.2015.v6n3s1p86; Dauren Balgimbekov and others, 'Scientific Researches of Counteraction of Illegal I Business in the Sphere of Human Trafficking in the Republic of Kazakhstan' (2016) 11(15) Social Sciences 3721, doi:10.3923/sscience.2016.3721.3727; Denis Leonov and Sagynysh Ayaganova, 'Issues of Improving the Legislation of the Republic of Kazakhstan Based on the International Standards on Counteraction to Crimes Connected with Human Trafficking' (2018) 9(3) Journal of Advanced Research in Law and Economics 1026, doi:10.14505/jarle.v93(33).29; Amangeldy Khamzin, Yermek Buribayev and Kaliya Sartayeva, 'Prevention of Human Trafficking Crime: A View from Kazakhstan and Central Asian Countries' (2022) 17(1) International Journal of Criminal Justice Sciences 34, doi:10.5281/zenodo.4756088; Amangeldy Sh Khamzin and others, 'Historical and Legal Analysis of the Institute for Countering Human Trafficking and Slavery in the Central Asian States' (2023) 8(1) BiLD Law Journal 86.

16 Muhammad Natsir and Nanda Ivan Natsir, 'Legal Arrangement in the Criminal Act of Human Trafficking' (2017) 20(1) Journal of Legal, Ethical and Regulatory Issues 1.

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to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000, and the Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime.

The current anti-trafficking legislation consists of the following main legal acts:

Law of December 29, 2008 No. 114-IV 'On Special Social Services',

Law of July 22, 2011 No. 477-IV 'On Population Migration',

Law of January 10, 2018 No. 131-VI 'On the Compensation Fund for Victims',

Order of the Minister of Health and Social Development of February 24, 2016 No. 138 'On Approval of the Standard for the Provision of Special Social Services to Victims of Human Trafficking',

Government Decree of April 28, 2022 No. 258 'On the Approval of the Plan for Further Measures in the Field of Human Rights and the Rule of Law',

Rules for the use of funds provided in the republican budget under the program 'Providing financial assistance to citizens of the Republic of Kazakhstan illegally imported into foreign countries and victims of trafficking, as well as those who suffered abroad from other crimes and found themselves in force majeure circumstances', approved by order of the Minister of Foreign Affairs dated November 28, 2005 No. 08-1/361,

Joint Order of the Minister of Labor and Social Protection of the Population of July 1, 2022 No. 235 and the Minister of Internal Affairs of July 1, 2022 No. 550 'On the Formation of an Interdepartmental Commission on Combating Illegal Export, Import and Human Trafficking',

Government Decree of February 24, 2021 No. 94 'On Approval of the Action Plan of the Government of the Republic of Kazakhstan for the Prevention and Combating of Crimes Related to Human Trafficking for 2021-2023'.

Articles of the Criminal Code of the Republic of Kazakhstan establishing liability for crimes related to human trafficking: Article 113 Coercion to remove or illegal removal of human organs and tissues, Article 125 Kidnapping, Article 126 Illegal imprisonment, Article 128 Human trafficking, Article 132 Involvement of a minor in committing antisocial acts, Article 133 Trafficking in minors, Article 270 Involvement in prostitution.

However, Kazakhstan has not enacted a specific legislative act dedicated to preventing and combatting human trafficking. Instead, the norms of international law related to human trafficking are incorporated into individual sector-specific legislative acts of the Republic of Kazakhstan.

At the same time, in Category 1, the countries with the best performance in combating human trafficking from the states of the former Soviet Union are Estonia, Georgia, and Lithuania.[17] The actions taken in these countries towards eradicating human trafficking align entirely with the minimum standards set in this field. The governments of these countries continue to demonstrate serious and consistent efforts, which has led to the fact that in 2022: Georgia and Lithuania remained in Category 1 since 2016; Estonia has remained in Category 1 since 2017.[18]

In addition, the governments of Moldova and Armenia are also frontrunners, making substantial efforts to eradicate human trafficking. However, they have not yet fully met the

17 Office to Monitor and Combat Trafficking in Persons, '2022 Trafficking in Persons Report' (US Department of State, 2023) <https://www.state.gov/reports/2022-trafficking-in-persons-report> accessed 10 August 2023.

18 ibid.

minimum standards, which is why they remained at "Tier 2" in 2022, similar to the previous reporting period.

Significant achievements in some of the listed countries have been the adoption of individual legislative acts to protect the rights of VHT foreigners. For example, Georgia adopted the Law 'On Combating Trafficking in Persons' in 2006,[19] which stipulates that a victim or person of a foreign state who has suffered from the crime of human trafficking committed on the territory of Georgia enjoys the same rights as those provided for all victims and persons who have suffered from human trafficking. In 2005, Moldova adopted the Law 'On the Prevention and Combating of Trafficking in Persons',[20] which regulates legal relations related to the prevention and suppression of human trafficking, the provision of protection and assistance to VHTs and presumed VHTs, cooperation between state authorities and NGOs. In 2014, Armenia adopted the Law 'On the Identification and Support of Persons Subjected to Trafficking and Exploitation,'[21] which establishes standard procedures for the identification, support, protection, and reintegration of presumed and identified VHTs, taking into account the capacities of state authorities, NGOs, international organisations, and civil society. As per Armenian law, foreign victims are accorded the same rights and services as those enjoyed by Armenian nationals.

In general, the leading positions of Georgia, Lithuania, Estonia, Moldova, and Armenia are ensured to a large extent by the adoption and continuous improvement of comprehensive national legislation aimed at:

- the detection and identification of VHTs;
- providing VHTs with medical and psychological assistance, creating conditions for their privacy, and protection from causing further harm;
- providing VHTs with a recovery and reflection period;
- provision of temporary residence permits to VHTs (compliance with the principle of 'no expulsion').

4 RESEARCH METHODS

This study is grounded in the analysis of the outcomes of the Human Rights Commission's activities in the Republic of Kazakhstan. It also utilises data from governmental agencies, non-governmental organisations, and crisis centres in the Republic of Kazakhstan, the International Organization for Migration (IOM) in Kazakhstan, the United Nations Development Program (UNDP) in the Republic of Kazakhstan, the OSCE Program Office in Astana, other international organisations, and results from the sociological research 'Human Rights in Kazakhstan: Public Opinion' conducted by the independent Association of Sociologists of Kazakhstan, which is a permanent member of the International Sociological Association (ISA). The research also incorporates findings from sociological and other studies conducted by the IOM, crisis centres, and specialised NGOs (ULE 'Union of Crisis Centers' in Kazakhstan, PF 'Rodnik', NGO 'Women Support Center', NGO 'Sana-Sezim', Private Fund 'Korgau-Astana',

19 Law of Georgia No 2944 'On Combating Human Trafficking' of 28 April 2006 <https://matsne.gov.ge/en/document/view/26152?publication=9> 10 August 2023.

20 Law of the Republic of Moldova No 241 'On Preventing and Combating Trafficking in Human Beings' of 20 October 2005 <https://www.legis.md/cautare/getResults?doc_id=133158&lang=ro> 10 August 2023.

21 Law of the Republic of Armenia No HO-212-N 'On the Identification and Support of Persons Subject to Human Trafficking and Exploitation' of 17 December 2014 <https://www.arlis.am/documentview.aspx?docID=94984> 10 August 2023.

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PF 'El Daryn', PF 'Medialife').

As sources of primary information, information obtained as a result of processing statistical official data and reports of the Ministry of Labor and Social Protection of the Population of the Republic of Kazakhstan; the Committee on Migration; the Bureau of National Statistics; the Commissioner for Human Rights in the Republic of Kazakhstan; special electronic services of the Supreme Court of the Republic of Kazakhstan;[22] statistical data on the consideration of civil and criminal cases of the Supreme Court;[23] statistical reports on the work of the courts, presented on the information service of the Committee on Legal Statistics and Special Accounts of the General Prosecutor's Office of the Republic of Kazakhstan.[24] The method made it possible, based on a quantitative method of obtaining and processing data, to analyse the main demographic indicators, statistics in the field of migration, and the increase or decrease in crimes related to human trafficking.

This article was formulated based on the study of international experience, specifically, the practices implemented by authorised government agencies in the USA, Canada, Australia, New Zealand, Sweden, and the European Union countries in dealing with human trafficking victims.

The key issues identified in the legal regulation of combating human trafficking in Kazakhstan that require scientific investigation are:

The national legislation's conceptual framework lacks harmony with international standards. The absence of basic concepts in national legislation can lead to confusion between trafficking in persons and other criminal offences, potentially causing challenges in mutual legal assistance with foreign countries adhering to definitions more in line with the UN Protocol to Combat Human Trafficking or other international standards.

Current Kazakhstani legislation does not pinpoint specific government bodies authorised to execute activities in combating human trafficking — including prevention, detection, suppression, case disclosure and investigation, as well as the provision of special social services to human trafficking victims.

The collaboration issues among anti-human trafficking stakeholders need to be resolved; the legal status of state Interdepartmental and regional commissions on countering illicit import, export, and trafficking in persons remains ambiguous.

It is crucial to enact appropriate norms on all NGOs' activities in combating human trafficking, including their interaction with competent authorities.

Establishing norms regulating an all-inclusive system for the prevention, detection, and suppression of human trafficking and related offences is required, as well as a system of measures for assisting human trafficking victims.

It is essential to legislate the mechanism of national risk assessment for combating human trafficking. It involves identifying and studying the characteristic forms and methods of committing crimes and finding and identifying weak points in the human trafficking tackling system.

A mechanism needs to be established for controlling and monitoring organisations involved in the import, export, and transit of citizens abroad and within the Republic of Kazakhstan.

The rights of human trafficking victims need to be developed and reinforced. The rights

22 Office of the Court <https://office.sud.kz> 10 August 2023; Bank of Judicial Acts <https://sud.gov.kz/kaz/court-acts> 10 August 2023.

23 'Statistics' (Supreme Court of the Republic of Kazakhstan, 2023) <http://sud.gov.kz/rus/content/statisticheskie-dannye-o-rassmotrenii-grazhdanskih-del> 10 August 2023.

24 Portal of Legal Statistics and Special Accounts <https://qamqor.gov.kz> 10 August 2023.

inconsistency in the legislation prevents victims of human trafficking from fully understanding their rights, utilising them, reaching out to the appropriate authorities, and receiving the necessary assistance and protection.

Including provisions on juvenile victims of human trafficking in legislation is crucial. Minors, like adults, are subjected to trafficking as well as labour, sexual, and other types of exploitation. Minors' specific characteristics include their vulnerability and dependence. It is essential to define a minor's status in line with international standards (paragraph c) of Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons) and to encode them in the legislation.

The provisions for foreigners who have become victims of human trafficking need to be revised in accordance with international standards.

5 DISCUSSION

The rise in human trafficking in recent years, coupled with the persistence of modern forms of slavery in Kazakhstan, can be attributed to clear and objective factors such with some countries of the post-Soviet space (there is no visa regime with Armenia, Azerbaijan, Moldova) and Central Asian countries; increased migration flows, both between states and within the country; a prosperous position in the economy and higher earnings than in other post-Soviet countries; organised crime, which sees Kazakhstan in a more minor role as a supplier, but more as a consumer, and also as a transit corridor.

Kazakhstan is an attractive market for human traffickers from neighbouring countries such as Kyrgyzstan, Uzbekistan, and Tajikistan and serves as a country of origin and transit for live goods for Europe, the UAE, Greece, Turkey, Israel, Albania, Qatar, and others.

In the global slavery ranking, in 2018, Kazakhstan ranked 83rd out of 167 countries, lagging behind post-Soviet countries such as Russia (64), Tajikistan (75), Uzbekistan (69), and Georgia (78).[25]

Despite the unfolding global economic crisis, Kazakhstan continues to allure citizens from economically unstable Central Asian countries. The rising incidence of internal human trafficking in recent years can be attributed to unemployment and heightened migration from rural regions to major cities. Adhering to the joint efforts of the world community, Kazakhstan is taking the necessary measures, including in the legislative, socio-economic, and international spheres, to effectively counteract new forms of the slave trade.

The problematic issues that hinder effective prevention and counteraction of human trafficking are broad and go beyond the powers of only law enforcement agencies, relating to the competence of most authorised state bodies and the activities of crisis centres and specialised NGOs. Such problems include:

- the lack of effective interaction between law enforcement and state bodies with non-governmental organisations and crisis centres;
- the lack of clear legal regulation of the competencies and powers of the concerned state bodies on the issues of preventing and combating human trafficking;
- the lack of high-quality regulation of mechanisms for assisting victims of human trafficking;

25 Walk Free Foundation, 'The Global Slavery Index 2018' (Walk Free, 2019) 179 <https://cdn.walkfree.org/content/uploads/2023/04/13181704/Global-Slavery-Index-2018.pdf> accessed 10 August 2023.

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- a low detection by law enforcement agencies of offences related to human trafficking;
- inadequate practical execution of the provisions of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which supplements the UN Convention against Transnational Organized Crime (also known as the Palermo Protocol).

In the annual report of the US State Department 2019 Trafficking in Persons Report,[26] among other 187 countries, Kazakhstan was assigned to the 2nd category of states under the Watch List — a Control list (such post-Soviet countries as Azerbaijan, Kyrgyzstan, and Uzbekistan were on the same list for the specified period). This fact led in the subsequent period to some strengthening of the response measures by the Government of the Republic of Kazakhstan and the elimination of misconceptions. Despite the lack of significant efforts, the Government has taken certain steps to solve the problem of human trafficking, and by the end of 2021, Kazakhstan was able to improve its position in the ranking.

The report of the US State Department indicated that Kazakhstan does not fully comply with international minimum standards in the field of preventing human trafficking.[27] Concurrently, it was highlighted that the law enforcement agencies performance was inadequate in terms of investigating, prosecuting, and sentencing crimes in this category. The report concluded that Kazakhstan does not fully meet the international minimum standards for combating human trafficking. This conclusion underscored the lack of effectiveness displayed by law enforcement agencies in investigating, prosecuting, and convicting perpetrators of such crimes. Emphasis was also placed on the complicity of officials and police officers in human trafficking, while only a small number of criminal cases, including against police officers, were in the proceedings of the law enforcement system. According to reports, traffickers bribed ordinary police officers to avoid criminal prosecution.

Our examination reveals that the national authorities in Kazakhstan are still lacking in mechanisms to identify victims of human trafficking and subsequently connect them to the necessary assistance services. Considering the magnitude of the human trafficking issue in Kazakhstan, the total number of victims identified by government bodies remains strikingly low. Furthermore, the country's Criminal Code does not include a specific definition for 'human trafficking victims', which hampers victim identification and limits their access to pertinent services. Authorities occasionally enforce punishments on potential victims, including detention and deportation for potential forced labour victims due to immigration law violations and prosecute potential sex trafficking victims for prostitution without scrutinising for indicators of trafficking. There's practically no governmental funding or dedicated programs for providing services to victims of human trafficking. Like in past years, the government has not formulated a national strategy or allocated roles and responsibilities to government departments for tackling human trafficking.

Our review also illustrates that to meet international human rights obligations and implement inter-state programs and national plans aimed at preventing human trafficking, monitoring and controlling external and internal labour migration, and assisting victims, several countries worldwide tend to adopt distinct anti-trafficking laws. This practice is common in developed countries such as Australia, Austria, Bahrain, Great Britain, Spain, Canada, the Netherlands, Singapore, the USA, France, and others. In former Soviet Union countries, separate laws have been enacted in Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

26 Office to Monitor and Combat Trafficking in Persons, '2020 Trafficking in Persons Report' (US Department of State, 2020) <https://www.state.gov/reports/2020-trafficking-in-persons-report> accessed 10 August 2023.

27 ibid.

Our study asserts that the absence of a fundamental legislative act in Kazakhstan's legal system that systematically and comprehensively regulates all matters related to combating human trafficking leaves a significant legal void and could pose challenges in practically implementing the provisions of the Palermo Protocol, such as in the areas of victim rehabilitation and provision of specialised assistance. The lack of this fundamental law is somewhat offset by the regular adoption of Action Plans by the Kazakhstan Government to prevent and combat crimes associated with human trafficking.

However, the complete and exhaustive implementation of all the significant positions of the Protocol within the framework of the government's Plan seems hardly feasible.

The practice of identifying violations related to human trafficking in Kazakhstan is limited. According to statistical data from the Committee on Legal Statistics and Special Accounts of the General Prosecutor's Office of the Republic of Kazakhstan, annually, more than 100 pre-trial investigations into crimes related to human trafficking are registered by the internal affairs bodies (2019 — 182, 2020 — 111, 2021 — 103, 2022 — 107), with up to 90 victims identified (2019 — 44, 2020 — 92, 2021 — 29, 2022 — 38).[28] As can be seen from the presented data, there has been a decrease in these parameters in recent years.

The Ministry of Labor and Social Protection of the population of the Republic of Kazakhstan establishes facts of violations of labour legislation, wherein the current year, under Article 86 of the Code of Administrative Offenses (Admission of a person to work without concluding an employment contract), 45 administrative proceedings were registered; under Article 87 of the Code of Administrative Offenses (Violation of wage requirements) — 370; under Article 89 of the Code of Administrative Offenses (Illegal overtime) — 35; under Article 90 of the Code of Administrative Offenses (Allowing discrimination in the workplace) — 53; and under Article 93 of the Code of Administrative Offenses (Violation of safety and labour protection rules) — 241.[29]

Over the past three years, the Ministry of Labor and Social Protection of the Republic of Kazakhstan has assisted 543 victims of human trafficking within the framework of providing special social services (2019 — 145, 2020 — 97, 2021 — 143, 2022 — 158), non-governmental organisations have helped 614 people (2019 — 120, 2020 — 141, 2021 — 200, 2022 — 153), and the International Organization for Migration in the Republic of Kazakhstan has assisted 151 victims (2019 — 76, 2020 — 21, 2021 — 16, 2022 — 38).[30]

In Kazakhstan, paradoxically, there is no legislation establishing liability for forced labour; the state in this direction relies on criminal penalties for human trafficking since these two phenomena are closely related. However, these are different offences, with different objective and subjective aspects of crimes; human trafficking, as a rule, precedes or is carried out for the purpose of labour and other exploitation — its purpose in some cases is slavery, and forced labour. We believe that the Kazakh legislation on human trafficking remains incomplete and does not regulate the situation with forced labour.

Today, responsibility for forced labour remains out of focus on the agenda of public authorities. Despite the robust legislative framework prohibiting forced labour, which includes a constitutional ban on forced labour, the Labor Code of the Republic of Kazakhstan's prohibition on forced labour, and Kazakhstan's ratification of the 1926 Slavery Convention, the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and

28 'Statistical Reports' (Legal Statistics, 2023) <https://qamqor.gov.kz/crimestat/statistics> accessed 10 August 2023. See, Report on the work of law enforcement agencies according to the information service of the Committee for Legal Statistics and Special Accounting of the General Prosecutor's Office of the Republic of Kazakhstan.

29 ibid.

30 ibid.

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Practices Similar to Slavery, the 1957 ILO Convention on the Abolition of Forced Labor, the 1984 International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the 1999 ILO Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, legislative resources aimed at preventing forced labour, particularly among labour migrants, remain untapped and unutilised.

There is no separate law providing for punishment for labour slavery in Kazakhstan. Such offences, as a rule, are classified under the following articles of the Criminal Code of the Republic of Kazakhstan:[31] 126 — 'Illegal imprisonment' or 128 — 'Human trafficking'. Therefore, it is practically impossible to hold accountable for labour exploitation, and there is no criminal or administrative liability for forced labour. Two main criteria apply for defining forced labour: the work must be done involuntarily, and the work must be done under threat of punishment. Trafficking in human beings is probably the most common phenomenon associated with forced labour, but not necessarily an accompanying feature.

Article 25 of the Convention on Forced or Compulsory Labor (Convention 29),[32] adopted in Geneva by the 14th session of the General Conference of the International Labor Organization on June 28, 1930, establishes the following guarantee: illegal involvement in forced or compulsory labour is punishable by criminal law, and each member of the ILO that ratifies the Convention is obliged to ensure effectiveness and strict enforcement of the sanctions prescribed by law.

Kazakhstan ratified Convention No. 29 on December 14, 2000, and for 23 years, it has not fulfilled its obligations to secure criminal prosecution for involvement in forced or compulsory labour. Articles of the Criminal Code of the Republic of Kazakhstan establishing liability for crimes related to human trafficking: Article 113 Coercion to remove or illegal removal of human organs and tissues, Article 125 Kidnapping, Article 126 Illegal imprisonment, Article 128 Human trafficking, Article 132 Involvement of a minor in committing antisocial acts, Article 133 Trafficking in minors, Article 270 Involvement in prostitution.

However, the Criminal Code of the Republic of Kazakhstan does not provide a separate composition for involvement in forced labour.

The criminal codes of the EAEU countries establish responsibility for using slave labour; however, in our opinion, slave labour is a multidimensional concept, and forced and unfree labour are related but not identical concepts. A multifaceted approach is needed to fully understand the heterogeneity of the unfree labour relations that characterise forced labour. We believe that one should proceed in this aspect of their international standards for the definition of forced labour and slavery, as well as the concept of forced labour, enshrined in Article 7 of the Labor Code of the Republic of Kazakhstan.[33]

We propose to supplement the Special Part of the Criminal Code of the Republic of Kazakhstan, namely Chapter 3, 'Criminal offences against constitutional and other rights and freedoms of man and citizen', with the following element of a crime.

Use of forced and slave labour

1. Forced labour is defined as any work or service extracted from an individual under the threat of punishment, which the individual did not voluntarily offer to perform. This includes using someone's labour by exercising powers similar to those inherent

31 Criminal Code of the Republic of Kazakhstan No 167 of 16 July 1997 <https://adilet.zan.kz/eng/docs/K970000167_> accessed 10 August 2023.

32 Convention Concerning Forced or Compulsory Labour (No 29) (signed 28 June 1930) <https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C029> accessed 10 August 2023.

33 Labor Code of the Republic of Kazakhstan No 414-V of 23 November 2015 <https://adilet.zan.kz/eng/docs/K1500000414> accessed 10 August 2023.

in property rights, especially when the individual cannot refuse to do the work or service due to circumstances beyond their control. This also encompasses exploiting an individual with the intent to coerce them into work or service or creating a scenario in which a person, whether paid inadequately, somewhat fairly, or not at all, carries out work or provides services for someone else's benefit, and cannot alter this circumstance due to their dependency on the other person.

2. The qualified composition must contain such signs as an act committed:
   - against two or more persons;
   - in relation to a minor;
   - by a person using his official position;
   - with the use of blackmail, violence or the threat of its use;
   - with the seizure, concealment or destruction of documents proving the identity of the victim,
   - by a group of persons by prior agreement;
   - against a pregnant woman known to the perpetrator.
3. A case may be classified as particularly severe if it negligently leads to death, inflicts serious bodily harm on the victim or other severe consequences, or is committed by an organised group.

State labour inspections could help detect instances of labour exploitation. However, national inspectors lack the knowledge and methodology to identify and report victims of human trafficking to law enforcement agencies. Article 191 of the Labor Code of the Republic of Kazakhstan states that state labour inspectors enforce labour legislation within the country. However, their established competencies do not mandate them to report any suspicious instances of human trafficking to the prosecutor's office or police. The question of equipping labour inspectors with essential methodological resources, like guidelines, recommendations, and manuals detailing the process of identifying and assisting victims of human trafficking, is still unresolved.

Authorities authorised to detect VHTs are law enforcement agencies which should specialise in the prevention and combating of human trafficking, as well as agencies authorised to identify and assist victims. At the same time, cooperation issues and interaction in this area between various entities, including police officers, border guards, prosecutors, labour inspectors, consular officials, and officials of local executive bodies, have not been regulated.

Victim identification is usually based on three elements: performance evaluation, stakeholder interviews, and information from third parties. The assessment should take into account the risks to the potential victim and include a proposal for the protection, security, and confidentiality measures required. The legislation of Kazakhstan does not contain any basic recommendations regarding the identification of VHTs, criminal investigations, and interagency cooperation.

At the same time, basic methodological clarifications, combined with the framework of interdepartmental recommendations on identifying VHTs, can become one of the main tools for identifying and applying procedures to VHTs. Appropriate guidelines can become an operational tool to guide the steps to be taken by central and local governments, NGOs, and service providers in the identification process. They should provide a methodology for identifying victims and potential VHTs and procedures for interagency cooperation while respecting appropriate confidentiality provisions. The methodology should proceed from the fact that official identification of VHTs is not required to receive assistance. In other words,

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every person suspected of being a VHT should be treated as such, with all relevant rights, unless proven otherwise.

Some problems hinder the timely provision of assistance to victims of human trafficking. Today, one of them is the activity of the migration service, which considers any foreign citizen (migrant worker) identified at various work sites first, as a potential offender. The main emphasis is on the lack of documents or overdue periods of stay in the country. At the same time, the reasons for their appearance in Kazakhstan, their living conditions, and whether wages were paid are not clarified.

Thus, a foreign person is primarily brought to administrative responsibility for violating migration legislation. Subsequently, foreign citizens are often deported without the right to enter Kazakhstan, and the employer avoids responsibility or pays an insignificant fine for attracting foreign labour. Only if foreign citizens subjected to labour or sexual exploitation are recognised as victims, the legislation extends their stay in the country until a court decision is made in a criminal case.

Over the past three years, no state order has been placed for NGOs to communicate about the risks of human trafficking or to engage in informational and preventative efforts within the population. Moreover, the corresponding costs associated with those activities have not been allocated in the national budget. Information is provided by NGOs on a volunteer basis or as part of an International Organization for Migration project.

6 PROBLEMATIC ISSUES IMPEDING THE EFFECTIVE PREVENTION AND COUNTERACTION OF HUMAN TRAFFICKING

In recent years, the socio-economic situation in Kazakhstan has turned the country into a kind of regional centre of attraction for migrant workers. Many residents of the neighbouring states of Uzbekistan, Kyrgyzstan, and Tajikistan illegally work on construction sites, harvest crops, and trade in kiosks and markets in large and small cities. No one knows exactly how many migrant workers work in the city of Shymkent and the Turkestan region. Migrants mostly come to Kazakhstan and do not always stay in the country legally. Kazakhstan has a so-called "visa-free" regime with these countries, so it is not difficult to come here. Low wages are among the main reasons forcing people to leave their country. This is followed by a bad business climate, a lack of work, and a desire to return to their historical homeland.

Getting information about employment opportunities is almost entirely informal, shady, or downright criminal. Before leaving, most migrants do not know where and for whom they will work in Kazakhstan. At the same time, most migrants do not get the work they expect, and even if the type of work aligns with the pre-agreed working conditions, they often differ from the promises initially made.

Migrant workers often seek employment assistance from private intermediaries. The so-called "black brokerage activity" has turned into an organised enterprise of the shadow economy, actively using proven schemes: advertising in newspapers and other media, personal employment of an employee (for example, at train stations and bus stops, when passing a border checkpoint). They can be hired directly at the workplace, and then the employee is transferred from one employer to another, usually for a fee. Sometimes the facilities are located across the street, and the owners approve the employees and transfer them hand to hand. Sometimes the 'old' employer does not pay employees but promises that a new employee will do it. Recruitment can also be carried out where immigrants looking for work gather.

Intermediaries often become part of the human trafficking mechanism. Therefore, special agents recruit girls in villages from rural areas of Central Asia to work on private farms and

provide sexual services in other states. The recruiter comes to the village and finds the most vulnerable families there (poor, with many children, alcoholic parents, the sick, the elderly, etc.). With the help of psychological pressure, a person convinces parents to "give" him their daughter, whom he undertakes to support, "arrange" in the city, help with work or study, and housing. Parents are usually paid a small amount (about $ 100-200) and promised regular money transfers from their daughters in the future. Essentially, a person is being bought. The procedure for moving across the border is regulated (if the girl is a minor — with the help of a power of attorney from her father). The girl is transferred and handed over to the "owner". Similar schemes are used to hire construction workers, cotton cleaners, underground workshop workers, and other purposes.

Resorting to the services of shadow brokers, migrants are initially forced to take risks. Private "entrepreneurs" themselves behave almost openly:

firstly, because of gaps in legislation that allow them to evade responsibility (they can only be held accountable for non-payment of taxes and similar "related" crimes);

secondly, thanks to corruption, which permeates all relations of labour migration.

The organisation of migration includes a full range of services: transportation of migrants, their work, housing, and sometimes temporary registration. Strict employer control over the employee can be carried out in different ways. The most common is the seizure of documents and the so-called debt bond. At the same time, the debt, as a rule, significantly exceeds the monthly earnings. Several practices lead to such debt: this may be a fabricated shortage on the seller's part, excessive consumption of construction materials, and work on the fees the employer pays to the intermediary for the employee.

The most brutal forms of exploitation of migrants have become widespread. Elements of slavery, violence, and coercion are inherent in labour relations and are often perceived as a norm rather than a violation of human rights.

Several factors contribute to this:

- the willingness of the employee, under the influence of certain circumstances, to tolerate the working conditions of enslaved people;
- complicity in the attitude of society and the authorities to exploitation in the workplace;
- stereotypes and distrust of the authorities and society towards migrants;
- corruption.

7 LEGAL APPROACHES AND TOOLS TO RESPOND TO THE CHALLENGE OF COUNTERING HUMAN TRAFFICKING

In 2018, criminal liability for organising illegal migration was tightened by Article 394 of the Criminal Code of the Republic of Kazakhstan (participation in public works was added to the types of punishment).[34]

For organising illegal immigration committed by a criminal group, imprisonment for a term of three to seven years is provided. Measures to combat human trafficking are being implemented within the framework of the interstate program of joint measures to combat crime

34 Criminal Code (n 31).

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for 2019-2023, adopted by the resolution of the Council of CIS Heads of State.[35]

In 2018-2020, an action plan was implemented to prevent and combat crimes related to human trafficking. During this period, the criminal activities of six organised groups engaged in human trafficking were suppressed. Two channels of importation of citizens from Uzbekistan and Kyrgyzstan for labour exploitation and seven channels of export of citizens of Kazakhstan for sexual exploitation to Qatar, Indonesia, Bahrain, the United Arab Emirates, Turkey and the Republic of Korea were eliminated.[36]

According to the Law of the Republic of Kazakhstan 'On the Victims Compensation Fund' dated January 10, 2018, persons recognised as victims of crimes related to human trafficking are entitled to monetary compensation from 2020. [37]

Expanding the legal channels of entry and employment of foreign citizens and simplifying the procedure for obtaining permits is an effective measure to prevent illegal immigration.

During the implementation of the migration policy concept for 2017-2021, a set of measures was implemented to improve the country's migration system, including creating an understandable and transparent system for providing migration services to foreign citizens. The Ministry of Internal Affairs of the Republic of Kazakhstan, within the framework of continuous modernisation and systemic reforms, is taking measures to improve the provision of stat-emigration services.

Migration Service Centres were opened in all regional cities in 2018-2019, and the "one window" principle was introduced when issuing labour patents.[38] From November 1, 2020, the function of processing documents for migrant workers has been transferred to Public Service Centers.

One of the effective international measures aimed at reducing illegal migration is readmission, that is, the return of foreign citizens illegally residing on the territory of the Republic of Kazakhstan to the territory of the countries from which they arrived. To create a legal basis for the return of illegally residing migrants, the Republic of Kazakhstan has concluded readmission agreements with 17 countries, including several Western European States, the Russian Federation, Tajikistan, Uzbekistan, and Kyrgyzstan. [39]

To deter instances of dual citizenship, as well as combat illegal immigration, the Law of the Republic of Kazakhstan № 306-VI on March 26, 2020, ratified the agreement between the Government of the Republic of Kazakhstan and the Government of the Republic of Uzbekistan on cooperation in combating illegal immigration on April 15, 2019. [40]

The fight against illegal migration on the way to its prevention can be carried out by establishing transparent and understandable procedures for obtaining the necessary permits and removing unnecessary bureaucratic obstacles to legalising migrants in the host country.

35 Interstate program of joint measures to combat crime for 2019–2023 (adopted 28 September 2018) <http://www.cis.minsk.by/reestrv2/doc/5863#text> accessed 10 August 2023.

36 Concept of Migration Policy of the Republic of Kazakhstan for 2023–2027 (approved 10 December 2022) <https://www.gov.kz/memleket/entities/enbek/documents/details/383914?lang=kk> accessed 10 August 2023.

37 Law of the Republic of Kazakhstan No 131-VI 'On the Victims Compensation Fund' of 10 January 2018 <https://adilet.zan.kz/eng/docs/Z1800000131> accessed 10 August 2023.

38 Ministry of National Economy of the Republic of Kazakhstan, Voluntary National Review of Kazakhstan: On the Implementation of the 2030 Agenda in the Field of Sustainable Development (Economic Research Institute 2022) 129, 135 <https://economy.kz/kz/Celi_ustojchivogo_razvitija/Nacionalnyj_otchet> accessed 10 August 2023.

39 ibid 135.

40 Agreement between the Government of the Republic of Uzbekistan and the Government of the Republic of Kazakhstan of 15 April 2019 On Cooperation in the Fight Against Illegal Migration <https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=114142&p_lang=en> accessed 10 August 2023.

The Republic of Kazakhstan is partially working on the abolition of migration cards, simplification of obtaining work permits and patents for migrants, de-registration of specific categories of migrants and raising awareness of migrants about migration legislation and existing rules through the visa and immigration portal.

The legal status of illegal immigrants can be improved by increasing their access to effective remedies that guarantee them the right to legally stay in the host country or return to their homeland.

Implementing the guiding principles and objectives of the global agreement on safe, orderly, and legal migration in the national migration policy of the Republic of Kazakhstan is integral. Given that the Republic of Kazakhstan is a country of origin for migrants, as well as their transit and destination, the country's migration policy is multilateral and comprehensive, aimed at ensuring the regularity, regulation, and legality of migration processes while respecting the rights and freedoms of both migrants and citizens of Kazakhstan.[41]

In 2018, the Republic of Kazakhstan was among the countries that voted for the Global Compact on Safe, Orderly, and Legal Migration.[42] During the implementation of the provisions of the global migration system, work was intensified to improve migration legislation, simplify the visa regime, the procedure for issuing invitations, entry, and registration of visiting foreign citizens, as well as modernising the visa and immigration portal. These measures correspond to the implementation of the goals set out in the global migration regime as a prerequisite for ensuring safe, orderly, and legal migration (in particular, Goals 4, 5, 9, and 12).

During 2018-2020, an action plan for the prevention and suppression of crimes related to the smuggling of migrants and human trafficking was implemented in the Republic of Kazakhstan. Measures to combat human trafficking are also being implemented within the framework of the interstate program of joint measures to combat crime for 2019-2023, adopted by the resolution of the Council of CIS Heads of State (Goals 9 and 10).

The Republic of Kazakhstan, among 103 countries, signed a joint statement on the impact of Covid-19 on migrants on 12.06.2020,[43] demonstrating its commitment to joint international actions to solve migration problems. The country implemented stabilisation measures to combat the crisis in the context of the pandemic, including protecting the rights of migrants stuck in the country due to the termination of interstate transport links.

The Kazakhstani government has not fully met the minimum standards required to eradicate human trafficking. However, they have been markedly increasing their efforts recently. In May 2023, a draft law titled 'On Combating Human Trafficking in the Republic of Kazakhstan' was proposed to the Parliament.[44] Developed by the Ministry of Internal Affairs, the draft aims to:

- Update definitions to align with international standards and introduce new terms.
- Specify the individuals covered by the new law.
- Identify and define the roles of official bodies responsible for tackling human trafficking, detailing their rights and duties.
- Describe the entities involved in counteracting human trafficking and their jurisdiction.

41 Concept of Migration Policy (n 36).

42 Global Compact for Safe, Orderly and Regular Migration (adopted 19 December 2018 UNGA Res 73/195) <https://www.iom.int/resources/global-compact-safe-orderly-and-regular-migration/res/73/195> accessed 10 August 2023.

43 Joint Statement on the Impact of COVID-19 on Migrants (adopted 12 June 2020) <https://www.un.int/philippines/statements_speeches/joint-statement-impact-covid-19-migrants> accessed 10 August 2023.

44 Draft Law 'On Combating Human Trafficking in the Republic of Kazakhstan' of 02 May 2023 <https://www.parlam.kz/kk/mazhilis/post-item/36/16028> accessed 10 August 2023.

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- Implement a system for assessing human trafficking risks and a procedure to assist victims.
- Outline the role of non-governmental organisations in the effort.
- Highlight the rights and responsibilities of trafficking victims.
- Ensure the protection of minors' rights.
- Set the foundation for international collaboration on the issue.

Upon reviewing the draft, we believe it does not adequately plan for the intended outcomes for several reasons. The draft law's nature is too broad and general, encompassing only 22 articles with vague norms that lack specificity in addressing human trafficking. The proposed definition of 'trafficking in human beings' in the draft deviates from that established in the UN's Palermo Protocol. Enhanced collaboration is necessary between law enforcement, other government departments, and NGOs dedicated to rehabilitating trafficking victims. Ways to strengthen cooperation between social network administrators, information services, and law enforcement must be established to prevent crimes against individuals better. The law's provisions should encompass Kazakhstani citizens, permanent residents, and those without formal migration status. The Kazakhstani legal system must be systematically updated to offer legal aid and social services to protect such victims. Emerging legislation needs to address the unique rights, needs, and vulnerabilities of child trafficking victims, ensuring they receive additional protection. The draft should mandate the protection of human trafficking victims' family members. It is imperative that the draft includes a stipulation that proceeds from the sale of confiscated traffickers' assets be channelled towards compensating trafficking victims.

The draft law introduces a holistic approach to protect and assist human trafficking victims and witnesses. For any national anti-trafficking initiative to work effectively, it must be multifaceted, involving experts from various disciplines. We suggest that the Kazakhstani government consider the creation of a dedicated entity, like a National Rapporteur, or another independent mechanism to oversee state activities related to human trafficking.

A more unified approach to tackling human trafficking could be achieved by enhancing national-level coordination. Regular information exchanges among all key agencies responsible for trafficking prevention, victim identification, assistance, and the prosecution of traffickers can facilitate this. We believe that designating a National Coordinator for Combating Trafficking in Human Beings, supported by a specialised office, could enhance this coordination significantly.

For effective policy creation, monitoring, and evaluation, the draft law should advocate for a comprehensive human trafficking database. This should contain trustworthy statistics about suspected and confirmed trafficking victims from all stakeholders, including specialised NGOs and international bodies. Moreover, it should cover data on investigations, legal proceedings, and convictions related to trafficking, detailing gender, age, exploitation type, and countries of origin or destination. The management of this database should prioritise protecting personal data, especially when sharing information with NGOs assisting trafficking victims.

The draft law should mandate that state entities adhere to international human rights standards and domestic laws. There should be increased accountability and transparency of state institutions, achieved through routine evaluations involving both governmental and non-governmental representatives.

In summary, while the proposed draft law on human trafficking by the Kazakhstani government is foundational and general, it represents a step in the right direction. However, its endorsement should come with the understanding that it serves not merely as legislation but as an impactful policy instrument.

8 RESULTS

We advocate for the development and adoption of a distinct law in the Republic of Kazakhstan titled 'On Combating Human Trafficking'. This law would clearly delineate the responsibilities and authorities of relevant governmental bodies and promote collaboration with NGOs and crisis centres. Furthermore, it would better adhere to the stipulations of the Palermo Protocol in practice. This would not merely be a declaration but a series of concrete steps outlined by the law.

1) We suggest adding to the Criminal Code of the Republic of Kazakhstan an explanation of the terms 'crimes related to human trafficking, as well as 'purchase, sale, and other transactions related to human trafficking' and 'victim's consent to the anticipated exploitation'. We propose the inclusion of a distinct, qualified crime provision, 'Use of forced and slave labour'.

2) The definitions of 'trafficking in persons and trafficking in minors' need to be clarified in line with the definitions enshrined in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Also, the penalties for these offences should be increased to reinforce criminal liability.

3) To improve the detection of human trafficking-related crimes, we recommend enhancing collaboration between law enforcement, governmental bodies, NGOs, and crisis centres, drawing from the experiences of the US and certain developed EU countries.

4) To better prevent and detect human trafficking-related offences, we suggest the implementation of special survey forms to be used by police officers, particularly those in special institutions, district police officers, and the migration service.

5) To expose labour exploitation and prevent such offences, the Migration Committee of the Ministry of Labor and Social Protection should create a permanent monitoring group in cooperation with relevant state bodies.

6) State labour inspectors should receive regular training on identifying victims of human trafficking and redirecting them to law enforcement agencies.

7) Efforts should continue to refine national legislation to align with international obligations and draw from global best practices in combating human trafficking. The main legally binding international instruments must be ratified. Recognition of advanced international acts will make it possible to move beyond the minimum standards that the Government of Kazakhstan proposes today, which in turn will significantly strengthen the component for the protection of victims of human trafficking. The development of a national legal framework in this area in the context of the international obligations assumed by the country will ensure the solution of a significant proportion of shortcomings in the developed draft law. It will provide guarantees for future improvement of legislation.

8) Regular monitoring of compliance with international human rights and anti-human trafficking obligations should be ensured by the Ministry of Internal Affairs and the General Prosecutor's Office in collaboration with NGOs and international organisations.

9) Regular trainings should be conducted for law enforcement officials to adopt a special methodological approach to investigate crimes involving victims of human trafficking.

10) We recommend the recognition of the competence of the UN Committee on Enforced

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Disappearances to consider individual and interstate communications in accordance with Articles 31 and 32 of the International Convention for the Protection of All Persons from Enforced Disappearance.

11) The Anti-Corruption Agency should intensify efforts to detect and expose corruption crimes involving government officials and law enforcement officers aiding or engaging in human trafficking.

12) A special program or Roadmap for the social integration of victims of human trafficking should be adopted by the Ministry of Labor and Social Protection, with the participation of relevant state bodies, NGOs, and experts.

13) The Ministry of Labor and Social Protection should develop and implement criteria and mechanisms for assessing the quality of special social services provided to victims of human trafficking.

14) Mechanisms should be developed to encourage the private sector to abandon exploitative labour, possibly by offering tax incentives for corporations and organisations that abide by an accepted ethical code of conduct.

9 CONCLUSIONS

We must acknowledge that the contemporary legislation and legal enforcement approach in Kazakhstan primarily targets illegal immigration rather than effectively enhancing preventive measures and detecting criminal acts related to human trafficking, including the social protection of trafficking victims. Regrettably, this often results in a cycle of re-victimisation for the victims of human trafficking, leading to continued social dislocation and hardship.

Our investigation underscores the pressing nature of the issue concerning safeguarding the rights of human trafficking victims in Kazakhstan. By consolidating the noted deficiencies in our national laws and law enforcement methods, as well as evaluating the extent of social and legal protection provided to human trafficking victims, we have been able to propose solutions to address the protection of these victims' rights.

Our study highlights the significance of the issues surrounding the protection of the rights of trafficking victims in Kazakhstan. By pinpointing gaps in our national legislation and law enforcement methods, assessing the level of social and legal protection offered to victims, evaluating their awareness of their rights, and addressing the main issues of victims' rights protection, we have been able to identify potential solutions to these issues.

The national mechanisms in place for safeguarding the rights of trafficking victims and ensuring their access to specialised social services require significant adjustments in line with the international obligations under the Palermo Protocol. The main objective of the recommendations put forward in this study is to enhance the national legislation and law enforcement practices regarding the protection of the rights of all categories of trafficking victims in adherence to international standards.

When revising the legislative acts of the Republic of Kazakhstan, it is crucial to consider the successful strategies of other countries in addressing human trafficking issues. Examples include the approaches taken by the United States, Sweden, Canada, Australia, and New Zealand.

Adopting the recommendations derived from this study could cultivate a human rights culture focused on combatting human trafficking. It can also facilitate the enhancement of effective collaboration methods among state and law enforcement bodies, non-governmental organisations, crisis centres, expert groups, and international organisations. Ultimately,

by implementing these recommendations, Kazakhstan can progress significantly towards establishing a law-based state, reinforcing national and public mechanisms for protecting the rights of human trafficking victims in line with international standards, and completely eliminating the potential risk of our country being placed on the "2 Watch List" (Control list) of the US State Department, which annually reports on human trafficking issues globally.

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Research Article

ASSESSMENT OF THE QUALITY OF TRANSFORMATION OF FINANCIAL REPORTING OF ENTITIES ACCORDING TO IFRS

Zasadnyi Bogdan*, Mykhalska Olena Feshchenko Yevgenia Tsybulnyk Maria, Sklyaruk Iryna

ABSTRACT

Background: *Mandatory application of IFRS for a specified list of entities brings about additional costs in terms of material, financial and labour resources. Consequently, this encourages the search for ways to minimise costs related to the transition to IFRS adoption, that is, its formalisation. Under such conditions, the need to improve the methodological toolkit for evaluating the process of transformation of financial statements in accordance with the requirements of the IFRS is actualised. This article aims to develop a methodological toolkit for assessing the quality of the financial reporting transformation process per IFRS requirements, using Ukrainian dairy industry enterprises as a case study.*

Methods: *The assessment of the impact of the transition to IFRS reporting on changes in the financial status of entities was carried out using statistical methods of comparison, generalisation, grouping, and coefficients. Conclusions were drawn based on the research findings employing the method of logical generalisation.*

Results and Conclusions: *The method of assessing the impact of the application of IFRS on the financial condition of enterprises in the dairy industry of Ukraine has been improved, particularly in terms of accounting for changes in financial statements as a result of transformational adjustments before and after the date of transition to IFRS. This refinement involves employing financial coefficients as a means of assessment, facilitating the determination of the quality assessment of the process of drawing up the first financial statements of enterprises in accordance with IFRS.*

New methodological aspects and recommendations for assessing the quality of the transformation process in the context of the application of IFRS will ensure effective management of enterprises in the dairy industry of Ukraine, leading to an increase in the attraction of foreign investments amidst the conditions of European integration processes and the post-war period.

1 INTRODUCTION

The financial reporting of entities and the quality of accounting information in the context of the application of International Financial Reporting Standards (IFRS) must be considered special objects of internal control since preparing the first financial reporting under IFRS and

subsequently reflecting economic transactions and processes in accounting; there is a high level of subjectivity due to the application of professional judgment, changes in accounting policies and estimates, the choice of different methods of transformation of financial reporting when transitioning from the application of National Accounting Standards to IFRS.

The general recognition and adoption of International Standards of Financial Reporting (IFRS) as the new global standards and framework for financial reporting has been hailed as one of the biggest revolutions in the accounting profession.

Scientific research on the problems of adaptation and application of IFRS in different countries was carried out by many scientists.[1]

Psaros J. and Trotman K. argued that using a single accounting standard is expected to improve the quality of financial reporting. According to the IFRS Concept of the International Accounting Standards Board, qualitative characteristics make the information provided in financial statements helpful to others.[2]

Tendeloo and Vanstraelen in their study of IFRS adoption for German companies, found that companies adopting IFRS do not exhibit better earnings management behaviour than companies reporting under German GAAP standards. In other words, their findings indicate that the voluntary application of IFRS in Germany cannot be associated with less earnings management.[3]

Barth et al. believed that IFRS encourages managers to be creative and use professional judgment, which tends to reduce the comparability, transparency, relevance, and reliability of financial information and, therefore, negatively impacts the quality of financial reporting.[4]

Iatridis investigated the potential of earnings management by examining the company's accounting indicators reported under GAAP and IFRS using the ordinary least squares regression technique.[5] The scientific work found that implementing IFRS reduces the scope of earnings management, leading to a higher cost of related accounting measures. This suggests that less information and earnings manipulation will lead to the disclosure of higher-quality accounting information and help investors make informed and unbiased judgments.

Liu C., Yao L., Hu N., Liu L. investigated the impact of IFRS on accounting quality in China

1 Karthik Ramanna and Ewa Sletten, *Why Do Countries Adopt International Financial Reporting Standards?* (Working Papers 09-102, Harvard Business School 2009); Anna Alon, 'The IFRS Question: To Adopt or Not?' in D Feldmann and TJ Rupert (eds), *Advances in Accounting Education: Teaching and Curriculum Innovations* (Advances in Accounting Education vol 13, Emerald Group Publishing Limited 2012) 405, doi:10.1108/S1085-4622(2012)0000013021; Victor-Octavian Müller, 'The Impact of IFRS Adoption on the Quality of Consolidated Financial Reporting' (2014) 109 Procedia Economics and Finance 976, doi:10.1016/j.sbspro.2013.12.574; Ray Ball, Xi Li and Lakshmanan Shivakumar, 'Contractibility and Transparency of Financial Statement Information Prepared under IFRS: Evidence from Debt Contracts around IFRS Adoption' (2015) 53(5) Journal of Accounting Research 915, doi:10.1111/1475-679X.12095; Irina-Doina Păşcan, 'Measuring the Effects of IFRS Adoption on Accounting Quality: A Review' (2015) 32 Procedia Economics and Finance 580, doi:10.1016/S2212-5671(15)01435-5; David Procházka, 'The Development of Capital Markets of New EU Countries in the IFRS Era' (2015) 25 Procedia Economics and Finance 116, doi:10.1016/S2212-5671(15)00720-0; Lucie Vallišová and Lilia Dvořáková, 'Implementation of International Financial Accounting Standards from the Perspective of Companies in the Czech Republic' (2018) 167(9-10) Economic Annals-XXI 70, doi:10.21003/ea.V167-14.

2 Jim Psaros and Ken T Trotman, 'The Impact of the Type of Accounting Standards on Preparers Judgments' (2004). 40(1) Abacus 76, doi:10.1111/j.1467-6281.2004.00144.x.

3 Brenda van Tendeloo and Ann Vanstraelen, 'Earnings Management under German GAAP Versus IFRS' (2005) 14(1) European Accounting Review 155, doi:10.1080/0963818042000338988.

4 Mary E Barth and others, *Accounting Quality: International Accounting Standards and US GAAP* (Working paper series, Stanford University and University of North Carolina 2006).

5 George Iatridis, 'International Financial Reporting Standards and the QUality of Financial Statement Information' (2010) 19(3) International Review of Financial Analysis 193, doi:10.1016/j.irfa.2010.02.004.

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using earnings management and value relevance as indicators of accounting quality. The scholars conducted evaluations by combining pre- and post-IFRS observations to determine the possible impact of IFRS adoption on the accounting quality of Chinese companies.[6]

Uyar conducted a study on the impact of standard change on accounting quality in Turkey using earnings management, timely recognition of losses, and cost relevance indicators. The scientific study revealed an enhancement in the accounting quality, particularly as the market became more active.[7]

Palea underscores the importance of assessing how accounting regulations can affect the quality of financial reporting. This assessment holds significant implications for standard-setting purposes, given the widespread adoption of IFRS in diverse countries worldwide and the anticipation of many other countries adopting it in the near future.[8]

Piechocka-Kaluzna investigated the quality of financial reporting of entities prepared under IFRS, which previously used Polish GAAP. The study concluded that implementing IFRS as a basis for preparing financial statements improves the quality of accounting.[9]

Furthermore, many Ukrainian researchers devoted their scientific works to the issue of adapting the national accounting and reporting system to the requirements of IFRS through standardisation and harmonisation.[10]

Zhuravka substantiates the expediency of implementing international financial reporting standards in Ukraine. The author examines the prospects of using IFRS in national accounting practice, defines the principle of transformation as a priority, and identifies the stages of IFRS implementation in Ukraine and the problems that arise at each stage. In addition to addressing the shortcomings of reforming the national accounting system, the author presents ways to optimise the process of IFRS implementation in Ukraine.[11]

Shulga, Tovkun, Perepelitsa, and Duravkin analysed problematic issues related to adapting Ukraine's national accounting and financial reporting system to IFRS. Their research systematised the advantages and challenges of this process and also noted that the success of IFRS adaptation in Ukraine depends on balanced, coordinated actions of state administration bodies, professional organisations and entities.[12]

In summary, it can be concluded that in scientific works, such issues are highlighted as the fact that the historical national features and the specifics of certain branches of the economy

6 Chunhui Liu and others, 'The Impact of IFRS on Accounting Quality in a Regulated Market: An Empirical Study of China' (2011) 26(4) Journal of Accounting, Auditing & Finance 659, doi:10.1177/0148558X11409164.

7 Metin Uyar, 'The Impact of Switching Standard on Accounting Quality' (2013) 9(4) Journal of Modern Accounting and Auditing 459.

8 Vera Palea, 'IAS/IFRS and Financial Reporting Quality: Lessons from the European Experience' (2013) 6(4) China Journal of Accounting Research 247, doi:10.1016/j.cjar.2013.08.003.

9 Agnieszka Piechocka-Kaluzna, 'Measuring The Quality of Financial Statements After the Conversion to IFRS, Case of Poland' [2021] Journal of Financial Studies and Research 479868, doi:10.5171/2021.479868.

10 RV Kuzina, 'Harmonization of Financial Reporting: International Experience and Ukrainian Practice' (2012) 721 Bulletin of the National University "Lviv Polytechnic" 126; Liudmyla Lovinska, 'The Impact of European Integration Processes on the Development of Accounting and Reporting in Ukraine' (2014) 9 Finance of Ukraine 21; Olena Kharlamova, 'Crisis "Markers" in the Controlling System of IFRS-Reporting Preparation' (2015) 3-4(2) Economic Annals-XXI 71; Victor Shvets, 'On the Issue of Legal and Regulatory Provision of Accounting and Financial Reporting under IFRS' (2015) 10(175) Bulletin of the Taras Shevchenko National University of Kyiv, Economics 60.

11 Fedir Zhuravka, 'Problem aspects of transformation in financial reporting of business entities in Ukraine' (2017) 1(1) Geopolitics under Globalization 36, doi:10.21511/gg.01(1).2017.05.

12 Tetyana Shulga and others, 'Introduction of International Financial Reporting Standards in Ukraine: Problems and Prospects' (2019) 8(21) Amazonia Investiga 341.

of different countries, in particular Ukraine, are not taken into account when approaching the harmonisation and standardisation of the accounting system on a global scale.

The process of applying IFRS in Ukraine in the development of legislative and regulatory support for accounting and reporting was started in 1998, when the resolution of the Cabinet of Ministers of Ukraine dated October 28, 1998 No 1706 approved the Program for reforming the accounting system with the application of international standards.[13] The Decree of the President of Ukraine, dated May 23, 1992, was the first legislative act defining the prerequisites for applying IFRS in Ukraine 'On the transition of Ukraine to the system of accounting and statistics generally accepted in international practice'.[14] Since then, several normative documents have been adopted in Ukraine, which regulate the application of IFRS and contain various clarifications for companies, auditing firms, and controlling and coordinating state authorities (Table 1).

Table 1. *Legislative and regulatory support of the IFRS application process in Ukraine15*

Adoption date and number	**Name of legislative and regulatory act**	**Scope of regulation**	**Publication**
1	2	3	4
23.05.1992 No 303	The Decree of the President 'On the Transition of Ukraine to the System of Accounting and Statistics Generally Accepted in International Practice'	The State Statistics Service of Ukraine, the Ministry of Finance of Ukraine, the Ministry of Economy of Ukraine, the State Committee of Ukraine for Standardization, Metrology and Certification, and the National Bank of Ukraine have been authorized to lead the development and implementation of measures to implement a unified system of accounting and statistics in Ukraine that complies with generally accepted international practice	(1992) 2 Collection of Decrees of the President
28.10.1998 No 1706	Resolution of the Cabinet of Ministers of Ukraine 'On the approval of the Program for Reforming the Accounting System with the Application of IAS'	Justifies the reform of the accounting system as a component of measures aimed at the implementation of market-oriented economic relations, and provides for the introduction of international standards by adapting them to the economic and legal environment and market relations in Ukraine	*Uryadovy Kuryer* (Kyiv, 5 November 1998)
16.07.1999 No 996-XIV	Law of Ukraine 'On Accounting and Financial Reporting in Ukraine'	Defines the legal principles of regulation, organization, accounting and financial reporting in Ukraine, interprets the National Regulation (standard) of accounting as a legal act that ensures the formation of state financial policy, defines the principles and methods of accounting and financial reporting, that do not contradict international standards	(1999) Official Gazette of Ukraine 33/71

13 Resolution of the Cabinet of Ministers of Ukraine No 1706 'On Approval of the Program for Reforming the Accounting System with the Application of International Standards' of 28 October 1998 <https://zakon.rada.gov.ua/laws/show/1706-98-%D0%BF#Text> accessed 29 June 2023.

14 Decree of the President of Ukraine No 303 'On the Transition of Ukraine to the System of Accounting and Statistics Generally Accepted in International Practice' of 23 May 1992 (as amended of 18 April 2011) <https://zakon.rada.gov.ua/laws/show/303/92#Text> accessed 29 June 2023.

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Adoption date and number	Name of legislative and regulatory act	Scope of regulation	Publication
18.03.2004 No 1629-IV	Law of Ukraine 'On the Nationwide Program of Adaptation of the Legislation of Ukraine to the European Union Law'	Identifies accounting of companies as one of the priority areas in which adaptation of Ukrainian legislation to EU legislation is carried out	(2004) Official Gazette of Ukraine 15/1028
24.10.2007 No 911-p	Decree of the Cabinet of Ministers of Ukraine 'On the Approval of the Strategy for the Application of IFRS in Ukraine'	Aimed at improving the accounting and financial reporting system in Ukraine, taking into account the requirements of IFRS and EU legislation	(2007) Official Gazette of Ukraine 82/3054
12.05.2011 No 3332-VI	Law of Ukraine 'On Amendments to the Law of Ukraine "On Accounting and Financial Reporting in Ukraine"'	Determines the mandatory application of IFRS to a specified list of business entities from January 1, 2012.	(2011) Official Gazette of Ukraine 44/1768
22.02.2012 No 157-p	Decree of the Cabinet of Ministers of Ukraine 'On Creating Conditions for the Implementation of IFRS'	Ensures the official publication of IFRS with compliance with the original, approved methodological recommendations for the preparation of a tax declaration on the income tax of enterprises using accounting data and compliance with the requirements of the IFRS and the verification of the indicators of such a declaration, the creation of a system of training, retraining and advanced training of accountants on issues of application IFRS	*Uryadovy Kuryer* (Kyiv, 3 April 2012)
27.06.2014 Ratified 16.09.2014 No 1678-VII	Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part	Creating the foundations of mutually beneficial economic, social, financial, civil, scientific, technical and cultural cooperation, promoting the development of trade, investment and harmonious economic relations, determining the need to adapt Ukrainian legislation to EU legislation.	(2014) Official Gazette of Ukraine 75(1)/2125

Thus, from January 1, 2018, by the Law of Ukraine 'On Accounting and Financial Reporting in Ukraine',[16] enterprises of public interest, public joint-stock companies, business entities operating in the extractive industries, parent enterprises of groups, which include enterprises of public interest, parent enterprises of a large group that do not belong to the category of large enterprises, as well as enterprises that conduct economic activities according to the types, the list of which is determined by the Cabinet of Ministers of Ukraine. This mandate dictates that these entities must prepare financial statements and consolidated financial reporting according to international standards.

16 Law of Ukraine No 996-XIV 'On Accounting and Financial Reporting in Ukraine' of 16 July 1999 (as amended of 10 August 2022) <https://zakon.rada.gov.ua/laws/show/996-14#Text> accessed 29 June 2023.

2 METHODOLOGY

Retrospective adjustments related to a change in accounting policy when transitioning to IFRS must be attributed directly to retained earnings on the transition date to IFRS or another item of equity. Such adjustment procedures at the first preparation of financial statements under IFRS[17] will affect the structure, ratio and size of assets, liabilities, income, expenses, and elements of capital. Accordingly, the transition to drawing up financial statements according to IFRS will lead to changes in the indicators of the financial condition of enterprises in the dairy industry of Ukraine. As a result of transformational adjustments of financial reporting items and possible changes in accounting policies or accounting estimates by the requirements of individual standards, there is a possibility that the indicators of the financial condition of enterprises will be different before the date of the first application of IFRS and after this date.

The research hypothesis posits that the change in indicators of the financial condition of enterprises, driven by the need for reclassification and retrospective adjustments of financial reporting items when switching to the application of IFRS, characterises the systematic approach to the transformation of reporting under IFRS and contributes to the improvement of the quality of accounting information. Methodical regulations for evaluating the process of the initial IFRS application of IFRS, which is based on the determination of changes in the values of financial reporting indicators as a result of transformational adjustments before and after the date of transition to IFRS using the method of financial ratios, make it possible to determine the level of systematicity or formality in the preparation of the first financial statements of enterprises per IFRS. To investigate the hypothesis, the quality of the process of transformation of financial reporting of enterprises in the dairy industry of Ukraine was evaluated following the requirements of IFRS. Based on the results of such an assessment, it was concluded how prepared and responsible the enterprises were in preparing the first IFRS reporting.

To assess the quality of the process of transformation of financial reporting of enterprises according to IFRS, twenty joint-stock companies of the dairy industry located in different regions of Ukraine were selected. The official financial statements of these enterprises, posted on the website of the National Securities and Stock Market Commission of Ukraine[18], became the information base for the impact of the transition to IFRS on the financial status. Also, an essential factor in the selection of enterprises of the dairy industry for the assessment of the quality of the transformation of financial statements was the fact that a significant number of enterprises representing this industry are joint-stock companies, which, according to the requirements of national legislation, are obliged to switch to the formation of financial statements as per IFRS.

To assess the quality of the transformation process of financial reporting following IFRS, the ratio method was used to determine the rate of change of individual financial ratios before and after the transition date to IFRS application when preparing financial statements. In particular, the research used absolute and relative indicators covering a comprehensive range of critical financial condition characteristics traditionally used in practice. The following are the fundamental indicators:

- the net assets indicator, which makes it possible to comprehensively assess changes in assets, capital and liabilities of the enterprise;
- an indicator of pre-tax income (EBT) to assess changes in the financial result of activ-

17 International Financial Reporting Standard 1 (IFRS 1). First-time Adoption of International Financial Reporting Standards (as amended of 01 January 2012) <https://zakon.rada.gov.ua/laws/show/929_004> accessed 29 June 2023.

18 *SMIDA* <https://smida.gov.ua> accessed 29 June 2023.

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ity. The selection of this indicator is justified by its characteristics as a performance indicator of the activity of each business entity, which is controlled by management.

To assess the impact of the application of IFRS on the financial position in terms of relative indicators, the following is proposed:

- Financial Autonomy Ratio and Financial Risk Factor — to assess the economic sustainability of the company;
- Intermediate Liquidity Ratio and Total Coverage Ratio — to determine the company's liquidity;
- The Main Activity Profitability Ratio is basic in the formation of the central part of the enterprise's profit (loss);
- Beaver's coefficient to assess the probability of bankruptcy. The choice of Beaver's coefficient is justified by the approbation and interpretation of its values based on the information of business entities that belong to the continental accounting model.

Also, to ensure the principle of comparison of indicators of financial analysis, it is necessary to clarify the methodology of calculating each coefficient when changing the content of financial reporting forms as the primary source of research, based on which the assessment of the financial condition is carried out.

Considering that in 2013, changes were made to the National Regulation (Standard) of Accounting No. 1 'General requirements for financial reporting'[19] in terms of the content of sections and articles of financial reporting forms, Table 2 shows the algorithm for calculating indicators (coefficients) to and after appropriate changes.

Table 2. The system of indicators (ratios) and their calculation method for assessing the financial condition of enterprises *(***L.** *— financial statement line;* **F. No. 1** *— Financial reporting form No. 1 'Statement of Financial Position' (Balance sheet);* **F. No. 2** *— Financial reporting form No. 2 'Profit and Loss Statement and other comprehensive income')*[20]

Name of indicator/ratio	Methodology for calculating the indicator/ratio	Algorithm for calculating the indicator/ratio
1. ABSOLUTE INDICATORS		
1.1. Net Assets	Assets — Liabilities	(L. 1300 (F. No. 1) — (L. 1595 + L. 1695 (F. No. 1))
1.2. Pre-tax income (EBT)	Pre-tax income	(L. 2290 (L. 2295) (F. No. 2))
2. RELATIVE INDICATORS		
2.1. Financial sustainability indicators		
2.1.1. Financial Autonomy Ratio	Sources of the company's own funds / Balance currency	(L. 1495 (F. No. 1)) / (L. 1300 (F. No. 1))
2.1.2. Financial Risk Factor	Sources of funds raised by the company / Sources of the company's own funds	(L. 1595 + L. 1695 (F. No. 1)) / (L. 1495 (F. No. 1))
2.2. Liquidity indicators		

19 Order of the Ministry of Finance of Ukraine No 73 'On approval of the National Regulation (Standard) of Accounting 1 "General Requirements for Financial Reporting"' of 7 February 2013 (as amended of 17 February 2023) <https://zakon.rada.gov.ua/laws/show/z0336-13#Text> accessed 29 June 2023.

20 Compiled by the authors.

Name of indicator/ratio	Methodology for calculating the indicator/ratio	Algorithm for calculating the indicator/ratio
2.2.1. Intermediate Liquidity Ratio	(Cash and cash equivalents + Current financial investments + Receivables) / Current liabilities	(L. 1165 + L. 1160 + L. 1125, 1130, 1135, 1145, 1155 (F. No. 1)) / (L. 1695 (F. No. 1))
2.2.2. Total Coverage Ratio	Current assets / Current liabilities	(L. 1195 (F. No. 1)) / (L. 1695 (F. No. 1))
2.3. Profitability indicators		
2.3.1. Main Activity Profitability Ratio	Gross profit / Production costs	(L. 2090 (L.2095) (F. No. 2)) / (L. 2050 (F. No. 2))
2.4. Assessing the Probability of Bankruptcy		
2.4.1. U. Beaver's coefficient (probability of bankruptcy)	(Net Income + Amortization) / Liabilities	(L. 1420 (F. No. 1) + L. 2215 (F. No. 2)) / (L. 1595 + L. 1695 (F. No. 1))

3 RESULTS

The change in net assets in absolute indicators illustrates an extraordinary trend. Only PrJSC Bershadmilk and JSC Zhytomyr Butter Plant show positive net asset changes. There is a slight decrease in net assets for PJSC Zhashkiv Dairy Plant. In contrast, PJSC Svitlovodsky BCMP demonstrates a significant decrease in net assets after applying IFRS, signalling changes in the composition of support and/or liabilities, influencing the net assets indicator.

According to the analysis results, the rate of change in the amount of assets deviates from unity in merely ten enterprises, which is 33% of the total number of enterprises. For the remaining enterprises (67%), the rate of change is equal to one. Therefore, any transformational adjustments in the composition of assets during the transition to IFRS were not made.

The assessment of the rate of change in the number of liabilities shows that four enterprises (PrJSC Wimm-Bill-Dann Ukraine, PJSC Chernihiv Milk Factory, JSC Zhytomyr Butter Plant, PJSC Svitlovodsky BCMP) made significant adjustments to the liability post-IFRS transition. Such adjustments were insignificant or absent for the rest of the enterprises.

The assessment in the pre-tax profit indicator of the enterprises made it possible to determine the facts of reclassifications in items of income and expenses, or items of assets and liabilities, which can affect income and expenses, and in the end — the amount of equity (net assets, due to the adjustment of net profit).

The profit and loss statement, which displays information for the reporting period, was used to sample data for estimating profit before taxation. This made it possible to display the absolute indicators of the profit of enterprises, calculated according to National Accounting Standards, as well as at the beginning of the first reporting period according to IFRS, taking into account retrospective adjustments of assets and liabilities. The results of the analysis confirm that in the reporting of PJSC Chernihiv Milk Factory, PrJSC Bershadmilk, JSC Zhytomyr Butter Plant and PJSC Svitlovodsky BCMP, there are significant differences between the pre-tax profit indicators after retrospective adjustment of items. In particular, the profit indicator was affected by the operations of bringing fixed assets to fair value, the display of new objects of non-current assets in accordance with the criteria for their recognition in IFRS, as well as the change in costs in connection with the adjustment of the amount of depreciation for such objects.

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According to the assessment results of the rate of change of the pre-tax profit indicator, significant changes related to the transition to the application of IFRS were also revealed. In particular, the rate of change in pre-tax profit is zero for PrJSC Zarichnenny Milk Factory, PrJSC Novovodolazh Milk Factory, PJSC Chernihiv Milk Factory, PJSC Khrystynivsky Milk Factory, PrJSC Bershadmilk and PJSC Svitlovodsky BCMP. This result is due to the reflection in the profit and loss statement of the zero value of pre-tax profit, which does not meet the requirements of IFRS. Conversely, for the remaining enterprises, constituting 70% of the total population, the rate of change in profit before taxation is equal to one. This indicates the absence of any retrospective adjustments in the composition of income and expenses for the reporting period preceding the first financial reporting period under IFRS.

Significant deviations of the autonomy coefficient values are observed, particularly at PJSC Khrystynivsky Milk Factory, PJSC Shpolyansk Milk Factory, PJSC Zhashkiv Dairy Plant and PJSC Horodyshchen Butter Plant. Factors influencing such a result in a downward direction after the transition to IFRS include the appropriate adjustment of assets and liabilities that do not affect the change in the amount of equity capital. Recommended values for the coefficient of autonomy are traditionally defined at the level of 0.5 — minimum and 0.8 — maximum. Based on this, the calculation of the coefficient of autonomy before and after the application of IFRS showed that the value of the indicators of fifteen enterprises (75%) is below the minimum level. At PrJSC Bershadmilk, JSC Zhytomyr Butter Plant, PrJSC Kalanchat Butter Plant and PJSC Kherson Butter Plant, the value of the coefficient is within the defined level, and only at PrJSC Chortkiv Cheese Factory the autonomy coefficient is higher than the maximum value.

According to the results of the analysis of the coefficient of autonomy, it can be concluded that the transition to the application of IFRS for enterprises of the milk processing industry of Ukraine did not significantly affect the change in their autonomy since no significant fluctuations in the values of the indicator were recorded.

To evaluate the liquidity of enterprises, intermediate liquidity ratios and the total coverage ratio were calculated both before and after the date of application of IFRS. Based on these indicators, the impact of adjustments to the value of financial investments, receivables and payables, and current assets in general was estimated. Analysis of the intermediate liquidity ratio indicates the absence of adjustments to the value of financial instruments, as notable deviations in ratio values were primarily observed at JSC Zhytomyr Butter Plant and PJSC Svitlovodsky BCMP. In contrast, the calculation of the total coverage ratio indicates significant changes in the adjustment of specific components such as current assets, costs of future periods, and current liabilities.

To justify the results of the analysis of the overall coverage ratio, it is advisable to determine the normative values directly for enterprises of the processing industry with a short operating cycle at the level of:

- 1.25 — the minimum (the value of the coefficient below the minimum indicates insufficient short-term solvency and decapitalisation of the enterprise);
- 2 — the maximum (exceeding the value of the coefficient of the maximum is an indicator of inefficient management of current assets).

The analysis results showed significant deviations in values, with a general trend of a decrease in the total coverage ratio after the application of IFRS.

Calculating the profitability ratio of the main activity will make it possible to analyse the application of retrospective adjustments in the composition of the enterprise articles, impacting gross profit and production costs. Key factors affecting the gross profit indicator include the volume of products sold in the assortment, product pricing, and production costs.

According to the results, the gross profit growth rate indicates the implementation of retrospective adjustments at JSC Zhytomyr Butter Plant and PrJSC Kalanchat Butter Plant. Based on the assessment of the growth rate of production costs, it can be concluded that the change in the amount of gross profit is due to the change in the volume of production costs at the respective enterprises.

Of the analysed enterprises, seven (35%) showed zero indicators of gross profit and production costs based on the results of the reporting period preceding the first year of preparing financial statements under IFRS; the remaining enterprises did not make any retrospective adjustments since the growth rate is equal to one.

Based on a comparative analysis of the values of the profitability ratio of the main activity of enterprises before and after the application of IFRS, the following generalisations were made:

- seven enterprises (35%) did not make retrospective adjustments, and the deviation of the profitability ratio is explained by zero indicators of gross profit and production costs for the last reporting period before the application of IFRS;
- six enterprises (30%) made retrospective adjustments on the date of application of IFRS, but the absolute value of such adjustments is insignificant;
- seven enterprises (30%) did not make retrospective adjustments during the transition to the application of IFRS, which does not meet the requirements of IFRS.

The impact of the IFRS application for the formation of financial statements on the probability of bankruptcy of enterprises was assessed using the Beaver ratio coefficient, calculated by incorporating indicators like net profit, amortisation of non-current assets, and liabilities. Such articles, upon first application of IFRS, are also subject to retrospective adjustments, which may increase or decrease the probability of enterprise bankruptcy. Thus, in assessing the net profit of enterprises on the date of transition to IFRS, only twelve enterprises (60%) made a retrospective adjustment of items that affected the change of this indicator. It should also be noted that six enterprises (30%) reflected in their financial statements the change in the amount of depreciation of non-current assets as of the date of application of IFRS. The factor that influenced the adjustment of the amount of depreciation is the revaluation of non-current assets in connection with revised accounting policies aligned with IFRS requirements.

To assess the process of forming the first financial statements according to IFRS by enterprises, the presence of reclassification and retrospective adjustments of individual items and their impact on the quality of accounting information, the following criteria are proposed:

- changes in 2/3 or more of the indicators– a quality process of preparation for the first application of IFRS;
- changes in 1/3 or more of the indicators — formal preparation for the first application of IFRS;
- no changes — non-compliance of financial statements with IFRS requirements.

The general results of assessing the impact of the application of IFRS on the financial condition of enterprises, based on the analysis of determined financial ratios, are shown in *Table 3*.

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Table 3. *The changes of the financial condition indicators (financial ratios) of enterprises (↑ — positive change; ↓ — negative change; – — no change)*[21]

No	Name of Company	Financial condition indicators (financial ratios)							General financial position
		Net Assets	Financial Autonomy Ratio	Financial Risk Factor	Intermediate Liquidity Ratio	Total Coverage Ratio	Main Activity Profitability Ratio	U. Beaver's coefficient (probability of bankruptcy)	
1	PrJSC DANON KREMEZ	↑	–	–	↑	↓	–	–	↑
2	PrJSC Wimm-Bill-Dann Ukraine	↑	–	–	↓	↑	–	–	↑
3	PrJSC Starobil Milk Factory	–	–	–	–	–	–	–	–
4	PrJSC Zarichnenny Milk Factory	–	–	–	↑		–	–	–
5	PrJSC Ostrog Milk Factory	↓	↓	↓	↓	↓	–	–	↓
6	PrJSC Novovodolazh Milk Factory	↓	–	–	↓	↓	–	–	↓
7	PJSC Chernihiv Milk Factory	↓	–	↑	↓	↓	–	–	↓
8	PJSC Khrystynivsky Milk Factory	↓	↓	↓	↓	↓	–	–	↓
9	PJSC Shpolyansk Milk Factory	↓	↓	↓	↓	↓	–	–	↓
10	PrJSC Chortkiv Cheese Factory	–	–	–	–	–	–	–	–
11	PrJSC Chaplinka BCMP	–	–	–	–	–	–	–	–
12	PrJSC Bershadmilk	–	–	–	–	–	–	–	–
13	JSC Zhytomyr Butter Plant	↑	↑	↑	–	↓	–	–	↑
14	PrJSC Rava-Rusky Butter Plant	–	–	–	–	–	–	–	–
15	PrJSC Ivanivsk Butter Plant	–	↑	↑	↑	↑	–	–	↑
16	PrJSC Kalanchat Butter Plant	↓	–	–	–	↑	–	–	–
17	PJSC Zhashkiv Dairy Plant	↓	↓	↓	↓	↓	–	–	↓
18	PJSC Horodyshchen Butter Plant	↓	↓	↓	↓	↓	–	–	↓
19	PJSC Kherson Butter Plant	–	–	–	–	–	–	–	–
20	PJSC Svitlovodsky BCMP	↓	–	–	↓	↓	–	–	↓

4 DISCUSSION

In today's context, there exists no viable alternative to adopting IFRS for forming financial statements by companies aiming to enter international capital markets.

The Law of Ukraine 'On Accounting and Financial Reporting in Ukraine' defines a clear list of business entities that are required to prepare financial statements in accordance with IFRS. This encompasses entities of public interest, public joint-stock companies, business entities that carry out activities in extractive industries, parent enterprises of groups, which include enterprises of public interest, parent enterprises of a large group that do not belong to the

21 Compiled by the authors on the basis of data from financial statements of enterprises. See, *SMIDA* (n 18).

category of large enterprises, as well as enterprises that conduct economic activities by types, as determined by the Cabinet of Ministers of Ukraine.

Within this list, the requirement for public joint-stock companies to adhere to IFRS causes the most considerable debate. Such entities are not always of public interest and may not belong to the category of large enterprises.

Additionally, examining the case of the Ukrainian dairy industry highlights that not all public joint-stock companies pursue international stock markets to secure foreign investments.

Therefore, taking into account the above, further scientific discussion should provide an answer to the question of whether there really is a need for mandatory application of IFRS for all public joint-stock companies.

5 CONCLUSIONS

In accordance with the defined criteria and the results of the impact assessment of IFRS' application on individual categories of financial statements, the distribution of enterprises based on the quality of preparation of the first financial statements are as follows:

1. Inconsistency of financial reporting with IFRS requirements — 16%;
2. The formal transformation of articles — 20%;
3. Qualitative transformation of articles — 64%.

The results of the quality assessment of the transformation process of financial statements to comply with IFRS, based on an analysis of the financial state of enterprises, can be considered reasonable and reliable. This assertion is well-founded since the research process covered a significant list of financial statement elements, namely assets, in particular, current assets, cash and their equivalents, current financial investments, current receivables; equity, long-term liabilities; current liabilities; gross profit; profit before taxation; net profit; amortisation; production costs.

In conclusion, it is appropriate to assume that enterprises whose financial condition did not change after the transition to accounting and financial reporting to IFRS-compliant accounting and financial reporting have formally approached transformational adjustments and the application of conceptual principles in forming financial statements that align with the standards set forth by IFRS.

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Research Article

LEGAL FRAMEWORK OF THE IDENTITY POLICY OF THE INTERNATIONAL COMMUNITY IN POSTWAR KOSOVO — A HISTORICAL OVERVIEW

Matilda Pajo*, Donik Sallova

ABSTRACT

Background: *This paper aims to elaborate and analyse the legal context of the identity policy of the international community in post-war Kosovo. Through this policy, the nature of Kosovo was determined as an entity under the UN administration until 2008 and as an independent state after that. Given that NATO's military intervention in Kosovo was initiated for humanitarian reasons and, therefore, was not an intervention aimed at resolving the historical conflict between Serbs and Albanians, the UN administration in Kosovo was also established by being neutral towards national interpretations on the "issue of Kosovo". This paper will bring together arguments that the international community, in its approach to the people of Kosovo, has actively tried to establish a new political entity detached from any national projections, thereby preventing it from being perceived as a national victory, especially among the Albanian majority. For this reason, all laws, regulations, governing documents and policies of the UN mission, which delineated Kosovo's political nature and way of governing, were based on the 'principle of multi-ethnicity'. This paper also examines the negotiation process for determining Kosovo's final status, through which independence was conditioned by the commitment to building a state based on the principle of multi-ethnicity.*

Methods: *In this article, qualitative methods have been used since the focus of this paper has been the understanding of some of the concepts of the legal framework used in the process of state building of Kosovo after the war and the role that the international community played in the policies of identity. The authors try to connect the theoretical with the practical aspects to present a broader view of the topic of this article. This scientific article is a single case study research focusing on the state of Kosovo in the post-war period. Data analyses were collected from the official documents of international institutions and the state of Kosovo. The historical method content analysis of the legal documents used in this paper has helped to achieve a deeper understanding of the topic presented in this paper.*

Results and Conclusions: *The authors' findings indicate that in post-war Kosovo, the international community in post-war Kosovo has established a neutral political entity in terms of national identification. This has been achieved through a legal and constitutional framework that prioritises identity by promoting multi-ethnicity and civic identity as the political identity of the people of Kosovo. This discrepancy between state and national identity has given rise to an identity crisis,*

especially among the Albanian majority population. This has resulted in religious radicalisation in part of the population and a lack of loyalty to the state in other parts of the country.

1 INTRODUCTION

Kosovo's declaration of independence on February 17, 2008, was prepared in coordination with the Western part of the international community, and it was presented as a sui generis case in the realm of international law. The very process of building the state of Kosovo presents a special case due to the way it was constructed from within and for the distant or neutral relationship it opted for concerning the national representatives of the people of Kosovo. Although the idea of an independent state of Kosovo was an idea that Kosovo Albanians pushed forward, driven by their desire to break free from Serbia and realise their incomplete national self-determination within the context of the dissolution of the former Yugoslavia, the intervention of the international community in Kosovo culminated with the NATO air-strikes in 1999. This intervention led to the establishment of the UN protectorate, entirely motivated by humanitarian reasons, aiming to prevent the recurrence of the catastrophe that had occurred several years earlier in Bosnia and to avoid the risk of regional escalation of the conflict.[1]

The capitulation of the former Yugoslavia, namely Serbia, after the 78-day NATO bombing, manifested itself as a national liberation by the Kosovar Albanians, who had been waging an armed war against the former Serbian forces since 1998 and political resistance since the suppression of the provinces' autonomy in 1989. However, the international community's approach to the subsequent political processes was completely indifferent to the historical and nationalist implications of this momentum. Even though June 10, 1999, is celebrated in Kosovo as the day of liberation from Serbia[2], in essence, it marks the beginning of a new phase that begins with the adoption of UN Resolution 1244[3], namely the establishment of the UN mission in Kosovo[4], which lasted until the negotiations for the final status and the declaration of independence in 2008.[5] The UN administration used the 'empty shell' approach, which would become a synonym for the policies followed in the case of Kosovo, implying that the post-war country was treated as a *tabula rasa* in terms of history, the past and the political system.[6] Every element of the state had to be invented from scratch, seemingly without considering the social actors and the past that would inevitably influence the country's future.[7]

This new phase in which Kosovo entered under international administration initially aimed to overcome the state of emergency caused by the war and lay the first foundations for democratic self-governance. This period left significant traces in the nature and contours of Kosovo. The declaration of independence and state-building took place under close international scrutiny

1 See, Tonny Brems Knudsen, 'From UNMIK to self-determination?: The puzzle of Kosovo's future status' in Tonny Brems Knudsen and Crasten Bage Laustsen (eds), *Kosovo between War and Peace: Nationalism, Peacebuilding and International Trusteeship* (Routledge 2006) ch 9, 167, doi:10.4324/9780203969618.

2 Military Technical Agreement between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia (1999) 38(5) *International Legal Materials* 1217, doi:10.1017/S0020782900020052.

3 UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244 <https://unmik.unmissions.org/united-nations-resolution-1244> accessed 16 August 2023.

4 ibid, para 10.

5 Kosovo Declaration of Independence of 17 February 2008 <https://www.refworld.org/docid/47d685632.html> accessed 16 August 2023.

6 Nicolas Lemai-Hebert, 'The "Empty Shell" Approach: The Setup Process of International Administrations in Timor-Leste and Kosovo, its Consequences and Lessons' (2011) 12(2) International Studies Politics 190, doi:10.1111/j.1528-3585.2011.00427.x.

7 ibid.

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and followed negotiation talks with Serbia, during which compromises were made on various aspects of Kosovo's future state. Serbia had double participation in the negotiations, appearing as a disputing party to the Albanian demand for independence and as a representative of the interests of Kosovo Serbs within the anticipated state.

The international community involved in Kosovo after 1999 refused to resolve Kosovo's final status in the context of resolving the Serb-Albanian conflict. The proposal put forth by the UN chief negotiator, Martti Ahtisaari, presented a state that would be built more as a result of current circumstances rather than as a solution to a historic dispute where one side 'triumphed' over the other. In this sense, according to the Ahtisaari Proposal, 'Kosovo could no longer be returned to Serbia'[8], just as 'Kosovo could not join any other state'[9], clearly implying the prohibition for union with Albania — a prospect viewed by the Albanian majority as the end of the process of national unification.

The new state of Kosovo was envisioned as a state for all its citizens, regardless of their historical and political stances on this aspiration, whether they were Albanians who had fought for it or Serbs who had opposed it. The state of Kosovo was projected as a state of all, but without the sign of national ownership and the symbolic cultural manifestation of any of the peoples of Kosovo, neither the majority Albanians nor other minorities.[10]

It should be specified that, in this paper, by 'international community', we do not refer to a single body or a unique mechanism representing the entire international community. Instead, it encompasses different parts of the international community (organisations, representatives, mechanisms) that have been involved in Kosovo. This involvement was initiated by the UN Mission, known as UNMIK (United Nations Mission in Kosovo), which played a leading role in the governance of Kosovo from 1999 to 2008.[11] The International Community in relation to Kosovo has also been the Contact Group (USA, United Kingdom, Germany, France, Italy and Russia), whose decisions have influenced the developments regarding the status of Kosovo.[12] The Secretary General of the UN and his Special Envoy, Martti Ahtisaari, have represented the international community (the UN) in the negotiation process for the settlement of the final status of Kosovo (2005-2007).[13]

After the declaration of Kosovo's independence and its initial phase of supervising the implementation of the principles and conditions of the Ahtisaari Proposal, the ICR (International Civilian Representative for Kosovo) was chosen by the Council of the European Union.[14] This appointment of the ICR symbolised the presence of the international community in the processes of the state-building policy of Kosovo. Therefore, starting from the phase of the UN protectorate until the determination of Kosovo's independent state status in line with

8 UNSC 'Report of the Special Envoy of the Secretary-General on Kosovo's future status' (26 March 2007) UN Doc S/2007/168, para 7 <https://digitallibrary.un.org/record/595358?ln=en> accessed 16 August 2023.

9 UNSC 'Comprehensive Proposal for the Kosovo Status Settlement' (26 March 2007) UN Doc S/2007/168/Add.1, art 1, para 1.8 <https://digitallibrary.un.org/record/595359?ln=en> accessed 16 August 2023.

10 Constitution of the Republic of Kosovo of 9 April 2008, arts 1.2, 6 <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702> accessed 16 August 2023.

11 UNMIK Regulation No 1999/1 'On the Authority of Interim Administration in Kosovo' (25 July 1999) <https://unmik.unmissions.org/sites/default/files/regulations/02english/E1999regs/RE1999_01.htm> accessed 16 August 2023.

12 'The Contact Group' (*US Departament of State Archive*, 20 January 2009) <https://2001-2009.state.gov/p/eur/ci/kv/c13102.htm> accessed 16 August 2023.

13 UNSC 'Letter dated 31 October [2005] from the Secretary-General addressed to the President of the Security Council (10 November 2005) UN Doc S/2005/708 <https://www.securitycouncilreport.org/un-documents/document/kos-s2005-708.php> accessed 16 August 2023.

14 Council Joint Action 2008/123/CFSP 'Appointing a European Union Special Representative in Kosovo' (4 February 2008) OJ L 42 <http://data.europa.eu/eli/joint_action/2008/123/oj> accessed 16 August 2023.

UN envoy Ahtisaari's proposal, the international presence has left its mark on the identity and nature of the state of Kosovo.

The paper seeks to argue that the nature of the state of Kosovo is the result of an identity policy pursued by the international community in Kosovo. This policy aimed to strip the Kosovo-Serbia dispute from its original nationalist context and support building the Kosovo state entity as a new political project with a multiethnic identity. According to scholar Francis Fukuyama, *'national identities can be created by states through their language, religion and education...'*[15] In the case of Kosovo, where the mechanisms of the international community have been the governing power since 1999, it initiated, imposed and implemented this policy of forming a new political identity at all stages.

Such an identity policy developed from the moment the UNMIK mission was established in Kosovo[16] and continued until the incorporation of these principles of a multiethnic state into the provisions of the Constitution of the Republic of Kosovo[17], the modification of which is almost impossible**.** Another primary objective of this paper is to argue that the creation of such a distant and indifferent state to the national identities of the people of Kosovo, especially to the majority, has produced an identity crisis which has compromised the very process of Kosovo's state-building.

2 THEORETICAL AND CONCEPTUAL FRAMEWORKS

The literature on the issues covered by the research may be divided into two groups: foreign and local authors' writings. Additionally, analyses and reports produced by international and national institutes, think tanks and other organisations addressing Kosovo and identity policies have played a pivotal role. In addition, legal documents such as constitutions, laws, UN documents and UNMIK regulations have been instrumental in facilitating this research. Collectively, these resources have provided valuable guidance for delving deeply into the research and finalising this article, which can serve as a resource to deepen the reader's understanding or as a solid foundation for further academic exploration in this field of study.

This identity policy is also a political experiment developed in a region where states are closely related to national belonging. The main factor of all wars has been the claim for national hegemony of one nation.

So, the concept of a 'civic-political nation' is unknown in this region of Europe, namely, South-Eastern Europe. In this context, all states have historically been built on ethnic nations, leading to the categorisation of these states as ethnic-nation states.[18] The extent of this experiment's success in creating such a state model in Kosovo and the complications it has generated will become more apparent as we delve deeply in the following paper. But essentially, identity policies aim to build identities, in this political case, on certain social groups or society as a whole.[19] Identity policies are usually a mechanism of the state and are used for the massification of a certain identity, namely the national identity, after the establishment of the state.

The importance of state mechanisms, including public education, mass media and social-cul-

15 Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (AIIS 2015) 181.

16 UNSC Res 1244 (n 3) para 10.

17 Constitution (n 10) ch 1, art 3.1.

18 Urs Altermatt, *Etnonacionalizmi në Europë* (Phoenix 2002) 37.

19 Andrew Heywood, *Politics* (5th edn, Red Globe Press 2019) 325-6.

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tural policies, in constructing national identity, respectively, forging a citizen identity based on a public culture constructed by the power elites, has also been evidenced by the theorist of nationalism, Anthony D. Smith.[20] The international community's involvement in Kosovo raises questions about whether this policy was intended to ease inter-national and inter-ethnic tensions among the people or construct a new shared cultural identity. With recent developments in Kosovo, where ethnic divisions seem to be deepening, identity-building policy may have likely failed. Today, in the ongoing dialogue between Kosovo and Serbia, mediated by the European Union, solutions that have been proposed within the framework of the so-called 'European Plan for the normalisation of Kosovo-Serbia relations'[21] ideas like the one on the Association of Municipalities with Serbian Majority Population (as an agreement reached in earlier Brussels negotiations)[22], seems to contradict the multi-ethnic concept of the state of Kosovo.

Also, it is important to emphasise that this identity policy of the international community in Kosovo has largely been imposed against the local political elites. Practically, the state-building of Kosovo has been conditional on the 'multi-ethnic nature' of the future entity.[23] However, the concept of an independent Kosovo was conceived and championed by Albanian nationalist elites, and within their political and party agendas, there was no intent to create a new national identity through the state of Kosovo. On the contrary, the idea of an independent Kosovo is considered the fulfilment of Albanian national self-determination, especially given the impossibility of uniting all Albanians in a single state. This perspective is vividly reflected in the Constitution of the Republic of Kosovo, approved by the Assembly of Kosovo on September 7, 1990, in Kacanik. In its first article, Kosovo was defined as *'a democratic state of the Albanian nation and members of other nations and national minorities...'.*[24]

So, unlike the constitution with Ahtisaari principles[25], the 1990 constitution recognised the title of the majority Albanian nation and other minority nations without aspiring to cultivate a new national identity.

Even the various illegal political groups that operated in Kosovo throughout the 20th century, especially from 1968 onwards, never included in their political agendas the aim of forging any new, distinct political identity for Kosovo that would be different from the broader Albanian national identity they considered part of. These groups generally aspired to unite Kosovo with Albania and naturally came out in support of the idea of the Republic of Kosovo, which they considered as a step toward achieving Albanian national unification.[26] Even according to Albanian academic Gazmend Zajmi, a key figure of the juridical-constitutional articulation in articulating the aspirations for the Republic of Kosovo, '*of course the vision of the unification of*

20 Anthony D Smith, *Kombet dhe Nacionalizmi në erën globale* (Dudaj 2008) 104.

21 'Belgrade-Pristina Dialogue: EU Proposal — Agreement on the path to normalisation between Kosovo and Serbia' (*European Union External Action (EEAS)*, 27 February 2023) <https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue-eu-proposal-agreement-path-normalisation-between-kosovo-and-serbia_en> accessed 16 August 2023.

22 Balkans Policy Research Group, *Brussels Dialogue between Serbia and Kosovo: Achievements and Challenges* (BPRG 2020) <https://balkansgroup.org/en/the-brussels-dialogue-between-kosovo-and-serbia-achievements-and-challenges> accessed 16 August 2023. See also: Association/Community of Serb-majority municipalities in Kosovo — general principles/main elements of 25 August 2015 <http://eeas.europa.eu/statements-eeas/docs/150825_02_association-community-of-serb-majority-municipalities-in-kosovo-general-principles-main-elements_en.pdf> accessed 16 August 2023.

23 Florian Bieber, 'Building Impossible States? State-Building Strategies and EU Membership in the Western Balkans' (2011) 63(10) Europe-Asia Studies 1783, doi:10.1080/09668136.2011.618679.

24 Kuvendit të Republikës së Kosovës, *Akte të Kuvendit të Republikës së Kosovës, 2 korrik 1990 — 2 maj 1992* (ASHAK 2005) 12.

25 See: Constitution (n 10) ch 1, arts 1.2, 3.1. See also: UNSC 'Comprehensive Proposal for the Kosovo Status Settlement' (n 9) art 1, para 1.1.

26 See, Ethem Çeku (hrsg), *Shekulli i ilegales: procesët gjyqësore kundër ilegales në Kosovë* (Brezi '81 2004).

the Albanian nation in the Balkans through a democratic and peaceful path, simultaneously focused on the integration processes in Europe, remains a natural projection and a constant of the Albanian national program'.[27] To sum up, no political movement in Kosovo, whether considered illegal by the Yugoslav system or part of the later democratic political movements leading peaceful resistance, viewed the demand for independence as a means to establish a new national identity. Instead, they have considered the state of Kosovo as a right denied to the Albanian nation within the former Yugoslavia and as a completion of national self-determination for Albanians.

In this article, we have relied on the concept of researchers and theorists of nationalism who assert that in the modern and contemporary era, 'national identity' is one of the main forms of collective identification of the individual, especially in the Western world. According to researcher Anthony D. Smith, '*a sense of national identity provides a powerful means of defining and locating individual selves in the world, through the prism of the collective personality and its distinctive culture. It is through a shared, unique culture that we are enabled to know 'who we are' in the contemporary world. By rediscovering that culture, we 'rediscover' ourselves, the 'authentic self, or so it has appeared to many divided and disoriented individuals who have had to contend with the vast changes and uncertainties of the modern world.*'[28] Another theorist, Ernest Gellner, suggests that the primary aspiration of a nation is the creation of a sovereign state which identifies with its national culture; that is, it identifies with itself.[29]

The connection we have made to the importance of national identity and its influence on citizens' loyalty to the state draws on the perspective of the political theorist Francis Fukuyama. According to him, *'National identity has been pivotal to the fortunes of modern states. When channeled in the form of an exclusive and intolerant ethnonationalism, it can drive acts of persecution and aggression. Yet national identities can also be built around liberal and democratic political values, and around the shared experiences of diverse communities. Contrary to arguments that the concepts of national identity and state sovereignty have become outmoded, such an inclusive sense of national identity remains critical to maintaining a successful modern political order. National identity not only enhances physical security, but also inspires good governance; facilitates economic development; fosters trust among citizens; engenders support for strong social safety nets; and ultimately makes possible liberal democracy itself.*'[30]

In this sense, since man is inclined towards belonging to a collective community, and in the modern era, these communities often take the form of 'national community', our argument in this article is that the lack of constitutional, institutional and political promotion of national communities in Kosovo, has produced an 'identity crisis'. Consequently, part of the population, especially Albanians, searching for a solid collective identity, is oriented towards religious identification. This has led to the consequences we aim to highlight below: religious radicalism and a lack of loyalty to the state.

The focus of this article on the impact of the international community's identity policy on the Albanian population in Kosovo is not driven by preference or partiality but rather stems from the fact that the Albanian community has predominantly felt this impact. There are several reasons for this:

1. The idea of the state of Kosovo was initially conceived as a project by the Albanians of Kosovo as an attempt to achieve national equality with other nations in Yugoslavia. The demand for full independence came as a response to the disintegration

27 Gazmend Zajmi, 'Ndrydhja e çështjes shqiptare si faktor i degradimit dhe i zhbërjes së Jugosllavisë' in G Zajmi, *Vepra*, 1 (Botime të veçanta 27, Seksioni i Shkencave Shoqërore 9, ASHAK 1997) 84.

28 Anthony D Smith, *National Identity* (Penguin 1991) 17.

29 See, Ernest Gellner, *Nations and Nationalism* (2nd edn, Cornell UP 2010).

30 Francis Fukuyama, 'Why National Identity Matters' (2018) 26(4) Journal of Democracy 5, doi:10.1353/jod.2018.0058.

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of the former Yugoslavia. In this sense, the construction of the multi-ethnic state presented by Marti Ahtisaari in his proposal represented a departure from the new and different concept of the state that they had envisioned for Albanians. Albanians considered Kosovo as part of their national identity, but the political, constitutional, institutional, and symbolic framework of the state announced in 2008 that it did not reflect and align with this perception.

2. Why is this fact not problematic for Kosovo Serbs at present? This is because Kosovo Serbs essentially do not recognise the state of Kosovo, or at least do not identify with it. Most Serbs consider Kosovo to be part of Serbia or associate it with the main elements of the Serbian nation. Kosovo Serbs primarily identify Kosovo with Serbian elements, such as the Serbian Orthodox Church in Kosovo, municipalities where Serbs form the majority, etc. Even the request to establish the Association of Serbian Municipalities serves to distinguish Serbs from any potential identification with the state of Kosovo as a collective political identity rooted in multi-ethnicity.

3. For the Kosovo Serbs, distancing themselves from the state identity of Kosovo is relatively straightforward because they continue to reject the idea of the state of Kosovo. Whereas, for the Albanians, who were the initiators of the Kosovo state, transforming their national project into a multi-ethnic state project with a tendency towards creating a new national identity[31] certainly presents a lot of tension. It is our contention that this transformation has also contributed to the identity crisis experienced by the Albanian community in Kosovo.

3 THE HISTORICAL CONTEXT OF THE DISINTEGRATION OF FORMER YUGOSLAVIA AND KOSOVO AS PART OF IT

Many local and international researchers have already studied the issue of the disintegration of the former Yugoslavia. Without devaluing the influence of external factors, such as the geopolitical changes of the late 20th century, which culminated with the fall of the Berlin Wall and the dissolution of the former Soviet Union, scholars generally consider that there were internal factors that led to violent conflicts and the final dissolution of the Yugoslav state. The main internal factor is considered the rise of nationalism, especially Serbian nationalism, which continued to grow after Tito's death and eventually led to the separation of the federal units that made up the Yugoslav Federation.[32] With the ascent of Milosevic as the head of Serbia and Yugoslavia, Serbian ambitions for bringing the Yugoslav state under control took off, starting with revoking autonomy for autonomous provinces such as Kosovo but extending to territorial and control-related claims against other republics.[33] The subsequent course of events, marked by wars and bloodshed, persisted until 1999, when, following the NATO bombing of the Federal Republic of Yugoslavia, Milosevic finally withdrew from Kosovo. Revoking Kosovo's autonomy in 1989 was Milosevic's first act towards dismantling Yugoslavia, while NATO's entry into Kosovo in 1999 marked the conclusion of almost ten years of violence in the region.

Given that the Badinter Commission,[34] on behalf of the European-international community,

31 See, Leandrit I Mehmeti, 'Kosovar Identity: Challenging Albanian National Identity' (2017) 9(1) Australia and New Zealand Journal of European Studies 16, doi:10.30722/anzjes.vol9.iss1.15171.

32 'Yugoslav Successor States' in Sabrina P Ramet and Christine M Hassenstab (eds), *Central and Southeast Politics Since 1989* (2nd edn, CUP 2010) ch 4, 249, doi:10.1017/9781108752466.

33 Viktor Meier, *Yugoslavia: A History of its Demise* (Routledge 2005).

34 The Opinions of the Badinter Arbitration Committee 1991–1992. See, Peter Radan, 'Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission'

recognised the right of secession for the Yugoslav republics but not for the provinces, the process of building Kosovo as an entity outside of Yugoslavia and Serbia is closely related to the role of the international community after the NATO humanitarian military intervention. Even though the International Court of Justice in 2010 concluded '*that the declaration of independence of Kosovo did not violate the international law*'[35], the construction of the state of Kosovo was done under the mentorship of the international community. The case of Kosovo was presented as a sui generis case rather than a classic case of self-determination.[36] This paper aims to illustrate that the Kosovo case, aside from being treated as a sui generis, represents a unique approach to state-building, where the international community established all parameters framing the nature of the state of Kosovo, including those related to identity. This encompassed the defining clauses of the entity-state up to the visual appearance of symbols, such as the flag, coat of arms and anthem of Kosovo. Various local and international researchers have considered this an 'identity policy' aimed at repairing the inter-ethnic relations destroyed during the conflicts of the 1990s.[37] As authors, we do not have a negative attitude towards this policy. Still, we aim to demonstrate, in an argumentative manner, the impacts and consequences that this policy has had with 'multi-ethnicity' as the identifying feature of the new entity against consolidated national identities, especially among Albanians. The fact that there is a distinct state identity versus national identity, both in symbolic and institutional contexts, sets Kosovo apart from other states created by the breakup of the former Yugoslavia. The historical analysis of this state-building process, its legal basis, and the political instruments employed are central to the article's research goals.

4 UN ADMINISTRATION IN KOSOVO AS A BASIS FOR STATEHOOD

Under a mandate granted by the UN Security Council, the UN Secretary-General established the UN Interim Administration Mission in Kosovo, known as UNMIK. This administrative mission held full governing authority over Kosovo from its establishment until the declaration of Kosovo's independence. Although its mandate has not been officially terminated, it has been limited to observing and reporting to the Security Council. Nonetheless, from 1999 to 2008, UNMIK was the bearer of all governing powers[38] in Kosovo, including formulating the Self-Government Framework to be exercised by the Provisional Institutions of Self-Government in Kosovo.[39]

Furthermore, the legal and political basis of governance and self-government in Kosovo was established through UNMIK regulations, through which every sphere of life was regulated in Kosovo.[40] Given that the purpose of this paper is not to analyse the wide range of governing competencies of UNMIK, it focuses on identifying the principles and governance policies of this mission that have reflected the tendency to build a multi-ethnic social and institutional organisation. Our analysis will delve into the aspects of documents and policies that have framed and sanctioned Kosovo as a multi-ethnic political entity. From the definition of the

(2000) 24(1) Melbourne University Law Review 50.

35 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 <https://www.icj-cij.org/case/141> accessed 16 August 2023.

36 James Ker-Lindsay, 'Preventing the Emergence of Self-Determination as a Norm of Secession: An Assessment of the Kosovo "Unique Case" Argument' (2013) 65(5) Europe-Asia Studies 837, doi:10.1080/09668136.2013.805962.

37 See, Bekim Baliqi, 'Politics of Identity and Ethnic Relations in Kosovo' (*SSRN*, 18 September 2014) <https://ssrn.com/abstract=2734338> accessed 16 August 2023.

38 UNMIK Regulation No 1999/1 (n 11).

39 See, Marc Weller, *Shtetësia e kontestuar: Administrimi ndërkombëtar i luftës së Kosovës për pavarësi* (Koha 2011) 199-308.

40 *United Nations Mission in Kosovo (UNMIK)* <https://unmik.unmissions.org> accessed 16 August 2023.

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people of Kosovo to how self-governing power is organised and shared, these documents and policies reflect the international mission's aspiration to build a model different from the political, state and governance models that previously existed in Kosovo or from the models of the political systems of the neighbouring states that existed around Kosovo.[41]

Thus, the freedom of Kosovo, despite being rooted in the aspirations of the Kosovo Albanian people, who had the status of a national minority under the former Yugoslavia and fought for the advancement and equalisation of this status with other Yugoslav nations, did not materialise as a process of Albanian national consolidation or sovereignty under the UN temporary mission.[42] So, regardless of the final solution to Kosovo's status, building institutional capacity for self-government (pre-state) was done following the principle of 'civic equality' and aimed at constructing a multi-ethnic entity rather than a purely national entity.[43] As we will see, this perspective is reflected in all relevant documents that defined the framework of Kosovo's political development during this period.

5 CONSTITUTIONAL AND POLITICAL FRAMEWORK OF KOSOVO UNDER PROTECTORATE

Kosovo's Constitutional Framework, which was adopted in 2001 by UNMIK in the form of a regulation, defined all aspects of Kosovo as an entity under provisional UN administration. It defined the political nature of this entity, the status and definition of the peoples that inhabited it, and the institutional organisation and competencies of each power, confirming that the final instance of decision-making remains the international administration.[44] Thus, in the first chapter of this framework, where the nature of the entity is defined by basic provisions, in Article 1.1, Kosovo is defined as '*an entity under temporary international administration, which, with its people, has unique historical, legal attributes, cultural and linguistic*.'[45]

This initial defining article of Kosovo, in addition to showing Kosovo as an entity under international administration, presents the people of Kosovo as a unique entity without specifying its national composition without identifying the majority nation and national minorities within the population of Kosovo. Given that the Kosovo war arose from the distorted relations between the Serb minority in a position of political power and the Albanians as the oppressed majority seeking national identity and sovereignty for Kosovo, even within the former Yugoslavia, this broad characterisation of the people of Kosovo in the Constitutional Framework established by UNMIK[46] indicates the intention of international politics that future political developments, starting from the establishment of self-government to the resolution of the final status settlement do not take place under the national background of any of the national communities of Kosovo.[47]

41 See, Adem Beha, 'Constitution-making and statebuilding in Kosovo: we (you) the people' [2023] Peacebuilding, doi:10.1080/21647259.2023.2217575.

42 UNMIK Regulation No 2001/9 'Constitutional Framework for Provisional Self-Government in Kosovo' (15 May 2001) <https://unmik.unmissions.org/sites/default/files/regulations/02english/E2001regs/RE2001_09.pdf> accessed 16 August 2023.

43 Vjosa Musliu, 'Multi-Ethnic Democracy as an Autoimmune Practice: The Case of International Missions in Kosovo' (2016) 19(1) The British Journal of Politics and International Relations 188, doi:10.1177/1369148116672211.

44 UNMIK Regulation No 2001/9 (n 42).

45 ibid, ch 1, art 1.1.

46 ibid.

47 See, Sébastien Gricourt et Gilles Pernet (dir), *Kosovo: Récits sur la construction d'un État* (Non Lieu 2014).

It must be said that the Kosovo issue has a strong national background. Kosovo Albanians brought it to the forefront as a crisis because they felt discriminated against, excluded and denied equal national status within the former Yugoslavia, especially when their autonomy was revoked in 1989.[48] The Albanian demand for a Republic within the former Yugoslavia aimed to achieve national equality. Albanians demanded that other nations have political unity in the form of the highest organisation within the former Yugoslav Federation, such as the Republic. They sought to give their national identity and existence a political status akin to a state entity, with the Republic of Kosovo representing the Albanian nation in Kosovo, one of the largest ethnic groups living in the former Yugoslavia, along with Serbs and Croats. This perspective is also reflected in the Constitution of the Republic of Kosovo, adopted on September 7, 1990, where Kosovo was declared a state of the Albanian nation majority and other national minorities.[49]

This shift in the constitutional categorisation of the political nature of the Kosovo population, moving from a population with well-defined national identities, with the majority being Albanians and others being minorities, to a people without national specifics by definition, is the first initial phase to build a new political collective identity in Kosovo. This emerging identity aimed to be more related to the political equality of all residents of Kosovo, regardless of which *national community* they belonged to, concerning Kosovo as a political entity. As we will see later, the same rationale was employed in the proposal presented by the UN Secretary General's special envoy on the final status of Kosovo. Despite the fact that his proposal was closer to the aspiration of Albanians for independence at that time, it did not recommend that the state of Kosovo would be the fulfilment of national aspiration. Instead, it portrayed it as a factual reality for a population who could never return to Serbia.[50]

According to this logic of removing nationality from the categorisation of the various communities that make up the people of Kosovo, Chapter 4 of the Constitutional Framework, which pertains to 'the rights of communities and their members', classifies communities in Kosovo solely in terms of their *ethnic, religious, linguistic characteristics,* and as such ensures the preservation and cultivation of their identity in those aspects. Meanwhile, the term 'nation', the main characteristic of modern people and communities, is not mentioned at all in this important constitutional clause of Kosovo under the UN protectorate.[51]

Moreover, to the basic provisions of the Constitutional Framework of Kosovo, which defined Kosovo as a non-national political entity, the multiethnic character of Kosovo's political and institutional organisation was defined through a set of political and institutional organisation principles. These principles were put into practice by the Provisional Institutions of Self-Government implemented during their operation under UNMIK from 2001 to 2008.[52] It should be noted that the definition of Kosovo as a 'multiethnic society' by the International Community and UNMIK was more of a *political definition* than a demographic reality of the ethnic composition of the population of Kosovo.

According to an estimate by the Statistical Office of Kosovo published in 2008, Kosovo in 2006 had 2.1 million inhabitants, of which 92% were Albanians, 5.3% Serbs, 1.1% Roma, 0.4% Turks and 1.2% others.[53] These demographic trends have not changed, even following

48 See, Noel Malcolm, *Kosova: nje histori e shkurter* (Koha & Shtepia e Librit Tirane 2001) 348-72.

49 Kuvendit të Republikës së Kosovës (n 24) 12.

50 UNSC 'Report of the Special Envoy (n 8).

51 UNMIK Regulation No 2001/9 (n 42) ch 4.

52 Marcus Brand, *The Development of Kosovo Institutions and the Transition of Authority from UNMIK to Local Self-Government* (CASIN 2003) <https://reliefweb.int/report/serbia/development-kosovo-institutions-and-transition-authority-unmik-local-self-government> accessed 16 August 2023.

53 Statistical Office of Kosovo, *Demographic Changes of the Population of Kosovo 1948–2006* (Series 4: Population Statistics, SOK 2008) 7.

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the most recent population census in 2012 at the municipal level organised by the Kosovo Statistics Agency, which revealed that about 90% of Kosovo's population is ethnically Albanian, while the rest consists of minority communities.[54]

Despite this homogeneous composition of Kosovo's population, the structure and functioning of its institutions and governance were built on the so-called *principle of positive discrimination,* where minorities would be over-represented politically and institutionally to "feel equal" in Kosovo's new government. This asymmetric equality, favouring minority representation over the majority, started with the establishment of linguistic equality between the Albanian language, spoken by 90% of the population, and the Serbian language, used by 5% of the population. The Constitutional Framework equally defined Albanian and Serbian as the working languages of Kosovos's governmental bodies, thus sanctioning the production of any official document, from laws to identification documents in both languages[55](besides English as the official language) of International Administration in Kosovo.

This approach extended to political representation in the institutions of the three branches of government: the legislature, the executive, and the judiciary. The Assembly of Kosovo consists of 120 seats, of which ten are reserved for the Serb minority and ten seats for other non-Serb minorities.[56] These reserved twenty seats for minorities do not exclude minority communities from the opportunity to compete with Albanian parties for the remaining 100 seats in the electoral race. Consequently, this makes them have a political presence in parliament much more than if subjected to a real electoral race. Reserved representation also included working bodies of the assembly, such as the presidency and parliamentary committees.[57]

In addition to the legislature, the reserved participation of minorities was also enabled in the Kosovo government, i.e. in the executive, where at least one minister had to be from the Serb community and another from other non-Albanian communities as if the government had more than twelve ministers, then every third minister would be from minority communities.[58] These reservations about the political participation of minorities in government had a conditional effect, as the government could not be constitutionally formed if it did not include minority ministers. Following Kosovo's independence, especially at a time when Serbian political formations came under the direct influence of Serbia, these constitutional clauses led to political blackmail, with the Serb minority refusing to participate in the government, endangering the possibility of establishing democratic institutions in the post-election period.

An illustrative example is the political blockage caused by the Serbian representative party in the Kosovo Assembly, influenced by Serbia, which did not recognise Kosovo's independence. This party obstructed Kosovo's efforts to transform its Kosovo Security Force into a regular army as part of a planned transition. According to the constitutional provisions, any amendment required the consent of two-thirds of the minority communities, including the Serbs, making it challenging to achieve any constitutional changes.

6 RESOLVING KOSOVO'S FINAL STATUS: AHTISAARI PROPOSAL AS A LEGAL-POLITICAL FRAMEWORK OF AN INDEPENDENT MULTIETHNIC STATE

As the UN administration in Kosovo extended beyond the scope of the Rambouillet Agreement, which incorporated principles for resolving Kosovo's future political status into UN

54 Kosovo Agency of Statistics, *Estimation of Kosovo Population 2012* (ASK 2013).
55 UNMIK Regulation No 2001/9 (n 42) para 9.1.49–9.1.51, 9.3.17–9.3.18.
56 ibid, para 9.1.3.
57 ibid.
58 ibid, para 9.3.5.

Security Council Resolution 1244,[59] impatience and tensions in Kosovo increased, especially during 2004. In response, UN Secretary-General Kofi Annan appointed a special envoy to assess the overall situation in Kosovo and its progress in implementing the Plan of the Standards, set in March 2004, as a condition for initiating the political process to determine the final status. In June 2005, Secretary Annan's Special Envoy, Norwegian Kai Aide, sent a comprehensive report on the situation in Kosovo, according to which, despite not fully meeting the standards, Aide recommended that it was time to continue the implementation of the standards and open the process of determining the final status of Kosovo.[60]

Thus, after rapid consultations with members of the Security Council, the UN Secretary-General, in October 2005, appointed former Finnish President Martti Ahtisaari as the special envoy to lead the process of determining Kosovo's future status.[61] It is essential to note that from the very beginning of this process, the international community, namely the Contact Group, which included France, Germany, Italy, the United Kingdom, the United States of America and Russia, assigned the Secretary-General of the United Nations and his envoy the *principles that would guide the process of resolving Kosovo's political status.*[62] These guiding principles formed the basis on which the solution to Kosovo's status would be built. Among the ten principles established by the Contact Group, it was explicitly stated that the political solution to Kosovo's status would involve the construction of a multiethnic political entity.[63] This multi-ethnicity would be manifested as a political identity reflected in the functional and organisational structure of governing institutions.

Another important aspect outlined in these principles was the insistence on Kosovo remaining a separate entity without the possibility of unification with any other state.[64] This stance aimed to separate Kosovo from the perspective of unification with Albania, fulfilling the nationalist aspirations of Kosovo Albanians.

In essence, right from the outset, the international community, particularly the Contact Group, defined the future political identity of Kosovo as an entity built politically and culturally on multi-ethnicity, as a collective identity based on diversity, detached from any historical-national context of the Kosovo issue. The alienation from the characteristic elements of a political community leads to the disconnection of the feeling of belonging, a very important element in fostering trust — a fundamental requirement for the sustainable development of a democratic state.[65]

Under the mandate given by the UN Secretary-General and guided by the principles of the Contact Group, Special Envoy Martti Ahtisaari conducted intense negotiations between Kosovo and Serbia for a year, aimed at reaching an agreement regarding Kosovo's status. Given that the negotiations failed to reach an agreement accepted by both parties and since securing such an agreement of both parties was neither a prerequisite nor a determining condition in the proposed solution, Ahtisaari, after a period of intensive and exhausting negotiations between Kosovo and Serbia, submitted a Report on the Future Status of Kosovo to the UN Secretary-General. This comprehensive report, presented to the Security Council in March

59 S/RES/1244 (1999) (n 3).

60 UNSC 'A Comprehensive Review of Situation in Kosovo' (7 October 2005) UN Doc S/2005/635 <https://digitallibrary.un.org/record/559052?ln=en> accessed 16 August 2023.

61 UNSC 'Letter dated 31 October [2005] (n 13).

62 UNSC 'Guiding Principles of the Contact Group for a Settlement of the Status of Kosovo' (10 November 2005) UN Doc S/2005/709 <https://digitallibrary.un.org/record/560544?ln=en> accessed 16 August 2023.

63 ibid, para 3.

64 ibid, para 6.

65 Robert Nisbet, *The Quest for Community* (ISI Books 2010).

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2007,[66] proposed *Kosovo's independence as a solution overseen* by the international community. The supervision corresponds precisely to the type of state that Kosovo must build to legitimise its independence. This report, which is also known as *the Comprehensive Proposal for the settlement of the status of Kosovo,* contained concrete constitutional, political and legal principles which should be included in the constitution of Kosovo and, depending on the success of the implementation of these principles in state-building, international supervision of Kosovo's independence would also be terminated. So, in a way, the statehood of Kosovo was conditioned by these principles, which were primarily related to the construction of multi-ethnicity as the political identity of the state of Kosovo.[67]

The *Proposal's first general provision defined the* nature of the state of Kosovo, specifying that *'Kosovo will be a multiethnic society ...'.*[68] *This formulation ruled out* the possibility of defining Kosovo as a nation-state, in this case, as a state exclusively for Kosovo Albanians. Another aspect of identity defined in the general provisions of the *Proposal* was the linguistic equality established between the Albanian language as the language of most of the population and the Serbian language as the language of the Serbian minority (about 5%). Both languages were recognised as official languages in the country.[69] Also, these defining provisions of the nature of the state extended to the state symbols of Kosovo, categorised as *national symbols,* including the flag, coat of arms and anthem. These symbols were expected to reflect the multiethnic character of Kosovo. [70] Consequently, the constitutional definition of the state and its symbolic manifestation was meant to underscore the principle of multiethnicity as *a political principle (read also: national)* of the Republic of Kosovo. Since national symbols are very important constructions created by nation-building elites, they carry significant cultural and historical weight, bearing ties to a nation's culture, history, ethnicity and tradition,[71] especially in Southeast Europe. Therefore, the imposition of these principles up*on Kosovo's national symbols* of Kosovo through this *Proposal* clearly represents an *identity policy* designed to cultivate a collective Kosovar identity based on the principle of *multi-ethnicity* and *statehood* as shapers of the new Kosovar national identity.[72]

Like the Constitutional Framework during the UNMIK era, the Ahtisaari *Proposal* outlines the principles of organisation and functioning of Kosovo's governing institutions while guaranteeing the substantial participation of minority communities in both central and local institutions. In many cases, this participation was made conditional, as in the case of the government vote, which could not be constituted without its composition and members of the cabinet representing the political entities of ethnic minorities.[73] Moreover, a significant part of the legislation, which was considered to affect the vital interests of any minority communities, including the constitution, could not be adopted or amended without the consent of the votes from two-thirds of the minority representatives in the Assembly of Kosovo.[74] So, through these conditional or blocking mechanisms, *the Proposal* aimed to build a democracy in Kosovo with a consociational or consensual nature, where fundamental aspects of the state's nature, particularly in its multiethnic character, couldn't be affected by the absolute majority consisting of the Albanian community.[75]

66 UNSC 'Report of the Special Envoy (n 8).
67 ibid, annex III Implementation.
68 UNSC 'Comprehensive Proposal for the Kosovo Status Settlement' (n 9) art 1, para 1.1
69 ibid, para 1.6.
70 ibid, para 1.7.
71 See, Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (CUP 2012) doi:10.1017/CBO9781107295636.
72 UNSC 'Comprehensive Proposal for the Kosovo Status Settlement' (n 9) art 1, para 1.7.
73 ibid, annex 1, art 3.
74 ibid, para 3.7.
75 ibid, art 10.

Through Annex III of the *Proposal* related to the decentralisation of governing power, it was guaranteed that in addition to the establishment of new Serb municipalities and other minorities, these municipalities would have a higher degree of self-government. This recognition included functions that, in the case of Albanian municipalities, fell under the jurisdiction of the central government.[76] Such decentralisation sought to prevent the central government from wielding power over areas and aspects that could affect the identity, cultural and educational life of these minority communities. So, in addition to prohibiting any constitutional clause of a national nature dictated by the majority in framing and regulating the functioning of the state, the Ahtisaari *Proposal*[77] aimed to prevent the actual exercise of power by the central institutions, which were expected to be dominated by Albanians, through these instruments of autonomous nature of the minority municipal units.[78]

Despite most of the annexes in the Ahtisaari *Proposal* resulting from negotiations and compromises between the parties during the dialogue in Vienna, primarily compromises made by the Albanian side regarding the internal settlement of Kosovo, in the end, it ultimately failed to secure an agreement that would garner support from both parties. Although Special Envoy Ahtisaari had the discretion, according to his mandate from the Secretary-General, to issue his proposal even without both parties' consent, it couldn't be given mandatory status through a new Security Council resolution. This was due to the veto imposed by Russia, which did not endorse a resolution on Kosovo's status without Serbia's consent for the proposed solution.[79]

In the end, although the Ahtisaari Proposal did not culminate in a Security Council resolution, the path to Kosovo's independence and statehood seemed unstoppable. The Western International Community, which included most of the Contact Group countries except Russia, which had defined the principles of how Kosovo's status should be resolved, decided to support Kosovo's independence. However, this support was on the condition that the state of Kosovo would be built according to the clauses, principles and conditionality set out in the Ahtisaari Proposal.[80] Consequently, the International Policy towards Kosovo failed to be formalised in the Security Council; the West decided to persist with this policy[81] to build the state of Kosovo on the principles of multi-ethnicity, democracy and citizenship.

This commitment was also reflected in the *Declaration of Independence of Kosovo* adopted on February 17, 2008, by elected representatives of the Kosovo people. In this declaration, which affirmed Kosovo's sovereignty and independence, the second point explicitly stated that *'we declare Kosovo a democratic, secular and multi-ethnic republic'*.[82] Furthermore, the third point of the declaration acknowledged all the obligations foreseen in the Ahtisaari Proposal and committed to implementing its principles in state-building, the constitution and legislation, despite that this proposal did not gain legal force through the UN Security Council. This voluntary acceptance of the Ahtisaari Proposal was a condition for the Western international community to support and recognise Kosovo's independence. Over the 120-day transition period from the UN protectorate to a sovereign state, the Assembly of Kosovo

76 ibid, annex 3.

77 ibid, annex 3, art 4.

78 Bekim Baliqi, 'Promoting Multi-Ethnicity or Maintaining a Divided Society: Dilemmas of Power-Sharing in Kosovo' (2018) 17(1) Journal on Ethnopolitics and Minority Issues in Europe 49.

79 Andrew Rettman, 'Russia confirms veto on Kosovo Independence' *EUobserver* (Brussels, 27 April 2007) <https://euobserver.com/world/23933> accessed 16 August 2023.

80 There is no joint statement of the Contact Group, especially after the withdrawal of Russia from the support of this plan, which expresses the condition that the declaration of independence depends on the acceptance of the Ahtisaari Proposal by Kosovo. But, in the Declaration of Independence of Kosovo, Kosovo undertakes the construction of an independent state according to the provisions of the Ahtisaari Proposal. American, British and European experts assisted in drafting this statement.

81 See: Gezim Visoka and Grace Bolton, 'The Complex Nature and Implications of International Engagement after Kosovo's Independence' (2011) 13(2) Civil Wars 189, doi:10.1080/13698249.2011.576158.

82 Kosovo Declaration of Independence (n 5) para 2.

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adopted all priority legislation related to guaranteeing the rights of minority communities, decentralisation and increasing self-government competencies for municipalities inhabited by minorities. Additionally, it established protected zones to preserve Serbian cultural and religious heritage sites, among other measures.[83]

7 THE CRISIS OF NATIONAL IDENTITY AS A FACTOR FOR RELIGIOUS RADICALISATION IN KOSOVO

The recognition of Kosovo's independence by the Western part of the international community was made on the condition that the state of Kosovo be built as a civic state, reflecting a multiethnic society rather than fulfilling the national aspirations of Kosovo Albanians. This situation sparked discussions about the 'birth of a new national identity'.[84] While the independence of Kosovo was primarily the result of the aspirations of the Albanian majority, the state of Kosovo was not intended to be a national state of Albanian. Instead, it was designed to neutrally represent all national and ethnic communities within Kosovo. This neutrality was manifested not only in the framework of the organisation of the political system but also in the state symbols, creating a gap between the national and state identities among the Kosovo Albanians.

Given that the sovereign state is the most accomplished form of political self-determination of a nation,[85] the non-identification of this state with the nation that fought for it presented a situation of confusion and paradox. National identity was depoliticised, leading to an *identity crisis* in which Kosovar society did not align with the national identity of the majority population.

This identity crisis, which is practically a *crisis of national culture*, is a result of the exclusion of the national identity of Albanians from the state-institutional framework and has made a part of society in search of a more solid collective identity. The suspension of state mechanisms promoting *national culture,* such as public education, created spaces for various cultural agencies, including religious organisations from the Middle East, to fill the identity and cultural gap. Many young people have found this identity in religion, namely in extremist Islamic movements which radically manifest the collectivity of their identity.[86]

According to a report by the Kosovo Center for Security Studies, supported by the American Embassy in Pristina, until the beginning of 2015, Kosovo, with a total of 232 cases, was ranked 8th out of 22 countries from which citizens had joined militant groups in Syria and Iraq. In terms of the number of foreign fighters per capita, Kosovo ranks first in the world among this group of countries, with 127 fighters per capita in one million inhabitants.[87] In an attempt to identify the external and internal factors that have influenced the increase in religious radicalism in Kosovo, the report states that one of the main causes was the decline in identification with the national or state cause, especially among young people.[88]

The growing need to publicly manifest religious identity is indicative of the priority of this identity among people in building a distinctive or unifying relationship with others. For

83 UNSC 'Comprehensive Proposal for the Kosovo Status Settlement' (n 9) annex 12.

84 Donik Sallova, 'The Issue of Kosovar Identity' (2015) 4(1) Thesis 93.

85 David Miller, *Mbi kombësinë* (Cuneus 2022) 97.

86 Adrian Shtuni, 'Dynamics of Radicalization and Extremism in Kosovo' (*United State Institute of Peace*, 19 December 2016) 397 Special Report <https://www.usip.org/publications/2016/12/dynamics-radicalization-and-violent-extremism-kosovo> accessed 16 August 2023.

87 Shpend Kursani, *Report inquiring into the causes and consequences of Kosovo citizens' involvement as foreign fighters in Syria and Iraq* (KCSS 2015) 25.

88 ibid 63.

Albanians in Kosovo and the broader Albanian nation, religious identity has never been primary in relation to others. Instead, in the hierarchy of identities for Albanians, the foremost distinguishing element, setting them apart from other neighbouring peoples, has been their Albanian identity, encompassing aspects of nationality, culture, ethnicity, and linguistic affiliation. Since Albanians belong to the three major religions — Catholic, Orthodox and Islam — religious affiliation has never served as the main distinguishing element with others because they had this religious plurality within their culture and nation. Therefore, religion has never been the main identity building and has taken precedence for Albanians.[89]

In the context of this paper, Kosovo's struggle for liberation from Serbia stemmed from the denial of Albanians' demand to promote their national identity rather than due to any impediments placed by Serbia (and the former Yugoslavia) on the cultivation of their religious identity. Thus, for Kosovo Albanians, the demand for the Republic of Kosovo, as a sovereign and equal state, initially within the former Yugoslavia, was based on the motive and the need to promote their national affiliation at the highest political level. Establishing the state of independence was a fundamental feature of any sovereign nation. Additionally, in the context of Yugoslavia's disintegration, the resistance and fight for independence were fundamentally driven by the conviction in the right to national self-determination as Albanians. So, the main catalyst for rebellion and resistance against Serbia was the Albanian national identity that was being discriminated against.[90]

So, after achieving freedom, independence, and state-building in Kosovo, there was a need for collective manifestations of religious identity, namely the emergence of extreme religious streams that prioritise religious identity as the primary facet of Albanian society in Kosovo. Although several studies have been conducted by local and international institutes and organisations on the causes of religious extremism and radicalism, with the emphasis often placed on the indoctrination of people from various religious organisations in the Middle East or the dire economic situation,[91] one influential factor among other causes, but that not much is emphasised in these reports, is that *this radical prioritisation of religious identity in Kosovo has come as a result of weakening the sense of Albanian national belonging*.[92]

This weakening of the Albanian national identity is *a consequence of the identity policy of the international community, which aimed to construct a multi-ethnic political identity*. However, it appears that this policy failed to fill the gap created by suspending pre-existing national identities in Kosovo. By devaluing the Albanian national identity of the majority Albanian people of Kosovo through the denationalising identity policy, the international community has inadvertently infringed on one of the basic aspects of the coexistence among the Albanian people in Kosovo: the trait of religious tolerance, which has traditionally been one of the core features of Albanian national identity.

8 LACK OF LOYALTY TO THE STATE AS AN INDICATOR OF AN IDENTITY CRISIS

The identity crisis in Kosovo has resulted in another significant consequence: an increase in indifference and a lack of loyalty to the state, namely indifference concerning how the political elites have governed the nation. According to the researcher Kalevi J. Holsti, ensuring horizontal legitimacy is very important in building strong or successful states, and

89 Ismail Hasani, *Vetëdija fetare dhe kombëtare tek shqiptarët* (Universiteti i Prishtinës 2001) 129-37.

90 Oliver Jens Schmitt, *Kosovo: A Short History of a Central Balkan Territory* (Koha 2012) 231-3.

91 See, Burim Ramadani and Rifat Marmullaku, *Influential Factors in Radicalization and Violent Extremism: Lessons from Peja, Mitrovica, Gjilan, Ferizaj and Kaçanik* (SPRC 2017) 19-21.

92 See, Agon Demjaha and Lulzim Peci, *What Happened to Kosovo Albanians: The Impact of Religion on the Ethnic Identity in the State Building-Period* (KIPRED 2016).

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it is contingent on the type of community over which governance is exercised. Therefore, according to him, *'the lack of horizontal legitimacy within society can lead to the erosion or loss of loyalty to the state and its institutions'*.[93] Thus, when people do not perceive the state as an integral part of their national community identity due to the exclusion of the national culture from institutional and state manifestation or when the state is not identified with the nation (or nations) that sacrificed historically to establish the state as a realisation of national self-determination, most people *do not feel a sense of sovereignty. In other words,* they do not view the state as representing the community and its interests.

This lack of experiencing the representativeness of interests, as a result of the non-representation of the identity of the national community by the state, has resulted in people failing to develop a sense of patriotism. In modernity, patriotism is manifested as 'citizen' or 'active citizen'. It corresponds with the creation of a *public ethic or a national ethic* from the prism of which governance and powers are also judged. The ethics of nationality represents one of the fundamental aspects of the collective feeling of nationality among people.[94] The severance of the link between the national community, i.e. the ethics of nationality, and the state and state affiliation, has led many people involved in politics, as well as those who vote for them, to perceive governance more as an opportunity for personal gain rather than as a service to the public interest according to national ethics.

The importance of the relationship between the state and the nation, respectively, the role that has the solidity of national identity in building a modern and successful state, is also emphasised by the scholar Francis Fukuyama. According to him, 'success in building the state depends on success in building the nation'.[95] In the case of Kosovo, since the liberation and independence from Serbia were interfered with by the international community through *the identity policy of multiethnicity*, the state-building process was not reflected as a process of national consolidation of Albanians. Consequently, the state-building process deviated from the ethics of nationality, and governance was not burdened with national political ideals. Since the citizens did not feel nationally represented by the state, the state did not formally represent the ideals of their national identity. As a consequence, many citizens cultivated a sense of not actively seeking democratic accountability from their rulers in terms of their governance.

This citizens' indifference towards the government has led to the degradation of state-building, the poor efficiency of governance, and the stagnation of the Europeanization reforms that would lead the state of Kosovo towards the European Union as a modern consolidated state. The contrary has happened. Kosovo's government and public institutions have been influenced by the interests of political parties through clientelism and political partisanship. This is best reflected by the high perception that the citizens of Kosovo have of the level of corruption in public institutions. In the measurements of this perception by Transparency International through the annual report *Corruption Perception Index*, which estimates the degree of perception of corruption from 0 points for highly corrupt countries to 100 points for countries free from corruption, from 2012 to 2021, Kosovo is estimated at an average of 35.6 points.[96]

9 CONCLUSIONS

The purpose of this article was to describe and analyse the legal framework underpinning the identity policy of the international community in Kosovo through a historical perspec-

93 Kalevi J Holsti, *Shteti, lufta dhe gjendja e luftës* (AIIS 2008) 92.

94 Miller (n 87) 63.

95 Fukuyama, *Political Order* (n 15) 181.

96 'Corruption Perception Index: Kosovo' (*Transparency International*, 2021) <https://www.transparency.org/en/cpi/2021/index/ksv> accessed 16 August 2023.

tive. This has corresponded with the evidence of all the legal norms through which the international community has managed to sanction the nature of the political system of Kosovo, transitioning from a political entity under the UN protectorate to an independent state over a period of several years of international supervision. The primary focus was not to delve into the entire state-building process of Kosovo through the assistance of the international (Western) community. Instead, our objective has been focused on highlighting the legal normative aspects, political principles, and governing instruments through which the international community has sought to develop a political entity (state) different from the models of the states formed as a result of the dissolution of the former Yugoslavia. It was not our intention to judge whether this state model promoted by the international community is more suitable than existing models of nation-states in the Western Balkans region but rather to highlight that the primary goal of the international community has been the construction of long-term peace, community reconciliation, and the "imposition" of a state model founded on citizenship and multi-ethnicity as unifying values. Some other conclusions from the above-extended analysis are as follows:

1) The international community has considered Kosovo's military and administrative intervention a humanitarian endeavour to prevent the escalation of the war in the Balkan region without taking sides in the historic Albanian-Serbian dispute.

2) The period of international administration of Kosovo from 1999 to 2008 aimed to establish a democratic and multiethnic political entity without national overtones and detached from the issue of national self-determination for Kosovo Albanians.

3) The international community, represented by UNMIK and other mechanisms, has implemented an identity policy in Kosovo based on the principles of multi-ethnicity and has aimed to produce a political entity, whether independent or not, that would not be headed by any nationality.

4) The international community in Kosovo, namely the Western part, as a supporter of the statehood and sovereignty of Kosovo, conditioned Kosovo's right to independence with state-building as a multiethnic political entity identified with equal citizenship for all national, ethnic, and languages of Kosovo, as equal arms of the state.

5) The removal of Kosovo state-building from the context of resolving the national issue of Kosovo Albanians has created a gap between national identity and state identity among Kosovo Albanians.

6) Failing to perceive national identity as politically, institutionally and symbolically represented within the Kosovo state framework led to an identity crisis among Kosovo Albanians.

7) The identity crisis among the Albanian majority in Kosovo, whose national identity felt devalued in the legal-political-state context, has led a part of the population to seek a more solid identity, often in religion.

8) The lack of state mechanisms in promoting national identity, as is common in modern nation-states, has filled this gap of action with non-state and non-national mechanisms, such as religious organisations originating mainly from the Middle East, which has led to the religious radicalisation of a large number of Kosovo Albanians.

9) The discrepancy between state identity and national identity has made the citizens of Kosovo, in this case around 90% of whom are Albanians, not perceive the state as an embodiment of their identity. Consequently, this has led to an increased indifference to the state's governance.

10) The disconnection between state identity and elements of the national glory of

the population, in this case, the Albanian majority, has meant that citizens did not exhibit loyalty to the inviolability of the state, both by external factors and internal misgovernance.

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Research Article

LEGAL CHALLENGES HINDERING THE DEVELOPMENT OF ISLAMIC FINANCE IN UZBEKISTAN

Alam Asadov, Ikhtiyorjon Turaboev

ABSTRACT

Background: *Recently, the Uzbek government expressed interest in introducing Islamic financial services. Nevertheless, the creation of the legal framework for the smooth operation of Islamic financial institutions is dragging. This work attempts to identify legal hurdles preventing the penetration of the Islamic finance industry in Uzbekistan, and formulates vital policy recommendations to lead the development of a regulatory framework for the industry.*

Methods: *A library research method and legal analysis is employed by going through diverse legal matters. For that purpose, we studied a range of legal documents varying from banking and capital market legislation to some newly introduced laws. Additionally, issues of Islamic finance in the tax law and the civil code of the nation are scrutinized.*

Results and Conclusions: *The finding of the paper shows that some legal barriers exist that hinder the complete implementation of the Islamic finance industry in the country. They are not only in one area of national legislation but also exist in various parts of the legal system. Accordingly, it is recommended that the Uzbek government develop a sound legal and regulatory framework to provide a favourable environment for the activities of Islamic finance institutions. The general conclusion of the research resolves that, even if the process of developing an Islamic finance legal framework may start gradually, it should be holistic to be fully effective.*

1 INTRODUCTION

Uzbekistan is the most populated country in the Central Asian region, with a permanent population exceeding 36 million as of January 1, 2023.[1] Estimates state that most of the country's population is Muslim, varying from 88 to 96 percent.[2] Despite having the largest Muslim population in the region, Uzbekistan began its efforts to introduce Islamic banking and finance into the country much later than other Central Asian countries. This could

1 Statistics Agency, 'Permanent Population' (Statistics Agency Under the President of the Republic of Uzbekistan, 2023) <https://stat.uz/en/58-useful-information/5903-permanent-%E2%80%8Epopulation> accessed 31 March 2023.

2 United States Department of State, '2021 Report on International Religious Freedom: Uzbekistan' (US Department of State, 2 June 2022) <https://www.state.gov/reports/2021-report-on-international-religious-freedom/uzbekistan> accessed 31 March 2023.

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be explained as a result of the former Soviet Union's legacy and a cautious approach to the reforms implemented by the previous leadership of the country.[3] Until 2016, it was difficult, almost impossible, to conduct any economic or financial projects that bore the title "Islamic." After the election of Mr Shavkat Mirziyoyev as the President of the Republic of Uzbekistan in 2016, reforms began in all aspects of the country, including in the economic sphere.

At the end of 2020, in his Presidential address to the Parliament of the Republic of Uzbekistan, Mr Shavkat Mirziyoyev admitted that the time had come to create a legal base for introducing Islamic financial services. He revealed the political will of the government to introduce Islamic finance and banking institutions in the country.[4]

The country's citizens are also interested in using Islamic finance services. A survey was conducted on introducing Islamic finance in Uzbekistan and showed that the main reasons for the non-use of bank loans by individuals and businesses were religious beliefs, high-interest rates, and the complexity of lending procedures at banks. In this survey, 61% of legal entities and 75% of individual respondents expressed their will and expectations of the operation of Islamic financial institutions in the country.[5] Thus, the survey results show a high demand for Islamic financial products and services in Uzbekistan, and the country has enormous potential for developing Islamic finance and banking. Nevertheless, some serious legal challenges prevent its development of Islamic finance.

Therefore, this work attempts to identify legal hurdles that prevent the emergence of the Islamic finance industry in Uzbekistan. The studied legal issues range from capital market legislation to banking rules, and from the newly introduced law on non-banking institutions to insurance regulations. In addition, we also delve into tax regulation and discuss some changes required in the Civil Code. As a result, we formulate important policy recommendations to improve the chances of introducing a regulatory framework for the industry. The general conclusion of the research is that, even if the process of developing an Islamic finance legal framework may start gradually, it should be holistic to be fully effective.

The structure for the rest of the paper is as follows: Section 2 provides a brief literature review on Islamic finance development in Uzbekistan. Section 3 discusses the methodology and data used in the study. The findings of the study related to legal issues hindering the progress of Islamic finance in the country are presented in the fourth section. The final section concludes the paper, provides relevant policy recommendations, and briefly highlights its limitations and avenues for future research.

2 LITERATURE REVIEW: ISLAMIC FINANCE IN UZBEKISTAN

Islamic finance started developing in the Commonwealth of Independent States (CIS) after 1991 when the Soviet Union broke down. The Central Asian (CA) region and the state of Azerbaijan, in the Caucasus region, are considered republics with a majority Muslim population. To develop Islamic finance infrastructure and secure financial aid from the largest Islamic financial institution, these states started joining the Islamic Development Bank (IsDB) group. Azerbaijan was the first to join in 1992, followed by Kyrgyzstan, Turkmenistan, Kazakhstan, and Tajikistan, each one year after another from 1993 to 1996. Uzbekistan was the last to

3 Muzaffar Ahunov, 'Financial Inclusion, Regulation, and Literacy in Uzbekistan' (2018) 858 ADB Working Papers, doi:10.1007/978-1-349-67278-3_116.

4 Shavkat Mirziyoyev, 'President Shavkat Mirziyoyev's Address to the Oliy Majlis' (President of the Republic of Uzbekistan, 29 December 2020) <https://president.uz/en/lists/view/4057> accessed 31 March 2023.

5 Jakhongir Imamnazarov, 'Landscaping Analysis of Islamic Finance Instruments in Uzbekistan' (UNDP Uzbekistan, 17 June 2020) <https://www.undp.org/uzbekistan/publications/landscaping-analysis-islamic-finance-instruments-uzbekistan> accessed 31 March 2023.

join IsDB in 2003. The regional office of IsDB was established in Almaty, Kazakhstan, which rapidly promoted the Islamic finance industry's development in the region.[6]

The CA region can be considered the epicentre of Islamic financial growth in the CIS. The Muslim countries in the CA region lie in the middle of the historic silk route that connected Central Asia with major economies across the world as the central vein of trade for silk, agriculture, spices, and minerals. Central Asian countries border with Russia and China, giving their markets a potential of 1.6 billion customers, a similar number to the combined population of the 57 Organization of Islamic Cooperation (OIC) member nations, currently standing at 1.8 billion.[7]

After the establishment of the IsDB regional office in Almaty, Islamic banking and finance activities increased in the region. Government bodies started adjusting regulations, investors opened Islamic banks, leasing, and takaful companies. States looked into the matter of sovereign Sukuk (Islamic bonds) to open new opportunities. Responding to the growing customer need for Islamic finance products, the governments of countries including Azerbaijan, Kazakhstan, Kyrgyzstan, and Tajikistan introduced some notable changes to their respective state legislation. Furthermore, IsDB and its group members, such as the International Islamic Trade Finance Corporation (ITFC) and the Islamic Corporation for the Development of the Private Sector (ICD), supported the new industry in the region.[8]

The last member of the IsDB among the Central Asian countries is Uzbekistan. It acceded to IsDB in 2003 and became the 55th member with a subscribed capital of 13.4 million ID, accounting for a 0.03% share in the total capital of the Islamic Development Bank. As compared to its neighbours, Uzbekistan is seen as the farthest from the Islamic finance industry despite its 36 million Muslim-dominated population. The country has received around 2.5 billion USD in financing since it acceded to the IsDB. To date, there have been 103 projects implemented countrywide, out of which 49 are complete, whilst 54 are ongoing. The majority of the financing received channelled to the fields of education, health, agriculture, electric development, and construction.[9]

Altogether, since 2005 till today during its 18 years of history in Islamic finance, Uzbekistan became a member of all suborganisations of the IsDB, including the Islamic Corporation for the Development of Private Sector (ICD), International Islamic Trade Finance Corporation (ITFC), Islamic Solidarity Fund for Development (ISFD), and Islamic Corporation for Insurance of Investment and Export Credit (ICIEC). The country has utilised some Shariah-compliant financing received from IsDB through some commercial banks during its membership in the organisation. In 2011, the first Islamic leasing company, Taiba Leasing, was established in Uzbekistan with sole ownership of ICD and contributed a capital of 5 million USD, which started its operation in 2011.[10]

Internally, the growth trajectory of Islamic finance was slow until 2017, which sparked more

6 GN Khaki and Bilal Ahmad Malik, 'Islamic Banking and Finance in Post-Soviet Central Asia with Special Reference to Kazakhstan' (2014) 4(2) International Journal of Excellence in Islamic Banking and Finance 1, doi:10.12816/0010779.

7 Join Madina Kalimullina, Sheikh Bilal Khan and Khondamir Nusratkhujaev, 'Islamic Finance: The CIS Region Opportunity' (Islamic Markets, 4 November 2020) <https://app.islamicmarkets.com/tv/islamic-finance-the-cis-region-opportunity> accessed 31 March 2023.

8 Bilal Ahmad Malik, 'Halal Banking in Post-Soviet Central Asia: Antecedents and Consequences' (2015) 2 Marketing and Branding Research 28, doi:10.19237/MBR.2015.01.03.

9 Khusan Khasanov, 'Prospects for the Development of Islamic Finance in the Republic of Uzbekistan: Presentation' (Round Table Meeting on Prospects of Development of Islamic Finance in Uzbekistan, International Islamic Academy of Uzbekistan, Tashkent, 11 September 2019) doi:10.13140/RG.2.2.16580.58247.

10 Alam Asadov and Khurshid Gazikhanov, 'Ijarah's Prospects in Central Asian: An Example of Uzbekistan' (2015) 11(2) Journal of Islamic Economics, Banking and Finance 63, doi:10.12816/0024915.

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interest by the elected president of the country in 2016, Shavkat Mirziyoyev, who pushed for the introduction of Islamic finance in the country's financial system. Thereafter, some attempts were made to establish a legal and financial infrastructure to allow the operationalisation of Islamic banking and finance, though unfortunately, it produced worse results than expected. Even if the country still lacks legal foundations for the establishment of Islamic financial institutions, there are numerous initiatives and attempts of establishing Islamic banking in some of the commercial banks, takaful companies, and Islamic trade financing companies.[11]

As a first attempt to legalise Islamic finance activities, at the end of 2019, the Capital Markets Development Agency (CMDA) of the Republic of Uzbekistan presented the Capital Market Development Strategy for 2020–2025. In the same strategy, CMDA's director, A. Nazarov, announced that by mid-2020, the country would start issuing Islamic bonds (Sukuk) with the technical assistance of the IsDB. After over 30 years of its independence, Uzbekistan still lacks an established capital market, a vital part of any country's financial system. The volume of securities freely traded on the Tashkent Stock Exchange was equivalent to 0.4% of the country's GDP as of late 2019. CMDA had an ambitious goal to increase the volume of the stock exchange indicator to 10% of GDP within 5 years. Despite conventional stocks and bonds being actively traded in the country, there is no legislation regulating the issuance and trading of Sukuk in Uzbekistan. To support the first and following issuance of Sukuk, a legal act on Islamic bonds was supposed to be adopted.[12] However, the legal action has not passed as of 2023, and CMDA was abolished. Its powers, rights, obligations, and property were transferred to the Ministry of Finance of Uzbekistan.[13]

Other sectors of the Islamic finance industry, such as Islamic banking, Islamic insurance (takaful), Islamic leasing (Ijarah), Islamic microfinance, Islamic fund management, and others, also need to further develop in Uzbekistan. Even with the introduction of some, they are still in a nascent stage in the country. To date, Islamic finance was implemented by the public financial institutions in Uzbekistan through financing lines offered by the IsDB and its subsidiary companies, such as the Islamic Corporation for the Development of Private Sector (ICD) and the International Islamic Trade Finance Corporation (ITFC). In parallel with its loan portfolio extended to the government initiatives, over 2.5 billion USD as per the latest figures, it has also offered over 30 million USD financing lines under the Murabaha contract to private banks, such as Aloqabank, Asia Alliance Bank, and Turonbank. Other banks, i.e., Kapitalbank, O'zsanoatqurilishbank, Trastbank, and Asia Alliance Bank have enjoyed financing from the International Islamic Trade Finance Corporation (ITFC), totalling 32 million USD. Furthermore, private sector clients and SMEs in Uzbekistan have received trade finance and development support under trade finance facilities for 17 lines, totalling 166 million USD since the country joined the ITFC in 2019.[14]

11 Imamnazarov (n 7); Moody's Investors Service, 'Banks — Uzbekistan: Islamic Finance Windows Would be Credit Positive for Uzbek Banks' (Islamic Finance News (IFN), 10 December 2020) <https://www.islamicfinancenews.com/islamic-finance-windows-would-be-credit-positive-for-uzbek-banks.html> accessed 31 March 2023; Hondamir Nusrathujaev, 'Opportunities and expectations for Islamic finance in Uzbekistan' (Islamic Finance News (IFN), 22 December 2020) <https://www.islamicfinancenews.com/opportunities-and-expectations-for-islamic-finance-in-uzbekistan.html> accessed 31 March 2023; Hondamir Nusrathujaev, 'Apex Takaful seizes opportunity in Takaful market of Uzbekistan' (Islamic Finance News (IFN), 20 April 2021) <https://www.islamicfinancenews.com/apex-takaful-seizes-opportunity-in-takaful-market-of-uzbekistan.html> accessed 31 March 2023.

12 Bekzod Shavkatovich Usmonov, 'Uzbekistan's Capital Market: New Rules and Development Strategy' (2020) 1 O'zbekiston iqtisodiy axborotnomasi <https://evu.uz/intervyu/uzbekistan-s-capital-market-new-rules-and-development-strategy.html> accessed 31 March 2023.

13 'Capital Market Development Agency is abolished in Uzbekistan' (UzDaily, 3 April 2021) <https://uzdaily.uz/en/post/64603> accessed 31 March 2022.

14 'ITFC extends US$ 15 Million Line of Trade Financing Facility to Invest Finance Bank' (International Islamic Trade Finance Corporation (ITFC), 26 January 2022) <https://www.itfc-idb.org/news-events/news/itfc-extends-us$-15-million-line-of-trade-financing-facility-to-invest-finance-bank> accessed 31

On the other side of the spectrum when supporting society's Islamic finance needs, private sector initiatives have displayed considerable results. Nowadays, despite the regulatory challenges in place, multiple firms are operating in Uzbekistan within the legal boundaries of conventional finance. One of these firms, the pioneer in the country, is the ICD-backed Islamic leasing company, Taiba Leasing LLC, which first joined Uzbekistan's financial market in 2011. As one of 130 leasing companies operating in the country, it has operated in Tashkent city since its beginning. It is then followed by the Iman Group of Companies, which joined the market in 2019 and has been distinctly recognised by both the regional and international viewers as a successful Islamic fintech company that freely operates in Uzbekistan despite the legal constraints.[15]

The third player in the market is Alif Shop in Uzbekistan, with its operations dedicated to the financing technologies sector. Serving as a shopping platform, it deals with several suppliers in the technology sector and presents its products on its platform (Alif Tech, no date). Between 2017-2020, two more firms joined the untapped Islamic insurance sector, namely Uzaro Yordam and Apex Takaful. Both, located in the capital city, offer general and family takaful to their clients. Notably, Uzaro Yordam was the first firm in the Islamic finance industry to establish itself and fill a genuine need to support over-exhausted businesses and households suffering from the nonexistence of Shariah-compliant insurance coverage and unfair premium packages. It is a non-profit organisation meant to provide cooperative mutual insurance services that are Shariah-compliant. Following, Apex Takaful became the second of the two to enter the market and obtained its Shariah compliance license from the Al-Huda Islamic economics centre.[16]

Next, in 2020, came the establishment of Oqil Himoya, the Islamic house and auto financing company as a part of Uzaro Invest Group. This firm has provided Islamic investment opportunities in the field of house and vehicle financing. It also offers a wonderful opportunity for the households to satisfy their need for houses and vehicles financed in Shariah-compliant forms, acting as a gateway for the local investors who wish to invest in Shariah-compliant projects. Most recently, in January of 2023, Trastbank, a local commercial bank, launched Trast Muamalat. Trast Muamalat is subsidiary offering Murabaha and Ijarah-based leasing products (IFN 2023). In recent years, from 2019-2023, an increase in momentum of Islamic finance development in the history of Uzbekistan has been experienced. The President issued an order to develop a draft resolution on Islamic finance introduction into the economy on the 19th of December of 2020; this was the first time in its history that Uzbekistan's public witnessed the President stressing the urgency of implementing Islamic finance publicly at a top-level event. This action was subsequently followed by Senate endorsement of the Law on "On Non-Banking Credit Organizations and Microfinance Activities " in April 2022.[17]

Along with the achievements highlighted above, there remain several other critical challenges holding various levels of priority. First, the list starts with regulatory challenges. During seven years of reforms started by the new government, led by President Shavkat Mirziyoyev, Islamic finance was only included formally in only one legislation, the Law "On Non-Banking Credit Organisations and Microfinance Activities." Even in that law, only non-banking financial institutions were permitted to engage in Islamic finance activities aligned with

March 2023.

15 Murod Khusanov, 'Uzbekistan Opens for Islamic Finance' (Islamic Finance News (IFN), 16 December 2022) <https://www.islamicfinancenews.com/uzbekistan-opens-for-islamic-finance.html> accessed 31 March 2023.

16 Nusrathujaev (2021, n 11); 'About Society' (UZARO Yordam, 2023) <https://yordam.uzaro.uz/About> accessed 31 March 2023.

17 'The Law "On Non-Banking Credit Organizations and Microfinance Activities" was approved' (The Central Bank of the Republic of Uzbekistan, 17 March 2022) <https://cbu.uz/en/press_center/news/614570/> accessed 31 March 2023.

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internationally-accepted standards and defined by the Central Bank of Uzbekistan (CBU).[18] Yet no such classification or definition of Islamic banking and finance products has been provided by the CBU as today.

From a general review of the literature on the development of Islamic finance in Uzbekistan, it can be understood that the country lacks a legal framework for the smooth operation of the Islamic finance industry. As Sharipov and Yuldashev state, "Any transactions performed based on or using Islamic finance principles shall be subject to conventional laws of Uzbekistan.[19] Islamic finance or Islamic banking and similar practices have not yet been afforded a specific treatment or legislative framework in Uzbekistan." Even if there is the first law "On Non-Banking Credit Organisations and Microfinance Activities," it is still not operational since directives for the operation of Islamic financial institutions are not yet defined by the Central Bank of Uzbekistan. Therefore, the main legal challenges facing the Islamic finance industry should be investigated in Uzbekistan's case.

3 METHODOLOGY AND DATA

The applied methodology in the study is a combination of systematic library research and content analysis of the current legal infrastructure in Uzbekistan. Firstly, previous studies in the matter were systematically reviewed and their conclusions summarised. Thereafter, an analysis of content in various legal documents pertaining to the activities of Islamic finance institutions was undertaken. Accordingly, different legal matters, varying from capital market legislation, insurance regulations, banking rules, as well as the newly introduced law on non-banking institutions, were scrutinised. We also delved into issues of taxation and evaluated the nation's Civil Code. When analysing issues pertaining to Islamic finance institutions or products, relevant articles or sections of law or regulatory documents were highlighted. Finally, changes necessary to accommodate the smooth operation of the Islamic finance industry are suggested.

The relevant financing documents from Uzbekistan's finance industry were utilised to collect data for this study. This information was sorted and organised concurring with the studied issues in Islamic finance. Next, the issues were compared to the theories of Islamic finance and the opinions of scholars. Whenever available, data was obtained directly from the official legal portal of the government of the Republic of Uzbekistan, which is Lex.uz. Alternatively, if an official translation was not available on the government's legal portal, an unofficial translation was taken from other websites, such as www.cis-legislation.com, which provides reliable information about legislation of Commonwealth of Independent States (CIS) members. Alternatively, a local language version of the document was taken from the regulation portals of the government of Uzbekistan, such as Lex.uz or Regulation.gov.uz. In addition, wherever applicable, regulations of neighbouring countries were taken from their respective official sources, such as the website adilet.zan.kz for Regulatory Legal Acts of the Republic of Kazakhstan.

Furthermore, official statements of the representatives of the government of Uzbekistan were pulled from the respective official websites, such as one regarding The Central Bank of the Republic of Uzbekistan at Cbu.uz, or the official government news agency, Uzbekistan National News Agency at Uza.uz. Nevertheless, if such statements or information regarding Islamic

18 Law of the Republic of Uzbekistan No ZRU-765 'About Non-Banking Credit Organizations and Microfinance Activities' of 20 April 2022 <https://lex.uz/uz/docs/5972411> accessed 31 March 2023.

19 Atabek Sharipov and Nodir Yuldashev, 'Islamic Finance and Markets in Uzbekistan' (Lexology, 1 October 2019) <https://www.lexology.com/library/detail.aspx?g=9aaf1dd8-417e-408c-ba8f-79e069edf65c> accessed 31 March 2023.

finance in the country could not be found in those sources, popular local news media, such as Kun.uz, Daryo.uz, or UzDaily.uz, or international news agencies, such as Islamic Finance News (IFN) were utilised. Relevant statistics of secondary data were brought in either from the State Statistics Committee of Uzbekistan or the Islamic Development Bank (IsDB) or its subsidiaries, such as the International Islamic Trade Finance Corporation (ITFC). Other reliable sources of data and information are also referenced wherever necessary.

4 FINDINGS: LEGAL CHALLENGES OF ISLAMIC FINANCE IN UZBEKISTAN

After the Uzbekistan leadership's commitment to introduce Islamic financial services, activities to create the legal base for the operation of Islamic financial institutions have begun. The government chose to start implementing Islamic finance through Islamic microfinance services, as mentioned earlier. The law of Uzbekistan "On Non-Banking Credit Organisations and Microfinance Activities" went into effect on April 20, 2022.[20] According to the law, microfinance organisations have the right to provide Islamic finance services. The law defines Islamic finance services as financial services which are provided within the procedure developed by the Central Bank of Uzbekistan, following the rules of international organisations which establish standards for the implementation of Islamic finance.

The law emphasises that the governing rules and principles of Islamic financing shall be that of AAOIFI-established standards as well as the Prudential Standards set forth by the IFSB. According to the content of the law, it will provide regulatory support for non-banking institutions and microfinance firms willing to offer Islamic financing lines. This move is the first of its kind, demonstrated by the Legislative body, Oliy Majlis (Parliament), to cover Islamic finance operations under the country's regulations. However, it has drawn certain criticism and disappointment from the experts in this field.

Following a thorough analysis of the law's content, it is worth noting that the comments given by the professionals are objectively formed, because the law only allows microfinance institutions and non-banking credit organisations to offer Islamic finance products, leaving out Takaful, Islamic banking, and Islamic capital markets disciplines, which are the cornerstones of Islamic finance. Furthermore, these services should be rendered strictly under the Procedure for Providing Islamic Finance Services, which should be developed and adopted by the Central Bank of Uzbekistan. This means that it may take another several months, if not years, before this law can be wholly implemented. Although the law has been in effect for over a year, the procedure for providing Islamic finance services has not yet been established. We agree with Sekoni that Islamic and conventional banking systems and products are not the same, and they should have separate legal frameworks.[21] The activities of Islamic microfinance institutions in Uzbekistan should also be regulated by a separate law rather than the law "On Non-Banking Credit Organisations and Microfinance Activities."

It is a fair assumption that the government of Uzbekistan is trying to regulate Islamic finance services out of its current banking system. The share of non-bank credit institutions in the financial market of Uzbekistan makes up less than 1% of the whole. The government of Uzbekistan aimed to increase the share of non-bank credit institutions in the total volume of crediting from 0.35% to 4% by 2025.[22] However, even 4% is a small fraction of the entire

20 Law No ZRU-765 (n 18).

21 Abiola Sekoni, 'Legal and Regulatory Issues and Challenges Inhibiting Globalization of Islamic Banking System' (2015) 62332 MPRA Paper <https://mpra.ub.uni-muenchen.de/id/eprint/62332> accessed 19 August 2023.

22 Decree of the President of the Republic of Uzbekistan No UP-5992 'On the Strategy of Reforming of Bank System of the Republic of Uzbekistan for 2020–2025' of 12 May 2020 <https://lex.uz/ru/docs/4811025>

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finance industry.

Ahunov also highlights a key role played by commercial banks in Uzbekistan, since the country's financial system is bank-based.[23] Therefore, there is little to no role played by the other types of financial intermediaries that operate in its financial market, including non-deposit-taking microfinance institutions. The same picture can be seen on an international scale where Islamic microfinance makes up a small portion of the financial services provided. It is reported that only 255 Islamic microfinance institutions operated worldwide in 2015, with a total outstanding loan portfolio amounting to 628 million USD.[24] Attempting to regulate Islamic finance services using non-bank credit institutions may be understood as an overly cautious approach to introducing Islamic finance in the Uzbekistan.

Despite the absence of appropriate legal conditions, Uzbekistan's commercial banks began to establish Islamic windows which would provide a limited number of Islamic finance services. Several commercial banks signed a memorandum of understanding with the Islamic Development Bank on introducing Islamic windows. The hope is that the opening of Islamic windows would be an initial step in further establishing fully-fledged Islamic banks.[25]

Efforts to introduce Islamic securities in the financial market of the country have also started. The Capital Market Development Agency of Uzbekistan (CMDA) offered the draft of a Presidential Decree of the Republic of Uzbekistan, "On measures of introducing securities based on Islamic principles," for public discussion at the portal of public discussions of drafts of legal acts, found at regulation.gov.uz, which envisaged rules for issuance and circulation of sukuk.[26] Unfortunately, this normative act has not been adopted. Also, the governing body that drafted this act, CMDA, was liquidated and all its powers were vested in the Ministry of Finance of Uzbekistan (now merged with the Ministry of Economy to form the Ministry of Economy and Finance).[27] Thus, a legal framework was created for regulating the emission and circulation of sukuk in economically-healthy ways.

Another important aspect of Islamic capital markets is the existence of Islamic equity markets through Shariah stock indexes and screening methods employed in the development of such indexes. Unfortunately, Uzbekistan does not have an active equity market, let alone a Shariah index or regulations specifying its screening. Nevertheless, solely setting up a Shariah index without enforcing some disclosure requirements is not enough. A study of some jurisdictions with advanced Islamic equity markets, such as Malaysia, Saudi Arabia, and the United Kingdom, revealed that a lack of Islamic disclosures related to the main activity of the companies screened for a Shariah index adds difficulty for Shariah scholars who perform the screening.[28]

The slow process of developing a legal framework could be explained by a cautious approach implemented by government officials. The chair of the board of the Central Bank of Uzbekistan revealed the position of the Central Bank concerning the introduction of Islamic finance in the country and acknowledged that microfinance organisations shall have the right to con-

accessed 30 April 2023.

23 Ahunov (n 3).

24 Asian Development Bank and The Islamic Financial Services Board, Islamic Finance for Asia: Development, Prospects, and Inclusive Growth (ADB-IFSB 2015) 15.

25 Nusrathujaev (2020, n 11).

26 Draft Decree of the President of the Republic of Uzbekistan ID-23150 'On Measures for the Introduction of Securities Based on the Principles of Islamic Finance' of October 2020 <https://regulation.gov.uz/uz/document/23150> accessed 31 March 2023.

27 Decree of the President of the Republic of Uzbekistan No UP-6207 'On Measures for Further Development of the Capital Market' of 13 April 2021 <https://lex.uz/ru/docs/5371091> accessed 31 March 2023.

28 Anna Azmi, Normawati Non and Norazlin Ab Aziz, 'Challenges to Shariah Equity Screening, from Shariah Scholars' Perspective' (2017) 10(2) International Journal of Islamic and Middle Eastern Finance and Management 229, doi:10.1108/IMEFM-11-2016-0165.

duct operations on Islamic finance principles. After, he also stated that Islamic windows will open within conventional banks to provide such services. The chairman of the Central Bank admitted that introducing Islamic finance in the country is a complex and delicate process.[29]

Another public official, former deputy minister of the Ministry of Economic Development and Reduction of Poverty, Ilhom Norkulov, explained that the reason behind the slow process of introduction of Islamic finance in Uzbekistan is the low level of the population's financial literacy. He stated that the public's awareness of Islamic finance principles is lacking.[30] Even if he is partially correct, it can be noted that such a level of Islamic finance awareness has not prevented neighbouring countries from introducing Islamic finance in their jurisdictions. For example, neighbouring country Kazakhstan adopted sound legislation to regulate Islamic finance and banking. By doing so, its government planned to make the country an Islamic finance hub of the Central Asian region in 2020. However, it did not reap the expected results as one cannot observe the rapid growth of Islamic finance in Kazakhstan. Specialists list the factors, such as low financial literacy and poor awareness of the population and businesses about Islamic finance services, which restrain the development of Islamic finance in Kazakhstan.[31] The lack of specialists in the Islamic finance sector is also considered a challenge that hinders the development of Islamic finance in the country. Despite all these difficulties, Kazakhstan's government is still ambitiously pursuing its goal of establishing the country as the Islamic finance leader of the region and has developed the Islamic Finance Master Plan for 2020-2025. According to the Master Plan, the country's Islamic banking assets are set to increase from the prior 1% to the new 3% of GDP by 2025.[32]

The efforts to introduce Islamic finance in Uzbekistan through non-bank credit institutions and to establish Islamic windows of conventional banks create a sceptical view about the future of Islamic financial services and products in the country. One reason is that the Civil Code of Uzbekistan does not contain provisions on types of Islamic finance service contracts. Problems with the taxation of financial services could be another issue for the further development of the sector. As it will be explained later, certain taxes would be applicable on Islamic finance products, making their application costly and inefficient.

The primary barrier to conducting Islamic finance operations by commercial banks is the presence of a ban for banks engaging in production and trade activities. Article 7 of the Law of Uzbekistan on Banks and Banking Activities prohibits commercial banks from engaging in production, trade, and insurance activities.[33] As Islamic banks base their activities on their direct involvement with trade and business, this ban is considered the main obstacle to conducting the activities of Islamic banks. Commercial banks that want to offer Islamic finance products through Islamic windows also complain about these issues. Abrorov and Imamnazarov specify that commercial banks that participated in their survey on issues of Islamic banking identified the nonconformity of banking and tax legislation as a main impedi-

29 "'We are Working on Opening an Islamic Window in Banks" — CB Chairman' (Kun.uz, 21 October 2021) <https://kun.uz/en/news/2021/10/22/we-are-working-to-open-an-islamic-window-in-banks-cb-chairman > accessed 31 March 2023.

30 'It Was Explained Why Islamic Financing Was Not Fully Implemented in Uzbekistan' (Daryo, 2 September 2021) <https://daryo.uz/k/2021/09/02/ozbekistonda-islomiy-moliyalashtirish-nega-toliq-amalga-oshirilmaganiga-izoh-berildi> accessed 31 March 2023.

31 Maiya Arzayeva and Assel Dochshanova, Problems of Development of Islamic Financing in Kazakhstan: Financial and Legal Aspects' (2016) 9(S1) Indian Journal of Science and Technology 1, doi:10.17485/ijst/2016/v9is1/99524.

32 Muhammad Rafiq, 'Islamic Finance Market in Kazakhstan Opens New Investment Opportunities' Astana Times (Astana, 17 August 2023) <https://astanatimes.com/2023/08/islamic-finance-market-in-kazakhstan-opens-new-investment-opportunities/> accessed 19 August 2023.

33 Law of the Republic of Uzbekistan No 216-I 'On Banks and Banking Activities' of 25 April 1996 <https://lex.uz/en/docs/4404890> accessed 31 March 2023.

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ment to the introduction of Islamic finance in Uzbekistan.[34] Unless this barrier is removed or Islamic banks are given special treatment and permitted to conduct trade activities, the introduction of Islamic banking is impossible in the country. For example, Kazakhstan's banking law set a special rule concerning the activities of Islamic banks, allowing them to finance production and trade activities by contributions done directly in the charter capital of legal entities or under partnership terms.[35]

Provisions of the current tax legislation of the Republic of Uzbekistan are also another obstacle to the introduction and further development of Islamic financial products in the country. Tax legislation makes financial operations of conventional financial institutions exempt from Value-Added Tax (VAT).[36] At the same time, some transactions that involve Islamic finance operations, especially Murabaha operations, could face double taxation. In Uzbekistan, VAT is charged for the sale of goods and services, which are considered taxable under the Tax Code. In Murabaha operations, initially, a bank purchases the goods and later sells them to the customer. Under current tax law, both transactions shall be subject to VAT, which will raise the price of the financial service for the customer. To avoid this double taxation, Murabaha operations should be recognised as financial operations, and corresponding amendments should be implemented into the tax legislation.

According to Article 244 of the Tax Code of the Republic of Uzbekistan, transactions with securities (shares, bonds, and other securities) are exempt from payment of VAT.[37] It is worth mentioning that tax legislation refers to securities such as shares, bonds, promissory notes, depositary receipts, certificates of deposit, forward, future, and option contracts, and other securities recognised as such per the laws or pertinent laws of another country. However, since sukuk is not yet recognised as a security by the local legislation, the above-mentioned tax incentives do not apply to transactions involving sukuk certificates. Thus, VAT will create another burden for the development of Islamic capital markets. It is necessary to make amendments to the legislation to treat sukuk similarly to conventional bonds under tax codes.

Regarding insurance regulation, Uzbekistan's rules are strict. The Law on Insurance Activities is the main law regulating the insurance industry in Uzbekistan. Even if the general principles of insurance are not vastly different from the takaful system, nevertheless, there are subtle differences in certain aspects. In this regard, Sharipov and Yuldashev specify that the principal difference is that, while insurance is considered a commercial activity and shareholders are primary beneficiaries of the company's profits under Uzbekistan law, under takaful principles, insurance is not considered a commercial activity and shareholders of the company do not directly benefit from underwriting surplus.[38]

Furthermore, there is clear insurer-insured relation between two parties as specified in the law, which is prohibited in takaful since participants contribute donations to a common fund and are considered mutual beneficiaries of the fund. Specifically, in Article 14 on Rights and Obligations of the Insurer of the Law, it is clearly stated that the insurer should "upon the occurrence of an insured event, make all necessary calculations and payments of the insurance indemnity (insurance benefit) within the terms provided for by the legislation or the insurance (reinsurance) contract."[39] However, in takaful, the takaful operator acts as an agent

34 Sirojiddin Abrorov and Jahongir Imamnazarov, 'Islamic Finance: New Opportunities for Uzbekistan' (2021) 4 Iqtisodiyot va ta'lim 146, doi:10.55439/ECED/vol_iss4/a148.

35 Law of the Republic of Kazakhstan No 2444 'On Banks and Banking Activities in the Republic of Kazakhstan' of 31 August 1995 <https://adilet.zan.kz/eng/docs/Z950002444_> accessed 31 March 2023

36 Tax Code of the Republic of Uzbekistan No ZRU-136 of 25 December 2007 (new edition 2019) <https://lex.uz/en/docs/5535180> accessed 31 March 2023.

37 ibid, art 244.

38 Sharipov and Yuldashev (n 19).

39 Law of the Republic of Uzbekistan No ZRU-730 'On Insurance Activities' of 23 November 2021 <https://lex.uz/en/docs/6124730> accessed 31 March 2023.

of the takaful participants and is not solely responsible for the payment of the claims. There exist other discrepancies which make the operation of takaful companies difficult in these countries unless certain leeway is provided in its regulation. Therefore, as admitted by industry experts, current takaful companies operating in the country use some existing loopholes in the system, rather than the specific regulatory exception, to provide takaful services.[40]

Regarding the importance of the legal framework for the takaful industry, a recent study by Amuda and Alabdulrahman that explores the policy and reinforcement of the Islamic insurance framework in Saudi Arabia can provide some insights. The study finds that consumers consider takaful as policyholder-oriented when compared to conventional insurance as shareholder-oriented. It also reveals that the statement of the policy period and the nature of the Islamic insurance contract are important to reinforce takaful products' Shariah compliance. Finally, takaful participants should receive a share of the income generated from the investment of takaful funds in addition to the underwriting surplus as provided in the Shariah principles of the takaful model.[41] The proposed perfect application of the takaful model would only be applicable if a country has a legal framework allowing for the application of principles of Islamic insurance.

The smooth operation of Islamic finance institutions in the country requires making corresponding amendments to the banking, insurance, civil, and tax legislations. During its annual meeting held in Tashkent on September 3-4, 2021, the Islamic Development Bank signed a grant agreement worth 265,000 USD with the Republic of Uzbekistan to provide technical assistance for the establishment of an Islamic banking and finance legal framework. The main objective of the agreement was to develop the requisite regulatory, supervisory, and Shariah guidelines, establishing awareness and capacity building for Islamic banking in Uzbekistan. It is hoped that attracting technical assistance from Islamic Development Bank will give additional impetus for accelerating the development of the legal and regulatory framework for the operation of Islamic finance institutions in Uzbekistan.

5 CONCLUSION AND RECOMMENDATIONS

This work analysed some of the legal impediments which exist in Uzbekistan that prevent the proper development of the Islamic finance industry in the country. The analysis shows that legal barriers hindering the complete implementation of the nascent new industry are not only in one area of national legislation but exist in various parts of the legal system. In general, it is observed that Uzbekistan's government is working to draft new regulations related to various stakeholders of Islamic banking and finance. Nevertheless, the drafting of such legal and regulatory acts is conducted by different government agencies, and it is difficult to garner coordination among these agencies. The absence of a national roadmap and a unique strategy that depicts the plan of development of a legal framework for the operation of Islamic finance institutions makes the smooth development of the Islamic finance industry difficult.

Considering the legal impediments and difficulties in the process of introducing Islamic finance in Uzbekistan, we provide some important recommendations. They are as follows:

i. Accordingly, to coordinate the activities of government agencies, the government should identify directions of the reform and adopt the "Concept of Introducing Islamic Finance Services in Uzbekistan." The Concept must identify perspectives and strict directions for introducing Islamic finance in the country. It should also delegate

40 Nusrathujaev (2021, n 11).

41 Yusuff Jelili Amuda and Sarah Alabdulrahman, 'Reinforcing Policy and Legal Framework for Islamic Insurance in Islamic Finance: Towards Achieving Saudi Arabia Vision 2030' (2023) International Journal of Law and Management, doi:10.1108/IJLMA-03-2023-0045.

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powers and responsibilities of state agencies to regulate Islamic finance and determine the legal and regulatory acts which need to be developed. Furthermore, since it is an important and time-consuming task, a separate agency or state department should be formed to implement the "Concept of Introducing Islamic Finance Services in Uzbekistan." In this phase, technical and consultative assistance from international organisations, such as the Islamic Development Bank or Islamic Financial Services Board, and some leading consulting organisations should be requested.

ii. Within the scope of the "Concept of Introducing Islamic Finance Services in Uzbekistan," the government of Uzbekistan can adopt one of two methods to approach the problem. It can either adopt a single legislative act which regulates the operation of Islamic finance in general, or it can pass several legal acts which coordinate each specific field of the industry. In the second scenario, legal acts for each sector, such as Islamic banking, Islamic insurance (takaful), and Islamic capital markets, should be drafted and adopted. The latter approach may be easier and faster to implement since the development of a comprehensive regulation for the entire Islamic finance industry could become a challenging and lengthy process.

iii. At the same time, to bring the adopted special legal acts related to Islamic banking and finance in conformity with the current legislation of the country, amendments to the current civil, tax, banking, and other legislations should be adopted. As indicated earlier, each piece of legislation has some elements that contradict legal conditions for the smooth operation of Islamic finance and the introduction of some of its products. Only once those impediments are removed or amended can the industry smoothly operate in the country.

iv. Learning from the example of its neighbours, Uzbekistan should ensure adequate awareness of Islamic finance among the public and the availability of a sufficient number of specialists once the Islamic finance legal framework is ready. Thus, training specialists in the field of Islamic finance should be one of the main priorities for introducing Islamic finance and banking in Uzbekistan. Preparing high-quality textbooks and manuals in Islamic finance should be the main concern in training within this field. Similarly, raising the awareness of the public about Islamic finance should promote quicker acceptance of the industry by ordinary citizens once introduced in the country. Thus, various means of knowledge dissemination through public talks, seminars, conferences, articles, and programs in various media outlets can help rapidly raise the population's awareness of Islamic finance.

v. Promoting research in the field of Islamic finance and banking shall be a priority. As noted above in the literature review section, research in the field of Islamic banking and finance legislation is scarce in the country. Researchers at universities and scientific-research institutions should be encouraged to conduct research in the field of Islamic finance and banking law.

Thus, following those recommendations, the government of Uzbekistan can adopt one of two methods to approach the problem. It can either adopt a single legislative act to regulate the operation of Islamic finance in general, or it can pass several legal acts to coordinate each specific field of the industry. Irrespective of which path it takes, the development of a sound legal and regulatory framework shall create a favourable environment for the activities of Islamic finance institutions. This could bring not only an increase of investment flow from other Muslim countries, but also bring about local investment potential not revealed due to people's avoidance of conventional financial products.

Former Deputy Chairman of the Senate of Uzbekistan, Mr Sodiq Safoyev, acknowledged that the people of Uzbekistan have approximately 10 billion USD which are stored out of

the banking system, and these funds can be utilised more beneficially.[42] Most people do not deposit their money into banks or do not take out bank loans due to fear of getting involved in *riba* (usury) that exists in the conventional financial system. Hence, introduction of the Islamic financial institutions in the country could draw local investments into these institutions and make effective use of financial resources, which are typically kept idle, to benefit the economy at large.

It is strongly believed that further development and flourishing of Islamic financial instructions in Uzbekistan shall positively influence the country's image within the Islamic world. To do so, the country's government should start making necessary changes in the legislative system and remove legal impediments that prevent the proper introduction and development of the Islamic finance industry. For this movement, it should adopt a national Concept of Introducing Islamic Finance Services. Even if the process of developing an Islamic finance legal framework may start gradually, the framework should be holistic in nature to be fully effective in its operation. Another point which should be considered for the effective operation of the Islamic finance industry is assuring the adoption of standard Islamic finance regulations on par with other jurisdictions already holding advanced Islamic finance industries. As some studies have shown, the harmonisation of regulations with other Muslim countries only promoted the development of the Islamic banking and finance industry in the country.[43]

There are also some limitations of the current study due to its limited scope. Since its findings are based on secondary data and a review of relevant literature, the scope of the research is general in nature. As it does not use primary data obtained from relevant stakeholders of Islamic finance in Uzbekistan, its findings are broad in perspective. This, in turn, proved a new avenue for future research where more narrow studies can be undertaken within a specific sector of the Islamic finance industry in Uzbekistan. As such, those studies can investigate areas including legal difficulties faced by certain segments, such as Islamic banking, Islamic insurance (takaful), or Islamic capital market, by collecting primary data from relevant stakeholders through surveys or interviews.

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42 "'Public has 10 billion dollars" — Sodiq Safoyev Suggested Beneficial Use of Idle Savings' (Kun.uz, 25 February 2021) <https://kun.uz/uz/news/2021/02/25/aholida-10-milliard-dollar-bor-sodiq-safoyev-bosh-mablagdan-foydalanish-zarurligini-aytdi> accessed 31 March 2023.

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RIGHTS AND PERMISSIONS

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Research Article

THE CONSTITUTIONAL AND LEGAL POSITION OF NATIONAL MINORITIES IN KOSOVO: AHTISAARI PACKAGE AND THE PRIVILEGE OF MINORITIES

Petrit Nimani*, Alban Maliqi, Artan Maloku, Shefqet Avdija

ABSTRACT

Background: *In this article, we address the legal and constitutional position, focusing particularly on the Serbian minority and other minorities in a broader context. We delve into their rights and privileges and Kosovo institutions' obligations and responsibilities concerning national minorities.*

Certainly, national minorities are an integral part of the population of Kosovo; they should enjoy rights and obligations arising from the Constitution and applicable laws.

National minorities are an added value in every society; they enrich the mosaic of the country where they live and should be respected, promoting the values they carry and represent in society.

The article pays great attention to the Serb community living in Kosovo, their rights identified by the Ahtisaari package, and the privileges that this package recognises as a minority. The Ahtisaari package acknowledges the Serbian Orthodox Church's unique status and explicitly outlines this community's representation within central institutions. This includes reserved and ensured seats in both the executive and legislative branches. At the local level, the package determines how they will be represented. Minorities are represented in the police, prosecutors' office, court, and all other public institutions. Attention has been paid towards instances of sabotage within the state and institutions of Kosovo by the Serbian community that lives in Kosovo and is influenced and directed by Serbia. Representatives of the Serbian community in Kosovo enjoy income and benefits from the state of Kosovo for the mandate they exercise. Still, their actions within the institutions tend to align with Serbia's agendas rather than addressing the concerns of the community they are supposed to represent. Despite the absence of recognition from the state of Kosovo and partial acceptance by some Serbs living in Kosovo, it is crucial to acknowledge that Kosovo is an independent state and internationally recognised by 116 democratic states of the world. Notably, the Constitution of Kosovo, as a strong constitution, guarantees double rights in favour of the Serbian community living in Kosovo even though they constitute no more than 5% of the overall population.

The research uses the descriptive analysis method, based on the precise description and in-depth analysis of the topic through gathering detailed data related to the research problem, analysing and interpreting legal texts and relevant information and privileging a certain community. These methods have been employed to compare the legislation in force with the international

obligations that Kosovo has received through the comprehensive proposal for treating non-majority minorities.

Results and Conclusions: *Our research shows that national minorities in Kosovo are not treated equally. The Serbian community is constantly privileged and continues to be favoured by the international community, while other communities have substantial problems living in practical terms.*

The citizens of Kosovo understand the issue of minority rights best. Therefore, the state of Kosovo and its citizens should not allow national minorities to be discriminated against or their rights abused.

Implementing the agreements reached in the dialogue, fulfilling international obligations, and advancing the rights of minorities in Kosovo is the obligation of Kosovo and its citizens. Kosovo institutions are obligated to dialogue with the Serbian community because they are part of society and must be integrated into it.

1 INTRODUCTION

National minorities have special treatment and attention from the international community, with particular emphasis from international organisations, which have issued binding legal norms for member and non-member states. International documents that have given a new meaning to the treatment and protection of minorities are numerous UN resolutions, the Universal Declaration of Human Rights and Freedoms, the European Convention on Human Rights and Freedoms, the European Charter of Freedoms and Human Rights, etc. All these international instruments have established standards that have served and continue to serve for the dignified treatment and respect of the rights of minorities in the countries where they live.

These standards serve to democratise the country, fostering peaceful coexistence among various ethnicities, languages and peoples. They project a peaceful and common future that has undoubtedly brought good results and life in peace and harmony in most Western democracies. Undoubtedly, national minorities add value to any society and should be treated as such by the majority population and the state. Naturally, every country and society has its own differences and specifics, and in this disease in every country, their cases are treated according to special characteristics and specifics.

A section of this scientific paper will deal with the rights of national minorities in Kosovo based on international legal norms that deal with national and European minorities. Our primary focus will centre on the Comprehensive Proposal of President Ahtisari, which laid the foundation for the rules governing minority obligations in Kosovo.

To begin, we should delve deeper into the population of Kosovo, particularly the national minorities living in Kosovo.

The population of Kosovo predominantly consists of Albanians, who constitute the majority, alongside other ethnic minorities that collectively form a significant percentage. The total population of Kosovo is 1,783,531 inhabitants, according to the 2016 Census,[1] of which 92% are Albanians and 7.1% other national minorities such as Serbs, Bosnian, Turks, Roma, Ashkali, Egyptians, Croats, Gorani and Montenegrins. It is worth noting that the Serb population in Kosovo, and especially the Serb population in Northern Kosovo, have refused to register in the census organised by Kosovo institutions. This percentage may change by approx. 2.5%

1 Agjencia e Statistikave të Kosovës, Vlerësimi i Popullsisë së Kosovës për vitin 2016 (ASK 2017).

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in total. It is supposed that the number of Serbs in the northern part of Kosovo does not exceed 40,000.[2]

The overwhelming majority of the population is Albanians, with a high percentage compared to other communities living in Kosovo; historically, this percentage of Albanians has been almost the case in the past, despite manipulations by the Serbian state system for political purposes and ethnic agendas. The Serbian state aimed to downplay the number of Albanians in Kosovo to minimise the influence of Kosovo Albanians under the laws in force and to give as much power to Serbs residing in Kosovo.

The debate over the number of Albanians and their presence in Kosovo is premature. There have been statistics in Yugoslavia, and we will refer to this situation somewhat. According to the Yugoslav census of 1971, the population of Kosovo was 1,245,000; of this population, 920,000 were Albanians, constituting 74%, while 23,0000 or 18% were Serbs. The remaining population belonged to the Roma, Ashkali, Turkish and Montenegrin minorities.[3]

The 1981 census recorded a population of 1,584,440, of which 1,226,736 or 77.4% were Albanians, while Serbs represented 209,497 or 13.2%, thus significantly inferior to Albanians.[4] These data show that the Albanian element in Kosovo has always been dominant and that the efforts of the Serbian governments have failed to create a less Albanian-dominated Kosovo. The colonisation of Kosovo and the change of its ethnic composition in favour of the Serbs, despite the energetic efforts of the entire state at that time and the previous Serbian-Yugoslav regimes, did not succeed. These efforts failed, among other things, though Serbia and all Yugoslavs, pre-communist and communist, wanted both a colonised and seductive Kosovo for Serbs and an underdeveloped and European-type birth rate for Albanians. These goals, of course, did not go together.[5]

Based on the aforementioned discussion above, the Kosovo population is predominantly Albanians, encompassing an overwhelming percentage, while other minorities collectively constitute less than 9% of the total population. However, when it comes to the terminology and definition of these groups as national minorities or minorities, there is no exact scientific clarity or definition to this. Despite ongoing academic and scientific scholarly debates concerning the correct definition of the term national minority or minority, we will still give a version the International Court of Justice gave for the Greek-Bulgarian Agreement 1919. Under the Greek-Bulgarian Agreement of 19 November 1919, the International Permanent Court of Justice termed the minority as:

> *'[A] group of persons living in a given country or locality having a race, religion, language and tradition in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another'.*[6]

2 Agjencia e Statistikave të Kosovës, Regjistrimi i popullsisë, ekonomive familjare dhe banesave në Kosovë 2011: rezultatet përfundimtare. Popullsia: sipas gjinisë etnicitetit dhe vendbanimit (ASK 2013) vol 2.

3 Hivzi Islami, Demographic Studies: 100 Years of Kosova Demographic Development (Special editions 85, Section of social sciences 25, 2 edn, Kosova Academy of Sciences and Arts 2008) 202.

4 ibid.

5 Islami (n 3) 202.

6 Interpretation of the Convention Between Greece and Bulgaria Respecting Reciprocal Emigration, Signed at Neuilly-Sur-Seine on November 27th, 1919 (Question of the 'Communities'), Advisory Opinion (PCIJ, 31 July 1930) (1930) 17 PCIJ Series B 33.

2 HUMAN RIGHTS AND NATIONAL MINORITIES

Human rights are inalienable, undeniable and guaranteed to every individual regardless of race, religion, colour or other distinction. These rights have a universal character and have sometimes acquired an international legal character through the Universal Declaration of Human Rights and Freedoms and other subsequent documents.

But undoubtedly, the Universal Declaration represents a major turning point in the history of human rights because it sets standards and legal norms for the dignified treatment of every human being. The Declaration emphasises:

'Everyone enjoys all the rights and freedoms set forth in this Declaration without any limitations regarding race, colour, sex, language, religious belief, political or other opinion, national or social origin, wealth, birth or other. No distinction shall be made on the basis of the political, legal or international status of the state or country to which any person belongs, whether the state or country is independent, under trusteeship, non-self-governing or any other conditions of the limitation of sovereignty.'[7]

This declaration represents the minimum threshold of freedoms and human rights, but states are empowered to advance beyond these minimum standards to promote greater respect for human rights and freedoms. Members of national minorities living in that country cannot and will not be excluded from this set of basic human ties.

Unlike the basic rights that every individual enjoys without distinction, states often impose restrictions on other rights, such as political or civil rights, that are reserved only for their citizens. National minorities cannot be included in this group of rights since they are part of the society of the country where they live, and their difference from the rest of the population is that they have a nationality, language, culture, different traditions, etc. Such features distinguish them from the majority population, and states are obliged to guarantee their rights through legislation and state bodies so that even national minorities can realise their rights without pressure and conditions. It is important to understand who can qualify as a national minority.

Although there is a great global debate, we will again refer to international documents issued by international organisations such as the UN or the Council of Europe. According to a definition offered in 1977 by Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, a minority is:

'A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members nationals of the State possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.'[8]

Today, this issue is regulated by various international conventions, but individual states have also issued constitutional and legal norms for the recognition and qualification of national minorities through internal legislatures. Of course, human rights and the rights of national minorities have a universal character, and their protection and respect are also the responsibility of international organisations. As outlined by the Framework Convention for the Protection of National Minorities (1995), the protection of national minorities and all obligations of freedoms that are part of their protection of minorities are part of their pro-

7 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) art 2 <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 15 August 2023.

8 United Nations, Minority Rights: International Standards and Guidance for Implementation (UN 2010) 2.

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tection of all people and, as such, are included in the framework international cooperation (Article 1). Persons belonging to national minorities may exercise the rights and enjoy the freedoms derived from their principles in this Framework Convention individually and in community with others (Article 3).[9]

Human rights are no longer an internal issue; today, they have a universal character and transcend national borders. The protection of national minorities rests with individual states but is subject to the monitoring of foreign organisations. The protection of national minorities and the rights and freedoms of persons belonging to those minorities form an integral part of the international protection of human rights and falls within the scope of international cooperation.[10]

States cannot claim to distance or limit the rights of national minorities because these rights are not only individual entitlements within the society they live in but also entail additional rights derived from international documents that aim to protect and respect the rights of national minorities. We usually encounter different treatments of minority rights from one country to another, so we cannot say that all countries respect the rights of national minorities in the same way. We usually find these differences in countries that have fragile democracies or in countries that have a totalitarian government system. As an example, we can cite the attitude towards national minorities in some countries of the Western Balkans, Turkey, China, the Middle East, etc.

This approach to the rights and freedoms of national minorities can be seen quite clearly in the Western Balkans countries, where not all countries treat national minorities in the same way. We have said, and we repeat again. Kosovo has been and remains a champion in recognising and respecting the rights of national minorities, unlike other countries in this region. In this region, we refer to Serbia, North Macedonia and Montenegro, where all of these countries have national minorities within their population. Still, the treatment the states have given these minorities leaves much to be desired.

3 AHTISAARI PACKAGE IS THE «ACHILLES' HEEL» FOR KOSOVO

Kosovo, after the end of the war, was placed under an international protectorate administered by the United Nations (UNMIK, according to Security Council Resolution 1244)[11] for a definite period until the definitive status of Kosovo was determined. The Kosovo status settlement period was also set out in the final document of the Rambouillet Agreement, which specified that three years after this agreement's entry into force, an international meeting would convene to determine a mechanism for a final placement (settlement) for Kosovo. This would be based on the will of the people, the opinions of the relevant authorities, the efforts of each party about the implementation of this Agreement and the Final Helsinki Act[12], and to undertake general assessments of the implementation of this agreement, considering the proposals from either party for additional measures.[13]

9 Framework Convention for the Protection of National Minorities (ETS No 157) (adopted 10 November 1994) <https://www.coe.int/en/web/minorities/at-a-glance> accessed 15 August 2023.

10 Council of Europe, Framework Convention for the Protection of National Minorities and Explanatory Report (SoE February 1995) <https://rm.coe.int/16800c10cf> accessed 15 August 2023; Zejnullah Gruda, Mbrojtja Ndërkombëtare e të Drejtave të Njeriut (4 ed, Universiteti i Prishtinës 2007) 478f.

11 United Nations Security Council Resolution 1244 (adopted on 10 June 1999) <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/1244(1999)&Lang=E> accessed 15 August 2023.

12 OSCE, Conference on Security and Co-operation in Europe: Final Act (Helsinki, adopted on 1 August 1975) <https://www.osce.org/helsinki-final-act> accessed 15 August 2023.

13 Interim Agreement for Peace and Self-Government in Kosovo (Rambouillet Accords) (adopted on 23 February 1999) ch 8, art 1, para 3 <https://peacemaker.un.org/kosovo-rambouilletagreement99> accessed

The process of defining Kosovo's final status began with direct talks in Vienna between representatives of Kosovo and Serbia, mediated by the United Nations Special Envoy Martti Ahtisaari. It was understood that it was impossible to find a solution between the parties as long as their diametrically opposed positions were known publicly. Kosovo aspired for independence, while Serbia was determined that Kosovo's final status should be an autonomy expanded within Serbia.

At the end of the process, UN Special Envoy Martti Ahtisaari prepared a Comprehensive Proposal based on which the future state of Kosovo should be governed. On February 2 2007, Ahtisaari landed in Pristina to present the Comprehensive Proposal to Kosovo's state institutions and leaders; this document would serve as the primary basis and the greatest compromise that the people and institutions of Kosovo would make in compensation for Kosovo's independence.[14]

The Ahtisaari package precisely specified the rights that should be included in Kosovo's constitution and laws for communities living in Kosovo. It faced particular challenges with the Serb community and had to provide clear promises that Kosovo's future state would uphold these promises.

All of these conditions are included in the Comprehensive Proposal, which can be seen from its structure:

> *'Annex I — Constitutional Provisions; Annex II — The Rights of Communities and Their Members; Annex III — Decentralization 23 Attachment to Annex III — Delineation of New Municipalities; Annex IV — Judicial System; Annex V — Religious and Cultural Heritage; Annex VI — External Debt; Annex VII — Property and Archives; Annex VIII — Kosovo Security Sector; Annex IX — International Civilian Representative; Annex X — European Security and Defense Policy(ESDP) Mission; Annex XI — International Military Presence; Annex XII — Legislative Agenda.'*[15]

The Comprehensive Proposal foresees internal legal regulation in Kosovo, particularly the rights that should be recognised by national minorities and the inclusion of their rights in future legislation after the establishment of state institutions in Kosovo. The Kosovo Constitution especially had to incorporate this document in its entirety.

It was precisely the Ahtisaari package that was the cornerstone of the definition of minority rights fully integrated into the Constitution of the Republic of Kosovo.[16] The package became the cornerstone of the obligations of future institutions created after Kosovo declared independence. Kosovo can freely be called the Balkan champion of guaranteeing and recognising minority rights. By champion, we have in mind the position of national minorities in Kosovo and the position of national minorities in the region's countries. In this aspect, Kosovo can be compared freely with the EU countries or beyond.

Although universal rules and principles exist in every democratic country, imposing states to recognise and respect the rights of minorities, new principles and standards have been used in Kosovo. Typically, the rights and share of power are gained by the percentage of the population that comprises the national minority. Kosovo has been conditioned by the international

15 August 2023.

14 Comprehensive Proposal for the Kosovo Status Settlement (Pristina, Kosovo, 2 February 2007) <http://pbosnia.kentlaw.edu/Comprehensive%20Proposal%20for%20the%20Kosovo%20Settlement.pdf> accessed 15 August 2023.

15 ibid, table of contents.

16 ibid 19-20.

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community to recognise the non-conceivable rights of minorities in Kosovo, particularly the Serb minority, which enjoys rights within the territory of Kosovo as much as the majority population enjoys, even more in some cases, in particular, in cases of constitutional change or cases of institutional involvement by giving reserved seats to the Kosovo Parliament and guaranteed automatic involvement in the executive.

It is understandable that Kosovo had to give international guarantees for the protection and respect of the rights of national minorities. These guarantees are based on constitutional and legal norms, which we must respect without distinction. As in any other country, in Kosovo, the rights and privileges of minorities must be in accordance with the best international practices, which guarantee dignified treatment for every member of national minorities. These minorities should not abuse their rights and privileges to sabotage the state in which they live.

No one can deny the rights of minorities, and everyone should support their rights, though it is essential to act against the over-factoring of one community by recognising their absolute rights against other minorities, as we can see in the example of the Serbian community in Kosovo.

The above-mentioned lead, among other things, that one minority is using these rights to make the state dysfunctional, as the examples described below.

The Comprehensive Proposal designed to address the final status of Kosovo was the Achilles' heel for the future state of the Kosovo state for many reasons and presented various obstacles to the state-building and functionalisation of the newly established state. In Article 10 of the General Proposal, constitutional amendments are foreseen:

> *'10.1 Any amendment to the constitution requires the approval of two-thirds of the deputies of the Assembly, including two-thirds of the deputies of the national minorities who have guaranteed mandates.'*[17]

At this point, the state of Kosovo was tested with the creation of its armed forces. Kosovo's independence, backed by the U.S. and most EU member states, came through a bargain struck by UN Special Envoy Martti Ahtisaari, which sought to balance competing Kosovar and Serb interests. It was accompanied by several painful concessions for Kosovo, including a period of internationally supervised independence; the creation of several new Serb-majority municipalities carved out of existing Albanian-majority ones; extra powers for those Serb areas, notably over education; protections for Serbian Orthodox Church sites; parliamentary seats set aside for Serbs and other "non-majority" peoples, with a veto over legislation of vital interest.[18]

In practice, additional privileges for communities only sometimes bring peace and stability to that country. In many countries, minority privileges have become a boomerang and brought about instability. Hence, it is not always the case that the rights people granted to national minorities automatically result in stable societies.

17 ibid 17.

18 International Crisis Group, Relaunching the Kosovo-Serbia Dialogue: Europe Report No 262, 25 January 2021 (Intern Crisis Group 2021) <https://www.crisisgroup.org/europe-central-asia/balkans/kosovo-serbia/relaunching-kosovo-serbia-dialogue> accessed 15 August 2023.

4 MINORITY RIGHTS UNDER THE CONSTITUTION AND LAWS INTO FORCE IN THE REPUBLIC OF KOSOVO

The Constitution of the Republic of Kosovo has incorporated all of Ahtisaari's recommendations, although they were, in most cases, challenging to implement. Considering the post-war scenario in Kosovo, it was difficult to envision their successful execution; however, this was deemed essential for the progression towards the country's independence.[19]

The Republic of Kosovo's Constitution has provided a separate chapter on communities. Chapter 3, 'Rights of Communities and Their Members' is exclusively designed for minorities by the recommendations of the Ahtisaari package and outlines the general principles of communities residing within the territory of Kosovo.

According to article 57:

> '*1. Inhabitants belonging to the same national or ethnic, linguistic, or religious group traditionally present on the territory of the Republic of Kosovo (Communities) shall have specific rights as set forth in this Constitution in addition to the human rights and fundamental freedoms provided in chapter II of this Constitution.*
> *2. Every member of a community shall have the right to freely choose to be treated or not to be treated as such, and no discrimination shall result from this choice or from the exercise of the rights that are connected to that choice.*
> *3. Members of Communities shall have the right to freely express, foster and develop their identity and community attributes.*
> *4. The exercise of these rights shall carry with it duties and responsibilities to act in accordance with the law of the Republic of Kosovo and shall not violate the rights of others.*'[20]

The Constitution of Kosovo obliges the relevant institutions to serve the communities and fulfil their requirements in accordance with the constitution and the laws into force on a non-discriminatory basis so that the citizens of these communities can exercise their rights as outlined.[21]

In addition to other rights, Kosovo communities are guaranteed equitable employment representation in public institutions and agencies at all levels, especially in areas where they are the majority, particularly in the police service, while respecting the rules concerning competence and integrity.[22]

By analysing the Ahtisaari package and the Constitution of Kosovo as the highest legal act, it becomes clear that some non-majority communities are favoured. Their rights derive from Kosovo's international agreements and the best practices of civilised nations. This is a good indicator of how minorities should be treated in any democratic country.

To uphold and protect the rights of national minorities, the Republic of Kosovo has issued a special law that originates from the Constitution, establishing and safeguarding the freedoms and rights of non-majority communities living in the country. This law ensures equality of

19 Arsim Bajrami dhe të tjerët, Hyrje në sistemin ligjor në Kosovë (Universiteti i Prishtinës "Hasan Prishtina", Akademia e Drejtësisë së Kosovës 2019) 27.

20 Constitution of the Republic of Kosovo of 9 April 2008, art 57 <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702> accessed 15 August 2023.

21 ibid, art 58, para 7.

22 ibid, art 61.

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minorities in our society, ranging from identity protection, language use, mother tongue education, culture promotion, broadcasting television in community languages by the public medium, preaching religion, health for all, participation in political life, local cooperation, etc.[23]

If the law is well received and analysed, it can be freely stated that Kosovo communities are treated according to all international conventions and norms.

In comparison to neighbouring countries of the region, it is evident that Kosovo stands ahead in this aspect. Even though other countries in the region have a higher percentage of minority populations, they lag behind Kosovo in providing equal rights. For instance, Albanians living in the Republic of Northern Macedonia, constituting around 30% of the population[24], struggle to have their rights recognised by the state of Northern Macedonia under international conventions and norms. As for the Albanians living in southern Serbia, we can freely say that they are the most oppressed and tortured national minorities in Europe and beyond, with the Serbian state denying even the most fundamental rights to this community.

So, despite approximately 16% of Serbia's population belonging to ethnic minorities[25], their privileges in this country are not even close to international legal standards and norms. In practice, ethnic communities in Serbia are discriminated against and oppressed by state bodies. Paradoxically, Serbia specifically demands the rights of Serbs living in a Western Balkan country above all democratic norms and standards. The systematic "passivation" process (massive and selective stripping of residency) against Serbia's minority populations, as well as Albanian national minorities living in Serbia, goes against democratic norms. This practice leads to families losing their status as citizens of Serbia along with all associated civil rights, including access to benefits, insurance, pension, employment, etc. Since to lack of awareness regarding "passivation", individuals often lose the right to appeal, for which the deadline is eight days. Additionally, the Albanian minority in Serbia suffers from a lack of equitable distribution of state capital investments. This part of Serbia, where the Albanian community lives, has been overlooked, underdeveloped and consequently offers little in terms of future prospects for its residents.

In addition to the passivation of addresses, individuals are also discriminated against in other areas such as education, employment, representation in institutional and public life, use of national symbols, etc. By law, ethnic minority populations have the right to be educated in their minority language, but this right was not always respected. According to the Ministry of Education and Science, 45,683 schoolchildren in elementary and secondary schools (5.6% of all schoolchildren in the country) received education in their mother tongue. There were no textbooks in the Albanian language available for secondary school students, even though ethnic Albanians are estimated to be one of the five largest minority groups in the country.[26]

According to a 2021 report by the Helsinki Committee for Human Rights in Serbia, the government's disproportionate application of this law targeting Albanians amounted to 'ethnic cleansing through administrative means.' The report noted that passivized individuals cannot renew their expired identity card or passport, without which they were unable to register a car, access healthcare

23 Law of the Republic of Kosovo No 03/L-047a 'On the Protection and Promotion of the Rights of Communities and their Members in Kosovo' of 13 March 2008 <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2531> accessed 15 August 2023.

24 Apostol Simovski (red), Maqedonia e Veriut në shifra, 2023 (Enti Shtetëror i Statistikës 2023).

25 Statistical Office of the Republic of Serbia, 'First results of the 2022 Census of Population, Households and Dwellings' (Statistical Office of the Republic of Serbia, 21 December 2022) <https://www.stat.gov.rs/en-us/vesti/statisticalrelease/?p=14061&a=31&s> accessed 15 August 2023.

26 Bureau of Democracy, Human Rights and Labor, '2022 Country Reports on Human Rights Practices: Serbia' (US Departament of State, 2023) <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/serbia> accessed 15 August 2023.

or social services (including pensions), buy or sell property, or vote in local or general elections.[27]

On this basis, if we compare Kosovo with other countries in the region, we can freely say that Kosovo is a step forward to a more democratic country in terms of freedoms and community leadership.

4.1 SERBIAN COMMUNITY IN KOSOVO

National minorities are national assets and should be treated as such. The treatment of national minorities must be the same, without differences, and in accordance with the best international practices. These rights and privileges are limited by constitutional and legal norms.

The practices used in the case of Kosovo regarding the rights of minorities are the highest democratic practices. Kosovo Serbs are assumed to be at most 5% of the population; this percentage may sound hypothetical due to the absence of a proper census. However, some local researchers have provided some estimates. In 1981, after the census by the institutions of former Yugoslavia, 209,497 Serbs lived in Kosovo, accounting for 13.2% of the population. In 1991, this number was reduced to 194,190 or 9.9% of the population. In the 2011 census, which was boycotted by northern Serbs, only 25,532 Serbs were recorded, representing 1.5% of the population. However, this number likely does not reflect the exact number of Serbs living in Kosovo.[28]

Serbian is the official language in Kosovo alongside the Albanian language, with Serb minorities guaranteed seats in central institutions.[29] Political parties, coalitions, civic initiatives and independent candidates who claim to represent the Serbian community are allocated seats in the Assembly based on their performance in open elections, with a minimum of ten guaranteed seats if the won seats are less than ten. This representation extends to the government as well. The Kosovo Government mandates at least one minister from the Serb community and one minister from any other non-majority community. If there are more than twelve ministers, the Government will also have a third minister representing one of the non-majority communities in Kosovo.[30]

Furthermore, the government ensures representation through at least two deputy ministers from the Kosovo Serb community and two deputy ministers from other non-majority communities in Kosovo. If the number of ministers surpasses twelve, the Government will appoint a third deputy minister, including one representing the Serb community and another representing one of the other non-majority communities in Kosovo.[31]

They are guaranteed leadership and command positions in the police, the court and the prosecutor's office. These additional benefits extend further to instances involving constitutional changes. Constitutional changes in Kosovo cannot be made unless it secures a two-thirds vote from the deputies of the Kosovo Parliament and a two-thirds vote from the minority representatives.

Any amendment requires the approval of two-thirds of all Members of the Assembly, including two-thirds of all Members of the Assembly holding reserved seats or guaranteed for representatives of communities that are not a majority in the Republic of Kosovo.

27 ibid.

28 Data for 1981 and 1991 were obtained from: Islami (n 3) 202. While 2011 data were obtained from: European Center for Minority Issues Kosovo, 'Minority Communities in the 2011 Kosovo Census Results: Analysis and Recommendations' (ECM Kosovo, Policy Brief 18 December 2012) <https://www.ecmikosovo.org/wp-content/uploads/2023/04/3engA.pdf> accessed 15 August 2023. It is worth noting that Serbs in northern Kosovo have boycotted the 2012 census.

29 Constitution (n 20) art 5, para 1.

30 ibid, art 64.

31 ibid, art 96, para 3, 4.

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As a result of constant coordination with official Belgrade, the Serb minority exerts significant influence over Kosovo's institutions and the destiny of its citizens, effectively obstructing the establishment of the state of Kosovo, which is its constitutional right.[32]

In the name of "positive discrimination", the Ahtisaari package offers minorities and, in particular, the Serbian minority, which entails aa high degree of decision-making as well as the possibility to impede the functioning of institutions through the mechanism of "blocking" in lawmaking. Under this framework, a concept of "double voting" is foreseen in the Assembly of Kosovo, either for laws related to "vital interests of minorities" or for constitutional amendments. "Double voting" extends to two-thirds of the votes of deputies representing minorities in the Kosovo Assembly. This vote, in fact, destroys one of the great values of democracy, namely the principle of majority-minority representation based on both numerical and cultural belonging.

While this concept of decision-making is claimed to be justified by the 'Ohrid Agreement' model[33] in the former Yugoslav Republic of Macedonia, now the Republic of North Macedonia, the comparison does not entirely correspond to reality. The figures of Albanian participation in the overall population differ significantly between the two regions. Moreover, the extent of minority participation, including the Serb minority within the total population of Kosovo, also contrasts with the situation in the Republic of Macedonia.[34]

As reiterated, the Serb community in Kosovo is the most privileged among other communities living in Kosovo, primarily due to the constitutional and legal rights guaranteed by the state of Kosovo. These rights are nearly on par with Albanian citizens, spanning every aspect of daily life. It is worth noting that when it comes to cultural and religious heritage. Ahtisaari's package gives the Serbian Orthodox Church a special status by recognising a certain kind of ex-territoriality, whereby designated areas around these religious facilities are safeguarded within a certain circumference:

'The protected area for the following facilities will be defined in 100 meters of space around their perimeter according to the Ahtisaari package, which is part of the Constitution of the Republic of Kosovo'.[35]

Decisions have been made for the Serbian Orthodox Church in Prizren located in Shadervan, and the church in Velika Hoca in Rahovec / Orahovac per the recommendations of the Ahtisaari Package.

Firstly, declaring them 'Serbian heritage' is unacceptable because it threatens 'the risk of Serbisation of the spaces where they are located'. Secondly, the establishment of 'protected areas' coincides directly or indirectly with Serbian pseudoscience's views of Kosovo as 'the cradle of Serbia and the Serbian state' unfounded, both historically and currently.[36]

These rights and privileges do not apply to other religious facilities in Kosovo, such as mosques and Catholic churches. Based on the past and present, the Albanian people are known for inter-religious tolerance. They are not recognised for destroying cultural and religious property even in times of war, except for the March 2004 riots, which, in our opinion, were driven and orchestrated by foreign and mainly Serbian services.

Today, Serbs in Kosovo are the majority in 10 of the 38 municipalities of Kosovo and hold leadership positions in these municipalities, where most of them were created after the

32 ibid, art 144, para 3, 4.

33 Framework Agreement (concluded at Ohrid, signed at Skopje, Macedonia on 13 August 2001) <https://www.osce.org/skopje/100622 > accessed 15 August 2023.

34 Esat Stavileci, Një Këndvështrim për Pakon e Ahtisaarit (Universiteti i Prishtinës 2007).

35 Comprehensive Proposal (n 14) 39.

36 Stavileci (n 34).

Kosovo War. These municipalities emerged as part of the ethnic decentralization which was preceded by the Ahtisaari package, and were included, establishing the cadastral boundaries of these municipalities.These municipalities were created precisely to empower Serbs living in Kosovo. The Ahtisaari package guarantees numerous privileges for minorities in Kosovo, placing particular emphasis on the Serbian minority. Furthermore, this package ensures the establishment of municipalities with a Serbian majority based on local self-government.[37]

"Additional rights" for Serbs, coupled with a high level of administration within their municipalities and broader powers than other municipalities, raises substantial challenges. With the change of the territory and its expansion, the chain links of Serbian or majority Serb municipalities and the possibilities of their special links and financing of Belgrade collectively constitute the biggest challenge in post-status Kosovo. They jeopardise not only the dysfunctionality of institutions but the exertion of influence within regions controlled by the Serb minority as well. This jeopardises the effective implementation of laws until the eventual separation and severance of links with the central government and the creation of a distinct Serb entity, which might subsequently come under institutionalisation.[38]

The decentralisation strategy in Kosovo becomes evident through the creation of new Serb-majority municipalities and modifications in the cadastral boundaries of existing municipalities, resulting in the incorporation of entire Serb-populated villages and the majority of the population in these municipalities to be dominated by the Serb population. This happened in the case of Novo Brdo[39], with the creation of the Municipality of North Mitrovica. Aside from establishing Serb majority municipalities, several other municipalities with different ethnic majorities created, including a Turkish majority municipality (Mamusha / Mamuama) and two Albanian majority municipalities (Hani i Elezit and Junik).

Therefore, this case best demonstrates how Kosovo's independence has been conditioned and shaped by a series of compromises that the Albanian side has agreed to in exchange for international support during the Declaration of Independence.

Regarding the Serb community in Kosovo, there are two opposing truths between themselves: Serbs living in Southern Kosovo who are fully integrated into institutional and social life, and Serbs living in Northern Kosovo who demonstrate an unwillingness to integrate into society and institutions. This dichotomy raises questions about their behaviour towards Kosovo's state institutions. How is it possible for citizens of the same community to exhibit such disparate behaviour? On one side of the country exists conscientious citizens who cooperate with Kosovo institutions, while on the other side, exists citizens who reject the rule of law in their region.[40] We believe that the Serbian citizens of the northern part of Kosovo desire integration and live as free and equal citizens, exercising their rights. However, the parallel structures maintained by Serbia prevent these citizens from integrating into Kosovar society.

The Ahtisaari package was designed to satisfy the ambitions of the Serbs in Kosovo and Serbia as their conductor.

As for the Serbian community in Kosovo, it can be concluded that they are the most privileged community within the Ahtisaari Package, the Constitution of Kosovo and the existing laws in force. This minority enjoys rights as much as 92% of the majority population in Kosovo. In this aspect, Kosovo has been forced to make the most painful compromises, from which Kosovo today bears the consequences. These compromises with this community seem not

37 Comprehensive Proposal (n 14) 29, 31-2.

38 Stavileci (n 34).

39 Republika e Kosoves Novobërdë <https://kk.rks-gov.net/novoberde> accessed 15 August 2023.

40 Marko Prelec dhe Naim Rashiti, Integrimi i Serbëve në Kosovë Pas Marrëveshjes së Brukselit (Grupi për Hulumtimin e Politikave në Ballkan (BPRG) 2015) 2.

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to be stopped even in the Pristina-Belgrade Dialogue in Brussels.[41]

It is likely that this dialogue between Kosovo and Serbia will evolve into Ahtisaari +, culminating in the formation of an association for Serb-majority municipalities with executive powers. This arrangement could represent a kind of autonomy for the Serb minority within the territory of Kosovo. We hold concerns about the potential dangers and unacceptability of this scenario for Albanian citizens in Kosovo and beyond. Such a precedent could reverberate in other Balkan countries and potentially pose a threat to regional security within the Balkans.

In 2013, Kosovo and Serbia signed a basic agreement that included key provisions such as the establishment of an Association of Municipalities with a Serbian majority, reforms within the prosecution system, the judicial system, the removal of parallel structures and their integration into the security, energy and telecommunication structures, local elections in the northern municipalities of Kosovo with the support of the OSCE, etc.[42] This agreement was thought to be useful for the advancement and integration of the Serbian minority in the north of Kosovo and to foster improved relations between Kosovo and Serbia.

The Kosovo-Serbia dialogue still continues today. In March 2023, another agreement was signed in North Macedonia, aiming for the normalisation of relations and the implementation of all outstanding agreements.[43] In a dialogue between the two parties, they expressed their reservations and dissatisfaction with the content of the past agreements, like the association of municipalities with a Serbian minority, which still remains a contentious point. Serbia opposes the 2015 agreement, which states that the association of municipalities with a Serbian majority in Kosovo must be in accordance with the Constitution of Kosovo,[44] and desire an association with executive powers. However, such an arrangement is impossible because it creates an intermediary power in Kosovo and destroys the legal order of the Republic of Kosovo. The association with executive powers risks Kosovo turning into a Serbian Republic, and as such, defunctionalises the state of Kosovo and fails to create peace and stability in Kosovo and the region. Serbia wants the entity to enjoy executive powers and constitute a separate level of government between central and local authorities. Kosovars — government and opposition alike — fear that such an arrangement would open the door to the northern municipalities' secession or internal fracturing and dysfunction reminiscent of neighbouring Bosnia.[45] At this point, both the US and the EU declaratively, through their representatives, oppose such an association.[46]

41 'Belgrade-Pristina Dialogue: The European Union facilitates the Dialogue on the comprehensive normalisation of relations between Kosovo and Serbia' (European External Action Service, 16 March 2022) <https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue_en> accessed 15 August 2023.

42 Law of the Republic of Kosovo No 04/L-199 'On Ratification of the First International Agreement of Principles Governing the Normalization of Relations Between the Republic of Kosovo and the Republic of Serbia' of 17 September 2013 <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8892> accessed 15 August 2023.

43 'Belgrade-Pristina Dialogue: Implementation Annex to the Agreement on the Path to Normalisation of Relations between Kosovo and Serbia' (European External Action Service, 18 March 2023) <https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue-implementation-annex-agreement-path-normalisation-relations-between_en> accessed 15 August 2023.

44 Kryeministri Thaçi, 'Asociacioni i komunave me shumicë serbe — plotësisht në përputhje me Kushtetutën e Kosovës, Ligjin për Vetëqeverisje Lokale, dhe Kartën Evropiane për Vetëqeverisjen Lokale: Fjala e kryeministrit të Qeverisë së Republikës së Kosovës, Hashim Thaçi në Kuvendin e Republikës së Kosovës, Prishtinë, 12 mars 2013' (Zyra e Kryeministrit të Kosovës, 12 mars 2013) <https://kryeministri.rks-gov.net/blog/kryeministri-thaci-asociacioni-i-komunave-me-shumice-serbe-plotesisht-ne-perputhje-me-kushtetuten-e-kosoves-ligjin-per-veteqeverisje-lokale-dhe-karten-evropiane-per-veteqeverisjen-lokale> aksesuar më 28 korrik 2023.

45 'Kosovo-Serbia: Finding a Way Forward' (International Crisis Group, 12 May 2023) <https://www.crisisgroup.org/europe-central-asia/balkans/kosovo-serbia/kosovo-serbia-finding-way-forward> accessed 15 August 2023.

46 G Escobar, 'Të përdorim Asociacionin për të ndaluar atë që po bën Serbia në veri të Kosovës' (YouTube, Top Channel Albania, 18 maj 2023) <https://www.youtube.com/watch?v=U1yfDqWbpyA> aksesuar më

We believe that there is a need to exert greater pressure on Serbia, as it prevents the implementation of the agreements reached in the Brussels dialogue. Serbia portrays itself as constructive in the dialogue with Kosovo, yet its actions hinder the implementation of these agreements. The Serbian community residing in the north of Kosovo is strategically employed by Serbian politics in Belgrade. The political status of Kosovo's northern Serbs will be the toughest challenge in negotiations and poses the greatest risk of violence.

While Serbia formally continues to claim sovereign right to all of Kosovo, it has, in practice, given up trying to exercise its rights in most of Kosovo's territory. However, this does not hold true in the north. In this area, both Belgrade and Pristina hold elements of state power, and local authorities, who retain close ties to Serbia, enjoy substantial self-rule, resulting in an uneasy equilibrium.[47]

Even today, Serbia upholds Kosovo's status as an integral part of its constitution, as evident in the following oath:

'I do solemnly swear that I will devote all my efforts to preserve the sovereignty and integrity of the territory of the Republic of Serbia, including Kosovo and Metohija as its constituent part, as well as to provide exercise of human and minority rights and freedoms, respect and protection of the constitution and laws, preservation of peace and welfare of all citizens of the Republic of Serbia and perform all my duties conscientiously and responsibly.'[48]

Such an approach, deemed unprofessional and undemocratic, was justified by the need to constitutionally preclude Kosovo's independence and entrench its position as a part of Serbia. Indeed, the statement that the province of Kosovo and Metohija is an integral part of the territory of Serbia dominates the preamble to the Constitution, where it also establishes the obligation for 'all state bodies to uphold and protect the state interests of Serbia in Kosovo and Metohija'.[49] As a matter of fact, the Constitution only refers to the establishment of substantial autonomy for this province but leaves all details of the concept of substantial autonomy to be further defined by the legislators. This lack of substance and detail, combined with the establishment of the constitutional obligation to "protect Kosovo", had led certain critics to interpret this as an incorporation or reflection of the (mythical) "Kosovo oath" in the Constitution.[50] Such acts of the Serbian state are direct attacks against the state of Kosovo and also negatively affect the integration of the Serbian minority in institutional and public life in Kosovo.

On a contrasting note, certain groups of the Serbian community, otherwise known as parallel structures (some of which are categorized as terrorist organisations) that organise and work in Kosovo have continuously worked in full coordination with Serbia's political and security establishments to undermine and exacerbate tensions within Kosovo. It is important to note that this sabotage does not come from all the Serbs living in Kosovo but comes because of the pressure exerted by the parallel structures on their citizens. Some of the functions of many dubious businesses are owned by individuals under suspicion who have been blacklisted in the US for economic crimes, financing and supporting criminal groups.[51]

Recently, there have been many incidents in those parts of the territory of Kosovo. The im-

15 gusht 2023.

47 Kosovo-Serbia (n 45).

48 Constitution of the Republic of Serbia of 30 September 2006 (commenced 8 November 2006) art 114 <https://www.srbija.gov.rs/tekst/en/130144/constitution-of-serbia.php> accessed 15 August 2023.

49 Ljubica Djordjević, Conceptual Disputes over the Notions of Nation and National Minority in the Western Balkan Countries (ECMI Research Paper 126, European Centre for Minority Issues 2021) 21.

50 ibid.

51 US Department of the Treasury, 'Treasury Targets Corruption Networks Linked to Transnational Organized Crime: Press Releases' (US Department of the Treasury, 8 December 2021) <https://home.treasury.gov/news/press-releases/jy0519> accesed 15 August 2023.

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plementation of several agreements reached in Brussels has evoked many reactions within the Serbian community in the northern part of Kosovo. Specifically, the agreement to transition from illegal to legal license plates of the Republic of Kosovo has triggered tensions in that part of the country.[52] Serbian citizens under the pressure of parallel structures are not allowed to change their license plates. While there are a handful of citizens who have decided to change their license plates to legal ones, their cars have been targeted and burnt by parallel structures,[53] leaving them vulnerable and unprotected by Kosovo's state bodies. We assert with full accountability that it is the responsibility of the institutions of the Republic of Kosovo to protect the lives and property of Serbian citizens in those parts of the country.

It is difficult to envisage a change in the situation in those parts of the country without Serbia's consent. Even when there was an agreement in Brussels and the separation of Serbia began, its implementation faced obstacles because of the intervention of Serbia through the parallel structures that functioned in those areas. This interference caused problems and high tensions, endangering the lives and property of Serbian citizens. Serbia's control is so extensive over the Serbs in the North of Kosovo that it affects their private and public lives in an extreme way.

Under the influence of Serbia and the parallel structures within the northern part of Kosovo, Serbian citizens were compelled to leave their public positions as police, mayors, prosecutors, judges, and more. This boycott of the attack on Kosovo by the Serbs came as a result of various tensions and pressure from Belgrade to use the opportunity for its own political and strategic objectives, capitalizing on the ongoing Russia-Ukraine war and the spread of the conflict in the Balkans as a concrete reality.[54] The series of events in the north of Kosovo, including the criminal structures of Serbia, the appearance of individuals in uniforms linked to the criminal group Wagner, the activation of the army in a state of readiness for war along the Kosovo border, the meetings involving Serbian leaders[55] (such as Aleksander Vulin[56] and Milorad Dodik[57]) with the Russian President Vladimir Putin, and many mobilisations strongly suggested that Serbia, influenced by Russia, also wanted to spread the conflict into the Balkans as well.

The existence of geographically concentrated areas of Serbs in Kosovo has facilitated Serbia's continued political presence in Kosovo. The Belgrade government has organised and funded parallel education, healthcare, civil services and clandestine security structures within Kosovo. Further, Serbia's political influence in Kosovo is extended through party politics. Nearly all the Serb political parties of Kosovo are branches of Serbian political parties, and their agendas are, therefore, set in Belgrade rather than Kosovo. Still, the Belgrade government has failed

52 'Belgrade-Pristina Dialogue: Statement by the Spokesperson on the Latest Decision Related to License Plates' (European External Action Service, 29 October 2022) <https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue-statement-spokesperson-latest-decision-related-license-plates_en> accessed 15 August 2023.

53 Xhorxhina Bami, 'Kosovo Serbs Report Arson Attacks Amid Licence Plates Dispute' (Balkan Insight, 16 November 2022) <https://balkaninsight.com/2022/11/16/kosovo-serbs-report-arson-attacks-amid-licence-plates-dispute> accessed 15 August 2023.

54 Ivana Stradner dhe Bekim Bislimi, 'Stradner: Rusia me strategji të përshkallëzimit të konfliktit Kosovë-Serbi' (Radio Evropa e Lirë, 13 dhjetor, 2022) <https://www.evropaelire.org/a/ivana-stradner-tensionet-ne-veri-te-kosoves-/32174283.html> aksesuar më 15 gusht 2023.

55 'US and Ukraine Condemn Vulin's Participation in Moscow Conference' (EuroNews Albania, 26 May 2023) <https://euronews.al/en/us-and-ukraine-condemn-vulins-participation-in-moscow-conference > accessed 15 August 2023.

56 US Department of the Treasury, 'Treasury Sanctions Official Linked to Corruption in Serbia: Press Releases' (US Department of the Treasury, 11 July 2023) <https://home.treasury.gov/news/press-releases/jy1606> accessed 15 August 2023.

57 US Department of the Treasury, 'Treasury Sanctions Milorad Dodik and Associated Media Platform for Destabilizing and Corrupt Activity: Press Releases' (US Department of the Treasury, 5 January 2022) <https://home.treasury.gov/news/press-releases/jy0549> accessed 15 August 2023.

to impose total control over Kosovo Serbs.[58] This narrative highlights a community that lives in the same country but has different approaches towards the state of Kosovo. Despite being the more privileged groups in their society, Serbs who live in the south of Kosovo are integrated into society. They participate in institutional life, live freely, enjoy all their legal and constitutional rights, and coexist harmoniously with Albanian residents and other communities in this part of the country.

The Serbs of northern Kosovo have not been integrated and do not want to be integrated into Kosovo society, driven by pressures and blackmail from parallel and criminal structures orchestrated by Serbia. Despite having existing rights, they pursue additional privileges, even though they do not use those they already have. Serbs in northern Kosovo, after the 1999 war, have refrained from paying for any services such as water, waste, energy,[59] and property taxes[60]. All of these expenses are paid by the government of Kosovo using the funds collected through the taxes of its citizens. The Serbs in this part of Kosovo do not recognise the state of Kosovo, and practically in that part of the country, different structures of Serbia operate.

4.2 OTHER NON-MAJORITY COMMUNITIES IN KOSOVO

When considering the European mentality and democratic values, communities living in European countries are considered as an added value to society. However, this principle cannot be applied to the Balkan mentality where, in most cases, communities have frequently posed complex challenges for the countries where they reside. In many instances, minority communities have usually been manipulated by countries of origin, exploited to cause problems and undermine state institutions in the countries where they reside, thereby becoming agents of unrest (the scourge of evil).[61]

In contrast, other non-majority communities living in Kosovo, such as Turks, Bosniaks, Gorani, Roma, Ashkali and Egyptians, enjoy a range of rights in the state of Kosovo that are safeguarded by the Constitution and laws in force in the Republic of Kosovo.

A comparison of the rights accorded to different communities in Kosovo reveals that the Serb community is on the top of the list of benefits guaranteed by the Ahtisaari package and the Constitution of the Republic of Kosovo.[62] On the other hand, despite having the status of the community in Kosovo and comprising a significant portion of the population, the RAE (Roma, Ashkali and Egyptian) community. This community is the most economically, socially and educationally discriminated. [63]

The Turkish community in Kosovo leads a municipality (Mamusha) at the national level and is represented at the national level in Parliament. They also occupy a ministry within the Government of Kosovo, partially participate in the judicial system, and enjoy an educational system developed in their own language. They are also granted the freedom to promote their language, religion and culture.

58 Denisa Kostovicova, 'Legitimacy and International Administration: The Ahtisaari Settlement for Kosovo from a Human Security Perspective' (2008) 15(5) International Peacekeeping 631, doi:10.1080/13533310802396160.

59 'Gjatë vitit 2021, Kosova ka paguar 41 milion euro për konsumatorët në veri' (Kosovo.Energy, 13 Qershor 2022) <https://kosovo.energy/gjate-vitit-2021-kosova-ka-paguar-41-milion-euro-per-konsumatoret-ne-veri> aksesuar më 15 gusht 2023.

60 Luljeta Krasniqi-Veseli, 'ATK: Serbët në veri iu shmangen tatimeve' (Radio Evropa e Lirë, 18 janar, 2013) <https://www.evropaelire.org/a/24877414.html> aksesuar më 15 gusht 2023.

61 Orjon Ago, 'Pakicat kombëtare dhe roli i tyre në marrëdhëniet ndërkombëtare në Ballkanin Perëndimor' (dis, Universiteti i Tiranës 2006).

62 Constitution (n 20) ch 3.

63 Organizata për Siguri dhe Bashkëpunim në Evropë, Pasqyrë e komunitetit Rom, Ashkali dhe Egjiptian të Kosovës (OSBE 2020) <https://www.osce.org/sq/mission-in-kosovo/443590> aksesuar më 15 gusht 2023.

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'In municipalities inhabited by a community whose mother tongue is not an official language and which constitutes at least 5% of the total population of that municipality, the language of that community shall have the status of an official language in that municipality and shall use equally with official languages. Despite the above, in the municipality of Prizren the Turkish language has the status of an official language.'[64]

So, it can be concluded that Turks in Kosovo enjoy all their rights as a recognized community.

Other communities are also represented in parliament, government and other public institutions, except Croatian and Montenegrin citizens, who do not yet have their status recognised as a community due to their smaller population size. However, in the near future, these citizens are expected to be granted community status, allowing them to exercise their rights similar to other communities in the country.

Communities enjoying community status under the Constitution and applicable laws have guaranteed representation within public institutions. Political parties, coalitions, civic initiatives and independent candidates representing these communities are allocated seats won through the open election. A minimum number of seats are guaranteed for each community in the assembly. For example, the Roma community is guaranteed one seat, the Ashkali community is guaranteed one seat, and the Egyptian community is also guaranteed one seat. Additionally, one additional seat is awarded to either the Roma, the Ashkali or the Egyptian community with the highest overall votes. The Bosnian community is guaranteed three seats, the Turkish community has two seats, and the Gorani community is allocated one seat if their respective won seats fall below the guaranteed number.[65] Furthermore, in addition to reserved seats for representation in the Assembly of Kosovo, the Constitution also mandates reserved seats for communities within the Government of the Republic of Kosovo.

Next, let us turn our focus to the RAE (Roma, Ashkali and Egyptian) community. Despite having representation in institutions, the members of these communities do not enjoy even the basic rights in Kosovo, encompassing areas such as education, socio-economic status and their overall well-being within society.

These communities mainly live in settlements populated by populations of different ethnicities, respectively, in mixed populations (Albanians, Serbs, Turks, Bosniaks, Roma, Ashkali, Egyptians, etc.). However, a significant proportion of them live in Albanian-inhabited settlements (about 26%), and a small number live in Serb-inhabited settlements (about 3%).[66] RAE students do not have the right to be educated in their own language; they are educated in Albanian or Serbian, depending on which municipality they reside in and the majority population in that municipality.

Traditionally, all three of these communities have high levels of illiteracy, but research data indicate a dire situation regarding the education level of these minority members communities. At present, the level of illiteracy is very high. All interviewees were asked to indicate how many years of schooling they had completed. 19.93% of the respondents have not completed even one year of education.[67]

Kosovo has taken steps towards addressing the challenges faced by the communities by drafting a National Strategy for their integration into the Kosovo society in all aspects of life. This strategy includes recommendations from the European Union, which defines four priority areas for the integration of Roma and Ashkali communities:

64 Law of the Republic of Kosovo No 02/L-37 'On the use Languages' of 1 March 2007, art 2, para 2, 3 <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2440> accessed 15 August 2023.

65 Constitution (n 20) art 64, para 2.

66 Kosovo Foundation for Open Society, Pozita e pjesëtarëve të komunitetit Rom, Ashkali dhe Egjiptas në Kosovë (Kosovo Foundation for Open Society (KFOS) 2009) 37.

67 Arsim Bajrami, Parlamentarizmi: Aspekte krahasuese (Universiteti I Prishtinës 2010).

1. Access to Education: Ensuring all children complete at least compulsory education.
2. Access to Employment: Reducing the employment gap between community members and the rest of the population.
3. Access to health care: Reducing the difference in health status between community members and the rest of the population.
4. Residential and access to essential services: Lessening the disparities in access to residential and public services (water, electricity, gas) between members of this community and the rest of the population.[68]

We believe that these communities will remain a challenge for Kosovo's institutions in the future, but they should be given the support and attention that all communities receive regardless of their language or background.

Other communities in Kosovo are extremely integrated into society, public life, and state institutions. They are loyal to the state of Kosovo and contribute to the country's and society's development. They make up roughly equal percentages of the Serbian minority in Kosovo, but the rights and attention of the European Union, the United States and the entire international community are geared towards the Serbian minority and the privileges of the Serbs in Kosovo. Turkish, Bosnian and Gorani communities enjoy their rights and are well integrated into Kosovo society and Kosovo institutions. These communities have consistently cooperated and contributed to building and strengthening democratic institutions in Kosovo.

The discrimination faced by Roma, Ashkali and Egyptian communities in various aspects of life, including employment, education, and health, highlights a pressing need for Kosovo institutions to take these communities more seriously and invest more into improving their quality of life.

We think that with Kosovo's membership in international organisations, the advancement of minority rights will naturally advance. However, it is important to note that international organisations have an important role and function in advancing various objectives and in creating a standard in different fields such as education, health, economic development, environmental protection, human rights, humanitarian efforts, cooperation, establishing norms and principles between member states, contacts and solving intercultural conflicts.[69]

However, it's essential to maintain a clear and critical perspective towards Kosovo's institutions because we have seen and are seeing many cases where they try to avoid implementing agreements for the rights of communities. These agreements, once ratified by the Assembly of Kosovo, have a binding character, and the government and other institutions of Kosovo must honour their international obligations.

It is the obligation for the Government of Kosovo to prioritise the rights of the Serbian community and work with them to find a solution for their integration into society. We think that this community is a victim of the politics of Belgrade and the parallel structures operating in the north of Kosovo. Therefore, they deserve to be free and use their rights that are guaranteed by the Constitution and laws. The rights of communities should be a priority of every state and government since these communities constitute a vital and contributing part of the population, significantly impacting the future of the country and its society.

68 Republic of Kosovo, Strategy for Inclusion of Roma and Ashkali Communities in the Kosovo Society 2017-2021 (Office of the Prime Minister 2017) 9-10 <https://www.refworld.org/pdfid/6012a7204.pdf> accessed 15 August 2023.

69 Ardian Emini and Alfred Marleku, 'The Prospects of Membership in International Organizations: The Case of Kosovo' (2016) 9(2) Acta Universitatis Danubius Relationes Internationales 174.

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5 CONCLUSIONS

By examining the constitutional and legal framework and various legal acts in force within the Republic of Kosovo, we can conclude that national minorities enjoy rights in accordance with European values and standards. However, not all minorities enjoy the same rights. It is clear that the Serbian minority are benefiting from greater privileges in relation to other minorities. This situation persists even though according to the last population census in 2011, 1.5% of Kosovo's total population consists of the Serbian minority. This percentage is not final because the Serbs who live in the northern part of Kosovo have boycotted participation in this census, but according to some data, Serbs make up about 5% of the population of Kosovo.

As for other minorities in Kosovo, in practical terms, we see that there are delays in the realization of their rights. The Roma, Egyptian and Ashkali communities are the most discriminated in Kosovar society in terms of education, health, social welfare, etc. These delays are the result of an absence of a comprehensive state strategy for the development and advancement of these communities. Tangible projects aimed at enhancing their well-being and raising awareness within these communities are also missing.

We think that several urgent needs must be addressed to improve their situation, including ensuring universal education for all the children of these communities, generating employment opportunities, and elevating their overall standard of living. These measures are vital for these communities to feel free and dignified within Kosovar society. However, despite these challenges, it is evident that while the Ahtisaari package was the most painful compromise for Kosovo, it has led to inequalities within both the majority population and the minority communities living in Kosovo.

The Republic of Kosovo should further enhance its efforts to strengthen the practical implementation of the rights afforded to the minorities under the existing legislation.

The institutions of Kosovo must implement the agreements reached in the Brussels dialogue with the mediation of the EU and the support of the USA because these agreements represent international obligations for Kosovo, and their proper execution is essential. The Serbian minority is an integral part of Kosovar society, and majority population should treat them equally to other citizens and in accordance with the constitutional, legal and international norms.

We hope that the neighbouring countries of the region also follow the example of Kosovo and recognise the basic rights of the national minorities living in their countries. The time has come for the countries of the Western Balkans to demonstrate their commitment to ending the mistreatment of minorities and to create an environment of inclusivity and respect.

Once again, we reiterate that national minorities are valuable and wealthy for societies, and we should consider them as such. We should not see them as foreigners or usurpers of power or material goods provided by the state. We hope that Kosovo will evolve into a country where every individual feels a sense of belonging and where they can envision their future and that of their children. In Kosovo, all individuals need to be protected and taken care of, irrespective of their ethnicity. It is the obligation and duty of the state and society of Kosovo to preserve and further cultivate the spirit of coexistence while respecting the Constitution and the laws in force.

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Research Article

BRING ON THE THE LIGHT: REDUCTION OF THE CORPORATE SHADOW ECONOMY BY TAX REFORM

Vincentas Rolandas Giedraitis, Andriy Stavytskyy, Ganna Kharlamova, Erstida Ulvidienė

ABSTRACT

Background: *Our preliminary research shows that tax reform can have a meaningful impact in reducing the corporate shadow economy of a society. Countries are constantly applying lower tax rates to attract large businesses to their territory. They are also trying to improve tax collection efficiency in their jurisdiction area. We study the relationship between the Baltic countries' tax systems and the shadow economy level within their respective economies. Our research examines how economic growth can reduce the corporate shadow economy due to changes in tax collections.*

Methods: *Based on quarterly data from 2002-2022, a panel regression was chosen for the analysis, which allows for determining the impact of each specific tax on the level of the shadow economy separately, considering all three samples as one synergistic system.*

Results and Conclusions: *Thus far, we find that for all types of taxes, the models have the same structure, which allows for comparing the impact of gross domestic product on tax collections both in the short and long term. Our analysis showed that the effective income tax rate growth increases the shadow economy; that is, the country's citizens attempt to move into the shadows. At the same time, the growth of the effective corporate income tax rate, on the contrary, reduces the level of the shadow economy. A positive increase in the effective VAT rate also contributes to the growth of the shadow economy. The long-term effect for general taxes is almost 19% higher than the growth of the tax base. Thus, as to the Lithuanian economy, for example, it has a tendency for a reduction of the shadow economy, which means that there are significant opportunities for further improvement.*

1 INTRODUCTION

The shadow economy, often referred to as the informal or underground economy, represents a significant challenge faced by many states worldwide. It encompasses a range of unreported economic activities and transactions that evade official monitoring, taxation, and regulatory oversight.[1] The prevalence of the shadow economy poses numerous problems for governments, including revenue losses, distorted economic indicators, reduced social welfare programs,

1 Alla Sokolovska and others, 'The Impact of Globalization and International Tax Competition on Tax Policies' (2020) 11(4) Research in World Economy 1, doi:10.5430/rwe.v11n4p1.

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and decreased public trust in the tax system. Addressing the shadow economy has become a critical policy concern, and tax reform emerges as a potent instrument to illuminate this concealed realm.[2]

The persistent existence of the corporate shadow economy poses substantial challenges to governments worldwide. In response, countries are increasingly turning to tax reform as a potential means to reduce the prevalence of informal economic activities and enhance their tax collection efficiency. Numerous papers[3] aim to emphasise the significant influence of tax reform in reducing the corporate shadow economy within society.[4] To occupy this research gap, this paper delves into the complex interplay between tax regulation and the corporate shadow economy. It attempts to shed light on the existing challenges states face in combating the informal sector and explores the potential avenues for reducing its level, specifically focusing on the role of tax reforms. This research aims to offer valuable insights into the efficacy of tax regulation as a mechanism to curb shadow economic activities.

The corporate shadow economy, also known as the informal or underground economy, represents a pervasive challenge for governments across the globe.[5] This hidden economic sector operates clandestinely, encompassing various unreported economic activities and transactions that evade official monitoring, taxation, and regulatory oversight. It exists parallel to the formal economy, thriving on tax evasion, labour informality, and cash transactions.[6] The shadow economy not only distorts economic indicators but also undermines the integrity of the tax system, resulting in substantial revenue losses for governments. The widespread prevalence of the shadow economy places a substantial burden on national resources, hindering public welfare programs, infrastructure development, and investment in vital public services.[7]

The impact of the corporate shadow economy on governments is far-reaching and multifaceted. Firstly, the loss of tax revenues from the informal sector creates budgetary constraints, affecting the government's ability to fund essential services such as healthcare, education, and social welfare programs.[8] This can lead to compromised public services and reduced quality of life for citizens.[9] Secondly, the presence of unreported economic activities distorts official economic indicators, making it difficult for policymakers to accurately assess the true state of the economy and design appropriate economic policies.[10] The shadow economy also fosters unfair competition, as businesses operating within the informal sector enjoy an

2 Erstida Ulvidienė and others, 'An Investigation of the Influence of Economic Growth on Taxes in Lithuania' (2023) 102(1) Ekonomika 41, doi: 10.15388/Ekon.2023.102.1.3.

3 Mario Solis-Garcia and Yingtong Xie, 'Measuring the Size of the Shadow Economy Using a Dynamic General Equilibrium Model with Trends' (2018) 56 Journal of Macroeconomics 258, doi:10.1016/j.jmacro.2018.04.004.

4 Leandro Medina and Friedrich G Schneider, 'Shedding Light on the Shadow Economy: A Global Database and the Interaction with the Official One' (2019) 7981 CESifo Working Paper, doi:10.2139/ssrn.3502028.

5 Daniel Němec and others, 'Corruption, Taxation and the Impact on the Shadow Economy' (2021) 9(1) Economies 18, doi:10.3390/economies9010018.

6 Van Cuong Dang, Quang Khai Nguyen and Xuan Hang Tran, 'Corruption, Institutional Quality and Shadow Economy in Asian Countries' (2022) Applied Economics Letters, doi:10.1080/13504851.2022.2118959.

7 Monica Violeta Achim and others, 'The Shadow Economy and Culture: Evidence in European Countries' (2019) 57(5) Eastern European Economics 352, doi:10.1080/00128775.2019.1614461.

8 Petr Janský and Miroslav Palanský, 'Estimating the Scale of Profit Shifting and Tax Revenue Losses Related to Foreign Direct Investment' (2019) 26 International Tax and Public Finance 1048, doi:10.1007/s10797-019-09547-8.

9 Mak B Arvin, Rudra P Pradhan and Mahendhiran S Nair, 'Are there Links between Institutional Quality, Government Expenditure, Tax Revenue and Economic Growth? Evidence from Low-Income and Lower Middle-Income Countries' (2021) 70(C) Economic Analysis and Policy 468, doi:10.1016/j.eap.2021.03.011.

10 Cong Minh Huynh and Tan Loi Nguyen, 'Fiscal Policy and Shadow Economy in Asian Developing Countries: Does Corruption Matter?' (2020) 59(4) Empirical Economics 1745, doi:10.1007/s00181-019-01700-w.

advantage over compliant businesses due to lower operating costs and tax avoidance. This can deter formal businesses from operating legitimately, further exacerbating the problem.[11]

Addressing the shadow economy has become a pressing concern for governments seeking to foster sustainable economic growth and financial stability.[12] One of the key instruments in combating the corporate shadow economy is tax reform. By reevaluating and restructuring tax policies, governments can incentivise businesses to transition from the informal to the formal sector. Lowering tax rates, simplifying tax systems, and implementing effective tax collection mechanisms can encourage compliance and discourage tax evasion. Furthermore, streamlined tax administration can enhance revenue generation capacity, providing governments with the necessary resources to invest in infrastructure, public services, and social welfare programs.[13]

Tax reform holds immense potential to reduce the prevalence of the corporate shadow economy and promote greater compliance within the formal economic sector.[14] An efficient and well-designed tax system can create a level playing field for businesses, ensuring fair competition and fostering an environment conducive to economic growth. By aligning tax policies with economic development goals, governments can incentivise businesses to operate within the formal economy, contributing to a more transparent and accountable economic landscape.[15]

Tax reform measures can also address the root causes of the shadow economy, such as high tax rates, complex tax structures, and burdensome compliance requirements. Lowering tax rates and simplifying tax regulations can reduce the incentives for tax evasion and encourage businesses to declare their income and operate legitimately.[16] Implementing robust tax collection mechanisms, including digital payment systems and electronic invoicing, can enhance revenue collection efficiency and minimise opportunities for tax evasion.[17]

The Baltic region, comprising Estonia, Latvia, and Lithuania, is a focal point of this research on the corporate shadow economy and tax reform. These countries have experienced significant economic growth and development in recent years, making them an intriguing context for studying informal economic activities' prevalence and impact. This research aims to contribute to formulating evidence-based policy recommendations to help governments to reduce the corporate shadow economy and foster sustainable economic growth. Specifically, we focus on studying the relationship between the tax systems of the Baltic countries and the level of shadow economy prevalent in their respective economies.[18]

The paper's structure follows a logical sequence, starting with an introduction to the problem and research focus, followed by a review of related literature, detailed methodology, presentation of results, discussion of findings, conclusion, and suggestions for future research. The

11 Halyna Mishchuk and others, 'Impact of the Shadow Economy on Social Safety: The Experience of Ukraine' (2020) 13(2) Economics and Sociology 289, doi:10.14254/2071-789X.2020/13-2/19.

12 Erstida Ulvidienė and others, 'The Relationship between GDP and Tax Revenues from the Market of Gambling and Lotteries in Lithuania' (2023) 1(222) Bulletin of Taras Shevchenko National University of Kyiv, Economics, doi:10.17721/1728-2667.2023/222-1/19.

13 Anna Karolak, 'Adaptation Process of a Polish Tax Law to European Union Norms –Harmonization of a Value Added Tax' (2011) 4(1) Economics and Sociology 54, doi:10.14254/2071-789X.2011/4-1/6.

14 Nguyen Vinh Khuong and others, 'Does Corporate Tax Avoidance Explain Cash Holdings? The Case of Vietnam' (2019) 12(2) Economics and Sociology 79, doi:10.14254/2071-789X.2019/12-2/5.

15 Orkhan Nadirov, Bruce Dehning and Drahomira Pavelkova, 'Taxes and the Incentive to Work under Flat and Progressive Tax Systems in Slovakia' (2021) 14(2) Economics and Sociology 40, doi:10.14254/2071-789X.2021/14-2/2.

16 Olena Liakhovets, 'Tax Incentives Effectiveness for the Innovation Activity of Industrial Enterprises in Ukraine' (2014) 7(1) Economics and Sociology 72, doi:10.14254/2071-789X.2014/7-1/7.

17 Ulvidienė and others (n 2).

18 Sokolovska and others (n 1).

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introduction introduces the problem of the corporate shadow economy and its significance for governments. It highlights the potential of tax reform as a means to address this issue and provides an overview of the research's focus on the tax systems (particularly of the Baltic countries). The literature review comprehensively reviews existing research and papers related to the shadow economy and tax regulation. So, this section establishes the context for the current study and identifies gaps in the literature that the research aims to address. The methodology part describes the research methodology, including the use of quarterly data from 2002 to 2022 and the adoption of a panel regression analysis. It explains how the data were collected and processed to assess the impact of specific taxes on the level of the shadow economy. The resulting part discusses the relationship between different tax rates and their influence on the shadow economy level, focusing on short-term and long-term effects. Discussion interprets and analyses the results in the context of the existing literature, drawing comparisons with previous studies on the shadow economy and tax reforms along with acknowledging any limitations in the study's methodology or data and suggests directions for future research to enhance the understanding of the shadow economy and its relationship with tax regulation. It discusses the implications of the findings and identifies potential policy measures to further reduce informal economic activities. The concluding part of the paper is the summary of the main findings and implications of the research. It emphasises the significance of tax reform in tackling the corporate shadow economy and proposes recommendations for policymakers based on the study's insights.

2 LITERATURE REVIEW

Due to the actors' efforts to avoid detection when conducting shadow economy activities, the shadow economy is, by its very nature, impossible to measure. The demand for details about the size of the shadow economy and its changes over time is driven by the political and economic significance of this information.

Additionally, formulating economic policies that react to changes in the economy over time and across space must consider all economic activity, including official and unofficial production of products and services. The magnitude of the shadow economy is also a key factor in determining how much tax evasion is occurring and, consequently, how much should be controlled.[19] The amount of empirical research on the extent and evolution of the global shadow economy has significantly increased.[20] The methods utilised to measure the shadow economy, pointing out their benefits and shortcomings, can be categorised as direct or indirect (including model-based) methods.[21] As to four direct and micro methods of measuring the shadow economy, they are brief:[22] measurement by the System of National Accounts Statistics — Discrepancy method; survey technique approach; the use of surveys of company managers; and the estimation of the consumption-income-gap of households. The majority of indirect strategies, often known as 'indicator' strategies, are macroeconomic

19 Leandro Medina and Friedrich Schneider, *Shadow Economies Around the World: What Did We Learn Over the Last 20 Years?* (WP/18/17, IMF 2018) doi:10.5089/9781484338636.001.

20 Alexander D Klemm and others, *Are Elasticities of Taxable Income Rising?* (WP/18/132, IMF 2018) doi:10.5089/9781484361566.001; Medina and Schneider (n 19).

21 Friedrich Georg Schneider and Dominik H Enste, *Hiding in the Shadows: The Growth of the Underground Economy* (Economic Iss 30, IMF 2002); Lars P Feld and Friedrich Georg Schneider, 'Survey on the Shadow Economy and Undeclared Earnings in OECD Countries' (2010) 11(2) German Economic Review 109, doi:10.1111/j.1468-0475.2010.00509.x; Colin C Williams and Friedrich Schneider, *Measuring the Global Shadow Economy: The Prevalence of Informal Work and Labour* (Edward Elgar Pub 2016) doi:10.4337/9781784717995.

22 Friedrich Schneider and Andreas Buehn, 'Shadow Economy: Estimation Methods, Problems, Results and Open questions' (2018) 1(1) Open Economics 1, doi:10.1515/openec-2017-0001.

in nature. These are partly based on, among other things, the discrepancy between national expenditure and income statistics, the discrepancy between the official and actual labour force, the 'electricity consumption' approach,[23] the 'monetary transaction' approach,[24] and the 'currency demand' approach.[25] However, given that these activities are conducted at least in part for the same reasons as "pure" shadow economy activities, the macro approaches to estimating the shadow economy incorporate criminal activity, do-it-yourself activity, and voluntary activity. The beginning values for MIMIC estimates of the size of the shadow economy have a significant impact, and if they are derived from other macro figures, we run into the same issue. Thus, the literature review, which discusses different approaches in measuring, regulating and analysing shadow economy and approaches of tax application in regulations, came us to the following conclusions:

- There is no definitive approach as all methodologies, without exception, possess their strengths and weaknesses. Employing multiple methods whenever possible is advisable.
- Additional research is required to further investigate the estimation methodology and its outcomes in diverse countries and timeframes.
- It is crucial to establish satisfactory validation procedures for empirical findings, facilitating an informed assessment of their plausibility. An internationally recognised definition of the shadow economy is lacking, which is essential for facilitating cross-country and cross-method comparisons and mitigating the issue of double counting.

We also note that one of the notable tax applications in regulating the shadow economy is the Laffer approach.[26] The Laffer curve postulates that at some tax rate, tax revenue maximises, but beyond that point, higher tax rates may lead to reduced compliance and decreased tax revenues. Policymakers often consider this approach when designing tax policies to balance revenue generation and encourage voluntary tax compliance[27].

Determining the success of regulating the shadow economy requires comprehensive evaluation criteria. Common metrics include changes in tax compliance rates,[28] formalisation of businesses,[29] and reduction in unreported economic activities.[30] Additionally, researchers often assess the impact of regulatory interventions on tax revenues, economic growth, and the overall integrity of the tax system. Successful regulation should lead to increased tax revenues,

23 Daniel Kaufmann and Aleksander Kaliberda, *Integrating the Unofficial Economy into the Dynamics of Post Socialist Economies: A Framework of Analysis and Evidence* (Policy Research Working Paper 1691, World Bank 1996) doi:10.1596/1813-9450-1691.

24 Edgar L Feige, 'How Big is the Irregular Economy?' (1979) 22(5) Challenge 5, doi:10.1080/05775132.1979.11470559.

25 Edgar L Feige, 'A Re-Examination of the "Underground Economy" in the United States: A Comment on Tanzi' (1986) 33(4) IMF Staff Papers 768, doi:10.2307/3867216.

26 F Guedes de Oliveira and Leonardo Costa, 'The VAT Laffer Curve and the Business Cycle in the EU27: An Empirical Approach' (2015) 20(2) Economic Issues 29.

27 Normann Lorenz and Dominik Sachs, 'Identifying Laffer Bounds: A Sufficient-Statistics Approach with an Application to Germany' (2016) 118(4) Scandinavian Journal of Economics 646, doi: 10.1111/sjoe.12170.

28 James Alm, Ali Enami and Michael McKee, 'Who Responds? Disentangling the Effects of Audits on Individual Tax Compliance Behavior' (2020) 48(2) Atlantic Economic Journal 147, doi:10.1007/s11293-020-09672-4.

29 Anastasiia Samoilikova, 'Financial Policy of Innovation Development Providing: The Impact Formalization' (2020) 4(2) Financial Markets, Institutions and Risks 5, doi:10.21272/fmir.4(2).5-15.2020.

30 Andrew J Temple and others, 'Illegal, Unregulated and Unreported Fishing Impacts: A Systematic Review of Evidence and Proposed Future Agenda' (2022) 139(3) Marine Policy 105033, doi:10.1016/j.marpol.2022.105033.

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improved economic indicators, and a more transparent and accountable economic landscape.[31]

Researchers have extensively studied the relationship between taxes, tax reform, and the level of the shadow economy.[32] Some studies have found that high tax rates can be a significant driver of informal economic activities, leading individuals and businesses to engage in tax evasion to reduce their tax burden.[33] On the other hand, tax reforms that lower tax rates and simplify tax systems have been shown to incentivise compliance, leading to a reduction in the shadow economy's size.[34]

The impact of tax reform on the shadow economy is often contingent on the specific context and design of the reforms. Some studies have suggested that comprehensive tax reforms, accompanied by tax administration and enforcement improvements, can yield more significant reductions in the shadow economy.[35] Additionally, the effectiveness of tax reform may vary across different countries and timeframes, necessitating a careful examination of the local economic and social conditions.[36]

However, researchers also highlight the importance of complementary measures in conjunction with tax reform to achieve successful regulation of the shadow economy.[37] Measures such as improving the business environment, reducing bureaucratic hurdles, and enhancing legal enforcement can reinforce the impact of tax interventions.

The Baltic region has been grappling with the issue of the shadow economy, which refers to the informal economic activities that operate outside the purview of official monitoring and taxation. Despite significant economic growth and development in countries like Estonia, Latvia, and Lithuania, the shadow economy remains a concern.[38] The prevalence of the shadow economy poses challenges for governments in the region, impacting tax revenues, distorting economic indicators, and hindering efforts to foster a transparent and accountable economic environment.

The shadow economy in the Baltic countries encompasses many activities, including unreported income, cash transactions, and under-the-table payments.[39] The informal sector has implications for businesses and the government alike. Informal economic activities can distort fair competition and deter formal businesses from operating legitimately, creating an uneven playing field. This can potentially hinder investment and economic growth in the region.

31 Stefan Kirchner and Elke Schüßler, 'Regulating the Sharing Economy: A Field Perspective' in Indre Maurer, Johanna Mair and Achim Oberg (eds), *Theorizing the Sharing Economy: Variety and Trajectories of New Forms of Organizing* (Research in the Sociology of Organizations 66, Emerald Pub 2020) 215, doi:10.1108/S0733-558X20200000066010.

32 Ben Kelmanson and others, *Explaining the Shadow Economy in Europe: Size, Causes And Policy Options* (WP/19/278, IMF 2019) doi:10.5089/9781513520698.001.

33 Ogunshola Idowu Bello and Karina Kasztelnik, 'Observational Study of Tax Compliance and Tax Evasion in Nigeria' (2022) 6(4) Financial Markets, Institutions and Risks 1, doi:10.21272/fmir.6(4).1-14.2022.

34 Fazle Rabbi and Saad Saud Almutairi, 'Corporate tax avoidance practices of multinationals and country responses to improve quality of compliance' (2021) 15(1) International Journal for Quality Research 21, doi:10.24874/IJQR15.01-02.

35 Franziska Ohnsorge and Shu Yu (eds), *The Long Shadow of Informality: Challenges and Policies* (World Bank Pub 2022).

36 Wilson Prichard and others, *Innovations in Tax Compliance: Conceptual Framework* (Policy Research Working Paper 9032, World Bank 2019).

37 Aleksandra Fedajev and others, 'Factors of the Shadow Economy in Market and Transition Economies During the Post-Crisis Period: Is There a Difference?' (2022) 33(3) Inžinerinė Ekonomika 246, doi:10.5755/j01.ee.33.3.28417.

38 Romualdas Ginevicius and others, 'The Impact of National Economic Development on the Shadow Economy' (2020) 12(4) Journal of Competitiveness 39, doi:10.7441/joc.2020.04.03.

39 Korhan K Gokmenoglu and Aysel Amir, 'Investigating the Determinants of the Shadow Economy: The Baltic Region' (2023) 61(2) Eastern European Economics 181, doi:10.1080/00128775.2022.2163905.

Tax evasion is a significant aspect of the shadow economy in the Baltic countries.[40] High tax rates and complex tax structures may incentivise businesses and individuals to underreport their income or engage in other tax evasion practices. The lack of adequate tax compliance can result in substantial revenue losses for the government, impacting its ability to fund public services and welfare programs.

Addressing the shadow economy in the Baltic region requires a comprehensive approach that involves effective tax reforms, streamlined tax administration, and improved enforcement measures. Governments can increase tax compliance and enhance revenue collection by implementing measures to incentivise businesses to operate within the formal sector. Creating a conducive business environment with lower tax burdens and simplified tax regulations can also encourage businesses to opt for formal operations. Understanding the dynamics and extent of the shadow economy in the Baltic region is crucial for formulating evidence-based policies to tackle this issue effectively. Research and analysis in this area can provide valuable insights into the drivers of informal economic activities and inform policymakers about the potential role of tax reform as a tool to curtail the shadow economy's expansion and foster a more transparent and accountable economic landscape in the Baltic countries.

The crucial factor to indicate is the impact of the COVID-19 period. According to Schneider (2022),[41] the average size of the shadow economy in 36 European and OECD countries decreased from 16.48% of GDP in 2020 to 16.07% in 2021 (a decline of 0.41 percentage points) when taking into account the development of the shadow economy over the period from 2003 to 2022 and the impact of the Coronavirus pandemic from 2020 onward. The average shadow economy of these 36 countries will marginally climb to 15.96% of GDP (average of all 36 countries) in 2022 as a result of a prolonged (forecasted) economic recovery: a very minor decrease of 0.11 percentage points. Nearly all OECD and European countries experienced a severe recession in 2020 and, to a lesser extent, in 2021 due to the coronavirus pandemic. The recession led to a significant increase in unemployment and a impulsive decrease in GDP and national income. These significant underlying causes of the shadow economy's growth resulted in significantly boosting the shadow economies of these 36 nations.

3 METHODOLOGY

The study examines the relationship between the tax systems of the Baltic countries and the level of shadow economy within their respective economies.

Despite many similarities, Baltic countries have some differences in tax rates and methodology of calculating tax obligations. In Estonia and Latvia, corporate income tax (CIT) is payable upon profit distributions at a 20% rate, while in Lithuania, the tax rate is 15%. However, a 20% CIT rate is applicable to credit institutions, and 0% and 5% rates may be applied under certain conditions. The main PIT (personal income tax) rate is 20% in Baltic countries. At the same time, in Estonia, a monthly basic exemption (EUR 654) is not taxed; in Latvia, there are 23 and 31% rates for high incomes; and in Lithuania — 32% for high incomes. The value-added tax also varies among countries. The main tax rate is almost similar (20% in Lithuania, 21% in Latvia and Estonia), but lower rates can be applied: in Estonia, 9% and 0%; in Latvia — 12% and 5%; in Lithuania — 9% 5% and 0%[42]. It should also be noted that

40 Behrooz Gharleghi and Asghar Afshar Jahanshahi, 'The Shadow Economy and Sustainable Development: The Role of Financial Development' (2020) 20(3) Journal of Public Affairs e2099, doi:10.1002/pa.2099.

41 Friedrich Schneider, 'New COVID-Related Results for Estimating the Shadow Economy in the Global Economy in 2021 and 2022' (2022) 19(2) International Economics and Economic Policy 299, doi:10.1007/s10368-022-00537-6.

42 'Baltic Tax Rates from 1 january 2023' (*Leinonen Lithuania*, 19 January 2023) <https://leinonen.eu/ltu/

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tax rates have changed several times during the investigated period. Considering such differences, we consider only effective tax rates, which count real payments to the GDP level, and neglect different rates and conditions of payment.

We consider the following hypothesis: the effective tax rate affects the level of the shadow economy.

It is clear that the rate of a specific tax cannot serve as a relevant influencing factor, as countries avoid changing them often. In most cases, the rates of basic taxes do not change for decades.[43] That is why a more informative indicator was chosen for the analysis — the so-called effective tax rate, which is determined by the ratio of actually collected taxes for a certain period to the country's GDP for that same period.[44] [45] Accordingly, effective rates of basic taxes and the level of the shadow economy are used to analyse tax changes. The latter indicator is taken from the works of F. Schneider, which is currently the most objective measure of the shadow economy.[46]

F. Schneider's approach to calculating the shadow economy level involves a comprehensive and multifaceted methodology considering various economic indicators and factors contributing to the informal economy. One of the key components of his approach is the 'currency demand approach', where he estimates the size of the shadow economy by analysing the discrepancy between the money supply and the actual currency held by the public. By assessing the difference between the two, F. Schneider can approximate the extent of unreported economic activities and cash transactions not captured by official statistics.

Furthermore, F. Schneider incorporates the 'structural equation modelling' (SEM) technique in his methodology. SEM allows him to establish causal relationships among variables that influence the size of the shadow economy. By identifying factors such as tax burden, regulations, labour market conditions, and corruption, he can discern how these elements affect the level of informal economic activities in a given country. This holistic approach enables F. Schneider to analyse various socio-economic factors' direct and indirect effects on the shadow economy level, providing a more comprehensive understanding of the informal sector's dynamics.[47]

F. Schneider's approach to calculating the shadow economy level is a rigorous and systematic methodology combining currency demand analysis with structural equation modelling.[48] By integrating diverse economic indicators and considering complex interactions between different variables, his approach provides valuable insights into the size and drivers of the informal economy. The findings derived from this method contribute to a more nuanced understanding of the economic landscape, assisting policymakers and researchers in formulating strategies

news/baltic-tax-rates-from-1-january-2023> accessed 10 August 2023.

43 Thomas Blanchet, Lucas Chancel and Amory Gethin, 'Why is Europe More Equal than the United States?' (2022) 14(4) American Economic Journal: Applied Economics 480, doi: 10.1257/app.20200703.

44 Elena Fernández-Rodríguez, Roberto García-Fernández and Antonio Martínez-Arias, 'Business and Institutional Determinants of Effective Tax Rate in Emerging Economies' (2021) 94(C) Economic Modelling 692, doi:10.1016/j.econmod.2020.02.011.

45 Ioannis Stamatopoulos, Stamatina Hadjidema and Konstantinos Eleftheriou, 'Explaining Corporate Effective Tax Rates: Evidence from Greece' (2019) 62(C) Economic Analysis and Policy 236, doi:10.1016/j.eap.2019.03.004.

46 Dong Frank Wu and Friedrich Schneider, *Nonlinearity Between the Shadow Economy and Level of Development* (WP/19/48, IMF 2019) doi:10.5089/9781484399613.001.

47 Mykolas Navickas, Vytautas Juščius and Valentinas Navickas, 'Determinants of Shadow Economy in Eastern European Countries' (2019) 66(1) Scientific Annals of Economics and Business 1, doi:10.2478/saeb-2019-0002.

48 Leandro Medina and Friedrich Schneider, 'The Evolution of Shadow Economies Through the 21st Century' in Corinne C Delechat and Leandro Medina (eds), *The Global Informal Workforce: Priorities for Inclusive Growth* (IMF 2021) 11.

to address and mitigate the challenges posed by the shadow economy.[49]

The working assumptions are as follows:

1. All three countries under consideration are in a related synergy in terms of state regulation of taxes and capital movement.
2. If the corresponding coefficient of the model is significant and negative with the growth of the effective tax rate, then the state has managed to collect adequate taxes and bring the corresponding share of the economy out of the shadows.
3. If the corresponding coefficient is significant and positive with the growth of the effective tax rate, it can be concluded that the state failed to collect all possible taxes, and some of them went into the shadows.
4. If the corresponding coefficient of the model is found to be insignificant, it can be assumed that the corresponding tax is not a significant channel for businesses to enter the shadow economy. The significance of the coefficient, accordingly, shows that this tax is a primary channel for entering the shadow economy and can be regulated by the state.
5. When significant, the constant of the model can be an indicator of the level of the shadow economy without the influence of state tax levers.

Based on the first assumption, a panel regression was chosen for the analysis, which allows for determining the impact of each specific tax on the level of the shadow economy separately, considering all three samples as one synergistic system. It should be noted that it was decided not to build separate regression lines for each country precisely because of the similarity of the states' economies. The model's choice depends on the study's specific circumstances and features. Typically, a fixed-effects model is used when one is interested in studying the effect of time-varying variables, while a random-effects model is used when the interest is in the overall sample effect. The Hausman test is often used to compare fixed- and random-effect models. If the test results show that a fixed-effect model is better, this may mean that the objects under study have constant characteristics important for modelling. If the random-effect model is better, it may mean that the objects have different characteristics that cannot be captured by the fixed effects.

In our study, a regression of the following type was constructed:

$$Shadow_{i,t} = \beta_0 + \beta_1 T_{i,t} + \beta_2 X_t + \mu_i + \varepsilon_{i,t},$$

where $Shadow_{i,t}$ - the shadow level of the i-th economy in the period t;

$T_{i,t}$ — effective tax rate in the country i in the period t;

X_t — additional variable, describing crisis periods;

μ_i — random cross-country effects;

$\varepsilon_{i,t}$ — model residuals.

Studying one model that would include all effective tax rates seemed irrational due to the possible level of multicollinearity between indicators. The presence of the additional variable X is explained by the dramatic changes in tax collection during two periods: in 2009 after the global financial crisis and in 2020 during the COVID-19 pandemic.

49 Friedrich Schneider, 'Do Different Estimation Methods Lead to Implausible Differences in the Size of Non-Observed or Shadow Economies? A Preliminary Answer' (2021) 9434 CESifo Working Paper, doi:10.2139/ssrn.3975110.

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4 DATA

The study compares the situation in three countries that have a lot in common in the economy: Lithuania, Latvia and Estonia. All three countries were members of the USSR and then underwent economic transformation, joining the European Union and introducing the euro as their national currency. These countries are located next to each other, have access to the sea, and accordingly have a relatively similar structure of economy. This makes it possible to analyse the level of the shadow economy in countries according to the same principle. The main data used in the work are the following (Table 1). Data from 2002 to 2021 were used for the analysis, allowing for forming a weighted dated panel.

Table 1. Study variables

Variable	Factor title	Description
Shadow	Shadow economy level	Size of the shadow, calculated by F. Schneider, (in % of off. GDP)
EPIT	Effective personal income tax rate	Personal income tax in % of off. GDP
ECT	Corporate tax	Corporate tax in % of off. GDP
EVAT	VAT	VAT in % of off. GDP
EPEV	Taxes on products, except VAT and import taxes	Taxes on products, except VAT and import taxes, in % of off. GDP
ECDT	Customs duties	Customs duties in % of off. GDP

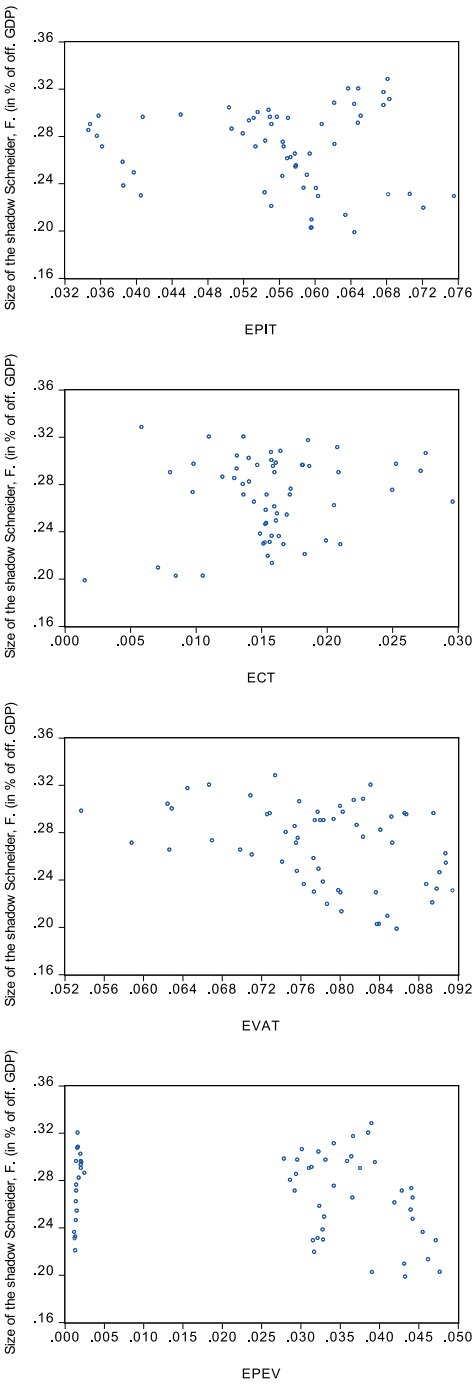
Table 2 shows the numerical characteristics of all considered variables.

Table 2. *Numerical characteristics of variables*

Parameter	SHADOW	EPIT	ECT	EVAT	EPEV	ECDT
Mean	0.268917	0.055965	0.015845	0.078279	0.025121	0.001847
Median	0.274000	0.057182	0.015776	0.078545	0.031984	0.001865
Maximum	0.328000	0.075598	0.029629	0.091497	0.047743	0.002978
Minimum	0.198400	0.034712	0.001555	0.053721	0.001248	0.000313
Std. Dev.	0.034285	0.010077	0.004987	0.008419	0.017386	0.000490
Skewness	-0.378009	-0.628301	0.230979	-0.686306	-0.461214	-0.484425
Kurtosis	2.070466	2.801937	4.400763	3.270507	1.530638	4.373194
Jarque-Bera	3.588989	4.045689	5.438857	4.893092	7.524741	7.060833
Probability	0.166211	0.132279	0.065912	0.086592	0.023229	0.029293
Sum	16.13500	3.357894	0.950698	4.696717	1.507261	0.110822
Sum Sq. Dev.	0.069353	0.005992	0.001468	0.004182	0.017835	1.42E-05
Observations	60	60	60	60	60	60

Fig. 1 shows graphs of all effective tax rates against the level of the shadow economy in the Baltic States.

Fig. 1. *The ratio of effective tax rates and the level of the shadow economy in the Baltic countries in 2002-2021.*



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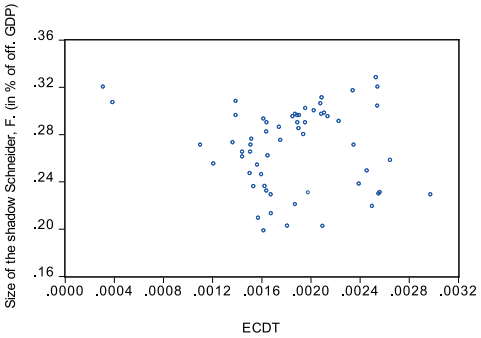

The initial stage of the research is testing the stationarity of the variables. For this, the Levin, Lin & Chu t-test for panel data was used. Most indicators were stationary in the first difference. However, the EPIT variable became stationary only in the second difference, and the EPEV and ECDT variables were stationary in levels (Table 3).

Table 3. *Test for stationarity*

Method	Statistics	Prob.**	Cross-sections	Obs	Result
Levels					
Shadow	0.09302	0.5371	3	54	Non-stationary
EPIT	-1.11979	0.1314	3	54	Non-stationary
ECT	-1.56377	0.0589	3	54	Non-stationary
EVAT	-1.46586	0.0713	3	54	Non-stationary
EPEV	-2.60316	0.0046	3	54	Stationary
ECDT	-3.38658	0.0004	3	54	Stationary
First differences					
ΔShadow	-2.97294	0.0015	3	51	Stationary
ΔEPIT	-1.29867	0.0970	3	51	Non-stationary
ΔECT	-3.59735	0.0002	3	51	Stationary
ΔEVAT	-5.57570	0.0000	3	51	Stationary
Second differences					
Δ^2EPIT	-2.86884	0.0021	3	48	Stationary

5 RESULTS

Based on the data, you can build a model that will reflect the relationship between the dependent and independent variables. When analysing panel data, choosing which of the models is most suitable for a particular situation is necessary. The model with fixed effects should be used when each economic unit is "special" and cannot be considered as the result of a random selection from some general population. A model with random effects is better because it is more "compact" and has fewer parameters; it can be considered a partial case of a model with fixed effects. Since the most important difference between the approaches to modelling the heterogeneity of observation objects is the ratio of the impact and regressors, random results are not correlated with regressors. In contrast, fixed effects can be associated with them. Choosing a fixed or random effects model depends on whether the effects correlate with the regressors. Under fair conditions, fixed-effects model estimates are robust, and random-effects model estimates are consistent. In this case, significant differences between

the estimates of these models can be expected. Detection of such a difference is investigated using the appropriate test based on the Hausman statistic.

A version of the model with random effects for countries and no results for periods was chosen for the work. The Hausman test confirms the presence of random effects for countries (Table 4).

Table 4. *Hausman test for Cross-section random effects for different mines*

Variable	Chi-Sq. Statistics	Chi-Sq. df	Prob.
Δ ² EPIT	0.6096	2	0.7373
ΔECT	0.0000	2	1.0000
ΔEVAT	0.0000	2	1.0000
EPEV	0.0000	2	1.0000
ECDT	0.0000	2	1.0000

At the same time, the impact of effects on the periods was not investigated due to significant fluctuations in 2009 and 2020 caused by the consequences of the global financial crisis and the pandemic. Taking this influence into account was more appropriate than constructing additional effects. In some models, it was essential to study the impact of only 2020 (variable Y20), while in others, both 2009 and 2020 were studied simultaneously (variable Y_09_20). The choice of such a model was also influenced by the number of available observations, which did not allow for simultaneously building a regression with random effects across countries and periods. The least squares method for panel regression was used for estimation, and the aggregated assessment results are given in Table 5.

Table 5. Aggregated model evaluation results

Coefficient	Δ ² EPIT	Δ ECT	Δ EVAT	EPEV	ECDT
Constant	-0.0070*	-0.0059*	-0.0069*	-0.0062*	-0.0088*
Coefficient with tax	0.1348***	-0.4900*	0.2781**	-0.0177^	1.1632^
Y_09_20	0.0179*	-	0.0161*	0.0158*	0.0160*
Y20	-	0.0191*	-	-	-
R^2	0.652	0.517	0.607	0.575	0.579
Prob(F-Stat)	0.0000	0.0000	0.0000	0.0000	0.0000

* significant at 1%, ** significant at 5%, *** significant at 10%, ^ — insignificant

The table shows that the impact of taxes is multifaceted, although the NO hypothesis is confirmed for all types of taxes except for EPEV and ECDT. In particular, the effective income tax rate growth leads to an increase in the shadow economy; that is, the country's citizens try to go into the shadows. At the same time, the growth of the effective corporate income tax rate, on the contrary, reduces the level of the shadow economy. A positive increase in the effective VAT rate also contributes to the growth of the shadow economy. However, the simulation showed an insignificant effect of various effective taxes on imports to regulate the level of the shadow economy.

Such a situation is not a surprise: the increase in payments to the budget is often perceived by the population as an incentive to avoid taxation through various schemes. This means that with an increase in the effective tax rate on citizens' incomes, the process of tax evasion develops. A similar approach can be observed with the payment of VAT, where there are various VAT refund schemes for exporters, fictitious imports, etc. However, an increase in corporate income tax, on the contrary, reduces opportunities for the withdrawal of funds abroad, which means tax evasion. The simulation showed approximately the exact impact of 2009 and 2020 on the level of the shadow economy. These years, they have contributed to an

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increase in the shadow economy by slightly more than one and a half per cent.

6 LIMITATIONS OF THE STUDY

Of course, the obtained results are based on assumptions about the impact of tax policy on the level of shadowing of the economy. On the one hand, this connection is confirmed by the model considered in the work and other analysed studies. On the other hand, a radical change in tax policy rarely leads to significant changes in shadowing, so it can be assumed that there is a deeper and more inert relationship between the level of shadowing and taxes. However, the study of such an effect must rely primarily on long-term data, free from the influence of the phase transition that we currently observe. Indeed, the reorientation of people from the sphere of production to the sphere of services, especially those that can be provided remotely, has significantly changed the perception of the effectiveness of tax policy. Thus, it is possible to investigate other factors that determine both the inertness of shading in the country and changes in its level due to the influence of these new factors. Unfortunately, it was impossible to consider them in our study.

Another limitation is using a panel regression tool for the similar development of the Baltic countries. Since these countries implement approximately the same tax policy and have similar economic structures, it is clear that the simulation results for them turned out to be similar. However, it is possible that for other countries, the simulation results will require using tax variables in other functional forms, which may lead to slightly different conclusions. In any case, the tax impact on the level of shadowing should also be investigated for countries in other regions.

7 CONCLUSIONS

The desire to attract large businesses and foster economic growth drives countries to explore measures such as applying lower tax rates and enhancing tax collection methods. To investigate the dynamics between economic growth and the corporate shadow economy, we examine changes in tax collections for 3 Baltic states. Our analysis utilises quarterly data spanning from 2002 to 2021, employing a panel regression approach to assess the impact of individual taxes on the shadow economy level collectively.

The literature review presented highlights various methodologies used to analyse and regulate the shadow economy, with special emphasis on tax-related interventions such as the Laffer approach. Measurement of success in regulating the shadow economy involves assessing changes in tax compliance, formalisation of businesses, and overall economic indicators. Existing research indicates that tax rates and tax reform play a significant role in influencing the level of the shadow economy, but the effectiveness of such interventions is context-dependent. To achieve meaningful results, policymakers must consider a combination of tax reform and complementary measures aimed at creating an enabling environment for businesses to operate within the formal economy. Further research is required to deepen our understanding of the complexities of the shadow economy and identify the most effective strategies for its successful regulation.

In conclusion, this analysis focused on constructing a model to examine the relationship between the dependent and independent variables in the context of the shadow economy. Panel data analysis was used, and the choice between fixed and random effects models was discussed. The model with random effects for countries and no effects for periods were selected for this study. The Hausman test confirmed the presence of random effects for countries. The study investigated the impact of taxes on the shadow economy, particularly the effective

income tax rate, effective corporate income tax rate, and effective VAT rate.

The results revealed a multifaceted nature of the impact of taxes on the shadow economy. The effective income tax rate increase leads to an increase in the shadow economy, indicating that citizens attempt to evade taxes. In contrast, the growth of the effective corporate income tax rate reduces the level of the shadow economy, possibly due to reduced opportunities for offshore fund withdrawal. A positive increase in the effective VAT rate also contributes to the growth of the shadow economy, attributed to various VAT refund schemes and fraudulent imports. An increase in payments to the budget can be perceived as an incentive to avoid taxation, leading to tax evasion through various schemes. While these findings align with expectations, they underscore the importance of designing tax policies carefully to mitigate tax evasion risks.

Due to significant fluctuations in 2009 and 2020 caused by the global financial crisis and pandemic, the impact of effects on the periods still needs to be thoroughly investigated. The choice of the model was also influenced by the availability of observations, leading to a focus on the impact of either 2020 alone or both 2009 and 2020 simultaneously.

The research contributes valuable insights into the complexity of regulating the shadow economy through tax interventions. It emphasises the need for well-balanced tax policies that promote tax compliance while considering the diverse impact of different taxes on informal economic activities. Further exploration and validation of these findings are crucial to developing targeted policies that effectively curtail the shadow economy and promote transparent, sustainable economic growth in the long run.

Based on the above conclusions, the tax regulating system for Baltic countries plays a pivotal role in addressing the shadow economy. Policymakers in Estonia, Latvia, and Lithuania must carefully consider the impact of tax policies on informal economic activities. To reduce tax evasion and encourage tax compliance, tax reform should focus on simplifying tax structures, lowering tax rates, and enhancing tax enforcement measures. Additionally, efforts should be made to improve tax collection efficiency and transparency to deter businesses and individuals from engaging in unreported economic activities.

The findings also shed light on possibilities to change the shadow economy in the Baltic countries. Policymakers should leverage the insights gained from the impact of different taxes on informal economic activities. For instance, the reduction of the effective corporate income tax rate has shown promise in reducing the shadow economy. Implementing targeted tax incentives for businesses to operate within the formal economy and promoting transparency in financial transactions can further reduce the shadow economy's size.

8 DISCUSSION & LEGAL ASPECTS

Understanding the legal facets of the shadow economy is crucial for comprehending the legal framework and countermeasures that are employed. Tax legislation, which sets the tax liabilities of individuals and businesses, is one of the most crucial. Businesses must accurately record their revenue and make timely tax payments. Additionally, the consequences and sanctions for tax evasion have a big impact on preventing people from engaging in illegal economic activities.

Laws against money laundering and corruption are also essential for thwarting the illegal financial activities connected to the shadow economy. These legal frameworks are designed to stop money laundering and guarantee financial transaction transparency. To control the shadow economy, effective legislative measures and enforcement procedures are necessary.

The fight against the shadow economy in the Baltic States also requires certain legal consid-

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erations that are tailored to the distinct socioeconomic circumstances of Estonia, Latvia, and Lithuania. To encourage companies and individuals to accurately record their revenue and comply with their tax obligations, tax authorities in these nations implement a number of different strategies. The Baltic States have recently tightened their legal systems to fight corruption and money laundering. These steps are essential to do in order to stop illegal financial activity connected to the shadow economy, such as tax fraud and money laundering. The Baltic nations work to promote financial transaction transparency and safeguard their economies from the damaging effects of the shadow economy by bolstering their legislative frameworks.

The Baltic States can contribute to a more transparent and accountable economic environment by implementing robust legislative measures and promoting compliance, ensuring sustainable economic growth and development. While tackling the shadow economy through tax reforms is important, governments in these countries must be mindful of tax competition between states. Lowering tax rates to attract business and investment can inadvertently lead to a race-to-the-bottom scenario where countries engage in aggressive tax competition, reducing their revenue potential and exacerbating the shadow economy. Policymakers should consider a joint approach to find a balance between attracting investment and maintaining stable tax revenues. However, it is the models of this study that suggest that a particularly sharp reaction to the "race to the bottom" scenario may not occur in the long run, just like the "race to the top" scenario.

As a result, the coordination and harmonization of tax laws across the Baltic States already suffice to reduce tax rivalry and foster regional economic growth. By lowering incentives for enterprises to relocate to the unofficial sector to evade taxes, encouraging fair tax policies and cooperation can result in a more stable business environment.

Future research could look at the effects of additional elements including economic growth, the regulatory environment, and technological advancement on the informal sector because it is a complex and diverse phenomenon. Additionally, studies should look into the success of particular tax reform initiatives in the Baltic States' struggle against the shadow economy. Comparative research can be done to evaluate how various tax policy strategies operate in surrounding areas and in other nations dealing with comparable issues.

Furthermore, further research is needed to understand how the epidemic and the global financial crisis have affected the shadow economy. Such external shocks should be studied in order to understand how they impact the informal economy and how governments might respond by implementing specific fiscal and economic policie

The initial findings of this paper reveal a consistent structure in the models for all types of taxes, enabling comparisons of the impact of gross domestic product on tax collections both in the short and long term. Notably, our research shows that an increase in the effective income tax rate leads to a rise in the shadow economy as citizens seek to evade higher tax burdens. In contrast, a higher effective corporate income tax rate has the opposite effect, reducing the level of the shadow economy. Furthermore, a positive increase in the effective VAT rate also contributes to the growth of the shadow economy. Overall, the long-term effect of general taxes surpasses the growth of the tax base by nearly 19%, indicating a tendency towards reducing the shadow economy in these states. To overcome the challenges of the shadow economy, governments must implement a well-balanced tax regulatory framework that encourages compliance and encourages formal economic activity. The study provides opportunities for targeted tax reforms and policy interventions, contributing to the region's efforts to reduce the shadow economy and promote sustainable economic growth. Further research in this area will be important for formulating adequate and effective evidence-based strategies to address the problems of the shadow economy in the Baltic States and beyond.

This study's implications are promising, suggesting significant opportunities for further improvement and policymaking interventions to mitigate the corporate shadow economy's

impact on the economy of these states. By investigating the relationship between tax reform measures and the level of informal economic activities, this research seeks to offer valuable insights into the potential of tax regulations as a potent tool in the fight against the corporate shadow economy. Through evidence-based analysis, we aim to contribute to the formulation of effective policies that can foster sustainable economic growth and bolster formal economic activities while discouraging the prevalence of unreported economic practices.

In addition to adjusting the tax policy, legal measures play an important role in the effective fight against the shadow economy. In this perspective, it is possible to offer the following legal recommendations for the Baltic countries to strengthen the regulatory framework and reduce the prevalence of informal economic activity and tax evasion:

1. Strengthening tax control and penalties: enhancing tax systems to find and stop tax evasion. This involves stepping up the use of cutting-edge technologies for real-time data processing, risk analysis, and transaction monitoring. To effectively dissuade non-compliant organizations and individuals, tougher penalties and sanctions for tax evasion should be implemented.
2. Promoting whistleblower protection: Providing protection and encouragement to whistleblowers can lead to more effective detection and prosecution of the shadow economy.
3. Anti-Money Laundering (AML) and Know Your Customer (KYC) Compliance: Strengthen AML and KYC regulations to prevent money laundering and illegal financial activities related to the shadow economy. Financial institutions should be required to implement strict due diligence measures when dealing with high-risk clients and transactions.
4. Encouraging voluntary tax compliance and training: promoting a culture of voluntary tax reporting and creating an image of the positive impact of taxes on public services and infrastructure development.
5. Cooperation with law enforcement agencies: to break the relationship between the shadow economy and organized crime, encourage better communication between tax officials and law enforcement organizations. Information and intelligence exchange can aid in more efficient criminal investigation and prosecution.
6. Encouraging self-regulation in specific sectors: Cooperation with industry associations and professional organizations to promote self-regulation in specific sectors prone to informal economic activity. Encourage businesses in these sectors to voluntarily apply best practices and ethical standards.
7. Periodic review and updating of the legislative framework: legislation must adapt to changing economic and technological landscapes to effectively curb informal economic activity, in particular, taking into account the results of data analysis and model scenarios.

In summary, a comprehensive legal approach combined with targeted tax policy adjustments is essential to successfully combat the shadow economy in the Baltic States.

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Research Article

PLATFORM EMPLOYMENT AND THE OBLIGATION TO CONCLUDE AN EMPLOYMENT CONTRACT IN THE REPUBLIC OF KAZAKHSTAN: ISSUES OF THEORY AND PRACTICE

Zhumabayeva Aigerim* and Nurmagambetov Amanzhol

ABSTRACT

Background. *The article is devoted to the main issues of legal regulation of platform employment in the Republic of Kazakhstan. The authors gradually considered the issues of the overarching concept of platform employment, its national legal regulation, the correlation of platform employment with labour relations, and the necessity of mandating Internet platform operators to conclude employment contracts with individuals providing their services.*

Methods: *In the process of analysing the current Kazakhstani labour and related legislation, national and international judicial practice, the authors came to the conclusion that the Social Code adopted in 2023 and the Law 'On Online Platforms and Online Advertising' separate the concept of an Internet platform and online-platforms. Internet platforms are so-called work platforms that specialise in mediating the provision of services and work performance. The authors identified several problems that arose with adopting the Social Code. In particular, the authors do not share the legislator's idea on the need for civil law regulation of relations in platform employment between the contractor and the Internet platform operator. The authors propose a targeted approach to determining the nature of the legal regulation of platform employment. Labour activity using Internet platforms, if it has signs of hidden labour relations specified in the ILO recommendations, should be regulated by labour legislation. Otherwise, the trend towards precarisation of the Kazakh labour society will inevitably strengthen.*

Results and conclusions: *Based on the statistical data analysis, the authors concluded that more and more people with higher or professional education adjoin the number of self-employed, hence the performers of platform employment. The data suggest that precarisation in the Republic of Kazakhstan is rapidly spreading among the underclass labourers and the relatively prosperous and promising able-bodied population of the country.*

Keywords: platform employment, labour relations, internet platform, social code, precariat.

1 INTRODUCTION

Until mid-2023, the Republic of Kazakhstan (hereinafter referred to as the RK) had no legislative framework to regulate platform employment—drivers and couriers of the most common Internet platforms in the country, such as Yandex. Taxi, Volt, Glovo, Chokofood and Indriver operated as individual entrepreneurs. The relationship between the platform owner, the courier/driver and the client arose based on a public offer and was regulated by civil law. Internet platforms acted as intermediaries between customers and service providers, including taxi drivers, couriers, and, occasionally, taxi companies. Relations between the owners of online media and executors of orders were not regulated within the framework of labour relations; accordingly, the obligation of owners of Internet platforms to conclude an employment contract with drivers and couriers when hiring was absent. When hiring, the commitment to terminate an employment contract determines the regulation of relations between the parties to labour relations by labour legislation.[1] The labour legislation of the RK guarantees employees the right to work, the exercise of labour rights (the right to rest, safety and labour protection, payment for downtime, compulsory social insurance, guarantees and compensation payments, etc.), and the protection of labour rights (the right to strike, judicial protection, conciliation commissions, association in trade unions, etc.). In addition, labour legislation provides for state control over its observance. This oversight is carried out through the Institute of State Labour Inspectors, who have the authority to check employers for employee labour rights violations, issue orders to eliminate violations, and initiate administrative or criminal liability.

The lack of labour rights and minimum social guarantees among couriers and taxi drivers operating through Internet platforms gave rise to a wave of discontent, which later turned into strikes and rallies.[2] On January 17, 2023, the Ministry of Finance of the RKlaunched a pilot project on the application of a different tax administration procedure for persons providing services using Internet platforms (hereinafter referred to as the Pilot Project), set to be implemented by the end of 2023.[3]

Under this draft, Internet platform owners, referred to as 'operators of Internet platforms', would become tax agents responsible for deducting personal income tax (PIT), mandatory pension contributions (MPC), social contributions (SC), mandatory health insurance contributions (MHIC) from the income of the service providers. Thus, the measures of the state to impose the obligation on the owners of Internet platforms (operators of Internet platforms) to withhold the above deductions to the budget, on the one hand, contribute to the provision of certain social guarantees to persons providing services and carrying out work using Internet platforms. Thus, the above-mentioned persons are subject to health insurance; they

1 Labour Code of the Republic of Kazakhstan no 414-V of 23 November 2015 <https://adilet.zan.kz/eng/docs/K1500000414> accessed 26 August 2023.

2 Shokan Alhabaev, 'Wolt Courier Strike: Story Gets Sequel' (*Tengri News*, 18 May 2021) <https://tengrinews.kz/kazakhstan_news/zabastovka-kurerov-wolt-istoriya-poluchila-prodoljenie-437686> accessed 26 August 2023; "Four Died, 500 Were Injured': Glovo Couriers Went on Strike in Almaty' (*Forbes*, 7 July 2021) <https://forbes.kz/process/chetvero_pogibli_500_postradali_kureryi_glovo_obyyasnili_zabastovku_v_almatyi_chitat_dalee_https_rusputnikkz_society_20210707_17548457_bolee-80-kurerov-glovo-bastuyut-v-almatyhtml> accessed 26 August 2023; 'Yandex Taxi Drivers Staged a Strike in Shymkent' (*Sputnik*, 6 December 2021) <https://ru.sputnik.kz/20211206/Taksisty-Yandeksa-ustroili-zabastovku-v-Shymkente-18838318.html> accessed 26 August 2023; Artur Edil'geriev, 'Yandex Taxi Drivers Staged a Strike in Petropavlovsk' (Liter.kz, 2 February 2022) <https://liter.kz/voditeli-iandeks-taksi-reshili-ustroit-zabastovku-v-petropavlovske-1643780448> accessed 26 August 2023.

3 Order of the Deputy Prime Minister and Minister of Finance of the Republic of Kazakhstan no 33 'On the Approval of the Rules and the Deadline for the Implementation of a Pilot Project on the Application of a Different Procedure for Tax Administration of Persons Providing Services Using Internet Platforms' of 17 January 2023 <https://adilet.zan.kz/kaz/docs/V2300031705 > accessed 26 August 2023.

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are charged a pension. On the other hand, government measures still need to fundamentally change the current situation with the lack of labour rights for couriers and taxi drivers working through Internet platforms.

On April 20, 2023, the Social Code of the RK,[4] as well as amendments and additions to the Labour Code of the RK[5] concerning the legal regulation of platform employment, the specifics of the legal law of the labour of employees of Internet platforms. Thus, the Social Code of the RK defines platform employment; an Internet platform represents the circle of subjects of platform employment (the operator of the Internet platform, contractor, customer) and, most importantly, indicates that relations between subjects of platform employment should be regulated within the framework of civil law, thus putting an end to the disputes about platform employment as a type of labour activity or civil legal activity for the provision of services and the performance of work. Employment relations can only arise for contractors who independently act as employers, with employees involved in providing services and performing work using platform employment. For example, a taxi company with a staff of drivers working under an employment contract acts as a performer.

In connection with this, several problems arise that are left unresolved and even exacerbated by the provisions in the Social Code of the RK and the novelties of the Labour Code of the RK. These issues fail to address the problems at hand and contravene international and constitutional norms. For instance, the presence of 'hidden forms of labour relations' in the RK, which is discussed in ILO Recommendation No. 198,[6], is not eliminated by conducting an effective national policy to combat such a negative phenomenon, but on the contrary, is legalised with the enactment of the Social Code of the RK, despite judicial practice, both international and domestic. The article analyses international jurisprudence on labour disputes related to work through Internet platforms. It is an example from the domestic jurisprudence of the Supreme Court of the RK.[7] Many court decisions reviewed establish a hidden employment relationship between couriers/taxi drivers and Internet platform owners. Despite this, in the RK, the obligation to conclude an employment contract when hiring performers — natural persons of platform employment is not fulfilled.

One of the reasons for the absence of a requirement for Internet platform owners to conclude employment contracts when hiring, in addition to the rule-making decisions of the state, lies in the general trend of narrowing the impact of labour law on labour activity in the RK, accompanied by the expansion of civil law elements within the employment relationships. An example of this trend is the presence in the Labour Code of the RK, which acknowledges the existence of multi-party employment relationships.

In addition, the problem of the absence of obligation of owners of Internet platforms to conclude an employment contract with individuals is closely related to the issues of the place, role and future of labour relations in the modern digital society. On the one hand, the digital economy contributes to the development and positive modification of labour relations; on the other hand, ignoring the basics of labour law and the reasons for its occurrence can lead to mass precarisation of Kazakhstani society.

4 Social Code of the Republic of Kazakhstan no 224-VII of 20 April 2023 <https://adilet.zan.kz/eng/docs/K2300000224> accessed 26 August 2023.

5 Law of the Republic of Kazakhstan no 226-VII 'On the Introduction of Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on Social Security Issues' of 20 April 2023 <https://adilet.zan.kz/kaz/docs/Z2300000226> accessed 26 August 2023.

6 International Labour Organization (ILO), Recommendation Concerning the Employment Relationship R198 of 15 June 2006 <https://www.refworld.org/docid/5c77a45e7.html> accessed 26 August 2023.

7 *Ospan A v Glovo Kazakhstan* no 6001-21-00-6ap/19 (Judicial Collegium for Administrative Cases, Supreme Court of the Republic of Kazakhstan, 6 December 2021) <https://office.sud.kz/courtActs/documentList.xhtml> accessed 26 August 2023.

2 THE CONCEPT OF PLATFORM EMPLOYMENT IN KAZAKHSTAN

In accordance with paragraph 1 of Article 102 of the Social Code of the RK, platform employment should be understood as the type of activity for providing services and the performance of work using Internet platforms and (or) platform employment mobile applications. An Internet platform is a resource intended for interaction between the operator of the platform, the customer and the contractor for the provision of services and performance of work (clause 81, clause 1, article 1). The legislator defines a platform employment mobile application as a software product installed and launched on a cellular subscriber device and providing access to services and works provided through an Internet platform (clause 126, clause 1, article 1).[8]

It should be noted that the concept of an Internet platform in the RK is inherent only in platform employment. The Law of the RK 'On Online Platforms and Online Advertising',[9] an online platform is defined as an internet resource and (or) software operating on the Internet, and (or) an instant messaging service. This definition encompasses functions related to receiving, producing, posting, distributing, and storing content on the online platform by the platform's users through their registered account or within a public community. It is worth noting that this definition excludes Internet resources and (or) software operating on the Internet, as well as instant messaging services designed to provide financial assistance and e-commerce. Even though, by their nature, the words 'online' and 'internet' have almost the same, if not identical, meaning, the legislator distinguishes the concept of 'internet platforms' from the general circle of platforms operating via the Internet.

The distinctive characteristics of an Internet platform, which make it possible to distinguish it from other online platforms, include 1) mediation to provide services and perform work and 2) mediation between a unique, strictly defined circle of subjects of platform employment.

Mediation to provide services and perform work is a vital aspect of the concept of not only an Internet platform but also platform employment since it indicates the essence and content of the idea of employment as a labour activity. Thus, the legislator clearly distinguishes between online platforms for leisure, placement, storage, transmission of information, provision of services (financial services, e-commerce, Internet banking, etc.) and Internet platforms of platform employment, through which customers-users are provided services and certain works are performed. For example, through the Glovo Internet platform, the customer places an order for a certain product (certain food, drinks), and he is provided with a service for ordering and delivering it; at the same time, the restaurant that accepted the order makes a dish for a specific customer, i.e. e. performs specific work. At the same time, the Yandex Internet platform, used for passenger transportation, mediates the provision of taxi services without performing specific work. Nevertheless, in our opinion, the main thing is the implementation by the parties of platform employment of labour activity through the provision of services and the performance of work.

Through the Internet platform, unlike any other online platform, mediation is carried out between the operator of the Internet platform, the customer and the contractor.

The operator of an Internet platform is understood as an individual entrepreneur or legal entity providing, using the Internet platform, services for the provision of technical, organisational (including services involving third parties for the provision of works or services), information and other opportunities using information technologies and systems for establishing contacts and concluding transactions for the provision of services and performance of work

8 Social Code no 224-VII (n 4).

9 Law of the Republic of Kazakhstan no 18-VIII 'About Online Platforms and Online Advertising' of 10 July 2023 <https://adilet.zan.kz/kaz/docs/Z2300000018> accessed 26 August 2023.

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between contractors and customers registered on the Internet platform. In other words, Internet platform operators provide intermediary services to customers and contractors through Internet platforms. At the same time, for platform employment, it does not matter who owns the Internet platform as an Internet resource who owns it. The Law of the RK 'On Online Platforms and Online Advertising' contains the concept of an owner of an online platform as an individual and (or) legal entity with the right to own the online platform.

The content in the definition of platform employment of such elements as an online platform and a mobile application of platform employment is not entirely explicit, as mutually exclusive terms. So, in implementing platform employment, in one of the cases, either an Internet platform or a mobile application of platform employment is used. However, their definitions regarding platform employment mention only the Internet platform. So, the customer is a natural or legal person registered on the Internet platform and placing an order on it to provide services or perform work. Contractor — an individual, individual entrepreneur or legal entity registered on the Internet platform, providing services to customers or serving work using the Internet platform based on a public contract. In this case, if orders are made only through the platform employment mobile application, does the operator of the Internet platform, as well as other subjects of platform employment, participate in the process of providing services and performing work? We consider the indication in the definition of platform employment of a mobile application of platform employment to be redundant, leading to a complication of the concept of platform employment. Since the mobile application of platform employment in the Social Code of the RK is referred to as a software product that provides access to services and work provided through the Internet platform, it would be more appropriate to make the following changes and additions to the Social Code of the RK. It is proposed to supplement paragraph 1 of Article 102 of the Social Code of the RK and state it as follows:

> *'Platform employment is an activity for providing services or performing work using Internet platforms. Access to services and works provided through the Internet platform can be carried out through the mobile application of the platform employment'.*[10]

An important factor characterising platform employment in the RK is the civil law regulation of relations between the subjects of platform employment. According to paragraph 3 of Article 102 of the Social Code of the RK, the relationship between the operator and the customer, as well as the contractor, is regulated by the Civil Code of the RK (General and Special parts).[11]

However, clause 3 of Article 102 of the Social Code of the RK does not indicate which specific civil law contracts regulate separately the relationship between the operator of the Internet platform and the customer, the operator of the Internet platform and the contractor, the customer and the contractor, or there is a tripartite agreement between the parties to platform employment. Under subclause 3, clause 2, article 102 of the Social Code of the RK, the contractor provides services to customers or performs certain work based on a public agreement.

According to Article 387 of the Civil Code of the RK, a public agreement is an agreement concluded by a person engaged in entrepreneurial activities and establishing his obligations to sell goods, perform work or provide services that such a person, by the nature of his activity, must carry out in relation to everyone who contacts him will turn.

The difficulty is that a public contract is traditionally a bilateral contract, where the entrepre-

10 Social Code no 224-VII (n 4).

11 Civil Code of the Republic of Kazakhstan (General Part) no 268-XIII of 27 December 1994 <https://adilet.zan.kz/eng/docs/K940001000_> accessed 26 August 2023; Civil Code of the Republic of Kazakhstan (Special Part) no 409 1 July 1999 <https://adilet.zan.kz/eng/docs/K990000409_> accessed 26 August 2023.

neur is the executor and initiator of such an agreement. In the case of platform employment, the initiator of the public contract is the Internet platform. The contractor and the customer have the right to accept the terms of the public contract of the offer or not to accept or refuse the services. The contractor and the customer are on equal terms. In addition, as a rule, two types of public offer contracts function in conjunction with the customer-operator-executor. The first is between the Internet platform operator and the contractor; the second is between the operator and the customer. By and large, there is no such agreement between the contractor and the customer. For example, when ordering taxi services through the Yandex Internet platform, the customer agrees to the terms of Yandex, the Internet platform operator, and the contractor is not involved in this process in any way. The contractor and the Internet platform operator have a separate agreement; the customer does not have the right to agree, disagree, or relate to this agreement in any way. In this regard, we consider it necessary to develop a separate platform employment contract similar to the Staffing Agreement, which will spell out the legal status of the Internet platform operator concerning both the contractor and the customer, the obligations of the Internet platform operator, as well as the responsibility of the operator Internet platforms in front of the customer and the contractor.

European Foundation for the Improvement of Living and Working Conditions (Eurofound) highlights the following features of platform employment: — paid work is organised through online platforms; — three parties are involved: online platform, worker and client; — results are concluded under the contract; — tasks are divided into functions; — Services are available upon request.[12]

Platform employment in the RK, in addition to the above, has its characteristics:

1) The provision of services and the performance of work is carried out through the mediation of Internet platforms;
2) There is a unique range of subjects of platform employment;
3) Relations between the subjects of platform employment are regulated by civil law and are based on a public offer contract;
4) A wide and indefinite range of obligations of operators of Internet platforms;
5) The need to create a uniform agreement in platform employment between its subjects.

3 THE OBLIGATION TO CONCLUDE AN EMPLOYMENT CONTRACT WHEN HIRING: AN ANALYSIS OF THE CURRENT LEGISLATION AND JUDICIAL PRACTICE

According to paragraph 2 of Article 23 of the Labour Code of the RK, the employer is obliged to conclude an employment contract with the employee when hiring.[13] Such an obligation on the part of the employer is necessary in order to exclude the substitution of labour relations with other types of social relations, mainly civil law, in order to prevent the emergence of so-called 'hidden labour relations' in society.

The ILO recommends distinguishing the following features of an employment relationship: performance of work in accordance with the instructions and under the control of the other party; integration of the employee into the organizational structure of the enterprise; performance of work in accordance with a certain schedule; if such work requires the presence of

12 'Platform Work' (*Eurofound*, 25 November 2022) <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/platform-work> accessed 26 August 2023.

13 Labour Code no 414-V (n 1).

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an employee; when it is supposed to provide tools, materials and mechanisms by the party that ordered the work; periodic payment of remuneration to the employee; the fact that this remuneration is the sole or primary source of income for the employee, etc.[14]

The Labour Code of the RK makes it possible to distinguish an employment contract from other types of contracts on the basis of the following features: 1) performance by an employee of work (labour function) for a certain qualification, specialty, profession or position; 2) fulfillment of obligations personally with subordination to the labour schedule; 3) receipt by the employee of wages for work (Article 27). At the same time, the condition that relations under an employment contract are determined in the presence of at least one of the three signs specified in Article 27 of the Labour Code of the RK is seen as important. We propose to consider each of them.

3.1 Employee performance (labour function) according to a certain qualification, speciality, profession or position.

The Labour Code of the RK does not explicitly define qualifications, speciality, profession, or position. However, some terms are found in other legal acts. So, according to paragraph 5.8 of Article 1 of the Law of the RK, 'On professional qualifications',[15] a profession is understood as an occupation carried out by an individual and requiring specific qualifications for its implementation. Instead of qualification, the concept of professional qualification is used — the degree of professional training that characterises the possession of competencies required to perform labour functions in the profession. Competence — the ability to apply skills that allow you to perform one or more professional tasks that make up the job function. According to the Classifier of professions and specialities of technical and vocational, post-secondary education (GK RK 05-2008),[16] a speciality is a complex of knowledge, skills and experience acquired through targeted training necessary for a certain type of activity, confirmed by relevant education documents. There is a concept of public office, official powers, official.[17] The unifying factor of the above concepts is that they are all interconnected with labour activity and sometimes directly follow from it. This does not give grounds to assume a causal relationship between these concepts and the identification of labour relations. Thus, the civil service itself is a part of labour relations regarding certain categories of workers. It would never occur to anyone to doubt that work in the public service can be formalised as a civil law contract. As for other labour activities, the concept of a profession, speciality, or qualification directly indicates the obligatory presence of appropriate education, a document confirming its presence. For example, if a person gets a job in a medical institution with a proper medical diploma, the likelihood that relations with such an employee will be formalised through a civil law agreement to provide services or a work contract is minimised. The situation is not so clear when it comes to professions such as a taxi driver or a courier. It is necessary to distinguish the work of a courier and a taxi driver working through Internet platforms from taxi drivers and couriers operating under an employment contract, whose activities are regulated by other legislative acts. So, according to the Law of the RK 'On Post',[18] a courier is an employee of a mail operator or an individual who has an agreement

14 ILO R198 (n 6).

15 Law of the Republic of Kazakhstan no 14-VIII 'On Professional Qualifications' of 4 July 2023 <https://adilet.zan.kz/kaz/docs/Z2300000014> accessed 26 August 2023.

16 Classifier of Professions and Specialties of Technical and Vocational, Post-Secondary Education (GK RK 05-2008) <https://mcdc.kz/images/pdf/4klasifikator.pdf> accessed 26 August 2023.

17 Law of the Republic of Kazakhstan no 416-V 'On the Civil Service of the Republic of Kazakhstan' of 23 November 2015 <https://adilet.zan.kz/eng/docs/Z1500000416> accessed 26 August 2023.

18 Law of the Republic of Kazakhstan no 498-V 'On Post' of 9 April 2016 <https://adilet.zan.kz/eng/docs/Z1600000498> accessed 26 August 2023.

with a mail operator who accepts a registered postal item from the sender outside the production facility and hands such item to the addressee or sender at the specified address on the postal item. According to the Rules for the Carriage of Passengers and Luggage by Road, a taxi driver is an employee of a taxi company and has certain obligations, for example, the obligation to undergo a medical examination.[19] In addition, when applying for a job, taxi drivers must have an appropriate driver's license, indicating the presence of certain driving skills, driving experience, etc.

Regarding couriers and taxi drivers working through Internet platforms, the Social Code of the RK defines them as contractors providing services and performing work under a public contract. However, it is not entirely clear why the work of a courier at the post office or a driver of a taxi fleet is a profession associated with the presence of a position, while the same work conducted through Internet platforms is characterised as either individual entrepreneurship (running a business) or lacks a specific legal status altogether. In this regard, it is not entirely accurate to characterise all individuals as potential performers. In contrast, in practice, only individual entrepreneurs can legally be taxi drivers and couriers working using Internet platforms. The Entrepreneurial Code of the RK defines entrepreneurial activity as an independent, initiative activity aimed at obtaining net income through property, production, sale of goods, performance of work, and provision of services based on the right of private or state property.[20] Obviously, couriers and taxi drivers working through Internet platforms are not engaged in entrepreneurial activities and do not conduct independent business.

This situation aligns with the perspective of the Court of Appeal of Australia,[21], which examined the case of Amita Gupta, a delivery driver for Uber. The Court concluded that Ms. Gupta did not run a business with the usual hallmarks of a business. In some cases, as the Court of Appeal points out, the above fact may favour the conclusion that a person is an employee. In other cases, it may support the conclusion that the person is an independent contractor. The Court of Appeal ruled that the fact that the plaintiff did not run a business did not indicate that she was an employee or a contractor. According to the Australian Court of Appeal, Ms Gupta worked for herself.

The Social Code of the RK indicates that in addition to individual entrepreneurs, persons 'working for themselves' are employees working under civil law contracts and independent workers. The independent workers category comprises payers of a single aggregate payment,[22] mainly small traders and artisans who provide services exclusively to individuals. Employees who do not work under employment contracts are classified as high-risk. If employees working through a staffing agreement are more or less protected by the labour legislation of the RK, then the rest fall into the category of 'hidden labour relations'. In this case, there is a tendency for the status of performers in platform employment to be ambiguous. In our opinion, Yandex taxi drivers, for example, cannot be considered business people because they are isolated from contact with potential customers.

As an alternative example, let us consider drivers working through the Internet platform InDriver. In this setup, customers initiate ride requests through a mobile application or an

19 Order of the Ministry of Investment and Development of the Republic of Kazakhstan no 349 'On Approval of the Rules for the Carriage of Passengers and Baggage by Road' of 26 March 2015. <https://adilet.zan.kz/kaz/docs/V1500011550> accessed 26 August 2023.

20 Entrepreneur Code of the Republic of Kazakhstan no 375-V of 29 October 2015 <https://adilet.zan.kz/eng/docs/K1500000375> accessed 26 August 2023.

21 *Amita Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* (C2019/5651) (Fair Work Commission, 21 April 2020) <https://www.fwc.gov.au/documents/decisionssigned/html/pdf/2020fwcfb1698.pdf> accessed 26 August 2023.

22 Code of the Republic of Kazakhstan no 120-VI 'On Taxes and other Obligatory Payments to the Budget (Tax Code)' of 25 December 2017 <https://adilet.zan.kz/eng/docs/K1700000120> accessed 26 August 2023.

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Internet platform, specifying the amount they are willing to pay for their trip. These ride requests are then displayed to the drivers, who, in turn, decide to accept the order out of their own autonomy. Additionally, the driver can offer a different fare for which they are willing to provide the service. Customers are afforded less than a minute to accept or refuse the offer.

In contrast, Yandex-taxi, as the operator of the Internet platform, determines the trip's price and route. The contractor cannot interact with the customer, and the customer cannot choose a specific contractor.

Thus, from the above, we can conclude that for those professions and types of work that do not require higher education or certain special skills (with the exception of taxi drivers), labour relations are primarily established through a direct formal instrument — an employment contract. The nature of these professions does not inherently create the employment relationship; rather, it is structured through this legal agreement. In the case of taxi drivers, they remain taxi drivers, but when working in a taxi company, their profession aligns with traditional employment. However, when they work through an Internet platform, they work for themselves, as independent contractors. Interestingly, the Social Code of the RK, in our opinion, introduced a new criterion (platform employment), which determines the difference between labour and civil law relations.

3.2 Fulfillment of obligations personally with submission to the labour schedule.

According to the Labour Code of the RK, the labour schedule regulates relations for organising the work of employees and the employer. The concept of work schedule is closely related to labour discipline. Considering the issues of labour discipline in enterprises, G. Clark pointed to the coercive and coordinating nature of work discipline.[23] In our opinion, labour discipline, like the work schedule, combines coercion and coordination of labour processes. According to paragraph 2 of Article 63 of the Labour Code of the RK, labour regulations establish working hours and rest periods for employees, conditions for ensuring labour discipline, and other issues regulating labour relations. Platform employment does not provide for a clearly fixed work schedule; the Internet platform operator does not set a work schedule, the contractor can work on weekends and holidays, etc. The free work schedule does not allow identifying platform employment as an employment relationship. This is also indicated by international jurisprudence.[24] The Labour Code of the RK provides flexible (variable) working hours, during which employees can perform labour duties at their own discretion. On the one hand, an employment contract is an agreement providing for the equality of the parties, and in this regard, it would seem that there should be no difference between an employment contract with flexible working hours and a civil law platform employment contract for the provision of services and work. On the other hand, a flexible schedule is part of the work schedule, where the employee is in a subordinate position in relation to the employer, while platform employment does not provide for subordination. However, it is important to understand that each work through the Internet platform has its own characteristics and difficulties in a uniform approach. So, if taxi drivers or couriers with vehicles can afford to violate the established norms of working hours relatively without harm to health (i.e. work at night, around the clock, etc.), then food couriers, as a rule, work a certain amount of time, according to the same schedule, which makes their work indistinguishable from work under

23 Gregory Clark, 'Factory Discipline' (1994) 54(1) The Journal of Economic History 128, doi:10.1017/S0022050700014029.

24 *Mr Michail Kaseris v Rasier Pacific VOF* (U2017/9452) (Fair Work Commission, 21 December 2017) <https://www.fwc.gov.au/documents/decisionssigned/html/2017fwc6610.htm> accessed 26 August 2023; V Lavoro sentenza n 778/2018 (Tribunale Ordinario di Torino, 7 maggio 2018) <http://www.bollettinoadapt.it/wp-content/uploads/2018/05/7782018.pdf> accessed 26 August 2023.

an employment contract. In addition, the work schedule issue when working with Internet platforms is not unambiguous. The Pennsylvania Supreme Court points out that an Uber driver's job is under the direction and control of the Internet platform operator, noting that control is less about approving or directing the end product of the job than controlling the means to achieve it.[25] A similar position is taken by the Belgian court, drawing attention to the fact that the way drivers organise their work trips with platform employment can in no case depend on a direct dialogue between the driver and their passenger.[26]

It should also be noted that the principle of personal performance by an employee of a certain work, as one of the signs of delimiting labour relations from civil law, with the introduction of the concept of joint employment into the Labour Code of the RK (paragraphs 56-1, paragraph 1, article 1), is gradually being neutralised. We believe that the institution of joint employment directly contradicts the concept of labour relations, an employment contract. It is not entirely clear the decision of the legislator to introduce joint employment without comprehending such an institution of labour law as the disciplinary liability of an employee.

Thus, the fulfilment of obligations personally with subordination to the labour schedule is inherent in both platform employment and labour relations, despite the debatable nature of this problem. In most cases, the distinction between the work of platform employment and work under an employment contract is largely conditional and depends upon the state's interpretation and assessment value of labour relations.

3.3 Receipt of wages by the employee.

The Labour Code of the RK understands wages as remuneration for work, depending on the qualifications of the employee, the complexity, quantity, quality and conditions of the work performed, as well as compensation and incentive payments. The Labour Code of the RK, in addition to the traditional monthly wage, provides for hourly wages for the time actually worked by the employee. The concept of an employment contract implies that wages are paid by the employer, while in platform employment, earnings come directly from customers, and the amount of earnings depends on the number of customers and is not a fixed amount. So, it is not possible to talk about the presence of such a sign of labour relations as wages with platform employment. Nevertheless, we believe that the signs of labour relations specified in the Labour Code of the RK require an extensive interpretation. In particular, we consider it necessary to add an indication of the only source of income to the criterion of the availability of remuneration for work in the form of wages paid by the employer. In this regard, the practice of the Supreme Court of the RK.[27]

At the end of 2021, the Supreme Court of the RK considered a cassation appeal to review the decision of the Judicial Collegium for Administrative Cases of the Astana City Court in a civil case. The case pertained to the claim brought forth by Ospan A. against a private bailiff (PB) named Astana Sarbasov M. The claim was centred on the demand to remove an arrest placed on the debtor's account. Initially, the court ruled in favour of the plaintiff, stating that the arrested PB's account received payment for courier services, which, in turn, were Ospan's only source of income. However, the Court of Appeal later annulled the above decision and issued a new one, dismissing the claim. The Court based its rationale on the fact that Ospan was not in an employment relationship with LLP 'Glovo Kazakhstan' but only operated based

25 *Lowman v Unemployment Compensation Board of Review* 235 A.3d 278 (Pa 2020) (Supreme Court of Pennsylvania Eastern District, 24 July 2020) <https://casetext.com/case/lowman-v-unemployment-comp-bd-of-review-3> accessed 26 August 2023.

26 *Demande de qualification de la relation de travail* nr 187 — FR — 20200707 (Commission Administrative de règlement de la relation de travail (CRT), 26 octobre 2020) <https://commissiearbeidsrelaties.belgium.be/docs/dossier-187-nacebel-fr.pdf> accessed 26 August 2023.

27 *Ospan A v Glovo Kazakhstan* no 6001-21-00-6ap/19 (n 7).

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on an agreement on accession to the conditions for providing services by courier.

Based on the terms of this agreement, Ospan received remuneration for his services rendered based on the volume of services he provided, which could be paid in both cash and non-cash form. After examining the bank account statements, the appellate court concluded that at the address of Ospan from LLP 'Glovo Kazakhstan', no payments were received, and remuneration or wages were not transferred. The plaintiff also failed to provide exhaustive evidence demonstrating that the money transfers and receipts took place from LLP 'Glovo Kazakhstan'. Consequently, the working capital in Ospens's account could not be classified as remuneration or wages for services rendered.[28]

The Supreme Court of the RK saw in the relationship between the courier Ospan and LLP 'Glovo Kazakhstan' the presence of 'hidden labour relations'. Thus, the Supreme Court of the RK pointed out that, despite the fact that the systematic payment of remuneration by LLP 'Glovo Kazakhstan' could not serve as a sufficient basis for the presence of labour relations, however, based on the requirements of international acts,[29] the Court of Appeal did not take into account the fact that the income from courier work was the only source of income for Ospan. This fact was substantiated by Ospen's financial statements and bank records, which were presented to the court and attached to the materials of the administrative case, as well as payment orders of the organisation and information from the database 'Pension contributions'.

We believe that the concept of wages, as a criterion for distinguishing labour relations from civil law relations in the RK, should not be limited to the framework of the remuneration given by the employer. In our opinion, it is necessary to apply the recommendations of the ILO and consider whether the payments of operators of Internet platforms are the only source of income for the contractor.

Thus, the obligation of the Internet platform operator to conclude an employment contract with platform employment workers arises only if the platform employment relationship has signs of a 'hidden employment relationship'. Such signs of labour legislation and judicial practice relate to the personal performance of work according to a certain qualification, speciality, profession or position, with subordination to the labour schedule, and payment by the employer of wages for work. In the RK, there is a positive practice of the Supreme Court of the RK on the recognition of platform employment as a 'hidden labour relationship'. At the end of 2021, the Supreme Court of the RK sent a private ruling to the Minister of Labour and Social Protection of the Population of the RK,[30] in which he ordered the Minister to pay attention to the revealed facts of the presence of 'hidden labour relations' and exercise appropriate control and supervision in the field of detection and suppression of 'hidden labour relations'. The Supreme Court of the RK, addressing the Minister, pointed out the need to work out issues to improve the current legislation in the spirit of bringing national standards for the protection of labour rights and regulation of labour relations closer to the standards of the most developed countries to harmonise labour legislation. However, the legislative policy of the RK recognised the autonomy of platform employment, which, in our opinion, prematurely excluded the presence of 'hidden labour relations' in platform employment and recognised platform employment workers as self-employed persons. In connection to this, it seems necessary to consider global and domestic trends in understanding the general theory of labour relations, the role of labour legislation and its relationship with platform employment.

28 ibid.

29 ILO R198 (n 6).

30 *Ospan A v Glovo Kazakhstan* no 6001-21-00-6ap/19 (n 7).

4 PROBLEM STATEMENT

G. Davidov offers several likely reasons for identifying and formulating justifications for the functioning of labour legislation. In particular, the author highlights the need to ask about the ultimate goal of reforming labour legislation and adapting it to new realities and challenges. At the same time, the idea is voiced that the improvement of labour legislation, depending on the goal, is due to a radical transformation of the labour system.[31] In this regard, the legislation on platform employment in the RK is emerging at the intersection of rethinking the foundations of labour relations, understanding labour in modern society, the dilemma of the need for labour legislation to adapt and change according to the requirements of the digital economy or be replaced by new, more flexible employment systems.

The classical understanding of labour relations is associated with the axiom that there is an inequality in bargaining power between the bearer of power — the employer and those who are not the bearer of power — wage workers. In such conditions, the labour law and legislation system acts as a compensatory force to counteract inequalities in negotiations between the parties to labour relations. According to A. Hyde, labour laws in modern advanced economies are a means to achieve concessions from elites in response to organised, sometimes destructive, worker discontent.[32] It should be noted that the 'concession' approach is not typical for all countries. Thus, the approaches of the so-called 'capitalist' and 'communist' countries to define labour relations, labour law and legislation differed in their time. Although after the collapse of the USSR, the policy of the RK in the field of labour relations has undergone a number of changes associated with the departure from the command and administrative mechanism of legal regulation of labour to market methods, the role of the state, as a kind of 'arbiter' between the employee and the employer, has remained unchanged. In connection to this, the image of an employee as needing protection against the backdrop of an underdeveloped trade union movement in the RK is not unfounded. At the same time, the constitutional principle of freedom of labour by introducing a civil law mechanism for regulating certain aspects of labour relations creates an inevitable tendency to understand the role of labour not through the classical model of labour relations but through the institution of employment. Gradually, there is a growing awareness that employment regulation plays a complex and multifaceted role through which major societal transformations can be observed.[33] While the canons of classical labour relations are 'weakened', the possibilities for strengthening and multiplying this traditional connection of subordination and control are expanding.[34] According to H. W. Arthurs, 'labour' is no longer perceived as a movement, class, or significant area of public policy. At the same time, workers prefer an alternative identity: consumers and investors rather than producers.[35] B. Langille indicates that normative basis labour rights must be based on the regulation of the deployment of human capital, not confined to preventing unfairness in the negotiation of contracts.[36] The legitimisation of efficiency as one of the main objectives of labour law is part of a broader trend in which an early focus on job protection is gradu-

31 Guy Davidov, 'The Capability Approach and Labour Law: Identifying the Areas of Fit' in Brian Langille (ed), *The Capability Approach to Labour Law* (OUP 2019) 42.

32 Alan Hyde, 'A Theory of Labour Legislation' (1990) 38(2) Buffalo Law Review 383.

33 Antonio Aloisi and Valerio De Stefano, *Your Boss Is an Algorithm: Artificial Intelligence, Platform Work and Labour* (Hart Pub 2022).

34 Riccardo Del Punta, 'Un diritto per il lavoro 4.0' in Alberto Cipriani, Alessio Gramolati e Giovanni Mari (eds), *Il Lavoro 4.0: La Quarta Rivoluzione industriale e le trasformazioni delle attività lavorative* (Firenze UP 2018) 225-50.

35 Harry W Arthurs, 'Labour Law as the Law of Economic Subordination and Resistance: A Counterfactual?' (2012) 10 Comparative Research in Law & Political Economy. Research Paper, doi:10.2139/ssrn.2056624.

36 Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 101, doi:10.1093/acprof:oso/9780199693610.003.0008.

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ally replaced by a commitment to liberal market ideals of flexibility, competitiveness and profitability.[37] Nevertheless, recent monographic studies show that the study and analysis of platform labour activity are impossible without considering the relationship between labour and value. This would require a transition from a comprehensive view of the functions performed by platforms to the idea of conflict occurring within platforms.[38]

The types of conflicts and problems that occur within platforms, as well as generated by work platforms, are diverse. One of the main problems of working platforms, in our opinion, is the uncertainty of the position and legal status of persons working with the mediation of Internet platforms and the consequences arising from such a situation. For example, platform workers in the workplace and online face a wide range of health and safety issues in the workplace.[39] Studies have been conducted on the impact of the gig economy platform employment on workers' health.[40] Recent scientific works testify to the growing trends of unobtrusive dehumanisation of society, the deterioration of the general condition of workers in atypical employment and the example of employees working with online platforms.[41] Some researchers, despite the advantages of working in the gig economy, point to the existing problems of the lack of social protection provided by traditional employment contracts.[42] Thus, the range of the above problems, in our opinion, is directly related to the fact that the uncertainty of the status of persons working through Internet platforms entails general instability and the prerequisites for the formation, both in the world and in the RK, of a hidden form of precariat.

G. Standing believed that the precariat is made up of many insecure people living indefinite, uncertain lives, working in random and constantly changing jobs with no prospects for professional growth.[43] The above description of the precariat as a social phenomenon brings it closer to the concept of underclass labourers, which include the unemployed, especially vulnerable segments of the population, marginalised individuals with extremely low earnings, etc. However, in our opinion, in the wake of the spread of labour activity using Internet platforms, performers of platform employment in the RK can also be attributed to the precariat for several specific characteristics. These include lack of labour rights and guarantees; irregular work schedule; indefinite wages; business risks; lack of influence on the scope of their activities, the amount of profit; low wages; lack of necessary conditions for the implementation of labour activity; disproportion of risks with wages; the public nature of the contractual relationship between the contractor and the operator of the Internet platform, etc. The Social Code of the RK, amendments and additions to the Labour Code of the RK, together with the Pilot Project, artificially brought the performers of platform employment into the category of self-employed — individual entrepreneurs who are traditionally considered to be more prosperous than the rest of the self-employed population of the RK. Similar examples in one form or another can be seen in several other countries.[44]

37 Alan Bogg and others (eds), *The Autonomy of Labour Law* (Hart Pub 2015) 316.

38 Emiliana Armano, Marco Briziarelli and Elisabetta Risi (eds), *Digital Platforms and Algorithmic Subjectivities* (University of Westminster Press 2022) doi:10.16997/book54.

39 Jan Drahokoupil and Kurt Vandaele, *A Modern Guide to Labour and the Platform Economy* (Elgar Modern Guides, Edward Elgar 2021) doi:10.4337/9781788975100.

40 Uttam Bajwa and others, 'The Health of Workers in the Global Gig Economy' (2018) 14(1) Global Health 124, doi:10.1186/s12992-018-0444-8; Marie Nilsen and Trond Kongsvik, 'Health, Safety, and Well-Being in Platform-Mediated Work: A Job Demands and Resources Perspective' (2023) 163 Safety Science e106130, doi:10.1016/j.ssci.2023.106130.

41 Rajesh Gupta and Rajneesh Gupta, 'Lost in the Perilous Boulevards of Gig Economy: Making of Human Drones' (2023) 10(1) South Asian Journal of Human Resources Management 85, doi:10.1177/23220937221101259.

42 Rita Remeikienė, Ligita Gasparėnienė and Romas Lazutka, 'Working Conditions of Platform Workers in New EU Member States: Motives, Working Environment and Legal Regulations' (2022) 15(4) Economics and Sociology 186, doi:10.14254/2071-789X.2022/15-4/9.

43 Guy Standing, *The Precariat: The New Dangerous Class* (Bloomsbury 2011).

44 Sikha Das and CS Rajeesh, 'Urban Underclass Labourers: The Life of Delivery Workers in South India'

5 METHODOLOGY

Consideration of the issues of platform employment in the RK and its correlation with labour relations, particularly the imperative for Internet platform operators to conclude employment contracts with those offering their services, necessitated a reflection of the overall picture regarding platform employment subjects. In connection to this , an analysis of the statistical data provided by the Bureau of National Statistics of the Agency for Strategic Planning and Reforms of the RK[45] was carried out.

The data presented below indicate the dynamics of changes in the number of self-employed people in the RK for the period from 2006 to 2022 (Table 1). The data in Table No. 2 shows the number of self-employed, divided by the level of education in the period from 2006 to 2022 (higher and postgraduate education; technical and vocational education; primary, basic, and general secondary education).

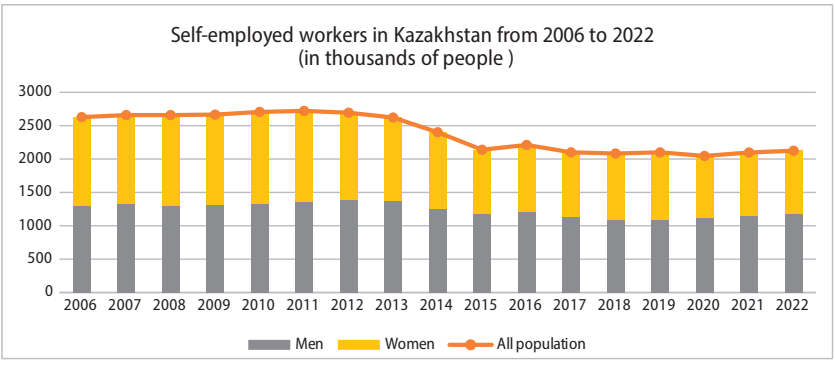

Table 1. Results

According to Table No. 1, from 2006 to 2013, the self-employed population shows stable quantitative indicators. From 2013 to 2015, the number of self-employed workers sharply decreased from 2621 thousand people, in 2013 to 2138 thousand people in 2015. From 2015 to 2022, with some fluctuations, the number of self-employed people is kept at 2100-2000 thousand people. The ratio of self-employed men and women during the review period remains unchanged and equals proportional values. The data show that the number of self-employed people in Kazakhstan has decreased by 20% over 16 years. So, if in 2006 the share of the self-employed was 17% of the total population (15219 thousand people), then at the end of 2022, the self-employed population was 10% of the total population — 19503 thousand people.

(2023) 58(23) Economic and Political Weekly 14; Gabriel López-Martínez, Francisco Eduardo Haz-Gomez and Salvador Manzanera-Román, 'Identities and Precariousness in the Collabourative Economy, Neither Wage-Earner, nor Self-Employed: Emergence and Consolidation of the Homo Rider, a Case Study' (2022) 12(1) Societies 6, doi:10.3390/soc12010006.

45 *Bureau of National statistics of Agency for Strategic planning and reforms of the Republic of Kazakhstan* <https://stat.gov.kz/en> accessed 26 August 2023.

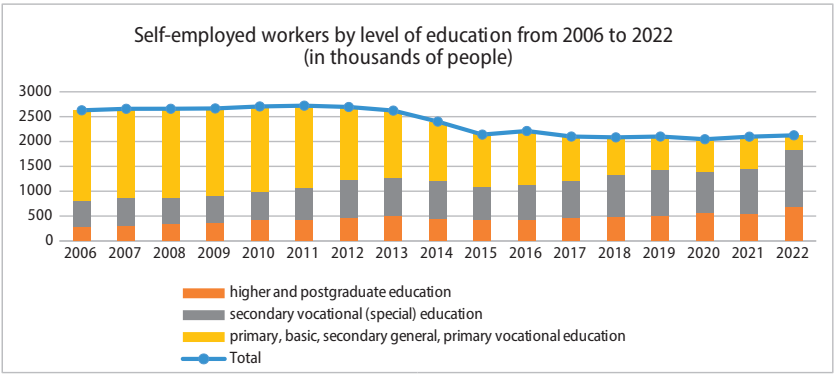

Table 2.

Despite the fact that official statistics show a decrease in the number of self-employed in comparison with the total population in the RK, from the data reflected in Table No. 2, one can draw an unambiguous conclusion that the level of education among the self-employed is significantly increasing. So, if in 2006 the lion's share of the self-employed were people with primary, basic, and general secondary education — 69% (1824 thousand people), then already in 2022 the share of people with primary, basic, general secondary education among the self-employed was 13% (297 thousand people). At the same time, the increase in self-employed people with higher education for the period from 2006 to 2022 amounted to 57%, from 297 thousand people in 2006 to 693 thousand people at the end of 2022. Notably, the number of self-employed people with technical and vocational education increased the most. Over 16 years, the number of the above self-employed has doubled (507 thousand people in 2006; 1135 thousand people in 2022).

In our opinion, the presented results of the statistical data analysis indicate the following circumstances. The growing level of education among the self-employed, which includes platform workers, confirms the likely involvement in the precariat, not only of the underclass labourers but also potentially able-bodied individuals who have not found ways and opportunities to adequately apply their abilities to work. So, graduate doctors, lawyers, engineers, teachers, etc., earn a living by working as a taxi or a food delivery worker. On the other hand, the level of education among the self-employed is proportional to the level of self-awareness and resistance to the manifestation of legal nihilism. It is more likely that platform employment performers, having higher or other professional education, will not only be aware of their right to decent work but will also actively defend their position [46]

6 CONCLUSIONS

The lack of legal regulation of platform employment in the RK caused a number of problems, including those related to the infringement of social and labour rights of persons engaged in labour activities through Internet platforms. The Social Code of the RK, as well as other legislative initiatives, did not solve the above problems but, in our opinion, only exacerbated the existing contradictions, creating the prerequisites for the formation of a rapidly growing

46 Dmitrij Mazorenko, 'Couriers of all Kazakh Food Delivery Services Create a Trade Union' (*Vlast*, 18 May 2021) <https://vlast.kz/novosti/45043-kurery-vseh-kazahstanskih-servisov-dostavki-edy-sozdaut-profsouz.html> accessed 26 August 2023; Andrey Sviridov, 'The Couriers' Union is Not Created at the Speed of a Courier Train' (*Kazakhstan International Bureau for Human Rights and Rule of Law (KIBHR)*, 6 October 2022) <https://bureau.kz/novosti/profsoyuz-kurerov-sozdayotsya/> accessed 26 August 2023.

precariat in the RK, which, due to legislative shortcomings, may include representatives of the educated, able-bodied population. The Social Code of the RK did not allow citizens to consider themselves as a person with the right to work. As a rule, the civil law method of regulating working relations between the contractor and the operator of the Internet platform (especially the public accession agreement) is unilateral imperative. Judicial protection of labour rights seems to be ineffective since the method of civil law regulation of platform employment relations specified in the Social Code of the RK implies the full responsibility of the contractor, who voluntarily signs a public contract of the operator- Internet platform(for example, simply downloading a mobile application) refused those labour rights and guarantees that the state can and must provide to him.

In our opinion, the obligation to conclude an employment contract when hiring should also be assigned to operators of Internet platforms. However, such an approach entails the adoption of a number of significant decisions. The imposition of such a duty on the operators of Internet platforms is impossible without recognising platform employment as a type of labour relationship. The Supreme Court of the RK made similar attempts with respect to a certain Internet platform (Glovo). However, it is impossible to predict the further development and functioning of Internet platforms, in addition, there are Internet platforms that act as intermediaries in the provision of services or performance of works that cannot fall under the characteristics of the employer because they really play the role of an intermediary. We believe that the approach of the state in determining the status of the parties to platform employment, as well as the legal relations regulated between them, should be targeted and applicable to a single Internet platform or a group of Internet platforms.

Legal regulation of activities related to the use of Internet platforms, in which facts indicate the existence of 'hidden labour relations', must be regulated in accordance with labour legislation. At the same time, the identification of 'hidden labour relations' should be carried out in accordance with the recommendations of the ILO.

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Research Article

UNDERSTANDING THE MECHANISM OF INDIVIDUAL CONSTITUTIONAL COMPLAINTS IN LITHUANIA: MAIN FEATURES AND CHALLENGES OF THE FIRST YEARS OF APPLICATION

Dovilė Pūraitė-Andrikienė*

ABSTRACT

Background: *The mechanism of individual constitutional complaints has been in place in most European states. In the constitutional legal practice of European states, constitutional complaints as the specific procedural instrument for protecting a person's constitutional rights and freedoms have become an increasingly acceptable, applicable, and justifiable measure. However, Lithuania has introduced this mechanism of human rights protection only with constitutional amendments of 2019. This article examines the legal regulation governing the institution of constitutional complaints, as well as the use of this institution in Lithuania in 2019–2022. The research aims to shed light on the choice of the Lithuanian model of constitutional complaints and its main features, as well as to identify the problematic aspects of this model.*

Methods: *To reveal theoretical and practical aspects of the question under consideration, this article combines different methods of scientific inquiry, including analysis of documents, as well as the logical, systemic, critical, comparative, teleological, and linguistic methods of analysis. The method of document content analysis was used to analyse the content of relevant normative and jurisprudential research sources. This approach used the text of the analysed documents to identify relevant words and phrases, contextualise their usage, and link the acquired data to statements in specialised literature. The analysis hinged on theoretical methods, particularly systemic and logical analysis, used to analyse virtually all the aspects discussed in the paper. Comparative analysis was used to compare the legal regulation of the constitutional complaint model in other Central and Eastern European countries and the Lithuanian legal regulation on similar issues. Teleological and linguistic methods of analysis have been used to clarify the content of the ambiguously understood provisions governing the individual constitutional complaint model, the true intentions of the legislator, and the meaning of the concepts contained in the legislation. The paper also analyses the statistical information on the admissibility of constitutional complaints in Lithuania and other aspects of using this human rights protection mechanism in 2019–2022.*

Results and conclusion. *The paper concludes that after the amendments to the Constitution concerning the consolidation of individual constitutional complaints entered into force in 2019, Lithuania can no longer be categorised among the states with a limited scope of entities entitled*

to apply to the constitutional court and that the consolidation of the institution of individual constitutional complaints in Lithuania was undoubtedly a necessary step. The paper also concludes that most of the elements of the Lithuanian constitutional complaint model in the context of effective human rights protection should be viewed positively and align with the tendencies existing in other Central and Eastern European states. However, it's essential to acknowledge that Lithuania's national model of constitutional complaints falls short in providing certain effective legal remedies that have proved to be successful in other states of the region.

Keywords: *Constitutional Court, Individual Constitutional Complaint, Constitutional Review, Protection of Human Rights, Central and Eastern Europe.*

1 INTRODUCTION

As of 1 September 2019, the amendments to the Constitution of the Republic of Lithuania[1] (hereinafter — the Constitution) consolidating the mechanism of individual constitutional complaints came into force.[2] Prior to these amendments, only the Seimas (Parliament) *in corpore*, a group comprising of 1/5 of all Seimas members, the courts, the President of the Republic, and the Government, could apply to the Constitutional Court on the constitutionality of legal acts.[3] Thus, these amendments significantly expanded the possibilities of access to constitutional justice in Lithuania.

In September 2019, concurrent with the amendments to the Constitution, significant changes were introduced with the enactment of amendments to the Law on the Constitutional Court of the Republic of Lithuania (hereinafter — the LCC) and amendments to the Rules of the Constitutional Court of the Republic of Lithuania;[4] these amendments specified the procedure for filing individual constitutional complaints. The above-mentioned amendments to the Constitution and the ordinary law are considered one of the most important changes in the Lithuanian legal system in recent years, and the requirements for constitutional complaints are one of the most pressing issues not only for potential applicants but also for the legal community.[5]

The institution of individual constitutional complaints has been in place in most Central and Eastern European (hereinafter — CEE) states. With its implementation in Lithuania, only the people of Bulgaria and Moldova in this region lack direct access to constitutional justice. In the context of the European Union, besides the above-mentioned Bulgaria, the people of Italy also do not have this right.[6] It is obvious that, in the constitutional legal practice of European states, constitutional complaints as the specific procedural instrument for the

1 Constitution of the Republic of Lithuania (approved on 25 October 1992) [1992] Valstybės Žinios 33/1014.

2 Law of the Republic of Lithuania no XIII-2004 'Amending Articles 106 and 107 of the Constitution' of 21 March 2019 [2019] TAR 5330.

3 Constitution (n 1) art 106, pts 1, 2, 3, 5.

4 Law of the Republic of Lithuania no XIII-2328 'Amending Articles 3, 13, 24, 28, 31, 32, 39, 40, 46, 48, 49, 53^1, 61, 65, 66, 67, 68, 69, 70, 76, 84, 86 and 88 of the Law no I-67 on the Constitutional Court of the Republic of Lithuania and Supplementing the Law with Articles 67^1 and $\mathbf{67}^{2}$' of 16 July 2019 [2019] TAR 12391; Decision no 17B-3 'On Amending and Supplementing the Rules of the Constitutional Court of the Republic of Lithuania' (Constitutional Court of the Republic of Lithuania, 5 September 2019) [2019] TAR 14273.

5 Dovilė Pūraitė-Andrikienė, *Lietuvoje įtvirtintas konstitucinio skundo institutas kaip žmogaus teisių apsaugos įrankis* (Vilniaus universitetas 2022).

6 For more details on the spread of the constitutional complaints in Europe, see: European Commission for Democracy Through Law, 'Revised Report on Individual Access to Constitutional Justice' (2020) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)001-e> accessed 20 September 2023.

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protection of the constitutionally secured rights of a person have become an increasingly acceptable, applicable, and justifiable measure; therefore, this choice by Lithuania reflects the common European tendencies.

Prior to the 2019 constitutional amendments that consolidated individual constitutional complaints, studies predominantly focused on analysing the potential for integration of this institution within the national legal system. The model of constitutional complaints, as consolidated in 2019, has already been addressed in national legal doctrine in the Lithuanian language. The main elements of this model were addressed by Danelienė[7] and **Pūraitė-Andrikienė**.[8] However, these issues have not been sufficiently examined in the broader comparative context of the legal regulation of other CEE countries. Furthermore, due to its recent consolidation, the Lithuanian mechanism of individual constitutional complaints has not been addressed in any legal scientific works by foreign authors. Thus, there is a lack of analysis of the Lithuanian constitutional complaints model in English language literature.[9] It is worth noting that the above-mentioned works also did not analyse the statistics on the use of this mechanism in the Lithuanian Constitutional Court in 2019–2022.[10]

However, in light of the significance of individual constitutional complaints for the protection of constitutional rights and the process of constitutionalisation at large, there is a compelling need for thorough, comprehensive comparative research on this institution. As such, this research aims to shed light on the choice of the Lithuanian model of constitutional complaints and its main features, as well as to identify the problematic aspects of this model. In addition, this research endeavours to compare different elements of the constitutional complaints model in Lithuania and such models in other states of this region. Specifically, this article also analyses the powers of constitutional justice institutions to examine constitutional complaints in other CEE states.

To provide a basis for this research, the article also examines the typology of constitutional justice concerning the range of applicants and individual constitutional complaints in the context of the development of constitutionalism.

7 Ingrida Danelienė, 'Konstitucinių ginčų teisena' in Toma Birmontienė and others, *Konstituciniai ginčai Constitutional Disputes* (Mykolo Romerio universitetas 2019) 379.

8 Dovilė Pūraitė-Andrikienė, 'Lietuvos individualaus konstitucinio skundo modelio privalumai ir trūkumai' (2020) 114 Teisė 49, doi:10.15388/Teise.2020.114.3; Pūraitė-Andrikienė (n 5).

9 As an exception, an article analyzing whether the constitutional complaint mechanism in Lithuania could be recognized as an effective legal remedy to be used before applying to the ECtHR, should be mentioned, see: Dovilė Pūraitė-Andrikienė, 'Individual Constitutional Complaints in Lithuania: An Effective Remedy to Be Exhausted before Applying to the European Court of Human Rights?' (2022) 15(1) Baltic Journal of Law & Politics 1, doi:10.2478/bjlp-2022-0001.

10 The statistics on the use of this mechanism in the Lithuanian Constitutional Court in 2019-2022 were collected from the Constitutional Court's 2019, 2020, 2021, and 2022 annual reports. Constitutional Court of the Republic of Lithuania, *Annual Report 2019* (Constitutional Court of the Republic of Lithuania 2020) <https://lrkt.lt/en/about-the-court/activity/annual-reports/183> accessed 20 September 2023; Constitutional Court of the Republic of Lithuania, *Annual Report 2020* (Constitutional Court of the Republic of Lithuania 2021) <https://lrkt.lt/en/about-the-court/activity/annual-reports/183> accessed 20 September 2023; Constitutional Court of the Republic of Lithuania, *Annual Report 2021* (Constitutional Court of the Republic of Lithuania 2022) <https://lrkt.lt/en/about-the-court/activity/annual-reports/183> accessed 20 September 2023; Constitutional Court of the Republic of Lithuania, *Annual Report 2022* (Constitutional Court of the Republic of Lithuania 2023) <https://lrkt.lt/lt/apie-teisma/veiklos-sritys/metiniai-pranesimai/1826> accessed 20 September 2023.

2 THE TYPOLOGY OF CONSTITUTIONAL JUSTICE CONCERNING THE RANGE OF APPLICANTS AND INDIVIDUAL CONSTITUTIONAL COMPLAINTS IN THE CONTEXT OF THE DEVELOPMENT OF CONSTITUTIONALISM

2.1 THE TYPOLOGY OF CONSTITUTIONAL JUSTICE CONCERNING THE RANGE OF APPLICANTS

The range of applicants who have the right to apply to the constitutional court is one of the essential elements defining the constitutional justice model of a state. As a rule, the following possible groups of applicants are identified: (1) supreme state or regional bodies; (2) courts of general competence and specialised courts; (3) natural and legal persons; and (4) constitutional courts ex officio.[11]

The first group comprises such entities as the head of state, the government, the parliament *in corpore*, a group of a certain number of parliamentarians (e.g. 1/5 of members of Parliament in Lithuania and Bulgaria, 1/3 of members of Parliament in Slovenia), the prime minister, the prosecutor general and ombudsmen; in some instances, the powers to apply to constitutional courts are accorded to federal entities or autonomous regions, municipal councils, etc.

The second group of applicants includes the courts of general competence or specialised courts, who can apply to the constitutional courts concerning the constitutionality of acts applicable in cases before them. This procedure is, at times, referred to as a preliminary request. In these instances, courts have certain powers in reviewing the constitutionality of legal acts and the interpretation of the constitution, i.e. insomuch as they can adopt a decision on the need to apply to the constitutional court concerning the constitutionality of an act applicable in the case before them. However, the principal difference between these procedures is that the powers to decide whether a legal act is indeed in conflict with the Constitution are, undoubtedly, assigned exclusively to constitutional courts. In some states, these powers are granted not to all courts but only to courts of the higher or highest level in the system of courts, as, for instance, exclusively to the Supreme Court in Ukraine.

In the context of the topic under discussion in this article, the most relevant group is the third one, i.e. natural and legal persons, who can file individual constitutional complaints with constitutional courts. In this respect, it is pertinent to note that different models of this mechanism are possible: (1) *actio popularis*, whose distinctive feature is that a person may apply to constitutional justice bodies not only in the event of the violation of his/her fundamental rights and freedoms, but also in cases where the person is acting in the public interest; and (2) constitutional complaints, whose essential feature is that they can be filed where the rights and freedoms of the applicant, rather than a third party, have been violated by a legal act contrary to the constitution. In general, the mechanism of constitutional complaints occurs in two forms: the model of full constitutional complaints and the model of limited constitutional complaints (in the first case, an individual constitutional complaint can be filed not only concerning the constitutionality of a legal norm on which the particular decision was based but also concerning the way that the judicial or other state authorities have applied this norm; meanwhile, the model of limited constitutional complaints can be further subdivided into two types: constitutional complaints concerning individual decisions and constitutional complaints concerning normative legal acts).

11 Helmut Steinberger, *Models of Constitutional Jurisdiction* (Science and technique of democracy 2, Council of Europe Press 1993) 13.

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As far as the last group, i.e. constitutional courts themselves, are concerned, it should be recalled that, in constitutional legal thought, such powers of constitutional courts are generally treated with scepticism and seen as potentially intervening in the balance of powers. For instance, most French constitutionalists have viewed this idea as dangerous, i.e. a constitutional justice institution with such a right of "veto" would be able, on its initiative, to participate in political debates; this could lead to the politicisation of the constitutional review process and, definitely, to a critical attitude towards the guardian of the constitution itself.[12]

In CEE states, the compliance of legal acts with the constitution can be challenged by the president of the state. In this regard, Lithuania can be considered a particular exception, as the President of the Republic has the right to apply only concerning the constitutionality of governmental acts. In Estonia and Romania, the President of the state can initiate exclusively the preliminary constitutional review of legal acts but has no right to initiate the review of the constitutionality of these acts after they enter into force. In large part of states, these powers are also granted to the government or the prime minister; but, for example, in Estonia, the Government is vested with no powers in the constitutional review process, while, in Croatia and the Czech Republic, the respective Government may initiate only the constitutional review of substatutory acts. In many states of this region, the constitutional review can be initiated by a group of parliamentarians: 1/5 in Lithuania and Bulgaria and 1/3 in Slovenia. These powers are also granted to the prosecutor general in Bulgaria, Latvia, Moldova, Poland, and Slovakia, as well as to ombudsmen in Albania, Latvia, Poland, and Ukraine. Constitutional review can likewise be initiated by the representative institutions of local government, as well as trade unions, for example in Slovenia.[13]

In most CEE states, individuals have direct access to constitutional justice institutions (based on either a broader or narrower model of constitutional complaints); as mentioned before, this possibility in the region is not granted only to the citizens of Bulgaria and Moldova.[14]

The right to initiate a constitutional review by constitutional courts exists in Albania, Montenegro, and Serbia (and also did so in Poland in the past). The possibility for initiated constitutional amendments to be assessed by the Constitutional Court *ex officio* is consolidated in Romania.[15]

Thus, this region covers states with relatively broad and particularly narrow scopes of persons entitled to apply to the constitutional court. The first category of these states primarily comprises countries like Hungary, where access to the Constitutional Court used to be nearly unlimited – due to *actio popularis*. The former President of the Hungarian Constitutional Court, L. Sólyom, observed that *actio popularis* virtually became a substitute for direct democracy in Hungary. However, in 2012, Hungary introduced a new system of constitutional complaints, replacing the formerly functioning *actio popularis*.[16]

The category of states with particularly narrow scopes of persons entitled to apply to the constitutional justice institutions in the region includes Estonia and Lithuania.[17] Until 2019,

12 Philippe Blacher, *Contrôle de Constitutionnalité et Volonté Générale* (PUF 2001) 82.

13 Dovilė Pūraitė-Andrikienė, 'Konstitucinės justicijos procesas Lietuvoje: optimalaus modelio paieška' (Dr disertacijos, Vilniaus universitetas 2017) 60-3.

14 European Commission for Democracy through Law (n 6).

15 Pūraitė-Andrikienė (n 13).

16 In the opinion of some authors, the new system of constitutional complaints of different types introduced in Hungary in 2012 has not so far provided a complete substitution for the formerly functioning *actio popularis* in terms of effectiveness. For more on this, see: Fruzsina Gárdos-Orosz, 'The Hungarian Constitutional Court in Transition — from Actio Popularis to Constitutional Complaint' (2012) 53(4) Acta Juridica Hungarica 302, doi:10.1556/AJur.53.2012.4.3.

17 Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer Dordrecht 2008) 6, doi:10.1007/978-94-017-8935-6.

applications with the Lithuanian Constitutional Court could be filedfor the review of the constitutionality of legal acts only by the applicants of the first and second groups identified above. These are the supreme state bodies or their members (1/5 of members of the Seimas, the President of the Republic, the Government of the Republic, the Seimas *in corpore*), courts of general competence and specialised courts. It should also be emphasised that, despite this rather narrow scope of applicants with the right to initiate the constitutional review of legal acts, these entities are additionally differentiated insofar as part of them are granted the powers to apply to the Constitutional Court only concerning an investigation into the constitutionality of a particular part of legal acts falling within the Court's jurisdiction. Specifically, the President of the Republic could exclusively apply to assess the compliance of the acts of the Government with the Constitution and is not authorised to challenge the constitutionality of laws or other legal acts adopted by the Seimas (the Parliament). However, the Government may apply only concerning the constitutionality of laws or other legal acts adopted by the Seimas. According to the data from 1993–2018, the Government merely exercised this right on five occasions, and the President of the Republic filed just three applications concerning the constitutionality of legal acts of the Government.[18]

Taking into account that until 2019, a person's right to initiate a constitutional justice case was not established in the Constitution of Lithuania, a person, considering that his/her constitutional rights had been violated by a decision based on an unconstitutional legal act, still had the right to apply to the Constitutional Court indirectly, through the courts of general jurisdiction. Unfortunately, although the decision of the court to apply to the Constitutional Court or not to apply to it under the provisions of the Constitution and official constitutional doctrine should be related to the existence of reasonable doubts about the constitutionality of the applicable legal act, procedural decisions made by courts of general jurisdiction also provide other arguments that determine this decision.[19]

Scientific literature has highlighted that the drafters of the text of the Constitution confined themselves to the most essential means of constitutional review, fearing the possible excessive overburdening of the Constitutional Court with constitutional complaints, which could disturb its functioning as a relatively new institution.[20] It was only in 2019 that, as a result of the constitutional amendments concerning the consolidation of individual constitutional complaints, the scope of applicants with the right to apply to the Constitutional Court was significantly expanded. It can be reasonably assumed that, following these amendments, Lithuania can no longer be categorised among the states with a limited scope of entities entitled to apply to the constitutional court. Thus, one of the most criticised elements of the Lithuanian constitutional control model created in 1992-1993, namely the absence of the possibility to apply to the Constitutional Court for natural and legal persons,[21] no longer exists.

18 Meanwhile, during the same period, the Constitutional Court received 883 applications by courts, 208 applications by groups of members of the Seimas and 17 applications from the Seimas *in corpore*, see: Constitutional Court of the Republic of Lithuania, *Annual Report 2018* (Constitutional Court of the Republic of Lithuania 2019) <https://lrkt.lt/en/about-the-court/activity/annual-reports/183> accessed 20 September 2023.

19 For more on these arguments and why a more effective form of protection of violated constitutional rights than the possibility of indirect application to the Constitutional Court should always be considered an opportunity to apply directly to the Constitutional Court, see: Danelienė (n 7) 414-9.

20 Jarašiūnas Jarašiūnas, 'Lietuvos Respublikos Konstitucinis Teismas ir žmogaus teisių apsauga' į D Gailiūtė ir kiti, Žmogaus teisių apsaugos institucijos (Mykolas Romeris university 2009) 206.

21 Danelienė (n 7) 414.

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2.2 INDIVIDUAL CONSTITUTIONAL COMPLAINTS IN THE CONTEXT OF THE DEVELOPMENT OF CONSTITUTIONALISM

Although it is not unchallenging to disclose the phenomenon of constitutionalism in laconic statements, its essence can be recapitulated concisely as the limitation of power to protect human rights and freedoms.[22] Constitutional review is the main instrument ensuring the effectiveness of the Constitution. This is particularly relevant in states in which constitutional order is being created. Therefore, after the collapse of the totalitarian system, the states of CEE looked towards constitutionalism with hope.[23] Constitutional courts in these countries were created to protect democratic constitutional stability and to prevent the erosion of democratic values.

The broader understanding of democracy, i.e. when it is understood not merely as a rule by the majority or free elections, has had considerable influence on the states that experienced authoritarianism or totalitarianism.[24] Like other CEE states, e.g. Latvia and Estonia, apart from the experience of Soviet totalitarianism, the experience of authoritarianism was not unfamiliar to Lithuania in the inter-war period; therefore, as political culture was immature, the functioning of the constitutional justice institution during the transitional period was even more significant, because the retention of the constitution as supreme law under these conditions becomes far more complex and important.[25]

Thus, the Constitutional Court in Lithuania was faced with reviewing the constitutionality of legal acts and forming a new concept of law based on the Constitution. The Constitutional Court has successfully carried out this historical mission for three decades. Constitutional justice has fundamentally transformed the perception and interpretation of the Lithuanian legal system.[26]

It is also important to note that constitutionalism, as a phenomenon, does not fit within the frames of any period or territory. Constitutionalism is neither regional nor national; it is a phenomenon of all Western democracies. In the context of the enlargement of the European Union, it is frequently maintained that constitutionalism has gained a new impetus. Following the triumph of democracy and legal statehood in Central and Eastern Europe in 1990–1992, the European Union has increasingly evolved into a union that emphasises not just economic sectors like mining or the coal industry but, more prominently, as a union of human rights, freedoms and the promotion of European legal culture.[27] All this leads to reasoning about European 'structural constitutionalism'.[28] Ever-growing sensitivity to human rights can be observed in Europe; at least partly, this phenomenon has been prompted by the possibility of applying to the European Court of Human Rights.

In response to these trends, many states have taken measures to introduce or broaden the possibilities for individuals to apply to constitutional courts. As previously mentioned, the

22 Dovilė Pūraitė-Andrikienė, 'Individualus konstitucinis skundas kaip veiksmingas žmogaus teisių apsaugos ir konstitucionalizmo plėtros instrumentas' (2015) 96 Teisė 201, doi:10.15388/Teise.2015.96.8765.

23 Dovilė Pūraitė-Andrikienė, 'The Developments and Prospects of the Lithuanian Constitutional Justice Model' in G Švedas and D Murauskas (eds), *Legal Developments During 30 Years of Lithuanian Independence: Overview of Legal Accomplishments and Challenges in Lithuania* (Springer Cham 2021) 226, doi:10.1007/978-3-030-54783-7_12.

24 Caroline Taube, *Constitutionalism in* Estonia, *Latvia and Lithuania: A Study in Comparative Constitutional Law* (Lustu Forlag 2001) 74.

25 ibid.

26 Egidijus Kūris, 'Konstitucinė justicija Lietuvoje: pirmasis dešimtmetis' (2003) 3-4 Justitia 2.

27 Egidijus Šileikis, *Alternatyvi konstitucinė teisė* (Teisinės Informacijos Centras 2005) 48.

28 Kaarlo Tuori, 'European Constitutionalism' in R Masterman and R Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (CUP 2019) 521, doi:10.1017/CBO9781316091883.

institution of individual constitutional complaints has been established in most states of the European Union and in nearly the whole CEE region.[29] All these tendencies may determine that the widespread establishment of constitutional complaint mechanisms can be identified in future legal thought as one more particular stage in the evolution of constitutionalism. Having identified before in this article and considering that the essential idea of constitutionalism is the limitation of power to protect human rights and freedoms, consolidating the institution of individual constitutional complaints in Lithuania is undoubtedly necessary.[30]

3 THE CHOSEN MODEL OF INDIVIDUAL CONSTITUTIONAL COMPLAINTS[31]

In the studies of constitutional legal science, the approach prevails that three constituent elements of their construction determine the effectiveness of the powers of constitutional justice: (a) the scope of applicants with the right to apply to the constitutional court; (b) the scope of powers or the range of objects that can be contested before the constitutional court; and (c) the legal effects of decisions adopted by the constitutional justice institution.[32] In the context of the powers to examine individual constitutional complaints, in addition to the three elements indicated above, there is one more particularly important element – conditions and terms for the application to the constitutional court (filters), which helps to reduce the inflow of individual constitutional complaints and contributes to achieving other essential objectives. The importance of this element is linked to the so-called dilemma between the overburdening of the constitutional court and providing an efficient human rights protection system. Therefore, this part of the article will further separately analyse four key elements defining the Lithuanian model of constitutional complaints: (1) the objects of individual constitutional complaints; (2) persons with the right to apply to the Constitutional Court by filing individual constitutional complaints; (3) conditions and terms for the application to the Constitutional Court; and (4) the legal effects of declaring individual constitutional complaints to be reasonable.

3.1 WHAT TYPE OF LEGAL ACTS CAN A PERSON CHALLENGE BEFORE THE CONSTITUTIONAL COURT?

In the European Commission for Democracy through Law (Venice Commission) study focusing on individual access to constitutional justice, which sums up states' experience in individual constitutional complaints, there is a notable emphasis on the nature of the relationship between constitutional and ordinary courts. In systems employing a specific model of constitutional complaints, where the constitutional court adopts decisions only regarding normative legal acts and does not directly review the application of normative legal acts by ordinary courts, conflicts between the two are less common.[33] The constitutional court's role is limited to the examination of 'constitutional matters', leaving the interpretation of ordinary

29 European Commission for Democracy Through Law (n 6).

30 For more on the reasons for the necessity of individual constitutional complaints, see: Pūraitė-Andrikienė (n 22).

31 For more on the development of the consolidation of the mechanism of constitutional complaints in Lithuania and other initiatives to broaden/limit the competence of the Constitutional Court, see: Dovilė Pūraitė-Andrikienė, 'The Legal Force of Conclusions by the Lithuanian Constitutional Court and the Issue of Their (Non-)Finality: Has the Time Come to Amend the Constitution?' (2019) 44(2) Review of Central and East European Law 244-49, doi:10.1163/15730352-04402005.

32 Paulius Vinkleris, 'Konstitucinės priežiūros elitinės koncepcijos ir žinybinio priklausymo ribų problema lietuvoje' (1999) 5-6 Justitia 23.

33 European Commission for Democracy Through Law (n 6).

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legal acts to the courts of general competence.[34]

However, it is also underlined that where the model of normative constitutional complaints is chosen, identifying what constitutes a constitutional matter can be difficult, especially in cases involving the right to a fair trial, where any procedural violation by the courts of general competence can be construed as a violation of the right to a fair trial.[35]

It is worth pointing out that the form of normative constitutional complaints is often called 'simulated' constitutional complaints, given the limited capacity it provides individuals to protect their violated rights. For example, in Poland, where the consolidation of individual constitutional complaints was based on a narrower concept, discussions are taking place as to whether the right granted to a person to challenge only a legal norm ensures the effective protection of constitutional rights, some authors argue that in Poland the constitutional complaint is capable of bringing the desired consequences to the applicant only in specific situations.[36]

Nevertheless, the form of normative constitutional complaints has clear advantages, such as reducing tension between the Supreme Court and the Constitutional Court, preventing the Constitutional Court from evolving into a 'super-Supreme Court', and ensuring the Constitutional Court does not become overburdened with applications.[37] In the region of Central and Eastern Europe, the model of limited normative constitutional complaints is opted for by Latvia, Montenegro, Poland, Romania, and Ukraine, while the model of full constitutional complaints exists in Albania, Bosnia and Herzegovina, Croatia, the Czech Republic, Slovenia, Slovakia, and Macedonia.[38] It should be noted that in some states that have chosen the full constitutional complaint model, constitutional courts are overburdened with applications. For example, the Constitutional Court of Slovenia received 4,000 constitutional complaints annually, subsequently asking the legislature to restrict this right.[39] Since 2008, the Croatian Constitutional Court has received around 5,000 constitutional complaints yearly, rising to over 6,000 in 2012.[40] In the Czech Republic, individual constitutional complaint proceedings amount to 98 percent of the Constitutional Court's caseload.[41] Such a high volume of complaints might hinder the court's effective operation, preventing it from fulfilling its genuine function of protecting individual rights.

In Lithuania, a person can file an individual constitutional complaint concerning the compliance of laws and other acts adopted by the Seimas, the acts of the President of the Republic and the acts of the Government with the Constitution or any other higher-ranking legal act (if a decision adopted on the basis of these legal acts has violated the constitutional rights or freedoms of this person).[42] Thus, the model of normative constitutional complaints has

34 ibid.

35 ibid.

36 Jacek Zaleśny, 'Constitutional Complaint in Poland: Model, Doctrinal Interpretation and Application Problems' (2018) 12 Law of Ukraine 25, doi:10.33498/louu-2018-12-025.

37 Pūraitė-Andrikienė (n 8) 52.

38 European Commission for Democracy Through Law (n 6).

39 Peter Paczolay, 'Introduction to the Report of the Venice Commission on Individual Access to Constitutional Justice' (Conference on Individual Access to Constitutional Justice, Arequipa, Peru, 30-31 May 2013) <https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2013)003-e> accessed 20 September 2023.

40 Ana Thoonen-Tornic, 'Access to Constitutional Courts: Popular Complaints in Croatia, Slovenia and Macedonia' (DPhil thesis, University of Zurich 2017) 81-6.

41 Katarína Šipulová, 'The Czech Constitutional Court: Far Away from Political Influence' in K Pócza (ed), *Constitutional Politics and the Judiciary: Decision-Making in Central and Eastern Europe* (Routledge 2019) 35.

42 Constitution (n 1). Constitution states that every person has the right to apply to the Constitutional Court concerning the acts specified in the first and second paragraphs of Art. 105 of the Constitution

been chosen in Lithuania. According to the Constitution and laws, being one of the three court systems in Lithuania, the Constitutional Court does not review the constitutionality of decisions of the other two court systems (courts of general jurisdiction and administrative courts). It is not intended to function as a 'fourth instance' for decisions of general jurisdiction or a 'third instance' for administrative court decisions.[43] Thus, if the Constitutional Court was granted the possibility of annulling the decisions of courts of general competence, its powers would be excessively expanded with respect to other judicial authorities.[44] This would be incompatible with the overall constitutional regulation, in particular with the mission of the Constitutional Court and the system of the judiciary, and could create tensions among courts. However, from 2019 to 2022, 87 individual constitutional complaints were lodged, requesting the Constitutional Court to assess whether court decisions were in compliance with the Constitution or laws, to review court decisions, or to review or reopen cases already decided by the courts.[45] This suggests that applicants often do not fully realise that an individual constitutional complaint cannot be used to challenge the constitutionality of court decisions. Consequently, the Constitutional Court refused to consider these applications.[46]

Thus, in Lithuania, the decision to adopt the model of normative constitutional complaint was influenced not only by the traditional arguments favouring this approach to avoid tension between the courts of general jurisdiction and the Constitutional Court, as well as by the threat of overloading the Court with complaints. Such a choice was made also because of the overall constitutional regulation, the established tradition of constitutional control[47] and the experience of neighbouring countries[48] that have chosen similar models of constitutional complaints. In this context, opting for the normative constitutional complaints appears to be the logical choice. However, if the narrower concept of a normative constitutional complaint is chosen, other elements of the constitutional complaint model should be modelled in such a way that they do not further restrict the person's capacity to defend potentially violated rights before the Constitutional Court.[49]

According to European constitutional review traditions, the competence of the constitutional court should encompass the constitutional review of not all normative legal acts but specifically the legal acts of supreme state authorities. In the opinion of the Venice Commission, the constitutional review of lower-ranking legal acts should be assigned to the competence of administrative courts.[50] As mentioned before, in Lithuania, a person may file an individual constitutional complaint concerning laws and other acts adopted by the Seimas and legal acts

if a decision adopted on the basis of these acts has violated the constitutional rights or freedoms of the person and the person has exhausted all legal remedies (Art. 106 (4)).

43 Danelienė (n 7) 428.

44 Pūraitė-Andrikienė (n 8) 53.

45 Here and below you will find summarized statistical data from the 2019, 2020, 2021, and 2022 annual reports of the Constitutional Court (n 10).

46 E.g. see: Decision no KT27-A-S16/2019 Regarding the Refusal to Consider Request no 1A-5/2019 (Constitutional Court of the Republic of Lithuania, 9 October 2019) <https://lrkt.lt/lt/teismo-aktai/paieska/135/ta1969/content> accessed 20 September 2023; Decision no KT28-A-S17/2019 Regarding the Refusal to Consider Request no 1A-4/2019 (Constitutional Court of the Republic of Lithuania, 9 October 2019) <https://lrkt.lt/lt/teismo-aktai/paieska/135/ta1970/content> accessed 20 September 2023; Decision no KT31-A-S20/2019 Regarding the Refusal to Consider Request no 1A-11/2019 (Constitutional Court of the Republic of Lithuania, 16 October 2019) <https://lrkt.lt/lt/teismo-aktai/paieska/135/ta1974/content> accessed 20 September 2023.

47 Since its establishment 30 years ago, the Constitutional Court has only examined the constitutionality of acts adopted by the legislative and executive branches of government, so the introduction of a full constitutional complaint would be too "revolutionary" in the context of the already established tradition of national constitutional review.

48 Latvia and Poland have also opted for the normative constitutional complaint model.

49 Pūraitė-Andrikienė (n 5) 268.

50 European Commission for Democracy Through Law (n 6).

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of the executive, i.e. legal acts passed exclusively by supreme state authorities. The range of objects falling within the scope of constitutional review does not include any acts passed by ministers, other institutions of governance and local government bodies. Cases concerning the lawfulness of normative administrative acts, whose review for ensuring their compliance with the Constitution and other laws does not fall within the competence of the Constitutional Court, are considered in Lithuania by administrative courts.[51] Such an option is in line with the aforementioned European traditions.

In the context of objects of individual constitutional complaints, it should be mentioned that in 2019-2022, the admissibility issue of 509 individual complaints was resolved in the Constitutional Court. Constitutional complaints whose admissibility issue was resolved in 2019-2022 most frequently questioned the constitutionality of laws – such a question was raised in 312 petitions; 30 petitions requested an investigation into the compliance of government resolutions with the Constitution and laws.[52] In that year, the Constitutional Court refused to consider 442 constitutional complaints. 170 of which were refused for consideration, noting that, under the Constitution, a person has the right to apply to the Constitutional Court regarding the compliance of not all acts with the Constitution and/or laws, but only regarding laws or other acts adopted by the Seimas, the acts of the President, and the acts of the Government.[53] These trends show that a large number of constitutional complaints were not accepted for consideration because the applicants did not know which acts could be challenged before the Constitutional Court.

It should be noted that the provisions of the Constitution are formulated in a very laconic manner and do not specify which particular laws (apart from ordinary laws) and other legal acts may be subject to constitutional review.[54] For instance, Articles 102 and 105 of the Constitution do not *expressis verbis* mention laws amending the Constitution, constitutional laws, laws ratifying international treaties or the Statute of the Seimas.

As a result, the Constitutional Court has more than once held that Article 102 of the Constitution should not be interpreted as providing an exhaustive and definitive list of legal acts subject to constitutional review.[55] The Constitutional Court has formulated a comprehensive doctrine regarding the list of objects falling within the scope of constitutional review. Given the limited scope of this article, all these aspects will not be discussed in greater detail.[56] The official doctrine developed by the Constitutional Court in relation to the objects falling within the scope of its constitutional review will, undoubtedly, continue to be relevant in examining individual constitutional complaints by the Constitutional Court. For example, in its ruling of 25 November 2019, the Constitutional Court clarified its authority to consider individual constitutional complaints in cases where an individual person raises concerns about a legal act, and the contested act is no longer in force, or is annulled or amended in the course of considering the case.[57] Thus, the object of an individual constitutional complaint may encompass both currently valid legal acts and those that have been rendered invalid (through annulment or amendment) or have expired in terms of their validity.[58]

51 Pūraitė-Andrikienė (n 8) 54.

52 Constitutional Court of the Republic of Lithuania (n 10).

53 ibid.

54 Dovilė Pūraitė-Andrikienė, 'Teisės aktų konstitucingumo patikros objektai Lietuvos Respublikos Konstitucinio Teismo jurisprudencijoje' (2020) 116 Teisė 72, doi:10.15388/Teise.2020.116.5.

55 Case 33/03 (Constitutional Court of the Republic of Lithuania, 28 March 2006) [2006] Valstybės žinios 32-1292.

56 For more on these aspects, see Pūraitė-Andrikienė (n 54).

57 For more on this, see Decision no KT52-N14/2019 in case no 14/2018 (Constitutional Court of the Republic of Lithuania, 25 November 2019) [2019] TAR 18747.

58 Danelienė (n 7) 427.

3.2 WHO CAN APPLY TO THE CONSTITUTIONAL COURT WITH AN INDIVIDUAL CONSTITUTIONAL COMPLAINT?

Persons entitled to file individual constitutional complaints are not precisely identified in the legal acts of CEE states. For example, in the Constitution of Poland an entity with the right to file an individual constitutional complaint is named 'everyone whose constitutional freedoms or rights have been infringed';[59] whereas, in Latvia, the content of the concept of the person is defined neither in the Constitution nor in the Law on the Constitutional Court. In the Constitutional Court Act of Slovenia, such an entity is similarly defined by using the particularly broad term 'anyone'.[60] In contrast, other CEE states in their legislation *expressis verbis* name natural and legal persons as entitled to file individual constitutional complaints: they are referred to as 'every individual or legal person' in Croatia,[61] 'a natural or legal person' in the Czech Republic,[62] 'any legal or natural person' in Serbia[63] and 'natural persons or legal persons' in Slovakia.[64] However, the respective legislation of the above-mentioned states does not specify the scope of these applicants to a more precise extent. The scope of applicants in question is revealed in the constitutional doctrine of these courts.[65] In this context, it should be mentioned that despite the fact that the institution of the constitutional complaint has been in existence in Poland for more than two decades, the issue of standing to file a constitutional complaint remains unresolved. Many doubts exist around the issue of the admissibility of constitutional complaints brought by some entities, notably those with some connection to public authorities.[66]

Lithuanian model of constitutional complaints is in line with these tendencies. An entity that can apply to the Constitutional Court with an individual constitutional complaint is referred to in Article 106 of the Constitution as 'every person', a fairly broad phrase. The Constitution does not specify what persons are covered by this concept: whether only natural or legal persons, whether only citizens of the Republic of Lithuania or also citizens of other states, stateless persons, etc. Nor does the LCC comprehensively define the scope of applicants in question. Nevertheless, a closer look at the provisions of this law makes it possible to state with certainty that not only natural but also legal persons are included.[67] However, the LCC does not answer as to whether all legal entities fall within this scope, i.e. whether only private or public legal entities have the right to file individual constitutional complaints. The category

59 Art. 79 of the Constitution of the Republic of Poland of 2 April 1997 <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm > accessed 20 September 2023.

60 Art. 24(1) of the Constitutional Court Act of the Republic of Slovenia (ZUstS) [2007] Official Gazette 64.

61 Art. 38 of the Constitutional Act on the Constitutional Court of the Republic of Croatia [2002] Narodne novine 49.

62 Art. 64 of the Constitutional Court Act of the Czech Republic no 182/1993 Sb (1993) <https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Constitutional_court_act_182_1993.pdf> accessed 20 September 2023.

63 Art. 168 of the Constitution of the Republic of Serbia of 8 November 2006 [2006] Official Gazette 98.

64 Art. 127 of the Constitution of the Slovak Republic of 1 September 1992 [1992] Zbierka zákonov 460; Art. 18 of the Law of the Slovak Republic no 38/1993 'On organization and procedures of the constitutional court and status of the judges' of 15 February 1993 [1993] Zbierka zákonov 10.

65 E.g. see the judgment of the Constitutional Court of the Republic of Latvia of 21 February 2002 in case No 2000-07-0409; the judgment of the Constitutional Tribunal of the Republic of Poland of 6 April 1998 in case No Ts9/98.

66 Marta Kłopocka-Jasińska and Adam Krzywon, 'On the Rights of Public Entities to Lodge a Constitutional Complaint in the Light of the Jurisprudence of the Polish Constitutional Tribunal' (2016) 6(1) Wroclaw Review of Law, Administration & Economics 45, doi:10.1515/wrlae-2015-0038.

67 Law of the Republic of Lithuania no I-67 'On the Constitutional Court' of 3 February 1993 [1993] Valstybės žinios 6-120. Article 32 of the LCC concerns the representation of a legal person at the Constitutional Court, while Article 67[1] prescribes that a petition filed with the Constitutional Court by a person referred to in the fourth paragraph of Article 106 of the Constitution must contain ... "the name and surname *(name)*".

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of natural persons is likewise not specified in more detail; the Constitution and the LCC do not *express verbis* indicate whether only citizens or also foreigners and stateless persons can be regarded as entitled to file individual constitutional complaints.

However, in light of the broad phrase 'every person' used in the Constitution, it is logical to assume that this wording covers all the categories of persons mentioned above. Otherwise, the concept of 'human' or 'citizen' would have been chosen to define the scope of persons entitled to file individual constitutional complaints.[68] The choice of an 'every person' in defining the persons entitled to apply to the Constitutional Court is also logical, taking into account overall Lithuanian constitutional regulation: everyone may defend his rights by invoking the Constitution (Art.6 (2)); a person whose constitutional rights or freedoms are violated shall have the right to apply to a court (Art. 30 (1)). Thus, the broad phrase 'every person' should be assessed positively as providing the possibility of defending the rights of different categories of persons.

It is important to note that, in accordance with the provisions of the Constitution (Art. 106(4)), a person does not have the right to apply to the Constitutional Court when: 1) he or she applies by submitting an *actio popularis*; 2) seeks to protect the constitutional rights or freedoms of another person (other persons) and not of his/her own.[69] In 2019-2022, the consideration of 168 individual constitutional complaints (or parts thereof) was refused on the grounds that they had been filed by an institution or a person who does not have the right to apply to the Constitutional Court.[70]

Nevertheless, certain categories of persons entitled to file individual constitutional complaints will inevitably have some distinctive features compared with others. For instance, citizens of foreign states and stateless persons do not have certain rights of a citizen (e.g. the right to vote in elections to the Seimas or elections of the President is a political right of a citizen of the Republic of Lithuania); therefore, their complaints, if submitted, concerning the respective rights will not be considered; the category of legal persons (in particular, public ones) will also have their own specific features.[71] For example, Lithuanian legal scholars are currently discussing whether the Judicial Council, as a self-governing body representing and defending the interests of the judiciary and judges, can be qualified as a subject entitled to apply to the Constitutional Court with an individual constitutional complaint.[72]

All these aspects will likely be revealed in the constitutional doctrine in the future when considering individual constitutional complaints filed with the Constitutional Court by different persons. The first statistical data on the admissibility of individual constitutional complaints show that complaints submitted by natural persons clearly dominate. From 2019-2022, the Constitutional Court received 593 individual constitutional complaints, of which 541 were filed by natural persons, 47 from legal persons, 5 were jointly submitted by natural and legal persons, and 121 were filed with the legal assistance of a lawyer.[73]

It is worth mentioning that the draft law registered in 2017 on amending the Constitution[74] proposed that the institution of individual constitutional complaints be combined with the

68 Pūraitė-Andrikienė (n 8) 56.

69 Danelienė (n 7) 425.

70 Constitutional Court of the Republic of Lithuania (n 10).

71 Pūraitė-Andrikienė (n 8) 58.

72 E Šileikis, 'Teisėjų Taryba ir Konstitucinis Teismas: teismų gynybos aspektai' (*TeisePro*, 14 March 2023) <https://www.teise.pro/index.php/2023/03/14/e-sileikis-teiseju-taryba-ir-konstitucinis-teismas-teismu-gynybos-aspektai/> accessed 20 September 2023.

73 Constitutional Court of the Republic of Lithuania (n 10).

74 Draft Law of the Republic of Lithuania no XIIIP-431 'Amending Articles 106 and 107 of the Constitution' of 10 March 2017 <https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/942a6100057411e78352864fdc41e502?jfwid=-4cu9uagrq> accessed 20 September 2023.

possibility of addressing the Constitutional Court by the ombudsmen.[75] It is unclear what reasons led to the absence of the said possibility in the final version of the constitutional amendments concerning individual constitutional complaints. In general, ombudsmen in Central and Eastern Europe have the right to apply to the constitutional court, inter alia, in Albania, Croatia, Estonia, Hungary, Latvia, Poland and Ukraine.[76]

3.3 WHAT ARE THE MAIN CONDITIONS AND TERMS FOR THE APPLICATION TO THE CONSTITUTIONAL COURT?

The Lithuanian model of individual constitutional complaints contains the following conditions and terms for applying to the Constitutional Court. Two of them are prescribed in the Constitution:

(1) the requirement that the rights and freedoms of the applicant have been violated by a legal act that is (possibly) in conflict with the Constitution and (2) the requirement to have exhausted all legal remedies (Art.106(4)). The third condition is established in the LCC, which provides for a time limit of four months for filing a constitutional complaint from the day when the final decision of the last instance having heard the case was adopted.[77] The Lithuanian model of constitutional complaint does not provide the requirement that a lawyer could draw up a complaint in accordance with the prescribed requirements.[78] The necessity of these conditions is obvious in the context of the overall constitutional regulation of Lithuania. The Constitution established the whole judiciary system (Chapter IX), consisting of the courts of different instances, to enable a person to realise his/her constitutional right to apply to a court in case of a violation of these rights or freedoms (Art. 30(1)). Therefore, it is natural that taking into account the existence of the judiciary system and the guarantee of judicial protection of a person's constitutional rights, the Constitution and the LCC provided certain conditions for the right to apply to the Constitutional Court with an individual constitutional complaint. These conditions also help to reduce the inflow of constitutional complaints and contribute to achieving other important objectives.

3.3.1 The requirement that the rights and freedoms of the applicant have been violated by a legal act that is (possibly) in conflict with the Constitution

It has been mentioned that in systems with *actio popularis*, a person can apply to the constitutional justice institution not only where his/her own fundamental rights or freedoms have been violated but also while acting in the public interest. However, given that such a model of access to the constitutional justice institution significantly reduces the capacity to manage the flow of unfounded, repetitive and potentially unsuccessful complaints, the Venice Commission has expressed a critical view regarding models based on *actio popularis*.[79] The availability of an *actio popularis* in matters of constitutionality cannot be regarded as a European standard; at present it is rather an exception in Europe and among the Member States of the Venice Commission.[80] Although it may appear from the outset that the instrument of *actio popularis* can be very effective and, in particular, involve people in the process

75 During the first attempt of voting on this constitutional amendment in June 2017, the Seimas failed to achieve the required two-thirds of votes of all its members.

76 European Commission for Democracy Through Law (n 6).

77 Constitution (n 1) art 65 (2(3)).

78 This is probably the issue that raised the most discussion during the creation of the Lithuanian model of constitutional complaints. For more on this see Pūraitė-Andrikienė (n 5) 170-4.

79 European Commission for Democracy Through Law (n 6).

80 European Commission for Democracy Through Law, Opinion no 614/2011 'On Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary' (2011) <https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2011)001-e> accessed 20 September 2023.

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of constitutionalisation, the experience of the states in which this institution operated shows that its choice increases the workload of the constitutional court, making it more complicated for the court to organise its work.

For example, before Hungary's change in the Constitution, it allowed anyone, including foreign nationals or stateless individuals, to request the review of a constitutional law, regulation, or petition for that particular law's annulment without proving any harm done to them. Prior to the amendments introducing this new system, *actio popularis* had been one of the most disputed elements in the Hungarian constitutional justice; one of the main reasons for this was the unbearable workload of the Constitutional Court (approximately 1,600 actions were brought annually before the Constitutional Court in the framework of *actio popularis*).[81] To avoid the paralysis of the Constitutional Court in Hungary, a new system of different types of constitutional complaints was introduced in 2012 to replace the former *actio popularis*. Some scholars and even the former president of the Hungarian Constitutional Court argued that abolishing the *actio popularis* (and introducing the real constitutional complaint) could serve the depoliticisation of the Hungarian Constitutional Court.[82] A similar situation occurred in Croatia due to the excessive inflow of *actio popularis* complaints.[83]

The Constitution of Lithuania provides that: 'person has the right to apply to the Constitutional Court concerning the acts ... if a decision adopted on the basis of these acts has violated the constitutional rights or freedoms of the person' (Article 106(4)). This is the first constitutionally laid down condition that also defines Lithuania's chosen model for individual constitutional complaints. After this provision has been laid down in the Constitution, Lithuania can clearly be grouped with states that have opted for the institution of individual constitutional complaints, rather than the institution of *actio popularis*.[84] *Actio popularis* would allow a person to apply to the Constitutional Court not only for the protection of their own constitutional rights but also to safeguard the public interest and challenge the constitutionality of any legal act assigned to the competence of the Constitutional Court.[85] It is interesting to note that in 2005, a group of members of Parliament tabled a draft to amend the respective article of the Constitution (Art.106); the draft proposed to establish the *actio popularis*; however, various academic and state institutions supported the introduction of individual constitutional complaint in Lithuania, but argued against *actio popularis*.[86]

Thus, the first condition for applying to the Constitutional Court enshrined in the Lithuanian model of constitutional complaints undoubtedly helps to reduce the inflow of unfounded constitutional complaints and, hence, is necessary. The introduction of this filter at the constitutional level should also be assessed favourably, as this issue is linked to the very essence of the model of constitutional complaints.[87] The choice of this condition is also logical, considering Article 30 (1) of the Constitution, according to which a person whose constitutional rights or freedoms are violated shall have the right to apply to a court (therefore, it excludes *actio popularis*).

The Constitutional Court held in its decisions that an individual constitutional complaint is deemed to have been filed by an institution or person not entitled to apply to the Constitu-

81 Gárdos-Orosz (n 16) 302-15.

82 Kálmán Pócza, Gábor Dobos and Attila Gyulai, 'The Hungarian Constitutional Court: A Constructive Partner in Constitutional Dialogue' in Kálmán Pócza (ed), *Constitutional Politics and the Judiciary: Decision-making in Central and Eastern Europe* (Routledge 2019) 99.

83 European Commission for Democracy Through Law (n 6).

84 Pūraitė-Andrikienė (n 8) 59.

85 Danelienė (n 7) 426.

86 Agne Limantė, 'Lithuania Introduces Individual Constitutional Complaint' (*Verfassungsblog*, 26 March 2019) <https://verfassungsblog.de/lithuania-introduces-individual-constitutional-complaint/> accessed 20 September 2023.

87 Pūraitė-Andrikienė (n 8) 59.

tional Court in cases where the impugned legal regulation has not led to the adoption of a decision that could possibly violate the constitutional rights or freedoms of the petitioner. For this reason, in 2019-2022 the Constitutional Court refused to consider 125 individual constitutional complaints (or parts thereof).[88] These numbers show that applicants do not always understand the conditions for filing a constitutional complaint.

3.3.2 The requirement to have exhausted all legal remedies

The importance of this condition is not limited to reducing the inflow of unfounded complaints but also contributes to achieving other important objectives: (1) highlights the responsibility of the courts of general competence in the protection of constitutional rights and freedoms, and (2) the Constitutional Court does not need to establish the factual and/or legal circumstances of the case and, therefore, it can properly fulfil its main function – to assess the constitutionality of the law under complaint.[89]

The requirement to have exhausted all legal remedies is likewise linked to the very essence of the model of constitutional complaints. Although there are many possible definitions of individual constitutional complaints, the most accurate description could be the following: it is a subsidiary legal remedy, which is used by a person to apply to the Constitutional Court or another analogous body and to defend his/her constitutional rights and freedom where the legal acts of certain state authorities have possibly violated these rights and freedoms.[90] Due to the requirement to have exhausted all legal remedies, a constitutional complaint can be identified as a subsidiary remedy. This makes it clear that the existence of individual constitutional complaints does not deny other possibilities for the protection of human rights since persons have recourse to the mechanism of individual constitutional complaints when it is impossible to prevent the violation of human rights by general measures for protecting rights. However, in order that this filter would not unduly narrow possibilities for persons to defend their violated constitutional rights, it is useful to provide some exceptions. For example, in Croatia, the Czech Republic, Latvia, Montenegro, Slovakia and Slovenia, exhausting all legal remedies is not required in those cases where compliance with this condition would cause irreparable harm to the person or where examining the constitutional complaint is significant for society.[91]

The Constitution of Lithuania provides that: 'person has the right to apply to the Constitutional Court …the person has exhausted all legal remedies' (Article 106(4)). This is the second constitutionally laid down filter, which is linked to the very essence of the model of constitutional complaints. It should be noted that the text of the Constitution does not specify what these legal remedies should be. The LCC clarifies that the concept of 'all legal remedies' encompasses more than just court applications and various ways to challenge court decisions (including appeal and cassation procedures). It also includes utilising mandatory pre-court dispute resolution procedures if required by law.[92] It is essential to note that reopening proceedings, which is an exceptional method of reviewing final decisions in civil, administrative, criminal, and administrative offence cases, is not obligatory as part of exhausting all effective legal remedies.[93] The Constitutional Court also noted that, under the Constitution and the LCC, a person is deemed to have exhausted all remedies only when not only all possibilities established by law for filing a complaint against the decision of the court have been exhausted, but also the final and non-appealable decision of the court is adopted,

88 Constitutional Court of the Republic of Lithuania (n 10).

89 Pūraitė-Andrikienė (n 22) 217.

90 Lina Beliūnienė, Žmogaus teisių apsaugos stiprinimas: konstitucinio skundo institutu (Justitia 2014) 34.

91 European Commission for Democracy Through Law (n 6).

92 Constitution (n 1) art. 65(2(2)).

93 Danelienė (n 7) 430.

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and it has not protected the constitutional rights of the said person.[94]

Nevertheless, there are cases where applicants either misunderstand or ignore this condition for lodging a complaint and attempt to apply to the Constitutional Court without exhausting all other legal remedies. The first statistical data on the admissibility of individual constitutional complaints show that from 2019-2022, by refusing to consider 20 individual constitutional complaints (or parts thereof), the Constitutional Court held that the persons, before applying to the Constitutional Court, had not exhausted all remedies provided for by law for defending their constitutional rights or freedoms and could no longer exhaust them.[95]

However, the national model of constitutional complaints does not provide for the exception to the requirement to have exhausted all legal remedies that have proved to be effective in other CEE states in which it is not required to have exhausted all legal remedies in those cases where compliance with this condition would cause irreparable harm to the person. Under the legal regulation in the Constitution and the LCC, a person has the right to apply to the Constitutional Court regarding the constitutionality of legal acts only after having exhausted all the legal remedies available to him or her and only after a final court decision has been issued. However, this legal regulation does not answer the question of what to do when the contested legal act and a decision infringing a person's constitutional rights and freedoms coincide. It also leaves unanswered questions as to whether it is possible to lodge a constitutional complaint in the absence of a formal "decision" and what the course of action should be in cases where there are no such legal remedies in national legislation.[96]

The European Court of Human Rights (ECtHR) also pointed out this shortcoming of the national constitutional complaint model. The case concerned the refusal by the Seimas to grant the Ancient Baltic religious association Romuva the status of a state-recognised religious association.[97] The applicant association, *inter alia*, argued that no effective domestic remedies were available. In this judgment, the ECtHR could not find that lodging an individual constitutional complaint could be considered an effective remedy in the present case within the meaning of Article 35(1) of the Convention. The ECtHR observed that the Lithuanian Constitutional Court may examine an individual complaint only after all remedies have been exhausted and a final court decision has been adopted. However, the ECtHR found that it had not been demonstrated that proceedings before the administrative courts constituted an effective remedy in the case circumstances. The ECtHR observed that the LCC does not provide for any possibility to lodge an individual complaint in cases that do not fall within the remit of other courts and in respect of which no other remedies are available. [98]

Therefore, it is proposed to consider amendments to the regulation of the LCC, which would provide exceptions to the rule of exhaustion of all legal remedies, or to have the Constitutional Court elaborate on (or even adjust) the constitutional doctrine on the matter.

3.3.3 The time limit for filing an individual constitutional complaint

This condition fulfils an important function by providing certainty in legal relationships. Contrary to applications from other entities, constitutional complaints from natural and legal persons can only be lodged for a limited period. Venice Commission recommends that the

94 See Decision no KT63-A-S49/2019 Regarding the Return of the Request no 1A-41/2019 (Constitutional Court of the Republic of Lithuania, 11 December 2019) <https://lrkt.lt/lt/teismo-aktai/paieska/135/ta2009/content> accessed 20 September 2023.

95 Constitutional Court of the Republic of Lithuania (n 10).

96 Pūraitė-Andrikienė (n 5) 61.

97 *Ancient Baltic religious association "Romuva" v Lithuania* App no 48329/19 (ECtHR, 8 June 2021) <https://hudoc.echr.coe.int/?i=001-210282> accessed 20 September 2023.

98 For more on this case and individual constitutional complaints in Lithuania as an effective remedy to be exhausted before applying to the ECtHR, see Pūraitė-Andrikienė (n 9).

time limits for filing a complaint be reasonable and allow the person to prepare the complaint. In this respect, several CEE states have introduced relatively short respective time limits: in Croatia, a constitutional complaint may be submitted within 30 days from the day the final decision was received;[99] in the Czech Republic[100] and Slovenia[101] — within 60 days of the delivery of the final decision, and in Slovakia within two months from the final decision.[102] However, Poland (three months from the adoption of the final decision)[103] and Latvia (six months from the final decision) [104] opted for longer time limits.

The LCC sets a four-month time limit for filing a constitutional complaint, starting from the final decision of the last instance after hearing the case was adopted.[105] As it is clear from the *travaux preparatoires* of the Law Amending Articles 106 and 107 of the Constitution, the consolidation, at the constitutional level, of this condition for implementing the right to file a constitutional complaint was a matter for certain debate.[106] Nevertheless, such a proposal was not accepted. It is worth pointing out that none of the CEE states has established a time limit for filing a constitutional complaint in their constitutions. Such tendencies indicate that the choice of a specific time limit is not an essential condition defining the model of constitutional complaints; therefore, time limits are a matter of ordinary procedural law rather than constitutional regulation. This does not undermine the importance of the time limit for filing an individual constitutional complaint.

The four-month time limit chosen for filing a constitutional complaint is in line with the trends in neighbouring countries and the recommendations of the Venice Commission. Establishing a time limit for filing an individual constitutional complaint to the Constitutional Court ensures that, after the expiry of this term, the parties can be sure of the stability of the legal relations approved by a court decision that has entered into force. This condition helps to prevent situations in which one of the parties to the case applies to the Constitutional Court five or even ten years after the final court decision, and if the Constitutional Court recognises that the legal act is unconstitutional, it would be possible to request a reopening of proceedings in such a long-closed case.[107] Lithuania has also implemented the recommendation of the Venice Commission that the Constitutional Court should be able to extend the time limit in cases where applicants have missed it due to reasons unrelated to their fault.[108]

3.4 WHAT ARE THE LEGAL EFFECTS OF DECLARING AN INDIVIDUAL CONSTITUTIONAL COMPLAINT REASONABLE?

It is evident that, in centralised constitutional review systems (including Lithuania), where powers of the annulment of the act or its removal from the legal system are concentrated in the hands of the specialised constitutional court, the decisions of these institutions have universal legal force (*erga omnes* effect). In all CEE states (including Lithuania), the decisions of constitutional courts on the constitutionality of legal acts are final, i.e. they can be overturned

99 Constitutional Act on the Constitutional Court of the Republic of Croatia (n 61) art 64.

100 Constitutional Court Act of the Czech Republic (n 62) art 72.

101 Constitutional Court Act of the Republic of Slovenia (n 60) art 52.

102 Law of the Slovak Republic no 38/1993 (n 64) art 53.

103 Art. 46(1) of the Constitutional Tribunal Act of 22 July 2016 [2016] ITEM 1157.

104 Law of the Republic of Lithuania no I-67 (n 67) art 19(2).

105 Constitution (n 1) art 65 (2(3)).

106 Main Committee Conclusion no 102-P-36 'On the Draft Law to Amend Articles 106 and 107 of the Constitution of the Republic of Lithuania (XIIIP-2159)' of 19 September 2018 <https://e-seimas.lrs.lt/portal/legalAct/lt/TAK/c5912070bbfe11e8aa33fe8f0fea665f?jfwid=-q4aj6ep1u> accessed 20 September 2023.

107 Danelienė (n 7) 432.

108 For more on this see: Pūraitė-Andrikienė (n 5) 165-70.

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only by constitutional amendments. In systems where the decisions of constitutional courts have *erga omnes* effects, there are also different solutions as to when the decisions of the constitutional justice institution become effective. Traditionally, the validity of judicial decisions is divided into three groups in terms of time: *ex tunc*,[109] *ex nunc*,[110] and *pro futuro*.[111] Scientific discussion on the legal effects of decisions delivered by constitutional justice institutions builds on the theories of invalidity and challengeability, which differ in their interpretation of the very concept of unconstitutionality.[112] It should be noted that, generally, none of these theories is implemented in practice in its pure form.[113]

Lithuania has the *ex nunc* constitutional review model: Article 107 of the Constitution stipulates that a legal act may not be applied from the date of the official publication of the decision of the Constitutional Court that the act in question conflicts with the Constitution. In Lithuania, the legal force of the decisions of the Constitutional Court is prospective. However, in its ruling of 30 December 2003, the Constitutional Court held that the general rule laid down in the Constitution, that the force of the decisions of the Constitutional Court is prospective, not absolute.[114] Furthermore, in the decision of 19 December 2012, it was also held that there may be constitutionally justified exceptions to the general rule that the force of the decisions of the Constitutional Court is prospective, i.e. under the Constitution, in exceptional cases, the force of the decisions of the Constitutional Court may be targeted at the consequences of the application of a legal act declared conflicts with the Constitution where such consequences had arisen before the Constitutional Court adopted the decision that this legal act (part thereof) is in conflict with the Constitution.[115] Currently, the jurisprudence of the Constitutional Court identifies four such exceptions (three of them are defined in the above-mentioned decision of 19 December 2012, and one more is singled out in the ruling of 19 June 2018[116]). Thus, the Lithuanian constitutional justice model also contains certain elements of the *ex tunc*[117] model, which have been developed in the jurisprudence of the Constitutional Court; there is no *expressis verbis* mention of them in the Constitution.[118] The same applies to *pro futuro* elements. Taking into account the specific circumstances of a particular case, the Constitutional Court may set a later date for the publication of its ruling by which a certain legal act (part thereof) is declared to be in conflict with the Constitution or laws (Article 84(3) of the LCC). Such powers of the Constitutional Court likewise evolved through jurisprudential means and were only subsequently laid down in the LCC. [119]

However, by the constitutional amendments of 2019, Article 107 of the Constitution was sup-

109 "From the outset": refers to the retroactive effect of law.

110 "From now on": signifies the validity of law from the moment of its adoption.

111 "Into the future": means the validity of law from a certain point in the future.

112 Viktorija Staugaitytė, 'Lietuvos Respublikos Konstitucinio Teismo nutarimų teisinė galia laiko požiūriu' (2005) 77(69) Jurisprudencija 66.

113 For more on this see: Dovilė Pūraitė-Andrikienė, 'Konstitucinio Teismo nutarimų padariniai laiko aspektu' (2019) 112 Teisė 70, doi:10.15388/Teise.2019.112.4.

114 Case no 40/03 (Constitutional Court of the Republic of Lithuania, 30 December 2003) [2003] Lietuvos žinios 124-5643.

115 Case no 43/2009 (Constitutional Court of the Republic of Lithuania, 19 December 2012) [2012] Lietuvos žinios 152-7779.

116 Decision no KT14-N9/2018 in case no 8/2018 (Constitutional Court of the Republic of Lithuania, 19 June 2018) [2018] TAR 10101.

117 Decision no KT74-N7/2021 in case no 13/2020 (Constitutional Court of the Republic of Lithuania, 19 May 2021) [2021] TAR 11041. By the ruling of the Constitutional Court of 19 May 2021 for the first time, all the consequences of the application of the unconstitutional legal regulation have been declared anti-constitutional. It was stated that the consequences that arose on the basis of the impugned unconstitutional legal regulation before the date of the official publication of this ruling of the Constitutional Court must not be regarded as lawful.

118 For more on this, see Pūraitė-Andrikienė (n 113) 70-90.

119 ibid.

plemented with the paragraph providing that, in the case heard subsequent to an application by a person referred to in the fourth paragraph of Article 106 of the Constitution, the decision of the Constitutional Court that a law or another act of the Seimas, an act of the President of the Republic or an act of the Government conflicts with the Constitution constitutes a basis for renewing, according to the procedure established by law, the proceedings regarding the implementation of the violated constitutional rights or freedoms of the person. Thus, the Constitution provides for the *ex tunc* effect of the rulings of the Constitutional Court adopted in cases initiated by the constitutional complaints.[120]

Consequently, the fifth exception to the general rule is that the force of the decisions of the Constitutional Court is prospective developed not through jurisprudential means but through legislative means by enacting the said constitutional amendments consolidating the institution of individual constitutional complaints.

Most CEE states also opted for the *ex nunc* constitutional review model. It is maintained that this conception regarding the validity of decisions in terms of time is more flexible and leaves more freedom to compromise between competing values – legal security and material justice. The model of the *ex nunc* effect of decisions is adopted by, *inter alia*, Albania, Croatia, the Czech Republic, Hungary, Latvia, Moldova, Poland, Romania, Serbia, Slovakia, and Ukraine.[121] Only relatively few countries introduced the model of the *ex tunc* effect of the decisions of constitutional courts. According to the Venice Commission, in CEE states, the *ex tunc* model is more widely applied in Slovenia.[122] However, the retroactivity of the decisions of constitutional courts in these states is mostly applicable with regard to criminal sentences. Among these states, only Slovenia provides for a vast *ex tunc* effect (i.e. with only a few exceptions, which need to be specified by the Constitutional Court).[123]

In summing up, irrespective of which model of the legal effect of decisions is chosen by individual states, the decisions of their constitutional courts may have similar consequences in practice. In states that recognise the doctrine of invalidity, the retroactivity of decisions is limited to ensure the stability of the legal order, legal security, the protection of acquired rights, etc.; meanwhile, in states that follow the concept of challengeability to ensure justice in individual cases, certain exceptions apply to the *ex tunc* rule.[124] Thus, certain exceptions from the dominant model of the legal effect of decisions are common to all states in the region under discussion.

The amendments to the Constitution concerning the consolidation of individual constitutional complaints in Lithuania entered into force only in 2019. Therefore, it is still difficult to predict potentially problematic issues that may occur in the context of the legal effects of rulings adopted in such cases. Nevertheless, in the ruling of 25 November 2019,[125] the Constitutional Court stated that the consolidation of the institute of the individual constitutional complaint is not an end in itself; this institute must be interpreted so as to be an effective tool for the protection of constitutional rights, i.e. taking into account the necessity to review decisions (judgments) based on unconstitutional legislation. In this ruling, the Constitutional Court corrected the previous official constitutional doctrine by stating its duty not to discontinue the case instituted by an individual constitutional complaint when the disputed legal provision lost its force. On this basis, the retroactive effect of the ruling of the Constitutional Court regarding the unconstitutionality of the disputed legislation can be grounded: such a ruling should be applied retroactively to a person who submitted an individual constitutional

120 Pūraitė-Andrikienė (n 9) 14.

121 European Commission for Democracy Through Law (n 6).

122 ibid.

123 ibid.

124 Staugaitytė (n 112) 69.

125 Decision no KT52-N14/2019 (n 57).

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complaint to restore his/her constitutional rights.

However, the question that is inevitably arising is whether it will be allowed to reopen proceedings regarding the violated constitutional rights exclusively to those who have applied to the Constitutional Court raising objections to the application of an anti-constitutional legal act with respect to them. These questions will likely be answered in the upcoming jurisprudence of the Constitutional Court. In the context of the institute of reopening the proceedings, the Court has recently adopted a significant ruling, which, *inter alia*, stated that when the Constitutional Court decides, in a case initiated on the basis of an individual constitutional complaint, that the legal act on the basis of which the decision that was the subject of the proceedings in the case sought to be reopened was taken is unconstitutional, the application for reopening of the proceedings could be made without the assistance of a lawyer.[126]

In 2019-2022, the Court adopted 13 rulings[127] in cases initiated by individual constitutional complaints, in six of which the Constitutional Court ruled legal acts unconstitutional. Therefore, the introduction of this mechanism has been a significant step in strengthening the protection of human rights in Lithuania. The fact that some of these rulings declare legal acts unconstitutional shows that this instrument can be used to protect the constitutional rights of natural and legal persons and, at the same time, to remove from the legal system the provisions of unconstitutional legal acts. The instrument of constitutional complaints also opens up more perspectives for the interpretation of the Constitution, contributes to the development of official constitutional doctrine, and allows for the discovery of new elements in the content of constitutional rights or freedoms.

4 CONCLUSIONS

After the amendments to the Constitution concerning the consolidation of individual constitutional complaints entered into force in 2019, Lithuania can no longer be categorised among the states with a limited scope of entities entitled to apply to the Constitutional Court. The institution of individual constitutional complaints is established in most states of the European Union, as well as in nearly the whole CEE region. These tendencies may determine that the widespread establishment of the mechanism of individual constitutional complaints can be identified in future legal thought as one more particular stage in the evolution of constitutionalism. Given that the essential idea of constitutionalism is the limitation of power to protect human rights and freedoms, the consolidation of the institution of individual constitutional

126 Decision no KT20-A-N1/2022 in case no 16-A/2020 (Constitutional Court of the Republic of Lithuania, 10 February 2022) [2022] TAR 2427.

127 Decision no KT49-A-N5/2020 in case no 14-A/2019 (Constitutional Court of the Republic of Lithuania, 18 March 2020) [2020] TAR 5659; Decision no KT166-A-N14/2020 in case no 4-A/2020 (Constitutional Court of the Republic of Lithuania, 11 September 2020) [2020] TAR 19129; Decision no KT36-A-N2/2021 in case no 2-A/2020-3-A/2020 (Constitutional Court of the Republic of Lithuania, 4 March 2021) [2021] TAR 4528; Decision no KT45-A-H3/2021 in case no 10-A/2020 (Constitutional Court of the Republic of Lithuania, 19 March 2021) [2021] TAR 5546; Decision no KT58-A-N4/2021 in case no 11-A/2020 (Constitutional Court of the Republic of Lithuania, 14 April 2021) [2021] TAR 7723; Decision no KT129-A-N10/2021 in case no 15-A/2020 (Constitutional Court of the Republic of Lithuania, 16 June 2021) [2021] TAR 16058; Decision no KT158-A-N12/2021 in case no 2-A/2021 (Constitutional Court of the Republic of Lithuania, 28 September 2021) [2021] TAR 20273; Decision no KT177-A-N14/2021 in case no 18-A/2020 (Constitutional Court of the Republic of Lithuania, 9 November 2021) [2021] TAR 23240; Decision no KT201-A-N15/2021 in case no 13-A/2021 (Constitutional Court of the Republic of Lithuania, 22 December 2021) [2021] TAR 26640; Decision no KT205-A-N16/2021 in case no 7-A/2021-16-A/2021-17-A/2021-18-A/2021 (Constitutional Court of the Republic of Lithuania, 30 December 2021) [2021] TAR 27683; Decision no KT20-A-N1/2022 (n 126); Decision no KT50-A-H4/2022 in case no 5-A/2021 (Constitutional Court of the Republic of Lithuania, 27 April 2022) [2022] TAR 8605; Decision no KT116-A-N10/2022 in case no 19-A/2021 (Constitutional Court of the Republic of Lithuania, 22 September 2022) [2022] TAR 19372.

complaints in Lithuania is undoubtedly a necessary step.

Lithuania, as well as a certain part of other CEE states, has established the model of normative constitutional complaints: a person may file a constitutional complaint concerning laws and other acts adopted by the Seimas and legal acts of the executive but not concerning decisions of the courts. Not only natural but also legal persons, as well as not only citizens of Lithuania but also citizens of other states and stateless persons, may apply to the Constitutional Court with a constitutional complaint, and this corresponds to the tendencies existing in other CEE states.

The Lithuanian model of constitutional complaints also embraces three main conditions for applying to the Constitutional Court: the requirement that the rights and freedoms of the applicant have been violated by a legal act that is (possibly) in conflict with the Constitution; the requirement to have exhausted all other legal remedies; and the four-month time limit for filing a constitutional complaint from the adoption of the final decision at the last instance that decided the case. However, the national model of constitutional complaints does not provide for the exception to the requirement to have exhausted all legal remedies that have proved to be effective in other CEE states. The ECtHR also pointed out this drawback of the Lithuanian constitutional complaint model. Although Lithuania has the *ex nunc* constitutional review model, the 2019 constitutional amendments consolidated the *ex tunc* effect of rulings adopted by the Constitutional Court after examining the individual constitutional complaints. This is not an exclusive feature of the Lithuanian model of constitutional complaints, as certain exceptions from the dominant model of the legal effects of decisions handed down by constitutional courts are common to all states in the CEE region.

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Research Article

POLICE SUPERVISION — THE CASE OF KOSOVO

Fitim Shishani*

ABSTRACT

Background: *The development of social relations in the democratic state of Kosovo necessitates quality regulation by the police. Therefore, the question of developing and implementing the police supervision system in Kosovo is relevant.*

Objectives: *This research aims to explore the principles underlying the monitoring of police officers in Kosovo, to describe the historical development of the Kosovo police and to characterise the prerequisites for the development of police oversight. Furthermore, it aims to draw a comparative analysis between the experiences of Kosovo and the United States in the context of monitoring police performance.*

Methods: *The research uses methods of analysis (to explore the Kosovo police as a law enforcement agency), synthesis (to explore the stages of policy development), comparison (to explore the similarities and differences between the activities), generalisation (to describe the effectiveness of different supervisory institutions), and formal legal analysis (to study the content of the main regulations governing activities).*

Results and Conclusions: *The research has established that in Kosovo, such a body is represented in the context of the Police Inspectorate. The research highlighted the main areas of activity of internal and external oversight mechanisms designed to combat unethical and illegal behaviour of police officers. It examined the main regulations that establish the rights and obligations of Kosovo Police officers and inspectors and proved that the control mechanisms complement each other in the course of police supervision. In addition, the research examined the experience of police oversight in the United States. The research has established that to increase the effectiveness of monitoring police activities, it is necessary to involve public representatives. It was found that the police system consists of an internal and external mechanism that allows for covering various areas of police activity and timely detection of violations in them. Also, within the internal control, there are special departments that are part of the police system. The research findings should be used to prepare reforms and strategies to improve police performance.*

Keywords: *monitoring, inspection, crime, powers, legal responsibility, law enforcement officers.*

1 INTRODUCTION

In a democratic state, society controls its government and the state agencies, including the police. In the Republic of Kosovo, the law enforcement system is an important link, as it affects

the protection of the rights and freedoms of citizens and the development of the country in general. Given its priority role for society, notably, it is worth noting that people have influence the effectiveness of its activities. Thus, the relevance of the issue of police oversight is driven by the need to improve their performance and level of competence. In addition, the quality of police services is influenced by the attitude of citizens towards this body, which is deteriorating due to the spread of negative factors, such as corruption. Accordingly, it is relevant to address this problem by improving the police oversight system.[1]

In Kosovo, the system of police oversight is differentiated, which allows for a broader scope of its influence on the police. Police supervision, in the modern sense, allows for quality interaction between law enforcement officers and citizens and other state bodies and structures.[2] This factor positively impacts the state's development level, ensuring democracy and the protection of fundamental human rights. In addition, police oversight helps to prevent violations that may occur within the law enforcement structure and adversely affect its image.[3] Thus, the development of supervisory bodies is a response to current societal challenges that hamper the work of the police and deform its system. The development of this institution should coincide with the organisation of police reforms in society to identify problems promptly and develop recommendations for overcoming them.[4]

Researchers approach this topic from different angles, allowing them to identify the specifics of police supervision and the circumstances that may affect its effectiveness. In particular, R. Maliqi, E. Maloku[5] and M. Wasco[6] have analysed the main purpose of police supervision, defining it as ensuring the responsibility of law enforcement officials for failure to perform their duties and violation of the rights of others. In turn, I. Mugari[7] and F. L. R. Coenders[8] drew attention to the features of the structure of police supervision. They found that it should be based on the principles of systematicity, which implies high-quality cooperation between different supervisory bodies. A. Shala[9] focused on the appropriateness of involving the public in police oversight. He concluded that the trust and willingness of citizens to interact with the police is essential for the future development of the police and the entire law enforcement system.

1 Roman Shapoval and others, 'Problematic Issues of the Administrative and Legal Status of the Police in the Baltic States (Lithuania, Latvia, Estonia)' (2018) 9(1) Journal of Advanced Research in Law and Economics 295, doi: 10.14505//jarle.v9.1(31).35.

2 Jacques de Maillard and Stephen P Savage, 'Performance Mechanisms Meet Professional Autonomy: Performance Management and Professional Discretion within Police Investigation Departments' (2022) 32(2) Policing and Society 145, doi: 10.1080/10439463.2021.1888949; Ganiy M Karasayev and others, 'History of European Union — Kazakhstan Relations (1991–2001)' (2023) 68 Cuadernos Europeos de Deusto 183, doi: 10.18543/ced.2702.

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Based on the above, the research aimed to explore Kosovo's experience in implementing and developing the police oversight system. In addition, the research has several objectives: to describe the historical development of the Kosovo police; to characterise the prerequisites for the development of police oversight; to review the regulations designed to control the activities of police officers; to identify the main mechanisms of police oversight in Kosovo; to compare the experience of Kosovo and the United States in the context of monitoring police performance.

2 MATERIALS AND METHODS

In this research, the method of analysis was used to explore the Kosovo police as a law enforcement agency and individual supervisory institutions. It served as a means to identify the main vectors and tools of police activity in Kosovo. In addition, this method facilitated an in-depth analysis of the essence of the police oversight system, the preconditions for its emergence and the principles of its implementation. Thus, the analysis was instrumental in revealing the interconnectedness between the activities of law enforcement agencies, in particular, the police and oversight bodies. Concurrently, the research used the synthesis method to explore the stages of policy development in Kosovo and the potential violations that police officers may commit.

The method of comparison was used in the research to explore the similarities and differences between the activities of different bodies in monitoring police activities. It served as a tool to identify the specifics of both internal and external police oversight bodies. In addition, the comparison was necessary to express statistical data on the activities of different institutions to improve the police in general. The method of comparison was crucial in exploring the similarities and differences in the experiences of Kosovo and the United States. It was used to compare the main approaches and peculiarities of implementing police control in these two countries.

The issues covered in this research are legal; therefore, the formal legal method was used. This approach was necessary for an effective study of the main regulations governing the activities of the police and police oversight institutions in Kosovo. Based on this method, the research examines the provisions in several documents, including the Constitution of the Republic of Kosovo,[10] Law of the Republic of Kosovo No. 04/L-076 'On Police',[11] The European Code of Police Ethics,[12] the Amending UNMIK Regulation No. 2000/64, as Amended, on Assignment of International Judges/Prosecutors and/or Change of Venue,[13] and the Law of the Republic of Kosovo No. 03/L-231 'On Police Inspectorate of Kosovo'.[14]

The research uses the method of deduction to explore the concept of 'police supervision' based on a general understanding of police powers and their limits. Thus, based on the

10 Constitution of the Republic of Kosovo no K-09042008 of 15 June 2008 <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702> accessed 15 June 2023.

11 Law of the Republic of Kosovo no 04/L-076 'On Police' of 2 March 2012 <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2806> accessed 15 June 2023.

12 Council of Europe Committee of Ministers, *The European Code of Police Ethics: Recommendation Rec(2001)10* (Council of Europe Pub 2002) <https://polis.osce.org/european-code-police-ethics> accessed 15 June 2023.

13 Regulation UNMIK no 2004/54 'Amending Regulation UNMIK no 2000/64, as Amended, on Assignment of International Judges/Prosecutors and/or Change of Venue' of 15 December 2004 <https://unmik.unmissions.org/sites/default/files/regulations/02english/E2004regs/RE2004_54.pdf> accessed 15 June 2023.

14 Law of the Republic of Kosovo no 03/L-231 'On Police Inspectorate of Kosovo' of 14 October 2010 <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2720&langid=2> accessed 16 June 2023.

knowledge of the activities, rights and obligations of police representatives, the research highlights the value of police oversight and its role in modern society. The method of generalisation was used to describe the effectiveness of different supervisory institutions in Kosovo. This method was necessary to identify the main activities of police oversight representatives, including civilians.

3 RESULTS

Studying the history of the Kosovo police provides an opportunity to analyse the fundamental principles on which it was established and continued to exist. It is further complemented by a comparison with the experience of the United States. Thus, it should be established that the police in Kosovo is a state body whose activities are designed to protect the population from unlawful encroachment on their interests, protect public order and maintain the state system. The spread of democracy in society and the increase in the level of protection of the rights of its population, which is one of the main responsibilities of this body, had a significant impact on the development of the police.[15]

Thus, the Police of the Republic of Kosovo belongs to the Ministry of Internal Affairs (MoIA) and, accordingly, monitors the observance of the principles of law and responsibility in society. Kosovo Police Service was established on 6 September 1999, in conjunction with the opening of a police school by the Organisation for Security and Cooperation in Europe.[16] According to the United Nations Resolution 1244, the professional training of candidates for the Kosovo Police was launched.[17] The newly established service was distinguished by high service and professionalism, which was monitored to a greater extent by the International Police. As a result, this body comprises 9079 staff, of whom 8113 are police officers and 966 are civilians. In terms of gender differentiation, 85.04 per cent of police officers are men, and 14.96 per cent are women. Regarding ethnicity, 84.82 per cent are Albanian, and 15.18 per cent are of other nationalities.[18]

The primary focus of the Kosovo Police is to protect the lives and property of the public and to ensure peace in society. In addition, their functions are designed to identify lawbreakers among police officers and punish them appropriately. The main values of the Kosovo Police are the implementation of professional impartiality, responsibility and accountability, which is necessary for the effective development of the state in the future. As for the organisation of the activities, distribution of powers and functions of this body, these processes are regulated by the Constitution of the Republic of Kosovo,[19] as well as Law of the Republic of Kosovo No. 04/L-076 'On Police'.[20] These regulations establish the principles of police oversight and the responsibilities of police officers at both the central and local levels. The local level comprises regional police departments, which focus their activities on individual regions,

15 Vasyl Ya Tacij, Volodymyr I Tjutjugin and Jurij V Grodeckij, 'Conceptual Model Establish Responsibility for Offense in the Legislation of Ukraine (draft)' (2014) 3 Criminology Journal of Baikal National University of Economics and Law 166.

16 Organization for Security and Co-operation in Europe, O*SCE Mission in Kosovo and Kosovo Academy for Public Safety* (OSCE 2020) <https://www.osce.org/mission-in-kosovo/474018> accessed 16 June 2023.

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18 European Commision Staff Working Document SWD(2022) 334 final 'Kosovo* 2022 Report' of 12 October 2022, 8 <https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-10/Kosovo%20Report%202022.pdf> accessed 16 June 2023.

19 Constitution no K-09042008 (n 10).

20 Law no 04/L-076 (n 11).

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which in turn are established by municipalities. The central level is headed by the General Directorate of Police, which covers the activities of all police stations within the Republic of Kosovo. It consists of various departments: Operations, Investigations, Borders, Support Services, and Human Resources.

According to the aforementioned Law of the Republic of Kosovo No. 04/L-076 'On Police', in addition to general tasks related to the protection of society, the Kosovo Police is entrusted with the responsibility of preventing and timely detecting criminal offences. This vector of activity covers the process of identifying perpetrators, investigating evidence, motives, etc. Article 11 of Law of the Republic of Kosovo No. 04/L-076 'On Police' establishes the powers of the Kosovo Police, including the right to conduct reasonable monitoring of people and property within their jurisdiction; the ability to issue and implement lawful orders to citizens; patrol the borders; analyse cross-border traffic; and conduct inspections of persons and their belongings.[21]

It is crucial to mention that the police in Kosovo are empowered to use restrictive measures. This approach is necessary for the smooth and effective implementation of police duties. Based on special peremptory powers, including using force, police officers can temporarily restrict the will of individuals, stop them, conduct interrogations and searches, seize property, and take fingerprints. In extreme circumstances that may pose a threat to their lives, the health of others or national security, authorised officers may use lethal force. However, notably, the disclosed rights are not absolute, as they arise only under certain conditions (danger). Thus, the listed powers can be exercised only based on legal grounds. Otherwise, such actions should be qualified as an abuse of power or authority, violating human rights and freedoms.

To ensure that police officers properly perform their rights and duties, Kosovo has an institution of police supervision. It is divided into two types, namely internal and external. The internal type involves the establishment of internal control mechanisms within the police institution that monitor its various departments. External oversight refers to independent monitoring mechanisms outside the police structure. The rationale for such oversight is that it allows for a fair assessment of the institution in terms of accountability, democracy, transparency and the friendliness of its staff. As a result, the level of competence of police officers is enhanced.

The functions of the internal control mechanisms are to organise disciplinary investigations against the Kosovo Police, which is subordinated to the Division of Professional Standards (DPS). In turn, the DPS is organised into three units: Internal Investigations and Data Verification Unit, Inspection Unit, and Integrity Unit. The first one is responsible for reviewing disciplinary cases opened against police officers and deciding to bring them to justice. The Inspection Division oversees the legality of police decisions and their implementation. A distinctive feature of the Integrity Division is that it does not deal with issues with signs of criminal offences but focuses on preventing cases that could worsen the image of the police in society.[22]

To analyse the effectiveness of internal oversight mechanisms, it is advisable to explore statistical data on their activities. Accordingly, in 2022, the DSP reviewed 1792 disciplinary cases, resulting in 986 cases in the reporting year and 803 cases transferred from previous years. In addition, 921 cases were closed, of which 306 were status cases, 589 were unfounded/unreasonable, 3 were locally recommended, and 34 were discontinued. In turn, the Disciplinary Committee (IDC) reviewed 1217 cases, resulting in 29 cases of termination of employment, 4 cases of demotion, 192 cases of withholding of salary, 79 written comments, 21 oral comments, 31 cases of exoneration from charges, 26 cases of suspension of investigation, and 874 cases of unfounded/unreasonable. As for the activities of the Appeals

21 ibid.

22 Stephen Rushin and Roger Michalski, 'Police Funding' (2020) 72(2) Florida Law Review 277.

Commission, in 2022, it received 473 appeals, of which 307 appeals were rejected, 66 were satisfied, 57 were partially satisfied, and 43 cases were returned for further investigation, review and re-decision.[23]

As for statistical data on citizens' trust in law enforcement agencies. About 65% of citizens express trust in the activities of the Kosovo Police, while 76% trust the Kosovo Police Inspectorate.[24] This testifies to the success of the second activity, namely, ensuring control and consideration of complaints regarding the illegal activities of police officers. At the same time, it should be emphasised that the task of the Kosovo Police Inspectorate is precisely to increase the indicators of citizens' trust in the activities of the Kosovo Police.

It is also worth paying attention to information about the most common cases reported by police units. In particular, in 2022, the Kosovo police recorded 49,183 cases of violations. Among them, 29,857 were criminal offences and 19,326 were minor offences and cases of a different nature. Comparing these data with the results of 2022, it can be established that they decreased by 1.92% (in particular, the number of criminal offences by 0.83%, as well as petty and other offences by 3.56%).[25] It is worth noting that such results were achieved thanks to the cooperation of the Kosovo police with the population and all local institutions. This proves that the level of citizens' trust in this body plays an important role in the implementation of its functions, namely, ensuring law and order and investigating cases.

Particular attention should be devoted to the organisation of internal audits and inspections, which are essential components of the police oversight mechanism. In 2022, the Police Audit Service conducted 23 regular and 5 extraordinary audits, which resulted in 73 recommendations. [26] The nature of the audits covered various types of police activities, such as finance and asset management and administrative procedures for police officers.

The provision of police oversight is an essential element in Kosovo's law enforcement system. In addition, this approach is envisaged by the provisions of The European Code of Police Ethics.[27] According to this regulation, the police are accountable to the state, citizens and their representatives and, therefore, are subject to external control. The Kosovo Police Inspectorate (KPI) oversees this type of oversight in Kosovo. The latter was established in July 2006, according to the UNMIK Administrative Order No. 2006/9. The legislative framework governing the activities of the PIC was expanded with the adoption of the Law of the Republic of Kosovo No. 03/L-231, 'On Police Inspectorate of Kosovo'.[28] As a result, the KPI was empowered to conduct criminal investigations against police officers. According to the above regulations, the main purpose of the KPI is to assist the Kosovo Police in implementing its legitimate mission by the law and international standards. Notably, the KPI's legal status is an executive oversight institution that does not fall under the competence of the police but is part of the MoIA. It is subordinated to the Minister of the Interior and is supervised by the Chief Executive Officer of the KPI.

As for the structure of the KPI, it consists of the following departments: Complaints, Investigation, Inspection, Finance and General Services, Planning, Liaison, Legal and Information. The main activity of this mechanism is the investigation and inspection of the Kosovo Police. In the exercise of their functions, inspectors take measures to prevent, detect and document crimes committed by police officers. Notably, the KPI is a general supervisory body that investigates all police officers regardless of their rank, position or duties. Figure 1

23 European Commision Staff Working Document SWD(2022) 334 final (n 18) 21-2.

24 ibid 16.

25 ibid 47.

26 ibid.

27 Council of Europe Committee of Ministers (n 12).

28 Law no 03/L-231 (n 14).

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presents statistical data on the number of complaints and investigative actions taken by the KPI for 2013-2022.[29]

Analysing the data in the table, notably, a large number of complaints received by the KPI were not registered but were forwarded to the Kosovo Police due to the absence of signs of crimes that fall within the competence of the former. This underscores another area of the KPI's activity, which involves receiving and reviewing all citizen complaints and forwarding them to the relevant authorities. In addition to this, the main pillar of the KPI is conducting inspections, during which authorised persons assess the activities of the Kosovo Police for compliance with applicable laws and standards. Based on the results of the inspections, the inspectors provide recommendations for solving existing problems and improving the work of the police. They are documented in the form of an inspection report. To ensure their proper implementation, the Minister of Internal Affairs and the Director General of the Police meet twice a year and develop plans to implement the necessary measures.

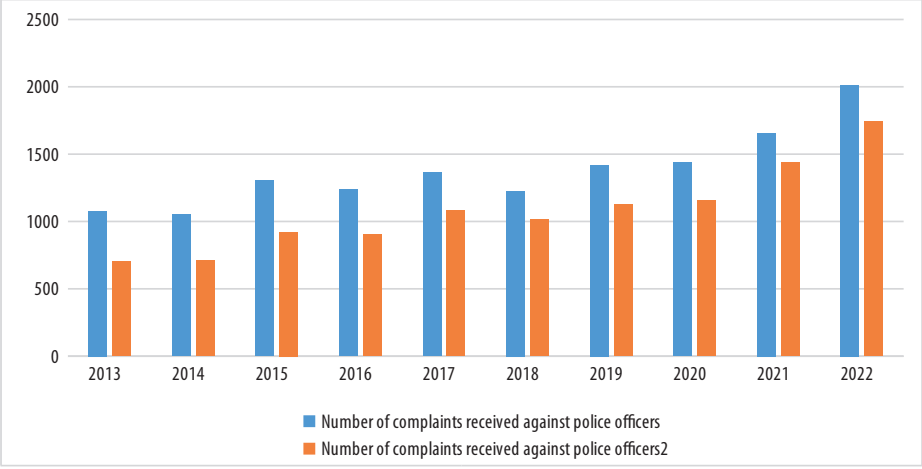

Figure 1. *The number of complaints received by the KPI from 2013 to 2022*

Considering the experience of Kosovo, it is advisable to devote attention to the United States and the reform of the police supervision system there. Notably, the Texas Rangers were the first to be established in the United States, representing the law enforcement system. In the 19th century, they were entrusted with protecting the state and constitutional order. Subsequently, they evolved into paramilitary units whose activities were related to the protection of the US-Mexico border. As a result, they have been involved in military conflicts and, as a result, have acquired the right to conduct law enforcement and border management activities.[30]

In the 1900s, they evolved into a criminal investigative agency, which is still in operation today and remains one of the most common. Describing the historical development of the police and law enforcement system in the United States, notably in the early 20th century, the following institutions operated in the country: police organisations in districts, sheriffs and departments in counties, state police departments, and police associations of the federal government. In addition, the latter included the US Department of Justice, the Post Office, the Treasury, and the Departments of the Interior and Defence.[31]

29 European Commision Staff Working Document SWD(2022) 334 final (n 18).

30 John McDaniel, 'Police Accountability in the United States: A View from the UK' (2021) 15 (3) Journal of Policy and Practice 1684, doi: doi.org/10.1093/police/paab026.

31 Mir Usman Ali and Sean Nicholson-Crotty, 'Examining the Accountability-Performance Link: The

It was in 1845 that the first police department was established in New York City. Since then, the law enforcement system has undergone reforms and currently consists of two levels — federal and local. The first one is designed to analyse, detect and eliminate crime in all states of America. Its activities are designed to investigate offences that pose a threat to the interests of the state. The local level deals with detecting and investigating specific crimes within individual states or concerning public order. It is at the local level that the basic police force operates, with more than 17500 departments, each with between 20 and 10000 officers. This system includes the following departments: traffic police, patrol police, criminal investigation, protection of senior state officials and sensitive facilities, and information and forensics.[32]

In addition, the United States has a sheriff's service consisting of more than 4000 offices. This position is elected, and the term of office is from 2 to 4 years.[33] A distinctive feature of this service is the absence of divisions and ranks, as it has only the position of sheriff and deputy. Its activities are designed to regulate law and order in a particular locality and to patrol highways, administrative administration, and bailiffs.

As for federal law enforcement agencies, their activities are designed to investigate federal crimes. They include the following services: Federal Bureau of Investigation, Drug Enforcement Administration, Federal Marshals and others. Thus, the organisation of the US law enforcement system is specific. Still, despite the differences in the powers of individual agencies (depending on their level), they actively interact with each other to protect the interests of citizens and the country in general.

However, one of the main problems that existed in the law enforcement system of America throughout its historical development was corruption, which had an adverse impact both on the functioning of internal mechanisms and on the attitude of citizens towards this institution in general. As a result, civil society organisations and activists began to call on government agencies to develop special tools for public oversight of the police. Such actions provoked large-scale audits of the law enforcement system. In particular, in 1972, a commission was established to explore the effectiveness of the New York City police, which resulted in a report describing corruption and abuse of power.[34] After that, the Commission made recommendations to the US Department of Justice and the US Attorney General's Office, which became the fundamental principles of nationwide police reform.

In this way, the personal responsibility of the management for their subordinate employees was introduced. Internal security departments were established in each district, which allowed for the strengthening and personalisation of the responsibility of authorised persons and a timely response to abuses of power by police officers. It established a mechanism of internal police supervision, which included personally invited officers. To prevent the development of corruption, an algorithm for their activities was defined, according to which, after three years of work in the department, police officers were transferred to regular precincts, and new employees were invited to fill the vacant positions. In addition, notably, there are units of "undercover officers" who can conduct special operations and regular raids in police stations.[35]

As for the external mechanism of police oversight, it is based on the involvement of society in regulating public order. Accordingly, a system of units was developed that included

Case of Citizen Oversight of Police' (2021) 44(3) Public Performance & Management Review 523, doi: 10.1080/15309576.2020.1806086.

32 ibid.

33 ibid.

34 ibid.

35 Zamira Sinaj and Alba Robert Dumi, 'Evaluation, a Challenge for Successful Management, Performance and Motivation of the Public Administration Empirical Analysis in Front of Theory-Cal Analysis' (2015) 6(1) Mediterranean Journal of Social Sciences 261, doi: 10.5901/mjss.2015.v6n1p261.

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residents who actively interacted with police officers. They helped both investigate offences and supervised the performance of authorised officers. If civilian informants detect violations committed by law enforcement officers, they are required to report them to the police leadership. Thus, the United States has developed a system of civilian control over the police that monitors all police activities and their quality.

Thus, the United States has a special system for evaluating police performance, which consists of a police commission (composed of 9 city residents appointed by the mayor in consultation with the city council) and an independent police oversight body (investigates complaints about police misconduct).[36] As for the indicators used to assess law enforcement agencies, they include the dynamism of crime reduction, the number of arrests, the ratio of registered to solved offences, and the efficiency of call response.

In addition, the United States actively uses alternative sources of information to monitor the work of police officers. In particular, public opinion polls, surveys of people who have had contact with the police; surveys of police officers, direct observation (analysis by specially trained subjects of specific types of police activities and their results) and simulation methods (for example, a previously trained person reporting a crime).[37] Thus, at the moment, the United States has developed and is operating a theoretical framework and practical institutions designed to oversee police activities.

Based on the above, it can be concluded that police oversight in Kosovo and the United States has common features, as they are both divided into internal and external. In addition, they have the same purposes: to increase the effectiveness of the law enforcement system and ensure appropriate protection of the public. In addition, they share the results of the reforms that have been implemented, which have led to an increase in the professional competence of police personnel and the level of public trust in law enforcement agencies.

In addition, attention should be paid to the experience of Great Britain where the Independent Office of Police Conduct (IOPC) has the status of a police complaints body. As such, it aims to organise and provide a system for making police complaints in England and Wales. The activity of this body is aimed at investigating the most complex and high-profile cases. For example, regarding the cases of death of a person after their appeal to the police or arrest. Accordingly, in addition to the specified type of activity, the Independent Office of Police Conduct is engaged in the development of standards according to which the police of Great Britain should consider complaints and statements from citizens. IOPC and KPI share the principles on which they exercise their powers. In particular, they are independent and aimed at increasing citizens' trust in the police. To do this, they use similar resources and tools, namely knowledge and recommendations acquired in the process of considering and solving complex cases. Both bodies aim to promote high standards of professionalism and accountability in policing. Accordingly, their activities concern not only the improvement of the police but also work with the public and its attitude to law enforcement agencies.

As for France, there is the General Inspectorate of the National Police (IGPN). This body has the status of a service with national jurisdiction, the activity of which is aimed at ensuring the control of all active services and educational units of the national police. Separately, it should be emphasised that their powers cover the headquarters of the Paris police and the municipal police. It is similar to KPI activities in that it provides the implementation of not only an audit, but also an advisory role. In this way, control is ensured, which provokes

36 Olena Lutsenko, 'Bringing Civil Servants to Liability for Disciplinary Misconduct in Judicial Practice of Ukraine, Poland, Bulgaria and Czech Republic' (2017) 8(1) Journal of Advanced Research in Law and Economics 103, doi: 10.14505/jarle.v8.1(23).12.

37 Ljupčo Sotiroski and Yu Kravtsov, 'Restoration of Ukraine's Foreign Policy Activities in the Context of the Founding of the United Nations' (2023) 33(1) Foreign Affairs 16.

administrative and judicial investigations. Thus, the IGPN has a wider jurisdiction than the KPI. Despite this, their goals and objectives are similar as they are aimed at developing police personnel and their control. This is a sustainable approach in the context of increasing public trust in the work of the police.

4 DISCUSSION

Police supervision in modern society is essential to the law enforcement system. It is explained by the specifics of socio-economic changes and approaches in society that require transparency in the activities of state bodies, including the police. Thus, there are different types of such supervision, which various scholars have explored. In particular, in their works, L. K. K. Ho and others, and K. R. Hope disclosed the essence of 'police surveillance' and its value for society. L. K. K. Ho and others[38] found that the origins of this mechanism are difficult to determine in retrospect, but he indicated that the issue of police oversight has been raised since ancient times. Society was particularly concerned about the possibility of holding police officers accountable for committing crimes and violating citizens' rights. In this regard, the researcher notes that the development of the institution of police supervision was natural and necessary for the state's future development. He found that in this way, society was allowed to influence the activities of law enforcement agencies and, accordingly, to increase their efficiency. In addition, the researcher proposed his definition of police supervision, under which he understands the supervisory activities of a special service designed to timely detect and investigate crimes committed by police officers and monitor their activities for compliance with the provisions of applicable laws. In turn, K. R. Hope[39] noted that the effectiveness of police work directly or indirectly depends on the attitude of citizens. In this regard, he supports the position of public trust and interaction. In his opinion, civilians provide the bulk of the information police officers use in investigating cases. Accordingly, without public trust, it will be impossible for the police to successfully perform their duties. In addition to that, the researcher notes that it is the police who are responsible for the effectiveness of their forces and integrity, which requires the development of additional internal control mechanisms. Both authors exclude the possibility of law enforcement agencies performing police functions without interaction with society. This suggests that public oversight should be ongoing, and identified problems should be addressed. The researchers also drew attention to the significance of the internal control system, which plays an important role in the context of professionalising police personnel. This conclusion has similarities with the results of this research, as it identified two types of police oversight, involving both control of police officers by special independent services and citizens. The approach to expressing the link between the effectiveness of law enforcement agencies and the level of public trust is similar.

K. McLean and others and F. D. Boateng and others analysed the US experience in developing effective institutions for police oversight. According to K. McLean and others[40], the main prerequisites for the emergence of this mechanism were the improper behaviour of law enforcement officials, which was manifested in corruption. This misconduct tarnishes the police's moral reputation and adversely affects their operational effectiveness. Consequently,

38 Lawrence Ka-ki Ho Ho and others, 'Professionalism Versus Democracy? Historical and Institutional Analysis of Police Oversight Mechanisms in three Asian Jurisdictions' (2022) 77 Crime, Law and Social Change 1, doi: 10.1007/s10611-021-09981-y.

39 Kempe Ronald Hope, 'Civilian Oversight for Democratic Policing and its Challenges: Overcoming Obstacles for Improved Police Accountability' (2020) 16(4) Journal of Applied Security Research 423, doi: 10.1080/19361610.2020.1777807.

40 Kyle McLean, Seth W Stoughton and Geoffrey P Alpert, 'Police Uses of Force in the USA: A Wealth of Theories and a Lack of Evidence' (2022) 6(3-4) Cambridge Journal of Evidence-Based Policing 87 doi: 10.1007%2Fs41887-022-00078-7.

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the researchers began to analyse the factors that influenced the development of misconduct among police officers and found a strong link to police culture. In his opinion, it is not uncommon for a colleague to be reluctant to report violations in the work of another officer. It significantly worsens the level of competence of professional staff, as failure to report offences increases the level of crime in the country. F. D. Boateng and others[41] believe that as a result, the level of public dissatisfaction and anxiety increases, resulting in the refusal to interact with law enforcement agencies. Based on this, the researcher concluded that police oversight is an essential element for developing a modern police system in a country. He emphasised that the latter should be based on professionalism, objectivity, impartiality and accountability. This conclusion aligns with this research, proving the priority of developing internal control mechanisms. In addition, the position regarding the impact of police oversight on the law enforcement system, which is characterised by strengthening the rule of law in it, is similar.

J. F. Albrecht, H. Asllani and J. R. Fisher analysed the effectiveness of investigations by the Kosovo Police Inspectorate. In his work, J. F. Albrecht[42] indicated that the concept of investigation should be understood as the process of verifying information relating to a specific offence committed by police officers. Thus, this process involves a set of actions to be taken after receiving a complaint from citizens about an alleged violation by law enforcement officials. An important step is establishing the grounds for satisfying or dismissing the complaint. Based on this, the KPI can independently investigate within its jurisdiction and apply the necessary punishment to the guilty person. J. F. Albrecht drew attention to the legal status of KPI investigators, who, in the course of exercising their powers, are endowed with police rights and can ensure them according to the Constitution of the Republic of Kosovo and other regulations. In this regard, the researcher defines the KPI as 'police for the police'. Accordingly, if a complaint is upheld, an authorised KPI officer drafts an indictment of a crime and sends it to the prosecutor with all the necessary information and evidence. In turn, H. Asllani and J. R. Fisher[43] explored the specifics of filing complaints with the KPI and the subjects of the complaint. He found that both Kosovo citizens and other foreign nationals have this opportunity. Therewith, the researcher indicates that external factors have an adverse impact on potential complainants. These include the complainant's involvement in the offence, doubts about the effectiveness of the KPI, and fear of retaliation from the police. As a result, some crimes may be concealed and, accordingly, not reported to the controlling authorities. It adversely affects the law enforcement system in general and the level of its interaction with society.[44] Thus, the researcher emphasises the need to hold information events for citizens on their possible participation in the oversight of police activities. In his opinion, it is advisable to conduct propaganda to involve civilians in the monitoring institution and improve the work of the police. For this purpose, he suggested developing several successful cases from the country's experience in implementing police oversight measures and presenting them to the public. He believes this will make it easier for citizens to understand the essence of the algorithm for detecting and investigating crimes. As a result, the public will be able to independently monitor the dynamics and effectiveness of complaints against police officers. A comparison of these two papers leads to the conclusion that they describe the same process, namely, submitting a complaint to an authorised body. The results obtained on the algorithm

41 Francis D Boateng, Daniel K Pryce and Ming-Li Hsieh, 'The Criminal Police Officer: Understanding Factors that Predict Police Crime in the United States' (2023) 69(9) Crime & Delinquency 1700, doi: 10.1177/00111287211054732.

42 James F Albrecht, 'Enhancing Law Enforcement and Criminal Justice within Kosovo: Evaluating the Challenges in Rule of Law Reform in a Post-Conflict Developing Democracy' in Garth den Heyer and James F Albrecht (eds), *Police and International Peacekeeping Missions* (Springer 2021) 157.

43 Halil Asllani and John R Fisher, 'The Need for Cultural Awareness Training for Police: A Case Study from Kosovo' (2020) 18(1-2) Competition Forum 198, doi: 10.33423/jbd.v21i3.4429.

44 Andrejus Novikovas and others, 'The Peculiarities of Motivation and Organization of Civil Defence Service in Lithuania and Ukraine' (2017) 7(2) Journal of Security and Sustainability Issues 369, doi: 10.9770/jssi.2017.7.2(16).

of consideration of the application and the specifics of its submission are consistent with the findings of this research. What is common is that the priority of raising public awareness of their possibilities in the context of police oversight is proved.

Based on the above, notably, the institution of police oversight is multidimensional and requires consideration of various factors for its effective development. However, the analysed studies demonstrate that the internal police culture and the public play the main role in supervisory activities. Thus, these elements are fundamental to ensuring the quality monitoring of professional police personnel.

5 CONCLUSION

The research has established that Kosovo has a well-developed police oversight system. Findings show that the system consists of an internal and external mechanism that covers various areas of police activity and timely detection of violations. Within the internal control, there are special departments that are part of the police system. In addition, external supervision is independent and is expressed in the activities of the Kosovo Police Inspectorate. The research establishes that both mechanisms significantly differ in their powers, but their effective operation is possible only in cooperation.

Accordingly, the KPI is an independent institution provided for by a special law and, therefore empowered to investigate criminal offences committed by police officers. Thus, this body has a direct impact on bringing perpetrators to justice. The research has identified the overall impact of the police oversight system on the law enforcement system and therefore found that it increases respect for the rule of law and human rights in Kosovo. Based on this, notably, improving the attitude of Kosovo society towards the police and ensuring quality and transparent investigation of complaints are the main functions of the KPI. The research has demonstrated that these functions have a positive impact on both the public perception and the internal police system, ultimately enhancing the effectiveness of police actions. To maintain transparency and accountability, the KPI regularly reports on its activities. The activities of oversight institutions in Kosovo include inspections, audits, investigations and preventive measures.

In addition, the research examined the US experience in developing a police oversight system. Much like the case in Kosovo, it consists of two mechanisms, the emergence of which was caused by widespread corruption in the police. Currently, the United States has special law enforcement agencies responsible for monitoring the activities of police officers and the law enforcement system in general and has developed public oversight institutions. The latter includes civilians being able to partially exercise police powers and file complaints about crimes committed by police officers.

Therefore, oversight bodies contribute to improving the efficiency of the police and the competence of its representatives. Thus, future research should focus on the perception of police officers themselves regarding the impact of oversight institutions on their work and society in general.

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CASE NOTE

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Case Note

OPTIMISATION OF JUDICIAL GOVERNANCE IN UKRAINE AS A PREREQUISITE FOR THE STABILITY OF ITS COURT SYSTEM AFTER WAR

Oksana Khotynska-Nor*

ABSTRACT

Background: *The conditions of the legal regime of martial law, introduced in Ukraine in response to Russia's full-scale invasion, have ushered in a new legal framework that has reshaped the landscape for all state institutions and Ukrainian society. The judiciary, tasked with responding to new challenges, adapting to new living conditions, and charting a course for its future development, has found itself in a transformative position. The need to optimise the judicial system is becoming increasingly evident in Ukraine. The question arises of how to organise judicial authorities to effectively administer justice for the state, even amidst a severe lack of funds and personnel.*

The article attempts to forecast the prospects of optimisation of the judicial system of Ukraine, considering the national features of its model and the ongoing course of the war. We will focus on the optimisation of the judicial governance bodies responsible for upholding the independence of the judiciary and corresponding to the characteristics of the Judicial Council, whose institutional composition reflects Ukraine's distinct model.

In addition, in the lead-up to the imposition of martial law in Ukraine, the judicial governance bodies found themselves in a state of crisis, leading to dysfunctionality within this institution and demonstrating its vulnerabilities. It is essential to analyse the reasons that led to the negative consequences of the functioning of the judiciary, especially in the context of the war's influence. This analysis is important in constructing legislative rules to prevent crisis phenomena in judicial governance and ensure its stable and continuous functioning.

Methods: *The author employed a range of research methods in this article, including the historical method, analysis methods and synthesis of information. Using actual empirical information facilitated proper argumentation of the author's conclusions.*

Results and Conclusions: *It was concluded that the challenges caused by the war required a transformation of the political system in general and the judicial system in particular. One way is to optimise its judicial governance bodies as a necessary element of ensuring accessible and fair justice. The national model of judicial governance resulted from the introduction of advanced European practices into the national legal system in the organisation and functioning of such a body as the Judicial Council. However, the historical totalitarian past, peculiarities*

of the legal culture, and non-identity of political and social conditions influenced the result. As a result of numerous reforms, a hybrid model of the Judicial Council, which should be identified as dual, is functioning in Ukraine. The national experience of the functioning of judicial governance in crisis conditions demonstrated the vulnerability of such a model. This put the issue of implementing appropriate safeguards and guarantees to ensure stable and uninterrupted work of judicial governance on the agenda. Their discussion is a necessary step in developing scientific discussion about guarantees of judicial independence, an essential aspect of which is the effective functioning of judicial governance.

1 INTRODUCTION

The conditions of the legal regime of martial law, introduced in Ukraine as a result of the full-scale invasion of Russia of our state, determined new rules for the existence of all its institutions and Ukrainian society. The judiciary, which not only responds to new challenges and adapts to new living conditions but also tries to orientate itself regarding its future development, was no exception. Specifically,, the issue of optimising the judicial system will become urgent for Ukraine. This is due to this.

As a rule, 'optimisation' is understood as giving something the optimal, most favourable properties, and ratios; choosing the best (optimal) option from among many possible ones, improving system characteristics. From an economic point of view, optimization means determination of the values of economic indicators, allowing to achievement the optimum, that is, the best status of the system. Most often, the 'optimum' means achieving the best result at the given resource expenditure or achieving the specified result with the minimum resource expenditure.

Therefore, the decision to optimise the judicial system is determined by the combination of the following factors:

a) the real state of functioning of the judicial system (its assessment) and compliance with societal conditions (public demand, political will);

b) effectiveness/inefficiency of the judicial system's operation;

c) resources available to the state (financial, human, material, temporal).

In the conditions of the war and the post-war situation for Ukraine, a natural question that arises is: how to construct the judicial authorities so that the judicial system could stably fulfil the global function of the state, namely justice administration, in the conditions of a total lack of funds and personnel (this is a statement of facts). In other words, how to ensure the effective functioning of the judicial system without harming the continuity and accessibility of justice with minimal costs for the judicial system.

Given the above, the issue of optimisation of the judicial system of Ukraine will be considered from two perspectives:

1) optimisation of the network of courts;

2) optimisation of judicial governance bodies.

Application of such an approach is conditioned by (a) the hierarchical relations where the courts are of paramount importance and (b) the components of the judicial system's budget. In the latter case, we mean that, on average, 70% of the budget allocated to the judicial system goes to salaries, in particular to salaries of the judges.[1] This corresponds to the issue of

1 European Commission for the Efficiency of Justice, European Judicial Systems: CEPEJ Evaluation Report

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guarantees of judicial independence, which is always particularly sensitive.

It should also be considered that war adjusts the important criteria for determining the optimal number and location of courts. In addition to the usual criteria, the processes of large-scale migration, de-occupation of territories, changes in public demand for certain categories of cases, etc., should be considered in the issue of optimising the network of courts. Therefore, we will consider optimisation of the judicial system from this angle in the future.

At the same time, an important place in the system of factors for the stable functioning of the judicial system is given to effective management.

One of the mechanisms of effective management of the judiciary spread in Europe is the functioning of special bodies. Their model (structure), procedure of formation and powers vary depending on the country. At the same time, a commonality among these bodies is the existence of the function of managing various processes and areas of the judicial system. According to *Beers,* they can be defined as 'constitutionally mandated bodies endowed with the legal authority to manage the careers of judges, independent of government influence and oversight'.[2] In general, the central idea of the existence of such bodies is the maximisation of judicial independence, which is central to the concept of the Rule of Law.[3]

In Ukraine, these bodies are called judicial governance bodies, the model of which is characterised by the specificity of the institutional composition. This specificity became one of the reasons for the emergence of the idea of optimising judicial governance bodies, which is essential for Ukraine given the abovementioned reasons. We also believe that the experience gained by judicial governance bodies under martial law in Ukraine is unique and valuable for other European states. In addition, our analysis will be a step forward in developing the scientific discussion about the most effective model of the Judicial Council as a necessary condition for the stable functioning of the independent judiciary in the state. Its results can be used as additional arguments in the dispute about the attractiveness of the idea of centralisation of judiciary management, which fades in case of an imperfect institutional structure, becoming a source of new problems for judges and society.[4]

Therefore, we will predict the prospect of optimising the judicial system of Ukraine, taking into account the national features of the model of its judicial governance and the course of the war.

For this, we will use the methods of analysis and synthesis of information. The historical process will allow us to demonstrate the specificity of the development of the model of judicial governance in Ukraine. Empirical data will make it possible to substantiate relevant conclusions, which, among other things, will be based on the author's observations and many years of experience.

2 EVOLUTION OF THE MODEL OF JUDICIAL GOVERNANCE IN UKRAINE

Historically, a unique model of judicial governance was formed in Ukraine. It provides for the functioning of two independent state bodies — the High Council of Justice (HCJ) and the High Qualification Commission of Judges of Ukraine (HCCJ). The legislative purpose of the

2022, pt 1 Tables, Graphs and Analyse: Evaluation Cycle (2020 data) (CoE 2022) <https://rm.coe.int/cepej-report-2020-22-e-web/1680a86279> accessed 24 August 2023.

2 Daniel J Beers, 'Judicial Self-Governance and the Rule of Law: Evidence from Romania and the Czech Republic' (2012) 59(5) Problems of Post-Communism 50, doi:10.2753/PPC1075-8216590504.

3 Pablo José Castillo Ortiz, 'Councils of the Judiciary and Judges' Perceptions of Respect to their Independence in Europe' (2017) 9 Hague Journal on the Rule of Law 315, doi:10.1007/s40803-017-0061-2.

4 ibid

functioning of the first body is formulated as ensuring the independence of the judiciary. It is also essential to ensure the disciplinary procedure implementation for judges. At the same time, the second body implements personnel policy in the judicial system, which includes the selection of candidates for election as judges, transferring judges, and evaluating judges, which in itself acts as a necessary tool for ensuring the judicial system's independence.

Functionally, this model corresponds to the characteristics of Judicial Councils/Council for the Judiciary. This is the general name of the body, which is used by international institutions and represents various, in particular, in terms of composition and set of powers, bodies of different European states responsible for ensuring the independence of the judiciary in the state.[5]

This 'duality' of the Judicial Council model in Ukraine has developed under many interrelated factors. Among the main ones, the following should be highlighted:

(a) spontaneous processes of democratisation of power in Ukraine, which belongs to the countries of the post-Soviet space, that affected the non-linearity of its development. Along with such countries as Armenia, Georgia, and Moldova, since gaining independence, Ukraine has been on the path of long-term political instability, permanent reforms and revolutions, which naturally affected the evolution of the judiciary;[6]

(b) the previous factor led to large-scale judicial reforms in the state, which were cyclical and were initiated each time with a change in the political elite.[7] The inconsistency in reforming brought the question of the independence of the judicial system to the fore. It was the need for its guarantees that became the most challenging task of the transition to democracy;[8]

(c) globalisation, intensification of international cooperation, and active involvement of international donors in reforming the judicial system collectively oriented Ukraine to world experience and European standards in the construction of the judiciary infrastructure;

(d) at the same time, the burden of the historical totalitarian past, peculiarities of society and non-identity of conditions caused 'deformations' in the introduction of advanced European institutions and practices.

The foundation of functioning of the modern model of the Judicial Council in Ukraine was laid by creating the High Council of Justice (HCJ) in 1998. It was responsible for forming a highly professional judicial corps capable of competently, conscientiously and impartially administering justice professionally.

Understanding that this was a completely new institution for Ukraine is essential. It was proposed as an additional article of the draft Constitution a few months before its adoption (1996). Parliamentarians or domestic scientists did not study the foreign experience of the activities of similar bodies at that time; there were no scientific publications on its status, purpose and role in ensuring the independence of the judiciary. According to one of the drafters of the relevant law, when the Supreme Council of Justice was created in Ukraine, the experience of the Supreme Council of Magistrates, which operated in France, Italy, Spain, and Portugal,

5 Opinion no 10(2007) of the Consultative Council of European Judges (CCJE) 'On the Council for the Judiciary at the Service of Society' of 23 November 2007 <http://www.euromed-justice-iii.eu/document/coe-2007-opinion-n10-consultative-council-european-judges-attention-committee-ministers> accessed 24 August 2023.

6 Oksana 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.

7 Oksana Khotynska-Nor, Theory and Practice of Judicial Reform in Ukraine (Alerta 2016).

8 Anja Mihr, 'Transitional Justice and the Quality of Democracy' (2013) 7(2) International Journal of Conflict and Violence 298, doi:10.4119/ijcv-3026.

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and the Councils of the Judiciary in Bulgaria and Poland,[9] was considered as an example.

Thus, it can be assumed that the 'creators' focused on the Southern European model of Judicial Councils.[10] Judicial Councils of this type are mostly constitutionally rooted and fulfil some primary function in the safeguarding of judicial independence, such as advice as regards the appointment or promotion of members of the judiciary or the exercise of the power of appointment or promotion by the Council itself, the training and the exercise of disciplinary powers with regards to a member of the judiciary.[11] In fact, it was one of the most successful attempts to introduce foreign institutions into Ukraine's national judicial system.

Nonetheless, the effectiveness of transplanting the European Judicial Council model depended heavily on identical conditions within the political and social environment. In the countries with transitional democracy, to which post-Soviet Ukraine belonged, it was impossible to reproduce them, which had a corresponding effect on the result.

Consequently, as a tribute to the past that proved resistance to change, Ukraine maintained these bodies in parallel. This includes the qualification commissions of judges, the High Qualification Commission of Judges of Ukraine, and later, only the High Qualification Commission of Judges of Ukraine. Remarkably, the latter assumed the powers which duplicated the powers of the Supreme Council of Justice.

Even in the wake of the ECtHR's ruling delivered against Ukraine in the case Oleksandr Volkov v. Ukraine(2013)[12] — a landmark case that addressed the issues of the composition of the Judicial Council and guarantees of judicial independence — there was no significant impact on the construction of a new model of the Judicial Council.

Upon implementation of the constitutional reform in the justice field in Ukraine in 2016, the field of judicial governance was modernised. The Supreme Council of Justice changed its name to the High Council of Justice, and the powers of the High Council of Justice and the High Qualification Commission of Judges of Ukraine were reallocated. However, compositionally, the 'dual' model of the Judicial Council remained functioning in Ukraine, under which the powers to manage the judiciary remained divided between two bodies.

Therefore, due to the abovementioned factors, the judicial reforms resulted in a model of the Judicial Council that modern researchers call a hybrid model. Hybrid models of the Judicial Council are so specific that they do not allow generalising them into a single pool. For example, Bobek M. and Kosař D. cite the model existing in England and Wales: they include judicial appointment commissions that deal only with the selection of judges up to the ascertain tier of the judicial system, whereas the rest of the court administration is vested in another organ.[13]

This feature became one of the reasons for the emergence of optimising judicial governance bodies, which took root, taking into account the current state of their functioning.

9 Viktor Vasyljovych Kryvenko, 'On Status and Role of the Supreme Council of Justice (from the standpoint of further judicial reform in Ukraine)' in VM Kolesnychenko and others, (eds), The Supreme Council of Justice – 15 Years of Activity (Logos-Ukraine 2013) 135.

10 Wim Voermans, 'Councils for the Judiciary in Europe: Trends and Models' in F Fernández Segado (ed), The Spanish Constitution in the European Constitutional Context (Dykinson 2003) 2133.

11 Simona Farkasova, 'The Constitutional Reform of the Judicial Council in the Slovak Republic from the European Comparative Context' (2022) 12(2) Juridical Tribune 142, doi:10.24818/TBJ/2022/12/2.01.

12 Oleksandr Volkov v Ukraine App no 21722/11 (ECtHR, 9 January 2013) <https://hudoc.echr.coe.int/fre?i=001-115871> accessed 24 August 2023.

13 Michal Bobek and David Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' (2014) 15(7) German Law Journal 1257, doi:10.2139/ssrn.2351299.

3 MODERN FORMAT FEATURES

Ukraine's current state of judicial governance bodies should be characterised as a crisis.

In the autumn of 2019, the judicial system of Ukraine underwent yet another round of reform, highlighting once again the extent to which its stability is intertwined with shifts in the country's political elite. However, another problem became apparent: the lack of quality, systematicity, thoughtfulness and predictability of the consequences of legislative changes that lead to judicial reform.

Thus, due to the shortcomings of the new legislation,[14] targeted at rebooting the composition of the High Qualification Commission of Judges of Ukraine, this body ceased to exercise its powers. This led to the suspension of all personnel procedures in the judicial system (appointment, transfer, evaluation of judges). The responsibility for forming a new composition of the High Qualification Commission of Judges was assigned to the HCJ (this made the dual model of the Judicial Council vulnerable). Nevertheless, it was impossible to do this, and on 10 March 2020, the HCJ made a statement about the impossibility of forming the High Qualification Commission of Judges.

At the same time, on 11 March 2020, the Constitutional Court of Ukraine delivered Judgement No. 4-p/2020, which stated the following: 'The Constitutional Court of Ukraine notes that the change in the... quantitative composition and subjects of appointment of the members of the High Qualification Commission of Judges of Ukraine without the introduction of an appropriate transitional period led to the suspension of performance of constitutional functions concerning selection and evaluation of judges, the impossibility of High Council of Justice to exercise its individual constitutional powers, and also created significant obstacles to the functioning of an effective judiciary and in some cases made it impossible to realise everyone's right to access to justice as required by the principle of the rule of law'.[15]

Such a position of the body of constitutional jurisdiction formalised the quite obvious connection and influence of the stability of functioning of judicial governance on ensuring the availability of justice in the state.

Thus, a 'conflict' arose in the legal regulation of the status of the High Qualification Commission of Judges, which could only be resolved through legislative changes, the development of which required some time. Therefore, the formation of this key body of the judicial system was blocked, and its work was paralysed.

The crisis in judicial governance deepened immediately on the eve of a full-scale war.

On 22 February 2022, two days before the Russian full-scale invasion of the territory of Ukraine, the HCJ ceased to exercise its powers. This happened due to the simultaneous resignation of most of its members.

Thus, on the eve of a full-scale war in Ukraine, the judiciary found itself in a state of 'man-

14 Law of Ukraine no 193-IX 'On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and some laws of Ukraine on the activities of judicial authorities' of 16 October 2019 [2019] Official Gazette of Ukraine 88/2933.

15 Decision no 4-p/2020 in case no 1-304/2019(7155/19) upon the constitutional submission of the Supreme Court with regard to conformity of certain provisions of the laws of Ukraine with the Constitution of Ukraine (constitutionality), namely: the Law "On the Judiciary and the Status of Judges" no 1402-VIII dated 2 June 2016, the Law "On Amendments to the Law of Ukraine on the Judiciary and the Status of Judges and some laws of Ukraine on the Activity of Judicial Governance Bodies" no 193-IX dated 16 October 2019, the Law "On the High Council of Justice" no 1798-VIII dated 21 December 2016 (Constitutional Court of Ukraine, 11 March 2020) [2020] Official Gazette of Ukraine 30/1063.

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agement dysfunction', which naturally destabilised it and affected the speed of its response to martial law challenges.

The fact that the High Council of Justice had the key powers, the implementation of which depended on the stable functioning of the judicial system (termination of the work of courts, transfer of judges, change of territorial jurisdiction of cases, etc.), led to the urgent need for legislative changes and delegation of the relevant powers to other bodies and representatives of the judiciary, who could respond promptly to the situation.[16]

By making changes to the legislation in March 2022, during the dysfunctionality of the High Council of Justice, the aforementioned powers to govern the judiciary were transferred to the Chairman of the Supreme Court.[17] [18] Moreover, although these powers are not typical for a judge of the highest court, it made it possible to stabilise the judicial system of Ukraine.

The situation with the crisis in judicial governance, the impact of the war, and the reaction of the public authorities also made it possible to draw a number of conclusions:

1) the judiciary is capable of reflection and redistribution of functions between its bodies (during the period of dysfunction of one body, its functions are temporarily performed by another body);
2) judicial authorities should be flexible and avoid excessive formalism in wartime;
3) there must be coordinated and operational communication with the parliament, which must quickly change the legislative basis of the judiciary's activities in accordance with the stage of the war.[19]

Having stabilised the situation in the justice system, despite the war, the issue of further measures to eliminate the dysfunction of the existing hybrid model of the Judicial Council became urgent.[20]

After all, as practice has shown, such a hybrid model is vulnerable if the formation of one of its institutional components (HQCJ) depends on another (HCJ) and does not provide for appropriate safeguards or guarantees. The obvious things, such as the formation of the composition of both bodies, which was ensured in the first half of 2023, are globally unable to solve the problem because they cannot prevent the recurrence of the situation in the future.

4 OPTIMISATION PREREQUISITES AND PROSPECTS

Optimising judicial governance bodies (Judicial Council) in Ukraine is far from new.

In 2007, the Venice Commission noted that 'there is no need for a separate Higher Qualification Commission and its powers must be transferred to the High Council of Justice, the

16 Oksana Khotynska-Nor and Andrii Potapenko, 'Courts of Ukraine in Wartime: Issues of Sustainable Functioning' (2022) 31 Revista Jurídica Portucalense 218, doi:10.34625/issn.2183-2705(31)2022.ic-09.

17 Law of Ukraine no 2112-IX 'On Amendments to Part Seven of Article 147 of the Law of Ukraine "On the Judiciary and the Status of Judges" on Determining Territorial Jurisdiction of Judicial Cases' of 3 March 2022 [2022] Official Gazette of Ukraine 32/1689.

18 Law of Ukraine no 2128-IX 'On Amendments to Section XII "Final and Transitional Provisions" of Law of Ukraine "On the Judiciary and the Status of Judges" on Ensuring Sustainable Functioning of Judiciary in Absence of Plenipotentiary of the High Council of Justice' of 15 March 2022 [2022] Official Gazette of Ukraine 33/1727.

19 Khotynska-Nor and Potapenko (n 16).

20 Maryna Stefanchuk, 'Recovery of Ukraine in the Field of Justice: Challenges and Priority Goals' (2022) 5(Spec) Access to Justice in Eastern Europe 186, doi:10.33327/AJEE-18-5.4-n000467.

majority of which is made up of judges'.[21]

Consistently asserting its position, in 2015, the Venice Commission once again drew attention to the fact that 'their parallel existence as separate bodies instead of specialized units of the HCJ forms a very complex system that creates dualism in the administrative management of the judicial system and increases the risk of overlaps and conflicts. However, this is a policy chosen by the Ukrainian authorities.'[22]

In 2019, the Venice Commission stated, 'All bodies vested with the relevant powers of judicial governance must be established and function by current international standards for Judicial Councils. In numerous opinions, the Venice Commission insisted that the system of judicial governance should be harmonised and recommended simplifying the structure of judicial governance bodies in Ukraine, in particular, in relation to the parallel existence of the HCJ, which is a constitutional body and the HQCJ, which has its legal basis only in law. The HQCJ is a historical relic of the time when, due to constitutional restrictions, it was considered difficult to reform the HCJ'.[23]

However, the unsuccessful attempt to reform the HQCJ in 2019, which resulted in the suspension of the procedures for forming the judicial corps, put the issue of stable functioning of the judicial system on the agenda, due to which the Venice Commission emphasised the following: 'There is a clear interrelation between the stability of the judicial system and its independence. Confidence in the judiciary grows only under the condition of a stable system. Although reforms in the field of the judiciary in Ukraine were considered necessary to increase public trust in the judicial system, constant institutional instability when reforms take place after a change of political power can also be dangerous from the point of view of public trust in the judiciary as independent and impartial institutions.'[24] Therefore, 'unification of the HCJ (constitutional body) and the HQCJ (whose activities are regulated only by the law) can only be a long-term goal'.[25]

Therefore, in the conditions of the war and post-war reconstruction, the lack of budget funds for financing the judiciary raises the question of the economic feasibility of the existence of two judicial governance bodies in the state, the distributed functions of which, under optimal conditions, might be and should be performed by one body with an extensive internal structure. In this case, the key question is: what conditions should be considered optimal?

21 Opinion no 401/2006 of the European Commission for Democracy Through Law (Venice Commission) 'On the Draft Law on the Judiciary and the Draft Law on the Status of Judges of Ukraine' of 20 March 2007 <https://www.venice.coe.int/webforms/documents/ default.aspx?pdffile=CDL-AD(2007)003-e> accessed 24 August 2023.

22 Preliminary Opinion no 803/2015 of the Venice Commission 'On the Proposed Constitutional Amendments Regarding the Judiciary of Ukraine' of 24 July 2015 <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI%282015%29016-e> accessed 24 August 2023.

23 Opinion no 969/2019 of the Venice Commission 'On the Legal Framework in Ukraine Governing the Supreme Court and Judicial Self-Governing Bodies' of 9 December 2019 <https://www.venice.coe.int/webforms/documents/ default.aspx?pdffile=CDL-AD(2019)027-e> accessed 24 August 2023.

24 Joint Opinion no 999/2020 of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe 'On the Draft Amendments to the Law "On the Judiciary and the Status of Judges" and Certain Laws on the Activities of the Supreme Court and Judicial Authorities (Draft Law no 3711)' of 9 October 2020 <https://www.venice.coe.int/webforms/documents/ default.aspx?pdffile=CDL-AD(2020)022-e> accessed 24 August 2023.

25 Urgent Joint Opinion no 1029/2021 of the Venice Commission and the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe 'On the Draft Law on Amendments to Certain Legislative Acts Concerning the Procedure for Electing (Appointing) Members of the High Council of Justice (HCJ) and the Activities of Disciplinary Inspectors of the HCJ (Draft law no 5068), issued pursuant to Article 14a of the Venice Commission's Rules of Procedure' of 5 May 2021 <https://www.venice.coe.int/webforms/ documents/default.aspx?pdffile=CDL-PI(2021)004-e> accessed 24 August 2023.

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In Ukraine, the first priority should be discussing stabilisation of personnel procedures. This is a question of a long-term perspective, which, at the moment, is not realistic to implement only by the HCJ's efforts. Among other things, this is due to the fact that for a long time, the HCJ itself did not have enough powers, which resulted in the accumulation of an array of unresolved issues directly related to its powers (for example, disciplinary proceedings against judges). Therefore, the fact that the personnel function is fully vested with the HCJ at this stage will not solve, but on the contrary, will aggravate the problem.

It is advisable to actualise the idea of liquidating the HQCJ and transferring its powers to the HCJ when the personnel crisis in the judicial system of Ukraine is overcome, and personnel procedures will acquire a planned, predictable character, which will make it possible to evaluate and calculate their progress taking into account:

(a) the stable volume of necessary processes within certain temporal frameworks;

(b) the measurement of their pace and expediency of simplification;

(c) costs of available resources.

However, this is only one of the possible ways to optimise judicial governance bodies. Its implementation will require structural reform, which may again destabilise the judiciary.

There are other options. Thus, the state has the right to independently choose which model of the Judicial Council will be effective for it. Therefore, the dual model of the Judicial Council has the right to exist, if the law provides appropriate safeguards and guarantees to ensure stable and uninterrupted functioning of judicial governance.

In the case of Ukraine, such a safeguard may be the introduction of 'reserve' tools for the operational formation of the composition of the HCJ if it loses its powers. Alternatively, at the legal level, it is possible to provide for the obligation of the subjects of the formation of the HCJ to form a reserve rating of candidates for the position of a member of the HCJ according to their quota. If the current member of the HCJ resigns, the subject of the formation of the HCJ must appoint the first person in the ranking to the vacant position and thus ensure the stable functioning of the HCJ.

In any case, the proposed ideas require a comprehensive discussion considering their possible modifications and forecasting the consequences of implementation, thus laying the foundation for further scientific discussion.

5 CONCLUSION

Despite the war, Ukraine continues to develop as a democratic and legal state. Its judicial system is an integral part of the national security system and ensures the continuity of protection of the rights and interests of an individual. The new challenges caused by the war required a general transformation of the political and judicial systems. One way is to optimise its judicial governance bodies as a necessary element of ensuring accessible and fair justice.

The national model of judicial governance resulted from the transplantation of advanced European practices in the organisation and functioning of such a body as the Judicial Council into the national legal system. However, the historical totalitarian past, peculiarities of the legal culture, and non-identity of political and social conditions influenced the result. As a result of numerous reforms, a hybrid model of the Judicial Council became functioning in Ukraine, which should be identified as dual. That is one that involves the distribution of key management functions in the judiciary between two bodies that are in a relationship of subordination and dependence. The national experience of the functioning of judicial governance

in crisis conditions (loss of authority by its bodies) demonstrated the vulnerability of such a model. This put the issue of implementing appropriate safeguards and guarantees to ensure stable and uninterrupted work of judicial governance on the agenda. Their discussion is a necessary step in developing scientific discussion about guarantees of judicial independence, an essential aspect of which is the effective functioning of judicial governance.

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Case Study

CASE STUDY ON INTEGRATION PROCESS OF ALBANIA TOWARDS EU: HARMONISATION OF DOMESTIC LEGISLATION WITH THAT OF EU

Erjola Xhuvani*, Naim Mecalla

ABSTRACT

Background: *The road of Albania's European Union integration process has been long and defiant. It started in 1993 with the approval of the Trade Agreement. The most important milestone was the signature of the Stabilisation and Association Agreement (SAA) in June of 2006. Part of its implementation included the harmonisation of domestic legislation with that of the EU, established by Article 70 of this agreement. This is an important process for the final step of EU membership. Its importance relates to the fact that if the domestic legislation is not in compliance with the European legislation, the standards of this country cannot compete with those of other EU countries. As a result, it cannot become part of the EU.*

Methods: *The introduction of the article, based on the descriptive method, gives an overview of domestic legislation in the framework of harmonisation. The second chapter, based on the analytic method, explains an example of law harmonisation in Albania in concrete terms. This example is based on the methodology used for the harmonisation of legislation. Based on these outcomes, the third section of the article explains the need for understanding and implementing the harmonised laws in Albania.*

Results and Conclusions: *The identification of the approximation process gaps in the second section of the article translates to achievable goals shown in the conclusion. A better functioning of Albanian structural and administrative capacities is needed, requiring a dedicated additional budget and trained staff. In technical terms, the text of the transposed EC Directive should be inserted in the table of concordance of the Law. The same EU act, expected to be transposed, should also be mentioned in the preface of the draft proposal, similar to the practice in the European countries. After the approval of the harmonised national legislation with that of EU law, its implementation and enforcement are crucial. The most important part of the harmonisation of legislation lies in the impact these laws will have after their implementation. A data base on EU terminology for Albanian and English languages of the Treaty Establishing the EU and European Community, the SAA, the Interim Agreement, and the European Partnership should be established. The most important issue Albania faces regarding its internal market legislation is the adaption of their internal mechanisms to implement.*

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1 INTRODUCTION

The harmonisation of domestic legislation with European legislation is one of the main obligations established by the Stabilisation and Association Agreement (SAA).[1] This process began in the early 90s through the signature and implementation of the Trade and Economic Agreement.[2] This Agreement established the harmonisation of domestic legislation with that of European legislation in economics.[3]

Though the process of approximation and the establishment of the specialised structures responsible for its functioning intensified much later in 2003. The institutional evolution of this process and the legal framework that handles it developed as follows:

- Establishment of the Directory of Harmonisation of legislation at the Council of Ministers in 1999,
- In 2000, transferee of the Directory of Harmonisation of Legislation from the Council of Ministers to the Ministry of Justice,[4]
- Establishment of the European Integration Ministry (MIE) and transfer of the Directory of Harmonisation of Legislation from the Ministry of Justice to the MIE in February 2004,
- Establishment of the Committee for Inter-Institutional Coordination of Integration,
- Establishment of the Inter-Institutional Working Groups by the Prime Minister Order No. 46, dated 10.04.2006,
- Establishment of the Sector for Harmonisation of Legislation at the Parliament,
- Establishment of the European Integration Units at the Line Ministries, by the Council of Ministers Decision No. 179, dated 22.02.2006,[5]
- Approval of Decision No. 119, dated 07.03.2007, "On procedures of Translation the Legislation in Albanian and of Albanian legislation in any of EU languages,"[6]
- Approval of Law No. 15, dated 05.03.2015, "On the role of the Parliament in the integration process of the Republic of Albania in the EU,"[7]
- In 2017, the transfer of the staff of the Ministry of Integration to the Ministry for Europe and Foreign Affairs, and
- In 2022, the transfer of the staff dealing with integration issues to the Minister of

1 Office of the European Union, 'Stabilisation and Association Agreement with Albania: Summaries of EU Legislation' (*EUR-Lex*, 05 April 2019) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=legissum:4314911> accessed 15 May 2023.

2 Leonard Demi, *European Enlargement and the Integration of Western Balkans* (Dudaj 2009) 49.

3 Ligj Nr 9590, datë 27.7.2006 'Për ratifikimin e "Marrëveshjes së Stabilizim-Asociimit ndërmjet Republikës së Shqipërisë dhe Komuniteteve Europiane e shteteve të tyre anëtare"' <http://qbz.gov.al/eli/ligj/2006/07/27/9590> accessed 15 May 2023.

4 Ministria e Drejtësisë dhe EURALIUS, *Manual i Hartimit të Ligjeve: Një Udhërrëfyes për Procesin Legjislativ në Shqipëri* (Pegi 2010).

5 Vendim i Këshillit të Ministrave Nr 179, datë 22.2.2006 'Për krijimin e njësive të integrimit europian në ministritë e linjës' <http://qbz.gov.al/eli/vendim/2006/02/22/179> accessed 15 May 2023.

6 Vendim i Këshillit të Ministrave Nr 119, datë 7.3.2007 'Për përcaktimin e procedurave të përkthimit të legjislacionit të Bashkimit Europian në gjuhën shqipe dhe të përkthimit të legjislacionit shqiptar në njËrën nga gjuhët e bashkimit europian' <http://qbz.gov.al/eli/vendim/2007/03/07/119> accessed 15 May 2023.

7 Ligj Nr 15/2015 'Për rolin e Kuvendit në procesin e integrimit të Republikës së Shqipërisë në Bashkimin Europian' <http://qbz.gov.al/eli/ligj/2015/03/05/15> accessed 15 May 2023.

State and Prime negotiator.

The first Directory of Harmonisation of Legislation was set up at the Council of Ministers in 1999. The staff and its competencies were limited. In 2000, the Albanian government decided to give more priority to the integration process, and so decided that this Directory should be transferred to the Ministry of Justice. The number of sectors for this Directory increased from two to three in total. In 2004, it established the Ministry of Integration (approximately 75 employees). The reason for its establishment was the fulfilment of the negotiation process for the Stabilisation and Association Agreement (SAA) between the EU, its member states, and Albania. Following this, in 2006, the Committee for Inter-Institutional Coordination of Integration and the Inter-Institutional Working Groups (structures dedicated to specific fields of negotiations) were established. During the first stages of the harmonisation of domestic legislation with that of the EU (1999 till 2006), Albanian institutions held a relatively poor level of knowledge of this process. The harmonisation process, including the obligation to harmonise draft acts with EU legislation, was hardly understood by central institutions. The staff of legal directorates in these institutions were not aware of the European legislation and the website.[8] Only after several years of trainings held by the European Commission through the Technical Assistance and Information Exchange (TAIEX) program and other technical assistances dedicated to integration and harmonisation of legislation issues, did the Albanian administration attain better knowledge of this matter and draft a law on harmonisation with EU legislation.

Since 2006, the process of harmonisation of domestic legislation with that of the EU is established by SAA. This obligation, the evolution of the entire integration process, and the impact of the study of European law in schools enabled a deepening of public administration knowledge. In this regard, a sector for harmonisation of legislation was established in the Parliament; every ministry has its own integration unit. Once the harmonisation of legislation became an obligation established by the article 70 of the SAA, it was approved under Decision No. 119, dated 07.03.2007, "On procedures of Translation the Legislation in Albanian and of Albanian legislation in any of EU languages," establishing the translation procedure and its fees.

According to the SAA implementation, the Albanian Parliament must hold a leading role in the integration process, especially regarding harmonisation of legislation. To fulfil this obligation, it was approved under Law No. 15, dated 5.03.2015, "On the role of the Parliament in the integration process of the Republic of Albania in the EU." In 2017, the staff of the Ministry of Integration was transferred to the Ministry for Europe and Foreign Affairs (internal decision of governance). In 2022, the staff handling integration issues transferred to the Minister of State and Prime negotiator. This structure was created after the EU General Affairs Council opened accession negotiations with the Republic of Albania on March 25 of 2020, accounting for the progress achieved in reforms and the fulfilment of conditions.

According to the DCM No. 179, dated 22.02.2006, the European Integration Units at the Line Ministries hold a supporting role for their institutions regarding the harmonisation of laws. Their tasks are identified as follows:

a) External institutional coordination and coordination of work between the Ministry of European Integration and the Line Ministries in the process of approximation of national legislation with the EU legislation and in the recording of normative acts that adopt EU legislation, under the framework of TAIEX program.

b) Internal institutional coordination for the arrangement of the reports on the Euro-

8 *European Union: Official website* <https://european-union.europa.eu> accessed 16 August 2023; *EUR-Lex: Access to European Union law* <https://eur-lex.europa.eu> accessed 15 May 2023.

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pean integration process.

c) Monitoring and recording within the Ministry related to European integration issues.

d) Distribution of data on the European integration process between the Ministry of European Integration and Line Ministries.

e) Evaluation of the activity carried out by the Ministry in proportion with the progress in the European integration process, proposing the functional mechanisms for the sector reforms' implementation.

f) Suggesting priorities, distribution of the human resources, and planning activities for the institutional support of the European integration process.[9]

The role of the Parliament in the process of SAA is regulated by Law No. 15 of 05.03.2015, "On the role of the Parliament in the integration process of the Republic of Albania in the EU."[10] The procedure for reviewing the compliance of domestic legislation with that of the EU in Parliament is detailed in an act of the Albanian Parliament and in Law No. 15/2015, dated 5.03.2015.[11] These acts stipulate that draft laws aimed at the approximation of Albanian legislation with that of the EU must be accompanied by an explanatory report and compliance tables (approximation instruments). The bodies of the Parliament (Speaker of the Parliament) and the Commission for European Integration may return to the initiator of the draft laws when they find deficiencies in the documentation accompanying the draft law.

The draft laws proposed to Parliament that direct the harmonisation are reviewed by the Commission for European Integration. When examining the compatibility of the draft law with the EU acquis, the Commission analyses the compliance tables accompanying the draft law, comparing the text of the draft act with the secondary legislation under which the draft act is aligned. After the review, the appropriate member of Parliament compiles the relevant report, which contains the degree of harmonisation of the proposed draft law with the EU acquis, as well as the relevant amendments to improve the articles of the draft act for harmonisation of legislation. Then, it is sent to the responsible commission and plenary session. In a plenary session, the review of the draft act's compliance with the EU acquis occurs according to the usual legislative procedure.

2 ANALYSIS OF APPROVED LAWS AND TABLE OF CONCORDANCE

This chapter presents an analysis on some approved laws, their table of concordance, EU legislation that should be approximated, law reports, and some general comments on the aforementioned topics.

Our analysis starts with Law No. 10480, dated 17.11.2011, "On the general safety of non-food products."[12] The institution that proposed this law is the Ministry of Economy, Trade, and Energy.

The content of the law, "On the general safety of the non-food products," aims to protect consumers and the public. It defines the operators' obligations and identifies responsible structures to guarantee product safety. It also foresees the imposition of administrative

9 Fondacionin Shoqëria e Hapur për Shqipërinë dhe të tjera, *Përmbledhje e Bazës Ligjore për Integrimin Evropian: Material mbështetes për Shkollën e Integrimit Europian* (Friedrich-Ebert-Stiftung 2021).

10 Ligj Nr 15/2015 (n 7).

11 ibid.

12 Ligj Nr 10480, datë 17.11.2011 'Për sigurinë e përgjithshme të produkteve joushqimore' <http://qbz.gov.al/eli/ligj/2011/11/17/10480> accessed 15 May 2023.

penalties, such as fines, in the case of infringements performed by commercial operators.

This law is partially approximated with the Directive No. 2001/95/CE of the European Parliament and the Council, of 03.12.2001, "On general safety of products."[13]

In addition, it partially approximates the Regulation 765/2008/CE of the European Parliament and the Council on 09.07.2008, "Setting out the requirements for accreditation and market surveillance relating to the marketing of products."[14]

By analysing the above-mentioned law, one determines that the law No. 10480, dated 17.11.2011, meets the formal legal requirements for the approximation process. The Integration Committee has conducted the formal control of the approximation process, and according to it, this law partially approximates two EU secondary laws.

This finding of the Integration Committee is accurate because, as it results from the content of law, it identifies different definitions from those in the directive 2001/95/EC and Regulation 765/2008, and it has not fully reflected the goal and articles of Regulation 765/2008. The determination of the compatibility level of domestic laws with that of European legislation belongs to the Albanian institutions, which should explain and motivate the compatibility level of the Albanian law (partial or full approximation) in any case. The lack of preliminary analyses of law benefits creates a challenge when assessing whether the institution is ready to ensure full alignment. The accompanying report of the law has shortcomings in terms of this analysis.[15]

The second law we will analyse regards the approximation procedures of Law No. 27 in 2018, "On Cultural Heritage and Museums."[16] This Ministry of Culture proposed this law. We will present a model of the table of concordance filled with the information of two articles and their levels of compatibility with the EU legislation.[17]

13 Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety <http://data.europa.eu/eli/dir/2001/95/oj> accessed 15 May 2023.

14 Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 <http://data.europa.eu/eli/reg/2008/765/oj> accessed 15 May 2023.

15 Erjon Fejzulla dhe Aida Gugu, 'Vlerësimi i përputhshmërisë së ligjeve me acquis e BE-së dhe roli i Kuvendit në këtë proces' (2012) 3 Buletini të Qendrës së Studimeve Parlamentare 5.

16 Ligj Nr 27/2018, datë 17.5.2018 'Për trashëgiminë kulturore dhe muzetë' <http://qbz.gov.al/eli/ligj/2018/05/17/27> accessed 15 May 2023.

17 Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast) <http://data.europa.eu/eli/dir/2014/60/oj> accessed 15 May 2023.

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Directive 2014/60/EU of the European Parliament and of the Council of 15 May, 2014, on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 OJ L 159, 28.5.2014		**Law on Cultural Heritage and Museums** **Compliance rate: Partially compliant**			
1	**2**	**3**	**4**	**5**	**6**
Article	**Text**	**Article**	**Text**	**Compliance**	**Notes**
Article 1	This Directive shall apply to the return of cultural property classified or designated by a Member State as a national treasure, as referred to in point (1) of Article 2, which has been unlawfully removed from the territory of that Member State.	Article 122, para 1	Principles related to illegal departure outside territory 1. National treasures which have been issued illegally, within the meaning of point 45, article 5, will be returned according to the provisions of this law and international agreements.	Fully complied	The scope of the directive is integrated in chapter 2 of the draft law (Articles 121-131), which regulate the international circulation of international assets
Article 2, para 2	2) 'Illegally removed from the territory of a Member State' means: a) removed from the territory of a Member State in breach of its rules on the protection of national treasures or in breach of Regulation (EC) No. 116/2009; or b) did not return at the end of a certain period, from the time of lawful and temporary removal, or violation, of another condition.	Article 122, para 2 and 3	Principles regarding the illegal removal of movable cultural assets outside the territory of the Republic of Albania 2. It is considered illegal to leave the territory of the Republic of Albania with the cultural values provided in this law in the following cases: a) When they are removed from the territory of the Republic of Albania in violation of the rules for the protection of movable cultural property defined in this law. b) When it is not returned at the end of a certain period from the time of lawful, temporary departure, or of any other violation. 3. Those cultural assets for which the temporary exit is authorized, but for which the conditions and measures reflected in the exit license have not been applied, are also considered illegal.	Fully complied	

The table of concordance is a crucial element to the harmonisation process. Understanding

its importance is necessary for inclusion of the tables of concordance of draft laws in the body of the draft act, and not as an annex of it. This ensures the existence of the table as an integral part of the act for the following years without risking the disappearance of this important part of compatibility. The same procedure is implemented in the drafting procedures of EU countries.

Special attention in the process of harmonisation of national legislation with that of the EU is dedicated to the issue of EU acts for translation. Based on the planning and prioritisation of the EU's legal acts that will be harmonised with the corpus of domestic law, the Albanian institutions must prepare the annual plan for the translation of the relevant acquis. The process of translation of the acquis must be regulated by a special decision of the Council of Ministers. During the process of harmonisation of legislation, the need of a manual or data base with well-defined legal terminology in English and Albanian increases. This database should define the basic terms used in the field of harmonisation of internal legislation. It will be used by all persons involved in this field of translation with the aim of utilising a unified terminology for the complete harmonisation of legislation.

3 UNDERSTANDING OF COMMUNITY LAW AND THE PREPARATION OF DOMESTIC LEGISLATION ANALYSIS

The first step in the process of clarification of the EU legislation's objective is the identification of its legal framework. The directive, part of EU secondary legislation, is composed of three components:

- the legal bases;
- the preface (preamble);
- the articles.[18]

Another important step is the identification of the administrative provisions. The Directive should determine an administrative body responsible for performing certain control functions. The Directive also must provide the following:

1) *Determination of the problems related to terminology issues*

Directives may identify a concept which does not have an Albanian equivalent. This lack of terminology could derive from the fact that the equivalent Albanian legal term has a slightly diverse definition, or simply because an Albanian term does not exist. This issue could be resolved by the national legislator who may choose the best terminology option. In such cases are the Directives required to foresee partial or non-mandatory harmonisation.[19]

2) *Determination of the type of harmonisation*

The preface of the Directive will indicate the type of harmonisation required. There are three types of harmonisation:

> **Partial harmonisation; in this case, the Directive does not prevent stricter national rules. Directives of this type are often used in policy areas, such as consumer and environmental protection, where the objective is to ensure a certain EU-wide minimum*

18 Alfred Kellermann, 'Raport mbi procedurat për përafrimin e Legjislacionit Shqiptar me *acquis communautaire*' (2007) 38 E Drejta Parlamentare dhe Politikat Ligjore 19-20.

19 Jordan Daci and Ilir Mustafaj, 'The Process of Integration of Albania into the European Union from an International and an European Law Perspective' (2011) 4(2) Revista shqiptare për studime ligjore 168.

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protection.
**Full harmonisation; in this case, the national law strictly follows the articles of the Directive's text. This is the case when technical requirements for products are harmonised to avoid barriers of trade.*
**Non-mandatory harmonisation; this is a tailor-made harmonisation accounting for items such as the size, specific work areas, and norms to be fulfilled by enterprises.*

3) *Determination of the initial Directives to be implemented prior to others*

Directives of the internal market may require prior implementation from Directives in other areas, as part of Copenhagen Criteria,[20] such as the functioning of democratic institutions, rule of law and human rights implementation, and the ability to take on the obligations of membership. In Albania's case, starting on December 1, 2006, the EU implemented the Interim Agreement on Trade and Commercial Cooperation between the European Community and the Republic of Albania, Law No. 9591, dated 27.07.2006, in order to implement the SAA agreement in the field of trade and commercial cooperation prior to other fields.

4) *Determination of the domestic acts to be revised in compliance with the Directive*

During the process of approximation of legislation, the existing Albanian legislation should transpose the Directive that corresponds to the same subject matter. In some cases, new laws will be needed, such as amended Law No. 9947, dated 07.07.2008, "On industrial property."[21] The approval of this law was an EU demand to include in the progress reports for Albania in 2006, especially regarding the alignment of Albanian intellectual property rights with EU legislation in this field.

However, in such cases, the Directive could also incorporate into existing laws that deal with identical topics.

5) *Implementation of the principles of the Treaties and ECJ decisions*

The Constitution of EU (Treaty) establishes the EU's functioning pillars. In this document are foreseen objectives and policies implemented by the secondary legislation of the EU. The application of the general principles of community law is more complicated than the implementation of only the Directives' text: it requires a greater general and extensive knowledge of European legislation and case law.[22]

Case laws of the European Court of Justice are an important source of interpretation of the EU's legislation. The judges of new member countries have an important task regarding the recognition and implementation of the EU legislation during the legal disputes.[23] Familiarity with the case laws of the European Court of Justice, with procedures implemented in these decisions and with the EU's legislation, simplifies the work for the member countries' judges.

20 'Copenhagen Criteria' (*Oxford Reference*, 2023) <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095637775> accessed 15 May 2023.

21 Ligj Nr 96/2021, datë 7.7.2021 'Për disa ndryshime dhe shtesa në ligjin Nr 9947, datë 7.7.2008, "Për pronësinë industriale", të ndryshuar' <https://qbz.gov.al/eli/ligj/2021/07/07/96> accessed 15 May 2023.

22 Paul Craig and Grainne de Burga, *EU law: Text, Cases and Materials* (OUP 2011) 194.

23 Iva Zajmi, *E drejta Evropiane* (EKD 2010) 38.

4 A COMPARATIVE PERSPECTIVE OF THE EU INTEGRATION PROCESS OF WESTERN BALKAN COUNTRIES

The integration process for Western Balkan countries was established at the Thessaloniki Summit, held on 21 June, 2003. Its implementation was proposed by EU to potential candidate countries, such as Albania, Bosnia and Herzegovina, Croatia, North Macedonia, Serbia, and Montenegro. This process was implemented independently to Western Balkan countries.

The table below presents data regarding the most important milestone of the integration processes in the Western Balkan countries. Referring to these data, Albania started this process relatively late in comparison with the other countries. The continuity of the reforms, especially in the field of rule of law and the fight against corruption, was the primary concern of the EU. Also, the increase of economic growth was directly related to the achievement of the European standards.

In Albania's case, the integration process was not hindered by war conflicts or non-respect of minority rights as in other Western Balkan countries (Serbia, North Macedonia). The slow development of its economy, the conduction of free elections, and corruption in high levels were the main problems during Albania's long road of integration into the EU.

Regarding the progress of Albania's integration process, during the last years, the country has depended on the progress of the North Macedonian reforms as well as the will of some EU member states to slow down the European integration process of this country. The SAA in other EU-aspirant countries took around 10 years to implement. In Albania's case, 16 years have lapsed since its signature. In the North Macedonian example, it took 21 years for full implementation after its signature. Referring to the data found in the table, the fastest moving country in the EU integration process is Montenegro. Even though this country signed the SAA one year after Albania, Montenegro opened membership negotiations with the EU in 2012, while Albania opened membership negotiations 10 years later. This delay in the European integration process for Albania is related to the lateness in the reform implementation, the high level of corruption, and drug trafficking. From 2012 to now, Montenegro has opened all 33 screened chapters (harmonisation of legislation of every chapter) and closed three chapters already. Albania opened the screening process together with Macedonia in 2022. As mentioned above, Albania still has a long road ahead in the screening process. Although Albania's European integration process has been long and difficult, it is important to note that this country was the first in the Western Balkans to implement the re-evaluation process of judges and prosecutors (vetting process). In 2016, the legal package was approved by the Albanian Parliament to start the transitional re-evaluation process of judges and prosecutors. This reform was undertaken under the conditions at that time when the judiciary system suffered from corruption among judges and prosecutors. Three independent bodies were established to realise this process.

To date, 64% of the vetting dossiers processed have resulted in dismissals, resignations, or termination of mandate of vetted magistrates.[24] This process was monitored by the international experts of the EU.

24 Directorate-General for Neighbourhood and Enlargement Negotiations, 'Albania Report 2022' (*European Neighbourhood Policy and Enlargement Negotiations (DG NEAR)*, 12 October 2022) <https://neighbourhood-enlargement.ec.europa.eu/albania-report-2022_en> accessed 15 May 2023.

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Country	Beginning of the relations with EU	Signature of the SAA with EU	Entry into force of the SAA	Candidate country status	Opening of accession negotiations with EU	Inaugural meeting of the screening process
Albania	2004	2006	2009	2014	2022	2022
Bosnia and Herzegovina	2005	2008	2015	2022		
North Macedonia	2001	2001	2004	2005	2022	2022
Montenegro	2006	2007	2010	2010	2012	all 33 screened chapters opened (three of them provisionally closed)
Serbia	2005	2008	2013	2012	2014	22 out of 35 chapters opened
Kosovo	2005	2014	2016			

5 CONCLUSIONS

During the first stage of SAA implementation, the harmonisation of legislation is focused on the most important fields, such as free movement of goods. A smooth harmonisation of legislation is established through starting with the most immediate field and followed by the other more complicated fields. The harmonisation of legislation is a demanding process because it focuses on two issues. The first one is the transposition of EU legislation in domestic laws. The second issue is related to the establishment of structural and administrative capacities. It requires a dedicated extra budget and trained staff to return to the issue of harmonisation of legislation. Regarding the first issue, it is important that the text of the transposed EC Directive be inserted in the table of concordance. The same EU act that is expected to be transposed should also be mentioned in the preface of the draft proposal, as European countries put into practice. The second requirement is essential, in the case that the table of concordance may be lost after some years, the mention of the EU legislation in the preface of the act serves as a memory of the transposed legislation in the domestic law.

After the approval of the harmonised national legislation with that of EU law, its implementation and enforcement are imperative. This obligation is established by the SAA. The approval of harmonised laws is not the only importance. The most important part of the harmonisation of legislation is the impact these laws will have after their implementation.

In addition, a data base on EU Terminology of Albanian and English languages for the Treaty Establishing the EU and European Community, the SAA, the Interim Agreement, European Partnership, etc. must be created. With this database, it will be possible to monitor uniform translation of Albanian legislation.

The most important issue Albania must address regarding its internal market legislation is not the approximation of their legal texts, but the adaption of their internal mechanisms in order to implement it wholly. This requires establishment of the necessary administrative institutions, adequate professional administrative capacities, and increased budget resources.

The presence of enforcing authorities is crucial to provide certainty to other members of the community that legislation is properly implemented.

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Case Study

ENHANCING THE EFFECTIVENESS OF DEFENCE PLANNING THROUGH THE IMPLEMENTATION OF CAPABILITY-BASED BUDGETING AND CIVILIAN CONTROL

Yuliia Petlenko*, Lucian Tarnu, Bohdan Shchehliuk, Silviu Nate

ABSTRACT

Background: *The effectiveness of defence planning within Ukraine's defence and security sector is heavily contingent upon the meticulous formulation and execution of future defence budgets, as delineated in Ukraine's National Security Strategy. Furthermore, it is imperative to comprehensively examine international experiences in defence planning, specifically in developing and sustaining vital resources and capabilities for fulfilling defence missions under budgetary constraints. Consequently, there exists an inherent necessity for extensive dialogues among scholars and officials tasked with military-strategic decision-making.*

Results and Conclusions: *This research explores the paramount significance of defence planning for bolstering Ukraine's security and defence capabilities. The intrinsic link between the identified issue and pivotal scientific and practical objectives becomes evident when considering the prioritisation of robust financial planning and judicious resource allocation, with the aim of fashioning modernised defence forces adept at countering emergent security threats. In this regard, the study diligently examines international experiences to discern and adapt best practices of essential facets like equipment, command systems, intelligence capabilities, and personnel training, all of which play a pivotal role in fortifying defence readiness and mission efficacy. Acknowledging the constraints of limited financial resources necessitates judicious strategic decision-making to optimise defence expenditures within well-defined parameters is paramount.*

Keywords: *defence planning, capability-based budgeting, civilian control, defence expenditure, resource allocation, international experience, Ukraine, National Security Strategy.*

1 PROBLEM STATEMENT

The effectiveness of defence planning in Ukraine's defence and security sector is heavily dependent on the proper formulation and execution of future defence budgets, which is a key priority outlined in Ukraine's National Security Strategy. Additionally, studying international experience in defence planning, specifically related to creating and maintaining essential resources and capabilities for fulfilling defence missions across various scenarios while operating within a limited budget, is crucial. To address these challenges effectively, extensive discussions among scholars and officials responsible for military-strategic decision-making will be necessary.

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2 THE CONNECTION BETWEEN THE PROBLEM AND IMPORTANT SCIENTIFIC AND PRACTICAL TASKS

The connection between the problem and important scientific and practical tasks is evident in the strategic importance of defence planning for ensuring the security and defence capability of the country. In Ukraine, the defence and security sector is currently undertaking efforts to develop new approaches to forward-looking planning based on capabilities aimed at strengthening defence capabilities and protecting national interests. The formulation and execution of defence budgets play a vital role in effective defence planning, establishing a critical link between budgetary opportunities and the imperative to provide mission capabilities across the full spectrum of possible defence system missions. The National Security Strategy of Ukraine prioritises the provision of robust financial planning and resource allocation to create modernised defence forces capable of addressing emerging security challenges. Studying international experience enables identifying and adapting best practices to the Ukrainian context. Establishing and maintaining essential assets and capabilities, including equipment, command systems, intelligence capabilities, and personnel training, are paramount in ensuring defence readiness and mission effectiveness. The challenge posed by limited financial resources necessitates strategic decision-making to optimise defence spending within the defined limits. Consequently, striking a balance between defence force modernisation, capacity building, and operational readiness demands meticulous analysis.

3 ANALYSIS OF RECENT RESEARCH AND PUBLICATIONS

The issue of defence planning based on capabilities for effective budgeting has garnered significant attention in the research conducted by foreign scholars. Notably, American researchers L. R. Jones and J. L. McCaffery analyse the nearly fifty-year history of implementing capability-based budgeting systems and highlight that decision-making in defence budgeting at the U.S. Department of Defence (DoD) level is among the most challenging tasks in overall public financial management.[1] Scholars note that implementing a capability-based budgeting system requires substantial effort and overcoming resistance within the organisation, particularly when transitioning control of planning and budgeting from the military to civilian authorities. The initial motivation behind transferring political control over the military is a critical objective in establishing civilian oversight, combating corruption, and rationalising resource planning. According to scholars, this process can take a minimum of five years.

Zrnić Bojan highlights that countries with transitional economies face budgetary resource constraints, necessitating that modern capability-based defence planning systems ensure the efficiency of this process by balancing available resources with the ability to achieve set goals.[2]

Publications by T.-D. Young, a Romanian scholar, provide interesting insights into the analysis of failures in implementing capability-based planning within the defence establishments of post-communist Central and Eastern European countries.[3] These failures are attributed to

1 LR Jones and Jerry L McCaffery, 'Reform of the Planning, Programming, Budgeting System, and Management Control in the US Department of Defence: Insights from Budget Theory' (2005) 25(3) Public Budgeting & Finance 1, doi: 10.1111/j.1540-5850.2005.00364.x.

2 Bojan Zrnić, 'The New Trends in Defence Planning and Their Impact on the Defence Planning Systems in Transitional Countries' (2008) 60(1) Vojno delo 25.

3 Thomas-Durell Young, 'Is the US's PPBS Applicable to European Post-Communist Defence Institutions?' (2016) 161(5) RUSI Journal 68, doi: 10.1080/03071847.2016.1253382; Thomas-Durell Young, 'The Failure of Defence Planning in European Post-Communist Defence Institutions: Ascertaining Causation and

the institutions' inability to develop viable defence plans based on objective data, primarily due to the lack of a defined political framework and decentralised financial decision-making. The hasty and ill-considered implementation of the Planning, Programming, and Budgeting System (PPBS) exacerbates the situation.[4]

It is worth noting that the work provides a general analysis of the planning and budgeting reforms conducted by the Ministry of Defence of Ukraine since 2000. The author emphasises that the Ukrainian defence establishment possesses an inadequate understanding of the role of money as a managerial instrument, leading to insufficient adaptation of expenditures to policy changes and priorities. Moreover, effective financial management is hindered by the presence of multiple software systems, such as Resurs, Parus, and Ruslo, which have never been fully integrated and, consequently, cannot support dynamic planning and management.[5]

Interestingly, Estonian researcher M. Sedysheva has proposed a conceptual approach to defining the optimal process of developing strategy and cost control for defence. This approach utilises the decision-making system adopted in the Republic of Estonia.[6]

In addition, Ukrainian researchers have also actively studied international experiences in capability-based defence planning for effective budgeting. However, most research is in its initial stages, focusing on the study of international experiences and developing methodological approaches for implementing this experience in practice based on NATO standards. Noteworthy articles include the work of I. S. Rusnak et al., which provides insights into the peculiarities of capability-based defence planning and its prospects for implementation in the country's defence force development process.[7] Additionally, Nalyvaiko et al. discuss the organisational peculiarities of capability-based defence planning and the need for personnel training. [8]

The absence of effective approaches to defence planning, particularly in terms of capability-based budgeting and civilian control, coupled with the necessity for the development and enhancement of methods and systems related to civilian control, poses a significant challenge in the comprehensive advancement of Ukraine's defence sector, encompassing the Armed Forces. Considering this, the present study focuses on exploring these pertinent issues, which are of utmost relevance and demand a thorough investigation, drawing upon the invaluable insights derived from the best practices adopted by NATO member states while duly considering the specific requirements of Ukraine's defence forces.

4 RESEARCH TASK

This research aims to investigate and propose strategies for enhancing the efficiency of defence planning in Ukraine's defence and security sector. Specifically, the research examines the implementation of capability-based budgeting to optimise resource allocation and prioritise

Determining Solutions' (2018) 41(7) Journal of Strategic Studies 1031, doi: 10.1080/01402390.2017.1307743.

4 Jones and McCaffery (n 1) 17-9.

5 Kateryna Yahelska and others, 'Comparative Analysis of Methods for Forecasting Budget Indicators' (2021) 39(3) Estudios de Economia Aplicada 4521, doi: 10.25115/eea.v39i3.4521.

6 Maritana Sedysheva, 'Strategic Management System and Methods of Controlling as Key Elements of Military Expenditure Policy-Making Process' (2012) 5(3) Journal of Strategy and Management 353, doi: 10.1108/17554251211247607.

7 IS Rusnak and others, 'Capability-Based Defence Planning: Peculiarities and Prospects for Implementation' (2017) 2 Science and Defence 3, doi: 10.33099/2618-1614-2017-0-2-3-10.

8 AD Nalyvaiko, IM Sivokha and AI Polyaev, 'Implementation of Capability-Based Defence Planning in the Components of the Defence Forces of Ukraine' (2018) 1(62) Collection of the scientific papers of the Centre for Military and Strategic Studies of the National Defence University of Ukraine 46.

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defence expenditures. Additionally, the research explores mechanisms for ensuring effective civilian control over the defence planning process. By analysing international experiences and best practices, the research aims to develop recommendations that will improve the effectiveness and transparency of defence planning in Ukraine, ultimately strengthening the country's defence capabilities and safeguarding national interests.

5 METHODS

This research, underpinned by empirical methodologies encompassing crowdsourcing and specialist consultations, delves into the fiscal processes and strategic planning intrinsic to Ukraine's defence sector. Endeavouring to augment the efficiency of defence planning, the study advocates the adoption of capability-based budgeting, concurrently emphasising the indispensability of civilian oversight. The investigation derives insights from international paradigms, assimilates a range of perspectives, and presents recommendations to bolster defence competencies and enshrine national imperatives.

During the academic symposium titled "Current Challenges of the National Economy in the Interests of Defence and State Security and Ways to Address Them," which took place in Kyiv on May 31, 2023, we meticulously established a digital platform purposed to combine insights from a spectrum of stakeholders engaged in complexities of defence planning and budgeting strategies. This methodological framework resulted in a wealth of insights, sourced not merely from trained professionals in the field of defence but also the wider civil society. Such discernments encompass perspectives on specific defence imperatives, budgetary delineations, and potential bottlenecks manifesting in the strategic rollout.

After the rigorous analysis of the aggregated data, a hermeneutic approach was deployed to distil dominant trends, shed light on key challenges, and propose feasible rectifications. In our unwavering commitment to preserving academic rigour and ensuring methodological precision, we extensively consulted with renowned experts. These deliberative sessions, oriented towards enhancing and reconciling insights drawn from the digital milieu, significantly enriched the depth, clarity, and relevance of our academic research. These consultations involved in-depth discussions and comprehensive interviews with experts in defence planning, budgetary protocols, and national policy vectors. These epistemological channels thus rendered an enhanced understanding of the diverse intricacies and the broader challenges embedded in defence planning and its implementation, particularly within the architecture of Ukraine's Armed Forces.

6 RESULTS

The analysis of budget expenditures for 2022 highlights that it was not structured as a "war budget",[9] leading to insufficient allocations for essential provisions such as food, medical care, and arms and logistical support. Scholars have emphasised that the financing of the Ukrainian army lacked effective planning and was ad hoc, resulting in significant challenges that need to be addressed in future budget planning.[10]

9 Vladyslav Ijerusalymov, 'Defence Budget: How War Altered Budget Expenditures' *Ekonomichna Pravda* (Kyiv, 8 July 2022) <https://www.epravda.com.ua/columns/2022/07/8/689001/> accessed 22 September 2023.

10 Robert H Chenhall, 'Management Control Systems Design Within its Organizational Context: Findings from Contingency-Based Research and Directions for the Future' (2003) 28(2-3) Accounting, Organizations and Society 127, doi: 10.1016/S0361-3682(01)00027-7; Igor Lyutiy, Yuliia Petlenko and Nataliia Drozd,

Considering the urgency and severity of the current security situation, according to R. H. Chenhall,[11] it is crucial to incorporate these concerns into future budget decisions. Allocating adequate funding is of utmost importance to ensure the readiness and capability of the Ukrainian army to counter potential threats effectively. Additionally, establishing a comprehensive budget framework is critical for effective resource planning and allocation. A meticulous assessment of the defence sector's needs, including immediate requirements and long-term perspectives, is necessary. A systematic and strategic approach to budget formulation should include financial forecasting and provision for defence resources, considering potential scenarios for utilising defence forces.

Since 1991, the manual formation of the military budget has been challenging due to political instability, considerable uncertainty, and limited funding.[12] Given the prospects of Ukraine's integration into NATO, a thorough review of budget provisions and resource allocation for the Ukrainian defence complex is essential. Before the war, the identified shortcomings in military expenditure budgeting emphasised the need to enhance budget planning and prioritise the defence sector's capabilities and goals.[13] The future budget must address the challenges of defence planning and align with the establishment and maintenance of military potential, particularly by adequately financing the essential needs of the Ukrainian army and considering long-term strategic perspectives.

NATO countries extensively utilise defence planning methods, such as scenario planning, tabletop exercises, structured planning, and risk-based planning (Tab. 1).[14] These methods enable the anticipation of emerging threats, identification of potential risks, and the development of strategic plans and policies for the optimal utilisation of defence resources during the forecasting phase.

The concept of capabilities stands as a pivotal element in defence planning. This approach is rooted in assessing the specific military capabilities required by the armed forces to accomplish established defence objectives. It empowers NATO countries to determine their needs for military resources, including weaponry, equipment, infrastructure, and personnel, and to allocate the necessary resources to attain strategic goals.

According to Elsawah et al., capability-based defence planning involves the systematic development of armed forces over the long term.[15] The purpose of such planning is to effectively prepare the country's armed forces for future challenges and threats by using available resources.

'The Importance of Openness and Transparency in the Budget Process in the Defence and Security Sector of Ukraine' (2022) 6(47) Financial and Credit Activity: Problems of Theory and Practice 99, doi: 10.55643/fcaptp.6.47.2022.3900; Nalyvaiko, Sivokha and Polyaev (n 8); AH Petrenko, 'On the Implementation of Defence Management and Change Management in the Ministry of Defence of Ukraine' (2019) 2 Science and Defence 3, doi:10.33099/2618-1614-2019-7-2-03-08; Rusnak and others (n 7); IS Rusnak and others, 'Documents of Strategic (Defence) Planning of the Ministry of Defence of Ukraine, the Armed Forces of Ukraine, other Components of the Defence Forces, and the Procedure for their Implementation' (2021) 3 Science and Defence 13, doi: 10.33099/2618-1614-2021-16-3-13-21; FV Sahaniuk and VS Frolov, 'Systemic Approach to Implementing Defence Reform in Ukraine' (2018) 1(62) Collection of the scientific papers of the Centre for Military and Strategic Studies of the National Defence University of Ukraine 13.

11 Chenhall (n 10).

12 Rusnak and others (n 7).

13 Christopher Mark Davis, 'The Ukraine Conflict, Economic-Military Power Balances and Economic Sanctions' (2016) 28(2) Post-Communist Economies 167, doi: 10.1080/14631377.2016.1139301.

14 Brendan W McGarry, 'DOD Planning, Programming, Budgeting, and Execution (PPBE): Overview and SelectedIssues for Congress' (*Library of Congress, Congressional Research SVC*, 11 July 2022) <https://ppbereform.senate.gov/in_the_news/congressional-research-service-crs-report-dod-planning-programming-budgeting-and-execution-ppbe-overview-and-selected-issues-for-congress/> accessed 22 September 2023.

15 Sondoss Elsawah and others, 'A Decision Support Methodology to Support Military Asset and Resource Planning' (2023) Journal of Simulation 1, doi: 10.1080/17477778.2023.2165460.

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Table 1. *Defence planning methods used in NATO countries*

Approach	Characteristic
Top-down planning	This approach involves the development of strategies based on a sequential process from the formulation of policies, interests and goals at the highest level, to the approval of plans at lower levels.
Resource-constrained planning	The goal of this approach is to create viable prospects for achieving goals based on a sustainable approach with a clearly defined budget. This approach does not foresee the ability to increase costs to achieve goals without a corresponding increase in productivity.
Incremental planning	This is an approach in which decisions are made not in view of clearly defined goals, but on the realities of the present and the ability to solve them only in general form with the help of gradual steps, which, in turn, are based on the constant correction of strategic plans under the influence of internal and external.
Capacity-based planning	This method involves planning, which involves the development of the capabilities of the defence forces in terms of countering threats and risks for the long term within the limits of available resources.
Scenario-based planning	This approach is based on establishing a sequence of states of the forecasting object under different forecasts of changes in the background on which the object is located.
Threat-based planning	This approach involves identifying potential adversaries and assessing their capabilities. Capability or system requirements are based on adversary dominance criteria. Quantitative and qualitative solutions are explored. This was a common approach to planning during the Cold War.

To anticipate and resolve these future conflicts, long-term planning is crucial.[16] This involves analysing the political, economic, social, and technological factors that could potentially affect the conflict environment and using that information to determine the direction of military development. Determining the strategic direction is extremely important because it enables the specification of the tasks necessary to create an effective defence force.

The planning continuum within defence structures has traditionally followed a sequential hierarchy, progressing from long-term expectations to medium-term strategies and ending with short-term operations.

The medium-term planning phase is of particular importance in this trajectory. According to M. Barzelay and C. Campbell,[17] mid-term planning comes after determining the main directions of long-term planning. This phase is characterised, as defined by G. A. Garrett and R. G. Rendon,[18] by focusing on detailed indicators crucial for orchestrating a smart composition of the armed forces. Such determinants and indicators are quintessential to ensure that defence structures can respond and adapt to new challenges and threats. Thus, P. Joyce defines the essence of medium-term planning as its ability to reconcile the broad visions of the long-term planning phase with concrete, actionable and measurable strategies that prepare the basis for the inevitable implementation phases.[19]

16 Jones and McCaffery (n 1).

17 Michael Barzelay and Colin Campbell, *Preparing for the Future: Strategic Planning in the US Air Force* (Brookings Institution Press 2003).

18 Gregory A Garrett and Rene G Rendon, *US Military Program Management: Lessons Learned and Best Practices* (Berrett-Koehler Pub 2006)

19 Paul Joyce, *Strategic Management and Governance: Strategy Execution Around the World* (Routledge 2022) doi: 10.4324/9781351045797.

Subsequently, as the defence system moves from planning to execution, J. L. McCaffery and L. R. Jones, the emphasis shifts to the short term.[20] At this stage, budget considerations become paramount. The intention of this phase is to actualise the plans set out in the medium term, ensuring that the construction of defence forces is not just theoretical but implemented. In this context, the budgeting process is not just a fiscal action. It becomes a strategic tool where resources are carefully allocated according to identified challenges and threats. This allocation ensures financial prudence and that the country's defence apparatus is flexible, resilient, and ready to face modern security challenges.

The interplay between medium-term planning and short-term budgeting plays a crucial role in bridging the gap between strategic foresight and effective defence efforts, ensuring that defence institutions are vision-driven and deliver results. Long-term strategic plans serve as the foundation for budget planning and other short-term activity plans in defence programs. Together, these stages form the Planning, Programming, Budgeting and Execution (PPBE) system (Fig. 1),[21] an integrated process that aims to achieve planning and management objectives while optimising budget expenditures.

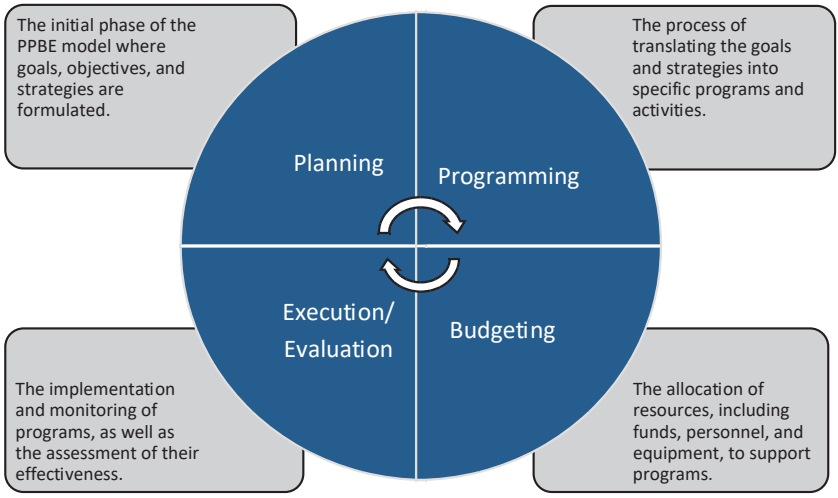

Figure 1. *Planning, Programming, Budgeting and Execution/Evaluation (PPBE) Model*

The PPBE system, within the framework of NATO and the world's leading countries, encompasses various key components. This includes strategic planning, which involves defining the directions of the defence sector and substantiating the qualitative and quantitative composition of weapons and equipment. Using software methods, priorities are established to address defence issues effectively. Subsequently, resources are allocated to comprehensive programs based on these priorities. Finally, the achieved results are evaluated, and adjustments are made to resource allocation if necessary.

The NATO capabilities process determines the desired future state, identifies gaps, distributes requirements, provides support, monitors progress, and relies on defence expenditures, which is challenging in the current economic environment. The Fig. 2 below provides a visual representation of the NDPP model.

20 Jerry L McCaffery and LR Jones, 'Reform of Program Budgeting in the Department of Defence' (2005) 6(2) International Public Management Review 141.

21 Jones and McCaffery (n 1).

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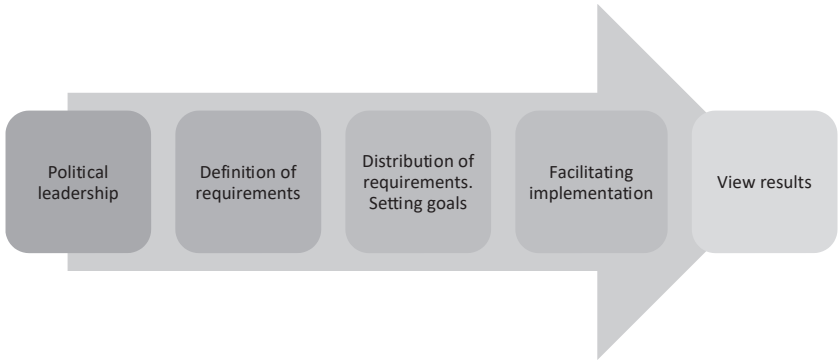

Figure 2. *NATO Defence Planning Process (NDPP)*

Categories of capabilities, which encompass strategic guidelines of the government, defence policy priorities, scenarios, capability requirements, gap identification, options for gap closure, investment balance, capability development plan, capability assessment, existing and planned capabilities, operational concepts, future environment (threats, technologies), and resource constraints, form a hierarchical classification structure. This structure serves as a shared vocabulary for all participants involved in the defence planning process.

Through this framework, the contributions of various armed forces can be compared in terms of overall combat potential and the development of defence capabilities, facilitating informed decision-making.

The creation, enhancement, maintenance, and decommissioning of capabilities are carried out to effectively address specific tasks within defined situations outlined in planning scenarios. These scenarios provide the necessary planning context and align capability requirements with strategic objectives set by the government forces. Furthermore, a transition towards alternative capabilities that can be implemented within allocated resources has been initiated. To assess and develop capabilities in the defence planning process,[22] the Ministry of Defence of Ukraine and the Armed Forces of Ukraine employ key procedures, including security environment assessment, force planning, resource planning, risk assessment, formation of a perspective model (structure) of the Armed Forces, preparation of programmatic documents, and their subsequent development.[23]

The procedures mentioned above yield several outcomes, including the development of a prospective composition and organisational structure for the forces, ensuring their alignment with the tasks of the Armed Forces of Ukraine and a fair distribution of resources.[24] Moreover, long- and medium-term program documents are being created to guide strategic planning. To strengthen civilian public control, the Resolution of the Verkhovna Rada of Ukraine No. 2056-IX (16/09/2022)[25] emphasises democratic civilian oversight over the Armed Forces and

22 Nalyvaiko, Sivokha and Polyaev (n 8).

23 Order of the Ministry of Defence of Ukraine no 484 'On the Approval of the Procedure for the Organization and Implementation of Defence Planning in the Ministry of Defence of Ukraine, the Armed Forces of Ukraine, and Other Defence Forces of the Ministry of Defence of Ukraine' of 22 December 2020 [2021] Official Gazette of Ukraine 15/587.

24 Rusnak and others (n 7).

25 Resolution of the Verkhovna Rada of Ukraine no 2056-IX 'On the adoption as a basis of the draft Law of Ukraine on Amendments to Certain Legislative Acts of Ukraine on National Security and Defense Issues on Strengthening Democratic Civilian Control over the Armed Forces of Ukraine, Improving the

designates the Ministry of Defence as the responsible civilian entity for defence planning. Additionally, a 5-year waiting period for the appointment of the Minister of Defence and Deputy Ministers is proposed to eliminate subjective factors that have hindered the process in Ukraine.

The defence review investigates potential scenarios for utilising the Armed Forces of Ukraine in the medium- to long-term perspective. Based on these scenarios, the composition of Armed Forces resources required to fulfil the designated tasks is determined while considering the existing composition. In this context, the Strategic Defence Bulletin (SDB), approved by Presidential Decree No. 473/2021 (17/09/2021),[26] establishes the main directions, perspective model, and strategic goals of the Armed Forces of Ukraine until 2025. The prospective model and requirements for structure, capabilities, and indicators are based on the mission and vision of the 2030 model, considering the results of the defence review. The SDB is the foundation for developing and implementing state target programs and other documents to enhance the Defence Forces' capabilities. Considering the difference in capabilities and the constraints that arise during the task formulation, the task of rational allocation of defence resources to achieve the maximum possible effect of the Armed Forces of Ukraine application within the defined scenarios is addressed.[27]

At the conceptual level, one of these tasks is being addressed by the Ministry of Defence of Ukraine, which has initiated work on the Unified Information System for Defence Resource Management. The results of calculations within the developed Decision Support System,[28] particularly the plans for the rational development of the Armed Forces of Ukraine (defence forces), are proposed to be presented within the framework of the Unified Information System for Defence Resource Management for general use.

It should be noted that the implementation of the capability-based defence planning (CBP) system, widely recognised as a best practice in defence planning worldwide, is somewhat limited in Ukraine. One of the main concerns pertains to the cyclical and continuous nature of the analysis and evaluation procedures for major and target defence programs and the statistical nature of implementing changes to the State Development Programs. Additionally, the acceptance of subjective decisions that deviate from the State Development Programs and the execution of programs and plans not prescribed by the regulatory acts of the Ministry of Defence presents another challenge. A comprehensive and detailed financial calculation pertaining to the impact of their implementation on the overall defence budget is lacking.[29] The persistent inconsistency and frequent modifications to previously planned measures necessitate improvements in the procedures for adjusting the State Development Programs, major and target development programs, and key indicators of defence planning in the medium-term perspective, including the redistribution of financial indicators.

An analysis of the actual indicators of budget programs within Ukraine's Ministry of Defence[30] reveals that they do not consistently adhere to the requirements outlined in the Program Classification Manual (PCM), particularly in terms of measurability and the presence of

Unified Leadership of the Defense Forces of the State, and Planning in the Fields of National Security and Defense' of 16 September 2022 [2022] Official Gazette of Ukraine 18/960.

26 Decree of the President of Ukraine no 473/2021 'On the decision of the National Security and Defense Council of Ukraine dated August 20, 2021 "On the Strategic Defense Bulletin of Ukraine"' of 17 September 2021 [2021] Official Gazette of Ukraine 76/4767.

27 Petrenko (n 10); Sahaniuk and Frolov (n 10).

28 Rusnak and others (n 7).

29 Vadym V Pakholtchuk, 'Transformation of the Financing Mechanism of the Armed Forces in the Context of Euro-Atlantic Integration' (DPhil thesis, Military Institute Kyiv National Taras Shevchenko University 2022).

30 ibid.

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target values to assess progress towards the program's ultimate strategic goal. Furthermore, the effectiveness of budget utilisation is often compromised. The decision-making process related to the defence budget, formulated using insufficient budget language encompassing article names, economic and program classification codes, procedural terminology, and others, falls short of ensuring transparency in resource allocation.

7 CONCLUSION

Addressing the existing challenges in defence planning and implementation is of utmost importance, necessitating the establishment of a more effective mechanism that not only links capability-based planning to the allocated budget funds but also evaluates the impact of achieving the desired objectives. Furthermore, the development of a comprehensive methodological framework for managing targeted programs within Ukraine's Armed Forces, aligning it with the principles of planning, programming, budgeting, and execution (PPBE), is crucial. Additionally, emphasis should be placed on strengthening civilian control and supervision in the defence planning process. This measure is essential for optimising resource utilisation, ensuring the alignment of defence priorities with national security objectives, and guaranteeing the overall success of the planning and implementation efforts. Therefore, integrating PPBE principles into Ukraine's defence planning, alongside reinforcing civilian control, will contribute to a more efficient and transparent defence planning process, leading to optimised resource utilisation and alignment with strategic goals.

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Case Study

THE IMPACT OF THE ARMED CONFLICT ON LABOUR LAW: THE CASE OF UKRAINE

Sergii Venediktov*

ABSTRACT

Background: *The full-scale military aggression against Ukraine by the Russian Federation has dramatically affected all walks of life in the country, and the world of work is certainly not exempt from this. During the first months of the war, the operation of many enterprises was significantly disrupted; a substantial proportion of the working-age population was conscripted into the armed forces, some were forced to seek employment in regions of the country not affected by the hostilities or even had to change occupations entirely. This circumstance necessitated the adoption of appropriate legislative measures to stabilise labour relations in the light of wartime. The article focuses on the specifics of Ukrainian labour law in wartime conditions, reveals the difficulties of legal regulation of labour in connection with martial law, and highlights the possible ways of solving the challenges for labour law in the period of armed conflicts based on the experience of Ukraine.*

Methods: *The methods of legal reasoning and analysis were applied to present the main approaches to legal regulation of labour relations during martial law in Ukraine. Actual statistical and empirical data were used for proper argumentation of the conclusions. The method of analogy was used to assess possible ways of solving the challenges faced by labour law during armed conflicts, based on the experience of Ukraine.*

Results and Conclusions: *The article stresses that there is no single approach towards regulating labour relations during armed conflicts. Such conflicts are always unique, i.e. they differ in scale, intensity, duration, technical capabilities of the parties, types of weapons used, etc. Given the diversity of armed conflicts in the world, it is impossible to develop uniform labour standards applicable, for example, at the international level. This demonstrates the priority of national law in adapting the regulation of labour relations to wartime conditions. In this regard, considering the Ukrainian experience, it is appropriate to take into account that: a) armed conflict is dynamic by nature; thus, it can have different stages of development, which can also affect the world of work and labour legislation may need to be systematically revised to reflect new realities; b) considering that the territory of a country may not be evenly affected by the consequences of an armed conflict, in some cases it might be appropriate to provide for the different legal regulation of labour relations for its different regions; c) armed conflict should never be considered a 'valid reason' for unjustified and long-lasting restriction of employees' rights, as it is at a period when they are more vulnerable and therefore require additional legal protection.*

Keywords: *labour law, employment relationship, armed conflict, martial law, restriction of labour rights, Ukraine.*

1 INTRODUCTION

On 24 February 2022, the Russian Federation waged a full-scale military invasion of Ukraine and aerial attacks on the Ukrainian territory, which have not stopped since. Russian troops invaded Ukraine near the areas of Kharkiv, Kherson, Kyiv, Chernihiv and Sumy, entering from the territory of Russia, Belarus and Crimea, temporarily occupied by the Russian Federation. As of early autumn 2023, the Russian Federation continues to occupy about 18 % of Ukraine's territory.[1] On the same day of the invasion, Ukraine declared martial law along with the general mobilisation of its armed forces.[2] The war outbreak has dramatically affected all walks of life in the country, and the world of work, in this case, is no exception.

During the first months of the war, the operation of many enterprises was significantly disrupted; some of them remained in the occupied territory, while others were completely or partially destroyed, and some could not function properly due to the broken supply chains, regular aerial attacks, an outflow of the labour force, etc. Moreover, the airstrikes caused significant damage to the critical infrastructure, resulting in widespread power outages affecting both businesses and private households during the autumn-winter period 2022-2023. Overall, the capacity of Ukraine's energy system was reduced by 68 %, nuclear generation capacity by 44 %, and hydroelectric power plants by 29 %. Out of 94 most important high-voltage transformers, 42 were damaged or destroyed.[3] At the same time, according to the estimation of the Ministry of Economy of Ukraine of March 2023, the GDP decline in 2022 amounted to 29.2 %.[4]

The war also had a significant negative impact on the workforce. For example, the National Bank of Ukraine estimated the unemployment rate in Ukraine at 25-26 % in 2022, equating to a total of 3.2 million unemployed persons.[5] Moreover, a substantial proportion of the working-age population was conscripted into the armed forces, while some were forced to seek employment in regions of the country not affected by the hostilities or even had to change occupations entirely. On the other hand, the workforce has been heavily influenced by the migration of the female population to other countries. The International Labour Organization (hereinafter, the ILO) estimates that approximately 1.6 million Ukrainian refugees, overwhelmingly women, were employed in Ukraine before fleeing the aggression, accounting for 10.4 % of the country's total pre-conflict workforce.[6] The UN Refugee Agency estimates that the number of refugees from Ukraine registered for temporary protection as of 29 August 2023 was 6.2 million.[7] This figure looks quite impressive, considering that the population of

1 *DeepState Map* <https://deepstatemap.live/#7/48.078/34.596> accessed 31 August 2023.

2 Decree of the President of Ukraine no 64/2022 'On the Imposition of Martial Law in Ukraine' of 24 February 2022 <https://zakon.rada.gov.ua/laws/show/64/2022> accessed 31 August 2023; Decree of the President of Ukraine no 65/2022 'On the General Mobilization' of 24 February 2022 <https://zakon.rada.gov.ua/laws/show/65/2022> accessed 31 August 2023.

3 Olena Kovalenko, 'This winter will be more terrible than the one we have already passed — energy' (*UNIAN*, 13 July 2023) <https://www.unian.ua/economics/energetics/energetiki-rozpovili-shcho-chekaye-na-ukrajinu-vzimku-12327288.html > accessed 31 August 2023.

4 Ministry of Economy of Ukraine, 'GDP falls by 29.2% in 2022' (*Government Portal*, 13 March 2023) <https://www.kmu.gov.ua/en/news/minekonomiky-vvp-za-pidsumkom-2022-roku-vpav-na-292> accessed 31 August 2023.

5 National Bank of Ukraine, *Inflation Report, January 2023* (NBU 2023) <https://bank.gov.ua/admin_uploads/article/IR_2023-Q1.pdf?v=4> accessed 31 August 2023.

6 International Labour Organization, *ILO Monitor on the World of Work: Multiple Crises Threaten the Global Labour Market Recovery* (10th edn, ILO 2022) 15 <https://www.ilo.org/global/publications/books/WCMS_859255/lang--en/index.htm> accessed 31 August 2023.

7 'Ukraine Refugee Situation' (*Operational Data Portal*, 29 August 2023) <https://data.unhcr.org/en/situations/ukraine> accessed 31 August 2023.

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Ukraine before the armed conflict was approximately 41 million citizens.[8]

The purpose of this article is to study the specifics of Ukrainian labour law in the context of wartime, to identify difficulties in the legal regulation of employment relationships in connection with martial law, and to focus on possible ways of solving the challenges for labour law in the period of armed conflicts, based on the Ukraine experience.

2 A BRIEF SUMMARY OF UKRAINIAN LABOUR LAW

Before analysing the impact of the armed conflict on Ukrainian labour law, one should clearly understand what the country's labour law looks like. Overall, Ukrainian labour law is characterised by the broad application of legislation and a rigid regulatory framework for employees and employers to autonomously determine their rights and obligations at the contractual level, including collective bargaining. In practice, this means that the primary regulations of labour relations in Ukraine are carried out through the Constitution, the Labour Code (hereinafter, the LC), specialised laws and subordinate legislation, with individual employment contracts and collective agreements holding a secondary importance.

The Constitution of Ukraine[9] belongs to a new generation of constitutions that widely began to be adopted after the Second World War and which are defined by a certain unified model, characterised by the consolidation in their provisions of strict rules on fundamental human and civil rights and freedoms, including in the world of work. The Ukrainian Constitution is no exception in this regard and contains a significant number of labour rights. These rights include the right to freedom of association and the right to strike; the right to labour, including the possibility to earn a living by labour that person freely chooses or to which a person freely agrees; the right to proper, safe, and healthy work conditions; the right to remuneration no less than the minimum wage determined by the law; the prohibition of employing women and minors in work hazardous to their health; protection from unlawful dismissal; the right to rest, ensured by the granting of weekly rest days and annual paid leave, the establishment of shorter working hours for certain professions and industries, and the reduction working hours at night; and the right to social protection in cases of disability or unemployment.

The LC plays a central role as it is the main legislative act regulating labour relations in Ukraine.[10] The fact that the Code was adopted in 1971, i.e., when Ukraine was part of the Soviet Union, is often used as a ground for criticism of its outdatedness and inconsistency with the realities of the modern world of work. But this criticism is only partially fair, given that the LC has been amended almost 170 times since its adoption, including 15 amendments during the last year alone. Consequently, based on these arguments, the LC can no longer be considered irrelevant in the present context. For example, in recent years, the Code has been supplemented with provisions covering on-call work, home and remote work, paternity leave, etc. However, since the world of work is extensive, not all categories related to it have received timely and proper regulation in the LC. In this regard, the Code still does not contain provisions on non-competition and non-disclosure of trade secrets, apprenticeship agreements, grievance procedures, digital labour platforms, etc.

In addition to the LC, there is a great variety of labour laws in Ukraine. As P. Pilipenko em-

8 Mariia Timonina (ed), *Number of Present Population of Ukraine, as of January 1 2022* (State Statistics Service of Ukraine 2022) <http://db.ukrcensus.gov.ua/PXWEB2007/popul_eng.htm> accessed 31 August 2023.

9 Constitution of Ukraine no 254 k/96-BP of 28 June 1996 (as amended of 01 January 2020) <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 31 August 2023.

10 Labour Code of Ukraine (LC) no 322-VIII of 10 December 1971 (as amended of 30 July 2023) <https://zakon.rada.gov.ua/laws/show/322-08?lang=en#Text> accessed 31 August 2023.

phasises, 'such practice of regulation of labour relations has emerged symptomatically and, unfortunately, has not justified itself'.[11] After all, the system of Ukrainian labour legislation is, in essence, a peculiar mishmash of legal regulation of labour, in which the still preserved Soviet labour law approach is not always successfully combined with modern practice.[12] Y. Simutina states that 'the process of improving the legal regulation of labour relations is not systemic but chaotic, generating numerous inconsistencies of legal norms'.[13] As a result, many provisions of Ukrainian labour laws essentially duplicate the LC, which undoubtedly confuses parties involved in employment relationships. For example, the regulation of labour remuneration is addressed both in a separate chapter of the LC, titled 'Remuneration of Labour,' and in a distinct law — the Law on Remuneration of Labour.[14] Yet, a significant portion of the provisions in these two acts is almost identical. The same can be observed concerning the correlation between the LC and the Law on Leaves[15] as well as the LC and the Law on Occupational Safety and Health.[16]

Regarding the subordinate labour acts adopted by the executive authorities, it should be noted that their presence in Ukraine's current system of labour legislation is insignificant and diminishing year by year. For instance, at the end of 2022, two key acts[17] in the field of multiple job holding were repealed. Since no alternative legislation was put in place, this sought-after category of labour law remains virtually unregulated. In addition, many subordinate acts enacted at a completely different time become obsolete in modern conditions. For example, due to the growth of digitalisation, the administration of employment record books became non-mandatory in 2021. Consequently, the still applicable guidelines on the procedure for administering these books[18] have lost practical significance. Notably, exceptions to this situation are the sphere of labour inspectorate and occupational safety and health, where subordinate legislation continues to hold substantial importance.

Summarising Ukrainian labour law, it is worth noting that, in addition to the dominance of legislative regulation of labour relations, it is generally characterised by low collective bargain-

11 PD Pylypenko, *Academic works of Pylypenko Pylyp Danylovych: Selected works* (TV Parpan ed, Kolo 2013) 407.

12 For example, the literal title of the LC is 'Code of Labour Laws', which initially implied that the Code incorporated all the basic labour regulations, while certain labour issues were specified in subordinate legislation. As for standalone labour laws, they began to emerge in Ukrainian labour law only from the end of 20th century.

13 Yana Simutina, 'Current Challenges of the Labour Law of Ukraine: On the Way to European Integration' (2018) 27 Juridica International 88, doi: 10.12697/JI.2018.27.09.

14 LC no 322-VIII (n 10) ch 7; Law of Ukraine no 108/95-VR 'On Remuneration of Labour' of 24 March 1995 (as amended of 1 April 2023) <https://zakon.rada.gov.ua/laws/show/108/95-%D0%B2%D1%80#top> accessed 31 August 2023.

15 LC no 322-VIII (n 10) chs 3b, 5, 12, 14; Law of Ukraine no 504/96-VR 'On Leaves' of 15 November 1996 (as amended of 29 July 2023) <https://zakon.rada.gov.ua/laws/show/504/96-%D0%B2%D1%80#Text> accessed 31 August 2023.

16 LC no 322-VIII (n 10) ch 11; Law of Ukraine no 2694-XII 'On Occupational Safety and Health' of 14 October 1992 (as amended of 31 March 2023) <https://zakon.rada.gov.ua/laws/show/2694-12#Text > accessed 31 August 2023.

17 Resolution of the Cabinet of Ministers of Ukraine no 245 'On Multiple Job Holding of Employees of State Enterprises, Institutions and Organisations' of 3 April 1993 <https://zakon.rada.gov.ua/laws/show/245-93-%D0%BF#Text> accessed 31 August 2023; Order of the Ministry of Labour of Ukraine, Ministry of Justice of Ukraine and Ministry of Finance of Ukraine no 43 'On the approval of the Regulations on Working Conditions in Case of Multiple Job Holding for Employees of State-Owned Enterprises, Institutions and Organisations' of 28 June 1993 <https://zakon.rada.gov.ua/laws/show/z0076-93#Text> accessed 31 August 2023.

18 Order of the Ministry of Labour of Ukraine, Ministry of Justice of Ukraine, Ministry of Social Protection of Population of Ukraine no 58 'On the approval of the Instruction on the Procedure for Administration of Employment Record Books of Employees' of 29 July 1993 (as amended of 27 July 2018) <https://zakon.rada.gov.ua/laws/show/z0110-93#Text> accessed 31 August 2023.

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ing coverage, insufficient popularity of industrial actions among employees,[19] and detailed regulation of the main terms and conditions of an employment relationship (remuneration, working hours and rest periods, termination of employment, etc.) at the legislative level. It also features extensive regulation of disciplinary proceedings against an employee, comprehensive legal regulation of the material liability of an employee towards the employer, and the presence of still unremoved vestiges of the Soviet labour law doctrine.[20]

3 REGULATION OF LABOUR RELATIONS DURING ARMED CONFLICT UNDER THE LEGISLATION OF UKRAINE

The ancient Roman politician Marcus Tullius Cicero said — *inter arma silent leges*, which means — in times of war, the laws are silent. But in the modern world, it is already difficult to agree with this well-known statement. Thus, armed conflict at the international level should be understood as the use of armed force by one state(s) against another state(s). Meanwhile, it does not matter whether the states concerned consider themselves at war with each other or how they describe the conflict.[21] Definitely, during such conflicts, the legal regulation of any type of social relations, including labour relations, is subject to the interference of many external unpredictable factors. However, it is important to emphasise that, in most cases, armed conflicts are not expressed by themselves; instead, they are accompanied by the imposition of martial law. Martial law is a special legal regime imposed on the whole country or some of its territories in the event of armed aggression or threat of aggression. One of the main tasks of martial law is to adapt social relations to the conditions of conflict in the most effective way. Typically, martial law is associated with temporary emergency measures, which are liable by their very nature and may involve certain restrictions, including on fundamental rights.

The foundations for the practical implementation of martial law in Ukraine are laid down at the constitutional level. Thus, the Constitution of Ukraine specifies that under the conditions of martial law, specific restrictions on rights and freedoms may be established with the indication of the period of effect for such restrictions. Also, the Constitution defines rights and freedoms that cannot be restricted, but labour rights are not among them.[22] Consequently, in Ukraine, the limitation of all relevant labour rights in the event of imposition of martial law is allowed at the constitutional level. This limitation is not absolute and may be adjusted by the government depending on the situation's complexity.

A more specific regulation for governing martial law in Ukraine is established through a special normative act known as the Law on the Legal Regime of Martial Law.[23] However,

19 According to official statistics there were no strikes at all in Ukraine in 2018-2020 and only 11 in 2021, see: 'Strikes and their consequences, by individual types of economic activity in 2018–2021' (*State Statistics Service of Ukraine*, 2022) <https://ukrstat.gov.ua> accessed 31 August 2023.

20 For example, the primary body for resolving most individual labour disputes in Ukraine remains the Labour Dispute Commission, which is formed at the level of a particular employer and consists of at least half of its employees. The introduction of the concept of commissions in the middle of the 20th century probably seemed to make sense. In particular, from an ideological point of view, giving workers considerable discretion in resolving a dispute at the Labour Dispute Commissions was in line with communist doctrine that cultivated the concept of a 'workers' and peasants' state'. In turn, in present-day conditions, a decision made by a Commission, a significant part of which is formed by employees who are indirectly dependent on the employer, may raise doubts about its objectivity.

21 The Art. 2 of Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949 Geneva) <https://www.ohchr.org/en/instruments-mechanisms/instruments/geneva-convention-relative-protection-civilian-persons-time-war> accessed 31 August 2023.

22 Constitution no 254 k/96-BP (n 9).

23 Law of Ukraine no 389-VIII 'On the Legal Regime of Martial Law' of 12 May 2015 (as amended of 20 August 2023) <https://zakon.rada.gov.ua/laws/show/389-19#Text> accessed 31 August 2023.

despite its diverse provisions, the Law does not contain precise rules devoted to regulating labour relations under martial law. Nonetheless, the mentioned law does impose certain restrictions, such as prohibiting strikes during martial law, defining the legal status of labour duty[24], and granting military authorities the authority to utilise production facilities and labour resources of enterprises for defence needs. In the early days of the aggression, the lack of clear regulation of labour at times of war created certain difficulties for both employees and employers. Remarkably, the Covid-19 experience (namely the practice of telework, which was widely applied during the pandemic) helped in this case to adapt to labour relations in new circumstances. Nevertheless, a few weeks after the war outbreak, the legislative body passed a specific act on this subject — the Law on the Organization of Labour Relations under Martial Law (hereinafter, the LML),[25] aiming to harmonise the regulation of labour relations under martial law.

The LML introduces various provisions applicable during the period of martial law. These include the possibility of imposing restrictions on the rights and freedoms guaranteed by Articles 43 and 44 of the Constitution of Ukraine[26]. Additionally, it allows employees and employers to independently determine the form of the employment contract, whether written or verbal. Limitations on the conclusion of fixed-term employment contracts, as stipulated in the LC, do not apply, and employers are not bound by the typical two-month notice period for notifying employees of changes in essential working conditions and conditions of remuneration.

The LML also grants employers the right to terminate an employee's employment during his or her temporary incapacity for work, as well as during his or her leave, with exceptions for social leave. It permits employers at critical infrastructure facilities to unilaterally extend standard working hours from 40 to 60 hours per week. Notably, time constraints on overtime work, established by the LC (four hours over two consecutive days and 120 hours per year), and public holidays on which work is not performed (12 days during the year) do not apply. Moreover, the LML grants power to employers to refuse any type of leave requested by an employee, except for social leave, if such an employee is involved in performing work on critical infrastructure facilities. The LML also stipulates that during martial law, certain provisions of the collective agreement may be suspended unilaterally at the employer's initiative, and employers are not obliged to deduct funds for the activity of trade union organisations.

In addition to the LML, on 19 July 2022, the Ukrainian Parliament adopted the Law on Amendments to Certain Legislative Acts of Ukraine on Simplifying the Regulation of Labour Relations in the Field of Small and Medium-Sized Entrepreneurship and Reducing the Administrative Burden on Entrepreneurial Activity (hereinafter, the LSR).[27] This Law significantly amended the LC by establishing a simplified regime for the regulation of labour relations

24 The labour duty is a short-term duty to perform defence-related work during martial law, as well as to eliminate man-made, natural and military emergencies that arose during martial law, which does not require the consent of the person in respect of whom such a duty is imposed (para 3), see: Resolution of the Cabinet of Ministers of Ukraine no 753 'On the approval of the Procedure for involving working-age individuals in socially useful work under martial law' of 13 July 2011 (as amended of 22 December 2022) <https://zakon.rada.gov.ua/laws/show/753-2011-п#Text> accessed 31 August 2023.

25 Law of Ukraine (LML) no 2136-IX 'On the Organization of Labour Relations under Martial Law' of 15 March 2022 (as amended of 19 July 2022) <https://zakon.rada.gov.ua/laws/show/2136-20#top> accessed 31 August 2023.

26 While Article 44 of the Constitution of Ukraine only ensures the right to strike, Article 43 tactfully contains the majority of labour-related constitutional rights.

27 Law of Ukraine (LSR) no 2434-IX 'On Amendments to Certain Legislative Acts of Ukraine on Simplifying the Regulation of Labour Relations in the Field of Small and Medium-Sized Entrepreneurship and Reducing the Administrative Burden on Entrepreneurial Activity' of 19 July 2022 <https://zakon.rada.gov.ua/laws/show/2434-20#Text> accessed 31 August 2023.

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during martial law. The concept of a simplified regime means that the parties entering into an employment contract may, at their own discretion, determine the grounds for the emergence and termination of employment relationship, the remuneration system, labour standards, working hours and rest periods. Moreover, employers applying the simplified regime are not subject to the obligation to adopt local regulations and administrative documentation such as employee handbooks and leave schedules. The simplified regime is of limited application and can only be extended to the regulation of employment relationship between an employee and an employer who is a small or medium-sized business entity or between an employer and an employee whose monthly salary exceeds eight minimum wages.

To some degree, the provisions of the LSR should be characterised as quite controversial. For example, it remains a mystery why the LSR amends the LC and not the LML. After all, it is at this level that the specifics of the legal regulation of labour relations under martial law are established. In turn, making direct amendments to the LC, which involve, among other things, significant interference with its structure and has a universal rather than time-limited application, seems illogical and creates risks of abuse of the simplified regime, especially on the employers' side. Furthermore, and most importantly, the largely unrestricted freedom given by the LSR to employers and employees to independently establish most rights and obligations may lead to the risk of narrowing labour rights, primarily in relation to employees. That is, given that the employee is in a subordinate position to the employer, his or her free will in determining the terms and conditions of employment is likely to be the 'free will' of the employer.

In addition to LML and LSR, the Parliament of Ukraine passed other laws that had limited impact on labour regulation under martial law. An example of this is an amendment of the LC to include a new ground for the termination of an employment contract at the employer's discretion. Under this amendment, an employer has the right to terminate an employment contract with an employee on the basis of the destruction (absence) of production, organisational and technical conditions, means of production or the employer's property due to military operations. Unfortunately, it is necessary to acknowledge that this new ground for termination of an employment contract appears somewhat declarative. After all, the LC has long included a ground for the termination of an employment contract in connection with the changes in the organisation of production and labour, which can also be applied to situations based on the employer's operational requirements related to the armed conflict. As a result, the LC currently contains two rather similar grounds for terminating an employment contract.

4 EFFECT OF THE MARTIAL LAW LEGISLATION ON LABOUR LAW

As the above examples show, the legislative framework adopted during the martial law period in Ukraine primarily focuses on the interests of employers and the government, leaving employees on the sidelines. While the deviations of the vector of legal regulation in this case appear insignificant, when combined with other factors, primarily the long duration of armed conflict, they could seriously affect the workforce. In this context, the observation of the ILO Committee on Freedom of Association on the impact of the duration of martial law restrictions on trade union rights should be referred to. The Committee notes that 'in a case in which emergency measures had been extended over many years, … martial law was incompatible with the full exercise of trade union rights'.[28]

The conclusion above can be illustrated by the example of regulating working hours and

28 International Labour Organization, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th edn, International Labour Office 2006) para 200.

rest periods during martial law in Ukraine. As mentioned, under the LML, employers are authorised to unilaterally increase the working hours of workers employed at critical infrastructure facilities from 40 hours per week to 60 hours. Besides, the LML allows not to apply the overtime work limits set out in the LC for all categories of employees. Additionally, during martial law, employers have the discretion to deny leave (except for social leaves) to employees working at critical infrastructure facilities. In addition, the LC provisions, which prohibit employees from working during public holidays and allow for reduced working hours on the day preceding the public holiday, do not apply under martial law. Is such regulation of working hours and rest periods justified? If we talk about the first months of full-scale aggression in Ukraine, the answer in this case would be unequivocally affirmative. However, if we consider it from the perspective of 18 months of hostilities, which is the very case of Ukraine, there may be some concerns.

Of course, most of the restrictions on working time and rest periods in the case of Ukraine relate to critical infrastructure employees. But in practice, the term 'critical infrastructure' is described in Ukrainian legislation rather broadly. For example, it encompasses essential public (administrative) services, energy supply (including heat), water supply and sewerage, food supply, healthcare, electronic communications, financial services, transport services, chemical industry and even research activities. Thus, the legal coverage of employees involved in critical infrastructure facilities is quite extensive. As a result, a significant number of employees in the country may be at risk of physical and mental exhaustion due to the excessive workloads caused by extended working hours over a significant period.

Even setting aside critical infrastructure employees, it can be seen that the martial law labour legislation no longer restricts overtime and, to some extent, limits the right to rest for all categories of employees. For example, during martial law, the LC provisions stipulating the right of employees not to work on public holidays and concerning the reduction of working hours on the day preceding public holidays do not apply. On the one hand, this does not appear to be a significant restriction on workers' rights since there are only 12 such holidays per year. But, if we take the standard 40-hour working week as an example, we can see that in the entire pre-war 2021, an employee worked 1994 hours per year. However, if martial law lasts for the entirety of 2023, the working time under the same working conditions will be 2080 hours per year. That is, a typical employee under the standard working conditions will work 86 hours more compared to the pre-war period. This is without considering other factors leading to an increase in working time duration, such as overtime.

The martial law labour legislation stresses the fact that it was enacted in the first months of the full-scaled aggression. Since then, it has not been significantly revised and, subsequently, does not reflect the current realities in the country, which are quite different from those that prevailed during the first months of the war. Within a fairly short time and under rather complicated conditions, the legislative body developed the acts to take prompt measures necessary to resolve the situation at that challenging time for the country. Certainly, under such conditions, it was quite difficult to develop comprehensive laws that take into account the interests of all participants in the world of work. In turn, modifying the martial law labour legislation would allow not only to adapt it to the present-day realities of working life but also help to carry out some 'gap analysis'.

The provisions of the LSR serve as a good example in this case, under which the employee and the employer participating in the simplified regime of regulation of labour relations may establish other grounds for terminating an employment contract than those established by LC. Undoubtedly, the purpose of such provision of the LSR was to facilitate the entry into and the exit from employment relationships that may not always be of a long-term nature under military conflict. However, it should be noted that implementing such a concept puts the simplified regime employees in an unequal position with 'ordinary' employees for whom

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the law strictly regulates the termination of the employment contract. For example, the LC stipulates that the employer is entitled to dismiss an employee unless there is a valid reason for such dismissal connected with the capacity or conduct of the employee or based on the operational requirements of the employer. Moreover, providing the employee and the employer with unlimited freedom in determining the grounds for termination of the employment contract is contrary to the spirit of labour law, which presumes that when labour issues in an employment relationship are negotiated between essentially two unequal parties, such negotiations require appropriate legal safeguards for the less protected party, i.e. the employee. Also, such provision of the LSR is inconsistent with international standards binding on Ukraine.

5 INTERNATIONAL CONTEXT

On the one hand, the regulation of labour relations is a purely domestic matter, but on the other, if a country is party to relevant international treaties, the country is responsible for its proper implementation at the national level. In particular, Article 26 of the Vienna Convention on the Law of Treaties states that any treaty in force is binding upon the parties to it and must be performed by them in good faith. However, armed conflict is the factor that can make it difficult or even impossible for a country to fulfil its obligations. In this case, it would be useful to refer once again to the Vienna Convention, Article 73 of which takes this circumstance into account and excludes from the scope of application of the Convention cases involving the outbreak of hostilities between countries.[29]

At the same time, some international treaties expressly provide for derogation clauses that may also be applicable in the event of armed conflicts. For example, Article 15 of the European Convention on Human Rights states that in times of war or other public emergency threatening the life of the nation, any country may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.[30] However, many international treaties do not contain such clauses. Among these treaties are the ILO conventions, which significantly influence the national labour law of the ratifying country.

In this context, it would be useful to draw attention to the practice of application of the Forty-Hour Week Convention, 1935 (No. 47)[31] and the Termination of Employment Convention, 1982 (No. 158).[32] After all, Ukraine is one of the few countries that have ratified these two ILO instruments. Without going into a detailed analysis of the content of these international labour standards, it seems appropriate to draw attention to just a few of their provisions. Thus, under Article 1 of the ILO Convention No. 47, each country which ratifies this Convention declares its approval of the principle of a forty-hour week applied in such a manner that the standard of living is not reduced in consequence and the taking or facilitating of such measures

29 Vienna Convention on the Law of Treaties of 23 May 1969 <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en> accessed 31 August 2023.

30 European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, as amended) <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 31 August 2023. Ukraine declared a derogation from the European Convention on Human Rights on 28 February 2022.

31 Convention concerning the Reduction of Hours of Work to Forty a Week (Forty-Hour Week Convention no 47) (adopted 22 June 1935) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C047> accessed 31 August 2023.

32 Convention concerning Termination of Employment at the Initiative of the Employer (Termination of Employment Convention no 158) (adopted 22 June 1982) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158 > accessed 31 August 2023.

as may be judged appropriate to secure this end and undertakes to apply this principle to classes of employment. In ILO Convention No. 158, particular importance should be given to Article 4, which states that the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

Even a cursory glance reveals that Ukraine's martial labour law legislation does not comply with the mentioned international standards. Increasing employees' working weeks to up to 20 hours contradicts the principle of a forty-hour week. Furthermore, allowing parties of the simplified regime for the regulation of labour relations to independently establish the grounds for termination of employment may violate the requirement that termination on the employer's initiative should relate to the employee's capacity or conduct or be based on the employer's operational requirements.

It should be noted that the ILO's approach to fulfilling a country's obligations under ratified conventions in situations of armed conflict is rather vague. The results of the work of the Committee of Experts on the Application of Conventions and Recommendations (hereinafter, the CEACR) responsible for the legal examination of ILO member states' reports on the implementation of the organisation's international standards are very illustrative in this case. For example, if we consider the observations and direct requests of the CEACR to Ukraine under Convention No. 158, it is clear their content does not refer to armed conflict when analysing the fulfilment of the country's obligations under the convention. In turn, Convention No. 158 is significant because it has been ratified by countries that have experienced some degree of armed conflict. These countries include Bosnia and Herzegovina, the Democratic Republic of the Congo, Uganda, and Yemen. Among those countries, the Committee's mention of conflict is only in direct request to Bosnia and Herzegovina.[33] However, to be more precise, CEACR's direct request focuses only on some details of overcoming the consequences of the armed conflict rather than on the fact of the obligations under Convention No. 158 during the conflict itself.

Turning to the question of Ukraine's compliance with its obligations under Convention No. 158, the CEACR, in its latest direct request, not only lacked any mention of the existing armed conflict in the country but seemed to overlook the real picture of Ukrainian labour law. In its direct request, published in the 111th ILC session (2023), the Committee 'requests the Government to indicate the reasons underlying the different probationary periods proposed for different categories of workers under the draft Labour Code.'[34] However, in this case, the CEACR examines the content of the draft Labour Code developed in 2014. It should be noted that since the development of this draft Labour Code, many aspects of labour relations in Ukraine have already undergone significant changes, and its developers have long abandoned the draft Code itself. Thus, only from 2019 to 2022, four draft acts have been developed to replace the current LC, and a fifth is being actively developed in 2023.

33 Direct Request (CEACR) (adopted 2005, published 95th ILC sess 2006) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:2248235> accessed 31 August 2023. The CEACR 'recalls its comments on the application of Convention No. 111 in which, further to the communications by the USIBH and the trade union organization of the 'Ljubija' iron mines concerning the dismissal of miners during the civil war, it noted that these constituted dismissals of workers based solely on their national extraction. The Committee indicated at that time that it was the responsibility of the parties concerned (the Government, the managers of the enterprises and the workers who had made the complaints) to implement the legislation so as to ensure that the workers who have not been able to return to their former jobs, for the sole reason of their national extraction and/or religion, can receive appropriate compensation'.

34 Direct Request (CEACR) (adopted 2022, published 111st ILC sess 2023) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4325712,102867:NO > accessed 30 August 2023.

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6 LABOUR LAW REFORMS IN UKRAINE DURING THE ARMED CONFLICT

It is remarkable that despite the lack of timely improvements in the legislation on labour relations under martial law, labour reforms in Ukraine are in full swing. For example, a new Law on Collective Agreements was adopted by Parliament of Ukraine in early 2023,[35] and a new Law on Collective Labour Disputes is currently being finalised.[36] The same can be said concerning reforming legal regulation of individual employment relationships. In the fall of 2022, the Ministry of Economy of Ukraine developed a draft Law on Labour to replace the existing LC.[37] In early 2023, the ILO, following the Ministry's request, elaborated a detailed ILO Memorandum of technical comments to facilitate the national drafting. In the late summer of 2023, a working group of Ministry representatives and academics was set up to transform this draft Law on Labour into a full-fledged draft Labour Code.

At the same time, throughout the entire duration of the war, the regular renewal of the current LC can also be observed. Specifically, 17 amendments have been made since martial law was imposed. However, not all of these amendments are wartime-related. For example, the LC was supplemented with provisions establishing the prohibition of mobbing in employment relationships, the application of on-call work contracts, the modification of certain public holidays on which work is not performed, the definition of professions (occupations), job function and professional qualification, and giving a natural person who is an employer the right to be a party to a collective agreement. In addition to the LC, other labour legislative acts have also undergone some amendments. Thus, the long-dormant concept of applying the multi-party employment relationship enshrined in the Law on Employment of the Population has undergone a significant revision. In July 2023, Ukraine also ratified the ILO Chemicals Convention, 1990 (No. 170).[38]

In this case, a fair question arises: is there any value in these reforms now? It is quite challenging to answer this question with absolute certainty. On the one hand, labour law needs constant development. After all, it evolves along with the social relations it regulates, and its failure to respond promptly to modern challenges may lead to negative consequences, primarily associated with a reduction of the rights and guarantees it offers. But on the other hand, the development of labour law requires a time-sensitive and well-balanced approach. Unfortunately, in the example of Ukraine, we can observe some kind of an oxymoron — a fairly comprehensive labour reform is taking place now. Still, it is oriented not for today but for some kind of tomorrow. Consequently, such a way of developing Ukrainian labour law does not provide employees and employers with what they need now and, therefore, fails to make their labour life any easier in this challenging time for the country.

For instance, the practical value of modifying public holidays remains unclear if, according to the LML, employees cannot take advantage of them during martial law. The comprehensive reform of the regulation of collective labour relations also raises certain doubts. As mentioned above, a new Law on Collective Agreements was adopted in 2023, planned to come into force six months after the cancellation of martial law, and a new draft Law on Collective Labour

35 Law of Ukraine no 2937-IX 'On Collective Agreements and Contracts' of 23 February 2023 <https://zakon.rada.gov.ua/laws/show/2937-20#Text> accessed 30 August 2023.

36 Draft Law of Ukraine 'On Collective Labour Disputes' (2023) <https://www.nspp.gov.ua/images/2023/PuoektZakonyProKolektvnDogovir.pdf> accessed 30 August 2023.

37 Draft Law of Ukraine 'On Labour' (2022) <https://www.me.gov.ua/Documents/Detail?lang=uk-UA&id=43600842-3772-427f-a725-39e35ae3adb8&title=ProektZakonuUkrainiproPratsiu> accessed 30 August 2023.

38 Convention concerning Safety in the use of Chemicals at Work (Chemicals Convention no 170) (adopted 25 June 1990) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312315> accessed 31 August 2023.

Disputes is being finalised. However, such steps by the legislative body are incomprehensible since, in the current realities, martial law legislation allows employers to unilaterally suspend the provisions of collective agreements, exempts employers from the statutory obligation to contribute to the activities of trade union organisations (which significantly reduces the effectiveness of their work), and prohibits strikes.

Thus, if we rephrase the question and formulate it as follows: is such a course of labour law reform appropriate in the context of an armed conflict? The answer is likely to be negative. After all, the war is not yet over and, to some degree, is at a different phase of progression, which means that at its beginning, the conditions for implementing labour relations were one, and now, they are entirely different. Accordingly, it is more appropriate in this stage of armed conflict to adapt labour regulation to the existing phase of the working conditions than to get ahead of it.

To illustrate the above, it is appropriate to focus on the specifics of the application of the working time regime and the impact of various wartime factors on it. One of these factors involves air raid alarms, which are launched periodically throughout Ukraine and, unfortunately, in some cases have negative consequences in the form of airstrikes. Statistically, the most common time slot for an air raid alarm is 12.00-18.00, i.e. it explicitly covers the period of typical working hours. In addition, the duration of air raid alarms in many regions of Ukraine is quite impressive. For example, in the time interval from 22 February 2022 to 27 August 2023, it was 2184 hours — in the Kharkiv region, 1895.3 hours — in the Dnipro region, 1543.6 hours — in the Kyiv region, etc.[39] In this case, we may at once have quite obvious questions: Does the employer have a direct obligation to ensure the safety of employees during air raid alarms? Is the time of the employees' stay in the bomb shelter related to working hours? What are the time frames for returning to the employer's premises (in cases where the employer does not have a bomb shelter and employees have to use an external one, e.g., a metro station)? What are the legal consequences of an employee's refusal to go to the bomb shelter?

At the same time, the legislation lacks provisions addressing the legal status of air raid alarms in labour law. So, in practice, the above issues are resolved on the basis of interpretation of general, not only labour law norms.

For example, the LC includes a broad rule (Article 153) in which the employer is responsible for ensuring the employee's safe and healthy working conditions. Based on the content of this provision of the Code, it can be concluded that the employer is also obliged to take appropriate measures during air raid alarms, given the potential hazard to employees. To find guidance on these measures, it is necessary to refer to Article 130 of the Civil Protection Code of Ukraine,[40] which states that business entities must establish an emergency response plan encompassing instructions for staff in case of emergency situations covering inter alia, air raid alarms. Meanwhile, the issue of remuneration of employees staying in a bomb shelter may be resolved on the basis of the provisions of Article 113 of the LC. According to this Article of the Code, the average wage is retained for downtime when a work situation is dangerous to the employee's life or health through no fault of his or her own. In addition, under Article 159 of the LC, the employee is obliged to cooperate with the employer in organising safe and hazard-free working conditions. Thus, it can be assumed that the employee must use the bomb shelter during air raid alarm.

As can be seen, most of the labour law issues related to air raid alarms can be addressed in practice. However, it should be emphasised again that the mentioned provisions of legislation are of general application and are not directly tied to armed conflict. Therefore, their

39 *Statistics of Air Alarms in Ukraine* <https://air-alarms.in.ua/en> accessed 31 August 2023.

40 Civil Protection Code of Ukraine no 5403-VI of 2 October 2012 (as amended of 31 March 2023) <https://zakon.rada.gov.ua/laws/show/5403-17> accessed 31 August 2023.

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application by the parties to an employment relationship may entail corresponding risks due to their ambiguous interpretation. For example, employees' obligation to use a bomb shelter in the event of an air raid alarm is not supported by an appropriate employer response in the event of the employee's refusal. In this case, the employer has no right to suspend the employee, as the LC allows for suspension only in cases expressly provided for by law. The above-mentioned problem underlines the need to improve legislation regulating labour relations during martial law. At the same time, all the above issues can be resolved quite promptly by introducing appropriate amendments to the LML.

CONCLUSIONS

The analysed situation with the regulation of labour relations during the armed conflict in Ukraine brings us to the following conclusions.

There is no unified approach to regulating labour relations during armed conflicts. After all, such conflicts are always unique, i.e. they differ in scale, intensity, duration, technical capabilities of the participants, weapons used, etc. In most cases, however, armed conflicts are no longer so extensive and all-consuming as in the First and Second World Wars but are rather more hybrid in nature. For example, in Ukraine, as of early autumn 2023, active hostilities are taking place in only 6 of the country's 27 regions. Unfortunately, this does not mean that the other significant part of the country lives an ordinary life. As rocket strikes continue to be launched throughout Ukraine, there is no place where a person feels safe. However, it should also be noted that the intensity of the air strikes differs depending on the country's territory. So, while the duration of air raid alarms between 22 February 2022 and 30 August 2023 in the Donetsk region totalled 3751 hours, in the region of Transcarpathian, it was only 390.1 hours.[41]

In Ukraine, most of the laws aimed at harmonising the regulation of labour relations in the conditions of the armed conflict were developed in the first months after the outbreak of the conflict. Since then, although the conflict has been ongoing for 18 months, no significant amendments have been made to wartime labour legislation. Against the background of the continuous dynamics of labour law reform in Ukraine, this looks rather extraordinary. In this case, given the uncertainty of when the armed conflict will end, it would be more beneficial for the legislative body to focus on improving the regulation of labour relations in light of the current situation rather than seeking to improve labour legislation in perspective.

Given the diversity of armed conflicts in the world, it is impossible to develop uniform labour standards applicable, for example, at the international level. This demonstrates the priority of national law in terms of adapting the regulation of labour relations to wartime conditions. In this regard, considering the Ukrainian experience, it is appropriate to take into account that: *a)* armed conflict is dynamic by nature; thus, it can have different stages of development, which can also affect the world of work and labour legislation may need to be systematically revised to reflect new realities; *b)* considering that the territory of a country may not be evenly affected by the consequences of an armed conflict, in some cases it might be appropriate to provide different legal regulation of labour relations for its different regions; *c)* armed conflict should never be considered a 'valid reason' for unjustified and long-lasting restriction of employees' rights, as it is at a period when they are more vulnerable and therefore require additional legal protection.

41 *Statistics of Air Alarms in Ukraine* (n 39).

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Case Note

HUMAN ORGAN TRAFFICKING: PERSPECTIVE FROM CRIMINAL MATTERS, BUSINESS, AND HUMAN RIGHTS

Fejzi Beqiri*, Elda Maloku, Ahmet Maloku

ABSTRACT

Background: *The trafficking of human organs has evolved over the years. At first it appeared across isolated cases, but over time it has increased the curiosity of organised crime due to the high benefits and the small possibility of the perpetrators being pursued with an international character. The perpetrators of this criminal act start this criminal activity with the trafficking of sperm, but they can also continue with the tissues and organs from corpses. Also, human rights have evolved in recent decades. Today, human rights are at the epicentre of global politics. In addition, security issues, poverty, social inequality, non-respect of human rights, lack of adequate laws, and lack of law enforcement are prerequisites for a particular impact on the trafficking of human organs.*

Methods: *This paper provides a comparative look at the topic with a special emphasis on human organ trafficking by analysing in different and interrelated perspectives, including the social aspect, criminal aspect, the benefits of criminal groups, and the violation of basic human rights.*

Results and Conclusions: *As part of the concluding remarks, suggestions for future actions by law enforcement institutions in terms of anti-trafficking policies and practices.*

Keywords: *trafficking with human organs, security-crime, brokers, human rights.*

1 INTRODUCTION

Human organ trafficking has economic, business, and societal origins stemming from before the birth of a person until after death. Recently, in the stage of world politics, human rights, trafficking of human organs, poverty, and inequality have taken on another dimension because the crises that affected most of the world were different and attacked in different ways. These crises, namely, poverty, political destabilisation, corruption, isolation, organised crime, nepotism, and fear of various conflicts, pose a threat to general security.

Trafficking in human organs is a multidimensional phenomenon with broad domestic, transnational, regional, and global expansion. As such, it requires a national, regional, and international approach to combat this phenomenon. Moreover, over the last decade or so, the comprehensive treatment of human organ trafficking has entered the agenda of the multilateral and bilateral international organisations, but also by developed countries as an

interdisciplinary strategy. Firstly, this essay will address the evolution of human organ trafficking from the point of view of its spread as a negative social phenomenon of transnational character. Next, we will tackle the relationship between trafficking and crime. Third, we will analyse the current nexus between human organ trafficking, business, and poverty. Finally, we will discuss human organ trafficking rise as a major human rights issue.

2 EVOLUTION OF HUMAN ORGAN TRAFFICKING

Many forms of human exploitation are known throughout human history. In this context, slavery and human trafficking were the most brutal and shocking forms of human rights, but these forms have changed globally, since the first sale of human organs for transplantation was reported in the 1980s when poor Indians sold their organs to foreign patients.[1] India was a common country that exported organs, however, in order to prevent this phenomenon of buying and selling organs, the Organ Transplantation Act was passed, thereby reducing the number of transplants. This did not stop the trade as the underground organ market still exists in India. Unfortunately, according to the association of health volunteers, every year, 2,000 Indians sell their kidneys.[2] Also, during 1984-1988, hundreds of patients from the United Arab Emirates and Oman voluntarily travelled to Bombay to purchase kidneys from unrelated Indian donors for $2,600-3,300. They used the mediation of local *borkers*, which means Indian brokers.[3]

Not even European countries were protected in terms of this negative phenomena. As far as Europe is concerned, evidence exists of EU citizens traveling abroad to get organs. The British Medical Journal, in 1996, described two German patients who died from complications after a transplant performed in India. It is stated that at least 25 German patients received kidneys abroad. The article called for appropriate legislative measures to prevent such incidents.[4]

Organ trafficking is only increasing over time. This is best proven by Nancy Scheper-Hughes, chair of Berkeley's doctoral program in medical anthropology and director of Organs Watch, a research-documentation centre in California. Scheper-Hughes told CNN that the market for human organs is booming so that "Demand for fresh organs and tissue . . . is insatiable." She added that fresh kidneys from "brain death," or those that have been lost with the help of trained organ harvesters, are the blood diamonds of illegal and criminal trafficking.[5] In this sense, it is worth noting that human organ trafficking has increased in some countries due to the violation of human rights. For example, in March of 2006, a woman revealed that about 4,000 Falun Gong practitioners had been killed for their organs at the hospital where she worked. A week later, a Chinese military doctor not only confirmed the woman's claims but claimed that such horrors took place in 36 different concentration camps across the country.[6] In July 2006, former Canadian Secretary of State for Asia and the Pacific, David Kilgour, and

1 Gabriel M Danovitch and others, 'Organ Trafficking and Transplant Tourism: The Role of Global Professional Ethical Standards - the 2008 Declaration of Istanbul' (2013) 95(11) Transplantation 1306, doi: 10.1097/TP.0b013e318295ee7d.

2 Yosuke Shimazono, 'The State of the International Organ Trade: A Provisional Picture Based on Integration of Available Information' (2007) 85(12) Bulletin of the World Health Organization 955, doi: 10.2471/blt.06.039370.

3 AK Salahudeen and others, 'High Mortality Among Recipients of Bought Living-Unrelated Donor Kidneys' (1990) *336 The Lancet* 725, doi: 10.1016/0140-6736(90)92214-3.

4 Helmut Karcher, 'German Doctors Protest Against "Organ Tourism"' (1996) 313(7068) British Medical Journal 1282, doi: 10.1136/bmj.313.7068.1282a.

5 Jan Kalvik, 'ISIS Defector Reports on the Sale of Organs Harvested from ISIS held "Slaves"' (*Defence and Intelligence Norway,* 1 January 2016) <https://www.etterretningen.no/2016/01/01/isis-defector-reports-on-the-sale-of-organs-harvested-from-isis-held-slaves/> accessed 29 September 2023.

6 'Žetva organa' (*Falun Dafa*, 2019) <https://hr.minghui.org/categories/102> accessed 29 September 2023.

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renowned human rights lawyer, David Matas, released their report in which they reached the "sad conclusion that the allegations are true." After this, two books were published on the subject, *Bloody Harvest: Harvesting the Organs of Falun Gong Practitioners in China* (2009) and *State Organs: Transplant Abuse in China* (2012). They conclude that tens of thousands Falun Gong practitioners were killed for their organs.[7] According to public reports, before 1999, a total of approximately 30,000 organ transplants were performed in China. In just the six-year period from 1994 to 1999, approximately 18,500 organ transplants were completed. ShiBingyi, vice president of the Chinese Medical Organ Transplant Association, stated that by 2005, a total of about 90,000 transplants, with around 60,000 transplants occurring in the six-year period from 2000 to 2005, had taken place after the persecution of Falun Gong began.[8]

Trafficking in human organs covers an even wider range. The International Center for the Study of Violent Extremism (ICSVE), with former prisoners and victims of ISIL, also illuminates the potential use of war criminals in this realm, including for financial purposes. One of the respondents, Abo Reed, a former ISIL surgeon, said that these surgeons removed the kidneys and corneas of prisoners and told him that "jihadists are more deserving than organs." In December 2015, a former ISIL fighter stated, "Now we have a statement from Da'esh: From now on do not kill slaves. Surely we should use their bodies to make money [for organ trafficking]. Basically, they are saying that the slaves are already 'dead.' We have to make money from their bodies by selling body parts."[9] Also, in February 2015, Iraqi Ambassador Mohamed Alhakim asked the UN Security Council to investigate the deaths of twelve doctors in Mosul, Iraq, who he claimed were killed by ISIS after they refused to remove organs from dead bodies. He also claimed that some of the bodies they found were mutilated by an opening in the back where the kidneys were located. "This is definitely something bigger than we think," said Ambassador Alhakim.[10]

We believe that in the historical review, human organ trafficking should be divided into two phases: the first phase encompasses the period when individuals performed illegal organ transplants for personal needs (above facts-data), and the second phase began when human organs were searched for online and the participants became organised criminal groups, or when trafficking in human organs was facilitated through intermediaries, brokers, and healthcare workers who organise trips and recruit donors. In the second phase, human organs started to be treated as commodities in order to give members of organised crime groups as much financial gain and power as possible. Trafficking in human organs has been a form of crime since ancient times. It is important to note that this trend gradually changed at the beginning of the XXI century when organised criminal groups engaged in organ trafficking. That is, when human organ trafficking began to be commercialised, and the illegal market for human organs flourished. This illegal market is a point of contact where, on one side, hopeless patients and poor individuals meet with a mediator, and on the other side are criminals who use these circumstances to make money on other people's troubles.

In 2019, the most common organ for transplant was the kidney, with a global estimate of

7 'Najava Kine o obustavljanju žetve organa samo trik: Ubijeni zatvorenici savjesti su glavni izvor organa' (*Faluninfo*, 8 December 2014) <https://faluninfo.rs/articles/1669> accessed 29 September 2023.

8 David Matas and David Kilgour, 'Bloody Harvest: Revised Report into Allegations of Organ Harvesting of Falun Gong Practitioners in China' (*An Independent Investigation Into Allegations of Organ Harvesting of Falun Gong Practitioners in China*, 31 January 2007) para F 27 <https://www.organharvestinvestigation.net/> accessed 29 September 2023.

9 Counter-Terrorism Committee Executive Directorate, *Identifying and Exploring the Nexus between Human Trafficking, Terrorism, and Terrorism Financing* (CTED 2019) para 92 <https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/files/documents/2021/Jan/ht-terrorism-nexus-cted-report.pdf> accessed 29 September 2023.

10 Kalvik (n 5).

100,097. Following are the liver (35,874), heart (8,722), lung (6,800), and pancreas (2,323).[11]

In comparative terms, these phases provide different data on trafficking in human organs. In the first phase, there were rare and isolated cases. The second phase unfortunately changed the status quo as trafficking in human organs is a serious problem today, in the same regions and beyond. Given the facts above, we believe that in the second phase, the growth of trafficking in human organs was huge compared to the first phase. The second phase switched to the trafficking of human organs due to the great benefits for organised crime members. In addition, this negative social phenomenon at this stage of development attacks some jurisdictions.[12]

This fact is based on the conclusion of the Council of Europe, which established that in recent years, there has been an increase in transplant tourism and trafficking in human organs around the world.[13]

3 CRIMES COMMITTED FROM BEFORE BIRTH TO AFTER DEATH

Global market capitalism, together with medical and biotechnological advances, has stimulated new tastes and desires for skin, bones, blood, organs, tissues, marrow, reproductive, and genetic material from others. In these new transactions, the human body is radically transformed.[14] In such circumstances, two distinct individuals are needed: recipients and organ donors. Altruism for organ donation is not lacking, but unfortunately, the number of recipients is much higher than the number of donors. Today, there is a large gap between organ recipients, transplants performed, and organ donors on an annual basis in one country. This fact also carries great risks because it gives opportunities for "criminal traffickers" to abuse human organs from people who hope to continue their lives and victims who have no hope, left without a choice but to sell their organs.

This type of crime does not recognise the age, gender, nationality, or religion of these victims because there is a widespread sale. In this sense, the trafficking of human organs is carried out from before birth, which means that sperm banks have been invented across the globe and work in a similar way as virtual supermarkets. Their goods are displayed on their websites; each donor "for sale" is described by bank staff and as a self-introduction where they are asked to provide information in response to various questions about personality, hobbies, educational and professional achievements, future plans, likes and dislikes, etc.[15]

Also, an expanded type of organ sale, i.e., renting, is the transplantation of foetuses to so-called "surrogate mothers." The cost of surrogacy, in the case of a healthy birth, ranges between $10,000 and $40,000 (and in the case of a failed birth, only about $1,000). To date, such contracts between contractual parents and leased uterus owners, over 5,000 babies were born in the United States alone. The cash turnover from contracts entered by contract parents, surrogate mothers, and brokers was around $40 million in 1990, excluding amounts

11 Global Observatory on Donation and Transplantation, *Organ Donation and Transplantation: Activities 2019 Report* (*GODT*, April 2021) <https://www.transplant-observatory.org/wp-content/uploads/2021/06/GODT2019-data_web_updated-June-2021.pdf> accessed 29 September 2023.

12 ibid

13 Council of Europe, 'A New Convention to Combat Trafficking in Human Organs' (*Council of Europe*, 8 July 2014) <https://rm.coe.int/16807212f2> accessed 29 September 2023.

14 Nancy Scheper-Hughes, 'Heo-Cannibalism: The Global Trade in Human Organs' (2001) *3*(2) *The Hedgehog Review Offers Critical Reflections on Contemporary Culture* <https://hedgehogreview.com/issues/the-body-and-being-human/articles/neo-cannibalism-the-global-trade-in-human-organs> accessed 29 September 2023.

15 Ya'arit Bokek-Cohen, 'Becoming Familiar with Eternal Anonymity: How Sperm Banks use Relationship Marketing Strategy' (2014) 18(2) Consumption Markets and Culture 155, doi: 10.1080/10253866.2014.935938.

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paid by contract parents to brokers when contracts were not fulfilled.[16]

Society has always reacted to aggression against life and body, of course, depending on their reciprocal relationships. Organised criminal groups, i.e., organ traffickers, use different ways and methods to reach the desired organs. In this regard, there are concerns about the discovery of a brain death machine identified in an investigative process conducted by investigative journalists presented in the documentary. One researcher said, "This machine causes brain death, but other organs remain undamaged."[17] The brain death machine causes the immediate death of the human brain. In terms of its structure, it contains a gas gun with a high speed. Inside, a metal ball is placed that hits the main stem of the human brain and causes immediate brain death.[18]

A brain death machine[19] does not require special properties for use and production, but can unfortunately cause brain death in an incredibly short time. According to the patent, this machine does not damage other vital organs, i.e., organs that are highest in demand for transplantation or organs that are the object of trade, so vital organs remain healthy. The way it works and its consequences should be of primary concern to state institutions dealing with the fight against trafficking in human organs.

Of course, when one considers that murder can be committed in different ways, there are different motives for this, including murder to remove organs from corpses or various exhibitions with parts of the human body.

For example, between 1976 and 1991, the Montes de Oca Institute of Mental Health in Buenos Aires killed patients for organ sales, leading to around 1,400 cases of mysterious disappearances reported during that period. When some of these patients' bodies were found, 11 doctors from that hospital were arrested.[20]

A scandal erupted at a general hospital in Ukraine when it was revealed that prominent surgeons there sold the organs of victims of traffic accidents. They received $4,000 in compensation for their efforts, the equivalent of several Ukrainian annual salaries. Some of the victims were not clinically dead when the surgeons stuck their scalpels into them.[21]

With this begins the theft of corpses, which were then used for trade. Not only that, but with the increase in the demand for the theft of corpses, this phenomenon was also an instigator. It pushed for murder in order to increase the number of corpses available. For over a year, in his apartment in Edinburgh, William Burke killed sixteen victims, all guests, and then sold their bodies to local medical schools.[22]

In addition to the aforementioned cases of corpse abuse, it is not uncommon for corpse parts to be placed and presented in various exhibitions. Different compounds are used to replace the fluid in the human body during various exhibitions, otherwise known as body plasticisation technology.[23] The technology of plasticisation of corpses would not have a large effect and

16 Darko Polšek, *Zapisi Iz Treće Kulture* (Naklada Jesenski i Turk 2008) 92.

17 TV Chosun, '*The Dark Side of Transplant Tourism in China: Killing to live*' (17 November 2017) <https://www.youtube.com/watch?v=xUiuVjX2ubQ&t=626s> accessed 29 September 2023.

18 Jason Lee, '"Killing to Live": China Transplant Tourism Exposed by Undercover Journalists' [2019] Vibrant Dot <https://vibrantdot.co/killing-to-live-china-transplant-tourism-exposed-by-undercover-journalists/> accessed 29 September 2023.

19 ibid.

20 Polšek (n 16) 89.

21 Ana Ursić, Marina Barić i Tajana Umnik, 'Trgovanje ljudskim organima' (2006) 14 (1) Kriminologija & socijalna integracija 105.

22 David E Jefferies, 'The Body as Commodity: The Use of Markets to Cure the Organ Deficit' (1998) 5(2) *Indiana Journal of Global Legal Studies* 621.

23 David Kilgour, Ethan Gutmann and David Matas, 'Bloody Harvest / The Slaughter: An Update'

would not be in high demand if it were not exposed all over the globe. In November 2015, in Manhattan, New York, an exhibition was opened with 22 corpses without skin and 260 samples of human organs. In 2006, the American newspaper, *The New York Times*, reported that the interest to see the exhibition was high and gathered around 20 million viewers. The organisers explained that "no one can know their identity."[24] Unfortunately, Europe also faced this phenomenon. During 2012, 200 human bodies were exhibited in Dublin, the capital of Ireland. Similar exhibits existed in the capital of Hungary, Budapest, where 150 corpses and other human organs were shown, and there were also exhibits of this nature in Czech Republic's capital. It is worth noting that these were not the only countries where such exhibitions were held. Over 20 countries have shown these types of exhibitions, with the number of visitors across all exhibits reaching 35 million people.[25]

4 THE CURRENT NEXUS BETWEEN HUMAN ORGAN TRAFFICKING, BUSINESS, AND POVERTY

Trafficking in human organs does not happen if the organ is not treated as a commodity. People who have waited for a long time on waiting lists with good incomes look for the desired organ as soon as possible, regardless of the method. Often, "money" is crucial for organ transplantation. In the classical sense, human organs are purchased and sold on the black market, and unfortunately, they are developing rapidly due to the huge difference in "supply and demand," i.e., the purchase and sale price of organs. Organ trafficking usually plays a role in the medical economy of poor countries, where it lowers the standards of surgical work, endangers vendors and their families, abuses their rights, opens the possibility of exploiting the rich over the poor, and turns the human body into a commercial commodity. The black market phenomenon attacks the unprotected and disenfranchised, exploiting the most vulnerable sections of the population. The simple answer to these questions is that the sale of organs becomes an act of despair and hopelessness. An individual must not risk his life to save another life, and as such, organ trafficking is illegal while all the money earned via this method is dirty money.[26]

Trafficking in human organs, along with trafficking in drugs, people, weapons, diamonds, gold, and oil, is rising as the subject of a billion-dollar illegal industry worldwide.[27] Global Financial Integrity (GFI), in its 2011 report, estimated that human organ trafficking could generate illicit earnings between $600 million and $1.2 billion a year.[28] In fact, of even greater concern is that this assessment states that not all transplants of vital organs were included due to a lack of sufficient data. If all the data for vital organs was available, it is certain that these numbers would be much higher and much more disturbing.[29] The data presented by GFI in this report showed the large number of illegal transplants annually worldwide and the associated exorbitant prices on the black market.

According to GFI, between $840 million and $1.7 billion a year are generated from illegal organ trafficking. This estimate refers to the illegal sale of the five best-selling organs: kid-

(*International Coalition to End Transplant Abuse in China*, 22 June 2016, Revised 30 April 2017) 379 <https://endtransplantabuse.org/an-update/> accessed 29 September 2023.

24 ibid 378.

25 ibid 381.

26 Hajrija Mujović-Zornić, *Donacija i transplantacija organa* (Institut društvenih nauka 2013) 1-10.

27 Violeta Besirevic and others, *Improving the Effectiveness of the Organ Trade Prohibition in Europe: Recommendations* (EULOD 2012).

28 Jeremy Haken, *Transnational Crime in the Developing World* (Global Financial Integrity 2011) 22.

29 ibid.

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neys, liver, heart, lungs, and pancreas. There is a huge difference in the amount of money that organ donors pay and the amount that the recipient receives. For example, the price of kidneys in developed countries is $20,000, while in developing countries it is around $3,000. The difference is more than 500%.[30]

To establish the above facts, we then must consider the number of transplants globally for each vital organ and the data provided by WHO experts to estimate that 5-10% of all transplants are illegal.[31] This then gives us the following data presented in Table 1 regarding illegal organ transplantation, via the black market for human organs.

Organ	Illegal Transplants (per year)[32]	Black Market 5%	Black Market 10%
Kidney	100.097	5,004.85	10,009.7
Liver	35.874	1,793.7	3,587.4
Heart	8.722	436.1	872.2
Lung	6.800	340	680
Pancreas	2.323	116.5	232.3

Table 1. *Number of transplants during the year globally compared to the black market*

We then multiply the number of organs obtained from the black market by the purchase price on the black market to prove the annual turnover created by the black market through the sale and purchase of vital human organs.

Organ	Price Range[33]	Illegal Transplants (per year) 5%	Illegal Transplants (per year) 10%
Kidney	$50,000 to $120,000	$50,000*5,004.85=$250,242,500 $120,000*5,004.85=$600,582,000	$50,000*10,009.7=$500,485,000 $120,000*10,009.7=$1,201,164,000
Liver	$99,000 to $145,000	$99,000 *1,793.7=$177,576,300 $145,000*1,793.7=$260,086,500	$99,000*3,587.4=$355,152,600 $145,000*3,587.4=$520,173,000
Heart	$130,000 to $290,000	$130,000 *436.1=$56,693,000 $290,000*436.1=$126,469,000	$130,000 *872.2=$113,386,000 $290,000*872.2=$252,938,000
Lung	$150,000 to $290,000	$150,000*340=$51,000,000 $290,000*340=$98,600,000	$150,000*680=$102,000,000 $290,000*680=$197,200,000
Pancreas	$110,000 to $140,000	$110,000*116.5=$12,815,000 $140,000*116.5=$16,310,000	$110,000 *232.3=$25,542,000 $140,000*232.3=$32,508,000
	Total	$548,326,800 to $1,102,047500	$1,096,653,600 to $2,204,095,000

Table 2. *Annual turnover of crime from illegal trafficking of vital organs*

From Table 2, we clearly see that this crime has a high annual turnover globally. If based on just 5% of illegal transplants, this turnover is around $548,326,800 to $1,102.047500; if based on 10% of illegal transplants, this turnover is around $1,096,653,600 to $2,204,095,000. This means that in 2019, there was a higher increase in turnover compared to that of 2011 and 2017.

30 Channing May, *Transnational Crime and the Developing World* (Global Financial Integrity 2017) XII, 108.

31 United Nations Office on Drugs and Crime, *Trafficking in Persons for the Purpose of Organ Removal: Assessment Toolkit* (UN 2015) 11.

32 Global Observatory on Donation and Transplantation (n 11).

33 May (n 30) 53-9.

5 HUMAN ORGAN TRAFFICKING RISES AS A MAJOR HUMAN RIGHTS ISSUE

The United Nations has always promoted the promulgation of Conventions of special importance, which serve as the legal basis for many other conventions approved by other international and national organisations. The Universal Declaration of Human Rights has served as a basis for many other conventions, and as such, it also serves in the convention against trafficking in human organs. Therefore, in this section, we will deal with the trafficking of human organs from the point of view of freedoms and human rights, which is always based on the human rights convention.[34]

Bearing in mind that the commercialisation of the human body (prostitution, pornography) and any other commercialisation of human organs is unacceptable, then the question arises of whether it is natural that people have the right to sell their organs for financial gain.

In this context, it should be considered whether personal freedom can reach beyond collective responsibility. Personal freedom refers to the freedom of each individual towards his life and goals, not accepting the intervention of other individuals.

This is clearly defined Article 3 of the Universal Declaration of Human Rights.[35] Although the state guarantees the right to life to every citizen without distinction, citizens are obliged by the state not to risk their lives but to also respect the lives of others.[36] Therefore, we believe that individual autonomy is limited in organ trafficking because of this collective responsibility and some ethical claims that the potential harm of organ trafficking exceeds the rights of the individual.

Furthermore, the right to bodily autonomy for the financial gain or commercialism of the human body (prostitution, pornography, organ sales, etc.) is prohibited in religious and legal terms. Unfortunately, organ trafficking has become one of the most important ways to obtain organs in the world today, so we must take a strong stance against it, preventing it from the individual level and on to society as a whole.

Unfortunately, this crime has already established the misuse of corpses to remove organs. However, a petition was filed before the European Court of Human Rights to establish a violation of Article 3 of the Convention, Khadzhialiyev and others v. Russia, no. 3013/04, paragraphs 120-22, dated November 6, 2008. In this regard, the Court pointed out that in the special area of organ and tissue transplantation, it was recognised that the human body must be treated with respect even after death. The Court noted that the rights of organ and tissue donors, whether living or deceased, are protected by the Convention on Human Rights and the Additional Protocol. The aim of these agreements is to protect the dignity, identity, and integrity of "everyone" who is born, whether alive or dead at the time. For the Court, in view of these specific circumstances, the emotional suffering incurred by the applicant constituted degrading treatment contrary to Article 3.[37] In this judgment, in the case of Khadzhialiyev and others v. Russia, the Court found that the removal of organs from corpses violated human rights, dignity, identity, integrity, and liberty.

34 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III)) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 29 September 2023; Council of Europe Convention against Trafficking in Human Organs (25 March 2015) <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=216> accessed 29 September 2023.

35 Art. 3 "Everyone has the right to life, liberty and security of person".

36 KK Ghai, 'Relation between Rights and Duties' (*Your Article Library*, 2022) <https://www.yourarticlelibrary.com/essay/law-essay/relation-between-rights-and-duties/40374> accessed 29 September 2023.

37 *Khadzhialiyev and Others v Russia* App no 3013/04 (ECtHR, 6 November 2008) para 120-22 <https://hudoc.echr.coe.int/?i=001-89348> accessed 29 September 2023; European Court of Human Rights, *Annual Report 2015* (ECHR 2016) 100.

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6 CONCLUSIONS

The trafficking of human organs is a complex crime. In this sense, law enforcement institutions are confronted with wide-ranging problems when following the right path, beginning with the identification of criminal activity, the identification of the trafficking victim, the full investigation of the case, and measures taken to bring the case to court so that the criminal faces deserved punishment.[38] Penal policies against this phenomenon should be strict because the consequences of these crimes can be fatal for the victim, and they can cause death or serious damage to physical or mental health. This negative social phenomenon is spreading with great dynamics, showing extraordinary advantages for criminal groups due to the incredibly low risk of criminal prosecution of these perpetrators.[39]

Bearing what was addressed in mind, the final remarks are fourfold.

First, from the perspective of the evolution of human organ trafficking, it can be concluded that the beginning of the XXI century marked the engagement of organised criminal groups in human organ trafficking, that is, human organ trafficking started its commercialisation, and the illegal human organ market began to grow. Trafficking in human organs is controlled by organised criminal groups almost worldwide, and these criminal groups exploit the mismatch between "supply and demand."

Second, the governments of the states throughout the world's supply and demand must provide balance. We consider that states should accept the opt-out system, given that countries with presumed consent laws have increased the organ donation rate by 25% to 35% more than in countries with explicit selection laws or an opt-in law.[40] This allows for a system without presumed consent, in addition to increasing the rate of organ donation. As such, we believe that a special measure to fight this negative phenomenon, this form of organised crime, is needed. Also, the governments of each European country, must meet the requirements to be members of Eurotransplant, Scandiatransplant, and Balttransplant, and accept the system of presumed consent because it increases the number of potential donors.

Third, we suggest that legitimate businesses, namely private clinics where illegal organ transplants are performed, can play a crucial role in curbing trafficking and other human rights abuses by not allowing transplants to be performed in those clinics and by not supporting the supply trafficking chains. Also, the doctors and other medical support staff who work in these clinics should be addressed as they make the illegal business more profitable.

Finally, given the nature of human organ trafficking, there is currently no single coherent summary that can capture different perspectives and integrate them into an article like this. As trafficking is a complex criminal offense, it creates problems that are profoundly multifaceted. While the views and actions are comprehensive, they are also specific and therefore require greater efforts. In preventing trafficking in human organs and developing prevention policies, states should include research and data collection, awareness-raising, public education campaigns, and training programs for potential victims as well as professional staff (each state should identify which health workers are the main actors in organised groups regarding human organ trafficking to aid in this).

38 Fejzi Beqiri, 'Comparative Analysis of the Criminal Offence of the Trafficking of Human Organs in the Recently-Formed Countries of the Balkans' (2019) 22(1) SEER Journal for Labour and Social Affairs in Eastern Europe 105, doi: 10.5771/1435-2869-2019-1-105.

39 Fejzi Beqiri, 'Trgovanje ljudima u svrhu uklanjanja organa na Kosovu' (2020) 28(1) Kriminologija & socijalna integracija 78, doi: 10.31299/ksi.28.1.4.

40 Abdulwasiu B Popoola and Isyaku Umar Yarube, 'An Overview of Transplant Tourism: "Kidney Business?"' (2016) 1(1) Bayero Journal of Biomedical Sciences 104.

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Case Note

STATE AWARDS OF UKRAINE IN WARTIME AS A FACTOR OF THE NATIONAL AND STATE CONSCIOUSNESS FORMATION

Yurii Prytyka*, Oksana Uhrynovska, Nataliya Maksymchuk

ABSTRACT

Background: *In this article, the authors carried out a systematic analysis of the current state of awarding military awards and the prospects for changes in the legislation of Ukraine regarding the awarding procedure and the system of state awards. In particular, the following issues were considered: the general procedure for awarding state awards, the grounds for awarding state awards, subjects of submissions and petitions for awarding state awards, proposed anti-corruption regulations, and foreign models of awarding military awards. In addition, the article provides statistical data on persons who have been awarded the title of Hero of Ukraine for outstanding heroic deeds since the beginning of the full-scale invasion of the Russian Federation. Comparisons with the foreign models of awarding as a state policy were made on the example of continental European states and the Anglo-Saxon legal system.*

Results and Conclusions: *The study aims to clarify the mechanism of awarding the state awards of Ukraine and identify if it meets the main current challenges and fits with the regulation of the European standards and anti-corruption and democratic norms. In the meantime, it was found that the social security of the awarded persons is still insufficient and impacts the prestige of the military awards.*

Keywords: *state award, order, medal, degree, deprivation of state awards, social policy, legal mechanisms.*

1 INTRODUCTION

When establishing the state awards of Ukraine as symbols of statehood, the question between the use of European and national experience in this field and the Soviet past arose. This uncertainty led to a lack of uniformity in the introduction of these state awards, which were mainly founded when there was a political necessity to do so.

Amidst the war in Ukraine, which escalated into a full-scale invasion by the Russian Federation on the territory of Ukraine in 2022, a conflict that has been ongoing since 2014, individuals who have certain merits to Ukraine continue to be honoured with state awards.[1]

1 See Yuriy Prytyka and others, 'Legal Challenges for Ukraine Under Martial Law: Protection of Civil, Property and Labour Rights, Right to a Fair Trial, and Enforcement of Decisions' (2022) 5(3) Access to

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The greatest number of awards today are given for military achievements. Notably, Ukrainian citizens, foreign nationals, and stateless persons receive awards, such as the title of "Hero of Ukraine" orders, medals, and presidential awards.

2 THE SYSTEM OF MILITARY STATE AWARDS OF UKRAINE UNTIL 2014

According to the Constitution of Ukraine,[2] the right to establish state awards belongs to the legislative power represented by the Supreme Council of Ukraine. As the head of state, the President of Ukraine has the right to grant state awards of Ukraine, as well as the right to establish and award the President of Ukraine awards.[3]

With the adoption of the Law of Ukraine "On State Awards of Ukraine" on March 16, 2000,[4] the Supreme Council of Ukraine legislated the system of state awards of Ukraine in a wide variety of fields. In particular, the system of state awards of Ukraine in the military sphere is as follows:

I. the title of Hero of Ukraine with the awarding of the "Golden Star" order - to award **citizens of Ukraine** for a remarkable heroic deed;[5]

II. the Order of Liberty - to mark the outstanding and special merits of **citizens** in establishing the sovereignty and independence of Ukraine, consolidation of Ukrainian society, development of democracy, socio-economic and political reforms, defence of constitutional rights and freedoms of man and citizen;[6]

III. order "For Merit" I, II, III degree - to celebrate the outstanding merits of **citizens** in the economic, scientific, socio-cultural, military, state, public and other spheres of social activity;[7]

IV. the Bohdan Khmelnytskyi Order I, II, III degree - for awarding **citizens** of Ukraine special merits in the **protection of state sovereignty** and territorial integrity, in strengthening the defence capability and security of Ukraine;[8]

V. order "For Courage" I, II, III degrees - to honour **military personnel, law enforcement officers** and other persons for personal courage and heroism, shown in saving people and material values during the liquidation of the consequences of emergen-

Justice in Eastern Europe 219, doi: 10.33327/AJEE-18-5.4-n000329; Oksana Uhrynovska and Anastasiia Vitskar, 'Administration of Justice During Military Aggression Against Ukraine: The "Judicial Front"' (2022) 5(3) Access to Justice in Eastern Europe 194, doi: 10.33327/AJEE-18-5.3-n000310.

2 Constitution of Ukraine No 254 k/96-BP of 28 June 1996 (as amended of 01 January 2020) art 106, para 25 <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 25 September 2023.

3 'State Awards of Ukraine' (*National Museum of the History of Ukraine*, 28 March 2018) <https://nmiu.org/avtorski/170-ekskursiji-kontent/vysta/1/650-derzhavni-nagorody> accessed 25 September 2023.

4 Law of Ukraine no 1549-III 'On State Awards of Ukraine' of 16 March 2000 (as amended of 2 April 2022) <https://zakon.rada.gov.ua/laws/show/1549-14> accessed 25 September 2023.

5 ibid, art 6; Decree of the President of Ukraine no 1114/2002 'On the title Hero of Ukrain' of 2 December 2002 (as amended of 13 May 2023) <https://zakon.rada.gov.ua/laws/show/1114/2002> accessed 25 September 2023.

6 Law no 1549-III (4) art 7; Decree of the President of Ukraine no 460/2008 'On the Order of Liberty' of 20 May 2008 <https://zakon.rada.gov.ua/laws/show/460/2008> accessed 25 September 2023.

7 Law no 1549-III (4) art 7; Decree of the President of Ukraine no 870/96 'On establishing the award of the President of Ukraine - Order "For Merit"' of 22 September 1996 <https://zakon.rada.gov.ua/laws/show/870/96> accessed 25 September 2023.

8 Law no 1549-III (4) art 7; Decree of the President of Ukraine no 112/2004 'On the Order of Bohdan Khmelnytskyi' of 30 January 2004 <https://zakon.rada.gov.ua/laws/show/112/2004> accessed 25 September 2023.

cies in the fight against crime, as well as in other cases, during the performance of military, official, civil duty in conditions associated with a risk to life;[9]

VI. the Princess Olga Order I, II, III degrees - to honour **women** for outstanding merits in the state, industrial, public, scientific, educational, cultural, charitable and other spheres of social activity, raising children in the family;[10]

VII. the Danylo Halytsky Order - for awarding **servicemen** of the Armed Forces of Ukraine and other military formations formed in accordance with the laws of Ukraine, the State Special Service of Transport, the State Service of Special Communications and Information Protection of Ukraine, **as well as civil servants** for a significant personal contribution to the development of Ukraine, conscientious and impeccable service to the Ukrainian people;[11]

VIII. medal "For military service to Ukraine" - for awarding **servicemen** of the Armed Forces of Ukraine and other military formations formed in accordance with the laws of Ukraine, as well as the State Special Service of Transport, the State Service of Special Communications and Information Protection of Ukraine, and other persons for courage and bravery, selfless actions shown in the protection of the state interests of Ukraine;[12]

IX. medal "For impeccable service" I, II, III degree - for awarding **officers and ensigns** of the Armed Forces of Ukraine, policemen, National Guard of Ukraine, Security Service of Ukraine, Foreign Intelligence Service of Ukraine, State Service of Special Communications and Information Protection of Ukraine, of the State Border Guard Service of Ukraine, the State Special Transport Service, the Civil Defense Forces, the Bureau of Economic Security of Ukraine, who have achieved high performance in combat and professional training, are a model of loyalty to the oath and fulfilment of military (service) duty, successfully manage their subordinates, and perform other exemplary duties military duties;[13]

X. "Defender of the Fatherland" medal - for awarding **war veterans, family members of deceased war veterans**, family members of deceased Defenders of Ukraine, persons who participated in the liberation of Ukraine from fascist invaders, and other citizens of Ukraine for personal courage and bravery to protect state interests, strengthening Ukraine's defence capability and security;[14]

XI. "Nominal Firearms" award - for awarding **the officers** of the Armed Forces of Ukraine, the State Border Guard Service of Ukraine, other military formations formed in

9 Law no 1549-III (4) art 7; Decree of the President of Ukraine no 720/96 'On establishing the award of the President of Ukraine - the Order "For Courage"' of 21 August 1996 <https://zakon.rada.gov.ua/laws/show/720/96> accessed 25 September 2023.

10 Law no 1549-III (4) art 7; Decree of the President of Ukraine no 827/97 'On establishing the award of the President of Ukraine "Order of Princess Olga"' of 15 August 1997 <https://zakon.rada.gov.ua/laws/show/827/97> accessed 25 September 2023.

11 Law no 1549-III (4) art 7; Decree of the President of Ukraine no 769/2003 'On the Order of Danylo Halytsky' of 30 July 2003 <https://zakon.rada.gov.ua/laws/show/769/2003> accessed 25 September 2023.

12 Law no 1549-III (4) art 8; Decree of the President of Ukraine no 931/96 'On the establishment the award of the President of Ukraine - the medal "For Military Service to Ukraine"' of 5 October 1996 <https://zakon.rada.gov.ua/laws/show/931/96> accessed 25 September 2023.

13 Law no 1549-III (4) art 8; Decree of the President of Ukraine no 932/96 'On the award of the President of Ukraine - medal "For Impeccable Service"' of 5 October 1996 < https://zakon.rada.gov.ua/laws/show/932/96 > accessed 25 September 2023.

14 Law no 1549-III (4) art 8; Decree of the President of Ukraine no 41/2015 'On the medal "Defender of the Fatherland"' of 30 January 2015 <https://zakon.rada.gov.ua/laws/show/41/2015> accessed 25 September 2023.

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accordance with the laws of Ukraine, the Security Service of Ukraine, the Foreign Intelligence Service of Ukraine, the State Service for Special Communications and Information Protection of Ukraine, as well as the State Special Service of Transport, the Bureau of Economic Security of Ukraine, police officers and civil servants who hold the rank of officer, for outstanding services in ensuring the defence capability of Ukraine, the inviolability of its state border, maintaining the high combat readiness of the troops, strengthening national security, fighting crime, protecting constitutional rights and freedoms of citizens, for impeccable long-term service, exemplary performance of military and official duties, and demonstrated honour and valour.[15]

3 THE SYSTEM OF MILITARY STATE AWARDS OF UKRAINE DURING THE ATO AND OOS (2014-2022) AND THE FULL-SCALE INVASION OF THE RUSSIAN FEDERATION ON THE TERRITORY OF UKRAINE

The system of military state awards of Ukraine has hardly changed since 2014. The Law of Ukraine On Amendments to Article 7 of the Law of Ukraine "On State Awards of Ukraine" dated July 1, 2014 introduced the Order of the Heavenly Hundred Heroes,[16] which honours individuals for civic courage, patriotism, defence of the constitutional principles of democracy, human rights and freedoms, active charitable, humanitarian, public activity in Ukraine, selfless service to the Ukrainian people, revealed during the Revolution of Dignity (November 2013 - February 2014), other events related to the protection of independence, sovereignty and territorial integrity of Ukraine. Nowadays, this order stands between the Bohdan Khmelnytskyi Order and the Order "For Courage" in the hierarchy of awards.

Unfortunately, this award turned out to be "stillborn". As of February 1 2021, only 4 people have been awarded this order. This is due to the fact that it was intended primarily for posthumous awards of fallen activists on the Maidan. However, under public pressure, they were awarded the title of Hero of Ukraine with the Golden Star Order. As a result, the Order of Heroes of the Heavenly Hundred lost its relevance.[17]

In addition, with regard to some state awards, legislative changes took place in 2015 regarding the range of persons who can be awarded such awards. For example, before 2015, the medal "For impeccable service" could be awarded, among other things, to members of the rank and file of internal affairs bodies and the internal troops of the Ministry of Internal Affairs of Ukraine and after 2015 - police officers and the National Guard of Ukraine, respectively. Since 2015, the presidential award "Nominal firearm" has been awarded, in particular, to police officers and not to officers of the Ministry of Internal Affairs of Ukraine, as before.

On February 17 2016, by the Decree of the President of Ukraine, the award of the President of Ukraine "For participation in an anti-terrorist operation" was introduced to honour the defenders of the sovereignty and territorial integrity of Ukraine during the anti-terrorist operation in the Donetsk and Luhansk regions.[18]

15 Law no 1549-III (4) art 9; Decree of the President of Ukraine no 341/95 'On the establishment the award of the President of Ukraine "Nominal Firearms"' of 29 April 1995 <https://zakon.rada.gov.ua/laws/show/341/95> accessed 25 September 2023.

16 Law no 1549-III (4) art 7; Decree of the President of Ukraine no 844/2014 'On the Order of the Heavenly Hundred Heroes' of 3 November 2014 <https://zakon.rada.gov.ua/laws/show/844/2014> accessed 25 September 2023.

17 Yurii Gherasymchuk 'Military Awards for Ukraine' (*Ukrainian Military Pages*, 8 May 2022) <https://www.ukrmilitary.com/2022/05/voenni-nagorody.html> accessed 25 September 2023.

18 Decree of the President of Ukraine no 53/2016 'On the award of the President of Ukraine "For Participation in an Anti-Terrorist Operation"' of 17 February 2016 <https://zakon.rada.gov.ua/laws/show/53/2016>

In 2021, the President of Ukraine introduced the presidential award "Legend of Ukraine", which honours citizens of Ukraine for outstanding personal merits in the formation of independent Ukraine, strengthening its statehood, protection of the Fatherland and service to the Ukrainian people, a significant contribution to the development of the national economy, science, education, culture, arts, sports, health care, as well as for active charitable and public activities.[19]

In 2022, the following awards of the President of Ukraine were introduced:

1) "Cross of Combat Merit" - to honour **servicemen** of the Armed Forces of Ukraine and other military formations formed in accordance with the laws of Ukraine for outstanding personal courage and bravery or an outstanding heroic deed during the performance of a combat mission in conditions of danger to life and direct confrontation with an opponent; outstanding successes in the management of troops (forces) during military (combat) operations.[20]

2) "For the Defense of Ukraine" - for awarding **military personnel**, law enforcement officers, **members of voluntary formations** of territorial communities, employees of central and local authorities, enterprises, institutions and organisations and **volunteers** who participated in measures to ensure the defence of Ukraine, protect the safety of the population and actively contributed implementation of such measures.[21]

From February 24 to August 19, 2022, 155 defenders of Ukraine received the title of Hero of Ukraine with the awarding of the "Golden Star" order, **75 of them - posthumously**.[22] Some Decrees of the President of Ukraine awarding certain persons were not published for reasons of state security, although, as a rule, all documents issued by the Supreme Commander-in-Chief of the Armed Forces of Ukraine are published on the website of the President of Ukraine.

4 GENERAL RULES FOR PRESENTATION FOR AWARDING AND AWARDING OF STATE AWARDS OF UKRAINE

Ukraine's legislation outlines the general procedure for the nomination and awarding of state awards in Ukraine. However, each state award is governed by distinct legal acts that define the grounds for awarding, contain a description of the award, and establish the protocol for its presenting, wearing, etc. Such documents are known as the Statutes for the title of Hero of Ukraine and each specific order and Regulations for other state awards.

The general rules for nominating and presenting state awards of Ukraine are provided in the Procedure for presentation to the awarding and presentation of state awards of Ukraine,

accessed 25 September 2023.

19 Decree of the President of Ukraine no 362/2021 'On the award of the President of Ukraine "National Legend of Ukraine"' of 16 August 2021 <https://zakon.rada.gov.ua/laws/show/362/2021> accessed 25 September 2023.

20 Decree of the President of Ukraine no 314/2022 'On the award of the President of Ukraine "Cross of Combat Merit"' of 5 May 2022 <https://zakon.rada.gov.ua/laws/show/314/2022> accessed 25 September 2023.

21 Decree of the President of Ukraine no 559/2022 'On the award of the President of Ukraine "For the Defense of Ukraine"' of 5 August 2022 <https://zakon.rada.gov.ua/laws/show/559/2022> accessed 25 September 2023.

22 Oleksandr Bekker, 'How Many Military Units of the Armed Forces of Ukraine Were Awarded the "For Courage and Bravery" Award in 2022' (*ArmyINFORM*, 19 August 2022) <https://armyinform.com.ua/2022/08/19/skilky-vijskovyh-chastyn-zsu-nagorodzheno-vidznakoyu-za-muzhnist-ta-vidvagu-u-2022-roczi/> accessed 25 September 2023.

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approved by the Decree of the President of Ukraine dated February 19, 2003.[23]

In accordance with this procedure, applications for state awards are submitted to the President of Ukraine by various entities, including the Supreme Council of Ukraine, the Cabinet of Ministers of Ukraine, ministries and other central executive bodies, the Constitutional Court of Ukraine, the Supreme Court of Ukraine, the Supreme Economic Court of Ukraine, the General Prosecutor's Office of Ukraine, regional, Kyiv and Sevastopol city state administrations, the Commission of State Awards and Heraldry under the President of Ukraine, as well as the Supreme Council of the Autonomous Republic of Crimea, the Council of Ministers of the Autonomous Republic of Crimea, the Representation of the President of Ukraine in the Autonomous Republic of Crimea, which make a joint submission.

Nominating candidates for state awards is carried out publicly at the workplace of the persons being put forward for an award. This includes labour teams of enterprises, institutions and organisations, regardless of the type and form of ownership. Requests for a state award are submitted to the relevant higher-level body or organisation.

Bodies authorised to submit applications for recognition of state awards send a formal submission along with an award letter of the established form addressed to the President of Ukraine. The award letter specifies the specific merits of the person, which serve as the basis for nomination of the state award. Additionally, the letter bears the official seal of the enterprise, institution, or organisation where the person is employed.

Submission documents for state awards undergo preliminary processing in the Department of State Awards and Heraldry of the Administration of the President of Ukraine.

A person awarded a state award is presented with both the award and a document certifying the honour. The presentation of state awards and awarding documents is conducted with a sense of solemnity and wide publicity. Before the presentation, the decree of the President of Ukraine on awarding is publicly announced.

State awards and awarding documents **are presented by the President** of Ukraine or by his authority, the Chairman of the Supreme Council of Ukraine, the First Deputy and Deputy Chairman of the Supreme Council of Ukraine, the Prime Minister of Ukraine, the First Deputy Prime Minister of Ukraine, the Deputy Prime Minister ministers of Ukraine, ministers, heads of other central executive bodies, the Head of the Administration of the President of Ukraine, the Chairman of the Constitutional Court of Ukraine, the Chairman of the Supreme Court of Ukraine, the Chairman of the Higher Economic Court of Ukraine, the Prosecutor General of Ukraine, ambassadors of Ukraine in foreign countries, the Chairman of the State Awards and Heraldry Commission under To the President of Ukraine, Chairman of the Supreme Council of the Autonomous Republic of Crimea, Chairman of the Council of Ministers of the Autonomous Republic of Crimea, Permanent Representative of the President of Ukraine in the Autonomous Republic of Crimea, heads of regional, Kyiv and Sevastopol city state administrations.

An official Protocol is drawn up according to the prescribed format after the presentation of state awards and awarding documents. This Protocol is signed by the awarding authority and stamped with the seal of the body responsible for conducting the presentation. The Protocol is then forwarded to the Department of State Awards and Heraldry of the Administration of the President of Ukraine no later than a week following the state awards.

In case of an awardee's death, where they were not presented with a state award and award

23 Decree of the President of Ukraine no 138/2003 'On the Procedure for Presentation to Awarding and Awarding of State Awards of Ukraine' of 19 February 2003 <https://zakon.rada.gov.ua/laws/show/138/2003> accessed 25 September 2023.

document during their lifetime, or in the event of a posthumous award for a person, the state award and its associated documentation are transferred to the awardee's family for safekeeping as a memory. The transfer of the state award and the award document is executed by a Protocol of the established format. The transfer Protocol is sent to the Department of State Awards and Heraldry of the Administration of the President of Ukraine.

5 DEPRIVATION MECHANISM OF STATE AWARDS OF UKRAINE

Nowadays, persons who have been awarded state awards of Ukraine **can be deprived of** these awards by the President of Ukraine, and only in the case of the awardee's **conviction for a serious crime,** at the request of a court in cases provided for by law. Currently, there is no actual specific procedure in the current procedural legislation for the deprivation of a state award.

However, the draft Law on Amendments to the Law of Ukraine "On State Awards of Ukraine" regarding the improvement of the system of state awards of Ukraine, registered in the Supreme Council of Ukraine on July 26, 2021, proposes a detailed mechanism for the deprivation of state awards.[24]

First of all, the above-mentioned Draft Law expands the list of grounds for deprivation of state awards. Deprivation of state awards of Ukraine may be carried out by the President of Ukraine only in case of:

1) entry into force of a court decision declaring the awardee guilty of a serious and especially serious crime or the awardee's violation of the Military Oath or the Oath of a civil servant;
2) the presence of information that would make awarding impossible, in particular, providing false information about a person when nominating them for an award;
3) unfavourable actions by the awardee that make them unworthy of the state award;
4) refusal of the awardee to accept the state award.

As for the deprivation procedure itself, the Draft Law indicates the following. Applications for the deprivation of state awards are filed in the name of the President of Ukraine by the bodies that nominated the awardee and submitted applications for awarding the relevant persons for the state awards. These submissions are considered by the Commission of State Awards and Heraldry, which makes issues a conclusion on the issue raised.

The President of Ukraine renders a decision on the deprivation of a state award by issuing a decree of the President of Ukraine, specifically for this purpose. The decision to deprive may apply to all or only some state awards received by the person.

Additionally, the bill introduces an independent procedure for voluntary refusal of a state award. In cases where an awardee declines to accept the state award, the awardee must submit a written statement, no later than five days after the publication of the relevant Presidential Decree, to the President of Ukraine indicating their refusal to accept the state award. The President of Ukraine acknowledges the refusal of a state award by issuing a Presidential Decree, which formally recognises that the Presidential Decree originally awarding the state award has become invalid in relation to the person who refused the award. This acknowledgement is based on the awardee's refusal to receive the state award.

24 Draft Law no 5829 'On Amendments to the Law of Ukraine "On State Awards of Ukraine" on Improving the System of State Awards of Ukraine' of 26 July 2021 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=72603> accessed 25 September 2023.

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Furthermore, the Draft Law provides for the legal consequences of state awards deprivation. Persons who have had their state awards deprived, including those whose Presidential Decrees for state awards have been revoked, as well as those who have refused state awards, forfeit their right to enjoy all benefits and privileges provided for awarded persons.

In the spring of 2022, the Supreme Council of Ukraine adopted, as a basis, the draft Law on Amendments to Certain Laws of Ukraine on Measures to Prevent Threats to National Security – Depriving Persons of State Awards (No. 6163).[25] This draft Law entails a revision of an article within the existing Law of Ukraine, "On State Awards of Ukraine", regarding the deprivation of state awards. According to the new wording of Article 16 of the aforementioned Law, the President of Ukraine may revoke state awards in the following cases:

1) in the case of conviction of the awardee for a serious or particularly serious crime at the request of the court;

2) upon a substantiated proposal of the Supreme Council of Ukraine or the National Security and Defense Council of Ukraine, in case:

   c) the awardee committed actions aimed at popularising or promoting the bodies of the aggressor state and its officials;

   d) the awardee committed actions aimed at justifying, recognising the legality or publicly denying the armed aggression of the Russian Federation against Ukraine, the annexation of the territory of Ukraine by the aggressor state, violation of the territorial integrity sovereignty of Ukraine;

   e) law enforcement agencies of Ukraine established the participation of the awardee in carrying out armed aggression against Ukraine or the occupation forces and/or occupation administrations of the aggressor state.[26]

6 SOCIAL POLICY OF THE STATE REGARDING PERSONS WHO HAVE BEEN AWARDED MILITARY STATE AWARDS OF UKRAINE

For persons awarded the state awards of Ukraine for their military service receive social benefits in the form of pension supplements.[27] These range from 35 to 40 percent of the subsistence minimum determined for persons who have lost their ability to work (amounting to 16 to 18.4 euros). This specific percentage depends on the number and types of state awards awarded to a person. The amount of the allowance is determined in accordance with the scheme for determining the amount of allowances based on merit to Ukraine. This scheme has been endorsed by the central executive body responsible for shaping social welfare policy.

When a mother, entitled to a pension supplement, dies, or her parental rights are revoked, and her children up to six are raised by the father, the father becomes eligible for a particular merit pension. This consideration also extends to the upbringing of children who have been legally adopted.

25 Draft Law no 6163 'On the Introduction of Amendments to Some Laws of Ukraine Regarding Measures to Prevent Threats to National Security - Depriving Persons of State Awards' of 11 October 2021 <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=72968> accessed 25 September 2023.

26 'Deprivation of State Awards: The Council Adopted the Draft Law as a Basis' *Legal Newspaper* (Kyiv, 15 April 2022) <https://yur-gazeta.com/golovna/pozbavlennya-derzhavnih-nagorod-rada-priynyala-za-osnovu-zakonoproekt.html> accessed 25 September 2023.

27 Law of Ukraine no 1767-III 'On Pensions for Special Services to Ukraine' of 1 June 2000 (as amended of 1 July 2023) <https://zakon.rada.gov.ua/laws/show/1767-14 > accessed 25 September 2023.

If the Pension Fund of Ukraine receives documented information about the existence of a pensioner's criminal record for committing an intentional criminal offence by decision of the territorial body of the Pension Fund of Ukraine, such a pensioner will lose their entitlement to the established pension for special merits.

In the event of the death of a person who was entitled to the above-mentioned allowance, the family members of the deceased, whose list is defined in the second part of Article 36 of the Law of Ukraine "On Mandatory State Pension Insurance", are eligible for a pension in the event of the loss of a breadwinner. This pension amounts to 70 percent (11.2 - 12.9 euros) for one disabled family member or 90 percent (14.5 - 16.5 euros) for two or more disabled family members. This percentage is calculated on the supplement received by the deceased breadwinner's pension or allowances that would have been entitled to them.[28] Such persons are:

1. Spouse, father, mother, if they are persons with disabilities or have reached retirement age as defined in Article 26 of the Law of Ukraine "On Mandatory State Pension Insurance";
2. children, including those born within 10 months from the day of the breadwinner's death, who have not yet reached the age of 18 or are older but became persons with disabilities before reaching the age of 18;
3. children studying full-time in general educational institutions of the system of general secondary education, as well as vocational and technical higher educational institutions. This provision extends to the period between the completion of studies at one of the specified educational institutions and admission to another educational institution or in the period between the completion of studies at one educational and qualification level and the continuation of studies at another, provided that such period does not exceed four months.- Such support lasts until the children graduate from educational institutions but no longer than when they reach the age of 23. Orphans, irrespective of their student status, are eligible for support until they reach the age of 23.
4. the husband (or wife), or in their absence - one of the parents or a brother or sister, grandfather or grandmother of the deceased breadwinner. This applies regardless of age and ability to work, as long as they are not working and actively caring for the deceased breadwinner's children up to the age of 8.[29]

In addition, in accordance with the Statute of the title of Hero of Ukraine,[30] persons who have been awarded **the title of Hero of Ukraine** for the performance of a remarkable heroic act are paid a one-time monetary reward in the amount of 50 times the subsistence minimum established for able-bodied persons on January 1 of the calendar year in which the title of Hero of Ukraine is awarded (2953.6 euros in 2022). In case of awarding the title of Hero of Ukraine with the award of the "Golden Star" order posthumously or the death of a person who was awarded the title of Hero of Ukraine with the awarding of the "Golden Star" order, a one-time monetary reward is paid to the family members of such persons.

The sphere of social security does not stand still, and, as of January 1, 2023, the Law of Ukraine "On Monthly Cash Payments to Certain Categories of Citizens",[31] introduces a monthly

28 'Pension for Special Services to Ukraine' (*WikiLegalAid*, 1 August 2023.) <https://wiki.legalaid.gov.ua/index.php/> accessed 25 September 2023.

29 Law of Ukraine no 1058-IV 'On Mandatory State Pension Insurance' of 9 July 2003 (as amended of 7 September 2023) <https://zakon.rada.gov.ua/laws/show/1058-15> accessed 25 September 2023.

30 Decree of the President no 1114/2002 (n 5) Statute.

31 Law of Ukraine no 2454-IX 'On Monthly Cash Payments to Certain Categories of Citizens' of 27 July 2022 <https://zakon.rada.gov.ua/laws/show/2454-20> accessed 25 September 2023.

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financial payment in the amount of:

- 3 minimum wages, established on January 1 of the calendar year, to persons awarded the title of Hero of Ukraine with the award of the "Golden Star" order (487.5 euros);
- 2 minimum wages - for knights of the Bohdan Khmelnytskyi Order of three degrees (full knights) (309.5 euros);
- 1 minimum wage - to knights of the Order "For Courage" of three degrees (full knights) and awarded with the Princess Olga Order of three degrees (154.7 euros);
- 1 minimum wage (calculated per month per family) – to family members of deceased or posthumously awarded persons who were awarded the title of Hero of Ukraine with the awarding of the Order of the Golden Star, Knights of the Bohdan Khmelnytskyi Order of three degrees (full knights), knights of the Order "For Courage" of three degrees (full knights) and awarded with the Princess Olga Order of three degrees (154.7 euros).

7 LEGISLATIVE WORK ON CORRUPTION RISKS IN THE AWARDING SYSTEM. THE STATE REGISTER OF AWARDEES

As Ukraine continues its fight against corruption, the Supreme Council's specialised committee is currently working on the Draft Law of Ukraine on Amendments to the Law of Ukraine "On State Awards of Ukraine" regarding the improvement of the system of state awards of Ukraine, registered on July 26, 2021.[32] This draft law proposes to legislate a number of anti-corruption norms, including **the prohibition of awarding deputies of all levels** and **high-ranking officials during their tenure** (awarding state awards to the President of Ukraine, the Chairman of the Supreme Council of Ukraine, the First Deputy and Deputy Chairman of the Supreme Council of Ukraine, People's Deputies of Ukraine, Prime Minister of Ukraine, First Deputy Prime Minister of Ukraine, Deputy Prime Ministers of Ukraine, Ministers, heads of other central executive bodies, deputies of representative bodies of local self-government is allowed **only after they have completed their powers** with the exception of awarding for personal courage and heroism and awarding presidential honours in the form of commemorative and jubilee medals). A similar provision exists in French and Belgian legislation.

Additionally, the proposed amendment suggests the inclusion of a provision according to which a person who has been awarded a state award can only be presented for another award no earlier than three years after the publication of the decree of the President of Ukraine for the prior award, with the exception of nominations for acts demonstrating personal courage and heroism. Furthermore, if a person is nominated for a subsequent award, only the merits or deeds accomplished after the previous award are taken into account.

The designs of state awards of Ukraine emblems are approved through a well-established procedure based on the results of competitions organised by the Commission of State Awards and Heraldry. The copyright for these designs is transferred to the state following the approval of competition results.

The production of state awards emblems (except for presidential awards in the form of commemorative and jubilee medals) and documents certifying their awarding is carried out exclusively by the Banknote Mint of the National Bank of Ukraine.

Samples of state awards are approved by the President of Ukraine following an open competition among manufacturers, which can be conducted free of charge.

32 Draft Law no 5829 (n 24).

In addition, the draft law amending the Law of Ukraine "On State Awards of Ukraine" regarding the improvement of the system of state awards of Ukraine, registered on July 26, 2021,[33] seeks to establish an open State Register of awardees (excluding those awarded by decree of the President of Ukraine with limited access). This register will include the recipient's surname, first name and patronymic, the primary organisation (person) that initiated the award, and the responsible person who approved the nomination. The procedure for maintaining the Register of awarded persons will be through a decree of the President of Ukraine. According to the bill's authors, this innovation will make the system of state awards in Ukraine transparent and, therefore, democratic.

8 THE FOREIGN MODEL OF AWARDING AS A STATE POLICY (ON THE EXAMPLE OF CONTINENTAL EUROPE STATES AND THE ANGLO-SAXON LEGAL SYSTEM)

In contrast to Ukraine, France and Belgium have different approaches to awards, specifically for act of bravery, which involves lower rank distinctions. To raise the significance of these awards, dual-purpose awards are used. In France, this includes the Military Cross (Croix de Guerre) (est. 1915) and the Cross of Military Valor (Croix de la Valeur Militaire) (est.1956). There are also older distinctions such as the Military Medal (Médaille militaire) (est.1852) and the Order of the Legion of Honour (Ordre national de la Légion d'honneur) (est.1804).

Belgium employs a similar strategy by using the Military decoration (Décoration Militaire/ Militaire Decoratie) (est. 1791) to implement a system of awards. National orders are then conferred in order of seniority. A disadvantage of this system is that dual-purpose awards can diminish the prestige of combat awards.[34]

Conversely, other countries, like Bulgaria, Poland, and Sweden, adopt a different system where a special combat award holds seniority and, as a rule, all awards for meritorious service in wartime typically stem from it. In Bulgaria, this is embodied in "For Courage" (est.1880), in Poland – Virtuti Militar (est.1792), and in Sweden - Svärdsorden (est.1522). Usually, in peacetime, such orders are "dormant"; that is, they are either not awarded at all or are awarded extremely rarely. Such orders are limited to a certain number of degrees. Moreover, in some countries, the degree of the order corresponds to the military rank. Thus, there are grades of awards for lower ranks, for officers and for generals.[35] Often, such orders are awarded not only for bravery but also, for example, for commanding troops.

Another award system has three or four decorations awarded according to the level of bravery on the battlefield. Such systems exist in the United Kingdom, Commonwealth countries, the USA, Italy, Israel, etc. The government award system in the United Kingdom consists of four award levels. At the same time, awards of the third level in each type of armed forces are their "own". For example, for the Army of the Ground Forces, the first level award is the Victoria Cross (est. 1856), the second - the Conspicuous Gallantry Cross (est. 1993), the third - the Military Cross (est. 1914), the fourth - the Commemoration Mentioned in dispatches (est. 1919). In addition, in the United Kingdom, there are orders for military service and combat merit, which are intended mainly for officers and generals and are not related to personal bravery.[36]

The system is similar in the USA. There is also a division by type of armed forces and four levels of awards. If we take the same ground troops as an example, the first level award for

33 ibid.

34 Gherasymchuk (n 17).

35 ibid.

36 ibid.

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them is the Medal of Honour (est. 1862), the second - the Distinguished Service Cross (est. 1918), the third - the Silver Star Medal (est. 1932), the fourth – Bronze Star Medal (est. 1944).

Italy's four-level system consists of the Gold (est. 1793), Silver (est. 1833) and Bronze (est. 1833) medals "For military valour" (Al Valore Militare), along with the Cross of the same name (Croce al valor militare) (est. 1922), which completes the set of awards for military merit.[37]

It is interesting to note that European countries have also established awards to honour civilians for bravery, in particular, in the face of the enemy. For example, in the already mentioned United Kingdom, there are separate bravery awards for civilians, which have four levels, like military awards. These awards can also be given to military personnel for bravery in peacetime. In Belgium, during the First and Second World Wars, on the basis of the Civil decoration (Décoration Civice) already established in 1867, wartime Civil decorations (Décoration Civice 1914–1918, etc.) were created. This award was given for resisting the enemy or performing their work in life-threatening conditions (for example, to fishermen who went out to sea under the threat of being drowned by enemy ships). [38] In the system of state awards of Ukraine, the peacetime award is the Order "For Courage".

In addition, in some states, there are special combatant awards. In France, for example, to receive the Combatant's Cross (Croix du Combattant) (est. 1926), one must serve in combat units for at least three months. Being wounded or captured gives the right to be awarded without taking into account this term. The Cross of the Combatant Volunteer (Croix du Combattant Volontaire) (est. 1953) was also additionally established, which is awarded to French citizens and foreigners who fall under the statutory definition of a volunteer. Only the US Air Force has a separate medal for active participation in ground or air combat (Air Force Combat Action Medal) (est. 2007).[39] In Ukraine nowadays, such a combatant award is the "War veteran" badge.

No war is complete without the capture of certain people. In certain states, special state awards have been established to reward persons who were in captivity. For example, in France, there is a "Medal of Fugitives" (Médaille des Évadés) (est. 1926) to award persons who escaped from captivity. It has been used for almost a century. The Prisoner of War Medal (est. 1985) was established in the USA.[40] In Ukraine, there is also a similar award - the Cross Petro Kalnyshevsky "For dignity in captivity", which, however, is awarded by the All-Ukrainian public organization "Kraina".

9 CONCLUSIONS

The model of awarding military awards existing in Ukraine neither reflects Soviet influences nor directly traces the European award system. Rather, the national award model is unique, unlike any other.

Since 2014, the system of military state awards of Ukraine, as outlined by the Law of Ukraine "On State Awards of Ukraine" in 2000, has evolved in response to the country's circumstances. This evolution is exemplified by the introduction of the Order of Heroes of the Heavenly Hundred.

The procedure of nominating and presenting follows a set of general principles and protocols established in both general and special legal acts. Today, because of objective circumstances,

37 ibid.
38 ibid.
39 ibid.
40 ibid.

military awards are most actively used.

The ongoing reforms in the field of state awards in Ukraine are responsive to today's challenges, as reflected in the developed legislative framework in place. One normative act entered into force on January 1, 2023, and the other - on amendments to the Law of Ukraine "On State Awards of Ukraine" regarding improving the system of state awards of Ukraine - is under consideration by the specialised committee of the Supreme Council of Ukraine.

Although Ukrainian legislation formally stipulates grounds for deprivation of state awards, these grounds, as well as the procedure for deprivation, are being improved and expanded in accordance with modern requirements.

To ensure the Euro-Atlantic course of Ukraine, the legislator brings the regulation of this sphere closer to the European model, introducing anti-corruption and democratic norms.

Even though there are benefits for persons awarded with state awards of Ukraine in the form of pension supplements, the social security of these persons is still insufficient. This fact reduces the prestige of awarding military awards.

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Summary: 1. Introduction. – 2. The system of military state awards of Ukraine until 2014. – 3. The system of military state awards of Ukraine during the ATO and OOS (2014-2022) and the full-scale invasion of the Russian Federation on the territory of Ukraine. – 4. General rules for presentation for awarding and awarding of state awards of Ukraine. – 5. Deprivation mechanism of state awards of Ukraine. – 6. Social policy of the state regarding persons who have been awarded military state awards of Ukraine. – 7. Legislative work on corruption risks in the awarding system. The State Register of Awardees. – 8. The foreign model of awarding as a state policy (on the example of continental Europe states and the Anglo-Saxon legal system). – 9. Conclusions.

Keywords: state award, order, medal, degree, deprivation of state awards, social policy, legal mechanisms.

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Abstracts in Ukrainian language / Анотації українською мовою

КОНЦЕПЦІЯ "ВОЄННОЇ ДЕМОКРАТІЇ" У КОНТЕКСТІ ЗБРОЙНОЇ АГРЕСІЇ РОСІЇ ПРОТИ УКРАЇНИ

Олександр Бакумов

АНОТАЦІЯ

Контекст дослідження: Падіння диктатури супроводжується періодом демократичного транзиту, який потребує використання спеціальних заходів для захисту молодої та, до цього часу, нестійкої демократії. Використання цієї моделі розпочалося на практиці після Другої світової війни у зв'язку з поширенням доктрини "демократії, здатної захищати себе", також відомої як воєнна демократія (militant democracy – англійською, або Wehrhafte (Streitbare) Demokrarie – німецькою). Флагманом тут була німецька наука конституційного права, яка сформувала інструменти для створення нової правової системи, врахувавши помилки Веймарської Республіки. Цей досвід особливо актуальний для України, оскільки з 2014 року вона стикається з зовнішньою збройною агресією реваншистських сил, які захопили владу від спадкоємиці радянської імперії, Росії, в якій був встановлений тоталітарний режим і яка стала повноцінною державою-агресором.

Методи: У роботі використовувалися наступні методи дослідження концепції воєнної демократії в умовах збройної агресії Росії проти України. Був застосований системно-структурний метод для виявлення засобів воєнної демократії в Україні (заборона політичних партій, люстрація тощо), а також проблем, пов'язаних із використанням певних засобів воєнної демократії. Логіко-правовий метод дозволив визначити суть рішень конституційних, верховних та інших судів, рішень Європейського Суду з прав людини, у яких використовувалися засоби воєнної демократії або оцінювалася їхня законність (легальність, конституційність або відповідність Європейській Конвенції з прав людини). Компаративний метод обґрунтовував впровадження реформ конституційного та законодавчого регулювання воєнної демократії в Україні на основі досвіду різних країн (переважно європейських) та необхідних механізмів для подальших дій.

Результати та висновки: У роботі містяться пропозиції конституційно та законодавчо удосконалити регулювання засобів воєнної демократії в Україні, які ґрунтуються на наявних досвідах у всьому світі, використавши вже існуючі практики, які були успішно перевірені та досягли результатів.

Ключові слова: *воєнна демократія, популізм, збройна агресія, комунізм, люстрація, тоталітарна пропаганда, окупація, політичні партії, конституційне судочинство, Україна.*

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ВІЙНА ЯК КАТАЛІЗАТОР: НАДИХАЮЧИЙ НАРАТИВ УКРАЇНИ ДЛЯ ФАРМАЦЕВТИКИ "MADE IN UKRAINE" НА НІМЕЦЬКОМУ РИНКУ

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АНОТАЦІЯ

Контекст дослідження: Позитивне сприйняття України, зміцнене глобальною підтримкою під час повномасштабної російської агресії проти України, глибоко вплинуло на національний бренд країни. Це збільшило готовність приймати українську продукцію, особливо в Європі та Північній Америці. Ці зміни в сприйнятті відобразилися на експортних зв'язках та динаміці торгівлі України. У цій статті досліджується взаємозв'язок між позитивним сприйняттям України, концепцією "Made in Ukraine" та споживанням українських товарів. Особлива увага приділяється впливу країни походження на сприйняття споживачів та процесу прийняття рішень. Вивчаючи ці фактори, дослідження ставить за мету збагатити розуміння споживчих уподобань, надаючи практичні висновки, що є актуальними для українських брендів, які діють на міжнародних ринках. Результати дослідження зроблять свій внесок у наявну літературу про національну репутацію, національний брендинг та споживчу поведінку. Крім того, вони нададуть цінні поради українським підприємствам, які прагнуть використовувати свій національний бренд та просувати "Made in Ukraine" продукцію на міжнародному ринку.

Методи: Методологія дослідження має двоступеневий підхід, що охоплює аналіз доступних джерел й опитування, яке допомагає вивчити зовнішнє середовище та зрозуміти ставлення мешканців Німеччини, як покупців, до українських фармацевтичних продуктів. Сформульовані запитання спрямовані на виявлення чинників, що впливають на вибір продуктів та уявлення про Україну як націю. Кілька факторів, зокрема розвинена фармацевтична промисловість України, потенціал для збільшення підтримки та інвестицій, геополітична динаміка, попит у системі охорони здоров'я Німеччини та майбутні можливості розвитку, лежать в основі вибору німецького ринку як ключового об'єкта цього дослідження.

Результати та висновки: За допомогою здійсненого аналізу було виявлено численні ринкові можливості для українських виробників фармацевтичних засобів на ринку Німеччини. Ці можливості передбачають подолання кризи COVID-19, вирішення проблем з нестачею ліків та стратегічне спрямування на конкретні демографічні сегменти. З іншого боку, аналіз опитування розкриває мотивацію та ставлення німців до українських фармацевтичних продуктів. Опитування свідчить про велике бажання німців підтримати Україну, купуючи її фармацевтичні продукти. Для використання позитивного сприйняття України на німецькому ринку українські виробники мають активно впроваджувати комунікаційні стратегії та налагоджувати міцні стосунки з фахівцями у галузі охорони здоров'я. Вони повинні акцентувати увагу на розширенні свого портфоліо продукції та оптимізації ефективності ланцюга постачання, підвищуючи рівень освіченості та співпрацюючи з відповідними зацікавленими сторонами. Загалом,

це дослідження підкреслює потенціал українських фармацевтичних виробників використовувати позитивне сприйняття України на німецькому ринку, а також надає цінні вказівки для успішного входу на ринок та сталого розвитку.

Ключові слова: *Поведінка споживачів, країна походження, дослідження джерел, опитування, етноцентризм, німецький ринок, Made in Ukraine, національний бренд, аналіз PESTEL, фармацевтичний ринок, повномасштабна російське вторгнення в Україну.*

ЧИ МОЖЕ ВІЙНА В УКРАЇНІ БУТИ КРОКОМ НАЗАД У БОРОТЬБІ ЗІ ЗМІНОЮ КЛІМАТУ?

Дін Шахікі

АНОТАЦІЯ

Контекст дослідження: Війна в Україні, головна подія останніх років у міжнародному праві, була викликана діями російської сторони шляхом втручання на територію суверенної держави з наміром анексувати окремі частини України. Особливе значення цій війні надає міжнародне співтовариство, яке прагне відстоювати міжнародний принцип справедливості, запобігаючи подібним ситуаціям у Європі. Окрім трагічної втрати життів людей, критичним пунктом є деградація навколишнього середовища в цих районах разом зі знищенням зусиль держав у боротьбі зі зміною клімату. Ця війна має глобальні наслідки поза полем бою. Вона впливає на численні соціальні аспекти та має прямий вплив на благополуччя суспільства. Крім того, відбувається зростання інфляції на світовому рівні, енергетична криза, порушення на ринку перевезень товарів та послуг, також безпосередньо піддаються впливу й інші взаємопов'язані компоненти соціального життя.

У цьому дослідженні проведено аналіз різних категорій, починаючи з викидів парникових газів, впливу бомбардувальних кампаній, що здійснювались поблизу ядерних реакторів, й оцінки потенційних ризиків їх розплавлення та подальших наслідків. Також було проаналізовано соціально-економічний аспект, рух глобального ринку, енергетичну кризу та інфляцію. Критична дискусія обертається навколо зміни акценту з боротьби зі зміною клімату на вирішення поточної ситуації, створеної війною в Україні. Крім того, частина дослідження включає з'ясування громадського настрою за конкретними питаннями та порівняння результатів двох різних груп для виявлення потенційних розбіжностей у точках зору.

Методи: Збір матеріалів із книг, статей, офіційних даних та інших наукових звітів; аналіз та структурування зібраного матеріалу; опитування.

Результати та висновки: На основі проведеного дослідження та аналізу, можна зробити висновок, що війна в Україні є кроком назад у боротьбі зі зміною клімату.

Ключові слова: *зміна клімату, війна в Україні, міжнародне право, енергетика.*

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ТОРГІВЛЯ ЛЮДЬМИ: ПРОБЛЕМИ ПРОТИДІЇ В КАЗАХСТАНІ

Аманґельди Хамзін*, Жанна Хамзіна, Омон Мухамеджанов Бінур Тайторіна, Єрмек Бурібаєв

АНОТАЦІЯ

Контекст дослідження: У цій роботі оцінюються поточні обставини щодо захисту та прав жертв торгівлі людьми в Казахстані. Дослідження спрямоване на оцінку основних національних інструментів та законів, прийнятих для боротьби з торгівлею людьми в Казахстані.

Методи: У дослідженні було застосовано кілька провідних методологічних підходів, включно з системним підходом, який передбачає вивчення боротьби з торгівлею людьми разом із забезпеченням гарантій прав людини; комплексним підходом, що складається з вивчення об'єктивних та суб'єктивних факторів, а також з аналізу внутрішніх і зовнішніх (соціально-економічних, демографічних, геополітичних тощо) факторів, які є причиною нелегальної міграції та торгівлі людьми; емпіричним підходом, який передбачає дослідження з урахуванням відповідного досвіду, наявного в Казахстані та за його межами; формально-правовим підходом, що використовувався з метою аналізу чинної нормативно-правової бази для боротьби з торгівлею людьми та шляхів її вдосконалення.

Результати та висновки: На основі результатів дослідження висунуто кілька практичних пропозицій з метою виправлення виявлених недоліків та прогалин у правопорядку та законодавстві Казахстану. У цій роботі ми дійшли висновку, що механізми, які за міжнародними зобов'язаннями Казахстану мають запобігти торгівлі людьми, не є досконалими. Однак значні покращення можливі за допомогою прийняття спеціального закону, а також у разі впровадження спеціальних організаційних заходів та посилення юридичної відповідальності.

Ключові слова: *торгівля людьми, нелегальна міграція, жертва торгівлі людьми, рабство, примусова праця.*

ОЦІНКА ЯКОСТІ ТРАНСФОРМАЦІЇ ФІНАНСОВОЇ ЗВІТНОСТІ СУБ'ЄКТІВ ЗА МІЖНАРОДНИМИ СТАНДАРТАМИ ФІНАНСОВОЇ ЗВІТНОСТІ

Засадний Богдан*, Михальська Олена, Фещенко Євгенія, Цибульник Марія, Склярук Ірина

АНОТАЦІЯ

Контекст дослідження: Обов'язкове застосування МСФЗ для визначеного переліку суб'єктів призводить до додаткових витрат, як матеріальних, фінансових, так і до витрат ресурсів працівників. Відповідно, це спонукає до пошуку шляхів мінімізації витрат,

пов'язаних з переходом до застосування МСФЗ, тобто їх формалізації. У таких умовах актуалізується необхідність удосконалення методологічного інструментарію для оцінки процесу трансформації фінансової звітності відповідно до вимог МСФЗ. Метою цієї статті є розробка методологічного інструментарію для оцінки якості процесу трансформації фінансової звітності за вимогами МСФЗ, яка здійснена на прикладі підприємств молочної промисловості України.

Методи: Оцінка впливу переходу до звітності за МСФЗ на зміни фінансового стану суб'єктів реалізовувалася за допомогою статистичних методів порівняння, узагальнення, групування та коефіцієнтів. Висновки були зроблені на основі результатів дослідження за допомогою методу логічного узагальнення.

Результати та висновки: Методика оцінки впливу застосування МСФЗ на фінансовий стан підприємств молочної промисловості України була удосконалена. Зокрема, була покращена методика щодо обліку змін у фінансовій звітності внаслідок трансформаційних коригувань до та після дати переходу до МСФЗ. Це удосконалення передбачає використання фінансових коефіцієнтів як засобу оцінки, що сприяє визначенню якості процесу складання першої фінансової звітності підприємств відповідно до МСФЗ. Нові методологічні аспекти та рекомендації з оцінки якості процесу трансформації в контексті застосування МСФЗ забезпечать ефективне управління підприємствами молочної промисловості України, що призведе до більшого залучення іноземних інвестицій в умовах європейської інтеграції та післявоєнного періоду.

Ключові слова: *бухгалтерський облік, фінансова звітність, міжнародні стандарти фінансової звітності (МСФЗ), фінансовий стан, фінансові показники, управління діяльністю підприємств молочної промисловості України.*

ПРАВОВА БАЗА ПОЛІТИКИ ІДЕНТИЧНОСТІ МІЖНАРОДНОЇ СПІЛЬНОТИ В ПІСЛЯВОЄННОМУ КОСОВІ – ІСТОРИЧНИЙ ОГЛЯД

Матильда Пайо*, Донік Саллова

АНОТАЦІЯ

Контекст дослідження: Ця стаття спрямована на розробку та аналіз правового контексту політики ідентифікації міжнародної спільноти в післявоєнному Косові. Завдяки цій політиці правовий статус Косова був визначений як суб'єкт, що перебував під управлінням ООН до 2008 року та як незалежна держава після цього. З огляду на те, що військова інтервенція НАТО в Косові була розпочата з гуманітарних причин, вона не була інтервенцією, спрямованою на вирішення історичного конфлікту між сербами та албанцями. Також була створена адміністрація ООН в Косові задля забезпечення нейтральності стосовно національних інтерпретацій "проблеми Косова". Ця стаття об'єднує аргументи, щодо підходу міжнародної спільноти до народу Косова як нового

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політичного суб'єкта, відірваного від будь-яких національних проєкцій, таким чином запобігаючи сприйняттю цього як національної перемоги, особливо серед албанської більшості. З цієї причини всі закони, нормативні акти, керівні документи та політика місії ООН, які окреслювали правовий статус Косова та спосіб правління, базувалися на «принципі багатонаціональності». У цій праці також розглядається процес переговорів щодо визначення остаточного статусу Косова, через який незалежність була зумовлена зобов'язанням будувати державу на принципі багатонаціональності.

Методи: У цій статті було застосовано якісні методи, оскільки акцент був зроблений на розумінні деяких понять правової бази, використаної у процесі будівництва держави Косова в післявоєнний період, та ролі, яку відіграла міжнародна спільнота в політиці ідентичності. Автори намагалися поєднати теоретичний аспект із практичним, щоб представити ширший погляд на тему цієї статті. Було проведено аналіз даних з офіційних документів міжнародних інституцій та держави Косова. Історичний метод, використаний для дослідження нормативно-правових документів, допоміг досягти більш глибокого розуміння питання, розглянутого в цій роботі.

Результати та висновки: Висновки авторів свідчать про те, що міжнародна спільнота визначила післявоєнне Косово, як нейтральний політичний суб'єкт з точки зору національної ідентифікації. Цього було досягнуто за допомогою законодавчої та конституційної бази, яка визначає пріоритет самовизначення шляхом просування багатонаціональності та громадянської ідентичності як політичної ідентичності людей Косова. Ця невідповідність між державним та національним самовизначенням породила кризу, особливо серед більшості албанського населення. Це призвело до релігійної радикалізації частини населення та відсутності лояльного ставлення до держави в інших частинах країни.

Ключові слова: *правова база політики ідентичності, правила місії ООН в Косові, конституційна база, багатонаціональність, криза ідентичності, національна ідентичність.*

ПРАВОВІ ВИКЛИКИ, ЩО УСКЛАДНЮЮТЬ РОЗВИТОК МОДЕЛІ ІСЛАМСЬКОЇ ФІНАНСОВОЇ СИСТЕМИ В УЗБЕКИСТАНІ

Алам Асадов, Іхтійоржон Турабоєв

АНОТАЦІЯ

Контекст дослідження: Нещодавно уряд Узбекистану проявив зацікавленість у запровадженні ісламських фінансових послуг. Проте створення правової бази для безперебійної роботи ісламських фінансових установ відбувається повільно. Ця робота намагається визначити правові виклики, які ускладнюють упровадження моделі ісламської фінансової системи в Узбекистані, а також формулює життєво важливі політичні рекомендації щодо розробки нормативно-правової бази для цієї галузі.

Методи: У статті було використано метод бібліотечного дослідження та юридичного аналізу у процесі вивчення різноманітних правових питань. Для цього ми дослідили низку нормативно-правових актів, що варіюються від банківської справи і законодавства про ринок капіталу до деяких нещодавно прийнятих законів. Окрім того, розглядаються питання моделі ісламської фінансової системи в податковому законодавстві та цивільному кодексі країни.

Результати та висновки: Висновки статті показують, що існують певні правові виклики, які перешкоджають повному впровадженню моделі ісламської фінансової системи в країні. Вони є не лише в одній галузі національного законодавства, а й існують у різних частинах правової системи. Тож рекомендовано уряду Узбекистану розробити надійну законодавчу та нормативну базу для успішної діяльності ісламських фінансових установ. Загальний висновок дослідження полягає в тому, що модель ісламської фінансової системи, для ефективного функціонування, має бути цілісною, навіть якщо процес її розвитку відбувається повільно.

Ключові слова: *ісламська фінансова система, Узбекистан, юридичні питання, нормативна база, фінансова галузь.*

КОНСТИТУЦІЙНО-ПРАВОВЕ СТАНОВИЩЕ НАЦІОНАЛЬНИХ МЕНШИН У КОСОВІ: ПАКЕТ АГТІСААРІ ТА ПРИВІЛЕЇ МЕНШИН

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АНОТАЦІЯ

Контекст дослідження: У цій статті ми розглядаємо правове та конституційне становище національних меншин, акцентуючи увагу на сербській. Ми досліджуємо їх права та привілеї, а також зобов'язання та відповідальність інституцій Косова щодо національних меншин. Безумовно, національні меншини є невід'ємною частиною населення Косова; вони повинні мати права та обов'язки, що передбачені Конституцією та чинним законодавством, і дотримуватися їх. Національні меншини є важливою складовою кожного суспільства; вони створюють мозаїку країни, в якій живуть, тому слід поважати їх та цінності, які вони несуть і представляють у соціумі. У статті велика увага приділяється правам, що визначені пакетом Агтісаарі, та привілеям сербської громади, що проживає в Косові та яку цей пакет визнає як меншину. Пакет Агтісаарі визнає унікальний статус Сербської православної церкви та чітко визначає представництво цієї громади в центральних інституціях. Це включає зарезервовані та забезпечені місця як у виконавчій, так і в законодавчій гілках влади. На місцевому рівні пакет визначає, як вони будуть представлені, зокрема в поліції, прокуратурі, суді та всіх інших державних установах. Була приділена увага випадкам саботажу в державі та інституціях Косова з боку сербської громади, яка проживає в Косові, проте перебуває під впливом та керівництвом Сербії. Представники сербської громади в Косові отримують дохід і пільги

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від держави за мандат, яким вони користуються. Хоча досі їхні дії всередині інституцій, як правило, спрямовані на узгодження з планами Сербії, а не на вирішення проблем сербської спільноти, яку вони мають представляти. Хоча деякі серби, що проживають в Косові, можуть не повністю приймати незалежність країни, ця незгода не змінює того факту, що Косово є незалежною державою, визнаною 116 демократичними країнами світу. Слід зазначити, що Конституція Косова, забезпечує привілейовані права сербської громади, що проживає в Косові, попри те, що вона становить менше 5% від загальної чисельності населення.

Методи: У дослідженні використовується метод описового аналізу, що ґрунтується на точному описі та поглибленому аналізі теми шляхом збирання детальних даних, що стосуються проблеми дослідження, аналізу та тлумачення правових текстів і відповідної інформації щодо надання привілеїв певній громаді. Ці методи були застосовані для порівняння чинного законодавства з міжнародними зобов'язаннями, які Косово отримало через комплексну пропозицію щодо ставлення до меншин, які не є більшістю.

Результати та висновки: Наше дослідження показує, що національні меншини Косова не є рівноправними. Сербська громада постійно перебуває в привілейованому стані та продовжує користуватися підтримкою міжнародного співтовариства, тоді як інші спільноти мають значні проблеми у практичному плані проживання. Найкраще питання прав меншин розуміють громадяни Косова. Тому держава Косово та її громадяни не повинні допускати дискримінації та порушення прав національних меншин. Реалізація домовленостей, виконання міжнародних зобов'язань та просування прав меншин в Косові є обов'язком самого Косова та його громадян. Косовські інституції зобов'язані вести діалог з сербською спільнотою, оскільки вони є частиною суспільства і повинні бути інтегровані в нього.

Ключові слова: *меншини Косова, пакет Ахтісаарі, Конституція Республіки Косова, права меншин.*

ПРОЛИТИ СВІТЛО: ЗМЕНШЕННЯ КОРПОРАТИВНОЇ ТІНЬОВОЇ ЕКОНОМІКИ ШЛЯХОМ ПОДАТКОВОЇ РЕФОРМИ

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АНОТАЦІЯ

Контекст дослідження: Наші попередні дослідження показують, що податкова реформа може мати значний вплив на зменшення корпоративної тіньової економіки суспільства. Країни постійно застосовують знижені податкові ставки, щоб привабити великі підприємства на свою територію. Вони також намагаються покращити ефективність збору податків на своєму територіальному просторі. Ми вивчаємо взаємозв'язок між системами оподаткування країн Балтії та рівнем тіньової економіки в них. Наше

дослідження показує, як економічний зріст може зменшити корпоративну тіньову економіку через зміни у зборі податків.

Методи: На основі квартальних даних з 2002 по 2022 рік було обрано панельну регресію для аналізу, яка дозволяє визначити вплив кожного конкретного податку на рівень тіньової економіки окремо, враховуючи всі три вибірки як одну синергетичну систему.

Результати та висновки: Наразі ми встановили, що всі типи моделей податкової системи мають однакову структуру, що дозволяє порівняти вплив валового внутрішнього продукту на збір податків як у короткостроковому, так і у довгостроковому плані. Наш аналіз показав, що зростання ефективної податкової ставки збільшує тіньову економіку; тобто громадяни країни намагаються перейти у тіньовий сектор. У той же час, зростання ефективної ставки корпоративного податку зменшує рівень тіньової економіки. Позитивне збільшення ефективної ставки ПДВ також сприяє зростанню тіньової економіки. Довгостроковий ефект для загальних податків майже на 19% вище, ніж зростання податкової бази. Отже, щодо Литви, наприклад, спостерігається тенденція до зменшення тіньової економіки, що відкриває ширші можливості для подальшого вдосконалення.

Ключові слова: *тіньова економіка, економічне зростання, панельна регресійна модель, податковий дохід, ефективна ставка податку, Балтійські країни.*

ПРАЦЕВЛАШТУВАННЯ ЧЕРЕЗ ПЛАТФОРМИ ТА ОБОВ'ЯЗОК УКЛАДЕННЯ ТРУДОВОГО ДОГОВОРУ В РЕСПУБЛІЦІ КАЗАХСТАН: ПИТАННЯ ТЕОРІЇ ТА ПРАКТИКИ

Айгерім Жумабаєва* та Аманжол Нурмаґамбетов

АНОТАЦІЯ

Контекст дослідження: Стаття присвячена основним питанням правового регулювання працевлаштування через платформи в Республіці Казахстан. Автори поетапно розглянули питання загального концепту платформного працевлаштування, його національно-правового регулювання, взаємозв'язок платформного працевлаштування з трудовими відносинами та необхідність зобов'язати операторів інтернет-платформ укладати трудові договори з особами, які надають свої послуги.

Методи: Під час аналізу поточного казахстанського трудового та пов'язаного з ним законодавства, національної та міжнародної судової практики автори дійшли висновку, що Соціальний кодекс, прийнятий у 2023 році, та Закон «Про інтернет-платформи та онлайн-рекламу» розділяють поняття інтернет-платформ і онлайн-платформи. Інтернет-платформи – це так звані робочі платформи, які спеціалізуються на посередництві у наданні послуг і виконанні завдань. Автори виявили кілька проблем, які виникли з прийняттям Соціального кодексу. Зокрема, автори не поділяють ідею законодавця щодо

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необхідності цивільно-правового регулювання відносин у платформному працевлаштуванні між виконавцем та оператором інтернет-платформи. Автори пропонують цільовий підхід до визначення характеру правового регулювання платформного працевлаштування. Трудова діяльність з використанням інтернет-платформ, якщо вона має ознаки прихованих трудових відносин, визначених рекомендаціями Міжнародної організації праці, повинна регулюватися трудовим законодавством. В іншому випадку, тенденція до прекарізації казахстанського трудового суспільства неминуче посилиться.

Результати та висновки: На основі аналізу статистичних даних автори дійшли висновку, що все більше людей з вищою або професійною освітою приєднуються до числа самозайнятих, тобто осіб, які беруть участь у платформному працевлаштуванні. Дані свідчать, що процес прекаризації в Республіці Казахстан швидко поширюється серед людей з низьким рівнем доходів, а також серед відносно заможного та перспективного населення країни.

Ключові слова: *платформне працевлаштування, трудові відносини, інтернет-платформа, Соціальний кодекс.*

РОЗУМІННЯ МЕХАНІЗМУ ІНДИВІДУАЛЬНИХ КОНСТИТУЦІЙНИХ СКАРГ В ЛИТВІ: ОСОБЛИВОСТІ ТА ВИКЛИКИ ПЕРШИХ РОКІВ ЗАСТОСУВАННЯ

Довіле Пурайте-Андрікієне*

АНОТАЦІЯ

Контекст дослідження: Механізм індивідуальних конституційних скарг існує в більшості європейських країн. У конституційно-правовій практиці європейських держав конституційні скарги, як специфічний процесуальний інструмент для захисту конституційних прав і свобод особи, стали все більш прийнятним, застосовним та обґрунтованим заходом. Проте Литва впровадила цей механізм захисту прав людини лише з конституційними змінами 2019 року. У цій статті розглядається правове регулювання, що стосується інституту конституційних скарг, а також використання цього інституту в Литві в період 2019–2022 років. Метою дослідження є висвітлення вибору литовської моделі конституційних скарг та її основних рис, а також виявлення проблемних аспектів цієї моделі.

Методи: Для розкриття теоретичних та практичних аспектів розглянутої проблеми в цій статті комбінуються різні методи наукового дослідження, включно з аналізом документів, а також логічним, системним, критичним, порівняльним, телеологічним та лінгвістичним методом аналізу. Метод аналізу вмісту документів використовувався для аналізу змісту відповідних нормативно-правових та судових джерел дослідження. При цьому підході використовувався текст проаналізованих документів, щоб визначити релевантні слова

та фрази, контекстуалізувати їх використання та долучити отримані дані до викладів у спеціальній літературі. Аналіз базувався на теоретичних методах, зокрема системному та логічному аналізі, які використовувалися для дослідження практично всіх аспектів, що згадуються в статті. Компаративний аналіз використовувався для порівняння правового регулювання моделі конституційних скарг Литви та інших країн Центральної та Східної Європи. Телеологічний та лінгвістичний методи аналізу були використані для уточнення змісту неоднозначно потрактованих положень, що регулюють модель індивідуальних конституційних скарг, справжні наміри законодавця та значення понять, що містяться у законодавстві. У роботі також аналізується статистична інформація щодо допустимості конституційних скарг в Литві та інші аспекти використання цього механізму захисту прав людини в 2019–2022 роках.

Результати та висновки: У результаті дослідження було з'ясовано, що після внесення змін до Конституції щодо об'єднання індивідуальних конституційних скарг, які набули чинності в 2019 році, Литва більше не може належати до країн з обмеженим колом осіб, що мають право подавати конституційні скарги до Конституційного Суду. Тож консолідація інституту індивідуальних конституційних скарг в Литві була, безумовно, необхідним кроком. У дослідженні також зазначено, що більшість елементів моделі конституційних скарг Литви у контексті ефективного захисту прав людини слід розглядати позитивно, адже вони узгоджуються з тенденціями, що існують в інших країнах Центральної та Східної Європи. Однак, важливо визнати, що національна модель конституційних скарг Литви не забезпечує ефективності певних засобів правового захисту, які виявилися успішними в інших державах.

Ключові слова: *Конституційний Суд, індивідуальна конституційна скарга, конституційний контроль, захист прав людини, Центральна та Східна Європа.*

ПОЛІЦЕЙСЬКИЙ НАГЛЯД — ПРИКЛАД КОСОВА

Фітім Шішані

АНОТАЦІЯ

Контекст дослідження: Розвиток суспільних відносин у демократичній державі Косово вимагає якісного регулювання з боку поліції. Тому питання розробки та впровадження системи поліцейського нагляду в Косові є актуальним.

Цілі: Це дослідження спрямоване на вивчення принципів, що лежать в основі моніторингу офіцерів поліції у Косові, опис історичного розвитку поліції Косова та характеристику передумов для розвитку нагляду за поліцейською діяльністю. Крім того, воно має на меті провести порівняльний аналіз між досвідом Косова та Сполучених Штатів у контексті моніторингу діяльності поліції.

Методи: У статті використовуються методи аналізу (для дослідження поліції Косова як правоохоронного органу), синтезу (для вивчення етапів розвитку методів нагляду за

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поліцейською діяльністю), порівняння (для виявлення подібного і відмінного між видами діяльності), узагальнення (для характеристики ефективності різних наглядових установ) та формально-правовий аналіз (для вивчення змісту основних нормативно-правових актів).

Результати та висновки: У результаті дослідження було встановлено, що в Косові такий орган нагляду представлений поліцейською інспекцією. Також було зазначено основні напрями діяльності внутрішніх і зовнішніх механізмів контролю, спрямованих на боротьбу з неетичною та незаконною поведінкою співробітників поліції. Досліджено основні нормативно-правові акти, які встановлюють права та обов'язки офіцерів та інспекторів поліції Косова, і доведено, що механізми контролю доповнюють один одного. Крім того, у статті було розглянуто досвід нагляду за поліцією у Сполучених Штатах. Встановлено, що для підвищення ефективності контролю над діяльністю поліції необхідно залучати представників громадськості. З'ясовано, що система поліції складається з внутрішнього та зовнішнього механізмів, що дозволяють охоплювати різні сфери діяльності поліції та своєчасно виявляти порушення в них. Також, у межах внутрішнього контролю існують спеціальні відділи, які є частиною системи поліції. Результати дослідження слід використовувати для підготовки реформ та стратегій покращення роботи поліції.

Ключові слова: *моніторинг, перевірка, злочинність, повноваження, юридична відповідальність, працівники правоохоронних органів.*

ОПТИМІЗАЦІЯ СУДОВОГО ВРЯДУВАННЯ В УКРАЇНІ ЯК ПЕРЕДУМОВА СТАБІЛЬНОСТІ ЇЇ СУДОВОЇ СИСТЕМИ ПІСЛЯ ВІЙНИ

Оксана Хотинська-Нор*

АНОТАЦІЯ

Контекст дослідження: Умови правового режиму воєнного стану, запровадженого в Україні у відповідь на повномасштабне вторгнення Росії, започаткували нову правову базу, яка створила нове підґрунтя для всіх державних установ та українського суспільства. Судова влада, яка має реагувати на нові виклики, адаптуватися до нових умов життя та визначати курс майбутнього розвитку, опинилася в трансформаційному становищі. Необхідність оптимізації судової системи в Україні стає все більш очевидною. Виникає питання, як організувати судові органи для ефективного забезпечення правосуддя в державі, навіть в умовах гострого браку коштів і персоналу. У статті зроблено спробу спрогнозувати перспективи оптимізації судової системи України, з урахуванням національних особливостей її моделі та перебігу війни. Ми зосередимося на оптимізації органів судового врядування, відповідальних за підтримання незалежності судової влади та таким, що відповідають характеристикам Ради суддів, інституційний склад якої відображає особливості української моделі судочинства. Крім того,

напередодні введення в Україні воєнного стану, органи судового врядування опинилися в кризовій ситуації, що призвело до дисфункції цієї установи та демонструвало її вразливість. Важливо проаналізувати причини, що призвели до негативних наслідків функціонування судової системи, особливо в контексті впливу війни. Цей аналіз є важливим для створення законодавчих норм, щоб запобігти кризовим явищам у судовому врядуванні та забезпечити його стабільну та безперервну роботу.

Методи: У цій статті використано низку методів дослідження, включно з історичним методом, методом аналізу та синтезу інформації. Використання актуальної емпіричної інформації сприяло належній аргументації висновків.

Результати та висновки: Було зроблено висновок, що виклики, спричинені війною, вимагали трансформації політичної системи загалом і судової системи зокрема. Одним із шляхів є оптимізація органів судового врядування як необхідного елемента забезпечення доступності і справедливості правосуддя. Національна модель судоустрою стала результатом запровадження передової європейської практики щодо організації та функціонуванні такого органу, як Рада суддів, в національну правову систему. Проте на результат вплинуло історичне тоталітарне минуле, особливості правової культури, неідентичність політичних і соціальних умов. Внаслідок численних реформ в Україні функціонує гібридна модель Ради суддів, яку слід визначити як дуальну. Національний досвід функціонування судової системи врядування в умовах кризи продемонстрував вразливість такої моделі. Тож на порядку денному постало питання впровадження відповідних заходів захисту та гарантій для забезпечення стабільної та безперебійної роботи судового врядування. Їхнє обговорення є необхідним кроком у розвитку наукової дискусії про гарантії незалежності суду, важливим аспектом якої є ефективне функціонування судової влади.

Ключові слова: *судова система, правосуддя, суд, судове врядування, Ради суддів, оптимізація судового врядування, незалежність правосуддя.*

ПРИКЛАД ІНТЕГРАЦІЙНОГО ПРОЦЕСУ АЛБАНІЇ ДО ЄС: ГАРМОНІЗАЦІЯ ВНУТРІШНЬОГО ЗАКОНОДАВСТВА З ЗАКОНОДАВСТВОМ ЄС

Ерйола Джувані*, Наїм Мекалла

АНОТАЦІЯ

Контекст дослідження: Шлях процесу інтеграції Албанії до Європейського Союзу був довгим і складним. Він почався в 1993 році із затвердження торговельної угоди. Найважливішим кроком було підписання Угоди про стабілізацію та асоціацію (SAA) в червні 2006 року. Статтею 70 цієї угоди було передбачено гармонізацію національного законодавства з законодавством ЄС. Це важливий процес для остаточного кроку до вступу в Європейський Союз. Його важливість полягає в тому, що якщо внутрішнє

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законодавство не відповідає європейському, то стандарти цієї країни не можуть конкурувати зі стандартами інших країн ЄС. Унаслідок цього отримання членства в ЄС стає неможливим.

Методи: У вступі статті, що ґрунтується на описовому методі, подається огляд внутрішнього законодавства в контексті гармонізації. Другий розділ, заснований на аналітичному методі, пояснює приклад гармонізації законодавства Албанії за конкретних умов. На основі цих результатів третій розділ статті пояснює потребу у розумінні та впровадженні гармонізаційних законів в Албанії.

Результати та висновки: У висновку було подано пропозиції щодо усунення прогалин процесу приведення внутрішнього законодавства у відповідність, виявлених у другому розділі статті. Зазначено, що існує необхідність поліпшити роботу структурних та адміністративних здатностей Албанії, для чого потрібен спеціальний додатковий бюджет і підготовлений персонал. Із технічної точки зору, текст транспонованої Директиви ЄС має бути внесений до порівняльної таблиці закону. Той самий акт ЄС, який, як очікується, буде транспоновано, також слід згадати у передмові до проєкту пропозиції, подібно до практики в європейських країнах. Після затвердження гармонізації внутрішнього законодавства з законодавством ЄС, виконання та здійснення цих законів є ключовим. Найважливіша частина гармонізації законодавства полягає у впливі, який ці закони матимуть після їх виконання. Має бути створена база даних щодо термінології ЄС для албанської та англійської мов, яка включає Договір про заснування Європейського Союзу і Європейської Спільноти, Угоду про стабілізацію та асоціацію, Тимчасову Угоду та Європейське Партнерство. Найважливіша проблема, з якою Албанія стикається щодо внутрішнього законодавства, – це адаптація внутрішніх механізмів до європейських стандартів.

Ключові слова: *гармонізація законодавства, процес інтеграції, порівняльна таблиця, затверджені закони, сумісність.*

ПІДВИЩЕННЯ ЕФЕКТИВНОСТІ ОБОРОННОГО ПЛАНУВАННЯ ШЛЯХОМ ВПРОВАДЖЕННЯ МОЖЛИВОСТІ БЮДЖЕТУВАННЯ ТА ГРОМАДСЬКОГО КОНТРОЛЮ

Юлія Петленко*, Люціан Тарну, Богдан Щеглюк, Сільвіу Нате

АНОТАЦІЯ

Контекст дослідження: Ефективність оборонного планування в Україні значною мірою залежить від ретельного формування та застосування майбутніх оборонних бюджетів, як це зазначено в Стратегії національної безпеки України. Крім того, вкрай необхідно всебічно вивчити міжнародний досвід оборонного планування, зокрема збереження та розвиток важливих ресурсів і можливостей для виконання оборонних завдань при

обмеженому бюджеті. Отже, існує потреба в широкому діалозі між науковцями та посадовцями, яким доручено ухвалювати військово-стратегічні рішення.

Результати та висновки: У статті було досліджено значення оборонного планування для зміцнення безпеки та обороноздатності України. Внутрішній зв'язок між виявленою проблемою та ключовими науковими та практичними цілями стає очевидним, коли розглядається пріоритетність надійного фінансового планування та коректного розподілу ресурсів з метою формування сучасних оборонних сил, здатних протистояти новим загрозам. З огляду на це, у дослідженні ретельно вивчено міжнародний досвід, щоб розпізнати та адаптувати найкращі практики таких основних аспектів, як обладнання, системи командування, розвідувальні можливості та підготовка персоналу, які відіграють ключову роль у зміцненні оборонної готовності та ефективності місії. Визнання обмежень фінансових ресурсів вимагає розумної стратегії прийняття рішень щодо оптимізації видатків на оборону в межах чітко визначених параметрів.

Ключові слова: *оборонне планування, можливості бюджетування, цивільний контроль, оборонні витрати, розподіл ресурсів, міжнародний досвід, Україна, Стратегія національної безпеки.*

ВПЛИВ ЗБРОЙНОГО КОНФЛІКТУ НА ТРУДОВЕ ПРАВО: НА ПРИКЛАДІ УКРАЇНИ

Сергій Венедіктов

АНОТАЦІЯ

Контекст дослідження: Повномасштабна військова агресія Російської Федерації проти України значно вплинула на всі сфери життя в країні, і трудові відносини, безумовно, не є винятком. У перші місяці війни робота багатьох підприємств зазнала значних порушень; частина працездатного населення була призвана до Збройних сил, хтось був змушений шукати роботу в регіонах країни, які не постраждали внаслідок бойових дій, або навіть змінювати професію повністю. Ця обставина зобов'язала вжити відповідних законодавчих заходів для стабілізації трудових відносин у контексті воєнного часу. У статті розглядається специфіка українського трудового права в умовах воєнного часу, розкриваються труднощі правового регулювання праці у зв'язку з воєнним станом, висвітлено можливі шляхи вирішення проблем трудового права в період збройних конфліктів на основі досвіду України.

Методи: Методи правової аргументації та аналізу застосовано для того, щоб представити основні підходи до правового регулювання трудових відносин під час воєнного стану в Україні. Для коректної аргументації висновків використано актуальні статистичні та емпіричні дані. Метод аналогії був задіяний для оцінки можливих шляхів вирішення проблем, з якими стикається трудове право протягом збройних конфліктів, спираючись на досвід України.

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Результати та висновки: У статті наголошується, що єдиного підходу до регулювання трудових відносин під час збройних конфліктів не існує. Такі конфлікти завжди унікальні, тобто вони відрізняються масштабом, інтенсивністю, тривалістю, технічними можливостями сторін, видами застосовуваного озброєння, тощо. Через різноманітність збройних конфліктів у світі неможливо виробити єдині стандарти праці, які можна було б застосувати, наприклад, на міжнародному рівні. Це свідчить про пріоритет національного законодавства в адаптації регулювання трудових відносин до умов воєнного часу. У зв'язку з цим, зважаючи на досвід України, доцільно врахувати, що: а) збройний конфлікт є динамічним за своєю природою, тож він може мати різні стадії розвитку, що також може впливати на сферу праці, і трудове законодавство може потребувати систематичного перегляду для відображення нових реалій; б) враховуючи, що територія країни може нерівномірно постраждати від наслідків збройного конфлікту, у деяких випадках буде доречним передбачити різне правове регулювання трудових відносин; в) збройний конфлікт ніколи не повинен розглядатися як "справедлива причина" для необґрунтованого та тривалого обмеження прав працівників, оскільки саме в період воєнних дій вони стають більш вразливими і тому потребують додаткового правового захисту.

Ключові слова: *трудове право, трудові відносини, збройний конфлікт, воєнний стан, обмеження трудових прав, Україна.*

ТОРГІВЛЯ ЛЮДСЬКИМИ ОРГАНАМИ В АСПЕКТАХ КРИМІНАЛЬНОГО ПРАВА, БІЗНЕСУ ТА ПРАВ ЛЮДИНИ

Фейзі Бекірі*, Ельда Малоку, Ахмет Малоку

АНОТАЦІЯ

Контекст дослідження: Торгівля людськими органами розвивалася протягом багатьох років.

Спочатку це були поодинокі випадки, проте з часом інтерес організованої злочинності зріс через високий прибуток і невелику ймовірність міжнародного переслідування винних. Злочинці, що займаються цим кримінальним діянням, починають його з торгівлі спермою, але також можуть переходити до торгівлі тканинами та органами трупів. Права людини в останні десятиліття зазнали розвитку, сьогодні вони знаходяться в епіцентрі глобальної політики. Крім того, проблеми безпеки, бідності, соціальної нерівності, недотримання прав людини, відсутність відповідних законів та недостатнє дотримання існуючих створюють особливий вплив на передумови для торгівлі людськими органами.

Методи: Ця стаття надає порівняльний погляд на тему торгівлі людськими органами, проаналізувавши її з різних, проте взаємопов'язаних поглядів, включно з соціальним аспектом, кримінальним аспектом, вигодою злочинних груп та порушенням основних прав людини.

Результати та висновки: У межах кінцевих висновків надаються рекомендації для майбутніх дій правоохоронних установ щодо політики та практики боротьби з торгівлею людьми.

Ключові слова: *торгівля людськими органами, кримінологічна безпека, посередники, права людини.*

ДЕРЖАВНІ НАГОРОДИ УКРАЇНИ ВОЄННОГО ЧАСУ ЯК ЧИННИК ФОРМУВАННЯ НАЦІОНАЛЬНОЇ ТА ДЕРЖАВНОЇ СВІДОМОСТІ

Юрій Притика*, Оксана Угриновська, Наталія Максимчук

АНОТАЦІЯ

Контекст дослідження: У цій статті автори здійснили системний аналіз сучасного стану присудження військових нагород та перспективи запровадження змін до законодавства України щодо порядку нагородження та системи державних нагород. Зокрема, були розглянуті такі питання: загальний порядок присудження державних нагород, підстави для присудження державних нагород, суб'єкти подання та клопотань на присудження державних нагород, запропоновані антикорупційні положення та зарубіжні зразки присудження військових нагород. Крім того, у статті подано статистичні відомості про осіб, які були нагороджені званням Героя України за видатні героїчні вчинки з моменту початку повномасштабної агресії Російської Федерації. Порівняння зі зразками нагородження як державної політики здійснено на прикладі континентальних європейських держав та системи англосаксонського права.

Результати та Висновки: Було з'ясовано механізм присудження державних нагород України та визначено, чи відповідає він основним поточним викликам і європейським стандартам, антикорупційним та демократичним нормам. Також було виявлено, що соціальний захист осіб, яким присуджено нагороди, все ще є недостатнім і впливає на престиж військових нагород.

Ключові слова: *державна нагорода, орден, медаль, ступінь, позбавлення державних нагород, соціальна політика, правові механізми.*

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